Criminal Disclosure Regime in the Digital Age

Comparative research of disclosure in common law jurisdictions

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EXECUTIVE SUMMARY

I. PURPOSE AND SCOPE OF THE RESEARCH

1. Spotlight on Corruption, a non-profit organisation operating in the United Kingdom, has asked OPBP to prepare a report on the criminal disclosure regime in comparable common law jurisdictions, with a specific focus on the rules and processes applicable to criminal cases involving large volumes of digital material such as complex fraud and corruption cases.

2. Spotlight on Corruption has the stated aim of shining a light on the UK's role in corruption at home and abroad, by highlighting corruption and the harm it causes and campaigning to improve the UK's legal systems and enforcement of the law. Spotlight's Executive Director, Dr Susan Hawley, has been invited to sit on the advisory panel contributing to the Independent Review of Disclosure and Fraud Offences in England, Wales and Northern Ireland led by Jonathan Fisher KC.[1]

3. OPBP's contribution to Spotlight on Corruption is focused on providing valuable comparative insights into the legal frameworks governing disclosure in some common law jurisdictions. This project will better equip Spotlight on Corruption to contribute to Jonathan Fisher KC's review and support their ongoing policy research and advocacy relating to disclosure in complex economic crime and corruption cases.

4. This report seeks to understand the legal framework of criminal disclosure regimes in the following jurisdictions: Australia; Canada; and the United States of America. For each of the jurisdictions, the report introduces the criminal disclosure regime in operation in brief and then highlights the relevant judicial decisions, where applicable. Particular attention is paid to the specific rules or cases involving large volumes of digital material and economic crime cases. The report finally considers recent academic studies or government reviews of how the criminal disclosure regime is operating in practice, where applicable.

[1] Home Office, 'Independent Review of Disclosure and Fraud Offences' (*Government of the United Kingdom*, October 2023) <https://www.gov.uk/government/collections/independent-review-of-disclosure-and-fraud-offences> accessed 2 April 2024.

II. CHALLENGES OF 'DISCLOSURE REGIME' IN THE DIGITAL AGE

5. In democratic regimes, to secure the right to a fair trial, the criminal procedure often establishes a duty of the prosecution to provide the defence with access to any material which might reasonably be capable of influencing the outcome of the case, whether undermining the prosecution's case or assisting the accused. This duty of disclosure is a fundamental safeguard and tenet of the justice system of England, Wales and Northern Ireland and finds statutory footing in the Criminal Procedure and Investigations Act 1996 (CPIA).[2]

6. Complex economic, fraud, and corruption cases often involve millions of documents, and complying with the disclosure duty might become challenging. In an attempt to keep up with the scale and complexity of disclosure in the digital age, the Attorney General of the UK has issued guidelines on disclosure for investigators, prosecutors, and defence practitioners dealing with large quantities of digital material.[3]

7. Nevertheless, several recent high-profile cases prosecuted by the Serious Fraud Office have collapsed owing to disclosure failures, raising questions about the suitability of the current disclosure regime.[4] Spotlight on Corruption has closely followed these Serious Fraud Office trials as part of their court monitoring programme.

III. JURISDICTIONS COVERED

8. The following jurisdictions are considered in this report:

    1. Australia
    2. Canada
    3. United States of America (USA)

9. The jurisdictions explored in the report were selected in conjunction with Spotlight on Corruption

[2] Criminal Procedure and Investigations Act 1996 (CPIA 1996).
[3] Government of the UK, 'Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners' (*Attorney's General Office,* 2020) <https://assets.publishing.service.gov.uk/media/5fdca7fd8fa8f514967c62b7/Attorney_General_s_Guidelines_2020_FINAL_Effective_31Dec2020.pdf> accessed 16 April 2024.
[4] Sam Tobin, 'Collapse of UK fraud office case raises resource, disclosure issues' (*Reuters*, 10 March 2023) <https://www.reuters.com/world/uk/uks-sfo-drops-prosecution-three-former-g4s-executives-2023-03-10/> accessed 16 April 2024.

to understand the legal framework governing criminal disclosure regimes in common law and commonwealth jurisdictions. While civil law countries also have their own rules regarding criminal disclosure, Spotlight on Corruption was primarily interested in common law jurisdictions which are most similar to the law in England and Wales.

IV. RESEARCH QUESTIONS

10. The report is structured around five research questions:

(i) What is the legal test for determining what material should be disclosed or made accessible to the defence in criminal cases?

(ii) Are there any specific legal rules and/or policy guidelines applicable to disclosure in criminal cases involving large volumes of evidence or digital material?

(iii) Are there any specific legal rules and/or policy guidelines applicable to disclosure in complex economic crime cases, such as fraud and corruption?

(iv) Have there been notable case law developments in recent years relating to disclosure in complex economic crime cases, such as fraud and corruption?

(v) Have there been any recent academic studies or government reviews of how the criminal disclosure regime is operating in practice?

V. SUMMARY

11. From the analysis of the jurisdictions that are covered in this report, some commonalities and divergences can be observed. The individual summaries below try to capture those commonalities and divergences in brief: the nature of disclosure, its scope and exceptions, specific rules for organization and search of disclosure materials, and the overall suitability of the disclosure regime.

12. All the jurisdictions analysed provide for the duty of prosecutors to promote the disclosure of material that could influence the outcome of the case. While in Canada and the US, disclosure is also a right of the accused, in Australia the duty of disclosure is an obligation to the Court, not the

accused. The research highlights that such differences can result in less oversight of the prosecutor's duty to disclose when it is considered as part of their wider duties to the court, by relying upon their assessment of what guarantees the defendant's fair trial rights, which can be impeded in an adversarial system where the prosecutor is a partisan individual. Similarly, exceptions to the duty of disclosure apply in all jurisdictions, mainly based on public interest and privileged documents.

