HM Crown Prosecution Service Inspectorate

Review into the disclosure handling in the case of R v Mouncher and others

HM Chief Inspector of the Crown Prosecution Service
to the Director of Public Prosecutions

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Michael Fuller QPM BA MBA LLM LLD (Hon), is Her Majesty's Chief Inspector of the Crown Prosecution Service as appointed by the Attorney General in accordance with the Crown Prosecution Service Inspectorate Act 2000. The Chief Inspector leads Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) as constituted under the Act. HMCPSI is the independent inspectorate for the Crown Prosecution Service. This case review is produced by the Chief Inspector pursuant to a request from the Director of Public Prosecutions. Its Terms of Reference are set out at paragraph 3.2 below.

Foreword

In January 2012, I agreed in response to your request to review the handling of disclosure by the prosecution team (CPS lawyers and counsel) in the case of R v Mouncher and others. This was on the basis that my position as head of Her Majesty's Crown Prosecution Inspectorate (HMCPSI), which is an independent statutory body, would enable me to take an objective view of events and to identify what went wrong, why it happened and whether any of the prosecution lawyers were ultimately responsible.

Terms of Reference were devised, and these are contained and addressed in the text of the report. These Terms of Reference distinguish my review from the work undertaken by the Independent Police Complaints Commission. This followed referral from South Wales Police in respect of the alleged destruction of documents by South Wales Police, which contributed to the decision to offer no evidence in the R v Mouncher and others trial.

In the last 15 months, the HMCPSI review team, in carrying out an exhaustive review, as our methodology section in this report shows, has overcome a series of hurdles to gather a body of information on which to found the judgements contained in the report. As you know, we have collated, examined and analysed a very substantial volume of material from many sources, including a series of interviews and written communications with key individuals involved in the case.

This has allowed the team to draw firm conclusions in answer to the questions mentioned above and to meet the Terms of Reference. As a consequence I have made a series of recommendations intended to complement current CPS proposals for further modernisation of the handling of disclosure in complex casework.

Michael Fuller QPM BA MBA LLM LLD (Hon)
Her Majesty's Chief Inspector

Contents

1 Executive summary

1.1 The case of R v Mouncher and others concerned charges of perjury and attempts to pervert the course of justice against eight police officers and two civilians that the prosecution alleged had led to the wrongful prosecution and conviction in 1990 of three people for the murder of Lynette White in February 1988. Two other people were acquitted of the murder. The trial came to an abrupt end on 1 December 2011 after it was discovered that material known as D7447 and D7448 was missing and was believed to have been destroyed by the police. The prosecution acknowledged that this meant that the court could no longer have confidence in the process for recording, retaining and disclosing unused material. The disclosure regime had been under attack from the defence throughout the trial.

1.2 The D7447 and D7448 material was discovered five weeks later in an office situated within the Major Incident Room used by the investigation team. The Independent Police Complaints Commission (IPCC) is reporting separately on how the material was handled by the police, how it was thought to have been destroyed and how it was eventually found.

1.3 Disclosure is as important as investigating the allegations and building the prosecution case. It should be treated with the same seriousness if cases are to meet the challenges they face at trial. In large or complex cases it places onerous responsibilities on police disclosure officers and prosecutors, which requires the commitment of substantial resources if their duties are to be carried out effectively. It therefore requires careful joint planning and management by the CPS and the police from an early stage of an investigation. Despite the determination and hard work of many people, the approach to disclosure in R v Mouncher and others did not consistently meet the necessary standards.

1.4 R v Mouncher and others was a very large case. It is said to have generated about a million pages of written material. Much of it was created between 1988 and 1990 for the original murder trial. More was generated in 2002 when advances in DNA techniques identified Jeffrey Gafoor as the murderer. He pleaded guilty and said that he had acted alone. Further material was created from 2003 during the investigation into how three people had been convicted of an offence for which someone else admitted sole responsibility. Key witnesses gave accounts to each of the investigations, which, in some respects, conflicted. Much of the earlier material was handwritten.

1.5 It is important to note that a great deal of unused material was disclosed to the defence and that the number of disclosure decisions questioned at court represented a very small proportion of the decisions made. The significance of the failure, until the trial was into its third month, to disclose notes of police and CPS contacts with key witnesses (and the absence of notes for some meetings) was, however, substantial. It attracted judicial criticism, particularly in the light of some of the comments mentioned in the notes that were available.

1.6 Other errors were less significant and some criticisms of the prosecution were unwarranted. Whilst many of the mistakes or oversights did not disadvantage the defence or were capable of correction - and corrected - during the trial, their cumulative effect enabled the defence to undermine confidence in the disclosure process.

1.7 We also found some errors of principle, particularly at the primary disclosure stage. The prosecution took too narrow an approach to the disclosure test and intervened too readily on the application of the relevance test, which is primarily a matter for the police. A narrow or over analytical approach also led to a large number of defence requests in secondary and continuing disclosure, when substantial further material was disclosed. Whilst prosecutors have been urged by the courts to adopt a thinking approach to disclosure, this went too far at the primary stage in R v Mouncher and others. They over analysed the potential defence cases, which resulted in delayed disclosure of some material that was capable of assisting a defence that was always apparent from the case papers, but which they believed the defendants would be unwise to pursue. It is, of course, for the defence to decide how to run their case in the light of any material that might assist their case. In reaching disclosure decisions, prosecutors should not be judgmental about the merits of a defence that is apparent from the case papers and should keep in mind the guidance in the *Attorney General's Guidelines* and the *Disclosure Manual* about resolving doubt in favour of disclosure.

1.8 The narrow approach was also a failure of case management, particularly the lack of supervision of (inexperienced) disclosure counsel's work. It is important that sufficient resource is devoted to disclosure to minimise the number of minor errors as well as to ensure that all defence themes - including those not articulated but apparent from caution interviews, correspondence and other sources - are identified and taken into account when making disclosure decisions. The burden of this on police disclosure officers and prosecutors should not be underestimated.

1.9 We did not, however, find any evidence that prosecutors or police disclosure officers made decisions for any improper reason. Police disclosure officers were given considerable guidance by lawyers. They made some mistakes in applying the guidance, but these represented a very small proportion of all the disclosure decisions that were made and many were discovered and corrected as a result of quality assurance exercises. They also submitted many items to disclosure counsel that they considered to be relevant and potentially disclosable, some of which he decided were not relevant. This material was, however, re-reviewed after service of defence case statements.

1.10 We found some evidence of good practice. Leading counsel produced a *Disclosure Protocol* that was served on the court and defence at an early stage. Disclosure counsel provided training and written guidance for police disclosure officers, tailored to the requirements of the case, and worked in the Major Incident Room for long periods. A number of quality assurance reviews identified some errors that were then corrected. Secondary disclosure included a full re-review of all material that was not used as prosecution evidence, including that previously treated as irrelevant.

1.11 The management of the case by the CPS, however, was weak. Disclosure was recognised as a major issue from the beginning, but did not receive the required level of attention in spite of the first reviewing lawyer's representations. The failure to take realistic decisions about the required resources at the outset of the case led to later problems. The CPS lawyer team did not always work together smoothly. The counsel team lacked the necessary collective experience for a case of this difficulty. Leading counsel should have been instructed at an early stage to

help to shape the investigation. Disclosure counsel was frank with us about his inexperience when first instructed. He told us that he had learned a great deal from working on the case. But this was not a case on which someone, however bright and industrious as he clearly is, should learn their trade. His work was not supervised as closely as it should have been; the quality assurance exercises focussed on the work of police disclosure officers. More experienced disclosure counsel and junior counsel should have been instructed so that they could have absorbed more of the responsibility for running the case.

1.12 Many of the problems that arose could, however, have been avoided by compliance with the *Disclosure Manual*. This provides guidance to lawyers and police disclosure officers about the handling of disclosure. It is an impressive document with which we found little fault.

1.13 Some reports to the Director's Case Management Panel were too reassuring about disclosure. The Director has introduced new independent reviews of disclosure at an appropriate stage of certain large or complex cases. These should help to ensure that guidance is followed properly and that prosecution lawyers have a full understanding of the defence case and are applying the appropriate disclosure mindset.

2 Recommendations

1 At the outset of a potentially large, complex or sensitive case, a CPS lawyer with responsibility for the allocation of resources, should meet the police to ensure that the CPS has a full understanding of its implications and to enable the investigators to explain their needs, including the likely burden of disclosure (paragraph 5.9).

2 The CPS works with other prosecuting authorities that handle large and complex cases and the Association of Chief Police Officers to consider the development of a searchable IT system for the handling of disclosure in large or complex cases (paragraph 6.54).

3 The CPS and the police should agree in each case on the treatment of secondary source and duplicate material. The agreed approach to secondary source and duplicate material should be written down and provided to the defence and the Court (paragraph 8.18).

4 When applying a thinking approach to disclosure decisions, prosecutors should not be judgmental about the merits of a defence that is apparent from the case papers and should keep in mind the guidance in the *Attorney General's Guidelines* and the *Disclosure Manual* about resolving doubt in favour of disclosure. They should be slow to overrule a police view that material is relevant (paragraph 8.46).

5 The CPS investigates with the Association of Chief Police Officers the availability of software that sorts emails into chronological order (paragraph 8.92).

6 The *Disclosure Manual* should explicitly state that, where direct communication with victims (DCV) meetings occur before a case is finalised, CPS notes of them should be agreed as far as possible and enter the disclosure process through the police disclosure officer (paragraph 9.4).

7 At the primary disclosure stage, the prosecution should provide to the defence and the court a summary of the disclosure processes adopted, including a clear description of and the rationale for the parameters employed in the identification of undermining or assisting material (paragraph 9.7).

8 The *Disclosure Manual* should require quality assurance exercises to be conducted in large cases (indicating the main areas on which they should normally focus) and require the maintenance of a log of quality assurance exercises conducted (paragraph 9.13).

3 Introduction

3.1 This case review deals with the handling by the Crown Prosecution Service (CPS) of the trial of eight police officers and two civilians who were accused of offences arising out of the wrongful conviction in 1990 of three men for the murder of Lynette White. The case, to which we shall refer as R v Mouncher and others, collapsed on 1 December 2011 when the prosecution decided to offer no further evidence and invited the trial judge to enter not guilty verdicts against all ten defendants. A planned trial of a further five police officers on the same allegations was also withdrawn. The case is estimated to have cost the CPS substantially in excess of £2 million in salaries, counsel's fees, travel, accommodation and other disbursements.

3.2 The Terms of Reference for the review were agreed by the Director of Public Prosecutions (DPP) and Her Majesty's Chief Inspector of the Crown Prosecution Service. The Terms of Reference were:

- Whether the prosecution team (CPS and counsel) approached, prepared and managed disclosure in this case effectively, bearing in mind the history, size and complexity of the investigation and prosecution

- Whether the prosecution team (CPS and counsel) complied with their disclosure duties properly, including all relevant guidance and policy relating to disclosure, in light of the extensive material generated in this case

- Whether the existing legal guidance is appropriate for cases of similar size and complexity; and

- To make such recommendations as it feels appropriate in light of the examination and findings set out above, including, if appropriate, recommendations about CPS policy and guidance, and/or systems and processes, and CPS arrangements for handling of cases of similar size and complexity

3.3 It will be seen that the Terms of Reference focus on the management by **prosecution lawyers** of their duties of disclosure **of unused material** under the Criminal Procedure and Investigations Act 1996 (CPIA).

3.4 The review does not cover the original charging decision except in so far as this impacts on disclosure issues. It specifically does not deal with the conduct of police officers assigned to the inquiry (known as Operation Rubicon) into the wrongful conviction of the three men in 1990. The IPCC has investigated specific aspects of the role of the police in R v Mouncher and others. The Terms of the IPCC investigation were:

- To establish the date that each of the four specific copy files of documents came into the possession of the Disclosure Team on the Lynette White 3 investigation

- To establish what disclosure process each of the four specific copy files of documents was subjected to by any police officer or police staff member and any recording process used to detail that disclosure process

- To establish if any decision was made to destroy any of those four specific files of documents and if so whether any police officer or police staff member properly recorded the reasoning and rationale for such a decision

- To establish the movements and location of the four specific copy files of documents from the time they originally came into the possession of the Lynette White 3 investigation until their discovery on 17 January 2012 still in the possession of South Wales Police

- To identify whether any subject of the investigation may have breached their standards of professional behaviour. If such a breach may have occurred, to determine whether that breach amounts to misconduct or gross misconduct and whether there is a case to answer

- To consider and report on whether there is organisational learning, including:

    - Whether any change in policy or practice would help to prevent a recurrence of the event, incident or conduct investigated

    - Whether the incident highlights any good practice that should be disseminated. The review team worked in close co-operation with the IPCC investigation team

3.5 Although HMCPSI's Terms of Reference do not include consideration of the role of the police in disclosure, it will be necessary to refer to their role from time to time to set the approach of lawyers in its proper context. It was suggested by Mr Mouncher's counsel during the trial that disclosure problems had arisen because of the lack of lawyer involvement in the disclosure process. In fact, there was lawyer involvement from very early in the investigation. It was not our task to examine the work of the police team. There are, however, some lessons about the strategic approach to disclosure in large cases that CPS at national level could usefully consider with the Association of Chief Police Officers (ACPO) on behalf of all police forces.

3.6 The defence also have an important role to play in ensuring that disclosure is managed efficiently. A number of criticisms of their role in R v Mouncher and others have been drawn to our attention. Our Terms of Reference do not include consideration of the way in which the defence approached their disclosure tasks. As with the police, we refer to the defence only where it is necessary to place the performance of prosecution lawyers in its proper context.

3.7 We have had the considerable benefit of hindsight and are acutely conscious of the ease with which it is to be wise after the event. It is important, however, to keep in mind that one of the purposes of case reviews is to identify how things can be done differently so that future cases can be handled better. Our Terms of Reference also led us to report on things that could have been done differently. The criticisms that we make should not detract from the quality of the great majority of work undertaken by prosecution lawyers and counsel in this case, or their dedication to seeing that it was handled fairly.

4 Background

The importance of disclosure

4.1 The CPIA sets out the duties of prosecutors and investigators. It provides a statutory framework for principles that the courts had attempted to define in the 1980s and early 1990s following a series of high profile miscarriages of justice in which it emerged that the police or prosecutors held material that they had not disclosed to the defence and which would either have undermined the prosecution case or assisted the defence case at the trial. The courts have repeatedly stressed the importance of compliance with disclosure duties in ensuring that accused persons have a fair trial. The CPS has given guidance to lawyers about their disclosure duties in a *Disclosure Manual*, which has been agreed with ACPO, to assist police disclosure officers and prosecutors to carry out their duties properly[1].

4.2 Under the CPIA the police must prepare schedules of all relevant material that they collect during an investigation which is not used as prosecution evidence. Relevance is widely defined in the *Code of Practice* issued under the CPIA. Material will be relevant if:

> *"…it appears … that it has some bearing on any offence under investigation or any person being investigated, or the surrounding circumstances of the case, unless it is incapable of having any impact on the case."*

4.3 The schedules (known after the forms on which they appear as MG6C for non-sensitive material and MG6D for sensitive material) must be revealed to the prosecutor who (subject to public interest immunity) must disclose to the defence any of the material that:

> *"Might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused"*[2].

4.4 Police disclosure officers are required to identify to the prosecutor any material that they consider might be disclosable according to the above test by completing a Disclosure Officer's Report (known as MG6E). The prosecutor must then review the MG6 C, D and E forms in order to make the final decision on which material should be disclosed to the defence.

1 The *Disclosure Manual* applied from 4 April 2005. Until 2005, joint guidance for police officers and prosecutors was contained in a document called *Joint Operational Practice and Instructions* (commonly known as the *JOPI*).

2 Section 3(1)(a) of the Criminal Procedure and Investigations Act 1996 stated that, at the primary stage, the prosecutor should disclose any material "*which in the prosecutor's opinion might undermine the case for the prosecution*". Section 7 provided that, at the secondary stage (that is, after receipt of a defence statement), the prosecutor should disclose any other material that "*might be reasonably expected to assist the accused's defence* ***as disclosed by the defence statement***".

The amendment to the CPIA, which came into effect in April 2005, created a single test for what was to be known as initial disclosure. By a new section 3(1)(a), the prosecutor must disclose material that "might reasonably be considered capable of undermining the case for the prosecution… or of assisting the case for the accused."

4.5 It is worth noting at this point that there was very little sensitive material in R v Mouncher and others and that it did not occasion any cause for concern. Our review has, therefore, dealt only with the handling of non-sensitive material, of which there was a very large amount.

4.6 There is no doubt of the importance of disclosure in R v Mouncher and others. It was recognised from the outset by all the reviewing lawyers and counsel as an issue on which the prosecution could fail.

4.7 To understand the scale and nature of the CPS's disclosure obligations in the trial of the eight police officers and two civilians, it is necessary to understand something of the history of the enquiries into the murder of Lynette White. The enquiries can be separated into three distinct phases that together lasted for almost 24 years.

The murder

4.8 Lynette White, a young Cardiff prostitute, was brutally murdered in the early hours of 14 February 1988. In December that year five men, John Actie, Ronnie Actie, Stephen Miller, Tony Paris and Yusef Abdullahi, were jointly charged with her murder. They stood trial in 1989, but the judge died suddenly before the trial could be completed. A second trial commenced in April 1990. At the conclusion of the second trial, three of the five defendants, Stephen Miller, Tony Paris and Yusef Abdullahi, were convicted of murder and were sentenced to life imprisonment. In 1992 the Court of Appeal quashed the convictions. We refer to the 1989 and 1990 trials and the appeal as LWI.

4.9 Almost ten years later advances in scientific techniques allowed the DNA of a suspect to be isolated and this led to the arrest of Jeffrey Gafoor. This investigation was known as Operation Mistral and was later referred to as Phase II of the Lynette White inquiry. We will refer to it as LWII. In July 2003 Mr Gafoor pleaded guilty to the murder of Lynette White. He described an argument over payment for her services followed by him attacking and killing her. He confirmed that no one else was involved in Lynette White's death and that he knew none of the original defendants or significant witnesses. There was compelling scientific evidence to link Mr Gafoor to the murder and he admitted it to the police and pleaded guilty at court.

4.10 Mr Gafoor's conviction triggered Operation Rubicon, or Phase III of the Lynette White inquiry. We will refer to it as LWIII. From July 2003 an in depth investigation was conducted into why and how the original five defendants came to be arrested, charged and tried for the murder which Mr Gafoor admitted he had committed alone.

4.11 In the course of the LWIII investigation more than 30 individuals were treated as suspects. Eventually 15 people were to be charged with either perverting the course of justice or perjury. It was convenient to split them into two groups: the Core Four and the others.

4.12 The Core Four were civilian witnesses who were alleged to have lied during their evidence in the original murder trials in 1989 and 1990 and, in some cases, during the committal proceedings that preceded the trial. They were Leanne Vilday, Angela Psaila, Mark Grommek and Paul Atkins. Three of them - Ms

Vilday, Ms Psaila and Mr Grommek - later pleaded guilty to their role in the LWI trials, but only after they had lost legal arguments. The case against Mr Atkins was dropped by the CPS on public interest grounds after a medical report about his mental health. All four agreed to give evidence against the other defendants. For simplicity, we will refer to them as the Core Four.

4.13 The possibility that others besides Mr Gafoor were involved in the murder of Lynette White was a line of defence raised from an early stage by some of those charged in LWIII. The LWI investigation team, some of whom were defendants in the LWIII case, believed that a number of witnesses, including some who were to give evidence against them, had not initially told everything they knew about the murder to the LWI investigation team. In addition, Mr Miller had admitted the murder and implicated Mr Paris and Mr Abdullahi when he was interviewed by the LWI team in 1988, although the conduct of those interviews was the main reason for the Court of Appeal overturning the guilty verdicts in LWI.

4.14 Although there was compelling scientific evidence to link Mr Gafoor to the murder and he, of course, admitted it to the police and pleaded guilty at court, it later transpired that his plea of guilty was contrary to the advice of his counsel, John Charles Rees QC. A note prepared by Mr Rees QC to help court staff to assess his fees suggested that others may also have been involved in the murder[3].

3 See *Getting to the bottom of LWI and LWII* in chapter 5.

The challenges presented by LWIII

4.15 We were told by a number of people to whom we spoke or from whom we received written contributions that LWIII was a unique case and that we should therefore be cautious about drawing general conclusions relating to disclosure duties. We acknowledge that this case had a number of unique features. But questions about the management of disclosure in large cases and the approach to the disclosure test are of wider application. Some of them have also affected other well publicised cases, each of which also had its own special features.

4.16 The LWIII investigation and prosecution was a formidable undertaking. It dealt with material gathered over almost 25 years and is said to have generated about one million pages of evidence and unused material. Whilst such volumes of material are not unknown in criminal cases, this case presented some unusual challenges. The history of previous investigations meant that significant parts of the information available were contradictory. Unlike many other large cases, such as fraud or major drugs investigations, there was no established template for the presentation of the evidence. Some important decisions needed to be made at the outset about the scope of the enquiry and the likely structure of any prosecution file. It needed, but did not receive, significant senior attention from CPS managers at the outset so that the scope of the CPS contribution could be properly assessed[4].

4 See *Scoping and resourcing the case* in chapter 5.

4.17 A long running investigation with early and continuing CPS involvement created a risk that there would be changes of personnel as it developed. This occurred more than would have been expected and brought with it a serious risk of loss of knowledge as people left the case[5].

4.18 The decision that South Wales Police (SWP) would conduct such an important investigation into the activities of its own officers, some of them senior, rather than ask an outside force to carry out the work also posed particular difficulties. The appropriateness of this decision is not a matter on which we wish to comment. But it created risks to the prosecution of the cases arising from it. The original LWI defendants and others may have been suspicious that an investigation by colleagues or former colleagues of the police suspects would not be sufficiently thorough. The steps taken to manage this risk created real problems for the prosecution[6]. On the other hand, the police suspects in LWIII may have believed - as some did and suggested during the R v Mouncher and others trial - that the investigation would be over zealous or insufficiently open minded because SWP was anxious to show that it could address public concern about the LWI trials.

4.19 There was substantial delay in identifying a suitable venue. Whilst this did not contribute to the disclosure problems that arose, the question of venue absorbed an unreasonable amount of lawyer time. Prosecution and defence advocates were required to make representations to court managers and the judge about a number of alternative court centres and even the hiring of an alternative building. Some visited proposed locations. An earlier decision on the location of the trial would have enabled everyone to maintain the momentum of case preparation.

5 The reviewing lawyers were: Ian Thomas (2003-July 2007); Gaon Hart 2007-2009; Michael Jennings (2009-April 2011) and Simon Clements (April 2011-December 2011). In addition, Howard Cohen fulfilled a "strategic" role from 2006 until January 2011. We deal with his role in *The ineffectiveness of the CPS team* in chapter 5.

6 See *Contact material relating to the five LWI defendants* in chapter 7.

5 The general management of LWIII

5.1 The failed case of R v Mouncher and others was the second prosecution arising out of the LWIII investigation. The first, which became known as the Core Four, dealt with those whose evidence would later be required in the second case. The second focussed on police officers whose behaviour was alleged to have led the Core Four to give false evidence in the LWI trials. In the event two civilians were also charged in the second case. The approach to disclosure in R v Mouncher and others cannot be fully understood without considering the way in which the two prosecutions developed and the history of disclosure in them.

5.2 Before considering disclosure issues specifically, however, it is useful to say something about the CPS's general approach to the management of the LWIII prosecutions. Many of the disclosure difficulties that were to arise in R v Mouncher and others can be seen simply as examples of wider and deeper problems in the CPS's approach to the handling of LWIII as a whole, which lacked the clarity required for such a large project.

5.3 LWIII was initially handled by CPS Headquarters Casework Directorate. In 2005, Casework Directorate was disbanded and the case was transferred to a new Special Crime Directorate (SCD).

Scoping and resourcing the case

5.4 Both LWIII cases were clearly going to be highly sensitive. The background was well known in the criminal justice system and the original murder case (LWI) and successful appeals had attracted significant public comment. The police appreciated this from the outset and established a large team of investigators. At times they had up to ten officers working on disclosure alone. As early as 2004, they asked the then reviewing lawyer, Mr Thomas for the appointment of a full-time dedicated CPS team. He suggested a dedicated service similar to the Soham case[7] and agreed to discuss the police request with his managers. The police also wanted a disclosure expert in the CPS team. The police request anticipated the conclusions of the *Gross* report, which recommends the involvement of prosecutors from the outset of large and complex investigations to influence decisions about disclosure[8].

5.5 Mr Thomas appears to have appreciated some of the challenges that the case would pose. He pointed out at a meeting with the police in November 2004 that:

> *"There is the big issue of Unused Material - I have to actively deal with this. I cannot think of a Case in the English legal system that would have more problems with Unused Material with the number of all documents that have been generated."*

5.6 He later referred to the time that would be required by defence teams to consider *"the vast amount of evidence and unused material"*.

7 R v Huntley - the murder of two schoolgirls in Cambridgeshire in August 2002.

8 *Review of Disclosure in Criminal Proceedings*, Rt. Hon Lord Justice Gross, page 69.

5.7 We asked the relevant managers about resourcing the case. They cannot now recall what consideration the CPS gave to these requests. Their overall approach to resourcing, however, was cautious. They preferred to wait and see how the case developed before committing more resources or instructing senior counsel to advise the reviewing lawyer. Although the reviewing lawyers devoted a great deal of their time to this case, a full-time team was never really provided. The reviewing lawyers all told us that they were also handling a number of other cases. The first Head of SCD, Carmen Dowd, was sceptical about their views of the time needed, particularly Mr Thomas's attendance in the Major Incident Room (MIR) to deal with disclosure issues. No-one was allocated to deal specifically with disclosure until 2007. One police officer, who played a major role in the investigation, told us that, with an investigation on this scale, it would have been advantageous to have expert assistance from the outset to advise the police on the best course of action for the recovery, recording and retention of voluminous amounts of material.

5.8 CPS managers were rightly mindful of the need to use scarce resources wisely. They did not, however, attend early conferences with the police where they might have gained a better impression of the scale of the material available and the resource likely to be required. As a result, they appear to have lacked a full understanding of the requirements of the case at a crucial early stage. Some of the problems that were to arise might have been averted by the early involvement of trial counsel as encouraged by the *Gross* report[9].

9 *Review of Disclosure in Criminal Proceedings*, Rt. Hon Lord Justice Gross, page 70.

5.9 At around the time R v Mouncher and others ended, the CPS reached agreement with the IPCC for initial contact to be with a senior CPS manager and for continued joint management oversight of cases to be dealt with in the newly created Special Crime and Counter Terrorism Division. They already have similar arrangements for some other specialist cases, but they do not extend to all large or complex cases. Arrangements with police forces for other large or complex cases need to be clarified so that managers make key early decisions about resource allocation, including the selection of trial counsel where appropriate.

Recommendation

At the outset of a potentially large, complex or sensitive case, a CPS lawyer with responsibility for the allocation of resources, should meet the police to ensure that the CPS has a full understanding of its implications and to enable the investigators to explain their needs, including the likely burden of disclosure.

5.10 Failure to appreciate the work required on the case continued. After the conclusion of the case against the Core Four, the Director's Case Management Panel (DCMP)[10] was told that, following decisions on which of the unused material from that case could be used as evidence against other suspects, the unused material for any second case would require:

10 DCMPs are an arrangement under which the Director of Public Prosecutions seeks to assure himself that cases likely to last a long time are being managed effectively. See *The ineffectiveness of the CPS team* later in this chapter.

"A relatively simple scheduling exercise to be undertaken and completed by April/May 2009. This should enable initial disclosure to be completed within a couple of months of charge (if relevant)."

5.11 The task was anything but simple, and was certainly time consuming. Similarly, after the service of defence statements in R v Mouncher and others in September 2010, it was anticipated by a meeting of the prosecution team that secondary disclosure would be resolved during November. In the event, it took until mid-January.

Getting to the bottom of LWI and LWII

5.12 We were surprised to find that meetings with the police about the case did not result in an agreed project plan identifying all the key steps required to build the two LWIII cases. The responsibility for managing the prosecution case rested squarely with CPS. Mr Thomas correctly advised the police that the case would need to be split with the Core Four to be prosecuted first so that they could be used as witnesses in the case against any police officers to be charged. It was plain that much of the evidence for LWIII existed before the investigation began. It was contained in the police and CPS LWI files supplemented by the LWII files.

5.13 Police and CPS files from both LWI and LWII were also likely to contain information that could undermine the prosecution case or assist the defence in LWIII. They would also have provided an early idea of the number of accounts given by key witnesses, particularly the Core Four. In the case of LWI, it indicated how the police and prosecution came to believe that they had a case against the original LWI defendants that had been sufficient to convict three of them. Mr Thomas indicated at a conference that some police suspects still believed that Mr Gafoor committed the murder in the presence of the original LWI defendants. On the face of it, therefore, everything from those investigations that was not to be used as prosecution evidence in LWIII was likely to be relevant to LWIII and much of it potentially disclosable. Mr Thomas pointed out in 2005 that the obvious areas where unused material was likely to be found included the CPS's and counsel's papers from both LWI trials and the appeal. We would have expected them to be read and digested by the lawyers at an early stage to understand as much as possible about the background and to help them to shape the LWIII case. Whilst Mr Thomas had reviewed a substantial part of the CPS material from the LWI trials for the purpose of the Core Four case before he left the case[11], he did not see the material from the appeal or from LWII. He included the need to complete the work on the CPS LWI file in his hand-over document to Mr Haskell[12]. It is not clear whether this occurred. We found no evidence that it was revisited by a lawyer in R v Mouncher and others.

