An Empirical Analysis of Disclosure Failings in Murder Appeals against Conviction 2006 – 2018.

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Abstract

This article considers alleged disclosure failings in relation to the offence of murder. A sample of 58 murder appeals against conviction, and renewed applications for permission to appeal, has been analysed. The article highlights what kind of errors are most frequently alleged to have occurred, and which are most likely to lead to the quashing of a conviction. Particular issues are highlighted around the police handling of key prosecution witnesses, which is found to be a significant source of undisclosed material. The Court of Appeal (Criminal Division)'s interpretation of the safety test in disclosure cases is critiqued. The recent implementation of the *National Disclosure Improvement Plan* has highlighted the necessity of cultural change with regards to disclosure. Some of the cases within this sample evidence the need for cultural change. It is suggested that more straightforward messaging by the Court of Appeal would assist.

Introduction

The criminal justice system of England and Wales has been rocked recently by the revelation of disclosure failings by the prosecution in criminal trials. This has caused the issue of prosecution disclosure to (re)enter the popular and political consciousness.[1] Issues surrounding prosecution disclosure are not new, and are regarded as a potential cause of miscarriages of justice.[2] Throughout the present crisis, there has been a particular focus on disclosure issues arising in sexual offence cases. This is largely due to the 'near misses' of Liam Allen, Oliver Mears, Issac Itiary, and Samuel Armstrong, all charged with sexual offences, which collapsed during their respective (unrelated) trials when the late production of evidence meant there were no longer realistic prospects of convictions.[3] These are considered 'near misses' as they could so easily have resulted in miscarriages of justice. In the Allen case, the police had in their possession text messages which undermined the Crown's case of lack of consent. A series of reviews of prosecution disclosure have followed.[4] A joint review into the case by the Metropolitan Police and the

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[1] For evidence of this see news reports covering the disclosure issue, such as M Evans, 'Rape Evidence Flaws May Have Put Hundreds of Innocents in Jail' *The Telegraph* (5 June 2018); O Bowcott, 'CPS and Police "routinely failing" to Disclose Evidence' *The Guardian* (Thu 15 Nov 2018).

[2] I Dennis, 'Prosecution Disclosure: Are the Problems Insoluble?' [2018] Crim LR 829.

[3] For a discussion of these cases, see T Smith, 'The 'Near Miss' of Liam Allen: Critical Problems in Police Disclosure, Investigation Culture and the Resourcing of Criminal Justice' [2018] Crim LR 711.

[4] For a discussion see Dennis (n 2).

CPS did not find evidence that the lack of disclosure was deliberate, but that it was caused by a 'combination of error, lack of challenge, and lack of knowledge'.[5]

In 2017 the Attorney General's Office ordered a review of the efficiency and effectiveness of disclosure. The ensuing report, published in 2018,[6] diagnosed a range of problems including reasonable lines of enquiry not being followed; incorrect use of disclosure schedules, and, ultimately, material not being disclosed when it should have been.[7] Perhaps the most critical passage in the report was the finding that 'all too often [disclosure] is regarded by investigators and prosecutors as an inconvenient task to be performed after the evidence proving the accused is guilty has been prepared'.[8] This has echoes of Quirk's observations more than a decade ago that the police, in particular, operate within a culture which is not necessarily conducive to proper pre-trial disclosure.[9]

In January 2018 the Crown Prosecution Service ordered a review of the disclosure of unused material in all pending rape and sexual offence cases. The report was delivered in June 2018, having reviewed some 3637 sexual offences cases which were under investigation or preparing for trial.[10] The review was designed to establish whether all reasonable lines of enquiry had been pursued, whether disclosure was being conducted effectively, and if any material was outstanding.[11] The report directed that in many cases the police needed to conduct further enquiries.[12] The concern regarding lack of adherence to disclosure rules has led to the development of the *National Disclosure Improvement Plan.*[13] This includes numerous initiatives designed to bring about cultural change when applying the disclosure regime. A recent report by HMCPSI[14] shows some improvement with compliance, but there is still a long way to go.[15]

This article reviews allegations of disclosure errors in relation to another serious offence: murder. It analyses 58 appeals against conviction and renewed applications for permission to appeal decided between 2006 and 2018, where an allegation related to prosecution disclosure was raised. Most of the errors of disclosure were found not to be sufficiently serious to require the quashing of the conviction. Despite the convictions in these cases being found to be safe, the sample evidences lax control of prosecution evidence and seemingly a disregard of procedural rules resulting in convictions for the most serious offences. If reform of the disclosure regime is needed to ensure compliance, a consistent message from the Court of Appeal as to what is acceptable and unacceptable conduct could be one avenue of reform.

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[5] Metropolitan Police and Crown Prosecution Service, *A Joint Review of the Disclosure Process in the case of R v Allan* (January 2018) 6.
[6] Attorney General's Office, *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System,* (CM 9735 2018).
[7] Ibid at 7.
[8] Ibid 22.
[9] H Quirk 'The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work' (2006) E & P 42.
[10] Crown Prosecution Service, *Rape and Serious Sexual Offence Prosecutions: Assessment of Disclosure of Unused Material Ahead of Trial* (CPS 2018) 3.
[11] Ibid.
[12] Ibid.
[13]See https://www.cps.gov.uk/sites/default/files/documents/publications/National-Disclosure-Improvement-Plan-May-2018.pdf (Accessed 24/2/2020).

[14]https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/disclosure-of-unused-material-in-the-crown-court/ (Accessed 25/02/2020).
[15] See Editorial, [2020] Crim LR 191.

The article presents a descriptive analysis of this sample of appeals, to show the kinds of issues which were raised and how the Court dealt with them. It is worth remembering that this is an historical sample of appeals against conviction, which were decided long before the current issues with prosecution disclosure became such a pointed source of concern. The results of this study show that a range of disclosure errors are alleged by appellants convicted of murder. The article begins with a discussion of the relationship between prosecution disclosure and human rights. It then critiques the Court of Appeal's approach to disclosure appeals, before outlining the methods of the study. The results are presented and discussed.