13. In complex cases involving a large volume of digital material, all jurisdictions give special attention to the timing of disclosure, as well as to the organisation of the disclosed material in order to ensure that disclosure of evidence is meaningful, and able to be understood by defendants who are often significantly more under resourced to handle disclosure of large amounts of digital data. In this regard, the US government, through the Joint Working Group on Electronic Technology in the Criminal Justice System, has issued guidelines for practitioners, judges and pretrial detainees with best practices for management of electronic discovery between the Government and defendants charged in federal criminal cases. In Canada, it is expected that the evidence is searchable and accessible for the disclosure to be meaningful. In Australia, there is only a recommendation that the parties consider the use of technology in cases requiring the disclosure of more than 500 documents and consider creating a 'data map'.

14. Overall, all jurisdictions seem to face the challenge of keeping up with the speed of the changes brought by the digital age, even if to different extents. In all of them, there are critics of the current rules and calls for solutions to improve the disclosure regime, particularly in complex cases dealing with large amounts of evidence. It is evident that across all three jurisdictions there is a need for further review of criminal procedure in light of technological developments.

AUSTRALIA

INTRODUCTION

15. Australia's criminal law and procedure is inherited from the British common law system, but the review of their rules regulating disclosure of evidence to the defence highlights that it is lagging behind other countries and requires updating to meet modern standards.

16. Similar to other jurisdictions, the obligation of disclosure is on the prosecutor to disclose all relevant evidence to the defence. However, the mechanics of disclosure are mostly managed on a case-by-case basis, with – as stated by the Queensland Supreme Court – electronic discovery for large volumes of evidence often requiring approval, and external file management systems needing to be appointed when courts lack the capacity to manage.

17. Despite a few efforts to reform this system, judges and lawyers still criticise the regime and how it is getting left behind internationally.

I. WHAT IS THE LEGAL TEST FOR DETERMINING WHAT MATERIAL SHOULD BE DISCLOSED OR MADE ACCESSIBLE TO THE DEFENCE IN CRIMINAL CASES?

18. The following principles summarise the legal tests determining what materials need to be disclosed to the defence in criminal cases in Australia, according to the Commonwealth Director of Public Prosecutions (CDPP) Summary of State and Territory Disclosure regimes across different jurisdictions.[5] Since there are no statutory requirements under the Australian Capital Territory (ACT) legislation for summary matters, differs across New South Wales, the Northern Territories, Queensland, South Australia, Tasmania, Victoria and Western Australia apply.

19. The common law principles, namely the duty of procedural fairness, govern disclosure in all

[5] Australia's Federal Prosecution Service, 'CDPP Summary of States and Territory Disclosure Regimes' (*CDPP*, December 2021) <https://www.cdpp.gov.au/system/files/CDPP%20Summary%20of%20State%20and%20Territory%20Disclosure%20Regimes.pdf> accessed 16 April 2024.

matters.[6] The ongoing duty of disclosure mainly rests on police and prosecutors as an obligation to the court, not the accused[7], which increases the prosecution's discretion to decide which materials shall be disclosed. In the *Cannon v. Tahche* (2002) case, the Supreme Court of Victoria explained that the obligation of disclosure is not directly enforceable by the accused.[8]

> The prosecutor's "duty of disclosure" has been the subject of much debate in appellate courts over the years. But, as it seems to us, authority suggests that, whatever the nature and extent of the "duty", it is a duty owed to the court and not a duty, enforceable at law at the instance of the accused. This, we think, is made apparent when the so-called "duty" is described (correctly in our view) as a discretionary responsibility exercisable according to the circumstances as the prosecutor perceives them to be. The responsibility is, thus, dependent for its content upon what the prosecutor perceives, in the light of the facts known to him or her, that fairness in the trial process requires.[9]

20. Complementing the local statutory disclosure obligations of each territory, policy practice and procedures such as the Prosecution guidelines, Barrister Rules and Practice Rules govern what materials should be disclosed on a case-by-case basis.[10]

21. The disclosure duty is considered vital to the administration of criminal justice, and ensuring 'that the accused receives a fair trial is the ultimate criterion for determining what material should be disclosed by the prosecution'.[11] As a rule, the prosecution must first fulfil the specific statutory disclosure obligations of their territory and, if necessary, also comply with the general practices below.

22. A statement from the Commonwealth Director of Public Prosecution[12], applicable to all ACT, sets out what is expected of the prosecution and investigative agencies to fulfil their duty of disclosure.

> Subject to any claim of public interest immunity, legal professional privilege, or any statutory provision to the contrary, in prosecutions conducted by the Commonwealth, the prosecution must, in accordance with this Statement:
> a. first, fulfil any applicable local statutory obligations relating to disclosure; and
> b. second, if not already required by the applicable state or territory provisions, also disclose to the accused, any material which:

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[6] Australia's Federal Prosecution Service, 'Statement on Disclosure in Prosecutions Conducted by the Commonwealth' (*CDPP*, 22 March 2017) <https://www.cdpp.gov.au/sites/default/files/Disclosure%20Statement-March-2017.pdf> accessed 16 April 2024.
[7] Stephen Lawrence and Felicity Graham, 'Prosecution Disclosure (and Non-Disclosure) in criminal matters' (22 June 2018) <https://criminalcpd.net.au/wp-content/uploads/2019/06/Prosecution-Disclosure-and-Non-Disclosure-in-Criminal-Matters-June-20181.pdf> accessed 16 April 2024.
[8] *Cannon v Tahche* [2002] VSCA 84; 5 VR 317
[9] ibid.
[10] ibid.
[11] Australia's Federal Prosecution Service, 'Statement on Disclosure in Prosecutions Conducted by the Commonwealth' (n 6).
[12] ibid.