5.14 Prosecutors were still identifying usable evidence from among the disclosure material after primary disclosure in R v Mouncher and others. Indeed, material from the CPS LWI file that was disclosable, or even usable as part of the prosecution case, was still coming to light in 2011. It also turned out that, although LWI

11 Mr Thomas left in circumstances unconnected to this case, which the CPS declined to accommodate, making it very difficult for him to continue working in London.

12 For details of Mr Haskell's role, see the sections headed *Selecting the counsel team* in this chapter and *The role of disclosure counsel* in chapter 6.

material from the CPS file had been scheduled, investigators had not recognised some exhibits shown to the jury in LWI (known as the Box 31 issue) that would have assisted the prosecution in explaining its case more clearly in LWIII and assisted the defence to prepare their cases. Mr Dean QC asked several times during the case (after Mr Mouncher and others were charged) whether the prosecution held the original exhibits from the LWI trials. He was told (by the police who by then relied mainly on the scanned database) that they had not been recovered. They were eventually discovered on 14 October 2011, more than three months after the start of the trial, when DS May personally inspected the CPS LWI files following another request from Mr Dean QC. When we examined the original CPS files, the photographs were readily apparent. The album covers and the indices accompanying them appeared to have been folded back during the scanning process and so not copied for LWIII. Once unfolded, markers on the covers indicated the relevant exhibit numbers from the LWI trials. The content of Box 31 (as with other boxes we examined) was indexed and was very obviously original trial material. Whilst the photographs did not undermine the prosecution case, they were of assistance to everyone, both in understanding what had happened to Lynette White and in explaining aspects of the case to the jury. Their absence caused some difficulty and delay when it came to the pathologist's evidence. In spite of the implausibility of the repeated assurances given to Mr Dean QC, CPS lawyers, who would almost certainly have known how the exhibits would appear in the CPS file, do not appear to have looked in the CPS boxes themselves. As Mr Dean QC observed, it was a significant blow to the credibility of the disclosure process to have to announce that something so obvious as the original exhibits had been overlooked.

5.15 The position in relation to the CPS LWII file was even worse. In 2006, Mr Cohen suggested that the CPS LWII file should be obtained from storage to ascertain what other evidence there had been against Mr Gafoor. In spite of this, the CPS file from LWII was not obtained until 2010, after the defendants in R v Mouncher and others had been charged and a number of court hearings had taken place. The majority of the prosecution team was under the impression that Mr Cohen had reviewed the CPS LWII material during the summer of 2010, but this was a misapprehension. He appears to have considered it primarily to identify any sensitive material that might exist before handing it to the police disclosure team for consideration of relevance and, if appropriate, scheduling. Some of the material, such as copy witness statements, replicated material already in the possession of the police (which had been considered), but there were also many items of correspondence and aspects of case presentation that were not in police possession. For example, the CPS file contained Mr Gafoor's certificate of conviction and a record of his confession signed by him which had not been served as part of the prosecution case at that stage. Another document (D10826) was to become very significant, but it was not identified until January 2011 when the police started to schedule the contents of the CPS LWII file. It was an assessment of the case prepared by Mr Gafoor's defence counsel to justify his claim for fees, which would not normally appear in a CPS file. It cast doubt on whether, in spite of his confession and guilty plea, Mr Gafoor had acted alone in killing Lynette White. It referred to suggestions by Mr Gafoor that others were present on the stairs outside the flat in which Lynette White was killed and that when he left there were people outside the premises about to enter, who it was thought may have inflicted further stab wounds that had possibly killed her.

5.16 Everyone agreed that D10826 was clearly relevant and disclosable in relation to the issue of whether Mr Gafoor may have acted in concert with one or more of the original LWI defendants. Although it was immediately disclosed to the defence (and therefore about six months before the trial started), the prosecution was unable to explain its provenance. In response to a question from two firms of solicitors Mr Cohen simply explained:

> *"It is not known when the particular item you are referring to actually got into the CPS papers, or indeed why the item was sent to the CPS. It is also not known who or which organisation sent the item to the CPS."*

Remarkably, no-one seems to have tried to discover how it came into the possession of the CPS, although leading counsel asked for such an exercise in March 2011, until part way through the trial in September 2011. We understand that the police searched the scanned material without success. No-one seems to have examined the original CPS paper file, although Mr Bennett said that this should happen and, at one point, the CPS head of fees, who is based in London, offered to do so. As a result Mr Dean QC wrongly stated in his *Analysis of Errors* document, which was placed before the court:

> *"The Assessment of Case was not attached to, nor surrounded by, any document that explained its presence in the CPS file. In those circumstances, always explaining this was simply the prosecution's best guess…"*

5.17 In the meantime, Mr Mouncher's legal team sought information from the person responsible for defence counsel's fees in the National Taxation Team[13] who made a statement in which she denied being the source of the document. When the police searched the scanned database against her name they discovered a letter from her to the CPS enclosing D10826. It had been sent to the CPS as a comparator when assessing the fees of prosecuting counsel in the Gafoor case. When we inspected the paper file, the letter was in the fees folder close to the original of D10826. Had the provenance of D10826 been established in early 2011, the false trail pursued diligently by Mr Mouncher's counsel, which wrongly fuelled speculation about improper behaviour by investigators, could have been avoided. It is difficult to understand why no-one looked at the paper file. Consideration of the CPS LWII file early in the investigation would also have enabled the prosecution to address the production of underpinning documents that the defence wanted to explore and which Mr Gafoor's lawyers argued attracted Legal Professional Privilege (LPP) well before the trial started. In the event, this issue absorbed a large amount of court time during the trial and cannot have created a favourable impression of the prosecution's mastery of the case[14].

13 The National Taxation Team was part of Her Majesty's Courts Service responsible for approving counsel's fees in certain cases.

14 For more detail on this, see *Third party material* in chapter 6.

5.18 In our view, there should have been a written agreement reached between the police and CPS at the outset of the case about the sources of evidence, including material in the CPS's own files, and the categories that needed to be considered for inclusion in the evidence bundle for LWIII and those that needed to be scheduled as unused material and arrangements for ensuring the agreed actions were fully completed. In practice, the decisions to charge were taken without a full and clear understanding of all the information arising from the LWI and LWII cases.

5.19 The solicitors for the five LWI defendants also had files relating to the case. Under disclosure guidance this is known as third party material[15]. The prosecution did not begin to think about it fully until early 2010. It should also have been sought earlier. Whilst, by definition, it was not in the hands of the prosecution team, it was likely to include key information that could impact on the reliability of the original five defendants from LWI and the Core Four, as well as Mr Gafoor.

5.20 Similarly, it was apparent from some suspects' interviews under caution and an internal CPS report in February 2006 that the police defendants may argue that they acted on the advice or instruction of the CPS in LWI. Yet the CPS role in LWI was not fully researched until DS May produced a report on 20 November 2008.

15 For more detail on this, see *Third party material* in chapter 6.

The ineffectiveness of the CPS team

5.21 While the case was in Casework Directorate, Mr Thomas was the sole CPS lawyer handling it in spite of the police's view that a dedicated CPS team was needed. A few months after the case was transferred to SCD in late 2005, Mr Cohen, whose previous role in the CPS had come to an end, was tasked to provide strategic oversight. He was more senior than Mr Thomas and also than Mr Thomas's line manager. We were unable fully to understand the intended role of Mr Cohen.

5.22 The poorly defined and difficult relationships between members of the CPS team absorbed a great deal of energy and may have contributed to some of the errors that damaged confidence in the disclosure process and the approach to the disclosure test.

5.23 Mr Cohen and the lawyers who worked with him at various stages were left to work out what strategic oversight meant. For example, when Mr Thomas left the case, Mr Hart was appointed to replace him while Mr Cohen continued to play a significant role. In an email the then Unit Head, Asker Husain, stated:

> *"This is to let you know that I have decided that Gaon is to take over from Ian on Op White. I do not expect Gaon to undertake the role of disclosure counsel (which was one of Ian's roles) as it would simply be impractical for him to do so given the type of case we have and given where we are in the life of the case. However, he will, in due course, take over, in particular, the responsibility of ensuring that junior counsel is doing all that he*

should vis a vis disclosure. You will both need to sit down and work out who does what more generally. I am happy to assist with that if required".

5.24 This question was never satisfactorily resolved and should not have been left to the participants to sort out, at least not without final approval by a senior manager. Both Mr Hart and Mr Cohen told us that they agreed between themselves that Mr Hart would focus on review decisions and that Mr Cohen would take responsibility for disclosure, which was not what the Unit Head had originally intended. They produced a note setting out the agreed arrangements.

5.25 Tensions had already appeared as early as 2006 when Mr Cohen felt that he was being excluded from consideration of the evidence and the review decisions by Mr Thomas, and he threatened to withdraw from the case. Some written exchanges between CPS lawyers were not of the standard we would have expected to find between professional colleagues. There were also some terse exchanges between CPS staff and with counsel, particularly Mr Hart and Mr Dean QC, but also Mr Cohen. Some were about trivial points. Whilst these did not relate to disclosure, they absorbed a lot of energy that could have been put to better use devising a more corporate approach to the case. This came to a head over two issues: Mr Hart's decision to stop the case against Mr Atkins (one of the Core Four) without consultation with Mr Dean QC who was on holiday; and after the guilty pleas of three of the Core Four when almost six months elapsed while the decision whether to prosecute any police officers was reviewed. Eventually, Mr Hart withdrew from the case and Mr Clements, who was by then the Head of SCD, made the decision to proceed. Given the work that had already been undertaken on the case, it should not have taken so long to reach a conclusion. The delay put the prosecution team, particularly the disclosure team, under great pressure to get the case ready for service on the defence and to prepare disclosure schedules, which may have contributed to some of the errors that eventually damaged confidence in the disclosure process.

5.26 These matters should not have been allowed to develop to the extent that they did. They distracted attention from the need to focus on key strategic decisions that would probably have made the later management of disclosure easier; for example how to deal with material from LWI and LWII[16]. The extent to which senior managers were aware of the terse exchanges is not clear, but some were copied to line managers. They recall little about the case. We would have expected them to take steps to deal with these disputes.

5.27 The requirement for Mr Clements to take the charging decision in R v Mouncher and others resulted in confusion about the identity and role of the reviewing lawyer. Written comments in the CPS electronic mailbox show that Mr Cohen regarded Mr Clements as the reviewing lawyer responsible for the case. In reality, he could not fulfil the day-to-day requirements of this role because he also had overall responsibility for many other important cases, and management responsibility for SCD. In practice the reviewing lawyer functions after the decision to charge related mainly to disclosure and were carried out principally by Mr Cohen assisted by Michael

16 See *Getting to the bottom of LWI and LWII* in this chapter.

Jennings, who replaced Mr Hart. Mr Clements maintained an appropriate overview of the case while Mr Cohen and Mr Hart or Mr Jennings did the main work on it for the CPS. Mr Clements was in frequent contact with them and also met all three counsel and Mr Coutts from time to time. He attended DCMP meetings to review the progress of the case.

5.28 The new arrangement was not helpful. The view of Mr Clements's role taken by Mr Cohen in particular and by his line manager meant that the line manager (who reported to Mr Clements) took less interest in the management of the case than would normally be expected of his role. Sometimes the police and counsel appeared unsure about the allocation of responsibilities among CPS staff, as, on occasions, did defence solicitors.

5.29 As late as November 2009, after service of the main tranche of primary disclosure in R v Mouncher and others, Mr Bennett asked Mr Cohen if he, rather than his then lawyer colleague, Mr Jennings, was the *"first point of call for disclosure issues"*. At the same time, leading counsel asked if it was intended that Mr Cohen would keep his role on disclosure, or whether it would be handed to Mr Jennings. Although Mr Cohen had been absent for some time on sick leave, he had returned to work in early September. Such confusion cannot have helped the progress of the case. It damaged the sense of team responsibility needed in a large case and must have contributed to the extent to which Mr Haskell was left to work alone in the MIR and in practice to set much of the disclosure policy himself. Whilst it is easy to overstate the significance of this, Mr Haskell gave a great deal of disclosure advice on which the police acted. The reviewing lawyers were not always aware of the advice and some, as we report in chapter 8, was, in our view, flawed. For much of the preparation phase, CPS lawyers placed a great deal of reliance on Mr Haskell, without having set written parameters for his role[17].

5.30 It is difficult, although not impossible, to separate the reviewing lawyer and disclosure functions. In this case disclosure counsel was doing the day-to-day work on disclosure subject to approval by Mr Cohen. It is not clear that both needed to be involved. If a more experienced disclosure counsel had been instructed to carry out the full disclosure role or Mr Cohen had undertaken it himself, this would have been a better and more cost effective approach.

5.31 This kind of confusion about roles and responsibilities, combined with a number of changes of reviewing lawyer, increased the risk of key matters falling between the cracks. The more people who are involved in a case at the same time without clearly defined roles, the greater the likelihood that each is leaving things to another. Every time someone left the case, there was a loss of accumulated knowledge. For example, Mr Thomas prepared - at very short notice - a sound hand-over document on disclosure matters for Mr Haskell, but it dealt only with the current status of disclosure and outstanding actions. It was not a set of formal instructions setting out his responsibilities and the limits of his authority as required by the *Disclosure Manual* so that his role was never properly defined[18].

17 See *The role of disclosure counsel* in chapter 6.

18 See *The role of disclosure counsel* in chapter 6.

5.32 The role of the DCMP, to which LWIII became subject in 2006, was also allowed to become a source of confusion. DCMPs are an arrangement under which the Director of Public Prosecutions satisfies himself that cases expected to last a long time are being managed effectively and costs are under control. They are attended by the reviewing lawyer and their Head of Division or area, as well as senior managers from CPS Headquarters. Although DCMPs in this case focussed mainly on process and cost, they also discussed proposed major decisions about the structure of the case and potential charges. As a result some police investigators and defence counsel were confused about the identity of the ultimate decision-makers. Some believed (wrongly) that it was the DPP himself. It is difficult in the time allocated to a DCMP to consider fully the quality of case preparation. Too many reports to DCMPs simply sought to reassure the meeting that things were under control. In the light of this and some other cases, we were pleased to note that the current DPP has put in place new arrangements to help DCMPs satisfy themselves about the handling of disclosure.

Communications

5.33 There was an absence of an agreed framework for communications and the allocation of responsibilities between the CPS and the police. When the police raised questions about the commitment of resource by the CPS, they were simply told to write to senior CPS managers rather than the reviewing lawyers resolving this internally through normal line management arrangements. In November 2008, it was necessary for Mr Hart to confirm in writing his understanding of the roles of CPS staff and counsel. In spite of this, there were repeated concerns about counsel communicating directly with the police so that CPS lawyers felt unsighted on significant matters. The police and counsel are said even to have held a conference that the CPS did not attend, having found out about it only at the last minute. This also extended to defence legal teams corresponding by email with prosecution counsel directly. Whilst this is unavoidable during a trial, it should not occur during the preparation phase.

5.34 Mr Hart also advised that notes of meetings with the police should not be exchanged with a view to reaching an agreed version. Although Mr Cohen disagreed with this, Mr Hart consulted others in SCD who said that, at that time, such notes were not routinely copied to others who had attended the meeting. They were expected to make their own notes. If true, we find this to have been a remarkable state of affairs. It may have contributed to the failure to produce agreed notes of meetings with the original defendants and their solicitors that caused serious concern during the trial and on which we report in chapter 7. We understand that this practice changed when Mr Clements found out about it.

Selecting the counsel team

5.35 Too little thought was give to the selection of the team of counsel that represented the prosecution. This probably stemmed from a failure by the CPS adequately to consider the difficulty and importance of the case at an early stage. James Bennett was the first to be instructed in 2004 when he was asked to advise Mr Thomas about the sufficiency and admissibility of the evidence against each suspect referred (usually separately) to the CPS by the police. Mr Thomas had previously instructed him in a complicated drugs case which raised issues relating to unused material and had been impressed by his meticulous recording and organisation of material. Mr Thomas's line manager, Ian Frost, considered him suitable for the role that he believed was then required and the Head of Division, Christopher Enzor, is said to have been unwilling to sanction the instruction of leading counsel until the likelihood of charges was clearer. Mr Bennett had been called to the Bar only about two years earlier.

5.36 We concluded that this was the kind of case in which it would have been helpful - and cost-effective in the long run - to have instructed a very experienced Queen's Counsel or Senior Treasury Counsel with considerable experience of leading a team presenting potentially long cases before juries at an early stage. This would have assisted the development of a case strategy from the outset.

5.37 In 2005 the prosecution instructed Nicholas Dean QC, who had experience of regulatory law, to advise on a specific question about a perceived conflict of interest on the part of a defence lawyer. He had been Queen's Counsel for about two years, but was already regarded very highly by the Birmingham office of CPS Casework Directorate. The appointment was approved by Mr Enzor, who, having never previously met him or dealt with him, told us that he must have relied on reports from others. In view of the knowledge of the case that he acquired, he was then instructed as leading counsel for the prosecution later in 2005. We were unable to establish who authorised the extension to the role, although it appears to have taken place as early as June 2005 and formalised later, probably in October 2005.

5.38 In 2007 James Haskell was instructed to act as disclosure counsel. Mr Thomas, who had been dealing with disclosure, was due to leave the case shortly and suggested that Mr Cohen was in the best position to take over his disclosure duties. Mr Cohen discussed the proposed approach with his line manager, Mr Husain, who consulted the then Head of SCD, Ms Dowd, and it was agreed to appoint Mr Haskell as disclosure counsel instead. He was from the same chambers as Mr Bennett and had a little knowledge of the case from conducting occasional administrative hearings. But he had completed pupillage only the year before and CPS records indicate that, as would be expected at that stage of his career, he had little experience of prosecuting in the Crown Court. By the time the case of the Core Four had concluded and the defendants in R v Mouncher and others had been charged, he also had experience as disclosure counsel in two other substantial cases.

5.39 The main burden of disclosure from July 2007 lay with Mr Haskell. We were told by some defence lawyers that he was not sufficiently experienced for this case. We agree, but this should not be taken as a criticism of his undoubted abilities. We spoke to him extensively and were impressed by his obvious

intelligence and energy. He gave us candid answers and made a number of sensible suggestions for improvements in the disclosure regime. He told us that he learned a great deal from this case. But its size and sensitivity required someone with considerably more experience, particularly given the substantial expectations placed on him while working with the police in the MIR without the benefit of immediate access to supervision. He was not given clear instructions about his role and the limits of his autonomy as required by the *Disclosure Manual*[19]. In practice, he became responsible for the majority of disclosure decisions, although they were signed off by a CPS lawyer.

5.40 We were told that it is common practice in parts of the CPS to instruct very junior counsel, sometimes referred to pejoratively as "baby counsel", to act as disclosure counsel. This is not advisable, particularly in large cases, where substantial experience of Crown Court trials is necessary. The additional cost, if any, would be repaid by the savings resulting from fewer challenges to disclosure decisions. The temptation for defence teams disproportionately to challenge the decisions (or advice) of very junior counsel should not be underestimated. We were told that some defence counsel appeared excited at the prospect of cross-examining Mr Haskell.

19 *Disclosure Manual*, paragraph 29.45. See also *The role of disclosure counsel* in chapter 6.

5.41 In March 2009 and on other occasions, Mr Dean QC raised the question of instructing another leading or very experienced junior counsel to assist him with what by then had become a very large case indeed. It was agreed that someone with more courtroom experience of large cases than Mr Bennett or Mr Haskell might be helpful. In the event, no further counsel were added to the team. The resulting burdens on Mr Dean QC made it very difficult for him to provide even a reasonable degree of supervision of Mr Haskell's work. He was under the impression that Mr Cohen, who was a very experienced CPS lawyer, was closely supervising Mr Haskell's work. In practice, Mr Cohen, who also had responsibility for other cases, did not provide continuous supervision. He attended the MIR when disclosure schedules were ready for his signature. While there, he made some checks on selected items, which are said by Mr Haskell to have been rigorous. But Mr Cohen himself accepted too readily assurances about the content of the D30 material[20], although he had been at some of the meetings to which it referred, and did not fully check one of the secondary disclosure schedules.

5.42 The contrast between the collective experience of the counsel team in LWIII and the team in LWI, which, by definition, had less material to manage, and arguably fewer challenges to deal with, is stark. The LWI team was led by an experienced Queen's Counsel supported by two juniors, one of whom took silk shortly before the first LWI trial.

20 See *Contact material relating to the five LWI defendants* in chapter 7.

Reliance on the police for prosecution functions

5.43 The prosecution relied heavily on the police and disclosure counsel to carry out tasks that they would normally have been expected to undertake themselves. The CPS agreed to serve the prosecution case, disclosure schedules and copies of documents to be disclosed electronically. It entered into a contract with a private company to undertake this work so that the evidence could also be shown electronically in court when required (EPE). Under this arrangement, the police agreed to deliver the relevant documents - which had been selected by counsel and CPS lawyers - to the private company, which scanned them on to a hard drive, which was later served on the defence. The CPS did not check the content of the material to be served or that the scanned material accurately reflected their intentions as it normally would have done in a case to be presented on paper. CPS lawyers were not always aware of what had been served or disclosed because they depended on the police and the private company to update the electronic case file. We found a number of examples of documents being discovered many months after the prosecution believed that they had been served, including a taped interview with Mr Gafoor, that had been wrongly classified on HOLMES (a police computer system for large and major inquiries) as used material or having to serve full versions of documents that were previously incomplete. The omission of the Gafoor tape attracted considerable criticism in court. Even during the Core Four case, which was paper based, Mr Cohen asked the police to complete a schedule showing what had been disclosed to whom and when in primary disclosure in order to brief leading counsel about disclosure. This was something that the CPS should have been in a position to do itself.

5.44 There is, of course, no guarantee that if CPS had done the EPE preparation or checking that errors would not have occurred, but at least accountability would have clearly rested where it properly belonged. The CPS was not in control of the preparation of the case for service or the disclosure of unused material, as it should have been. We were told that this arrangement has also been applied in other cases. In a case of this size, some errors are inevitable, but basic errors kept occurring which did not convey the impression of an efficient team.

5.45 Similarly, the police and disclosure counsel were left to arrange service of disclosure schedules and copy documents themselves. The defence pointed out that some items that were supposed to have been disclosed appeared to be missing from the bundles that they received. Sometimes they were in fact included, but the absence of a separate index made it more difficult to find them; they had to search through the MG6C to discover what was supposed to be in the bundle of copy documents served on them. This basic checking should have been completed by the CPS and separately indexed. This would obviously have taken some time. But it would have assisted the defence in finding their way through a very large quantity of material and so saved a lot of complaining and possibly unnecessary requests. Combined with the difficulties caused by the phasing of disclosure[21] and the failure to add the MG6C document number for LWIII to copies of documents that already carried a number from LWII, it made the job of the defence difficult.

21 See *Phasing of disclosure* in chapter 6.

5.46 We were surprised to find that the CPS decided not to deploy a caseworker at court during the trial. The size of the police team was a factor in this decision. Whilst this undoubtedly saved some cost for the CPS, it resulted in weaker accountability for events at court. Mr Clements visited court frequently to check on progress, but the CPS did not have a presence at court on many days of the trial. Normally, a caseworker would take responsibility for serving additional evidence and any additional unused material that became disclosable during the trial. These matters were left in the hands of the police and counsel. Fortunately, Mr Haskell kept a record of all requests for further disclosure and the prosecution's responses together with records of material that was disclosed of the prosecution's own volition. The CPS did not, however, have its own copy, although we were told that it was intended to create one at the end of the case.

6 The management of disclosure

6.1 The prosecution team was aware from the outset that the case could stand or fall on the handling of disclosure. As the *Gross* report points out[22], the onerous nature of the disclosure requirement is capable of exploitation in large and complex cases. As the trial approached, the prosecution team was aware of a paper written by one of the defence advocates in R v Mouncher and others describing how weaknesses in the handling of disclosure could lead to the collapse of cases. They were also aware of the scrupulous approach to disclosure taken by the trial judge in other cases, both when sitting and during his time as an eminent advocate who had represented the prosecution in many serious and complex cases. As a result, some sensible arrangements were made for the management of disclosure, including the use of a *Disclosure Protocol*, the provision of training and guidance about the relevance and disclosure tests, the use of quality assurance exercises and a full re-review of all unused and irrelevant material as part of secondary disclosure. But good plans or ideas were not always followed through or applied as thoroughly as they might have been and supervision fell short of the required standard. We will deal with the difficulties that arose under a number of headings.

22 *Review of Disclosure in Criminal Proceedings*, Rt. Hon Lord Justice Gross, page 35.

Project management

6.2 Although we were told by several members of the prosecution team that they applied a project management approach, it lacked formality. We found some evidence of such an approach, including disclosure work, particularly in the early stages of LWIII when the case against the Core Four and the possibility of prosecuting others was under consideration. A number of key disclosure questions were considered at a conference of the whole prosecution team on 30 August 2007. Whilst this demonstrated a managerial approach to disclosure, some of the decisions reached suggested that there was - or at least had been - a narrow view of disclosability (see chapter 8). We also found evidence that 'strategy' was considered at later stages, including preparing, at leading counsel's instigation, well in advance for work on secondary disclosure in R v Mouncher and others.

6.3 Most conferences of the whole prosecution team, however, tended to concentrate on the progress of police actions and the volume of disclosure work undertaken and outstanding, rather than deal with the substance or quality of disclosure. Ensuring timely progress is of course important, but it is easy to lose sight of the importance of quality. Regular review of E-Catalogues[23] by Mr Cohen, for example, might have led to a discussion about the approach taken by Mr Haskell on some issues. Mr Haskell was clear, however, that all lawyers understood and agreed with his approach on these points.

23 See *The E-Catalogue system* in this chapter.

6.4 There could have been more rigour in the management of disclosure. In spite of the project management approach, including regular conferences with the police and counsel to discuss progress, a number of important matters drifted. The service of the prosecution case was delayed, partly because Mr Haskell needed to modify the draft MG6C in the light of the compilation of *"a more definitive list of used material"* and also because it had been discovered that a substantial number of audio tapes from the two LWI trials had not been transcribed or listened to and further tapes had been located. Leading and junior counsel had been under the impression that work on the tapes had been completed some time before. Although the work required on the tapes was a police responsibility, a more formal agreement with the prosecution about the sources of evidence that needed to be considered before charging decisions were taken would have helped to identify this kind of problem at a much earlier stage[24]. It would have been helpful to have required regular written reports to the prosecution team by disclosure counsel about the issues dealt with since the previous meeting. In this case, regular reviews of a cross-section of E-Catalogue endorsements at team meetings might have identified the narrow approach to some of the decisions on which we comment later.

24 See *Getting to the bottom of LWI and LWII* in chapter 5.

Co-location

6.5 There was considerable merit in assigning a lawyer to work with the police on disclosure, although some serious risks later became apparent. During his time working on the case, Mr Thomas visited the MIR frequently to advise the police on the scheduling of unused material. He told us that on his visits to the MIR the police had put material on which they required advice into three boxes, each representing a different issue that concerned them: documents that they found difficult to describe appropriately; documents that they were not sure should be treated as sensitive or non-sensitive; and documents that they thought might contain undermining material or they were simply unsure how to treat. When he was also asked about the relevance of some documents, he was clear that he was simply giving advice about potential relevance, although it is likely that the police routinely followed it. He kept a record of the advice that he gave to the police, which was stored on the CPS electronic case file. When Mr Haskell became disclosure counsel, he kept records of his written advice on his personal computer or relied on records such as the E-Catalogue ring binders kept in the MIR. We could not find evidence that the CPS obtained copies of these records.

6.6 Mr Thomas also insisted that it was essential there was a clear record of his advice to the police disclosure team and decisions made by the police disclosure officer because the prosecution would have to be accountable as to the methodology used, how it categorised material and the reasons for the categorisation. He emphasised that there should be an unused policy document and agreed to hold weekly disclosure meetings with the police disclosure

team. The police found Mr Thomas's approach very helpful and Mr Thomas told us that he could usefully have spent more time at the MIR if managers had allowed him to do so.

6.7 In particular, Mr Thomas told the police that all irrelevant material must be listed and this was reinforced by the officer then in charge of the MIR and Mr Dean QC. But it appears that this was not done at the time because scheduling was ordered in late 2007 as a result of the errors discovered when dealing with an application under section 8 CPIA[25] made by one of the Core Four. There was much discussion in early 2008 about the resource required to produce the lists of irrelevant material that should have been created from the outset. The CPS does not appear to have been ensuring that the police completed the work that they had agreed was necessary.

6.8 Whilst there are many advantages to the co-location of the disclosure lawyer with the police in large cases, there are also some challenges. Co-location means that police officers inevitably ask the disclosure lawyer many questions. A conscientious and enthusiastic lawyer is likely to be as helpful as possible. Both Mr Thomas and, later, Mr Haskell gave advice on a large number of items. Indeed, Mr Haskell told us that he discussed disclosure matters with the police on an almost daily basis. It is difficult to keep control of this unless everyone is very clear about their role. The role of Mr Haskell, who was appointed in July 2007 when Mr Thomas left the case, does not appear to have been set out in any formal document or set of written instructions as required by the *Disclosure Manual*[26]. He had not fulfilled the role before he started on this case and was not provided with written instructions or guidance about how to approach his task and the extent of his autonomy. In practice, he was doing more than reviewing MG6Cs, which is the usual role of disclosure counsel. Under what became known as the E-Catalogue system[27], he was in effect determining the content of the MG6E. On occasions, he decided that material was irrelevant, contrary to the view of the police disclosure officer, on whom the primary responsibility rests. This risked causing police disclosure officers to take a narrow view of relevance when considering later documents. The police had sought advice from Mr Thomas on relevance, as they are encouraged to do when in doubt by paragraph 6.1 of the CPIA *Code* and paragraph 6.2 of the *Disclosure Manual*[28]. But the advice they sought from Mr Haskell under the E-Catalogue system did not generally fall into this category.