Prosecution disclosure and human rights

Fair and proper disclosure of evidence is a cornerstone of the right to a fair trial. Article 6(1) of the European Convention on Human Rights provides a requirement on the State to ensure that a trial is fair, and fairness ordinarily requires that material which undermines the case for the prosecution should be disclosed.[16] A trial must be fair overall, though this does not necessarily require that the trial process was impeccable.[17] In *McInnes v HM Advocate* the Supreme Court, considering the law in Scotland, said that a failure by the prosecution to properly disclose material evidence would be incompatible with article 6.[18] During the investigative phase of a case, the police are supposed to consider all reasonable lines of enquiry, including any defences and matters which indicate lack of involvement by the suspect, and retain the material found.[19] Presumably, if evidence is uncovered which proves the suspect was innocent, the investigation into him or her would be discontinued. Where the police continue to have sufficient evidence against the suspect to proceed to charge, natural fairness mandates that the defendant should be afforded the opportunity to test the Crown's case. In this sense, prosecution disclosure has a normative component, in that the State, as represented in this instance by the prosecution authorities, should have the moral high ground if seeking to condemn its citizens as criminals.[20]

Disclosure in criminal proceedings is governed by the Criminal Procedure and Investigations Act 1996 (CPIA). Section 3 of CPIA states that the prosecutor must disclose to the defence any material that appears reasonably capable of undermining the case for the prosecution or assisting the defence. Unused material must be listed on disclosure schedules which are created by the police disclosure officer and reviewed by the CPS who decide what should be disclosed to the defence.[21] For non-sensitive material, the disclosure schedule (called MG6C) should provide numbered descriptions of the items which should make clear the nature of the item and contain sufficient information to allow the prosecutor to decide whether or not it should be disclosed.[22] Any sensitive material should be scheduled on form MG6D, and includes items such as those relating to national security, material received from intelligence, information from informants, or relating to the private lives of witnesses.[23] Items marked as sensitive should explain why it is deemed sensitive, and provide sufficient details for the prosecutor to be able to ascertain whether the material needs to be viewed before deciding whether it should be disclosed. The duty of

[16] F Stark, 'Moral Legitimacy and Disclosure Appeals' (2010) Edin LR 205.
[17] Ibid at 209.
[18] [2010] SC 28, [2010] UKSC 7 at [19].
[19] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (Revised) (section 23(1)) Code of Practice* (2015) para. 3.5 and 5.1.
[20] As argued by R A Duff et al, *The Trial on Trial Volume 3 – Towards a Normative Theory of the Criminal Trial* (Hart 2007) 225.
[21] See note 19, para 6.6.
[22] Ibid, para 6.11.
[23] Ibid, para 6.15.

prosecution disclosure is a continuing one, especially in response to the defence statement.[24]

As well as the CPIA, a number of other non-statutory materials govern or guide the disclosure regime, including: the Attorney General's Guidelines on Disclosure;[25] the CPIA Code of Practice;[26] the CPS Disclosure Manual;[27] the Judicial Protocol on Disclosure;[28] and Part 15 of the Criminal Procedure Rules. These documents emphasise that prosecution disclosure is key to ensuring a fair trial. The CPS Disclosure Manual refers to it being 'essential' that disclosure is 'dealt with competently and fairly, ensuring a thinking approach throughout'.[29] The Attorney General's Guidelines say that 'fair disclosure to the accused is an inseparable part of a fair trial',[30] and the Judicial Protocol says that 'disclosure remains one of the most important – as well as one of the most misunderstood and abused – procedures relating to criminal trials'.[31] In addition, the senior judiciary have stressed the importance of disclosure in numerous cases. In *H and C*[32] the House of Lords said 'bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure … should be made'.[33]

Given the centrality of disclosure in fulfilling the ends of justice, it is pertinent to ask what happens when flawed disclosure occurs and is uncovered during the trial process. Recent CPS data has shown that more than two cases per day are discontinued or dismissed due to disclosure failures by the prosecution, as shown by Table 1.[34]

Table 1: Number of Cases Discontinued due to Disclosure Failures (CPS data)

2013-2014	2014-2015	2015-2016	2016-2017	2017-2018
583	537	732	916	833

This table shows an increase in the number of trials discontinuing due to disclosure failings since 2013-14, albeit a decline is shown in the figures for the most recently available year.[35] When an issue regarding disclosure is identified during the proceedings it can be effectively resolved by a ruling from the judge, an adjournment, a formal review of disclosure, or perhaps a less formal agreement between the parties designed to resolve

[24] Section 7A CIPA.
[25] Attorney General's Office, *Guidelines on Disclosure* (2013).
[26] See note 19, above.
[27] Which can be downloaded from https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Disclosure%20Manual_0.pdf (Accessed 18/9/2019).
[28] Judiciary of England and Wales, *Judicial Protocol on the Disclosure of Unused Materials in Criminal Cases* (2013).
[29] Note 27 at 3.
[30] Note 25 at 4-5.
[31] Note 28 at 5.
[32] [2004] 2 AC 134.
[33] Ibid at 147.
[34] Data was released following a Freedom of Information request by persons unknown, and is available from https://www.cps.gov.uk/publication/freedom-information-releases-2019 (accessed 15/10/2019).
[35] Although of course it is not possible to say whether this is due to better or more accurate recording of the reasons for the discontinuation, or whether it really is the number has increased.

the matter. To a large degree, therefore, the extent of disclosure issues may be hidden from view and resolved during the trial itself. The various reviews of disclosure conducted in recent years have shown that issues of prosecution disclosure are potentially wide-ranging. Thus, it is important to keep in review how the criminal justice system deals with allegations of breaches of disclosure, and assessing the decision-making of the Court of Appeal (Criminal Division) (hereafter, the 'Court of Appeal') is one way of so doing.

The 'safety test' and its application in disclosure appeals

The test applied by the Court of Appeal in an appeal against conviction is whether it thinks the conviction is safe.[36] In most cases before the Court of Appeal the appellant will have contested his / her guilt at trial and on appeal will argue that there remains at least doubt about his guilt owing to an irregularity which occurred or fresh evidence.[37] In *Davis* the Court said that: 'a conviction can never be safe if there is doubt about guilt. However … a conviction may be unsafe even where there is no doubt but the conviction has been vitiated by serious unfairness or significant legal misdirection'.[38] Normally, the Court will be able to resolve the question of safety asking had the error or irregularity not occurred is it satisfied that the only reasonable and proper verdict would have been one of guilty?[39] In fresh evidence cases, which is often how disclosure cases are treated, the central question remains whether the Court is satisfied that the conviction is safe in light of the fresh evidence and all the other evidence.[40] In cases of difficulty, the Court can confirm its view by considering whether the fresh evidence, if given at trial, might reasonably have affected the decision of the jury to convict.[41] In practice, except for the most egregious breaches of process,[42] convictions are rarely quashed due to procedural irregularities alone if the Court does not think the irregularity could have had an impact on the decision of the jury to convict.[43] In *Randall*[44] the Privy Council considered that the matters complained of inhibited the presentation of the defence case on the crucial issues and so the trial was unfair and the convictions unsafe.[45] Thus, it is clear that the safety test requires more than a breach of procedure, and the breach must be related to some important part of the defence case.