(i) can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or
(ii) might reasonably be expected to assist the accused to advance a defence; or
(iii) might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.[13]

23. According to the same statement, some types of evidence are excluded from the prosecution's duty of disclosure (unless there is a local statutory provision to the contrary), such as material which is relevant only to the credibility of defence witnesses or the defendant, or material that might deter the defendant from giving false evidence or that might alert and prevent the defendant from creating a trap for himself/herself based on suspect evidence.[14]

24. If the prosecution submitted that they should be able to withhold disclosure on public interest grounds, or professional privilege, or if the material is precluded by statute, the defence should be informed of that and, if possible, be informed of the nature of the non-disclosed material. In such cases, the court must then consider if it is fair to continue the procedure without such disclosure.[15]

25. Disclosure is a continuous obligation, existing from the prosecution process, and continuing after the conclusion of appeals. Additionally, disclosure should occur 'as soon as is reasonably practicable'[16]. Delays in the disclosure may only be justified when disclosing evidence might prejudice ongoing investigations or threaten the security of witnesses or the course of justice.

26. Regarding how to disclose the material, the statement explains that the prosecution may provide electronic or hard copies of the evidence, whether 'via a schedule listing the material or by making the material available for inspection or copying'.[17] If performed via a schedule listing, the prosecution should clearly describe the nature of that material, so that the defence may decide if it wishes to obtain a copy.[18]

27. If the prosecution is not sure whether it needs to disclose some material, they should consult with the relevant Assistant Director at the CDPP on the matter.[19]

28. As mentioned, before resorting to the general rules, the prosecution needs to first comply with the

[13] ibid.
[14] ibid.
[15] ibid.
[16] ibid.
[17] ibid.
[18] ibid.
[19] ibid.

statutory rules of disclosure in its territory. For illustrative purposes, this report will analyse the main disclosure statutory rules in New South Wales (NSW) and Queensland (QLD). Nevertheless, a summary of the criminal disclosure regime in all territories can be found in the CDPP Summary of State and Territory Disclosure Regimes.[20]

a) New South Wales (NSW)

29. The Criminal Procedure Act 1986 of New South Wales establishes that the prosecution must serve a brief of evidence to the accused relating to each offence subject of the proceedings.[21] This brief must include:

> (a) copies of all material obtained by the prosecution that forms the basis of the prosecution's case,
> (b) copies of any other material obtained by the prosecution that is reasonably capable of being relevant to the case for the accused person,
> (c) copies of any other material obtained by the prosecution that would affect the strength of the prosecution's case.[22]

30. Given that the disclosure duty is continuous, if the prosecution obtains new material not included in the brief of evidence, the prosecution must include the new material in the brief 'as soon as practical'.[23]

31. The prosecution is not obliged to provide a copy of the evidence if it is impossible or impractical to copy it or if the accused agrees to inspect the material. In any case, the prosecution is obliged to provide a notice with a reasonable time and place at which the accused may inspect the evidence.[24]

32. Another legal test applied is the exception to obligatory disclosure based on public interest, following Section 130 of the New South Wales Evidence Act 1995 which outlines the conditions of the exclusion of evidence as a State matter.[25]

> (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

[20] Australia's Federal Prosecution Service, 'CDPP Summary of States and Territory Disclosure Regimes' (n 5).
[21] Criminal Procedure Act 1986 (NSW), s 61.
[22] ibid s 62(1).
[23] ibid s 63.
[24] ibid s 64.
[25] Lawrence and Graham (n 7).

> (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
> (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit […][26]

b) Queensland (QLD)

33. Queensland Criminal Code Act 1899 regulates the criminal disclosure regime in its Chapter Division 3. The prosecution has an ongoing obligation to disclose

> (a)all evidence the prosecution proposes to rely on in the proceeding; and
> (b)all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person.[27]

34. However, the same Act establishes that the 'failure to comply with this chapter division in a proceeding does not affect the validity of the proceeding'.[28] Moreover, the disclosure of some types of evidence is not mandatory and depends on the request by the accused person, as provided in section 590AJ of the Criminal Code Act 1899.

> (2)For a relevant proceeding, the prosecution must, on request, give the accused person—
> (a)particulars if a proposed witness for the prosecution is, or may be, an affected child; and
> (b)a copy of the criminal history of a proposed witness for the prosecution in the possession of the prosecution; and
> (c)a copy or notice of any thing in the possession of the prosecution that may reasonably be considered to be adverse to the reliability or credibility of a proposed witness for the prosecution; and
> (d)notice of any thing in the possession of the prosecution that may tend to raise an issue about the competence of a proposed witness for the prosecution to give evidence in the proceeding; and
> (e)a copy of any statement of any person relevant to the proceeding and in the possession of the prosecution but on which the prosecution does not intend to rely at the proceeding; and
> (f)a copy or notice of any other thing in the possession of the prosecution that is relevant to the proceeding but on which the prosecution does not intend to rely at the proceeding.[29]

35. Other limitations to the disclosure obligation are provided for in Chapter Subdivision D.[30] For instance, the prosecution is not required to disclose 'sensitive evidence' (as defined in section 590AF of the Criminal Code Act 1899), protected counselling communications or recorded statements, or to make a disclosure that it considers contrary to the public interest.