6.9 The CPS should consider carefully whether it is appropriate to instruct disclosure counsel and, where they are used, give clear instructions about their role as required by the *Disclosure Manual*. We were pleased to hear that the CPS is considering the creation of a list of approved disclosure counsel for large and complex cases.

25 The (unamended) version of section 8 of the Criminal Procedure and Investigations Act 1996 that applied to this case. It enables defendants to apply to the court for an order requiring the prosecution to disclose material which *"…might reasonably be expected to assist the accused's defence as disclosed by the defence statement"*.

26 *Disclosure Manual*, paragraphs 29.44-29.46.

27 See *The E-Catalogue system* in this chapter.

28 The *Disclosure Manual* applied from 4 April 2005. Before that, similar guidance on this point was contained in a document agreed between the police and the CPS entitled *Joint Operational Practice and Instructions* (the *JOPI*) at paragraph 2.62.

Training

6.10 Mr Thomas provided training to the police disclosure team in 2006 before any suspects were charged. He was a CPS trainer on disclosure and based the two day programme on the same material used for lawyer training.

6.11 Mr Haskell provided further training in 2008 when a number of new police disclosure officers joined the team. He used examples of issues likely to arise in the approaching case against the Core Four and the training added significantly to the understanding of disclosure provided by standard police training. He delivered more training in 2009 directed at the specific requirements of the case against R v Mouncher and others, including the possibility that the five LWI defendants might in some way have been involved in the murder. The written material did not, however, direct attention to some issues that we would have expected it to cover[29]. He updated this in October 2010 in a presentation for secondary disclosure following receipt of defence case statements. The update included a document, to which the whole prosecution team contributed and which was approved by leading counsel, refining the issues that the disclosure team should address. Although he did not provide similar training to new officers joining the police team, this was not a factor in the problems that later emerged. There were few of them and most did not work significantly on disclosure.

29 See *Credibility of witnesses* and *Integrity of the investigation* in chapter 8.

6.12 The CPS had provided resource for the 2006 training (delivered by Mr Thomas). We were very surprised, therefore, to learn that Mr Cohen wrote to SWP on behalf of CPS declining to authorise payment for the 2009 training delivered by Mr Haskell. SWP paid for it, but believe that the CPS should have done so. We agree, because this was not simply a training exercise, but a necessary part of ensuring that the very specific disclosure issues of this case were properly addressed. In addition DS May suggested that such training sessions should be attended by CPS staff as well. We agree that joint training - both general disclosure training and any linked to a specific case - should usually be delivered to a joint audience. It would have helped to ensure a shared understanding of the approach to be taken in a case in which disclosure was complex and demanding and also provided an opportunity to agree policies.

Disclosure Policy Document (or Disclosure Protocol)

6.13 The purpose of a Disclosure Policy Document is *"to provide an open and transparent basis for disclosure decisions and to encourage disclosure discussions at an early stage for relevant non-sensitive material."* A *Disclosure Protocol* for R v Mouncher and others was served in April 2009 at the same time as the case summary required in complex cases. It appears to have been prepared by Mr Dean QC, who told us that it was intended to inform the defence and the court as much as it was for the guidance of the prosecution team.

6.14 The format of the *Protocol* largely followed the template for a Prosecution Disclosure Policy Document in the *Disclosure Manual*, but did not, as required by the template, include an analysis of the prosecution's understanding of the defence case. Mr Dean QC told us that this was because the defence had not at that stage submitted their defence case statements. We accept that it is easier to describe the defence when it has been formally revealed, but the template in the *Disclosure Manual* gives an example of describing any defence revealed in caution interviews. It is not necessary, therefore, to wait for the defence case statements before completing this section of the *Protocol*. Indeed, there are advantages in outlining the prosecution's current understanding of the defence case(s), whether based on caution interviews or correspondence from defence lawyers, so that it can indicate the criteria by which decisions in primary disclosure were made and whether or how they were changed after receipt of defence case statements. For example, in this case the prosecution could have indicated that it had only a general understanding of how the defence intended to argue that the original defendants were in some way involved in the murder, thereby inviting the defence to articulate their approach or, if they did not do so, showing the court that the prosecution had done its best to help the defence. In fact the prosecution delayed full consideration of some material relating to the credibility of the original LWI defendants which is likely to have contributed to the defence allegation that the prosecution had closed its mind to the possibility that they had been in some way involved in the murder.

6.15 We doubt whether the *Disclosure Protocol* was used as much as it should have been by any of the parties to the case. The prosecution departed from it in some respects, notably in adopting a narrower application of the relevance test than that described in the *Protocol*[30]. Referring to the *Protocol* while preparing the case might have avoided this and completing the section about the prosecution's understanding of the defence case would have had tactical advantages. The CPS now refers to such documents as Prosecution Disclosure Policy Documents. Gross LJ commented favourably on their use in his report[31]. Prosecution Disclosure Policy Documents should be used fully and actively throughout a case.

The role of disclosure counsel

6.16 We referred earlier to Mr Haskell's limited experience of prosecuting in the Crown Court when he was first instructed. The *Disclosure Manual* provides that only suitably experienced, competent and capable counsel should be appointed who are familiar with the CPIA 1996, the *Code of Practice*, the *Attorney General's Guidelines*, and the *Disclosure Manual* itself[32]. The *Manual* also says that very careful consideration should be given to disclosure counsel's fees, which should be agreed in advance with counsel's chambers. Cost is, of course, always an important feature of any management decision, but, if counsel is to be instructed to deal with disclosure, it is necessary to bear in mind the importance

30 See *The E-Catalogue system* later in this chapter and the sections beginning with *A narrow approach to the relevance test* in chapter 8.

31 *Review of Disclosure in Criminal Proceedings*, Rt. Hon Lord Justice Gross, page 69.

32 *Disclosure Manual*, paragraph 29.49.

of instructing someone with the necessary experience, even if they cost a little more. The decision to appoint Mr Haskell was taken very quickly after it became clear that Mr Thomas would be leaving the case without adequate consideration of the work that would be expected of him. The document proposing his appointment referred only to his brief knowledge of the case and sharing chambers with Mr Bennett. This was not a satisfactory basis on which to select disclosure counsel in a case of this difficulty and importance. We acknowledge that by the time the prosecution of the Core Four had been completed, Mr Haskell was considerably more experienced, both from his work on that case and on two unrelated cases in which he had acted as disclosure counsel. By then Mr Dean QC was sufficiently impressed by his work to recommend that he continued to act as disclosure counsel in R v Mouncher and others. The mindset on and approach to disclosure, however, had already been established within the team.

6.17 When Mr Thomas left the case there should have been a considered hand-over to Mr Haskell. The *Disclosure Manual* recognises this[33] and states that such changes of disclosure lawyer should occur only when absolutely necessary and that incoming personnel should have the opportunity to acquaint themselves with the papers prior to any discussion and hand-over, so that they can make sensible decisions regarding disclosure with a firm grasp of the essence of the case. Mr Thomas believed that Mr Cohen was well placed to handle disclosure when he left, although this may have required re-allocation of some of his other work. Whilst Mr Thomas prepared a hand-over note for his successor, he did not have the opportunity to discuss the case with him, including his experience of working alone in the MIR. The decision to instruct disclosure counsel and the selection of Mr Haskell as the person to undertake the role was made far too hastily.

6.18 The *Disclosure Manual* also states[34] that a written advice on disclosure will be required (if necessary adopting and incorporating the endorsed schedules) and arrangements should be made for interim progress reports from counsel, orally or in writing, and at such intervals as the reviewing prosecutor considers appropriate. Apart from a few discrete matters, Mr Haskell was not asked to provide written advice on his disclosure recommendations. Arguably, this was unnecessary because Mr Cohen visited the MIR when MG6Cs were ready for his consideration and he discussed individual decisions with Mr Haskell. Mr Cohen kept working notes, but they were mainly limited to identifying the items to be discussed and did not reveal the thinking behind decisions.

6.19 Whilst the role of the reviewing lawyer may have acted as a useful check on the work of disclosure counsel, it used additional resource and risked confusion about the line to be taken. It does not appear that any significant consideration was given either to requiring Mr Cohen to fulfil the whole disclosure role or to instructing disclosure counsel to take on the full role. The latter is allowed in large cases by the guidance given in the *Disclosure Manual*[35], in

33 *Disclosure Manual*, paragraphs 29.37-29.39.

34 *Disclosure Manual*, paragraph 29.53.

35 *Disclosure Manual*, paragraphs 29.41 and 29.44-46.

which case the rationale for the appointment, the extent of the appointment and the scope of counsel's duties should be recorded in their brief and agreed with trial counsel. In the view of inspectors, it would have given clearer accountability and been more cost effective to rely on one of the reviewing lawyer or a disclosure counsel rather than both. In the event, very junior counsel was left to work largely unsupervised in the MIR subject only to review of his work when Mr Cohen visited to sign off the MG6C schedules or when Mr Haskell himself sought guidance from a CPS lawyer or leading or junior counsel. Mr Cohen recalls looking at some E-Catalogues when he questioned a recommendation on the MG6C to disclose material. It is not clear how far he reviewed other E-Catalogues, particularly those relating to material that Mr Haskell decided should be treated as irrelevant.

6.20 When Mr Haskell was instructed, it was envisaged that he would be in frequent contact with Mr Bennett, with whom he shared chambers, so that he could discuss difficult disclosure points with him. In practice this was not as easy as thought. Mr Haskell was based at the MIR for much of his work on LWIII. Mr Bennett was sometimes working on other cases. Whilst it is clear that Mr Haskell raised issues with Mr Bennett and Mr Dean QC from time to time, they were able to offer limited structured supervision of his work. This could have been provided by the experienced CPS lawyers assigned to the case, but their work centred on signing off MG6Cs. Indeed, Mr Cohen sometimes asked Mr Haskell for advice on sensitive topics, such as the handling of complaints against LWIII officers and occasionally on evidential matters. He frequently referred defence questions to Mr Haskell, who inevitably had a closer working knowledge of the unused material. In short, too much was expected of Mr Haskell, who willingly worked very hard to fulfil what was required of him. The strict approach allegedly wanted by Mr Cohen ran the risk of causing delay at court by the late disclosure of material that the defence reasonably requested. Mr Haskell, perhaps torn between this and a more liberal approach, appears to have applied the disclosure test inconsistently and fallen into some errors of principle that others did not notice or in which they acquiesced.

6.21 We have learned of other cases in which junior counsel was left to deal with disclosure with very limited involvement by leading counsel, not all of whom appreciated the need for them to play an active role in disclosure. This was not such a case. Mr Dean QC took disclosure very seriously and recognised the risks that it posed to the prosecution. The *Disclosure Protocol* provided for him to have a supervisory role. He was not, however, in a position to provide the level of supervision required for a case of this nature because of the burdens placed on him.

The E-Catalogue system

6.22 The *Disclosure Manual*[36] encourages the police to seek advice from a prosecutor about material that they consider is potentially disclosable, although it does not specify a mechanism. In July 2008, Mr Cohen agreed that the police should start provisional work on scheduling relevant unused material for what became R v Mouncher and others on the implicit understanding that the police would decide the question of relevance before seeking advice about items that they considered potentially disclosable. This understanding appears to have been shared by the police, CPS lawyers and counsel. Police disclosure officers completed a pro forma, which became known as an E-Catalogue, for each item on which they wanted advice. The pro forma contained a number of columns for this purpose, the final one being for Mr Haskell to explain his opinion. For reasons that are not clear, the pro forma also included a column for the officer to state whether he thought the material was relevant, which should not have been necessary given its purpose.

6.23 Whilst Mr Haskell decided to disclose a substantial number of items that the police listed on the MG6C without referring them to him as potentially disclosable, he also advised the police - contrary to their expectation - to treat a significant number of items on the E-Catalogues as irrelevant, although he envisaged reconsidering some in secondary disclosure[37]. In the same way he had removed a number of items from the MG6C schedule in the Core Four case because he thought the police had been too cautious in including them. The determination of relevance is primarily a matter for the police disclosure team. If the police consider an item to be relevant, prosecutors should be very slow to change that decision. In this case it was difficult to see how any material from LWI or LWII would not meet the definition of relevance given in the CPIA *Code* and the widely worded guidance in the *Disclosure Protocol*. If, on the other hand, it becomes clear that the police have not scheduled an item that was relevant, the prosecutor should take steps to remedy this. Indeed, CPS lawyers should have, as Mr Thomas had in the Core Four case, conducted dip sample checks of the material treated by the police as irrelevant.

6.24 The burden on Mr Haskell was considerable and he worked for long periods in the MIR without direct supervision by the CPS or other counsel or even clear parameters for his work. The final responsibility for disclosure, however, rested with the reviewing lawyer, who was responsible for signing the MG6Cs. This was a considerable task, with many thousands of items to consider. The reviewing lawyer - mostly Mr Cohen - considered all the schedules and sometimes read the underlying material himself. Mr Haskell told us that Mr Cohen regularly challenged his advice as endorsed on the MG6C and inspected documents to satisfy himself that they were not disclosable. He described Mr Cohen's approach as the most thorough that he had ever met. Mr Cohen usually approved the decisions recommended by Mr Haskell, but changed a few of them. We were told that he did not decline to disclose anything recommended for disclosure by Mr Haskell and decided to disclose some items that Mr Haskell had said did not need to be disclosed. We were also told,

36 *Disclosure Manual*, paragraph 10.5. The *Disclosure Manual* applied from 4 April 2005. Before that, similar guidance on this point was contained in a document agreed between the police and the CPS entitled *Joint Operational Practice and Instructions* (the *JOPI*) at paragraph 2.115.

37 See for example paragraphs 7.54-7.55.

however, that Mr Cohen insisted on a strict application of the CPIA test. There is evidence that all counsel accepted, or at least acquiesced in, this approach, which they pointed out was in line with the recommendations of Gross LJ[38]. This expectation or mindset might explain some surprising disclosure decisions. We noted that, in spite of Mr Cohen's checks, some misconceptions were perpetuated (eg on the witness credibility issue)[39]. It is not clear how far Mr Cohen inspected the E-Catalogues, which were a very important part of Mr Haskell's work on which he set out the rationale for his decisions about the material to which they related.

Development of disclosure policy

6.25 The storage of policy decisions in a central file is particularly important in a long running case where there is a substantial risk that lawyers working on it will need to be replaced. Mr Dean QC informed us that there were relatively few policy decisions about disclosure at case conferences and relatively little discussion of individual disclosure decisions. In practice, Mr Haskell set much of the policy when giving advice on individual disclosure issues. Some examples are described in chapter 8.

6.26 Although individual disclosure decisions were subject to approval by a reviewing lawyer, we found no evidence of systematic consideration by them of the rationale underlying much of Mr Haskell's advice, which took the form of a draft MG6C. We accept that a written advice from disclosure counsel about his recommended decisions for each phase of disclosure, which the *Disclosure Manual* says should be required, was unrealistic for an MG6C the first phase of which exceeded 3,000 pages. Instead, Mr Cohen discussed items that caused him concern with Mr Haskell when approving the draft MG6C. There was, however, no written record of the reasoning behind the eventual decisions and it is not clear how far Mr Cohen reviewed the E-Catalogues on which Mr Haskell recorded his reasoning for items submitted to him by police disclosure officers. We therefore had difficulty locating policy decisions. Whilst some were recorded in minutes of meetings held when Mr Thomas, Mr Haskell or Mr Cohen visited the MIR, others seem to have been agreed by email. In the main notes of meetings about disclosure appear to have been prepared by the police, who maintained a file of key policy decisions. The minutes contain evidence of a structured approach to disclosure, including some discussion of quality, but their frequency reduced over time, perhaps because there were fewer formal meetings when Mr Haskell worked in the MIR for long periods. He also told us that he discussed how to approach issues with the lead police disclosure officer, who disseminated the conclusions to the police disclosure team. Prosecutors should not have to rely on the police to keep a record of policy decisions or have to recall when an email set a policy. Prosecutors should maintain a file of agreed disclosure policy decisions.

38 *Review of Disclosure in Criminal Proceedings*, Rt. Hon Lord Justice Gross. The report was published during the trial of R v Mouncher and others in September 2011, but its conclusions on this point had been anticipated by many and reflected the decisions of the appellate courts.

39 See *Credibility of witnesses* in chapter 8.

Accounting for secondary and continuing disclosure

6.27 In mid-2010, junior counsel, Mr Bennett, reported that he was finding it difficult to keep track of disclosure requests and responses following the main tranches of primary disclosure and suggested the creation of a schedule or log. As a result Mr Haskell created a log of requests and circulated it to the rest of the team. Unfortunately, the schedule was not maintained for very long so we could not find a comprehensive log of disclosure requests before the start of the trial. Indeed, during the trial, Mr Dean QC had to request the creation of a schedule to put before the court. As with other matters, it created unnecessary pressure at a time when the prosecution should have been able to focus on other matters.

6.28 In large cases a log of disclosure requests and responses is a basic requirement for managing disclosure. A log should have been established as soon as the first phase of primary disclosure had been served and fully maintained thereafter. We found the failure to do this surprising because the prosecution had rightly insisted on written requests and that they should be routed via the CPS to ensure auditability. This may not matter in simple cases where the MG6Cs are short and requests are few. Reading the correspondence is likely to be sufficient in such cases. In large cases, on the other hand, it is helpful to keep a log to enable the prosecution to keep track of what has been disclosed to whom and when it occurred. Mr Cohen had had to ask the police to create a schedule or log in the Core Four case.

6.29 Once the trial started, the prosecution (through counsel) managed requests for disclosure much more effectively. Whilst the defence were not satisfied with the content of some responses, the process for ensuring that issues raised by them, or recognised by the prosecution, during the trial was very effective. At Mr Clements's suggestion, the prosecution informed the court at the outset of the trial that all disclosure requests should be entered in a hardback book so that there would be a comprehensive record of requests and responses. In practice, requests were made electronically. The prosecution rightly insisted that any made orally would not be answered until they were put in writing. As a result it was agreed that Mr Haskell, in the absence of a CPS caseworker, would print all requests and responses, which were kept in ring binders. This was a better system than the proposed hardback book, because emails created a clear audit trail recording times of receipt and response as well as making it easier to pass full details of requests to those researching the replies. The emails were not, however, copied to the CPS electronic file, although it was envisaged that they would be given to the CPS at the end of the case.

6.30 Sometimes only the prosecution could recognise the significance of something said in court. Again, post-court conferences enabled these to be actioned quickly. Mr Haskell's detailed knowledge of the unused material, supported by the presence at court of the lead police disclosure officer and the police office manager, enabled the prosecution to locate relevant items quickly, using electronic searches where necessary. As a result, requests for disclosure during the trial - which were voluminous - were generally answered promptly. Initially, urgent

matters or progress reports were sent by text or email from the courtroom by Mr Bennett, although he was increasingly absent from the courtroom as the trial progressed. But if they related to a new request for disclosure, they would be followed up by a written request from the defence. In the experience of inspectors, this aspect of disclosure is not usually as well managed as it was in R v Mouncher and others. The processes devised to manage continuing disclosure during the trial represented **good practice**, although it would have been helpful to keep a log as a simple guide to the contents of the ring binders, which should also have been copied or scanned into the CPS's file.

Quality assurance exercises

6.31 The police disclosure team, in conjunction with disclosure counsel, conducted a number of quality assurance exercises at various stages. Some were planned, while others were prompted by the discovery of errors. During preparation of the Core Four case, it was agreed to dip sample the material classified as irrelevant. In spite of this a number of errors remained undetected until discovered on later assurance exercises or when searching for documents in response to defence requests. A few of these items should have been on the MG6C, some of which needed to be disclosed. In 2008 a wholesale review of LWIII material previously considered to be irrelevant revealed over 120 items that should have been included on the MG6C, almost half of which fell to be disclosed in the Core Four case.

6.32 There were also some early indications in R v Mouncher and others that there were serious omissions from the MG6Cs, including items that had been served on one of the defendants as part of a pre-interview disclosure pack in July 2005 or failures to identify important evidence. Whilst these items may or may not have turned out to be helpful to the prosecution, the failure to use them as part of the evidence or to include them on the MG6C revealed serious shortcomings in the management of the available material that should have raised alarm. A quality assurance review shortly after revealed significant material that was useful prosecution evidence or that should have been included on the MG6C. The prosecution continually served as additional evidence material that it had had in its possession for several years, some of it potentially very significant. On most occasions, this material was found in the unused material schedules, sometimes after they had been signed off for disclosure by the reviewing lawyer. Some was found in the material previously classified as irrelevant or wrongly registered as used (that is served as part of the evidence) and therefore needed to be considered for disclosure at quite a late stage.

6.33 The quality checks represent **good practice**, although they were not always as effective as they might have been. They were necessary and undoubtedly enabled a number of errors to be corrected. Most of them did not have a direct impact on the case, but the piecemeal service of evidence and scheduling of unused material must have been very frustrating for the defence and contributed to a sense that the prosecution was not in full command of the case and the unused material. In an historical case such as this, the prosecution had ample time before charge in which to get to the bottom of the material from the LWI and LWII investigations and prosecutions. These errors were troubling. Some should easily have been avoided, including the late discovery of D10826[40] and the exhibits in Box 31[41].

40 See *Getting to the bottom of LWI and LWII* in chapter 5.
41 See *Getting to the bottom of LWI and LWII* in chapter 5.

6.34 Although police disclosure officers quality assured the lists of irrelevant material and re-reviewed it all as part of secondary disclosure, we did not find any evidence that lawyers dip sampled the irrelevant material, as Mr Thomas had in the Core Four case. In view of the narrow approach to relevance applied by Mr Haskell, such checks may have had limited benefit, but they should have occurred.

6.35 We make a recommendation about quality assurance exercises in chapter 9.

Complete re-review of unused and irrelevant material in secondary disclosure

6.36 The prosecution team wisely decided on a complete re-review by police disclosure officers of all previously undisclosed and irrelevant material during secondary disclosure. They had been troubled by the errors previously revealed and regarded this as an opportunity to ensure that no disclosable material had been overlooked. Although this was a very time consuming task and delayed consideration of some previously unreviewed material, it was an important safeguard. But later checks revealed that it had failed to identify some material that should have been disclosed. The resulting late disclosure of this material attracted criticism[42].

6.37 The E-Catalogues considered in primary disclosure were not themselves reconsidered in secondary disclosure, although all the unused material itself was reviewed again. Mr Haskell accepted that reconsideration of the rationale for the original E-Catalogue decisions would have been an additional safeguard. This might have alerted the prosecution to the importance of the D7447 and D7448 material that was by then missing[43].

42 See *Block listing* in chapter 8.

43 See *D7447 and D7448* in chapter 7.

Phasing of disclosure

6.38 The prosecution made disclosure in phases, according to when the material was registered on HOLMES and available for review. This was inevitable for material that was not obtained until after the first phase. It would, however, have been helpful if it had been decided that the material that had been available from the outset should be structured in logical groups so that the defence could work on a specific theme of the case. Otherwise, it is likely to be better to serve schedules of all the available material that is not part of the prosecution case at the same time. In most cases, it is not practicable to input information to HOLMES according to themes. The MIRSAP[44] process depends on material being registered as soon as possible after its receipt in the MIR. This means that unused material is scheduled according to the order in which it is registered on HOLMES. This resulted in a number of defence complaints that it was difficult to identify related items, both in R v Mouncher and others and the Core Four where it was a central feature of a section 8 application[45]. It also appears to have explained a substantial proportion of the many defence requests for documents that had in fact been disclosed in earlier phases and caused a lot of extra work for the prosecution.

6.39 In LWIII much of the material existed before the investigation began. The prosecution do not appear to have discussed with the police the opportunities for registering the existing material in groups that would have made later

44 The Major Incident Room Standardised Administrative Procedures.

45 The (unamended) version of section 8 of the Criminal Procedure and Investigations Act 1996 that applied to this case. It enables defendants to apply to the court for an order requiring the prosecution to disclose material which *"…might reasonably be expected to assist the accused's defence as disclosed by the defence statement"*.

management of the information easier. Few cases are likely to provide such an opportunity, but prosecutors should bear in mind - as the Senior Investigating Officer (SIO), Mr Coutts, implicitly recognised at the conference in September 2004[46] - that understanding the needs of prosecutors and defence lawyers is important at the outset of an investigation.

Third party material

6.40 There was clearly a great deal of information in the hands of solicitors who had represented key and significant witnesses, including the original five LWI defendants (both during LWI and in their civil claims against SWP), the Core Four and Mr Gafoor. This material was likely to be subject to Legal Professional Privilege (LPP). It was bound to be relevant to the LWIII case because it was highly likely to contain accounts given to solicitors and counsel by witnesses who were key to the case of R v Mouncher and others. Any inconsistencies between these accounts and the allegations now made against the R v Mouncher and others defendants would have had the potential to undermine the prosecution case or to assist the defence. In addition, the IPCC held material relating to complaints made by John Actie about SWP and on behalf of one of the LWIII suspects about some of the LWIII investigation team.

6.41 The *Disclosure Protocol* required the police disclosure officer to:

> *"Seek to identify whether relevant or potentially relevant material is held by any third party and where it is established that such material is so held… use his best endeavours to obtain such material."*

6.42 The *Protocol* went on to say that if the police disclosure officer could not secure the voluntary surrender of third party material, he should inform the prosecutor. If the prosecutor was then unable to obtain the material voluntarily, he will:

> *"Consider whether steps to compel surrender of the material are required… in any event inform the representatives of any defendant… of the identity of the third party and the nature of the material thought to be held by the third party."*

6.43 In spite of this, the question of obtaining material from the legal representatives of the original LWI defendants and the Core Four did not receive concentrated attention until early 2010 when leading counsel explained its potential significance. This again took up a lot of time and energy at a stage when the prosecution was dealing with disclosure of material already obtained. It would have been preferable to have sought this material before charge so that lawyers could fully evaluate the credibility of the key witnesses. At that stage, the prosecution would have been able to secure the material only if the witnesses agreed to waive LPP, as most eventually did.

6.44 Similar considerations arose with LWII material, particularly Mr Gafoor's instructions to his legal team. This was brought into sharp focus following the discovery of D10826 in January 2011[47]. Mr Gafoor was unwilling to waive LPP, although the judge eventually ruled that it had been partially destroyed by the discovery of D10826. The prosecution attempted to obtain the material, but the matter had to be resolved

46 See *Scoping and resourcing the case* in chapter 5.

47 See *Getting to the bottom of LWI and LWII* in chapter 5.

after the trial commenced when Mr Gafoor's solicitors handed the material to the trial judge for him to decide what was relevant and should be disclosed to the defence. Its consideration disrupted the trial appreciably and caused considerable inconvenience to the jury which could not sit while it was being discussed in court. In this context, the earlier discovery and disclosure of D10826 would have prompted much more urgency in seeking the LPP material that must have lain behind it and was obviously likely to assist the defence. The resulting late resolution of the Gafoor material contributed to the impression that the prosecution was not as much on top of its case as it believed.

6.45 We accept that, as Mr Dean QC pointed out, the solicitors for three of the Core Four could not be approached until after their clients had been sentenced in early 2009. He submitted to the court that material held by them was then pursued appropriately. A note of legal arguments in November and December 2010, records that he stated that:

> *"Some legal reps had responded unsatisfactorily as to docs in their possession. They may need to be invited to court. ND stated that efforts will be made in the coming week to resolve this issue."*

6.46 At a prosecution team conference on 21 February 2011, Mr Haskell reported that the solicitors for Ms Vilday and Mr Grommek had still not responded to requests for the information. It was agreed that Mr Jennings would write to them

> *"Indicating that if they do not respond to our requests then their attendance at Court on either 9th or 10th March will be sought (by summons if necessary) to explain their position."*

6.47 Although the prosecution obtained and disclosed material from the Core Four's solicitors before the trial started, it would have been helpful to have sought the court's intervention to ensure that disclosure could take place much earlier.

6.48 We also noted that there was an exchange of correspondence with Ms Vilday's solicitor in 2004 about access to her medical records in which her solicitor said, if it came to the crunch, he would advise her to consent to their release. Unfortunately this matter was allowed to drift until a witness summons for their production was sought on the first day that she was due to give evidence, seven years after the initial correspondence with her solicitors. This unnecessary delay by the prosecution in seeking the court's intervention was compounded by the failure to recognise the relevance and disclosability of entries in an officer's diary relating to counselling and a psychologist[48] used by one of the Core Four.

6.49 In the late summer and early autumn of 2009, there was considerable discussion about whether the CPS should disclose the individual amounts of compensation paid to the original five defendants by SWP following the successful appeals of Mr Miller, Mr Paris and John Actie. The prosecution had legitimately received the information from the SWP legal department, which had represented SWP in the civil cases.

48 See *Contact with the Core Four* in chapter 7.

The prosecution wanted to disclose the individual sums, which varied considerably. The recipients not surprisingly objected to disclosure of the specific sums. At their request, the matter was listed for a hearing before the trial judge who declined to rule on the point because the decision was for the prosecution to take, although he suggested how they might deal with the issue. The prosecution eventually disclosed the specific figures. We accept that prosecutors were trying to be as helpful as possible to the defence while considering the interests of the original LWI defendants. But a great deal of time and energy was spent in correspondence and in preparing for a court hearing that, with a little more imagination, could have been avoided by making a formal admission referring in general terms to substantial settlements. If the defence had wanted additional details, they could have made an application to the judge under section 8 CPIA.