The Court of Appeal has faced some criticism for a number of years as to its approach to considering the question of safety. Many have suggested that the Court of Appeal appears too restrictive or narrow in its approach, especially in relation to appeals which raise fresh evidence.[46] These appeals are more likely to raise the issue of factual innocence, and an unduly narrow approach could perpetuate a miscarriage of justice if one has occurred. Roberts argued recently that the Court of Appeal applies a narrower 'subjective approach' to considering factual issues on appeal, where the primary issue for the Court is whether

[36] Criminal Appeal Act 1968) (as amended) s 2.
[37] See *Archbold Criminal Pleading Evidence and Practice* (2020) Ch 7-44. Those who pleaded guilty can appeal, but this is comparatively rare.
[38] *R v Davis, Rowe, and Johnson* [2001] 1 Cr App R 8, at 131 – 2.
[39] Ibid.
[40] *R v Pendleton* [2002] 1 Cr App R 34 453 – 4.
[41] Ibid.
[42] Such as that which occurred in *R v Mullen* [1999] 2 Cr App R 143.
[43] See JR Spencer, 'Quashing Convictions for Procedural Irregularities' [2007] Crim LR 835 at 837.
[44] [2002] 2 Crim App R 17.
[45] Ibid at [29].
[46] For example see K Malleson, 'Appeals Against Conviction and the Principle of Finality' (1994) 21 JL & Soc'y 151; L Elks, *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (JUSTICE 2008); S Roberts, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' (2017) 81 J Crim L 303.

it thinks the conviction is safe. This is in contrast to an apparently broader 'jury impact' approach, where the Court considers whether the jury might have been influenced by the new evidence.[47] As I have argued elsewhere,[48] the empirical support for the claim of a restrictive approach is questionable, given that discussion of the Court's approach inevitably involves difficult issues of where justice lies in individual cases. This makes empirical study of the Court's 'approach' difficult. It must always be remembered, if trying to discern an approach of the Court, that each case is highly fact specific. A breach may render a conviction unsafe in one case while a similar breach might not threaten safety in another.

Garland confirmed that the central questions for the Court in a non-disclosure case are firstly whether the material should have been disclosed, and then whether, having regard to its content, the Court considers that the non-disclosure renders the conviction unsafe.[49] In *Simmons,* which concerned sexual offences, the Court said the jury had seen a 'sufficiently accurate picture' of the complainant, despite some details relating to her not having been disclosed to the defence.[50] Whilst all appeals are different and will turn on their specific facts, usually unless the appellant was materially impacted (in terms of the likelihood of an acquittal) a conviction will be unlikely to be unsafe. In effect, this is what Americans call the 'harmless error' approach.[51] An error can be considered harmless if it would have been unlikely to have altered the outcome of the trial, and this reasoning can be clearly seen in the decisions of the Court discussed below.

The Director of Public Prosecutions recently referred to proper disclosure as being 'critical' to a fair trial.[52] There is a fair amount of rhetoric surrounding the centrality of disclosure to a fair trial. Can a, or any, breach of a critical right really be considered harmless? To a large extent the Court has answered this question in the affirmative, and then needs to explain how the conviction remains safe despite the breach. It would have been open, and probably justifiable, for the Court to have quashed a number of convictions which it upheld in this sample. These were appeals decided before the issue of prosecution disclosure became so prominent. It is possible that the current spotlight on disclosure will induce the Court to become more liberal in quashing convictions for disclosure errors in the future. While there is nothing inherently wrong with the Court's approach to safety in disclosure cases, a more liberal approach is certainly possible under the safety test.

Methods

This study is an analysis of appeals against conviction, and renewed applications for permission to appeal, against murder convictions where a ground of appeal related to issues with prosecution disclosure. Appeals raising disclosure issues frequently raise questions of Public Interest Immunity (PII). PII is a contentious issue, and is not one which is considered directly in this article. Rather, PII appeals were included in this sample only if there was a ground of appeal based on of non-disclosure, rather than the issues around the making of a PII order. The year 2006 was chosen as the starting point as this reflects 10 years since the passing of CPIA. It could be safely assumed that the requirements of

[47] See Roberts ibid at 311 - 313.
[48] P Dargue, 'The Safety of Convictions in the Court of Appeal: Fresh Evidence in the Criminal Division through an Empirical Lens' (2019) 83 (6) J Crim L 433.
[49] *R v Garland* [2016] EWCA Crim 1743 at [55].
[50] [2018] EWCA Crim 2534 at [53].
[51] For a discussion of the harmless error rule see W M Landes and R A Posner, 'Harmless Error' (2001) J Legal Stud 161.
[52] M Hill, 'Disclosure – A Response from the CPS' [2019] Crim LR 611.

the legislation were well established by this point. There were two appeals in which the conviction occurred before the enactment of CPIA but similar disclosure principles applied at the time so these cases were included.[53]

Murder is a crime of particular significance in the criminal justice system, carrying as it does the mandatory life sentence. The decisions of the Court of Appeal in murder appeals are among the more high-profile, especially when a miscarriage of justice is revealed. For this reason the sample was restricted to murder and inchoate versions thereof (and not manslaughter). A breakdown of the sample is provided in the next section. There is wide scope for further consideration of other offences in future research.

The *Westlaw UK* and *LexisLibrary* online databases were searched for any available murder appeals / renewed applications decided between January 2006 and December 2018 which contained the word disclos*. This ensured that any appeals referring to disclosure would be retrieved, including fresh evidence appeals which included disclosure issues. The applications included in the sample are the available Full Court renewed applications (applications for permission to appeal which had been previously refused by the single judge and were renewed). Unless relevant, all the cases in this sample will be referred to as appeals. The initial search results were reviewed to determine whether the issue raised in the appeal was an issue with prosecution disclosure. There were 61 cases found comprising a combination of appeals and renewed applications. Each case was examined and the factual and legal details recorded on an SPSS dataset.

Three of these appeals were omitted from the study as whilst they raised disclosure issues there was insufficient information provided on the disclosure issue.[54] In *Baker,* an application for permission, the disclosure ground was of the applicant's own composition, and was not argued by counsel in the appeal. In *Ali*, the Court said that any disclosure failures were so peripheral that they could not make the conviction unsafe, without expanding upon the apparent failings were.[55] In *Noye* the Court said that any disclosure problems had been dealt with by an earlier appeal which is outside the scope of this study.[56]

The removal of *Baker*, *Ali*, *Noye* provides the sample of 58 appeals. It is possible that there are appeals missing from this sample. This might apply to the earlier years of the sample where cases may not be available online. Furthermore, not all renewed applications for permission to appeal are published, and so it is likely some of these are missing. It is not possible to say whether the appeals included in the sample are representative of those which may be missing. The analysis below does not seek to claim that this is necessarily a representative sample of the Court's decision-making, but is instead a description of the sample itself.