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[26] Evidence Act 1995 (NSW), s 130.
[27] Criminal Code Act 1899 (QLD), s 590AB(2).
[28] ibid s 590AC(2).
[29] ibid s 590AJ(2).
[30] ibid s 590AN – s 590AQ.

II. ARE THERE ANY SPECIFIC LEGAL RULES AND/OR POLICY GUIDELINES APPLICABLE TO DISCLOSURE IN CRIMINAL CASES INVOLVING LARGE VOLUMES OF EVIDENCE OR DIGITAL MATERIAL?

36. The Queensland Supreme Court[31] has outlined the protocol for managing disclosed documents electronically, suggesting parties 'consider the use of technology if it is likely that the number of documents to be disclosed will exceed 500'.[32] However, the protocol mostly refers to the categorisation and terminology of electronic/digital documents which are the digitalisation of a large number of material documents.

37. The Practice Direction 31B on Electronic Disclosure from October 2010 describes the extent of disclosure in fraud cases as:

> 16. CPR 31.5 provides that standard disclosure is the default rule, unless the Court orders otherwise. Historically fraud cases would have involved disclosure beyond standard disclosure documents, and included "train of enquiry" documents. There remain good arguments for "train of enquiry" disclosure to be ordered in fraud cases. However given the increased prevalence of relevant documents being held electronically new thinking is required across the spectrum.[33]

38. Whilst there is no specified legal rule about large volumes of evidence, the Supreme Court of Queensland makes specific technological capabilities available, and also outlines where requests can be made to depend on outside services when the courts' capacity/budget seems overloaded:

> 'Subject to competing demands and within limited budgetary constraints, the Court will endeavour to provide resources to assist with the conduct of a trial using electronic document management. These resources may change on a case-by-case basis depending upon availability and other criteria, however as a guideline, the following may be available:
> • file server and operating system software
> • dedicated, permanent internet connectivity
> • routers, firewalls, network switches and virus protection software
> • disk capacity (this may fluctuate considerably depending on availability)
> • network cabling
> • flat screen or traditional monitors
> • desktop computers running recent versions of Microsoft desktop applications
> • evidence display facilities, and
> • real time transcribing services

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[31] Queensland Courts, 'Practice Direction Number 8 of 2004 Supreme Court of Queensland' (2004) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/86388/sc-pd-8of2004.pdf> accessed 16 April 2024

[32] ibid.

[33] Hugh Sims and John Lapraik, 'Disclosure and E-Disclosure Issues in Fraud Cases – Forensic, Technology And Costs Management' (*Millnet and Guildhall Chambers,* November 2012) <www.guildhallchambers.co.uk/files/Disclosure_and_E_disclosure_issues_in_fraud_cases_HughSims&JohnLapraik_November_2012.pdf> accessed 16 April 2024.

> The parties will need to provide:
> • any required equipment which cannot be provided by the court, and
> • courtroom technology support services or imaging services.[34]

39. Still less specific about the handling of large volumes of digital materials, according to the Federal Court of Australia, litigation using electronic discovery needs to be pre-approved by the courts following electronic discovery considerations, including:

> 1. What is the scope of discovery and whether the scope of discovery warrants electronic discovery
> 2. Determine preliminary estimates of the cost of electronic discovery – are the costs and time proportionate to the proposed electronic discovery?
> 3. […]
> 4. What is a suitable and reasonable timetable for electronic discovery?
> 5. If the discovered documents should be managed as electronic documents, determine strategies (a discovery plan) […].[35]

40. There may be grounds within the electronic discovery rules that could govern the larger volumes of digital material through a 'data map' in order to overview them in court more comprehensively. Again, however, this is neither regulated nor obligatory:

> Some additional useful tips to consider include:
> When dealing with the management of electronic documents contained within databases, proprietary computer systems and other uncommon formats or repositories – parties should consider creating a data map to show the relationships between the different databases being referred to[36]

41. These excerpts outline that there are legal rules governing whether and how electronic materials should be obtained, but not about the disclosure of them. Rather, rules concerning disclosure are subjugated to case management orders, which change depending on a case-by-case basis. These orders can define the scope of disclosure obligations as well as provide directions for managing and reviewing evidence. However, there do not seem to be legal rules or policy guidelines so far, as the case-by-case basis depends on judges' and expert witnesses' discretions.

42. Regulations about disclosure are mainly descriptive of the management of documents and their most efficient presentation in the courts. The concept of 'cost-effectiveness' has come up in the Australian Crown Court,[37] indicating that there may be issues getting approval by the court to

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[34] Queensland Courts, 'Practice Direction Number 8 of 2004 Supreme Court of Queensland' (n 31).
[35] Australia, C.C. of A.O.C.O 'Litigation using electronic discovery (with checklists)' (*Federal Court of Australia,* 2019) <www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-tech/electronic-discovery> accessed 16 April 2024.
[36] ibid.
[37] JLB Allsop, 'Technology and the Court Practice Note (GPN-TECH)' (*Federal Court of Australia* 25 October 2016) <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-tech> accessed 16 April 2024.

investigate large numbers of digital material as it may not be 'cost-effective':

> 3.3 At an appropriately early stage in a proceeding that may be benefited by an electronic discovery processes, and before the Court may consider making an order for electronic discovery, the parties will be expected to have:
> (a) discussed and agreed upon a practical and cost-effective discovery plan having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable; […][38]