6.50 There was also some delay in sending a letter to the IPCC seeking access to their information, which was consistent with the lack of urgency that was shown on access to third party material generally. Indeed, the IPCC had to prompt the prosecution to seek the material. The IPCC commented on the risks inherent in last minute searches for material.

6.51 Mr Dean QC conceded to the court that third party disclosure had been the source of some delay but submitted that the prosecution had *"doggedly pursued such disclosure as expeditiously as possible"*. He went on to say that:

> *"Whilst alternative methods of obtaining this material might have been pursued, any process of compulsion would, itself, have been very time consuming and is unlikely to have resulted in production significantly earlier."*

6.52 We consider that third party disclosure could have been handled more expeditiously and therefore avoided some of the pressure placed on the prosecution (and the defence) immediately before and during as the trial. Experience suggests that some third parties will resist production of their material. In many parts of the country, the CPS and courts have agreed arrangements with some statutory agencies for certain types of sensitive material held by the agencies. The CPS should follow similar principles when dealing with other categories of third party material such as that attracting LPP.

The use of IT in disclosure

6.53 The unused material in R v Mouncher and others was scanned onto a database. One defence team requested access to the database to conduct their own searches. This was refused because it would have amounted to granting "the keys to the warehouse" to the defence, an approach of which Lord Justice Gross[49] expressly disapproved. We were told, however, that the search function was limited. In addition, because of the age of the LWI investigation, some documents were in manuscript and could not be searched at all. This is a declining problem as more information is recorded electronically. We consider that the electronic revelation of material to prosecutors was **good practice**, but realisation of its full benefits requires a different approach by prosecutors. When reviewing unused material electronically the police and prosecutors should apply the principles set out in the *Attorney General's Guidelines* of 2011[50], including involving the defence in defining the search terms. It would also be helpful if the MG6C could, where practicable, hyperlink the descriptions to the original material for ease of inspection and to enable the reviewing lawyer to annotate the MG6C with details of which original material he has inspected.

6.54 We were told of facilities used by other prosecuting agencies and in civil cases on which the CPS could draw in order to develop its own system for large cases, either alone or in conjunction with other prosecuting authorities and the police. We did not examine them but some respondents spoke positively about their potential to make the management of disclosure in large and complex cases easier.

Recommendation

The CPS works with other prosecuting authorities that handle large and complex cases and the Association of Chief Police Officers to consider the development of a searchable IT system for the handling of disclosure in large or complex cases.

49 *Review of Disclosure in Criminal Proceedings*, Rt. Hon Lord Justice Gross, pages 7, 73 and 74.

50 *Attorney General's Guidelines on Disclosure Supplementary Guidelines on Digitally Stored Material* 2011.

7 The four principal issues

7.1 All prosecution lawyers involved with the case during the trial told us that four matters caused the most difficulty for them: the failure to serve on the defence a taped interview with Mr Gafoor as intended; the late discovery of exhibits from the LWI trials (known as the Box 31 issue); failure to disclose material relating to contact by the police and CPS with the LWI defendants (known as D30, D30 Plus and D30 Plus Plus); and the missing material (referred to as D7447 and D7448) that led to the decision to offer no further evidence. We deal with these four matters in this chapter.

The Box 31 issue and the Gafoor tape

7.2 These were really matters of general management and case preparation rather than disclosure. We dealt with them in *Getting to the bottom of LWI and LWII* in chapter 5.

Witness contacts

7.3 The extent and nature of contact with key prosecution witnesses by the police and CPS lawyers became a central concern in the case. Mr Dean QC repeatedly assured the defence and the court, on the basis of assurances given to him, that contact with the original LWI defendants had been administrative and routine updating. Mr Haskell made a witness statement on 24 November 2011 in which he reported that Mr Bennett had informed him that he had been present when Mr Dean QC had checked with Mr Thomas and Mr Cohen in 2006 that meetings with the LWI defendants were being recorded. Mr Haskell also said that he had always been told that the meetings were *"routine updating as to the progress of the investigation and that the evidence was not discussed"*. It turned out that the nature and degree of contact was unusual and, so far as the original LWI defendants were concerned, recognised as a sensitive area at the outset. For example, Mr Thomas informed Mr Miller at a meeting on 15 March 2007 that he would need a copy of the notes that his solicitor had been taking because they may have to be made available to the court. In spite of this, witness contacts were not included among the categories of material likely to satisfy the disclosure test in the disclosure guidance for R v Mouncher and others presented to a training seminar in March 2009.

Contact material relating to the five LWI defendants

7.4 There were references in court in relation to contact with the five LWI defendants during R v Mouncher and others to material known as D30, D30 Plus and D30 Plus Plus. These terms were never formally defined, but it appears that: D30 relates to contact logs; D30 Plus was the actual material referred to in the logs; and D30 Plus Plus was the records of meetings between the police, CPS and victims which were referred to in the logs but for which records (Mr Cohen's notebooks and notes taken by solicitors for the original LWI defendants) were only identified and disclosed during the trial. For simplicity, we will refer to it all as D30.

7.5 The D30 material was described on the MG6C as:

> *"The victim contact log. This documents police contact with John Actie, Ronnie Actie, Miller, Paris, Abdullahi during phase III of the enquiry."*

7.6 This description of the material did not provide any indication of the content of the material or its significance to the case. It was marked CND[51] on a very long MG6C served in October 2009. The size of the MG6C meant that Mr Haskell had to make a judgment about what material he needed to review himself. He did not inspect D30. He, Mr Dean QC and Mr Bennett all believed that D30 had been reviewed by Mr Cohen when he approved that part of the MG6C schedule. This was a misunderstanding. There is a very brief note about it in Mr Cohen's notebook for 29 September 2009 when he was at the MIR. He told us that he had not looked at the logs themselves, but asked the police about them. They assured him that they consisted of administrative matters and routine updating of the original LWI defendants. There is nothing to suggest that anyone other than the police reviewed the D30 material in spite of its obvious importance. Mr Cohen had been at a number of meetings with the LWI defendants and their solicitors at which senior police officers were also present. Discussion of D30 does not seem to have prompted his memory about the content of these meetings where some statements that went beyond administrative matters and routine updating had been made.

7.7 In secondary disclosure, two police disclosure officers considered the D30 material and did not consider that it needed to be disclosed to the defence, although some defence statements sought details of all contacts with witnesses. In March 2011, the prosecution wrote to Mr Massey's solicitors enclosing a schedule giving the prosecution's response to their request for a number of items. Whilst some were disclosed, D30 was marked as not disclosable. As with other items on the schedule, no explanation was given. We did not find evidence that it was considered further by any lawyer during secondary disclosure.

7.8 The D30 material that we examined consisted of five ring binders containing more than 2,000 pages of documents relating to police contact during the LWIII enquiry with the five LWI defendants and their legal representatives. It consisted of a Family Liaison Log, notes of telephone calls, letters, emails and reports of some meetings. Not all of the material can have existed at the time of primary and secondary disclosure. New material continued to be added as it was created. It is contrary to the guidance in the *Disclosure Manual*[52] to change the content of a document that has been scheduled on an MG6C. The updated material should have been registered in its own right periodically under different document numbers and scheduled on an additional MG6C.

7.9 Much of the D30 material was purely administrative or routine updating of the type to be expected for witnesses who were to be treated as the victims of crime under the Victims' Charter. This included matters such as the location of evidential interviews with them, how and by whom they would be conducted, letters and phone calls informing them of persons arrested, interviewed, bailed, charged or released without charge, arrangements for supporting them at the trial, including special measures at court and travel and accommodation arrangements. Contact was generally formal and showed how anxious the police were to keep the LWI defendants notified of events. We did not find this surprising given the background to the case.

51 CND is the standard abbreviation for "clearly not disclosable".

52 *Disclosure Manual*, paragraph 31.39.

7.10 However, the material also included references to negotiations by the police with the victims and their lawyers in order to obtain witness interviews, arrangements for psychological and psychiatric assessments to determine the approach to the interviews and updates about the progress of the LWIII investigation. This showed that the original LWI defendants were initially reluctant to be interviewed despite the focus of the investigation. Their reluctance stemmed from mistrust of the police in the light of their experience and a belief that the investigation would concentrate on the part played by civilian witnesses and would not lead to the conviction of any police officer. When they were informed that there was insufficient evidence to prosecute certain officers, their disappointment was clearly expressed in the correspondence on the logs. Whilst they had a desire to see justice done from their point of view, in the case of Mr Miller at least, there was still some doubt as to whether he wished to give evidence. This appears to have related, at least in part, to the trial taking place in the same court as the original murder trial.

7.11 Much of the contact was by officers who were involved in the LWIII investigation. The logs could therefore have been used by the defence to suggest too close a relationship with the LWI defendants. This was a difficult issue for the police. During an investigation it is the job of investigators to deal with potential witnesses to obtain their evidence. Later contact usually takes place through witness care units or, in the case of fatalities, family liaison officers. But this was a different and unusual type of case and some contact with the SIO and other senior members of the investigation team was reasonable, given the need to reassure the LWI defendants that their concerns were being treated seriously. This view was reinforced by the decision of the CPS to meet them pursuant to its discretion under the direct communication with victims (DCV) scheme[53]. In most meetings, great care was taken to ensure that nothing inappropriate was discussed, but some of the contact went further and was disclosable for the reasons we set out in paragraphs 7.21-7.23.

7.12 It was obvious from reading the witness contact logs that some material was missing. There are references to letters about meetings that are not specifically recorded in the logs. This should have been apparent to any lawyer who had examined the logs.

7.13 During 2010, DS Jones was tasked to collate all the contact material in chronological order. At first we thought this was to facilitate consideration for disclosure. But we later learned that the exercise had been ordered by Mr Coutts for ease of reference and research and to be available to him whilst giving his evidence if necessary. We were told that Mr Coutts envisaged that the relations between the original LWI defendants and the enquiry team could be an issue on which the defence would focus.

53 The CPS's guidance on direct communication with victims sets out a number of circumstances in which the reviewing lawyer must offer to meet a victim. It also includes a discretion to offer a meeting if the reviewing lawyer *"… thinks it appropriate in the circumstances of the case."* The guidance goes on to state that the discretion should be exercised *"… according to the needs of the case rather than the… seriousness of the charge"* and to provide some examples of such circumstances including allegations against someone *"… in a position of authority or trust…"* It appears that the CPS met the original LWI defendants under this discretionary guideline.

7.14 DS Jones appears to have realised that some material was missing and was tasked to fill the gaps. None of the prosecution lawyers recalled knowing about the exercise. But the outstanding actions sheet distributed at each meeting of the full prosecution team referred to it on numerous occasions under Entry 232, which commenced on 6 July 2010 when the action was described as:

> *"Requirement to prepare a chronological sequence of events with victims and members of LWIII".*

7.15 It was regularly updated thereafter including a reference on 12 August 2010 in the following terms:

> *"Matthew Gold has been spoken to with regards to obtaining details of his records showing contact between victims and Police. He states he will prepare information for 11th Oct 2010. Meeting arranged with Kate Maynard on 24th Aug 2010 when she will asked for similar information. These can then be cross referenced against our records for accuracy".*

7.16 Another entry on 8 September 2010 states:

> *"E-mail response received from Kate Maynard with a record of meetings as requested. Now being cross referenced against the police records".*

7.17 The action was (optimistically) endorsed as 'complete' on 20 May 2011.

7.18 We are not clear how much attention lawyers paid to the action sheets, which were maintained by the police. But DS Jones's work does not appear to have featured prominently in their thinking. Otherwise, the absence of records of meetings with the solicitors for the original LWI defendants should have rung alarm bells.

7.19 Whilst the solicitors contacted by DS Jones were co-operative, matters drifted until after the trial had started when the issue became more urgent in view of defence requests for copies of the contact logs and the underlying material. The defence suggested that there may have been an unhealthily close relationship between the police and the original LWI defendants to the extent that the investigation had become tainted. When the judge indicated that his practice at the Bar had been to provide details of contacts with prosecution witnesses, the prosecution simply provided all the material in their possession without further reviewing it.

7.20 On receipt of the D30 material, Mr Mouncher's counsel analysed it and produced a schedule of over 30 meetings between the police and the original LWI defendants. The material did not contain details of a number of meetings. This led to renewed efforts to obtain the notes made by those who had attended the meetings. Some CPS typed notes were discovered and Mr Miller's solicitor, Matthew Gold, provided notes that he had made. Eventually, Mr Cohen's personal notebooks were found. They contained brief working notes rather than formal minutes. The notes filled in some of the gaps identified earlier and were copied and disclosed to the defence on 3 November 2011.

7.21 The contents of the additional notes, particularly those from meetings on 29 November 2006 and 8 and 15 March 2007, when combined with notes of other meetings, provided fertile cross-examination material for the defence to suggest that the relationship of the police (and prosecution lawyers) with the LWI defendants had been too close. For example, at the meeting on 29 November 2006, Mr Coutts reassured Mr Miller that he and the other four were "*fitted up*". Mr Thomas explained to him that the prosecution in the trial of the Core Four would show that the five had nothing to do with the murder of Lynette White. The CPS's own notes of the meeting show that he was recorded as saying:

> *"… that at any Trial, we would show the Jury that Gafoor murdered Ms White and that you all had nothing to do with her murder; the evidence against all 5 of you was manufactured by the peole (sic) charged. The jury would realise in the first few minutes that the five were innocent."*

and that someone said:

> *"On Conviction, Sentences could be very long as there may be consecutive sentences passed - there is not a worse case of misconduct than this matter. If these people do not plead Guilty, they would be likely to receive the maximum sentence for the offences against them."*

7.22 Mr Cohen's notes of the meeting on 8 March 2007, which were referred to at the trial, contained a puzzling reference to the likely sentence of the Core Four: *"…minimum of 10 years (14?)"* and the statement, *"help us - or throw away the key."* There was also some discussion of a reduction in sentence for guilty pleas. The suggestion of very long sentences for the Core Four was highly unrealistic and incompatible with internal notes discussing the possibility that any custodial sentence would be suspended. In the event they received sentences of 18 months' imprisonment. It will rarely be appropriate to comment on likely sentences for those convicted beyond mentioning what can be discovered from guidance published by the Sentencing Council.

7.23 Some of the things recorded as said at meetings attended by Mr Cohen, Mr Thomas and senior police officers arguably went beyond routine Victims' Charter contact, particularly as the original LWI defendants were witnesses at the trial of R v Mouncher and others. Whilst most of the material was not likely to have had a significant effect on the outcome of the case, the comments in the November 2006 and March 2007 meetings were put to some use by the defence in their cross-examination of Mr Coutts during legal argument. The same material would almost certainly have been used to cross-examine him in the presence of the jury if the case had continued. Had the case proceeded, the jury could have come to its own conclusions about the defence assertions that the police relationship with the victims was too close and that the CPS's stated view that the victims were not connected with the murder showed a less than even handed approach to the investigation.

7.24 We were very surprised to find that there was no agreement about the responsibility for producing a note of the meetings with the LWI defendants and their solicitors. It is difficult to understand how meetings of such significance could be held without anyone establishing who was to take the definitive record of what occurred. The CPS, the police and the solicitors each made their own notes. This is very unsatisfactory, particularly where, as Mr Gold's note of a comment by Mr Thomas makes clear, it is anticipated that they may be disclosable. It is important that there should be a single agreed record of a meeting and, if that is not possible, a note of any differences in recollections. The abbreviated nature of some of the notes also made interpretation of their meaning difficult and sometimes ambiguous. Meetings with people who are likely to be significant witnesses should be fully noted. It was suggested to us that, in some cases, they should be audio or video recorded. We are conscious that such meetings can be very difficult and that victims in some cases might be inhibited by such arrangements for meetings that should not touch on evidence or say things that could later be misconstrued.

7.25 The decision not to disclose the D30 material (if necessary in edited form) was mistaken. It was maintained at the secondary stage in spite of requests for it in defence case statements. This and later repeated specific requests by the defence should have prompted lawyer consideration of the content and the underlying material rather than continued reliance on police disclosure officers' assurances about the content. Their eventual late provision (without having been reviewed), combined with the absence of agreed minutes of the meetings, gave the material significance beyond the simple nature of its content and contributed to suggestions of mishandling. This was aggravated by concern that notes that remained missing might have contained other damaging material.

7.26 All CPS lawyers from whom we received evidence agreed that the notes of meetings should have entered the disclosure process if they contained relevant material. It appears that the need to send the CPS's own notes to the police for this purpose was overlooked.

7.27 The prosecution's position attracted trenchant comment from the judge. He was especially concerned about **t**he absence of records of some of these contacts, particularly with the original LWI defendants and their lawyers, as well as some of the content of records that did exist. He said, "*When I was at the Bar, my policy when prosecuting was almost to disclose every contact with a witness.*" This caused the prosecution team some consternation. In most cases, contact with witnesses will be dealt with by witness care officers who have no connection with decisions about the case itself. It will usually be formal and uncontroversial.

7.28 Although much of the contact with the original LWI defendants and their solicitors in R v Mouncher and others was non-controversial, some was made by officers involved in the investigation, including senior investigators and also by prosecution lawyers. The background to the case and the circumstances of the LWI defendants gave the material significance which should have prompted greater consideration of the contact records by those making the disclosure decisions. Importantly, review of

the material would have revealed the gaps in the logs. Investigation of the missing material should have revealed its significance in terms of what was said at the meetings with the victims and their lawyers.

7.29 We discussed the judge's practice when he had been at the Bar with senior CPS lawyers who had regularly instructed him. They produced a pack for him showing all police contact with key witnesses. They showed us the guidance that they had created for their lawyers on how to approach its creation. It was prompted by the need for trial counsel, in long running cases where investigators are likely to have had extensive contact with witnesses, to assure themselves that they had a full record of all contacts and to satisfy themselves that, where appropriate, they had been disclosed. The CPS should consider giving similar advice to lawyers who deal with large or complex cases.

7.30 Copying all the relevant witness contact material in R v Mouncher and others would have produced an enormous package, but the proper review of D30 would have identified some of the main difficulties that were to arise during the trial.

7.31 It is convenient to mention at this stage the nature of contacts with other important witnesses, because they too were the subject of criticism during the trial.

Contact with the Core Four

7.32 The Core Four were regarded throughout as the key witnesses. Mr Bennett produced a very detailed analysis of their credibility before the decision to charge the defendants in R v Mouncher and others.

7.33 The Core Four were in the first place potential (and later actual) defendants. Considerable material was disclosed to the defendants in R v Mouncher and others about police contact with them and their solicitors and CPS contact with the lawyers for those who considered entering into co-operating defendant agreements[54].

7.34 Before the Core Four were interviewed under caution, they were provided with considerable material to refresh their memories, including their witness statements from LWI and their interviews during LWII. Unusually, it was provided about two weeks before the interviews. This was designed to avoid delays during the LWIII caution interviews when they would almost certainly have asked to see the earlier material. This matter took on particular significance in the case of Mr Grommek because he provided the key evidence against Mr Powell and there was material indicating his reluctance to sign his proposed SOCPA statement. The prosecution case in LWIII was based on the alleged manipulation of Mr Grommek and others during LWI. Therefore any contact with him during the LWIII investigation was relevant and potentially disclosable, particularly where that

54 These are agreements under section 73 of the Serious Organised Crime and Police Act 2005 (SOCPA) by which a person may enter into a written agreement to assist a prosecutor or investigator in relation to an offence. The court may take into account the extent and nature of the assistance given when fixing that person's sentence.

contact led up to a SOCPA cleansing interview. Considerable material was disclosed, including the recording of the discussion with the solicitor for Mr Grommek prior to the interview (D2176). But other items were not, including the letters listing the material sent to Mr Grommek and his solicitor before the interviews. They were eventually provided to the defence on 19 September 2011, long after Mr Grommek had given evidence, when Mr Powell's team sought to use them to support an argument that Mr Grommek had been treated favourably by investigators.

7.35 Mr Dean QC pointed out in his *Analysis of Errors* document[55] that Mr Powell's counsel had misunderstood part of the letter and that there was more support for the contention that Mr Grommek had been groomed or coached - an issue specifically raised by the defence at a later stage - in D2176 than in the letters and their enclosures. The fact that investigators provided so much material to Mr Grommek in advance of his interview and there was a suggestion of "grooming" meant that it would have been prudent to disclose the letters. It was not for the prosecution to decide which material the defence should use but provide material that could assist them. The letters should have been disclosed much earlier, at the very latest during secondary disclosure when the attack on Mr Grommek's general credibility had been clearly raised in a defence statement.

7.36 Curiously, no submissions were made in relation to similar material relating to the remaining three, Ms Psaila, Ms Vilday and Mr Atkins, who had been treated in the same way as Mr Grommek. However, in strict disclosure terms it does not matter that no complaint was made in relation to the other three. The same principle applies. The prosecution was aware of the importance of their credibility.

7.37 The Core Four were significant witnesses. A schedule of all contacts and the nature of the contacts would have helped to avoid this error and enabled the prosecution to demonstrate to the defence and the court that they had approached the disclosure of witness contact material systematically and openly.

Contact material relating to Mr Gafoor

7.38 A small number of items relating to Mr Gafoor were not disclosed as soon as they should have been. We have already referred to the error concerning a taped interview with him[56]. Although the error was discovered and corrected during the trial and Mr Mouncher's counsel appeared to concede that the tape error did no harm to the case, it enabled the defence to question the general reliability of MG6C schedules and caused the judge to comment that *"...what could have been disastrous was happily averted"*.

7.39 Mr Gafoor's custody record dealing with his arrest and detention during LWII was not disclosed until 14 July 2011, the day on which Mr Gafoor started to give evidence, having been refused six days earlier because it was not thought to undermine the prosecution case. As is to be expected, it showed when Mr Gafoor was taken from his cell for interview and when he was returned. Mr Mouncher's counsel appeared to suggest that there may have been an improper conversation with Mr Gafoor after

55 See paragraph 8.2 for the status of this document.

56 See *Getting to the bottom of LWI and LWII* in chapter 5.

his formal taped interview about his potential co-operation with any new inquiry. In fact, Mr Gafoor was spoken to on tape at the end of his interviews during which he agreed to be interviewed again following the outcome in his case. The custody record did not suggest that the custody officer was ever aware of the content of this conversation, which is not surprising. There was no evidence of any cell or corridor conversation that was overlooked by the custody officer and a full audit trail was possible from the statements of officers who conducted the interviews and who asked for further interviews at the end in relation to LWIII. Whilst the issue of Mr Gafoor's custody record seems to have been a red herring, it caused a lot of work. Mr Mouncher's counsel claimed that it *"created the impression of grudging reluctance"* by the prosecution to disclose full details of this contact with Mr Gafoor. The custody record should have been disclosed as part of contact material with a very significant witness who was central to the case. It would have prevented unnecessary work and prevented suggestions that something irregular had occurred.

7.40 More troubling was the failure of the prosecution to disclose material about an approach from Mr Gafoor's solicitors for information to use in his tariff setting exercise until the trial was underway. Whilst the request was disclosed early in the trial, Mr Coutts's response was not disclosed until 1 September 2011, after Mr Gafoor had given evidence and before he was re-called. We deal with this as an example of a narrow approach to the disclosure test in chapter 8.

Contact material for other significant witnesses

7.41 We found a number of examples of incomplete disclosure of material relating to witnesses who were to be called to give evidence. The prosecution policy was to serve all accounts of significant witnesses as part of its case. As we have seen, a few were missed from the evidence bundle by mistake[57]. Others appear to have been kept out of the evidence bundles deliberately, perhaps because the witnesses were not considered to be sufficiently central to the prosecution case, and scheduled on MG6Cs. Some were marked CND when careful thought should have caused them to be disclosed. Whilst some were reconsidered and served before the trial started or added little to information already disclosed elsewhere, failure to disclose them sooner undermined confidence in the disclosure regime. We would have expected prosecutors to have been alerted by the MG6C descriptions to the potential disclosability of some of these items. For example, one referred to *"antecedent information"* in relation to the Core Four as well as suggesting potentially useful prosecution evidence that Mr Grommek had been bullied by LWI police officers. Fortunately, the material contained nothing that was not available in other material that had been disclosed. Whilst the defence were not disadvantaged by the oversight, some decisions indicated an inconsistent approach to disclosure.

57 See *Reliance on the police for prosecution functions* in chapter 5.

7.42 Similarly, a statement by Mr Gafoor's sister with whom he was living at the time of the murder was marked as CND in the first phase of primary disclosure. The statement was capable of undermining the proposition that Mr Gafoor committed the murder because it did not mention blood on his clothes, although she did his laundry, and was silent about any change in his demeanour. It was eventually disclosed in the course of a legal argument in May 2011 and later served as additional evidence.

7.43 Mistakes occurred in extracting items relating to prosecution witnesses from the block list of house-to-house forms. As Mr Mouncher's counsel said during the trial:

> *"Ordinarily, one might expect house to house enquiries to be high up on the list of material to be reviewed for a significant witness".*

7.44 Mr Haskell relied on police disclosure officers to isolate potentially disclosable material from block lists in accordance with CPS guidance, which accorded with the CPIA *Code* and the *Attorney General's Guidelines*[58]. Although we were told that police disclosure officers were specifically directed to consider house-to-house forms when searching for accounts given by witnesses, a final check shortly before an important witness was due to give evidence led to the discovery of a disclosable house-to-house form in the block list. This prompted further searches which resulted in the discovery of a small number of other house-to-house forms that needed to be disclosed. One of them had previously been isolated by the police. Although it was marked CND after consideration by Mr Haskell, he changed his mind when re-assessing related material in February 2010, and decided that the item should be disclosed. By oversight it was not then disclosed. In early 2011, Mr Cohen declined to disclose the same form and the related material after a defence request for any material relating to the relevant witness because it was not considered to meet the disclosure test. It is not clear whether he was aware of the previous decisions. This sort of inconsistency is a matter of concern.

7.45 A statement by a police officer about the demeanour of Ms Vilday while in the police station during the LWI investigation that was capable of suggesting she was treated appropriately by the LWI investigators was not disclosed until July 2011. It should have been disclosed at the same time as the transcript of the officer's interviews following a request in May 2011 from Mr Mouncher's team. Although the content of the statement was contained in the final interview transcript that had been disclosed, the defence would not have known this as the items were not cross-referenced on the MG6C. Whilst the defence were not in practice disadvantaged, this suggested a lack of thoroughness on the part of the prosecution that the defence claimed undermined confidence in the disclosure regime.

7.46 In the case of another witness, a number of items were served as evidence or disclosed to the defence before he gave evidence. But another potentially significant entry in an officer's pocket notebook was missed and had to be dealt with later by formal admissions agreed by the prosecution. The description of the pocket notebook's contents on the MG6C was very vague but was not questioned. Mr Haskell admitted in a witness statement that he had misread a defence written request for the item

58 See *Block listing* in chapter 8.

during the trial. He was facing a barrage of defence requests and the occasional error by him of this kind is perhaps not surprising and it was cured easily. But it was far from the only disclosure error and again contributed to the cumulative loss of confidence in the disclosure process.

7.47 Where it is decided to rely on a witness, the prosecution should assess **all** material relating to them, including house-to-house forms in block lists, in case it adds to their story or undermines them in some way. This was especially important in R v Mouncher and others because the prosecution stated that it would serve all accounts given by key and significant witnesses as part of the evidence bundle. This brings into sharp focus the need in large enquiries to have a searchable database for disclosure, which HOLMES performs only to some extent.

7.48 The police put in place arrangements for a nominated officer to make monthly checks with other forces to find out whether any new allegations or intelligence had come to light that might affect the credibility of prosecution witnesses. This is a sound practice to reduce the risk that potentially important undermining material is not missed. In general, this worked well, but the early October 2011 check did not pick up on everything in relation to one witness. The relevant defendant in LWIII became aware of the information from other sources. Whilst disclosure would probably have taken place before the witness gave evidence, the error raised doubts about the accuracy of other checks. These doubts may well have been unjustified, but this error occurred after other matters that had been mentioned to the judge and added to the emerging picture of a flawed disclosure regime.

D7447 and D7448

7.49 In view of the significance of the failure to locate D7447 and D7448 during the E-Catalogue exercise on 28 November 2011, we have included copies of the E-Catalogue and the MG6C entries for this material at annex B. The IPCC report describes the origins of this material, its disappearance and eventual discovery about five weeks after the end of the trial.

7.50 The box labelled D7447 consisted of copies of a number of complaints made by John Actie about SWP officers who were not connected to the LWIII enquiry and a copy of a complaint by William Evans, the husband of one of the police suspects who was not charged with any offence. All this material was forwarded to the MIR by the IPCC in July 2009 following inspection of the originals by DS Allen. It is difficult to understand why the Evans complaint was stored in the same box as the Actie complaints. It referred to entirely different subject matter and should have been given its own D number on HOLMES. It was not referred to in the MG6C description of D7447.

7.51 The unusual handling of this material through the MIR process has been outlined by the IPCC. When we examined the box in which the D7447 material was stored it included four complaints by Mr Actie. The MG6C referred to four complaints by Mr Actie, but only three were included on the E-Catalogue examined by Mr Haskell. The box also contained D7448 which had been obtained from a different source, the SWP Legal Services Department. As the IPCC report explains, the handling of D7447 breached normal MIR processes and led to difficulty in ensuring a complete audit trail.