Sample profile

Across the 13 year period in the sample, there were 58 appeals / renewed applications. In total, these appeals concerned 82 appellants / applicants, although not all 82 appellants were necessarily alleging a disclosure problem relating to their particular conviction. This represents 4.4 appeals per year for murder in which the question of prosecution disclosure issues was raised; a small amount of the Court's workload. By comparison, between

[53] *R v Edwards* [2012] EWCA Crim 5; *R v Heibner* [2014] EWCA Crim 102. Both appeals were dismissed.
[54] These cases were: *R v Baker* [2008] EWCA Crim 3118; *R v Ali* [2010] EWCA Crim 1619; and *R v Noye* [2011] EWCA Crim 650.
[55] Ibid at [48].
[56] See *Noye* note 53 at [56].

October 2017 and September 2018 the Court heard 191 appeals against conviction overall, allowing 79, and heard 437 renewed applications, granting permission on 69 occasions.[57] Nineteen of the cases in this sample were renewed applications for permission to appeal; 39 were full appeals against conviction. Full appeals against murder convictions which allege disclosure issues during this period were therefore rare events. Twelve of these appeals were CCRC referrals. There were three cases in which the appellant(s) were convicted of attempted murder only; two conspiracy to murder, and the rest (53) involved convictions for murder. These numbers refer to cases, not appellants and so in some cases there was more than one appellant convicted of the offence(s) in question. There were five cases in which the appellant was convicted of murder in addition to a separate attempted / conspiracy to murder. There were nine cases which concerned appellants convicted of more than one count of murder. Persons convicted of murder would frequently also be convicted of other non-fatal offences such as grievous bodily harm, weapons offences, and property offences. The number of appeals per year ranged from zero (in 2008) to eight (in 2010).

Across the sample, eight appeals were allowed on the basis of non-disclosure.[58] This is 14% of the 58 cases (including applications), or 21% of the full appeals against conviction. Four of these appeals were conceded by the respondent prosecution,[59] two (*Maxwell* and *Joof*) on the ground that police misconduct was not disclosed. Thus, where were only four appeals where the Court decided the conviction was unsafe against the arguments of the prosecution. None of the renewed applications for permission in this sample were granted permission to appeal. Three cases were ordered to be retried. Five of the successful appeals were CCRC references. Court of Appeal annual reports show that it consistently allows 30% to 40% of the appeals against conviction (not including applications for permission) it hears.[60] In 2009, a high of 42% of the appeals heard were allowed,[61] with the lowest rate being 31% in 2006.[62] Murder appeals raising disclosure issues therefore appear to be substantially less likely to be allowed than other appeals in the Court of Appeal. Whether this is due to the offence or the issue raised is unclear and would warrant additional scrutiny.

Alleged disclosure errors in murder appeals

The kinds of errors raised can first be divided into three categories: whether there was no disclosure at all; whether disclosure was late; and whether the disclosure was incorrect in some way. The following table shows these categories.

[57] Court of Appeal, *In the Court of Appeal Criminal Division 2017/18,* annex E.
[58] These being: *R v Maxwell* [2009] EWCA Crim 2552; *R v Harrison-Allen* [2010] EWCA Crim 7; *R v Thambithurai* [2011] EWCA Crim 946; *R v Joof* [2012] EWCA Crim 1475*; R v Hallam* [2012] EWCA Crim 1158; *R v Dunn* [2016] EWCA Crim 1392; *R v Embleton* [2016] EWCA Crim 1968 and *R v Khan* [2018] EWCA Crim 1421.
[59] These being *Maxwell*, *Joof*, *Khan*, and *Hallam.*
[60] Only a small percentage of the applications the Court receives are granted permission to appeal and proceed to a full hearing. The 2018 – 19 annual report shows it receives over 1000 applications for permission to appeal against a conviction each year, and ultimately quashes less than 100. As a percentage of all applications received, therefore, fewer than 10% are quashed.
[61] Court of Appeal Criminal Division, *Review of the Legal Year 2009 – 2010*, at 29.
[62] Court of Appeal Criminal Division, *Review of the Legal Year 2006 – 2007*, at 20.

Table 2: Broad category of alleged error in murder appeals

Nature of error	Number of times raised
1) No disclosure	40
2) Late disclosure	12
3) Incorrect disclosure	6

The late and incorrect disclosure complaints are different in character to the no disclosure cases and they raise different issues. Where the allegation is that there was no disclosure of something which should have been disclosed the complaint is that the appellant was denied the opportunity to use or rebut the evidence at all. These will then usually be treated in a similar way to fresh evidence. Where the complaint is that disclosure was late or incorrect, the allegation is that while some disclosure occurred the error in some way prejudiced the trial process. In the present sample of appeals, all of the quashed convictions were from the 'no disclosure' category, suggesting that nothing less than a complete lack of disclosure would be needed to render a conviction unsafe. Usually the appeals would be dismissed because, when the Court found that an error had occurred, it did not think that the appellant was unfairly prejudiced by it,[63] it thought the issues were already before the jury,[64] or simply that any error did not make the conviction unsafe.[65] Cases from this sample will be referred to in more depth in the following sections, where we see this kind of decision-making occurring.

Having categorised disclosure errors in this way, the disclosure complaints are now further divided based on more particular issues. Initial categories of disclosure issues were taken from the report produced by the HMCPSI and HMIC in 2017.[66] This report found that the main prosecution failings in non-sensitive disclosure related to the incorrect listing of items, poor descriptions of items, lack of schedules, witnesses previous convictions, and items being missing from schedules.[67] As the analysis of cases in the present sample progressed, it became apparent that the errors in the sample did not always fit adequately into these categories. Instead, new categories were developed and the cases were re-examined into the new categories. Ultimately there were six different kinds of errors raised in these appeals, and these are shown in the following table. It should be noted that a degree of judgement is required in fitting cases into these categories. Some categories overlap with each other and some cases will have had more than one kind of error. In such cases the category used is the one which received the most consideration by the Court. Each category is then discussed in turn.

Table 3: Nature of alleged error in murder appeals

Nature of error	Number of times raised	Number of times a successful ground
1) Piecemeal disclosure	12	0
2) Police Malpractice	5	2
3) Scheduling issues	5	0

[63] For example *R v Nwankwo and Williams* [2014] EWCA Crim 1205.
[64] *R v Osborne* [2010] EWCA Crim 1981; *R v Olu* [2010] EWCA Crim 2975.
[65] *R v R* [2015] EWCA Crim 500.
[66] HM Crown Prosecution Service Inspectorate and HMIC, *Making it Fair: Joint Inspection of The Disclosure of Unused Material in Volume Crown Court Cases,* (HMCPSI and HMIC 2017).
[67] Ibid see Annex B, question 12 provided the initial list of errors found.