43. Finally, the option of targeted disclosure outlined in the Practice Direction 2010 specifies that specific disclosure is only through the route of standard disclosure but that this is not necessarily more cost-effective for the courts. The section below outlines this in more detail:

> TARGETED DISCLOSURE
> 21. The concept of targeted disclosure gives rise to the thought of specific disclosure under CPR 31.12.
> 22. The traditional route under the CPR is to order standard disclosure under CPR 31.5, and then allow further specific disclosure obligations under 31.12.
> 23. But is this necessarily the best or most cost effective route in commercial fraud cases and cases which are heavy on electronic documents?
> 24. The concept of predictive coding (used in the US, a court approved process which combines people, technology and workflow to find key documents quickly, not tied into the process of keyword searches) may have a part to play here.
> 25. For example, in fraud cases a party may take the view that the first step required in a disclosure exercise is to obtain full disclosure of all meta-data. Following disclosure of that documentation the disclosure trail might lead in a very different direction from the usual standard disclosure process.[39]

III. ARE THERE ANY SPECIFIC LEGAL RULES AND/OR POLICY GUIDELINES APPLICABLE TO DISCLOSURE IN COMPLEX ECONOMIC CRIME CASES, SUCH AS FRAUD AND CORRUPTION?

44. The Australian Parliament specifically highlights The Public Interest Disclosure Act (2013)[40] in aiming to encourage current and former commonwealth employees to come forward about suspicious activities regarding fraud and corruption cases.[41]

45. Apart from this, there appear to be no specific legal rules or policy guidelines applicable to

[38] ibid.
[39] Sims and Lapraik (n 33).
[40] Attorney-General's Department, 'Public Interest Disclosure' <https://www.ag.gov.au/about-us/accountability-and-reporting/public-interest-disclosure#:~:text=The%20Public%20Interest%20Disclosure%20Act,and%20effective%20investigation%20of%20reports.> accessed 6 May 2024.
[41] Parliament of Australia, 'Fraud Control Policy and Guidelines for Reporting Fraud' <www.aph.gov.au/About_Parliament/Parliamentary_departments/Department_of_Parliamentary_Services/Fraud_Control_Policy_and_Guidelines_for_Reporting_Fraud> accessed 16 April 2024.

disclosure. The focus is still mainly on the prosecution and investigative services to facilitate disclosure. This seems notable in recent cases of Li Zhang and other financial crime cases where disclosure was equated to investigative findings.[42]

IV. HAVE THERE BEEN NOTABLE CASE LAW DEVELOPMENTS IN RECENT YEARS RELATING TO DISCLOSURE IN COMPLEX ECONOMIC CRIME CASES, SUCH AS FRAUD AND CORRUPTION?

46. While there have not been notable case law developments specifically in relation to complex economic crime cases, the most relevant cases concerning disclosure generally have been included in previous sections.

V. HAVE THERE BEEN ANY RECENT ACADEMIC STUDIES OR GOVERNMENT REVIEWS OF HOW THE CRIMINAL DISCLOSURE REGIME IS OPERATING IN PRACTICE?

47. Gregoire and Nedim provide a well-written overview of identified pitfalls of criminal disclosure in practice on the NSW court website that offers free legal information by Sydney Criminal lawyers.[43] Whilst not an academic study or officially Government-affiliated, the article is comprehensive in describing governmental and academic initiatives, such as the prosecutorial ethics or Dr Robert Moles' Paper about 'failure to disclose'.

> A duty of disclosure exists within the NSW criminal justice system, and in all other jurisdictions across the nation, which requires the prosecution to provide the defence with all the evidence it has prior to the trial commencing. This stipulation exists in the legislative guidelines governing the various state criminal justice systems.[44]

48. The authors note that in the 2005 *Mallard v. The Queen* case, the then 'Justice Michael Kirby explain[ed] that this practice has been growing nationally and internationally, and it is especially applicable in shining a light on witness credibility and the truthfulness of the accused'.[45] However, organizations such as Civil Liberties Australia (CLA) started to refer to the practice as 'failure to

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[42] Australian Taxation Office, 'Financial crime case studies' (March 2024) <www.ato.gov.au/about-ato/tax-avoidance/the-fight-against-tax-crime/news-and-results/case-studies/financial-crime-case-studies> accessed 16 April 2024.
[43] Paul Gregoire and Ugur Nedim, 'Prosecutors routinely ignore their legal duty to serve evidence on the defence' (*NSW Courts,* 17 January 2023) <https://nswcourts.com.au/articles/prosecutors-routinely-ignore-their-legal-duty-to-serve-evidence-on-the-defence/> accessed 16 April 2024.
[44] ibid.
[45] ibid.

disclose' as a result of the many failures of the disclosure regime in Australia.[46] In 2023 the Failure To Disclosure (FTD) was one of the two main campaigns launched by CLA on issues affecting the Australian justice system.[47]

49. In another piece published in August 2020, Felicity Graham and Tim McKenzie list 10 points related to the ethics of the prosecution's duty of disclosure in Local Courts.[48] Among other issues, they observe that there are no significant distinctions from the duty of disclosure applicable to summary and indictment procedures, neither between the duty applicable to the police prosecutors and the DPPs. They also emphasise that the prosecution duty of disclosure is owed to the court, not to the accused, as part of the prosecutor's wider legal duties, giving greater discretion to the prosecution as to which materials will be disclosed based on what they consider necessary to fulfil fair trial rights, and that the obligation does not depend on the prompting or request of the defence. Other legal commentators have pointed out how 'prosecutors' minister-of-justice norm has not always overcome countervailing tendencies that follow from their role as partisan advocates of charges that they believe are well grounded', and thus perhaps raises concerns where the adversarial system conflicts with the reciprocal duty of disclosure, which is perhaps also exacerbated by the duty of a disclosure as stemming from a prosecutor's role as a minister of justice, rather than stemming from the rights owed to the defendant.[49] Additionally, while Graham and McKenzie affirm that it is not possible to exhaustively state what type of material shall be disclosed, if there is a breach of the duty of disclosure the accused might even get relief.[50]