7.52 The three Actie complaints listed on the E-Catalogue were considered by Mr Haskell on 12 August 2009. They related to: an allegation that he was sprayed with CS gas in July 2005 when he claimed to be trying to calm a crowd; alleged racial abuse by a police officer on 1 October 2005; and a drugs stop and search in October 2006, during which he said £50 was stolen from him (which was not mentioned in the description or Mr Haskell's decision on the E-Catalogue). The fourth complaint, which did not feature on the E-Catalogue, alleged that police officers had verbally abused Mr Actie in April 2007. Mr Actie did not co-operate with some investigations and there was evidence to contradict his account in some. All were rejected or withdrawn.

7.53 Mr Haskell was unclear about the extent to which Mr Actie's credibility would be in issue and was not convinced that the material undermined him in any event. He said that the material should be re-assessed if it became apparent from the defence statements that credibility would be an issue. In our view, the credibility of the original LWI defendants was always likely to be an issue[59]. These complaints could have been used by the defence to suggest that Mr Actie was prone to make false accusations against police officers or was not a reliable witness[60]. Whilst there may have been disadvantages as well as advantages to the defence in pursuing such a line, it was for them to make that decision. The material was clearly capable of undermining Mr Actie's evidence. It should have been disclosed at the primary stage.

7.54 The E-Catalogue dealing with the three Actie complaints also contained a lengthy statement by William Evans dealing with the treatment of his wife by the LWIII enquiry team. Mr Haskell noted that it contained unsubstantiated allegations and derogatory remarks relating to a number of officers, including a senior officer. He wrote:

> *"In my view, there is nothing to suggest that the credibility of those individuals will be an issue in the ongoing proceedings. Consequently, this material is not relevant to the current prosecution. The Crown has a continuing duty of disclosure & if in the future (after defence case statements) the credibility of these officers does become an issue, this material can be re-visited. No need to schedule."*

7.55 As we note in paragraph 8.73, large cases often attract criticism of investigatory techniques and allegations of irregularity. Some of the comments in Mr Evans's statement suggested impropriety on the part of the LWIII investigation team and specifically named a senior officer[61]. The Core Four had already argued abuse of process, albeit on a different basis. We were therefore surprised that this material was not to be treated as relevant and included on the MG6C. The suggestion that its relevance would be reconsidered if the integrity of any of the officers named became an issue also suggests

59 See *Credibility of witnesses* in chapter 8.

60 We mention the material only to indicate why the defence were entitled to receive it and so decide whether to deploy it in cross-examination. Mention of it in this report should not be taken to imply any view on the truth or otherwise of the likely defence suggestion.

61 We have not named the senior officer or other officers referred to in this section. We understand that complaints against them are still under investigation. There are special rules relating to the disclosure of unresolved complaints during criminal proceedings in which the officers are or may be witnesses. Unresolved complaints are not always disclosable. Mention of them in this report should not be taken to imply any view on their truth or otherwise.

that it was capable of having some impact on the case. In our view, this material was always relevant and should have been scheduled. We consider that it became disclosable as soon as it was clear that the integrity of the investigation was in issue. There had already been indications that it was in issue with specific complaints about two senior officers[62].

7.56 As previously stated, the box that we examined also contained the D7448 material that had been obtained from SWP's Legal Services Department. It consisted of a file of claim forms and documents relating to civil actions against SWP by a number of officers and former officers who had been arrested as part of the LWIII enquiry. It was forwarded by SWP's Legal Services Department on 28 July 2009. We do not know why D7447 and D7448 were stored together, although it may be because both contained complaints about LWIII officers and needed to be kept away from the main MIR rooms[63].

7.57 DS Allen says that he discussed the D7448 material with Mr Haskell and it was to be scheduled. It was registered on HOLMES immediately after D7447 and marked CND on the MG6C served in October 2009. The claim form from Mrs Evans raised similar points to those mentioned by her husband in his complaint to the IPCC, which was not scheduled. Another complaint also alleged unlawful action in seeking a warrant and that the prosecution was being pursued aggressively. Although each LWIII defendant must have known the content of their own civil claim, other defendants were unlikely to be aware of them and none would necessarily have known the content of claims by those who had not been charged. As the integrity of the investigation was a clear issue in the case, they could have helped all defendants and should have been disclosed. Further, the supporting information for the warrants might have helped the defendants and so should have been disclosed.

7.58 Although it is not clear whether Mr Haskell read the D7448 material, he advised the CPS on 2 February 2010 that material covering similar matters was not relevant and need not be scheduled. It is not clear why or how he came to be asked for such advice, which followed a prosecution team conference at which the material had been discussed[64]. It is troubling, however, that the similar material was treated differently from D7448. An IPCC lawyer had noted in an email to Mr Cohen in May 2008 about the same matters *"that… the new PRA matters directly question the integrity of the LWIII team…"* In our view, this material, like the complaint made by Mr Evans, was always relevant and became disclosable as soon as it was clear that the integrity of the investigation was in issue[65].

7.59 The IPCC report outlines the conflicting evidence about whether Mr Haskell was made aware of the missing D7447 and D7448 material at the secondary stage. The police disclosure officer allocated to re-review the material certainly noted on HOLMES that both items were missing. There is no record of what took place, however, and therefore no audit trail to provide an assurance about the process employed. It

62 See paragraphs 8.78-8.83.

63 Independent Police Complaints Commission: *South Wales Police Destruction of specific documents leading to the collapse of the R vs Mouncher & others trial at Swansea Crown Court on 1 December 2011.*

64 See paragraphs 8.72-8.77.

65 See *Integrity of the investigation* in chapter 8.

certainly meant that D7447 and D7448 were not reconsidered at the secondary stage, in spite of assurances, which were repeated to the court, that everything had been re-reviewed. Had the correct decisions about these items been taken, however, in primary disclosure, the problem that led directly to the decision to stop the case would not have arisen.

D7447 and the end of the case

7.60 On 28 November 2011, after hearing extensive argument and evidence about disclosure issues over several days, the judge instructed Mr Dean QC to carry out a final quality assurance test to establish whether he *"…could have any confidence in the latest assurances that all is now well and there is nothing more that can come out"*. He believed that consideration of the E-Catalogues endorsed by Mr Haskell would identify the extent to which there were documents *"…that had been thought… by the disclosure team… to be disclosure-relevant, which it had then been decided are not disclosure-relevant and have not been disclosed"*. He was later to describe matters at that time as *"…on a knife-edge, if not already beyond the knife-edge."*

7.61 During the required exercise on 28 November 2011, Mr Dean QC called for D7447. He was told that the documents could not be found, but HOLMES recorded that *"this document is held by the IPCC"*. The originals of D7447 were obtained from the IPCC's offices later on 28 November 2011. It does not appear that anyone was asked to confirm that they contained all the documents that had been copied and formed D7447, although it may have turned out to be impossible. Nor was it realised that two of the missing complaints were available under different numbering on the HOLMES system[66]. The process of registration and cross-referencing was not robust enough to identify this.

7.62 Mr Dean spoke to a number of officers during the evening of 28 November 2011, including Mr Coutts, DS Allen and DS May. These conversations are set out in the IPCC report. It is sufficient for our purposes to note that, at the time, Mr Dean QC believed on reasonable grounds that there was evidence that the D7447 and D7448 material had been destroyed. On 28 and 29 November 2011, the prosecution lawyers considered that, even if it could be established that the originals of all the copy material in D7447 and D7448 were available from the IPCC and SWP's Legal Services Department, the evidence suggesting that the copies had been destroyed without an adequate audit trail to explain the reason, was a serious issue striking at the heart of the disclosure process, which was already under serious attack. Mr Dean QC and Mr Bennett believed that an extensive search had taken place before it was concluded that D7447 and D7448 could not be found. The IPCC Report sets out how the search was conducted.

7.63 After discussing the situation with Mr Clements and sleeping on the matter, Mr Dean QC concluded that the prosecution would not now be able to satisfy the court that it could have confidence in the disclosure process. Normally, the prosecution would seek the views of the SIO before taking such a step. Mr Dean QC did not, however, consult Mr Coutts further. He was concerned that any further conversations with Mr Coutts (or DS Allen)

66 See *Credibility of witnesses* in chapter 8.

would risk him being accused of contaminating any evidence they might later be required to give, or placing himself in the impossible position of becoming a witness of fact in a prosecution that he was conducting. It is unlikely that any such consultation would have altered Mr Dean QC's conclusion. Mr Coutts was not aware of the location of D7447 and D7448. The prosecution was under severe pressure to report back to the court about the outcome of its E-Catalogue review by 9.00 am the next morning and any adjournment, if granted, would have been for a short time. Although Mr Dean QC had, until this problem arose, intended to defend the disclosure regime, it is not surprising that the decision to stop the case was taken quickly when further serious questions arose about the treatment of important documents.

7.64 Because of the importance of the case, the DPP was consulted at a meeting attended by leading counsel, Mr Clements, the Deputy Chief Constable of SWP and the leading IPCC Commissioner. Other issues were discussed at the meeting, including problems that had occurred with the D30 material and the emerging thoughts about the E-Catalogue exercise ordered by the judge. All agreed that the prosecution could no longer continue. The judge considered the decision to be appropriate. Mr Dean QC described it as a tipping point.

7.65 However, the problem with the missing D7447 and D7448 would not have arisen if the correct decisions about disclosure had been taken in 2009. For the reasons outlined in chapter 8, in our view the John Actie complaint files were clearly disclosable at the primary stage because they had the potential to be used in cross-examination to attack his credibility. The complaint by Mr Evans should at least have been scheduled as relevant material and arguably disclosed at the primary stage as tending to assist the defence allegations about the integrity of the LWIII investigation. It was certainly disclosable when the defence began fully to articulate their concerns about the integrity of the investigation.

7.66 Although attention in court focused on the immediate problem relating to the IPCC material, it is clear that there were other factors relevant to the decision to stop the case. Indeed, the judge made extensive reference to the witness contact material (D30) in his remarks to the jury at the end of the trial. The judge did not see the results of the E-Catalogue exercise that he had ordered. Mr Dean QC considered that some of the E-Catalogue endorsements would not have looked good. We agree. They showed a narrow approach to the disclosure test. Whilst we cannot say what would have happened if the IPCC material had not been missing, we note that the judge had previously commented critically on other disclosure problems. The missing IPCC material was the final straw.

8 A thinking approach to disclosure

8.1 Mr Dean QC repeatedly stressed to the court and others that the prosecution had taken a thinking approach to disclosure, in line with comments made by Thomas LJ in R v Olu[67]. In this chapter, we discuss the way in which the prosecution team approached the disclosure test.

8.2 We initially believed that examination of 39 items described in a document produced by Mr Dean QC entitled *Analysis of Errors* would enable us to understand the prosecution's approach to the disclosure test. We concluded that this would not be a sufficient approach. The document was not designed to be a review of all the issues underlying disclosure. It was intended to be used - and was used - in court to defend or explain the prosecution's position on 39 specific disclosure points that appeared still to be in dispute during the legal arguments at the close of the prosecution case. In some instances, it sought to argue that any error had been corrected and therefore had not caused prejudice to the defence.

8.3 We were told by a number of people with whom we made contact that, in a very large case, even a tiny error rate produces a significant absolute number of errors. That is self-evidently true and we accept that most were likely to be minor errors that were unlikely to affect the overall fairness of the trial. For example, some were failures to disclose an additional piece of information of a nature that was already available to the defence in other material that had been disclosed, or were remediable by making formal admissions or recalling a witness. But others were more serious and undermined the confidence of the defence and the trial judge in the disclosure regime. Smaller or less significant errors compounded the concerns caused by the more significant errors. Further, some of the E-Catalogues that we saw revealed errors of principle that did not reach the judge's attention, but would have caused considerable concern. In addition, some of the 39 matters also suggested flaws in the underlying management of approach to disclosure, which the defence were entitled to argue could mean that other important material was likely to remain undisclosed.

8.4 In this section, we outline our findings about underlying flaws and our examination of a sample of E-Catalogues. These are the documents that the judge asked Mr Dean QC to review as a final quality assurance test to establish whether he *"…could have any confidence in the latest assurances that all is now well and there is nothing more that can come out."* In the event, they were not made available to the court or the defence because the case was stopped when the prosecution decided to offer no further evidence. Not all of the matters we identify resulted in complaints during the trial. Some may not have been apparent to the defence or the court.

A narrow approach to the relevance test

8.5 Material is defined as relevant in the *Code of Practice* issued under the CPIA if:

> *"…it appears … that it has some bearing on any offence under investigation or any person being investigated, or the surrounding circumstances of the case, unless it is incapable of having any impact on the case."*

67 R v Olu, Wilson and Brooks [2011] 1 Cr App R 33.

8.6 The *Disclosure Protocol* in R v Mouncher and others stated, with underlining for emphasis:

> *"… a working assumption should be made that all material held is relevant. The assumption may be displaced only where it is absolutely clear that specific material is incapable of having any impact on the case."*

8.7 Mr Haskell in turn stressed in his training seminar for police disclosure officers in March 2008 that officers should err on the side of caution when assessing relevance and that, again underlined for emphasis, *"If in doubt make it relevant"*. He added that he could remove items from the MG6C if necessary.

8.8 But when he conducted a training session for officers at the start of disclosure work for R v Mouncher and others in March 2009, his written guidance stated:

> *"In assessing whether any material is incapable of having any impact on the case, the police disclosure officers should ask themselves…*
>
> *Does the material have any connection, directly or indirectly with the 15 suspects?*
>
> *If the answer is **NO** then the material **DOES NOT** require scheduling.*
>
> *If the answer is **YES** then the document **MAY** require scheduling."*

8.9 We accept that this attempt to tailor the CPIA test of relevance to R v Mouncher and others was designed to focus attention on the material that was capable of having some impact on the case. It followed fairly closely the guidance given by Mr Thomas for the Core Four case:

> *"The Code defines that all material recovered in the investigation must be scheduled, unless it is unable (sic) of having any impact on the case (Paragraph 2.1 of the Code). We have taken a strict interpretation of that in the following way:*
>
> *What we are looking at here is material that is relevant to the charges of perjury for the four core suspects."*

8.10 Mr Haskell's guidance was, however, capable of being misunderstood by police disclosure officers. Mr Thomas's advice had been specifically limited to the issues in the Core Four case who had admitted their perjury in interviews under caution. In R v Mouncher and others, on the other hand, it was already apparent that the defence would focus on the way in which the LWI investigation was conducted and the possibility that the original LWI defendants had been in some way involved in the murder. Limiting the test for relevance in R v Mouncher and others to anything connected to *"the 15 suspects"* risked overlooking relevant material. Whilst it was widened in a document for the second phase of disclosure that DS May produced to us to include material that named any significant witness, showed the movements and antecedents of Lynette White or was relevant to any of the potential issues in the case (illustrated by a list of examples),

this post-dated the main disclosure phase. The narrower approach suggested by the earlier guidance was re-inforced by Mr Haskell's decisions to treat as irrelevant some documents placed on E-Catalogues by police disclosure officers who thought them to be disclosable.

8.11 The guidance was shared among the prosecution team, but not challenged by any of the lawyers, although the *Disclosure Protocol* was prepared later. If they had sampled some E-Catalogues, they would have gained a sense of the narrowness with which the relevance test was applied. As we have noted elsewhere, it is difficult to accept that any material from the LWI and LWII investigations was not relevant in LWIII. We also consider that the decision to treat as irrelevant some complaints about the way in which the LWIII investigation was conducted indicated a narrow view of relevance[68].

8.12 The treatment of secondary source material was also narrower than intended by the guidance given in the *Disclosure Protocol*. The *Protocol* drew a distinction between primary sources and secondary sources of material. The distinction was made in the context of urging caution about treating secondary source material as irrelevant (and so not to be scheduled on MG6C) because it might contain information independent of the primary source. The *Protocol* stated:

> *"…particular care must be exercised when dealing with secondary source information. For example, a police report might simply record the fact that a statement was taken from an individual. Where that statement is available it might be thought sufficient that the statement should be scheduled and the report treated as irrelevant. However, the report will require closer scrutiny because it may well contain information independent of the statement, and even if that further information is as mundane as identifying an officer who was working on the case at the time is potentially relevant."*

8.13 The written guidance given by Mr Haskell on 3 March 2009, very shortly before the *Disclosure Protocol* was served on the defence and the court, stated:

> *"This document identifies the Crown's approach to unused material…*
>
> *…..Does the material contain primary or secondary source information?*
>
> *If the answer is that the material contains PRIMARY source information then this document MUST be scheduled.*
>
> *If the answer is that material contains SECONDARY source information and the original information is already being assessed as part of the CPIA process, then that material DOES NOT require scheduling."*

8.14 The caveat as to closer scrutiny contained in the *Disclosure Protocol* is absent, with the result that the guidance gives the impression (rightly or wrongly) of the blanket treatment of secondary source material as irrelevant. It is not

68 See *Integrity of the investigation* in this chapter.

clear how far Mr Haskell's guidance was agreed with Mr Dean QC, or the CPS, but it was available to them and does not appear to have been challenged. Mr Bennett told us that he saw and did not disagree with all guidance and training materials. Mr Haskell agreed that officers found the determination of relevance for secondary source material difficult.

8.15 A number of Mr Haskell's E-Catalogue endorsements simply state the report is "*secondary source*" material and following the relevancy test need not be scheduled. Some reports were more than a simple summary of the primary documents to which they related. According to the *Disclosure Protocol*, they should have been scheduled. This gave the impression of a blanket approach to secondary source material consistent with the guidance of 3 March 2009 but inconsistent with the *Disclosure Protocol*. It would certainly have been helpful to have a fuller explanation of the rationale for deciding that the material was not relevant. Even if it is a shorthand expression, as Mr Dean QC speculated to us, it risked suggesting to police disclosure officers that secondary source material would always be regarded as irrelevant.

8.16 Whilst the concepts of primary and secondary sources do not appear in the *Disclosure Manual* (and did not appear in the *JOPI*), they can represent a useful distinction aimed at preventing excessively long disclosure schedules. But the distinction is fraught with danger and was expanded in R v Mouncher and others beyond the circumstances envisaged by the *Disclosure Protocol*. In spite of this, police disclosure officers submitted a number of secondary source items to Mr Haskell on E-Catalogues because they considered the material to be potentially disclosable. We saw a number of such examples in which he decided that the material should not be scheduled. For example, some police reports or messages from other parts of the police service providing information about pending prosecutions against witnesses were treated as secondary sources. This is said to have been on the basis that the primary sources would be the police and CPS files for the pending case. This was an inappropriate use of the distinction because, in some instances, police disclosure officers in LWIII had not seen the primary sources and could not be certain that they would be consistent with the reports. Sometimes the primary source had not been retrieved when Mr Haskell reviewed an E-Catalogue submitted to him for a police report. At the time, the report was the primary - indeed only - source of the information in the hands of the LWIII investigation. For example, Mr Haskell noted that the antecedents of the witnesses (which are normally updated shortly before trial) would reveal sufficient information about any new cases mentioned in such reports, or that the primary source would be reviewed later and was likely to be disclosable, so the report could be treated as irrelevant. There is a risk in these circumstances that obtaining or reviewing the primary material might be overlooked, or of the case not proceeding or the witness being acquitted so that details of the case would not appear among their antecedents. This would be particularly concerning if the decision not to proceed were to be taken on public interest grounds (for example, because it had been decided not to compel the complainant in a domestic violence case to attend court or the charge was minor in relation to other matters).

In these circumstances the defence would not know of a matter potentially relevant to credibility because it did not appear on any schedule. Fortunately, it appears that the cases mentioned on the E-Catalogues that we saw resulted in convictions or that sufficient information was eventually disclosed.

8.17 In practice the approach seems, intentionally or otherwise, to have become to treat police reports about other material as secondary sources even though, in some cases, they were at the time the only source of information and there could be no guarantee that the same information would enter the investigation in another way. This was a very risky approach and overlooked the implication that a police disclosure officer, by putting it on an E-Catalogue, considered that it had passed the relevance test.

8.18 It is important to reach agreement on the treatment of secondary source and duplicate material because of the risk that the material will not be identical. Secondary sources, such as police reports, may include details that are not apparent from the primary sources, and duplicates may contain significant annotations. The agreed approach should also be explained to the defence.

Recommendation

The CPS and the police should agree in each case on the treatment of secondary source and duplicate material. The agreed approach to secondary source and duplicate material should be written down and provided to the defence and the Court.

A narrow approach to the disclosure test

8.19 When dealing with the disclosure test, the *Disclosure Manual*[69] provides that:

> *"Prosecutors should resolve any doubt they may have in favour of disclosure".*

8.20 It is useful to pause here to note that there are also pressures to avoid unnecessary disclosure in large cases. Prosecutors have been urged by the courts[70] and are advised in the *Attorney General's Guidelines*[71] not to disclose all relevant material. This is sometimes expressed as avoiding giving the defence the keys to the warehouse. To do so would breach the principles of the CPIA, its *Code*, the *Attorney General's Guidelines* and the CPS's own guidance to its lawyers. It is perhaps not surprising, therefore, that Mr Dean QC believed that Mr Cohen was insistent on strict compliance with the CPIA regime. In spite of this, the *Disclosure Protocol* mirrored the *Disclosure Manual* by stating that:

> *"For the purposes of primary disclosure it should be assumed that material considered to assist the defence, no matter how obscurely, also undermines the prosecution case."*

8.21 On the other hand, the minutes of a conference of the whole prosecution team on 19 March 2009 record:

> *"ND continued that the Defence will probably get very little unused material."*

69 *Disclosure Manual*, paragraph 12.18. The *JOPI* had given similar guidance at paragraph 3.30.

70 R v H & C (2004) 2 AC 134.

71 *Attorney General's Guidelines on the Disclosure of Unused Material* 2005, paragraphs 5 and 6.

8.22 Similarly, when police disclosure officers submitted material that they considered met the disclosure test under cover of E-Catalogues, Mr Haskell decided that a significant number did not include material that needed to be disclosed at the primary stage and ruled that some did not satisfy the relevance test. We deal with some examples in the sections that follow.

8.23 On the other hand Mr Cohen wrote to defence solicitors informing them that the prosecution was taking a *"generous"* approach to disclosure.

8.24 In practice there was considerable confusion about the approach to be adopted by the prosecution. It pre-dated R v Mouncher and others. In March 2005, Mr Thomas stated at a conference with the police that disclosure would be *"open-access"*. Later he said that disclosure would be strictly in accordance with the CPIA and confirmed this in his hand-over note to Mr Haskell in which he wrote:

> *"…you can see that the clear policy of dealing with the unused is that we will comply with Attorney General's guidelines and we will not give the keys of the warehouse to the defence. Material will only be disclosed if and when it requires disclosure"*.

8.25 Further confusion could have arisen because the disclosure test had changed in 2005 as a result of amendments to the CPIA. Because the investigation began before the changes, the old two stage test applied[72]. Mr Thomas took a (sensible) policy decision for the Core Four case, which he outlined in his hand-over note that:

> *"Despite using CPIA in its original form… we should consider not only material that undermine (sic) but also material that could assist. In some instances that is not possible but wherever possible if we feel the material can assist it will be disclosed at this stage prior to a defence statement."*

8.26 The original two stage test required the prosecution to disclose potentially undermining material at the primary stage and to review decisions after service of defence statements (the secondary stage) and then disclose material that *"…might be reasonably expected to assist the accused's defence **as disclosed by the defence statement**."* The qualification set out in the old test does not appear in the post-2005 form of the test. Given the decision to merge the two tests (so far as possible), prosecutors were considering whether items might assist the defence case without the benefit of a defence case statement. A number of Mr Haskell's endorsements on E-Catalogues and comments to us strongly suggested that prosecution lawyers wanted to see defence case statements before deciding on the issues against which material should be assessed for disclosure. This may explain some apparently inconsistent decisions at the primary stage[73], although the *Disclosure Manual* instructs prosecutors to consider disclosure in the context of *"… any distinct explanation…"* that *"has been put forward by the accused, or is apparent from the circumstances of the case…"*[74].

72 See paragraph 4.3 and accompanying footnote.

73 See, for example, D7447.

74 The *JOPI* (paragraph 3.29) gave similar guidance.

8.27 The inconsistent application of the disclosure test is illustrated by two responses to defence requests. On 3 January 2010 (before secondary disclosure was triggered), Mr Haskell's advice to the CPS about their response to a request from Mr Powell's lawyers showed a generally open attitude to disclosure that:

> *"It seems to me that it is reasonable, in light of the way that the request is put, to say that any Material that the Crown has, which is capable of refreshing his memory regarding his own movements during the period of the Police investigation, may assist his defence, given that his Case (in Interview) was that he was away from the Inquiry from summer, 1988 to December, 1988."*

8.28 In contrast Mr Cohen responded in October 2010 (after service of defence statements had triggered secondary disclosure) to Mr Greenwood's lawyers, who had made a request for assistance in establishing their client's role in the investigation, that the prosecution would need: *"a further particularised request"* rather than a list of *"all witnesses attended upon by Peter Greenwood in the original investigation."* He went on to say that, *"It is not clear how it is said that such a list, in itself, is capable of satisfying the statutory test for disclosure."* On the other hand, he informed Mr Jennings's solicitors that "…any outstanding *contemporaneous material…will be disclosed to you on the basis that it may assist your defence by acting as an aide-memoire."*

8.29 The issues outlined in the following sections illustrate how the prosecution, in a well intentioned effort to keep the volume of disclosure manageable for the defence, took too narrow a view of the issues. In reality, this resulted in further work for everyone as the defence made many requests for additional disclosure, which required further research by prosecutors and police disclosure officers.

8.30 Although we disagreed with Mr Haskell's decisions on a number of E-Catalogues and in primary disclosure, he told us that many of them followed agreed policies. All those relating to items scheduled on MG6Cs were approved, principally by Mr Cohen, but on occasions by Mr Jennings and, from April 2011, Mr Clements.

The defence claims that the investigation was conducted honestly and that there were grounds to believe that the LWI defendants were involved in the murder

8.31 A number of LWIII defendants suggested during their caution interviews that their original investigation had been conducted legitimately. Some also indicated that they still believed that the original LWI defendants were guilty or had been involved in some way with the murder. The solicitor for another told the LWIII team that he did not believe that the (Core Four) witnesses were lying originally and that it was possible that Mr Gafoor may have ulterior motives for making his statement. Mr Thomas pointed out at a conference attended by the police, Mr Dean QC and Mr Bennett on 16 May 2006 that the police (defendants):

> *"Still felt that GAFOOR did the Murder in the presence of the 5 Principals".*

8.32 The defence never fully articulated how they believed the five were involved, but their potential involvement was clearly put in issue. Although the prosecution legal team did not consider that the defence would be wise to pursue this line, it was one of the issues against which they assessed material for disclosure at the primary stage. The guidance given by Mr Haskell at the primary stage of the disclosure exercise also recognised that the defendants would need to show how the investigation was run and why they believed that they had reasonably come to the conclusions that there was a case against the five LWI defendants. At the primary stage, police disclosure officers were directed to look for:

> *"Any material suggesting the original defendants were responsible for the murder."*
>
> *"Any material suggesting that the police treatment was NOT oppressive."*
>
> *"Any material from police officers (not suspects) who did not witness anything untoward."*
>
> *"Advice from CPS/forensic scientists which police officers may have relied upon."*

8.33 At the secondary stage after considering defence statements, Mr Haskell added other points:

> *"Any material, which not only suggests that the original defendants were responsible for the murder, but also any material that suggests that they might have had some involvement, motive or that they had some knowledge or connection with Gafoor."*
>
> *"Continue to look for any material which undermines the credibility of any prosecution witnesses including medical reports and previous accounts as well as any material which may suggest the original suspects had a tendency/propensity to be violent or carry weapons."*
>
> *"Furthermore, given that Gafoor's guilt (as the lone killer) is now plainly in issue - identify any material which may suggest anybody (other than Gafoor, but not restricted to the original suspects) was involved in White's murder."*
>
> *"Any material which suggests that*[75]*... were in any way "hands on" and instructing/had knowledge of what junior officers were involved in."*
>
> *"Any material which suggests that the police's actions were due to a lack of training/experience."*

8.34 We were troubled by the sophisticated way in which the prosecution decided to treat the issue of the original LWI defendants' alleged involvement in the murder. The *Disclosure Protocol* stated:

> *"It is particularly important in this case to disclose material undermining of the credibility of prosecution witnesses."*

75 Two named senior officers who were not charged.

8.35 This contrasted with the view explained to us by Mr Haskell and implied by the written guidance for the primary stage, which did not explicitly mention credibility. He explained that because it was not clear at the primary stage how the LWIII defendants intended to put their case on the alleged involvement of the original LWI defendants, the prosecution team had a policy not to disclose material which was undermining of the original LWI defendants' general credibility. For example, there was a significant amount of material relating to Mr Miller's rough treatment of Lynette White and acting as her "pimp" in order to fund his misuse of drugs. The prosecution team drew a distinction between this sort of material, which was relevant to his general character, and material which suggested he had murdered her. They considered that, on the contrary, the general material demonstrated how important she was to him and was therefore consistent with the Crown's case. Similar distinctions were made in relation to the other original LWI defendants. The prosecution team decided, therefore, that rather than disclosing all material potentially undermining of the original five defendants' general credibility, they would, at that stage disclose only the material that was capable of suggesting that they were, or may have been, involved in or responsible for the murder. The position also reflected a list of types of material "*possibly falling to be disclosed*" set out in Mr Bennett's *Preliminary Advice on Unused Material - Police Suspects* of 6 November 2008.