4)	Trial ambush	6	0
5)	Items not on schedule – police unaware of evidence	3	1
6)	Items not on schedule – police aware of evidence	27	5

Piecemeal disclosure

Piecemeal disclosure refers to cases where disclosure might have been made, but was incomplete, late, or where there were repeated requests for disclosure by the defence. It can be seen that it was the second most frequent category of error raised on appeal. None of the cases in which piecemeal disclosure was alleged led to the appeal being allowed. Piecemeal disclosure can cause considerable difficulties for the defence. *Olu* is one example. There were a large number of disclosure issues including: items which would assist the defence being marked as not for disclosure; the late production of a 900-page bundle of unused witness statements causing 'significant difficulties'; requests by the defence for disclosure going unanswered until shortly before the trial; and there was a general suggestion that the disclosure officer did not understand his duties.[68] Issues of PII also arose. The Court concluded that disclosure 'was not in accordance with the statutory regime'[69] and observed that the breaches of disclosure were adverse to the defence planning of the case.[70] Finally, the Court said 'experience shows it is inevitable that there may be some late disclosure, but *late disclosure on the scale that occurred in this case is unacceptable*'.[71] Despite this final observation, the Court held that the trial was not as a whole unfair and there was no substance in the disclosure point as it thought the main issues were aired at trial and had been properly disclosed.[72] The conviction was therefore safe.

Police malpractice

This category arises when the appellant alleges directly that the evidence was deliberately not disclosed or was not disclosed due to malpractice. The five cases alleging police malpractice were *Maxell;*[73] *Joof;*[74] *Grant;*[75] *Forrest;*[76] and *Hafiz*.[77] *Maxwell* and *Joof* were both allowed (conceded) appeals, *Grant* was a dismissed appeal. *Forrest* and *Hafiz* were renewed applications which were not granted permission to appeal as the Court of Appeal found that there was no evidence of malpractice or that errors with disclosure (such as there were) were not deliberate. In *Maxwell* and *Joof* the police misconduct related to how the police handled key prosecution witnesses subject to PII.

Grant concerned three appellants who were convicted of murder and conspiracy to murder for their roles in a shooting which had occurred four years previously. The prosecution accepted, and the Court of Appeal found, that there had been impropriety by the police in

[68] [2010] EWCA Crim 2975 at [19 - 24].
[69] Ibid at [41].
[70] Ibid at [46].
[71] Ibid. (Emphasis added).
[72] Ibid at [50].
[73] [2009] EWCA Crim 2552.
[74] [2012] EWCA Crim 1475.
[75] [2015] EWCA Crim 1815.
[76] [2011] EWCA Crim 1061.
[77] [2012] EWCA Crim 4.

relation to inducements offered and disclosure but held that the convictions were safe.[78] The malpractice related to a crucial prosecution witness, *N*, without whom there could be no conviction.[79] During the investigation *N* was prosecuted and later convicted of unrelated serious drugs offences. At her sentencing hearing she received, unusually, a suspended sentence.[80] The suspicion was that the police had played a role in procuring a deal to secure a lower sentence.[81] Contact between *N*'s lawyers and the police was not disclosed as it should have been. The appeal was dismissed as *N*'s credibility was aired at trial, and the Court did not think that the renewed way of attacking her credibility would have led to a jury doubting her evidence.[82] What is perhaps troubling is that the Court accepted that the police had acted with impropriety which most likely would have been subject to disciplinary proceedings if the implicated officer was still in office, yet the conviction remained safe.[83]

Scheduling issues

There were five cases which specifically concerned scheduling issues alone. However, scheduling issues would frequently arise in other categories, such as where items were simply missing from the schedules, and the trial ambush category (see below). There were three cases in which evidence was 'mistakenly' marked as sensitive when it should not have been.[84] It is perhaps noteworthy that none of these kinds of error led to the convictions being quashed; similar to piecemeal disclosure, in these appeals at least, a complete lack of disclosure was necessary for a conviction to be quashed.

Trial ambush

There were six appeals which alleged that evidence went undisclosed (or was not properly disclosed) which was then used against the appellant at trial, a so-called trial ambush. In one case, a letter was disclosed as unused evidence but was not properly described meaning it was missed by both the prosecution and defence lawyers.[85] The material related to a letter sent to the appellant while he was in prison. Part way through the trial, the prosecution decided to cross examine the appellant as to the content of the letter, but it transpired it had been intercepted by prison authorities and he had never in fact received it. It was argued that this amounted to an ambush, but the Court of Appeal said the prosecution were not at fault since at the time of disclosure they did not intend to use the letter and did not see the significance of it.[86] The appeal was dismissed because of other overwhelming evidence.[87] A further case is *Morris*[88] in which telephone records which undermined the appellant's defence to four counts of murder were disclosed as unused material. During the trial, the prosecution cross examined him on some of the records. It was asked whether this was a trial ambush and whether the material should have been disclosed as used evidence.[89] The Court of Appeal said that it was not an ambush as they had been disclosed and were available for the defence to review. This appears somewhat

[78] [2015] EWCA Crim 1815 at [17].
[79] *Grant* (note 74) at [8].
[80] Ibid at [13].
[81] Ibid.
[82] Ibid at [27].
[83] Ibid at [19].
[84] *R v Hodgson* [2009] EWCA Crim 742; *R v West* [2006] EWCA Crim 1843; *R v Spires* [2014] EWCA Crim 129.
[85] *R v Simmonds* [2006] EWCA Crim 691.
[86] Ibid at [76].
[87] Ibid at [77].
[88] [2007] EWCA Crim 1995.
[89] Ibid at [25].

disingenuous, as there was a 'large number' of documents,[90] only two of which were the subject of the cross-examination. At the same time the Court observed it was 'highly important evidence available to the Crown to rebut an essential feature of the applicant's case',[91] which may suggest it should have formed part of the Crown's case and have been disclosed accordingly.

Items not on schedule - Police unaware of evidence

The three cases in the 'police unaware of evidence category' are included as disclosure cases because they involved evidence which the police / prosecution had in their possession but which they were (apparently) not aware of at the time of trial. Clearly there is an interplay with fresh evidence in this particular category, the key difference being that for fresh evidence cases the evidence must not have been available at the time. The convictions in *Khan*[92] were quashed as evidence 'emerged' following conviction which was said to prove the appellants should not have been convicted of a conspiracy to murder. After receiving the evidence, which was confidential and not explained in the judgment, the Crown conceded the appeal and a conviction for conspiracy to commit grievous bodily harm was substituted.