50. Gregoire and Nedim add that the disclosure duty includes 'relevant material that unravels a new issue, as well as evidence that provides a lead'.[51] Another relevant issue is that the prosecution may not deny the disclosure of evidence in its possession or available to it if such evidence 'is material to the contested issues in the trial'[52]. The integrity of the investigation and, as a result, of the disclosure duty, presupposes that the investigations were conducted objectively and 'have attempted to uncover all relevant evidence that can reasonably be assembled, whether it is

[46] Civil Liberties Australia, 'Failure to Disclose: Tas police 'don't take disclosure seriously' (*CLA,* 2 March 2023) <https://www.cla.asn.au/News/failure-to-disclose-tas-police-dont-take-disclosure-seriously/> accessed 16 April 2024.
[47] ibid.
[48] Felicity Graham and Tim McKenzie, 'Ethics: The Prosecutor's Duty of Disclosure in the Local Court' (August 2020) <https://criminalcpd.net.au/wp-content/uploads/2020/09/When-you-dont-know-what-you-dont-know-10-things-you-should-know-UPDATED-SEPT-2020-with-template-letter.pdf> accessed 16 April 2024
[49] Darryl K Brown, 'Evidence Discovery and Disclosure in Common Law Jurisdictions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (OUP 2019). p.560
[50] Graham and McKenzie (n 48).
[51] Gregoire and Nedim (n 43).
[52] Graham and McKenzie (n 48).

inculpatory or exculpatory'[53]. Additionally, when deciding what evidence should be disclosed, the prosecution must adopt a 'broad view' of what materials and issues might be relevant to the case[54].

51. Finally, in a Networked Knowledge Briefing Paper regarding the 'Failure to Disclose' in Australia,[55] Dr Robert Moles and Bibi Shanga set out that Australia is lagging behind regarding initiatives to 'address the issues of wrongful convictions'.[56] According to the paper, while comparable countries such as the US, UK, Canada and New Zealand all have mechanisms focused specifically on addressing wrongful convictions, such as Conviction Integrity Units, Innocence Projects and Criminal Cases Review Commissions, Australia 'has none of these initiatives in place or in contemplation'.[57] As an example of systemic errors leading to wrongful convictions, the authors mention the case of Kathleen Folbigg, who was considered guilty for killing her four children, spent 20 years in prison and was recently acquitted after a new scientific research threw reasonable doubt on her guilt. Folbigg's lawyer said Australia should 'consider moving to an independent body for review such as a criminal case review commission like those established elsewhere in the world'.[58]

[53] ibid.
[54] ibid.
[55] Bibi Sangha and Bob Moles, 'Networked Knowledge Briefing Paper', attachment (*CLA,* 21 December 2022) <https://www.cla.asn.au/News/dpp-and-police-failure-to-disclose-ftd-warps-justice/#Failure-to-Disclose> accessed 5 May 2024
[56] ibid.
[57] ibid.
[58] Catie McLeod and Tamsin Rose, 'Kathleen Folbigg's convictions for killing her four children quashed by NSW court' (The Guardian, 13 December 2023) <https://www.theguardian.com/australia-news/2023/dec/14/kathleen-folbiggs-convictions-for-killing-her-four-children-quashed-by-nsw-court> accessed 25 May 2024

CANADA

INTRODUCTION

52. The criminal law system in Canada, both substantively and procedurally, is inherited from the British common law tradition and is adversarial in nature. Unlike the United Kingdom, criminal law is codified in a single criminal code, which governs the legal and procedural rules related to disclosure. Similarly to the other common law systems examined, the obligation to disclose and determine disclosure is on the prosecution.

53. In cases with large volumes of evidence, and digital disclosure of this evidence, there is an obligation that the evidence be searchable and accessible to be meaningful. Canada's prosecutorial service has just begun to examine how electronic closure can be handled with large volumes of digital files, and it is clear that more progress has been made here in pilot schemes implementing digital evidence management systems and establishing working groups on the topic to fast track the court's digitalisation.

I. WHAT IS THE LEGAL TEST FOR DETERMINING WHAT MATERIAL SHOULD BE DISCLOSED OR MADE ACCESSIBLE TO THE DEFENCE IN CRIMINAL CASES?

a) Canadian Criminal Code

54. Canadian Criminal law is codified including both the substantive legal provisions as well as the procedural rules under the Canadian Criminal Code (CCC). Under Part XX of the CCC, s.603-606 outline the rules regarding inspection and copies of documents during criminal proceedings. S.603 outlines the following:

> **Right of accused**
> **603** An accused is entitled, after he has been ordered to stand trial or at his trial,
> **(a)** to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any; and
> **(b)** to receive, on payment of a reasonable fee determined in accordance with a tariff of fees fixed or approved by the Attorney General of the province, a copy
> **(i)** of the evidence,
> **(ii)** of his own statement, if any, and
> **(iii)** of the indictment;
> but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied that the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused.