8.36 Applying this approach, Mr Haskell decided that a number of items of material suggesting that Mr Miller had previously harmed Lynette White and may have had a potential motive for causing her serious harm should not be disclosed during primary disclosure. Mr Haskell was not convinced of the truthfulness of a witness who said that Lynette White had told him on 29 January 1988 that some bruises had been inflicted by her boyfriend. He pointed out that there was already a plethora of material suggesting that Mr Miller would hit Lynette White if she did not provide him with enough cash. Not all these statements were disclosed in primary disclosure. He noted that this sort of material showed how useful Lynette White was to Mr Miller and did not provide him with a motive for killing her. An alternative view - which was part of the case theory in the LWI trials - was that his source of income had disappeared and he had killed her as a result. The defence in LWIII were entitled to receive this material because it would undermine Mr Miller's credibility as a witness and was consistent with the theory developed by the LWI investigation team[76].

8.37 The position changed after service of defence statements in September 2010 when it was explicitly stated that the defence (or at least some of them) would be asserting that the original five defendants were somehow involved in Lynette White's death, although how they were involved and how that stance was to fit with the conviction of Mr Gafoor was still less clear. There was no longer any doubt that the three surviving members of the LWI defendants would be live prosecution witnesses and that their general credibility would be in issue. Consequently, at secondary disclosure stage the prosecution agreed that any material capable of undermining the original LWI defendants' credibility was now disclosable, as set out in the guidance quoted above. Whilst the material that we saw on the E-Catalogues

76 We mention this material only to indicate why the defence were entitled to receive it and so decide whether to deploy it in cross-examination. Mention of it in this report should not be taken to imply any view on the truth or otherwise of its contents.

relating to Mr Miller was later disclosed during secondary disclosure (or was available in other documents), failure to do so earlier fuelled defence arguments that the potential guilt of the original five had not been at the forefront of the prosecution's minds. The D7447 material (relating to John Actie's credibility) however, remained undisclosed, although one of the items was also registered under another number and was disclosed separately.

8.38 In our view, the absence of credibility as an explicit theme at the primary stage was wrong. We note that the guidance for secondary disclosure was to *"continue to look"* for such material, although it had not appeared as a separate theme in the guidance for the primary stage. There may, however, have been an informal shift in the prosecution's position. Mr Cohen had written to Mr Massey's solicitors on 4 August 2010, more than a month before defence statements were due, and so before secondary disclosure began, stating:

> *"The Crown further accepts that material which may affect the credibility of a prosecution witness may assist the defence."*

8.39 The legitimacy of the investigation was also treated narrowly. We were told that, at the primary stage, the prosecution had not ruled out the possibility that the police defendants would argue that, although they accepted the LWI defendants were innocent, their original investigation had been conducted properly. One defendant, Mr Stephen, put it directly during his caution interview:

> *"We felt as, as interviewers, we had conducted them in accordance with the guidelines that were there. There were solicitors represented it, you know, obviously there and what have you and everything was above board"*.

8.40 To show that their investigation had been conducted properly (according to the standards of the time), the LWIII defendants would need to show its context and how they believed that they had reasonably come to the conclusions that there was a case against the five LWI defendants. All the material from LWI that was not to be used as part of the prosecution case in LWIII was therefore likely to be relevant and, on the face of it, disclosable, because it showed how the LWI team investigated the case and could all be said to support a defence that the original LWI defendants were properly investigated. In addition, the police defendants would always know what they had done as part of the investigation, and could, if they chose, repeatedly point out prosecution failures in LWIII. In spite of this, the prosecution took a very restrictive approach to disclosure of such material.

8.41 In addition, during primary disclosure, a police disclosure officer completed an E-Catalogue for a police report that detailed the absence of any interview training for SWP officers in 1988. He considered that it might assist the defence by showing the lack of training in modern interviewing techniques for the LWI investigating team. The *Disclosure Manual* requires disclosure to be considered in the context of *"… any distinct explanation…"* that *"has been put forward by the accused, or is apparent from the*

circumstances of the case…"[77] In spite of this, Mr Haskell stated this was not disclosable because the allegations in LWIII against the police related to moulding and manipulating evidence and not to technical breaches of PACE[78] and the prosecution case did not, at that stage, refer to the nature of the interviews with Mr Miller. It was, however, disclosed in the first phase of primary disclosure and Mr Haskell's specific guidance for secondary disclosure stated that such material should be disclosed.

8.42 The nature of Mr Miller's interviews later became a more important part of the prosecution case. We were surprised to learn that they had not been regarded as important evidence from the outset because the pattern of verdicts in the LWI trial suggested that it - more than the evidence of the Core Four - was central to the jury's decisions. Prosecution lawyers had taken the view that the interviews of Mr Miller went beyond what anyone would consider acceptable and had obtained expert opinion on this. Whether the interviews went too far[79] was a matter for the jury. The defence were entitled to see any evidence that could help them to show that the officers believed - erroneously or otherwise - that they had acted properly.

8.43 Another E-Catalogue referred to a police report which summarised an external review of the LWI investigation, known as the Hacking and Thornley review. The full Hacking and Thornley report itself was disclosed only after a number of defence requests had been rejected or met with the disclosure of extracts of the notes taken by Mr Hacking and Mr Thornley. The summary contained criticism of the investigation, but also some good points about it. It highlighted potential disciplinary offences and corporate management failures arising from LWI, including detail about accepted practice and management approval of the interviews with Mr Miller. Mr Haskell noted that it was secondary source and did not reflect criminal conduct so did not require scheduling. The summary seen by Mr Haskell was a useful aid to understanding the implications of the full report and should also have been scheduled and disclosed.

8.44 The decision whether to disclose must depend on an analysis of the case. The prosecution team in LWIII cannot be faulted for the effort that they put into this analysis. Mr Dean QC repeatedly stressed to the court and others that the prosecution had taken a thinking approach to disclosure, in line with comments made by Thomas LJ in R v Olu[80]. It appears to us that they took this too far and from time to time ignored their instincts - and, in some instances, those of police officers - about what was disclosable. It is not for the prosecution to make judgments about which of a number of potential defences the defendants will rely on. If the defence has been put forward or is apparent from the case papers (for example, caution interviews or correspondence) then disclosure decisions should be assessed against it *"even though it suggests a defence inconsistent with or alternative to the one already advanced by the accused"*[81]. Nor should prosecutors fail to assess material against a defence on which they consider it would be

77 *Disclosure Manual*, paragraph 12.17.

78 Police and Criminal Evidence Act 1984.

79 The Court of Appeal's criticisms of some aspects of the interviews was trenchant.

80 R v Olu, Wilson and Brooks [2011] 1 Cr App R 33.

81 *Disclosure Manual*, paragraph 12.11.

unwise for the defendant(s) to rely. It is for the defence to decide how to run their case in the light of all the material used by the prosecution and that might undermine the prosecution or assist the defence. The defence should also be given material that *"might… enable them to call evidence or advance a line of enquiry or argument"*[82]. It should not be assumed that all defendants in a multi-handed case will take the same approach.

8.45 Mr Dean QC accepted that some examples suggested an over analytical approach leading to decisions against disclosure whereas, if an item is deemed to be ambiguous, the instinct should tend towards the disclosure of material. Mr Haskell agreed that a more instinctive approach might have resulted in some documents being disclosed before the secondary stage. He believed that, after defence case statements, the team was clearer about the issues against which disclosure should be assessed. Delaying decisions that could have been made at the primary stage until the secondary stage put a premium on the ability of police disclosure officers and lawyers to recall the reasons for previous CND decisions, particularly ensuring (in the absence of checking the primary stage E-Catalogues) that items noted for further consideration were properly re-assessed.

8.46 It is difficult to accept that anything in the LWI investigation and prosecution was not relevant to the LWIII case. The prosecution should have scheduled (with a strong presumption in favour of disclosure) everything connected with LWI that was unused. The *Disclosure Protocol* had made clear that the working assumption was that all material held by the police was relevant.

8.47 The length of the disclosure process in large cases also poses particular challenges. There is more time for the explicit issues to change or be clarified, causing prosecutors to revisit previous decisions. This is likely to cause a lot of extra work under the pressure of court deadlines. In a long running case, changes of personnel are likely to occur, with the attendant loss of knowledge when changes occur. There is considerable merit in taking a wider approach to the disclosure test at the primary stage rather than one that risks being too narrow. The wholesale re-review of unused material during secondary disclosure in R v Mouncher and others was a useful safeguard, but as we discovered, not foolproof.

Recommendation

When applying a thinking approach to disclosure decisions, prosecutors should not be judgmental about the merits of a defence that is apparent from the case papers and should keep in mind the guidance in the *Attorney General's Guidelines* and the *Disclosure Manual* about resolving doubt in favour of disclosure. They should be slow to overrule a police view that material is relevant.

82 *Disclosure Manual*, paragraph 12.11.

8.48 The judge was very critical of the prosecution's failure to disclose Mr Powell's pocket notebook from 1994. In November 2011, Mr Haskell made a witness statement in which he accepted that the decision not to disclose the notebook when it was first requested in March 2011 was a mistake. He had decided against disclosure because the notebook related to events several years after the LWI investigation and trial. He declined repeated requests for the same reason. When Mr Powell's counsel explained that they wanted to use the notebook to support their argument that Mr Powell was a "*meticulous*" record keeper, it was immediately disclosed. Whilst the prosecution's approach before the Powell team explained their reasons for seeking disclosure of a document so far outside the timeframe of the alleged conspiracy was defensible, it gave the appearance of a grudging approach to disclosure. It would have been advisable to have disclosed it earlier, or invited the defence to make an application to the court under section 8 CPIA, which would have had the effect of making them articulate their (valid) reasons for disclosure.

Credibility of witnesses

8.49 The *Attorney General's Guidelines*[83] give examples of material that might reasonably be considered capable of undermining the prosecution case or assisting the defence case, including *"any material that might go to the credibility of a prosecution witness"*.

8.50 Section 5 of the *Disclosure Protocol* for R v Mouncher and others served in April 2009 stated:

> *"It is particularly important in this case to disclose material undermining of the credibility of prosecution witnesses."*

8.51 Whilst some of the themes set out in the guidance to police disclosure officers in March 2009, identified substantial material relating to the credibility of witnesses, as we have already noted[84] the guidance did not include credibility of witnesses as an explicit theme for primary disclosure. Mr Haskell explained that, at the primary disclosure stage, the team made a distinction between material suggesting the original LWI defendants were involved in the murder and material relating to their general credibility[85]. Only the former material was to be disclosed; this position was also reflected in disclosure guidance dated 11 December 2008. In practice there was an inconsistent approach to the question of witness credibility at the primary stage.

83 *Attorney General's Guidelines on the Disclosure of Unused Material* 2005.

84 See paragraphs 8.34 and 8.37.

85 See paragraph 8.34.

8.52 Mr Haskell himself noted in an email on 25 June 2010 that a statement in the court papers relating to the civil settlements between SWP and the five LWI defendants was probably disclosable because:

> *"The fact that he is so keen for the compensation not to be revealed to the defendants might in itself affect credibility".*

8.53 Mr Cohen agreed and said that the material should be reviewed in the normal way *"with a police view being obtained via the MG6E system"*.

8.54 The defence had made their interest in the credibility of prosecution witnesses very clear in a number of written communications about the MG6Cs already served. This was apparent from a summary of defence disclosure requests to date prepared by the allocated CPS caseworker on 13 July 2010. Mr Bennett noted in an email on 29 June 2010 that he had re-read the Massey disclosure requests *"which confirms the credibility of the original defendants is in issue"*. Mr Cohen wrote to Mr Massey's solicitors on 4 August 2010, more than a month before defence statements were due and so before secondary disclosure began stating:

> *"The Crown further accepts that material which may affect the credibility of a prosecution witness may assist the defence."*

8.55 He further promised that:

> *"Each request has been given detailed consideration. In light of your counsel's submissions additional material which does satisfy the statutory test for disclosure will be disclosed to you. This will be done during the next update of the hard-drives, which is due to take place before the end of August 2010."*

8.56 At the secondary disclosure stage the prosecution agreed that any material capable of undermining the five original LWI defendants' credibility was now disclosable; this is confirmed in the written secondary disclosure guidance dated 21.10.10. It details:

> *"…specifically look for any material, which not only suggests that the original defendants were responsible for the murder, but also any material that suggests that they might have had some involvement, motive or that they had some knowledge or connection with Gafoor. Continue to look for any material which undermines the credibility of any prosecution witness including medical reports and previous accounts as well as material which may suggest the original suspects had a tendency / propensity to be violent or carry weapons."*

8.57 We have already described how it was decided that material relating to the general credibility of Mr Miller was not disclosed at the primary stage[86]. A similar approach to issues of credibility led to the non-disclosure at primary stage of some documents relating to John Actie's credibility, which later could not be found (D7447) and which led to the decision to stop the case (see chapter 7). We also saw other complaints made by John Actie about the conduct of officers from SWP in addition to those contained in D7447. Two were duplicates of complaints contained in the D7447 material, although there is no cross-reference on the E-Catalogue or on HOLMES that these are duplicates, in line with the policy decision on cross-referencing duplicate material[87]. Mr Haskell endorsed the E-Catalogue for one of them in March 2009 that he was *"… unconvinced that this is capable of undermining Actie's reliability."* He endorsed the second, which was not corroborated and in which Mr Actie admitted he may have exaggerated the details, that, *"On balance, I am of the view that the material does not undermine Actie's credibility because the complaints were not upheld"*. Although Mr Haskell believed that the two duplicate complaints were disclosed after defence case statements as credibility material, the first one appears not to have been disclosed until 21 September 2011 (at the same time as the D30 contact material) after John Actie had given evidence and we could not confirm whether the other had been disclosed.

8.58 As with the other complaints contained in the D7447 material, these complaints were either not upheld or withdrawn. They were therefore capable of suggesting that John Actie either exaggerated, or even made up, events about police officers. None of this material was disclosed at the primary stage although the credibility of John Actie was always bound to be an issue in any trial and these complaints were clearly relevant to it. Similarly, we found examples of police intelligence and other material that was relevant to John Actie's credibility, including suggestions that he had been watching an assault when he had some kind of weapon up his sleeve. Mr Haskell noted that this information was not capable of implicating John Actie in the murder, nor could it assist the defence, particularly given the date of the intelligence. Although relating to a matter several years after the murder, it was, in our view, capable of assisting the defence by enabling them to argue that John Actie had a propensity to violence, or to associate with violent people. A further E-Catalogue included intelligence as well as material from witness statements referring to John Actie's alleged criminal behaviour and drug dealing. Mr Haskell decided that it should be scheduled but marked CND on the basis that there was *"No dispute Actie involved in drugs trade, but this does not make him a murderer or incapable of telling the truth about LW murder"*. The material relating to the assault was disclosed in the later stages of secondary disclosure. The defence were entitled to decide whether to use any of this information to attack John Actie's credibility or to suggest

86 See paragraph 8.34.

87 See *Scheduling of copies and cross-referencing* in this chapter.

that he had a propensity for violence[88]. This material, including the Actie complaints in D7447, should have been disclosed at the primary stage[89].

8.59 We found the decision to delay disclosure of material affecting the general credibility of the original LWI defendants difficult to understand. It was clear from the outset that it was very likely that they would have to give evidence, if only to say that they were not in any way involved in the murder. Some police defendants in LWIII had said when interviewed under caution that they believed the LWI defendants had some involvement in the case. The *Attorney General's Guidelines* make no distinction between witnesses who are to be called to give live evidence and those whose evidence may be agreed. In any event, Mr Haskell recorded in E-Catalogues on 25 March 2009 that Mr Miller would be a live witness. The whole prosecution case strategy was founded on the innocence of the original LWI defendants. Their evidence was part of the prosecution case and had been served as such on the defendants and the court. The *Attorney General's Guidelines* state that prosecutors should assess material in the light of available information, including that revealed by the defence during questioning[90]. Given that the original LWI defendants were key witnesses in the case, it is difficult to see how information that might be used to test their credibility should not be disclosed at the primary stage. The prosecution should not have waited for the provision of defence case statements before considering disclosure of material that might assist the defence to challenge the credibility of the LWI defendants.

8.60 We believe that this was an over analytical approach by the prosecution that resulted in additional work in secondary disclosure. It did not, however, feature as an issue in the trial because disclosure took place as part of the full re-review carried out during secondary disclosure. But considerable extra work and the appearance of an unnecessarily restrictive approach to disclosure could have been avoided by a more realistic outlook at primary disclosure.

8.61 Similarly a very narrow view was taken of a letter from Mr Gafoor's solicitor dated 4 May 2004 requesting *"written confirmation that Gafoor had assisted in the ongoing phase III enquiry by providing a statement"* so that this could be *"put forward in relation to his prison sentence tariff"*. On 14 April 2009, Mr Haskell recorded:

> *"I'm not convinced that this material really undermines Gafoor's evidence. It is not clear at this stage if his evidence will be challenged. That said, Gafoor pleaded guilty to an offence knowing that it would result in a mandatory life sentence (whatever the tariff). When he made his statement to phase III in 2004 (stating that he killed Lynette alone) there was no suggestion of any inducement. It may be that if one of the defendants seriously challenge Gafoor's admission of guilt, it may be that this docuements (sic) will need to be reviewed. At this stage, schedule it on the MG6C only."*

88 As in chapter 7, we mention the material only to indicate why the defence were entitled to receive it and so decide whether to deploy it in cross-examination. Mention of it in this report should not be taken to imply any view on the truth or otherwise of the likely defence suggestion.

89 Subject to material, if any, that attracted public interest immunity.

90 *Attorney General's Guidelines on the Disclosure of Unused Material* 2005, paragraph 9.

8.62 It was marked CND as was Mr Coutts's reply (D1568) which stated that:

> *"Mr Gafoor is a significant witness in this complex, complicated and protracted long-term inquiry."*

8.63 Whilst the E-Catalogue endorsement makes clear that the request was likely to need to be re-reviewed once the issues in the case were clearly identified, it was not disclosed until 1 September 2011 when material relating to Mr Gafoor was again reviewed after he had given evidence. He was later re-called for further cross-examination. Whilst Mr Coutts's response is carefully worded, the request for confirmation itself was significant. The letter from Mr Gafoor's solicitors indicated that the reply would be *"put forward in relation to his prison sentence tariff"*. This suggested that Mr Gafoor was seeking support from the police to be taken into account when setting his sentence tariff. Mr Dean QC pointed out in his *Analysis of Errors* document[91] that the tariff had been set when Mr Gafoor provided his witness statement in LWIII and that Mr Coutts's reply was uncontroversial. In our view this was a narrow view of Mr Coutts's letter when seen in conjunction with the wording of the request that initiated it. The letter and Mr Coutts's carefully worded response were capable of suggesting that Mr Gafoor had something to gain by co-operating with the LWIII enquiry. The defence might even have suggested that it was consistent with a prior agreement or tacit understanding that the police would provide a report to assist Mr Gafoor when his tariff was considered. Whilst this is a speculative suggestion, anything that is capable of suggesting favourable treatment of a prosecution witness (whether he is to be called or his evidence agreed or formally admitted) must be at least relevant and is likely to be disclosable.

8.64 We found the comment about waiting to see if any defendant would seriously challenge Mr Gafoor's guilt difficult to understand. Some LWIII defendants had already indicated their belief that the original LWI defendants were involved in the murder. It was not appropriate to wait and see whether Mr Gafoor or the LWI defendants would be required to give oral evidence. They were prosecution witnesses because their evidence had been served as part of the prosecution case. Any material casting doubt about their credibility was disclosable irrespective of whether they gave oral evidence. Indeed, such material might show the defence that they had grounds to challenge evidence they might otherwise have accepted. So far as Mr Gafoor's evidence was concerned, the earlier discovery of D10826 (Mr Rees QC's *Assessment of Case* note) would have made the possibility that his guilt might be challenged much more obvious[92].

91 See paragraph 8.2 for the status of this document.

92 See discussion of this in *Getting to the bottom of LWI and LWII* in chapter 5.

Treatment of issues not in dispute

8.65 Mr Haskell on occasions declined disclosure because the prosecution did not dispute a point the defence wished to make. For example, an officer submitted an E-Catalogue relating to interviews of John Actie conducted by Mr Powell, which said the tapes revealed no evidence of bullying by Mr Powell. The officer considered that this information could undermine the prosecution case or assist Mr Powell's case. Mr Haskell endorsed the E-Catalogue:

> *"... it is not and never has been part of our case that Powell bullied or threatened John Actie during his suspect interviews and therefore this report does not undermine our case. The disclosable interviews involving John Actie will be provided in any event. I am tempted to say this is irrelevant, but it probably should be scheduled on the MG6C."*

8.66 Mr Haskell's recollection was that the report was later disclosed, because the prosecution decided to rely on Mr Powell's interviewing of others (as evidence of bad character to support evidence from Mr Grommek), which made this material become disclosable.

8.67 Similarly, an E-Catalogue that described a profile of John Actie was scheduled but not disclosed on the basis that there was:

> *"No dispute Actie involved in drugs trade, but this does not make him a murderer or incapable of telling the truth about LW murder"*[93].

8.68 This was too narrow a view. The defence were entitled to any information that would add weight to their contention that Mr Actie was an unreliable witness.

8.69 On other occasions, Mr Haskell appeared to make his own judgment about how material should be interpreted. For example, phrases such as *"there could be a whole host of explanations for this..."* and *"...it could be argued...I'm not sure that is correct"* suggest that material that might reasonably have been considered capable of undermining the prosecution case or assisting the defence case was not disclosed. In another example, he seems to have missed the potential value to the defence of a comment by a senior officer who was interviewed in LWIII but not prosecuted:

> *"He insists that he has done nothing wrong. ... This e-mail does not seem to be disclosable, because he does not say that he did not witness anything untoward (by other officers)."*

8.70 Although the senior officer did not make a positive assertion in favour of the LWIII defendants, the absence of any criticism from him was a point that they might have chosen to pursue or investigate further before deciding whether to call him in their defence.

93 As in chapter 7 we mention this material only to indicate why the defence were entitled to receive it and so decide whether to deploy it in cross-examination. Mention of it in this report should not be taken to imply any view on the truth or otherwise of its content.

Integrity of the investigation

8.71 The *Attorney General's Guidelines*[94] state that material capable of undermining the prosecution case or assisting the defence case includes material that has the capacity to support submissions that could lead to a stay of proceedings or a finding that a public authority had acted incompatibly with an accused's rights under the European Convention on Human Rights.

8.72 Prosecution lawyers were aware from an early stage that the defence were likely to submit that the proceedings were an abuse of process. They told us that they believed that any such argument was likely to be based on the effects of delay in the investigation, including missing material and the lapse of time since the events under consideration. They were emphatic that the defence did not articulate their suggestion that the LWIII investigation and prosecution lacked integrity until the trial had begun. Mr Stephen's legal team made their position clear at the start of the trial when they asked that the SIO should be excluded from court while other witnesses gave evidence because:

> *"… the nature of the defence which will be mounted in this case, which will involve an attack on the way in which this investigation was conducted under his supervision…"*

8.73 There had, however, been earlier indications that the integrity of the LWIII investigation would be attacked by the defence. Whilst these occurred mainly when defence statements were served in September 2010[95], Mr Cohen had been troubled in 2006 by the potential implications of allegations made against two senior officers by a former officer from another force, who had been recruited to work on the LWIII investigation[96]. The material was revealed to the CPS consistent with guidance in the *Disclosure Manual*[97]. Mr Cohen was alerted to further potential concerns in an email from the IPCC on 1 May 2008 relating to a number of other complaints about the LWIII investigation team, including senior officers. The email referred to *"the rather obvious point that… the new … matters directly question the integrity of the LWIII team…"*

8.74 Experienced prosecutors should also be aware of the tendency in large cases to submit that the proceedings are an abuse of process and that these submissions often include an attack on the regularity or lawfulness of police actions. In spite of these factors, the CPS accepted advice from Mr Haskell in early 2010 that a number of allegations of impropriety in the investigation, including those mentioned by the IPCC in their email to Mr Cohen, were not even relevant and should not be scheduled because:

94 *The Attorney General's Guidelines on the Disclosure of Unused Material* 2005, paragraph 10.

95 For example, Mr Seaford's defence statement requested disclosure of, *"All information indicating that the integrity of the evidence or of the integrity of the Prosecution witnesses, or the inferences to be drawn from that or their evidence is in doubt, or information as to the reliability of the observations made by Prosecution witnesses; for example - any disciplinary or Police complaint commission action on the investigation taken against any of the Police Officers involved in dealing with this offence."*

96 See paragraphs 8.78-8.83.

97 *Disclosure Manual*, paragraph 18.29.

"In my view the only potential issue that this material is capable of going to is the credibility or integrity of the individual officers concerned, or the Investigation Team as a whole. It is of note that the individuals complained about are not at present witnesses in current prosecution, and many are unlikely to be so. Furthermore, in relation to the current criminal proceedings, none of the Defendants have so far raised any issue about the credibility or integrity of the Phase III Investigation Team as a whole, or on an individual basis."

8.75 The complaints included concerns about: *"the manner in which this re-investigation is being carried out"* and allegations that: the decisions to arrest, detain and obtain and execute search warrants were unlawful; that a named senior officer unconnected with the LWIII investigation team had threatened the LWIII team with the sack if details of the complaint[98] were made public and that he did not want the CPS to know about it; and that there was a *"political dimension"* to the investigation. The file of material that we saw also included a letter from a Member of Parliament on behalf of a constituent who had been arrested saying that there were accusations that a named senior officer had pressurised an unnamed LWIII witness to change his version and that an unnamed LWIII officer alleged to have stated that there was nothing to justify the arrests[99].

8.76 Mr Haskell's written advice followed a conference of the whole prosecution team a few days earlier, at which the matter had been discussed, and consultation with Mr Dean QC and Mr Bennett. It is very difficult to see how these complaints were not relevant and some of them, in our view, disclosable. Even if it had not already been clear that the integrity of the investigation would be questioned, the complaints themselves represent the clearest possible indication that there would be such an attack. Further, it is difficult to see how at least one of the officers would not be required to give evidence, even if they had not at that stage been formally required by the defence, particularly as the prosecution was aware that some defendants intended to submit that the prosecution was an abuse of process.

8.77 Some of the complaints were also the subject of civil actions against SWP, which were registered as D7448. Although the individuals who made the complaints or commenced civil actions would know the content of their own complaint or cause of action, other defendants were also entitled to know about the alleged misconduct of the LWIII enquiry team. Indeed, not all the complainants were defendants, so none of the defendants would have been aware of their allegations unless they had been told privately.

8.78 Although Mr Haskell and Mr Cohen said the complaints would need to be reconsidered after defence case statements, there was no clear mechanism for ensuring that this occurred, particularly as knowledge of them had (quite properly) been restricted.

98 See paragraphs 8.78-8.83.

99 We have not named the senior officer or other officers referred to in this section. We understand that complaints against them are still under investigation. There are special rules relating to the disclosure of unresolved complaints during criminal proceedings in which the officers are or may be witnesses. Unresolved complaints are not always disclosable. Mention of them in this report should not be taken to imply any view on their truth or otherwise.

8.79 Mr Cohen recognised that the 2006 complaint could affect the integrity of the investigation. At a conference with Mr Cohen in 22 November 2006 an IPCC representative summarised the complaints. They alleged that the LWIII team had failed to follow up intelligence material and there was a conspiracy to remove the former officer from the investigation because they did not like what she was discovering in her work on telephone evidence and that the Lynette White Enquiry was effectively pre-determined. A disciplinary investigation was commenced into her complaints, which, after appeal, resulted in a disciplinary finding relating to a statement made by the officers about their handling of the former officer's expenses claims, but no sanction.

8.80 Mr Cohen was, at least initially, very concerned that the allegations could undermine the integrity of the LWIII investigation, particularly given some differences between the recollections of the officers concerned on the one hand and Mr Thomas about previous discussions of the issue. He therefore kept tight control of the information relating to the allegations, but was sufficiently troubled by them to discuss the matter with the then Head of SCD, Ms Dowd. In 2007, he concluded that the LWIII investigation's integrity was intact, but we were unable to find the reasons for his initial concerns being assuaged in the written records of the case. Later, a conference of the prosecution team concluded that the officers' conduct amounted to mere technicalities that did not need to be scheduled, let alone disclosed to the defence in the Core Four case. The extent of counsel's knowledge of the complaints is, however, unclear. None remembered anything that suggested doubts about the integrity of either of the officers, although Mr Haskell's written advice refers to the former officer's suggestion that there was *"some kind of police 'conspiracy'"* and to the minutes of a meeting at which the IPCC and the CPS had discussed the allegations. They drew a distinction between police incompetence and technical breaches on the one hand and deliberate bad faith, oppression, bullying and manipulation of evidence on the other hand. All agreed that they would have been very concerned by anything that suggested a conspiracy to remove the former officer from the investigation but could not recall being told of anything like that[100].

8.81 The decision does not appear to have been revisited in R v Mouncher and others where the integrity of the investigation was explicitly challenged. It appears the decision from the Core Four case was simply allowed to stand. The endorsements on the E-Catalogues for R v Mouncher and others relating to other material covering the same matters state:

> *"During the trial against the 'Core Four' a policy decision was made in relation to the (former officer's) material. It was decided (I advised the CPS) that it was not relevant and therefore did not require scheduling."*
>
> and
>
> *"During the last trial it was decided that the…… material was not relevant. I can see no good reason why that should change."*

100 We have not named the officers referred to in this section. Mention of the matter in this report should not be taken to imply any view on the truth or otherwise of the unproven allegations.