In *Boyle*[93] it emerged that the police were ostensibly unaware that the appellant's car was under their control at the time of the murder (thus undermining the evidence of a witness) because the appropriate forms had not been completed correctly. The witness was cross-examined by the defence (who were aware that the car was in control of the police at the relevant time) but it could not be definitively established at trial due to this lack of disclosure. The appeal was dismissed because the Court of Appeal thought the witness's evidence was weak already and the jury would not have relied upon it. While the police were not aware the car had been seized at the time, this evidences a certain laxity in the control of their evidence. In *R v Edwards*[94] a key witness in the trial was asked by defence counsel whether he was a police informant, to which the witness (K) answered that he was not. It later transpired that K was an informant, although the prosecution at the time did not know this. The appellant appealed by way of CCRC referral on the basis of the lack of this disclosure, but the appeal was dismissed as the Court of Appeal thought that the jury would have approached their task in the same way had they known of K's status.

Items not on schedule – Police aware of material

As seen in table 3, the largest proportion of cases fall into this category of alleged error - that evidence which it transpired the prosecution had in their possession was simply not disclosed. As seen in table 4, below, the kind of evidence which most frequently went undisclosed was evidence which related to the credibility of prosecution witnesses; it was also the kind of evidence most likely to lead to the conviction being quashed.

The issue in *Harrison-Allen*[95] was the late disclosure of evidence showing that a firearm used in a shooting was found in the possession of another man (G) five months after the killing. G was known to both the appellant and another man, S, and the appellant's case was that S was the murderer. The conviction was quashed because the Court thought

[90] Ibid at [24].
[91] Ibid at [27].
[92] [2018] EWCA Crim 1421.
[93] [2006] EWCA Crim 2101.
[94] [2012] EWCA Crim 5.
[95] [2010] EWCA Crim 7.

there was a real possibility the jury might have reached a different conclusion if it had known about the association between S and G.

In *Russell,*[96] who was convicted of attempted murder, two pieces of evidence went undisclosed. First, it was not disclosed to the defence that a small quantity of drugs was found in the victim's trouser pocket. Russell's defence was that he was not present at the time of shooting, and that he was being falsely named by the victim who had enemies in the drugs world. The victim said he would have nothing to do with drugs, although the shooting occurred in a car in which were found a large quantity of drugs. This evidence went undisclosed because it was initially deemed irrelevant and was subsequently overlooked by the police. Also undisclosed was evidence of gunshot residue on a jacket which could be linked to the shooting but could not be linked to Russell. The Court noted that the material should have been disclosed and that 'no justification for the failure has been *or could be* offered'.[97] The Court of Appeal dismissed the appeal as it did not think that this evidence would have made any difference to the jury's assessment of the evidence.

Additional examples of non-disclosure will be discussed in the next section, where attention turns to the nature of the undisclosed material in this sample.

Nature of undisclosed material

The following table shows, of the 58 appeals in the sample, what kind of material was said to have gone non-disclosed. There is some overlap in these categories, in that, for instance, all the material could potentially be considered 'police documents' if they were in the possession of the police. However, it has been sought to categorise the kinds of material to highlight more effectively what has allegedly gone wrong in these cases. An explanation of each category is provided below.

Table 4: Nature of allegedly undisclosed evidence in murder appeals.

Nature of undisclosed evidence	Number of times raised	Appeals allowed
1) Credibility of prosecution witnesses	26	5
2) Expert evidence	2	0
3) Police documents	16	3
4) Real evidence	7	0
5) Witness statements	7	0

Credibility or character of prosecution witnesses

Non-disclosure of material relating to prosecution witnesses is the largest source of appeals and quashed convictions. In *Thambithurai*[98] prosecution counsel became aware that there was at least a chance that a fraud investigation against a key witness (S) might be discontinued, but counsel did not inform the judge, or the defence. The convictions were quashed as it was said that the S's motives in giving evidence were crucial. In

[96] [2011] EWCA Crim 49
[97] Ibid at [25] (emphasis added).
[98] [2011] EWCA Crim 946.

Embleton[99] a report was not disclosed to the defence which suggested that a witness (C) might have been mistaken about the date the appellant went to her house with a bleeding hand. The Crown accepted it should have been disclosed and the conviction was quashed. In *Dunn*[100] it was not disclosed to the defence that a key part of a key prosecution witness's (V) evidence must have been mistaken or perjured. In quashing the conviction, the Court said 'the failings in disclosure here also bear directly on the actual *fairness* of the trial and appeal process. This court cannot view such failings with equanimity'.[101] The two other successful appeals in this category were *Maxwell* and *Joof*, discussed previously and also related to police malpractice in the handling of prosecution witnesses.

Two points can be inferred from this category having the largest number of appeals and quashed convictions: first the Court of Appeal seems more open to quashing convictions when the disclosure issue relates to the credibility of prosecution witnesses and to police malpractice, and secondly, disclosure issues arise quite frequently regarding prosecution witnesses. This category of appeals has some relationship with the issue of Public Interest Immunity (PII). PII permits the non-disclosure of relevant material if there is a real risk of serious prejudice to an important public interest.[102] Such material will include, for instance, whether informants were used and material pertaining to the character of witnesses. PII was not the focus of this study, but it is clear that issues do arise in relation to it, in particular when information comes to light undermining the credibility of witnesses protected by PII. *Joof,* and *Olu* (discussed above) concerned witnesses subject to PII where information was not disclosed in relation to how the witnesses were handled. *Okuwa*[103] is another case in the sample which stands out. It was only by the time of the appeal, four years after conviction, that it was revealed there was unused material relevant to the making of anonymity orders which should have been disclosed.[104] The Court described itself as being 'astonished' that proper disclosure was not made in such a serious case.[105] The Court of Appeal reviewed the evidence at length and concluded that the material would not have changed anything of substance so far as the defence's conduct of the trial was concerned and the appeal was dismissed.[106]

Two cases in this category, *Joof* and *Maxwell* were particularly egregious examples of non-disclosure; both were conceded by the prosecution. In less egregious cases the appeal would usually be dismissed by reference to the strength of the prosecution case, even if the prosecution admitted breaches. In *Dorling*[107] a report which demonstrated that a witness was highly unreliable was not disclosed to the defence. The prosecution accepted it should have been disclosed, but the appeal was dismissed as the Court concluded that the jury already knew about the unreliability of the witness. In *Kelly*[108] it was not revealed to the defence until after the trial that a witness (N) was under investigation for fraud. The Court of Appeal said that the fraud investigation was 'neither here nor there' in relation to her status as a witness in a murder trial and the failure to disclose had no impact on the safety of the verdict.[109]

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[99] [2016[EWCA Crim 1968.
[100] [2016] EWCA Crim 1392.
[101] Ibid [49]. (Emphasis original).
[102] See CPIA Code of Practice at 6.15. See also *R v H and C* [2004] UKHL 3.
[103] [2010] EWCA Crim 832.
[104] Ibid at [24].
[105] Ibid at [25].
[106] Ibid at [45].
[107] *R v Dorling* [2016] EWCA Crim 1750.
[108] [2015] EWCA Crim 817.
[109] Ibid [61 - 3].