55. S.605 follows this with the rule that a judge of a superior court of criminal jurisdiction may, on summary application on behalf of the accused or the prosecutor, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.[59]

b) Canadian Charter of Rights and Freedoms

56. Following the enactment of the Charter, the constitutional right to make 'full and answer defence' to criminal charges under Sections 7 and 11(d), also enshrined the obligation of the prosecution to disclosure.[60]

c) Public Prosecution Service of Canada Deskbook

57. The majority of specific rules relating to disclosure are outlined in the Public Prosecution Service of Canada Deskbook.[61] This research will now frequently reference the case from the Supreme Court of Canada *R v Stinchcombe* (1991) which set out the duty on the part of the Crown to provide disclosure to an accused person in criminal proceedings and 'established what has become a constitutional standard for the provision of pre-trial disclosure for all indictable offences prosecuted in Canada. From that point on, disclosure ceased to be a haphazard practice.'[62]

c) Scope of the disclosure duty

58. For the *Stinchcombe* principles to apply, the material in question must be 'material relating to the accused's case' and 'in the possession or control' of the Crown. The obligation is also subject to the limitation that the accused has no right to information that would distort the truth-seeking process.[63]

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[59] Criminal Code 1985 (CA) s605(1).
[60] Canadian Charter of Rights and Freedoms (Constitution Act) 1982 (CA).
[61] Public Prosecution Service of Canada, 'Principles of Disclosure' (1 March 2014) <www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch05.html#fnb5> accessed 16 April 2024 (PPSC Guidebook); Graham Reynolds KC, 'Canadian Disclosure and Investigative Practices: A Comparative Perspective' (2011) British Institute of International and Comparative Law <www.biicl.org/files/5797_reynolds_14-09-11_biicl.pdf> accessed 16 April 2024
[62] *R v Stinchcombe* [1991] 3 SCR 326 (CA).
[63] *R v Mills* [1999] 3 SCR 668; (1999), 139 CCC (3d) 321 (CA).

59. The Supreme Court of Canada makes it clear that the disclosure obligation, though broad, is not absolute; it is subject to the Crown's counsel discretion with respect to both the disclosure and the withholding of information for valid purposes, including the protection of police informers, cabinet confidences and national security, international relations, and national defence information.[64]

d) What does the duty require of the prosecution?

60. There is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it.[65] There is no definitive test for the standard of what may assist the accused.[66] The Canadian Prosecution Deskbook states that 'it is difficult to provide "bright line" guidelines respecting disclosure of the "unused" material in the Crown's file. Counsel are expected to exercise good judgement and consult with senior managing lawyers in assessing what should and what need not be disclosed'[67] (subject to review by a trial judge). The failure to disclose all relevant non-privileged information is a violation of Section 7 of the Canadian Charter.

e) Documents beyond the scope of the disclosure duty

61. As noted above, the material to be disclosed must be in the possession or control of the Crown for it to fall within the scope of this duty. While the Crown must err on the side of inclusion, it need not produce evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged.[68] The Crown may refuse to disclose certain information but has the burden of proving why full disclosure should not be applied. [69]

62. It is the Crown's obligation to disclose all information, whether inculpatory or exculpatory, that could:

> reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such

[64] *Stinchcombe* (n 62).
[65] PPSC Guidebook (n 61).
[66] ibid.
[67] ibid.
[68] *R. v. Chaplin,* 1995 CanLII 126 (SCC), [1995] 1 S.C.R. 727 (CA) at para 25.
[69] *R. v. Durette,* 1994 CanLII 123 (SCC), [1994] 1 S.C.R. 469 (CA) at para 44.

as, for example, whether to call evidence.[70]

63. Information is relevant for the purposes of the Crown's disclosure obligation if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make a full answer and defence.[71]

64. The Canadian system also does not require evidence to be admissible for disclosure to be required.[72] It is sufficient if the information is relevant, reliable, and not subject to some form of privilege. Second-hand information that is unconfirmed may or may not be disclosed, depending on the counsel's assessment of the issues in the case.[73]

f) Disclosure obligation and procedure

65. Consequences of failure to meet disclosure obligations may include a Crown stay (initiated by the Crown prosecutor), withdrawal of the charges or request for a judicial stay of proceedings.[74]

66. The disclosure obligation is ongoing throughout criminal proceedings. Crown counsel's disclosure obligation is a continuing one and relates to information that comes to the attention of or into the possession of Crown counsel throughout the process and continues after conviction, including after appeals have been decided or the time of appeal has elapsed.[75]

67. Regarding the timing of disclosure, Crown counsel shall, as soon as reasonably practicable, provide disclosure.[76] The phrase 'as soon as reasonably practicable' is intended to provide a degree of flexibility based on the facts in individual cases. The right to disclosure is triggered by a disclosure request made by or on behalf of the accused, though the practice of waiting for the request by the defence appears to differ across Canada.[77]

II. ARE THERE ANY SPECIFIC LEGAL RULES AND/OR POLICY GUIDELINES APPLICABLE TO DISCLOSURE IN CRIMINAL CASES INVOLVING LARGE VOLUMES OF EVIDENCE OR DIGITAL MATERIAL?

[70] *R v Egger* [1993] 2 SCR 451 (CA).
[71] *Stinchcombe* (n 62).
[72] *R v O'Connor* [1995] 4 SCR 411; (1995), 103 CCC (3d) (CA).
[73] PPSC Guidebook (n 61).
[74] ibid.
[75] *Stinchcombe* (n 62).
[76] ibid.
[77] PPSC Guidebook (n 61).