8.82 Subsequent E-Catalogues show this latter statement was adopted as the policy of that date, although it was not set out in a formal policy log.

8.83 We do not know whether the former officer's allegations of conspiracy had any merit, but the way in which information about her complaints was handled by the CPS caused us concern. We have not been able to establish whether disclosure counsel was made aware of the full extent of the background to the complaint despite being asked to advise the CPS about its disclosability.

8.84 Mr Haskell and Mr Bennett believe that the material was eventually disclosed. We were unable to confirm this. Even if it was finally disclosed, the earlier decision to treat it and the other complaints material as irrelevant is concerning.

8.85 In spite of the statement in open court by Mr Stephen's counsel at the start of the trial in July 2011[101], as late as 2 September 2011 the prosecution was still resisting disclosure of material that the defence submitted was relevant to the integrity of the investigation. Mr Stephen's counsel had asked for a copy of the information supplied to the magistrate who issued a search warrant for their client's address in view of his clear indication of "*his willingness to fully cooperate with any investigation and having regard to his status as a serving police officer and the length of time between the alleged offence and the search*." A warrant was not essential in such circumstances because the police had the power to search the address of an arrested person under section 18 Police and Criminal Evidence Act 1984. As the police had decided to use a different power, the defence request was reasonable. They also stated that some items seized during the search had been used during Mr Stephen's interview under caution, which might therefore have had a bearing on the interview's admissibility. The prosecution responded that they did not accept that the material was relevant because the defence had not provided any basis or foundation for their assertion.

8.86 The material was eventually disclosed on 6 October 2011 when the defence outlined the reasons for their request with a view to a section 8 application[102]. This added to the impression of prosecution inflexibility. The material also revealed an administrative error. The date of issue of the warrant had been recorded incorrectly, which led the judge to observe that, *"a search warrant with wrong date prima facie did not authorise the search that it sought to justify"*. The error about the date had been brought to the attention of the CPS in 2006, who advised the police that it had no effect on the lawfulness of the search.

101 See paragraph 8.71.

102 The (unamended) version of section 8 of the Criminal Procedure and Investigations Act 1996 that applied to this case. It enables defendants to apply to the court for an order requiring the prosecution to disclose material which *"…might reasonably be expected to assist the accused's defence as disclosed by the defence statement"*.

Scheduling of copies and cross-referencing

8.87 The approach taken to duplicate material was to schedule only one copy with the others listed as irrelevant material and HOLMES noted accordingly. The rationale for the policy was to reduce the volume of scheduled material listed to lessen the burden on the defence. However, documents that appeared to be the same were not always identical. For example, a document containing briefing notes of Core Four interviews and a critique of their witness interviews, which was capable of giving an indication of how well the new accounts were obtained, was likely to be disclosable. It was not initially scheduled because it was thought to be a copy of another document that had already been scheduled. But during a quality assurance exercise, it was discovered it contained additional appendices. As a result it was scheduled later.

8.88 Mr Haskell conceded that duplicate material caused problems. It was decided not to include cross-references on the MG6Cs but to rely on HOLMES to keep the schedules as simple as possible. HOLMES was not always annotated as intended, which made quality assurance of irrelevant material difficult. Mr Haskell told us that, even after a full review of irrelevant material, some documents were not cross-referenced on HOLMES.

8.89 The process of bringing documents forward from the LWI and LWII investigations added to the difficulties. We saw an example in which more than one officer brought across the same material from LWI and gave it different HOLMES document numbers and described it slightly differently (omitting the name of an officer defendant who had taken a witness statement in LWI). They were not cross-referenced, or both would almost certainly have been disclosed at the same time. The defence attempted to maximise the opportunities afforded by such failings through open criticism before the trial judge.

8.90 Confusion also arose because documents from LWII were marked with the HOLMES number from LWII but registered under a new number for LWIII without endorsing that number on the document itself. This sometimes caused the defence to ask for a document under the wrong number.

8.91 The prosecution disclosed transcripts of witness interviews with an officer who had sat with Ms Vilday and Ms Psaila while they were at the police station on a significant day during the LWI enquiry, following a request from Mr Mouncher's legal team in May 2011. But they did not disclose her witness statement at the same time. Mr Haskell accepted that there should have been a check for the statement, which was referred to in the final interview transcript. Fortunately, the final transcript contained the whole of the content of the statement, but, in the absence of cross-referencing on the MG6C schedule, the defence could not have known this for certain. Whilst the defence did not suffer any disadvantage as a result of this error, it added to their doubts as to the thoroughness with which the prosecution team approached its task and the ability of the systems employed to ensure that material was not overlooked.

8.92 Disclosure of copies poses particular problems in relation to email chains. An email from Mr Grommek's solicitor about attempts to persuade him to sign a proposed SOCPA co-operating defendant agreement was not scheduled on the basis that it was wholly contained in the email responding to it. The

scheduled email was marked CND. This caused considerable confusion. Ideally each individual email should have been scheduled in its own right and cross-referenced to others in the chain. Alternatively, the description should have made it clear that the scheduled item was a chain, with a summary of its subject matter and details of the start and end dates. The entire email chain, including the extract was eventually disclosed as part of the witness contact material on 19 September 2011.

8.93 Inspectors heard at a lawyer training event in February 2013 of the availability of a software package that is capable of sorting a series of emails into chronological order. If such a system had been available, it may have assisted police disclosure officers and prosecutors to avoid some of the problems associated with a series of emails, only some of which were contained in a chain.

Recommendation

The CPS investigates with the Association of Chief Police Officers the availability of software that sorts emails into chronological order.

8.94 Although these problems might appear to relate to the performance of police disclosure officers, more thought should have been given at the outset of the case to the approach to be taken to the handling of duplicate material. We have already noted the reasons why Mr Coutts requested the inclusion of a disclosure expert in the CPS team at the beginning of the enquiry, which would have helped to prevent some of the problems. Although time consuming, it would have been advisable to schedule duplicates and cross-reference them.

Disclosure of extracts

8.95 We understand the rationale for disclosing only the disclosable parts of large documents. It is important not to overburden the defence with unnecessary material and save a considerable amount of copying. But sometimes the context of the extract is important. In other instances, careful review of the whole document can reveal other significant information.

8.96 Mr Thomas told us that his approach in the Core Four case was to disclose the full document in which the disclosable extract appeared unless it would be unrealistic to photocopy it. In R v Mouncher and others, lawyers considered whether to call for the whole document when an extract was shown to them, depending on its context or the potential of the full document to contain additional information. The diary of Chief Inspector Morgan, an important officer in the LWI enquiry, illustrated the dangers of considering extracts in isolation. The E-Catalogue records consideration of the extract alone, which related to the willingness of three of the Core Four to give evidence at the second LWI trial *"of their own free will"*. Mr Haskell (correctly) decided that this should be disclosed. In fact, the diary contained a number of other relevant entries in relation to the Core Four and the LWI defendants, particularly in relation to the counselling of Ms Vilday. The MG6C description included, *"… and his frequent visits to Leanne Vilday in Operation Safehouse…"* which should have suggested that there might be important evidential or disclosure material relevant to the allegation that the LWI investigation team had moulded or manipulated the evidence that she gave during the LWI trials. It would have been advisable to consider and, as it turned out, disclose the whole diary, redacted as appropriate to conceal entries unrelated to LWI. It was disclosed shortly before the trial started.

The quality of MG6C descriptions

8.97 Some MG6C descriptions were excellent. Mr Haskell raised concerns about police disclosure officers whose work caused him concern and the police dealt with them robustly. At least one officer was removed from disclosure duties as a result. When descriptions did not include the date or other key identifying features of a document, steps were taken to remedy this in many instances and to improve future descriptions. But some remained uncorrected and some descriptions were vague and unhelpful. The defence complained about a significant number of descriptions, sometimes without justification[103]. This added to the burdens on prosecution counsel who had to answer the complaints.

8.98 Some weak descriptions led to late disclosure. For example, D8448 referred to a sighting of Lynette White on 4 February 1988 in a car driven by Mr Miller. It did not, however, say that the sighting had occurred in James Street, where she was murdered ten days later. Whilst this did not directly link Mr Miller to the murder (a theme at primary and secondary disclosure) it indicated his familiarity with James Street and might suggest that he was aware that Lynette White used premises there for prostitution. It was, therefore background evidence that formed part of the narrative that would have been useful to anyone asserting his role in the murder. The omission of any mention of James Street was significant. With the benefit of hindsight, it would have been helpful to have clarified at the outset the nature of descriptions. For example, if particular events or key words such as locations or names appeared in a source document, they should be covered in the description. This would have helped the prosecution and the defence to understand their significance and make a proper assessment about disclosure or the rationale for requesting disclosure.

8.99 Mr Dean QC stated in his *Analysis of Errors* document[104] that the information in D8448 *"… linking Miller to James Street had in fact been disclosed in January 2010, in far more detail than is contained in D8448, within D7169…"* This is not a satisfactory explanation. It may well mean that the defence were not in fact disadvantaged, but it demonstrates that not all disclosable documents had been disclosed. As with some items, it was a matter of good fortune that the information was also contained in another document.

8.100 A poor description of a document known as the Prostitutes Book contributed to it being marked CND at the primary stage in October 2009. It was described as:

> *"Plain clothes log of prostitutes from 06/05/88. It shows sightings of Psaila, Vilday, Ronnie Actie and others".*

8.101 It was disclosed after two requests from Mr Daniels's legal team, who wanted it to show the movements of Ms Psaila and to identify her associates. It does not appear to have been read by a lawyer before these requests. It showed an association between two of the Core Four and one of the original LWI defendants, including information suggesting that Ronnie Actie bullied Ms Vilday. These were thought to have been

103 See *Unwarranted criticisms of the prosecution* in this chapter.

104 See paragraph 8.2 for the status of this document.

described in other documents that had been disclosed, although, again, this was fortuitous rather than a considered decision. Indeed, in one instance the other source of information did not include the key points mentioned in the book. The book also revealed additional potentially useful information for the defence including details of the habits of Ms Vilday and Ms Psaila on a number of occasions and eight sightings of combinations of people that were relevant and potentially of use to the defence.

8.102 In another example, the same document was scheduled twice by mistake. Perhaps unsurprisingly, the descriptions were slightly different. Both undermined claims made by Mr Atkins during the LWI enquiry as to his whereabouts on the night of the murder. One stated that the statement had been taken by Mr Jennings. The other did not. Mr Jennings's counsel submitted that both descriptions were required to see the *"full picture"*. Mr Dean QC asserted in the *Analysis of Errors* document[105] that *"The simple fact that it was taken by Jennings does not explain how the statutory disclosure test is met"* and *"Both descriptions are clear and accurate and in any event…"* the one identifying Mr Jennings as the statement taker *"… was disclosed in February 2011"*. The documents taken together could, however, have been used evidence to show that Mr Jennings had reason to believe in the guilt of original LWI defendants. In the end, both were disclosed and no real harm was done. But the disclosure of one without the identity of the statement taker was used by the defence to add to the impression that the prosecution really did not have a grip on disclosure and unused material. As with D8448, fuller involvement of lawyers at the outset of the LWIII enquiry should have resulted in guidance about key elements of descriptions. In this case, the identity of statement takers was likely to be important.

8.103 Another poor description of a report about Mr Grommek requesting the SIO in LWI to considering paying for him to have a new ex-directory telephone number led to late disclosure. The description did not indicate the reason for the request which the report stated stemmed from Mr Grommek's claim that he was receiving threatening calls. Once the underlying material was inspected during a quality assurance review it was disclosed immediately. That said, the existing description should have prompted some enquiry by disclosure counsel and/or the reviewing lawyer when considering the original MG6C on which it was marked CND in October 2009.

8.104 It would be helpful at the outset of major cases to discuss with police disclosure officers key features of the case that should be included in the descriptions of documents in which they appear. For example, in R v Mouncher and others, references to key locations (such as James Street) or names of people (such as the taker of witness statements in LWI) would have avoided criticisms.

105 See paragraph 8.2 for the status of this document.

Failure to reconsider primary stage E-Catalogues during secondary disclosure

8.105 The guidance on the application of the disclosure test was updated after service of the defence statement. As well as responding to specific defence requests for material, it was decided to re-review all the unused material and material previously classified as irrelevant in the light of the revised guidance. This was a sensible, if very time consuming, approach. The reasoning for the CND marking in the primary stage was not recorded on the MG6C, which meant that the decision at the secondary stage was, in effect, a fresh review. This could be considered a safeguard or a kind of quality assurance exercise. But no-one considered the endorsed E-Catalogues from the primary disclosure stage to see if the reasons for Mr Haskell's decisions not to disclose (or, in some cases, even schedule) at the primary stage remained valid. Mr Haskell accepted that he should have done this. He had stated on a number of E-Catalogues that the item should be reconsidered after service of defence statements, sometimes on the basis that the decision would be different if a particular witness's credibility was in issue. As we have already indicated, we think this was a mistaken approach, but a review of E-Catalogue endorsements would have prevented the perpetuation of some errors. For example, it should have caused Mr Haskell to ask for the Actie complaints in D7447[106] so that their absence could have been dealt with much earlier. Mr Haskell had also treated a number of stage one E-Catalogue items as irrelevant. The mere fact that a police disclosure officer had placed them on an E-Catalogue should have made them a priority for re-review in secondary disclosure. Material was therefore reconsidered in secondary disclosure without the benefit of the rationale for the decision not to disclose it or schedule it in primary disclosure. If a police disclosure officer thought that an item might be disclosable in stage two, a fresh E-Catalogue was created without reference to any that might have existed in stage one.

106 See *D7447 and the end of the case* in chapter 7.

Block listing

8.106 The *Code* issued under the CPIA[107] and the *Attorney General's Guidelines*[108] allow police disclosure officers to use block listing for large quantities of items *"of a similar or repetitive nature"*. The *Code* also states[109] that if material is listed in a block the police disclosure officer *"must ensure that any items among the material that might satisfy the test for prosecution disclosure are listed and described individually"*. Similarly, the *Disclosure Manual* encourages the use of block listing where there are any items of a similar or repetitive nature[110], provided the material *"would have no added value if scheduled individually"*. This approach was encouraged by the *Gross* report *"where appropriate"*[111]. The *JOPI* gave similar guidance and warned that *"the inappropriate use of generic listing… is likely to lead to requests from the prosecutor and the defence to see the items"*. Whilst the *Manual* states that block lists

107 *CPIA Code*, paragraph 6.10.

108 *Attorney General's Guidelines on the Disclosure of Unused Material* 2005, paragraph 27.

109 *CPIA Code*, paragraph 6.11.

110 *Disclosure Manual*, paragraph 31.38.

111 *Review of Disclosure in Criminal Proceedings*, Rt. Hon Lord Justice Gross, pages 4 and 25-28.

can be used for all material types, it also provides that where the disclosure officer is not sure whether to create a particular block, he should speak to the prosecutor to ensure that both are happy with the approach to be adopted.

8.107 Mr Thomas set a policy for the LWIII investigation team that block listing should be used merely for internal police administrative documentation and not evidential material. He repeated this in his hand-over note to Mr Haskell of 26 July 2007. The training materials used by Mr Haskell in March 2009 advised police disclosure officers to be careful with block listing. He emphasised that some internal police material would also contain references to evidence, which would have to be considered and, if appropriate, disclosed. In spite of this the use of block listing was a feature of several disclosure problems that arose. It is obviously tempting in cases with large volumes of paper to use block lists to save time in laboriously scheduling hundreds or sometimes thousands of individual items. This is more dangerous where, as with some material from LWI, those items are largely handwritten and therefore not searchable electronically.

8.108 House-to-house forms are frequently block listed. This is a reasonable practice. There may be thousands of them (a hundred streets worth in this case), almost all of which yield no useful information. But it is particularly important that any that contain disclosable information are scheduled separately. A number should have been separately listed in R v Mouncher and others, including a form relating to Noreen Amiel. She was a significant witness whom the prosecution intended to call and there was an expectation that all material containing accounts by significant witnesses, including house-to-house forms, would be disclosed. The prosecution lawyers agreed that the Amiel house-to-house form should have been isolated from the block list because it was a witness contact. It was only found on the eve of her giving evidence, following a specific defence request. This in turn prompted the extension of a quality assurance review to all LWI material. As a consequence a small number of other house-to-house forms were disclosed. This formed the basis of a defence complaint about the disclosure process. A full review of material relating to significant witnesses well before the trial started should have resulted in earlier disclosure. Electronic searches against the names of such witnesses are relatively straightforward. Searches of manuscript details, such as house-to-house forms, take more time but should still have been undertaken before the trial.

8.109 The *Assessment of Case* written by Mr Gafoor's counsel in LWII (D10826)[112] was extracted from the CPS file for LWII which was otherwise block listed. As a result, the contents of the fees file were separated from the rest of the block list and given a separate number (D11144). The letter from Mrs Jeffries[113] was among the items block listed in D11144 and had not been found when efforts were made to establish the provenance of D10826. The description of D11144 did not mention Mrs Jeffries by name.

112 See *Getting to the bottom of LWI and LWII* in chapter 5.
113 See *Getting to the bottom of LWI and LWII* in chapter 5.

8.110 The Box 31 issue[114] was aggravated by the use of block listing. Box 31 was described as:

> *"A block list of 19 sets of photographs contained in the 40 CPS boxes. Contains scenes of crime photographs relating to the murder scene, frog key fob and post mortem, miscellaneous photograph albums and photofit photographs and an album of injuries to Adrian Fitt."*

8.111 The photographs should have been listed separately with an adequate description, because they were a key part of the evidence used in the LWI trials, including some showing the injuries that caused the death of Lynette White. Many were helpful prosecution evidence or disclosable. But the description on the block list should have been sufficient to make prosecutors ask to inspect the photographs, both as potential evidence in the LWII trial and for disclosure purposes.

8.112 The scheduled item D10513 contained 3,344 Operation Mistral actions which were categorised as relating to: 480 LW; 7 Psaila; 15 Vilday; 19 Grommek; 19 Atkins; 106 Miller and others; 243 prostitutes; 158 taxi drivers; 11 photofit/cut hand man; 93 punters and kerb crawlers; 165 forensics 88-89; 760 forensics 00-03; 220 police officers; 248 Gafoor; 800 intelligence. This is another example of inappropriate block listing. If such a system is to be used there should be a block list for each category of actions rather than an all encompassing list of 3,344 actions as in D10513. The schedule itself was just a list of action numbers under a heading with no indication of the nature of actions. At the MIR there was no supporting file of actions behind the schedule. Anyone reviewing D10513 would have to examine each action individually on HOLMES, to which lawyers do not have authorised access. In view of defence put forward (that Mr Gafoor did not act alone), it is likely that there would be actions in the schedule that could have been capable of undermining the prosecution case or of assisting the defence case. Lawyers reviewing the MG6C should have been alert to this. Because any actions that were disclosable would not have been readily identifiable, they should have asked for the block lists to be restructured and given guidance on the type of material that might be disclosable.

8.113 Similarly, D1198 was a block list of items taken from CPS files in LWI referring to Mr Massey, disclosure issues, fees issues, the pathologist's evidence and a Y chromosome in blood found at the murder scene. This is a wide ranging list and another example of the inappropriate use of a block list, where the audit trail needed breaking down further. It also included correspondence relating to the secret report[115] that was provided. Items of a different nature should not be grouped together. This is particularly important where the material concerned cannot be searched electronically.

8.114 A number of these issues could have been avoided if the investigators and prosecutors had agreed at an early stage how to deal with material from LWI and LWII as we described in chapter 5. As the *Disclosure Manual* suggests, investigators and lawyers should discuss the potential use of block

114 See *Getting to the bottom of LWI and LWII* in chapter 5.

115 See paragraph 8.122.

listing at an early stage. This should take place as soon as scheduling is set to start, so that agreement can be reached on its parameters and, so far as possible, the criteria by which items will be extracted from the block list and scheduled separately.

8.115 There was also a difficulty in R v Mouncher and others by adding material to the D30 block list after it had been scheduled in October 2009. Later contacts with key witnesses were simply added to the list when they should have been entered on a fresh list. Otherwise the disclosure decision entered on the MG6C would relate to material some of which did not exist at the time of the decision. Nothing should be added to a block once it has been submitted on a schedule[116]. The wholesale provision of D30 in September 2011 meant that the risk associated with this had no direct effect in R v Mouncher and others. It demonstrates, however, the importance of full discussions between police disclosure officers and prosecutors at an early stage of an investigation, supported by regular reviews of compliance with the agreed approach.

116 *Disclosure Manual*, paragraph 31.39.

Unwarranted criticisms of the prosecution

8.116 Although during 2010, including the period after service of defence case statements, several defence teams implied in court documents that they were satisfied with the prosecution's disclosure performance, complaints emerged as the trial approached. They were drawn to the judge's attention during the trial. Some criticisms were misconceived or unfair. In this section we deal with a few examples.

8.117 Complaints about an issue known as AutoIndex were misplaced and appear to have been based on a misunderstanding of its purpose and capability. The prosecution spent considerable time and the police a great deal of money trying to satisfy Mr Page's counsel about it. AutoIndex was merely an index used to manage information during the original LWI material before HOLMES was brought into use. By the time of the LWIII enquiry the data held on AutoIndex was no longer accessible by SWP. A number of experts were asked to help without success. Eventually, an academic was able to reverse engineer the software so that access was gained. His report was served on 15 April 2011. AutoIndex did not contain anything that was not available to the LWIII investigation in some form, but Mr Page's counsel continued to believe that it might.

8.118 On occasions defence lawyers complained about what they termed *"fundamental"* flaws in the descriptions of documents that the prosecution had already disclosed. They did not specify the alleged flaws and, on the face of them, the descriptions encompassed in the complaint were a fair reflection of the items to which they referred. Some related to material that had already been disclosed at the primary stage.

8.119 Some very late requests or complaints appeared to have been added to submissions to the court without genuine merit. They bore the hallmarks of jumping on the bandwagon. For example, it was said that the prosecution had failed to disclose *"relevant material"* although the MG6C description amounted to a cut and paste of the message it described. It was not requested until two years after the relevant MG6C had been served and it did not relate to the client whose lawyers requested it. No reason was ever provided to show how it passed the test for disclosure, save that it was *"relevant material"*.

8.120 The same team also sought other documents without providing satisfactory justification for their request after they had had the relevant MG6C for over two years. In fact some of the documents were capable of assisting the defence and they could easily have provided justification and, if disclosure was then declined, made an application to the court under section 8 CPIA. Such requests - even in some instances referring to the wrong test for disclosure - from very experienced counsel do not help even the best run disclosure exercises to operate smoothly. All these documents were, however, part of the LWI enquiry. A lot of time could have been saved by the prosecution disclosing to the LWIII defendants all material generated by the police defendants during their investigation of LWI, except any that was genuinely sensitive. Given the nature of this case and the way in which the police defendants intended to run their defences, some should certainly have been disclosed.

8.121 Another team complained that the prosecution had failed to schedule and disclose a specific piece of relevant material relating to a previous conviction of a significant witness. In fact the prosecution made extensive enquiries, discovered that the relevant material no longer existed for legitimate reasons and disclosed reports about the enquires they had made. This request was made part way through trial when the defence had been in possession of the document that prompted their enquiry for about seven months.

8.122 In spite of the prosecution making very clear early in the preparation of the case that disclosure requests must be justified, we saw some lengthy requests that consisted simply of lists of document numbers without any attempt to explain their potential significance.

8.123 As the trial got under way, the prosecution adopted a more open approach to disclosure requests. Mr Mouncher's counsel told the judge that an appeal to Mr Dean QC usually resulted in disclosure of the material sought. Some of the material was disclosed in spite of the prosecution's view that it did not strictly meet the disclosure test. But this late generosity on the part of the prosecution was sometimes used as a stick with which to criticise earlier disclosure decisions. For example, a document known as the secret report prepared by Mr Mouncher concerning a civilian defendant in LWIII, Mr Massey, who had been an important witness in LWI, had been disclosed, having previously been marked CND at the primary stage. On 5 October 2011, Mr Mouncher's counsel requested full disclosure of all correspondence between the CPS, the police and counsel between January 1989 and 1992 in order to help them establish whether the secret report had been brought to the attention of CPS

and counsel and disclosed to the defence in the LWI trials. The prosecution reviewed all this material. Although they considered that none of it met the disclosure test, in order to be as helpful as possible, they made it all available to Mr Mouncher's counsel for inspection and provided them with copies of a few documents on request. The evidence of whether the prosecution team in LWI (counsel and lawyers) had seen the report was equivocal. The correspondence made available for inspection did not cast any direct light on the point, although it helped the defence to prepare a chronology that assisted them to prepare their cross-examination of junior counsel from LWI. Whilst this amounted to assisting the defence, the original decision not to disclose the correspondence was not unreasonable. Having said that, the prosecution was not helped by the atmosphere created by the strict approach they had taken on a range of other requests, so providing the material at a late stage played into the hands of the defence.

9 The appropriateness of CPS guidance on disclosure for large and complex cases

9.1 Our Terms of Reference ask us to consider whether the existing legal guidance is appropriate for cases of similar size and complexity. In considering this question, we have taken into account the findings of reviews into some other cases that failed because of disclosure problems.

9.2 The main CPS guidance is contained in the *Disclosure Manual*, which has been agreed between the CPS and ACPO[117] We found the guidance available in the *Disclosure Manual* to be appropriate, although we suggest some modest improvements in this section. The main difficulty in R v Mouncher and others was that the guidance was not always followed properly. Indeed, guidance and policies created specifically for the case were not applied consistently. To some extent this was a consequence of the case lasting such a long time. Not only were there changes to the CPS lawyers allocated to the case, but the absence of systematic supervision of much of disclosure counsel's key work on the E-Catalogues resulted in some drift from the initial approach that might not have been appreciated by him. It would have been helpful for his work on E-Catalogues to have been sampled from time to time to guard against this. The Gateway Reviews of disclosure in large cases now introduced by CPS should provide a mechanism for this[118].

9.3 Prosecutors were, of course, aware of the appellate courts' strictures on wholesale disclosure and the injunction in the Crown Court Protocol[119] not to give the defence the "keys to the warehouse" because of the potential cost to the public purse of defence inspection of the material. Whilst, under existing court guidelines, it would not have been right to give the defence the keys to the warehouse, there was scope for a more liberal approach. The *Disclosure Manual*[120] (as had the *JOPI*) suggests that any doubt prosecutors may have as to the disclosability of any material should be resolved in favour of disclosure. In line with this, the *Disclosure Protocol* for R v Mouncher and others, which was intended to steer a sensible course between granting the keys to the warehouse and a strict application of the statutory test, referred to *"…the most liberal possible interpretation…"* of relevance stated that, *"For the purposes of primary disclosure it should be assumed that material considered to assist the defence, no matter how obscurely, also undermines the prosecution case."* In the face of the general guidance in the *Disclosure Manual* and the specific provisions of the *Disclosure Protocol*, we were surprised to see a narrow approach to the disclosure test (for example, in relation to credibility of witnesses at the primary stage). The relatively rigid approach to requests for disclosure after service of the MG6Cs, which persisted for some time, resulted in continuing correspondence about some items. The prosecution was not helped by the failure of some defence teams to explain how they thought the requested material met the disclosure test. But a more liberal approach

117 The *Disclosure Manual* applied from 4 April 2005. It replaced the previous *Joint Operational Practice and Instructions* (the *JOPI*), which had also been agreed with ACPO.

118 In a Gateway Review a senior lawyer from another CPS area or Headquarters Directorate with considerable experience of disclosure will conduct a quality review of disclosure processes and the approach to the disclosure test in certain serious and complex cases and report to the DCMP or, in some other cases an equivalent local management panel.

119 *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court,* paragraphs 30 and 31.

120 *Disclosure Manual*, paragraph 12.18.

would have saved a great deal of time for everyone and been less disruptive to the court, as well as avoiding or reducing the impression that the prosecution was constantly on the back foot with regard to disclosure.

9.4 Anyone reading the court transcripts, however, can be left in no doubt that the main issue troubling the court related to the missing notes of meetings with the original LWI defendants and the content of some of those that were available. The police and the prosecution were faced with a difficult task in treating as victims people who were key witnesses in the case. The CPS's decision to meet the LWI defendants appears to have been taken under the discretionary provision of the CPS's direct communication with victims scheme. Guidance given in the DCV scheme requires a full note of any meeting to be made and warns that things said in the meeting could be disclosable to the defence. Whilst the *Disclosure Manual*[121] indicates that letters sent to victims will not routinely need to be disclosed to the defence under the CPIA, it goes on to say that disclosure issues should be kept under review and that any response from a victim should be scheduled and handled in accordance with the CPIA. At the meetings, the LWI defendants and their solicitors responded to information provided and asked questions. CPS lawyers present seem to have been aware of the sensitivity of the meetings and the need to keep a record of them. In spite of this, some unwise things were said by prosecutors at some meetings and satisfactory note taking arrangements were not set. Although the matter should have been obvious, it would be helpful, in the light of this case, if the *Disclosure Manual* was more explicit.

Recommendation

The *Disclosure Manual* should explicitly state that, where direct communication with victims (DCV) meetings occur before a case is finalised, CPS notes of them should be agreed as far as possible and enter the disclosure process through the police disclosure officer.

9.5 We were surprised to find that D30 (the witness contact log and material) was not examined by a lawyer in a case that was so sensitive that the police had established an Independent Advisory Group with which they and the CPS consulted periodically, and in which CPS lawyers and senior police officers had together attended a number of meetings with the original LWI defendants and their solicitors while the case was still being reviewed. The *Disclosure Manual* should emphasise the importance of a full review by lawyers of contact logs to manage the risk that police disclosure officers do not appreciate the difference between contact that is merely administrative and updating and contact that could be disclosable.