Expert evidence

A small number of appeals related to expert evidence. In *Hodgson*[110] a linguist's report was mistakenly marked as sensitive and so not properly disclosed until after the trial. The Court of Appeal received the evidence as fresh evidence and decided the expert did not assist the appellant and the conviction was safe. In *Iqbal*[111] evidence was not disclosed which revealed there was an error in how an expert had used cell site evidence. The appellant argued this meant he could show he was elsewhere at the time. The appeal was dismissed because the Court was sure the appellant was lying when he said he was elsewhere, so the expert's evidence did not assist him.

Police documents

Police documents refer to documentary material collected by the police during the investigation, and other documents the police had in their possession, but which were not directly related to the credibility or character of a witness. For instance, in *Yam*[112] it was not disclosed that a neighbour of the victim had reported an attempted robbery to the police while Y was in prison. The argument was that it was the attempted robber, not Y, who committed the murder. The appeal was dismissed. In *Lynch*[113] a recorded conversation between the three defendants was not disclosed before trial, it was then submitted in evidence. The conviction was considered safe. In *Osborne*[114] the shooter in a drug-feud murder apparently said 'this is from Mark' at the time of the shooting. It was disclosed late that there had been an earlier shooting using the same gun involving someone called Mark, who was not the appellant. The Court said it was regrettable that disclosure was late,[115] but that the conviction was safe.

There were three allowed appeals in the 'police documents' category, these were *Harrison-Allen*,[116] *Hallam*[117] and *Khan*.[118] In *Hallam*, the Crown conceded the appeal largely on the basis of fresh evidence (evidence which the police had in their possession but had seemingly not thoroughly reviewed) which suggested Hallam's alibi was not false but was instead mistaken and placed him elsewhere at the time of the murder. There were also disclosure issues, in that messages received by the police indicating mistaken identity might have occurred were not disclosed to the defence.[119] Since the appeal was conceded on the basis of fresh evidence, the Court did not explain in depth the nature of the undisclosed material. *Harrison-Allen* and *Khan* have been discussed above.

It can be seen that by far the two most frequent kinds of evidence which went undisclosed were evidence relating to prosecution witnesses and other police documents. Together, these accounted for 72% of the material subject to disclosure issues. This raises questions regarding the role of the police in the disclosure of material since it would appear there are issues with how the police disclose their documents, and particularly those related to witnesses.

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[110] *R v Hodgson* [2009] EWCA Crim 742.
[111] *R v Iqbal* [2009] EWCA Crim 1627.
[112] [2017] EWCA Crim 1414.
[113] [2010] EWCA Crim 1754.
[114] [2010] EWCA Crim 1981.
[115] Ibid at [42].
[116] [2010] EWCA Crim 7.
[117] [2012] EWCA Crim 1158.
[118] [2018] EWCA Crim 1421.
[119] See *Hallam*, note 117, at [47].

Real evidence

There were six cases in which what is termed 'real evidence'[120] was allegedly not disclosed. *Croft*[121] from within this category stands out as a particularly egregious example of non-disclosure. The prosecution had been disclosing evidence in a piecemeal fashion and it was only revealed during cross-examination at trial that the police had in their possession a pair of trainers. The evidence relating to the trainers was then used by the prosecution to place the appellant at the scene. The defence wanted the jury discharged so they could conduct DNA analysis of the shoes; a negative finding could be utilised to cast doubt as to whether Croft had worn them. On appeal, the prosecution conceded that the situation was unacceptable. The Court of Appeal went further and called it 'deplorable'.[122] The appeal was dismissed. The Court accepted the trial judge's reasoning that a negative DNA test would not assist the defendant, as it would not show positively that the appellant was not wearing the trainers at the time of the killing.[123]

Witness statements

There were seven cases in which part or whole of the contents of witness statements were not disclosed, although none of these led to a conviction being quashed. In *West*[124] the alleged error related to a witnesses (G) who gave a statement to a police officer, implicating the co-accused who were acquitted, the evidence was then mistakenly marked as sensitive and not disclosed. The appeal was dismissed because, while an error had occurred, the new statement was not helpful to the appellant. In *Heibner*[125] statements from eye witnesses who saw a man (not the appellant) running from the scene of the murder at about the same time were not disclosed. The Court of Appeal said the evidence should have been disclosed, but supported guilt rather than innocence and so the appeal was dismissed.

Prosecution and Court of Appeal response to allegations of disclosure failures

In disclosure appeals the Court of Appeal operates a two-fold test. First, should the evidence have been disclosed and secondly, even if it should is the conviction still safe?[126] The following two tables show the operation of this process. First, table 5 shows the prosecution's response to the appeal. Secondly, table 6 shows in how many cases the Court of Appeal thought there was an error and in how many there was no error.

Table 5: Prosecution's response to disclosure errors

Prosecution's response	
Accepted error occurred, but conviction safe	34
Argued there was no disclosure error	21

[120] Meaning material objects other than documents which could have been produced for inspection. See H M Malek (ed) *Phipson on Evidence* (19th edition 2018) at 1.14.
[121] [2007] EWCA Crim 30.
[122] Ibid at [32].
[123] Ibid at [34].
[124] [2006] EWCA Crim 1843.
[125] [2014] EWCA Crim 102.
[126] See *R v Garland* [2016] EWCA Crim 1743 at [55]

Appeal conceded on grounds of disclosure[127]	3

Table 6: Court of Appeal's response to disclosure errors

Should have been disclosed		Conviction unsafe
Yes:	41	8
No:	17	1[128]

The most frequent response from the prosecution to the alleged error of disclosure was to accept that an error occurred but to argue that the conviction remained safe. There were 21 cases in which the prosecution argued that no error of disclosure had occurred, or that any evidence did not fall to be disclosed. In 41 cases (72% of cases) the Court concluded that there was an error of disclosure. Thus, it can be observed that where the Crown argued no error had occurred, the Court would usually agree, but that in the majority of cases (70%) the Court ultimately concluded there had been an error with disclosure. Of the 41 cases in which the Court found an error had occurred, only 8 (17%) were allowed. This includes the case of *Hallam*, where the Court said there might have been error with disclosure but did not consider the issue in depth as the conviction was rendered unsafe by fresh evidence.