9.6 The schedule of all contacts with key witnesses referred to by the trial judge is a sensible approach in large, complex or sensitive cases. Last minute checks in R v Mouncher and others resulted in the disclosure of a number of accounts or contacts (such as house-to-house forms) that had not been previously disclosed. These checks should have been made before the trial started. The CPS should advise lawyers to produce, in appropriate cases, witness packs as described to us by lawyers who regularly instructed the trial judge when he was at the Bar.

121 *Disclosure Manual,* paragraphs 20.14 and 20.15.

9.7 In many instances, it was not clear why an item was marked CND (clearly not disclosable). The *Disclosure Manual* does not require prosecutors to enter an explanation for not disclosing an item. Although the comments column of the MG6C could be used for this purpose, it would be an onerous task to give an explanation for every decision on an MG6C that in this case ran to more than 5,400 pages. It would have helped, however, if the prosecution had set out the criteria by which it had assessed material, either in the *Disclosure Protocol* or in a separate document. The criteria were eventually made available in an attachment to a witness statement made by Mr Haskell on 26 September 2011.

Recommendation

At the primary disclosure stage, the prosecution should provide to the defence and the court a summary of the disclosure processes adopted, including a clear description of and the rationale for the parameters employed in the identification of undermining or assisting material.

9.8 We had difficulty identifying what was disclosed at the secondary stage and during continuing disclosure. The *Disclosure Manual* states that the MG6C should be endorsed with the updated decisions and the reasons for them. We would add that the endorsement should include the date of the decision and the identity of the decision-maker. The MG6C in R v Mouncher and others was not endorsed with updated decisions, which accords with our experience in many other cases. Most disclosure at these stages in R v Mouncher and others took place under cover of correspondence. A log of requests and responses was started but not continued. Prosecutors therefore had to search through correspondence bundles, the updates to the computer hard drives served on the defence or rely on police use of HOLMES to discover the required information. It is sometimes necessary to be able to demonstrate to the court what has been disclosed during the secondary and continuing stages of disclosure.

9.9 The *Disclosure Manual* gives sensible guidance on the selection and appointment of disclosure counsel, including setting out clearly:

- The parameters of disclosure counsel's role
- The tasks
- The level of autonomy
- The type of decisions that counsel can take
- The type of decisions that have to be referred to the reviewing prosecutor
- The role of disclosure counsel in any subsequent trial

9.10 As we noted earlier, Mr Haskell was not provided with written instructions about his role. In practice he simply carried on from the work of Mr Thomas which evolved through the E-Catalogue system into one carrying a much higher level of responsibility than was appropriate. We understand that the CPS is considering the creation of a list of approved disclosure counsel. This should help to ensure that only those with the necessary experience are instructed in future. It may also allow them, in appropriate cases, to fulfil the whole disclosure role rather than simply recommend decisions to a reviewing lawyer, and so avoid duplication of work.

9.11 The *Disclosure Manual* also provides guidance on the common issues that prosecutors should consider when applying the disclosure test. This is capable of working satisfactorily in simple cases where only one police disclosure officer will be working on the case. In R v Mouncher and others there were several police disclosure officers and a lead police disclosure officer. Mr Haskell produced specific guidance for them at both the primary and secondary stages, having discussed it with Mr Dean QC and Mr Bennett. With the benefit of hindsight, it would have been helpful if the guidance had been more detailed and it would have benefitted from an open discussion with all police disclosure officers before it was finalised. The *Disclosure Manual* should say more about how to approach the setting of case specific guidance in cases with more than one police disclosure officer to ensure consistency. This case would also have benefitted from an agreement about the inclusion in MG6C descriptions of key locations or persons mentioned in the material described. These will vary according to the facts of a case, but guidance should require prosecutors to consider how to achieve this.

9.12 The *Disclosure Manual* draws attention to the need to use project management techniques in large scale cases[122]. There was some evidence of this approach in R v Mouncher and others, but there was too little formal review of the application of agreed processes or policies. For example, prosecutors do not appear to have addressed the departure from the block listing guidance given by Mr Thomas. Effective project management requires regular assessment of compliance with agreed processes. In practice, it focussed mainly on whether work was progressing to the expected timescales. Most CPS line managers generally did not pay close enough attention to the case, particularly the level of legal experience required. They were very concerned about cost. Whilst important, it is also necessary to avoid false economies. Some reports to DCMPs were not as helpful as they could have been. The independent assessments of disclosure[123] now required by DCMPs should help to address this. We do not, therefore, make a recommendation on this, but we believe that there is merit in considering a suggestion made to us by Mr Dean QC that experienced specialist police officers should join the CPS assessors. In appropriate cases, this would assist lawyers in understanding the capability of police systems, including HOLMES, to address any concerns identified.

9.13 Quality assurance arrangements should be part of any project management approach and are particularly important in large cases, especially where there are a number of police disclosure officers. Several quality assurance exercises were undertaken in R v Mouncher and others with varying success. In the main, they related to the quality of police work on disclosure. Similar exercises should have been undertaken in relation to the work of disclosure counsel, particularly given his limited experience at the time he worked on the case. Although Mr Cohen's review of MG6Cs achieved this to some extent, it is not clear how far he considered the E-Catalogues on which much of Mr Haskell's work was recorded. Time should have been built into the stage plans created by the CPS to manage counsel's work for leading counsel to fulfil his

122 *Disclosure Manual*, chapter 29.

123 The Gateway Reviews described at paragraph 9.2.

supervisory role and ensure that disclosure was being handled in accordance with the *Disclosure Protocol*. The *Disclosure Manual* does not deal with quality assurance arrangements.

Recommendation

The *Disclosure Manual* should require quality assurance exercises to be conducted in large cases (indicating the main areas on which they should normally focus) and require the maintenance of a log of quality assurance exercises conducted.

10 Conclusions and recommendations

10.1 We received a number of suggestions from people whom we contacted for changes to the way in which disclosure is managed in large and complex cases. We were particularly grateful for the thoughtful and considered views on these points of Mr Dean QC, Mr Haskell and DS May. We adopt some of them in the following paragraphs, sometimes with variations. Some have already been identified by the CPS and implemented or are planned.

10.2 Disclosure is as important as investigating the allegations and building the prosecution case. It should be treated with the same seriousness if cases are to meet the challenges they face at trial. In large or complex cases it places onerous responsibilities on police disclosure officers and prosecutors. It requires the commitment of substantial resources if it is to be carried out effectively. The police and prosecutors must, therefore, undertake careful joint planning and project management from an early stage of an investigation. Despite the determination and hard work of many people, the approach to disclosure in R v Mouncher and others did not consistently meet the necessary standards.

10.3 Many of the disclosure problems that arose could have been avoided by following the guidance given in the *Disclosure Manual*. It is a comprehensive document, with which we could find little fault. We have already made some suggestions for minor changes to it and to CPS's guidance for the handling of specific types of unused material in large and complex cases in chapter 9. It should not be necessary to remind CPS lawyers to follow such important guidance. They also have a responsibility to ensure that disclosure counsel follows it and does not stray into matters that are for the police to decide. There is little doubt that, until it emerged that the D7447 and D7448 material was missing, the main focus of concern about disclosure centred on the D30 witness contact material. Mr Dean QC had, however, hoped to persuade the judge to allow the case to continue. He would have had to contend with the formidable doubts about the appropriateness of the content of some of the meetings with the original LWI defendants and, more importantly, the difficulty that notes of some meetings could not be found. The CPS already has appropriate guidance for lawyers who attend meetings with witnesses about the information that should be given and the importance of a full record of such meetings. It is difficult to understand why those notes that existed were not put into the disclosure process, particularly given Mr Thomas's warnings to Mr Gold[124] that his notes should be preserved for potential disclosure to the defence[125]. **We have already made recommendations about these points in chapter 9.**

10.4 We have reported a number of other concerns about the approach to the disclosure test, particularly at the primary stage. Some of the problems were avoidable if the prosecution had not taken too narrow an approach to the disclosure test and intervened too readily on the application of the relevance test, which is primarily a matter for the police[126]. It was unwise to treat as irrelevant items put forward by the police for consideration of disclosure.

124 The first reviewing lawyer and Mr Miller's solicitor.
125 See paragraph 7.24.
126 See *A narrow approach to the relevance test* in chapter 8.

10.5 A narrow or over analytical approach also risks generating a large number of defence requests in secondary and continuing disclosure. The prosecution team estimated that they received about 6,000 such requests in R v Mouncher and others. It also put an enormous burden on prosecution advocates during the trial. It is their responsibility to keep disclosure under constant review as the evidence unfolds. This is obviously very difficult where there are thousands of pages of unused material, much of which has not been disclosed. It was made even more difficult in this case because disclosure counsel (and junior counsel) were not in the courtroom for very substantial periods while they worked on replies to disclosure requests, proposed admissions and so on. Whilst prosecutors have been urged by the courts to adopt a thinking approach to disclosure, this can go too far. They should not over analyse the potential defence case(s) and certainly should not make judgments about the wisdom of the defence pursuing a line of defence that is apparent from the case papers.

10.6 With hindsight, it is clear that there were flaws in the approach to the relevance and disclosure tests. The quality assurance exercises concentrated almost exclusively on the work of police disclosure officers. There was no compendium of all disclosure policies to be applied. The team meetings should also have required periodic checks on compliance with agreed disclosure policies by lawyers as well as by police disclosure officers. Sampling of E-Catalogues might have exposed the narrowness of the approach to relevance and disclosability at the primary stage, which differed from the approach outlined in the *Disclosure Protocol*. We were also surprised to find that the primary stage E-Catalogues were not reviewed during secondary disclosure.

10.7 Whilst many of the mistakes or oversights in R v Mouncher and others did not disadvantage the defence or were capable of correction - and corrected - during the trial, their cumulative effect enabled the defence to undermine confidence in the disclosure process. This was also a failure of case management, particularly the lack of supervision of (inexperienced) disclosure counsel's work. It is important that sufficient resource is devoted to disclosure to minimise the number of minor errors as well as to ensure that all defence themes - including those not articulated but apparent from caution interviews, correspondence and other sources - are identified and taken into account when making disclosure decisions. The burden of this on police disclosure officers and prosecutors should not be underestimated.

10.8 It is important to note, however, that a great deal of unused material was disclosed to the defence and that the number of disclosure decisions questioned at court represented a very small proportion of the decisions made. Some criticisms were unwarranted. We also found some examples of **good practice**, including the provision of bespoke training to police disclosure officers, quality assurance exercises, the complete re-review of all unused material, including that listed as irrelevant, as part of secondary disclosure and intelligence checks made by the police in the lead up to a witness giving evidence. The training sessions used a list of the issues against which disclosure decisions were to be made. Indeed, these sessions, particularly the one on secondary disclosure, were more than simple training. They appear to have been more of a seminar in which the approach to disclosure was set. They would, however, have benefitted from the

presence of all those who were to be involved in disclosure, including the reviewing lawyers, and the agreement of a more detailed outline of the way in which material could undermine the prosecution case or assist the defence case. The Prosecution Disclosure Management Document should include, where necessary, an analysis of and proposals for officer training and guidance specific to the instant case, and for quality control measures.

10.9 The seeds of disclosure failure were, however, sown early in the life of the case. Managers in Casework Directorate and SCD should have played a more active role at the beginning of the case. This would have given them a clearer idea of the resources likely to be needed and should have led to a more considered approach to the selection of CPS staff and the counsel team to work on it. When the need for additional lawyer resource was appreciated, the appointment of Mr Cohen to a poorly defined "strategic" role that we found difficult to understand led to serious confusion about the ultimate responsibility for decision-making and case management. Because of his seniority in the CPS, it also undermined the accountability of line managers. In chapter 5, we recommended that at the outset of a potentially large, complex or sensitive case, a CPS lawyer with responsibility for the allocation of resources, should meet the police to ensure that the CPS has a full understanding of its implications and to enable the investigators to explain their needs, including the likely burden of disclosure.

10.10 The counsel team did not have sufficient collective experience for the very unusual burdens placed on them by a case that was extremely difficult to prosecute. Where very junior counsel are instructed, the burden on leading counsel is greater. Mr Dean QC himself was a relatively new Queen's Counsel, but we doubt whether anyone could have led such an inexperienced team in such a voluminous and challenging case with the degree of supervision and management required. It is a pity that more attention was not paid to his repeated requests to instruct an additional experienced junior.

10.11 The *Disclosure Manual*[127] states that disclosure in large and complex cases requires a project management approach. The weakness of the project management arrangements in R v Mouncher and others resulted in leading counsel and CPS lawyers being poorly sighted on important issues, particularly the supervision of Mr Haskell's work on E-Catalogues. The project management arrangements should deal with the quality of disclosure work, not just the processes and progress. Whilst there were a number of quality assurance exercises, they did not correct all errors and reports about them to the prosecution team meetings tended to be quantitative rather than provide an analysis of the underlying causes. This led Mr Dean QC to comment on a number of occasions that these exercises demonstrated the robustness of the disclosure regime. Underlying errors should have been summarised in reports to the team meetings so that the remedial action could be demonstrated to the court if necessary.

127 *Disclosure Manual*, chapter 29.

10.12 Fuller use of a project management approach might also have avoided other problems, including poor MG6C descriptions, the inappropriate use of block lists, the treatment of secondary source and duplicate material and obtaining third party material. We have made specific comments about these matters in the relevant sections of chapter 8.

10.13 The prosecution should also have been more robust in managing the defence approach to disclosure. Many disclosure requests offered little by way of justification for seeking the items mentioned. Some were repeated with little additional information. Whilst the prosecution repeated its requirement for the request to be justified, prosecutors could have raised the matter sooner with the trial judge as an issue for submissions at one of the pre-trial hearings or by inviting the defence at the hearings to identify specific or problematic disclosure issues. Alternatively, the prosecution might have invited the defence to make an application to court under section 8 CPIA[128]. The latter approach might well have produced a fuller justification for the request in the application itself or in a skeleton argument to support it. The prosecution's efforts to avoid troubling the court with these matters was ultimately counterproductive.

128 The (unamended) version of section 8 of the Criminal Procedure and Investigations Act 1996 that applied to this case. It enables defendants to apply to the court for an order requiring the prosecution to disclose material which *"…might reasonably be expected to assist the accused's defence as disclosed by the defence statement"*.

10.14 We found no evidence that prosecutors or police disclosure officers made decisions for any improper reason. Police disclosure officers were given considerable guidance by Mr Thomas and Mr Haskell. They made some mistakes in applying the guidance, but these represented a very small proportion of all the disclosure decisions that were made and many were discovered and corrected as a result of the quality assurance exercises. They also submitted many items to Mr Haskell that they considered to be relevant and potentially disclosable, a few of which he decided were not relevant. In our view some of them should have been scheduled. Although the full re-review of unused material after the service of defence statements resulted in significant further disclosure, some of these items should have been disclosed at the primary stage.

10.15 Finally, however good the processes adopted to manage disclosure and the available guidance, compliance with the prosecution's duties depends on the correct application of the disclosure test by lawyers, a realistic understanding of the likely defence case and what might be termed the disclosure mindset. Whilst it is right to adopt what the Court of Appeal has described as a "thinking approach" to disclosure, it is also important not to become over analytical. Doubts about whether to disclose particular material should be resolved in favour of disclosure and not deferred for later consideration. Similarly, decisions about borderline questions of relevance should result in the material concerned being scheduled.

Annexes

A Methodology

The review team was led by Her Majesty's Chief Inspector of the Crown Prosecution Service, who is a barrister (non-practising) and former Chief Constable with over 30 years' experience of investigating serious crime. He was assisted by two experienced inspectors who were, respectively, a solicitor with more than 15 years with a prominent criminal defence firm and a barrister with ten years specialising in prosecuting and defending criminal cases. They were joined by a retired Chief Crown Prosecutor. They were also helped on specific aspects of the review by another inspector and a retired inspector. It is estimated that the cost of the review was £250,000.

To gain an overview of the case, we first considered a lengthy note submitted to the DPP by Mr Dean QC explaining how the case ended, together with his opening speech to the jury and his review of the evidence in August 2006. We were also greatly assisted by the Head of SCD, Mr Clements, who outlined the history of the case in an interview in February 2012. Similarly, in March 2012 leading counsel, Mr Dean QC, gave us an overview of the disclosure and other problems that the prosecution encountered. Both Mr Clements and Mr Dean QC were interviewed again in late 2012 when we had considered evidence gathered from other sources.

We received 136,736 megabytes of electronic information and collated the evidence that we have relied on into notes totalling 1,784 megabytes. Some electronic sources required expert assistance to access because they were stored on the locked computer accounts of people who had left the CPS. In the absence of a caseworker at court, almost all the information generated during the 76 days of the trial was not transferred to CPS systems, but was stored on computers belonging to counsel or the police. Whilst much of it had been printed for use in court, the police seized this when the case collapsed and placed it in 101 boxes which were taken to the MIR. The MIR was, in turn, sealed with strictly controlled access. Some material existed only in the MIR. It took some time, therefore, for the team to be assured that it had access to all relevant information. Some turned out to be duplicated and it was also difficult to be sure that some versions were those finally relied on in court.

We considered 76 days of court transcripts, paying particular attention to the legal submissions about disclosure, but also considering how the defence put their case to prosecution witnesses. We did not read all the prosecution evidence bundle, but considered any that had a bearing on legal arguments or disclosure.

The electronic CPS case file ran to 924 megabytes. It did not contain the evidence or unused material, which was recorded separately. It contained correspondence, notes of conferences, advice from counsel, review notes, reports to DCMPs, finance details, and a range of other material. We considered it all, concentrating on documents that related in any way to disclosure. We also read more than 10,000 emails from an electronic mailbox. Whilst some duplicated material on the CPS electronic case file, it also included a great deal of internal discussion and exchanges with counsel and the police.

The MG6C exceeded 5,400 pages. It is estimated that there were over 6,000 defence requests for disclosure. The E-Catalogues, which were a very important part of the disclosure process, were stored in the MIR. South Wales Police helpfully checked some material for us on HOLMES.

Some of the CPS staff who had been involved with the case, including those with the most detailed knowledge of it, had retired by the time our review was commissioned. Others had long before ceased to play a role in the case. Although it was not as easy as we had expected to arrange interviews or gain agreement to respond to questionnaires with a few, all helped us by answering questionnaires or attending interviews. Altogether, we received responses from 12 individuals to whom we sent questionnaires, most of which were lengthy. We conducted and transcribed interviews with eight key people. Some were interviewed twice. In total the interviews lasted 47 hours over 11 days. We also received written submissions from a number of defence counsel.

The review team paid three visits to the MIR totalling eight days to inspect material stored there. Quite properly, the material was arranged for the benefit of the police, who are dealing with a number of complaints and civil proceedings related to the case. We were grateful for the assistance of the officers who work there in locating material that we needed to see, including many of the working documents relating to disclosure. They saved us considerable time.

We reviewed all the evidence that we collected and condensed it into review notes according to the themes that we identified. Our findings on these themes form the main body of this report. We also took into account the findings of reviews of a number of other large cases that encountered difficulties with disclosure.

B D7447 MG6C and E-Catalogue and D7448 MG6C

D7447 and D7448 MG6C page 1

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Form MG 6C

POLICE SCHEDULE OF NON-SENSITIVE UNUSED MATERIAL

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R v MOUNCHER & OTHERS URN:

The Disclosure Officer believes that the following material, which does not form part of the prosecution case, is NOT SENSITIVE

Holmes URN	Material Type	Description and Relevance Give sufficient detail for CPS to decide if material should be disclosed or requires more detailed examination (For guidance refer to the Prosecution Team Disclosure Manual and Attorney General's Guidelines	Location State precisely where the item can be found / located	Note	FOR CPS USE: *Enter: D = Disclose to defence I = Defence may inspect CND = Clearly not disclosable *	COMMENT
		THE ORIGINAL SUSPECT INTERVIEWS OF [redacted]				
D7447	EDITED DOCUMENT	MATERIAL FROM IPCC RELATING TO FOUR SEPARATE COMPLAINTS BY [redacted] AGAINST THE SOUTH WALES POLICE. FIRST COMPLAINT (JULY 2005) WHEN [redacted] WAS SPRAYED WITH CS SPRAY; SECOND COMPLAINT (OCTOBER 2005) WHEN [redacted] WAS ALLEGEDLY RACIALLY ABUSED; THIRD COMPLAINT (OCTOBER 2006) WHEN [redacted] WAS SUBJECT TO STOP AND SEARCH; AND FOURTH COMPLAINT (APRIL 2007) WHEN [redacted] WAS ALLEGEDLY VERBALLY ABUSED. ALL FOUR COMPLAINTS WERE UNPROVEN.	INCIDENT ROOM ST ATHAN	ZH	CND	
D7448	EDITED DOCUMENT	FIVE FILES WHICH RELATE TO CIVIL CLAIMS BROUGHT AGAINST SOUTH WALES POLICE BY [redacted]	INCIDENT ROOM ST ATHAN	ZH	CND	

Signature: [redacted] Name: [redacted] Reviewing Lawyers signature :

Date: 14TH OCTOBER 2009 Print Name:

Date:

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2006/07(1)

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Form MG 6C

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POLICE SCHEDULE OF NON-SENSITIVE UNUSED MATERIAL

R v MOUNCHER & OTHERS **URN:**

The Disclosure Officer believes that the following material, which does not form part of the prosecution case, is NOT SENSITIVE

Holmes URN	Material Type	Description and Relevance Give sufficient detail for CPS to decide if material should be disclosed or requires more detailed examination (For guidance refer to the Prosecution Team Disclosure Manual and Attorney General's Guidelines	Location State precisely where the item can be found / located	Note	FOR CPS USE: *Enter: D = Disclose to defence I = Defence may inspect CND = Clearly not disclosable *	COMMENT
		[redacted] AND [redacted] IN 2008. THE CLAIMS ALLEGE FALSE IMPRISONMENT AND PERSONAL INJURY. EACH FILE CONTAINS DOCUMENTS INCLUDING A CLAIM FORM, CONSENT ORDER AND CORRESPONDENCE BETWEEN THE PARTIES. ALL CIVIL CLAIMS HAVE BEEN STAYED PENDING THE OUTCOME OF THE CRIMINAL PROCEEDINGS.				

Signature: [redacted] **Name:** [redacted] **Reviewing Lawyers signature :**

Date: 14TH OCTOBER 2009 **Print Name:**

Date:

RESTRICTED

2006/07(1)

D7447 E-Catalogue page 1

LYNETTE WHITE PHASE III - POST CHARGE ANALYSIS OF UNUSED MATERIAL

[redacted]

DOCUMENT NO	ISSUE DESCRIPTION	IS THE MATERIAL CAPABLE OF HAVING ANY IMPACT ON THE CASE. 2.1	CAN ITEM BE BLOCK LISTED. 6.10.	DOES IT UNDERMINE	DOES IT ASSIST	COMMENTS
1	statement of complaint [redacted] Makes complaint re search of premises and arrest of [redacted] Complains about [redacted] and [redacted] and [redacted]					I have reviewed this lengthy statement [redacted] is plainly very hostile to the whole investigation & is angry that [redacted] was arrested on suspicion of conspiracy. Within [redacted] statement are a number of unsubstantiated allegations & a number of derogatory remarks. These relate, on the whole, to [redacted] & [redacted] In my view, there is nothing to suggest that the credibilty of those individuals will be in issue in the ongoing proceedings. Consequently, this material is not relevant to the current prosecution. The Crown has a continuing duty of disclosure & if in the future (after DCS) the credibilty of [redacted] does become an issue, this material can be revisted. No need to schedule.

D7447 E-Catalogue page 2

LYNETTE WHITE PHASE III - POST CHARGE ANALYSIS OF UNUSED MATERIAL

[redacted]

DOCUMENT NO	ISSUE DESCRIPTION	IS THE MATERIAL CAPABLE OF HAVING ANY IMPACT ON THE CASE. 2.1	CAN ITEM BE BLOCK LISTED. 6.10.	DOES IT UNDERMINE	DOES IT ASSIST	COMMENTS
2	Complaint of racial abuse by Police officers towards [redacted] October 2005 [redacted] May undermine [redacted] credability as it is suggested that the complaint may be malicious and Investigating officer suggested in a report of considering prosecuting [redacted] for wasting Police Time.					This material is relevant. I have considered whether this should be disclosed. Does it undermine [redacted] credibility? The first point is that it is unclear to what extent [redacted] credibility will be in issue: in any event, I am unconvinced that this does undermine [redacted] has made complaints & whilst they have not been proven, that is not to say that the allegations were untrue. I do not agree entirely with [redacted] observations [redacted] says the complaint "may be" malicious, but cannot support that conclusion, other than say that the evidence neither proves nor disproves the complaint. For the moment, I am satisfied this material should be on the MG6C. It can be re-assessed if it apparent from DCS that [redacted] credibility is in issue.

D7447 E-Catalogue page 3

LYNETTE WHITE PHASE III - POST CHARGE ANALYSIS OF UNUSED MATERIAL

[redacted]

DOCUMENT NO	ISSUE DESCRIPTION	IS THE MATERIAL CAPABLE OF HAVING ANY IMPACT ON THE CASE. 2.1	CAN ITEM BE BLOCK LISTED. 6.10.	DOES IT UNDERMINE	DOES IT ASSIST	COMMENTS
3	Complaint following drug search of [redacted] 3 October 2006 alleged false imprisonment assault harassment use of force and abuse of authority etc against searching officers and appeal against finding of no case to answer (Appears to be irrelevant)					My view is that this material is relevant ([redacted] is a prosecution witness) and should be scheduled on the MG6C.
4	Complaint July 05 of assault after being sprayed with CS Spray [redacted] after being requested to assist police by [redacted] (Appears to be Irrelevant)					My view is that this material is relevant ([redacted] is a prosecution witness) and should be scheduled on the MG6C.

C Glossary

Director's Case Management Panel (DCMP)
An arrangement under which the Director of Public Prosecutions seeks to assure himself that cases likely to last a long time are being managed effectively.

Disclosure Protocol
A document prepared by the prosecution and served on the defence and the court in April 2009 outlining the prosecution's approach to disclosure.

E-Catalogues
Documents on which disclosure officers summarised material that they submitted to disclosure counsel for decisions on its disclosability and on which disclosure counsel recorded the reasons for his decisions.

Gross report
Review of Disclosure in Criminal Proceedings, Rt. Hon Lord Justice Gross, September 2011

HOLMES
A computer system used by police forces to manage information in large and complex cases.

The Independent Police Complaints Commission (IPCC)
A statutory body responsible for the investigation or supervision of investigations into allegations of police misconduct.

Legal Professional Privilege (LPP)
Information passing between a solicitor and his client that generally remains confidential and cannot be obtained by the police.

LWI
The first investigation into the murder of Lynette White and the resulting prosecutions in 1988, 1989 and 1990 and the successful appeals of those convicted.

LWII
The second investigation into the murder of Lynette White (known as Operation Mistral) resulting in the guilty plea of Jeffrey Gafoor.

LWIII
The investigation into how the original five LWI defendants came to be arrested, charged and tried for the murder which Mr Gafoor admitted he had committed alone.

Major Incident Room (MIR)
The facilities used by the police for major enquiries.

Major Incident Room Standardised Administrative Procedures (MIRSAP)
The normal administrative arrangements for managing information in a Major Incident Room.

MG6C
The form on which non-sensitive unused material is scheduled.

MG6D
The form on which sensitive unused material is scheduled.

MG6E
The Disclosure Officer's Report on which material he or she considers meets the disclosure test should be identified.

Prosecution Disclosure Policy Document
A document similar to the Disclosure Protocol that the *Disclosure Manual* requires prosecutors to complete in large and complex cases.

Section 8 Criminal Procedure and Investigations Act 1996
The (unamended) version of section 8 of the Criminal Procedure and Investigations Act 1996 that applied to this case. It enables defendants to apply to the court for an order requiring the prosecution to disclose material which *"…might reasonably be expected to assist the accused's defence as disclosed by the defence statement"*.

D The key players

Lynette White	the victim, murdered in February 1988

The original LWI defendants

Stephen Miller
Anthony Paris
Yusef Abdullahi
John Actie
Ronnie Actie

The Core Four

Angela Psaila
Leanne Vilday
Mark Grommek
Paul Atkins

Jeffrey Gafoor	pleaded guilty in 2002 to the murder of Lynette White

The principal prosecution lawyers

Nicholas Dean QC	leading counsel
James Bennett	junior counsel
James Haskell	disclosure counsel and later second junior counsel
Ian Thomas	the first CPS reviewing lawyer from 2003 until 2007
Gaon Hart	replaced Mr Thomas as CPS reviewing lawyer in 2007 until 2009
Howard Cohen	CPS lawyer with strategic oversight of the case and responsibility for disclosure from 2006 until January 2011
Simon Clements	Head of CPS Special Crime Division from 2008
Carmen Dowd	Head of CPS Special Crime Division from 2005 until 2008
Christopher Enzor	Head of the Northern and Midlands offices of Casework Directorate until 2005
Ian Frost	Manager of the Midlands office of Casework Directorate until 2005
Asker Husain	Unit Head in CPS Special Crime Division Directorate from 2006 until 2012

The defendants in R v Mouncher and others

Graham Mouncher	John Seaford
Richard Powell	Violet Perriam
Thomas Page	Ian Massey
Michael Daniels	
Paul Jennings	
Paul Stephen	
Peter Greenwood	