Discussion

Reflecting upon the dismissed appeals and applications, few could be considered likely to be factually unsafe. As has been seen, not all breaches of process render a conviction unsafe, and this is true for issues relating to disclosure. For a conviction to be unsafe, the undisclosed material cause a doubt as to whether the jury would still have convicted, if the error had not occurred.[129] The Court of Appeal does not know precisely why the jury convicted an appellant, but the fact of conviction, and its knowledge of the available evidence, will allow it to piece together the minimum which must have been accepted by the jury in order to convict. The conviction will be safe if the Court does not think the appellant's position would have been substantively improved by the undisclosed material. Errors relating to peripheral issues, or issues which were already aired at trial, will be unlikely to render the conviction unsafe. The Court does operate this task consistently but, it is submitted, there is a messaging problem. There are instances in which 'deplorable', 'astonishing', or 'unacceptable' failures of process did not render the conviction unsafe. As seen above, the convictions remained safe because the errors, while significant, did not prejudice the appellant to the extent alleged. These may be considered judicial flourishes or statements of exasperation, but from a messaging perspective, how can a conviction following an unacceptable or deplorable failure of a critical process still be safe? It is recommended that the Court of Appeal should remain consistent when it discusses breaches of disclosure. If, in light of all the evidence and the nature of the breach, it believes that a breach was genuinely 'unacceptable' the logical consequence must be that conviction should be quashed. It is not suggested that all breaches should render a conviction unsafe. Errors relating to peripheral issues in a serious trial with overwhelming other evidence do not threaten the safety of the conviction. Accordingly, the Court should be cautious in chastising breaches as unacceptable if it thinks that the conviction is safe,

[127] *Hallam* was conceded, but not on the grounds of disclosure.
[128] There was one other case in the sample, *R v Witnell* [2013] EWCA Crim 161, in which the conviction was quashed for reasons not related to disclosure. In that case, it was found there had been no error in disclosure.
[129] See *R v Davis, Rowe, and Johnson* [2001] 1 Cr App R 8

as this is a mixed message which does not aid clarity. More careful messaging may hopefully improve adherence to the procedural rules as the prosecution will be more aware of the consequences for breaches.

The above analysis of these cases has highlighted some particular issues of concern. Even for offences of particular seriousness, issues with incorrect scheduling arose. The most frequent error found was that material was simply absent from the schedules. Although the Court of Appeal's judgments do not provide a complete picture of everything which occurred in each case, there is evidence throughout of the sample of lax control by the prosecution of their evidence, for instance through incorrectly scheduling material as sensitive, or not properly examining all the material. In cases as serious as those in this sample this is particularly concerning.

As can be seen in the above analysis, a particular issue with prosecution disclosure appears to arise in relation to the police's dealings with prosecution witnesses. Information which might undermine a prosecution witness is one of the more common kinds of evidence which went undisclosed in these cases. It is not hard to imagine the role of 'cop culture' when the disclosure officer is asked to compile the schedule of unused material related to the credibility of their key witnesses.[130] Parts of that culture, such as constructing a case against the first plausible suspect, ignoring information to the contrary, and adopting the attitude that the accused is likely to be guilty,[131] are not conducive to good disclosure practices. It may be that further oversight, and certainly additional training, is required especially in relation to disclosure relating to key prosecution witnesses.

There is one further finding of interest. In 35 of the 58 cases (60%) there was a clear motive for the killing (or attempt) related to drugs, gangs, and other serious crime. More often than not, both the appellant and the victim were involved in other serious crime leading up to the murder / attempt. While it is not known whether a similar phenomenon arises in cases not in this sample, the police culture inference that suspects are probably guilty must surely be stronger when the suspect is already implicated in serious crime, and this may be a further cause for concern requiring further investigation. The ability of the police to separate the roles as investigators and disclosure officers must be further considered.

It is suggested that the Court needs to deliver a consistent message as to what kinds of errors of disclosure will render a conviction unsafe. There needs to be a consistent message as to whether disclosure really is 'critical' to a fair trial. If so, and it appears that is the case, the Court should not state on the one hand that fair disclosure is critical but then uphold convictions when a significant (in light of the case as a whole) breach has occurred. The Court needs to be open as to how highly it really values disclosure responsibilities, and if it values them highly it may be bolder in quashing convictions when it finds errors have occurred. Disclosure failings is currently a matter of public import, and it will remain to be seen whether the Court takes this approach. The Court also has the power to order investigations under section 23A of the *Criminal Appeal Act 1968.* The threat of investigation may induce more careful exercise by the prosecution authorities of their disclosure obligations.

Conclusion

[130] J A Epp, 'Achieving the Aims of the Disclosure Scheme in England and Wales' (2001) 5(3) E & P 188.
[131] Ibid, at 191.

The duty placed upon the prosecution to disclose any material which weakens their case or assists the defence has the aim of reducing the difference in arms between prosecution and defence, and securing a fair trial. It has been seen that there is a considerable amount of rhetoric regarding the importance of disclosure to the criminal justice system. Despite such lofty rhetoric, a series of controversial cases and enquiries have shown in recent years that the system of prosecution disclosure is deficient.

Using a dataset of 58 murder appeals against conviction, it has been shown that a range of disclosure errors occurred. Much of the recent concern regarding prosecution disclosure failings have concerned sexual offences. While it is right to place a focus on that particular kind of offending – given the nature of the 'near misses' which triggered the current crisis – it may be that the issue of disclosure is much more systemic. What is particularly apparent from this sample is, whether or not the breaches of procedure were severe enough to threaten the safety of the conviction, breaches of disclosure rules have been occurring in an offence as serious as murder throughout the life of the CPIA 2006. As has been seen, these breaches of procedure range from police misconduct, to piecemeal disclosure, to disclosable items simply not being listed on schedules.

The use of a sample of appeal cases allows for an analysis of the judicial response to disclosure failures in a more systematic manner. The safety test in relation to disclosure appeals is clear: convictions will usually only be rendered unsafe if the breach relates to a core part of the case such that the breach of disclosure might have impacted the decision of the jury to convict. It has been suggested that some of the Court's messaging in relation to some of the appeals gives the impression that the prosecution authorities are afforded a considerable degree of latitude in their disclosure obligations. As has been seen, significant breaches, in terms of their potential to disrupt the planning of the defence case, criticised by the Court as astonishing or deplorable, need not render the conviction unsafe. More careful messaging might make it clearer what standards are required of the prosecution.

It is important to appreciate that in these appeals the (alleged) errors of disclosure, or the material which should have been disclosed, had been discovered by the appellant and their legal teams. The Criminal Cases Review Commission has had a particular role in uncovering such breaches. However, there are undoubtedly other cases where breaches have occurred which have not yet been discovered. Some of these other cases may, in due course, find their way to the Court of Appeal and it is important to continue to observe the decisions the Court makes.