68. In document-heavy cases, Crown counsel must particularly ensure that the disclosure provided to the defence is well-organised and capable of being searched. In other words, it must be reasonably accessible. As noted in *Dunn*, 'the greater the volume of material disclosed, the greater the need for organization and reasonable search capabilities'.[78] Additionally, electronic disclosure in cases of "data dumps" must be searchable and well-organised as 'electronic disclosure is only meaningful if it is reasonably accessible… Reasonable accessibility is a matter to be assessed contextually on a case by case basis, but certainly to be accessible disclosure must be reasonably organized and searchable.'[79] In practicality, this requires the Crown to identify a list of "core" documents which make up the basis of its case.

69. The above was confirmed in the Canadian Court of Appeal case in *Dieckmann* that the Crown's obligation is to ensure that electronic disclosure is searchable.[80] For example, in this large-scale tax fraud case, the Crown was obliged to provide software to the defence, parallel in quality to the Crown's, to permit them to search the 21 CD's of provided disclosure. The Crown was also obliged to provide training in the use of the software.

a) Disclosure costs

70. An accused person or his or her counsel shall not be charged a fee for 'basic disclosure' materials.[81]

71. 'Basic disclosure' materials include the information, a synopsis, copies of witness statements or will-says, the Report to Crown Counsel, if one exists, and copies of documents, photographs and the like, that Crown counsel intends to introduce as exhibits in the Crown's case. Each accused is entitled to one copy of 'basic disclosure' materials. Where an accused person requests an additional copy or copies, the accused may be charged a reasonable fee for this service.[82]

72. Costs associated with the preparation of copies of materials that are not part of 'basic disclosure', e.g., photographs that will not be introduced as exhibits by Crown counsel, should be considered on a case-by-case basis. In instances of unfocused or unreasonable requests involving substantial numbers of documents, it may be appropriate to shift the resource burden to the defence, by

[78] *R v Dunn,* 2009 CanLII 75397 (ONSC) (CA) at para 59.
[79] ibid 58.
[80] *R. v. Dieckmann* [2017] ONCA 575 (CA).
[81] Report of the Criminal Justice Review Committee, (Queen's Printer for Ontario, February 1999) at 48.
[82] PPSC Guidebook (n 61).

requiring that the costs be borne by the accused.[83] Failing agreement, simple access without copies may be provided.

b) Timing of disclosure

73. Regarding the timing of the disclosure, in the *R. v. Jordan*[84] case, the Supreme Court decided that, in particularly complex cases, the existence of voluminous disclosure material may serve as an exceptional circumstance to justify a delay of the trial above the presumptive ceiling.[85] However, the Crown must make the disclosure promptly. According to the Court

> [178] One example is a case involving a large amount of disclosure, where it could reasonably be expected that such disclosure would lengthen the inherent time requirements to try the case. However, disclosure may be a major factor contributing to delay and should be approached on the basis that the Crown has a duty to make disclosure fully, but also promptly. And defence counsel must not engage in unnecessary fishing expeditions. The reasonable estimation of the objective inherent time requirements of a case must assume both prompt disclosure and the absence of unnecessary fishing expeditions.[86]

74. Additionally, the accused must also act with due diligence, having the obligation to pursue and review the disclosure in a timely way.[87]

c) Digital technology developments and disclosure

75. With the advent of mass digital information, and more digital information being readily available to police and prosecutors in investigations, especially considering surveillance, the prosecutorial systems have begun to consider how best to respond. Several small working groups have been set up across Canada, the largest being the Working Group on Digital Evidence Management in Novia Scotia to consider the adoption of compatible digital evidence management systems, giving due credence to privacy, and confidentiality.[88]

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[83] Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (the Martin Report), (Queen's Printer for Ontario, 1993) at 273.
[84] *R v Jordan* [2016] 1 SCR 631 (CA).
[85] The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). *See,* Jordan (n 84) at para 5.
[86] *Jordan* (n 84) 178.
[87] ibid 193.
[88] David Antonyshyn, 'Digital Transformation in Canada's Criminal Justice System' (2022) <www.iap-association.org/getattachment/Publications/IAP-Publications/Conference-Reports/Conference-Documentation/Documentation-24th-Annual-Conference-(1)/Presentation-on-Digital-Transformation-in-Canada-s-criminal-justice-system.pdf.aspx?lang=en-US#:~:text=Currently%2C%20electronic%20disclosure%20tools%20cannot,stored%20in%20a%20secured%20manner> accessed 16 April 2024

76. The PPSC has recently begun to investigate how electronic disclosure and discovery can be utilised. For example, there are pilots being conducted regarding the use of Nuix eDiscovery and Liquid Files as platforms for disclosure.[89] Most recently, a technology called Caselines developed by Thomson Reuters was implemented by the Provincial and Superior Courts of Ontario. In the interim, Microsoft 365 OneDrive is being used to share material with defence counsel which helpfully removes the need to use physical media such as hard drives or DVDs.[90]

77. Across the board, the Government of Canada is conducting a review into the use of Artificial Intelligence and technology, to streamline costly processes, through its Financial Transactions and Reporting Analysis Centre.[91]

78. Electronic disclosure becomes more complex regarding confidential information. In Alberta, the shared drive system of disclosure has led to issues regarding tracking when and if disclosure has been received, most notably due to the failure of defence counsel to confirm the receipt and download of material.[92] However, they have an online electronic disclosure system which allows the defence to request and view relevant documents.[93] In Saskatchewan, a range of disclosure processes from online cloud system to email and hard drives are used for standard disclosure; however, sensitive information, such as that relating to confidential informers, is delivered in paper form in a double sealed envelope.[94] In Ontario, the PPSC has developed a hybrid process of both digital and hard copy for receipt and delivery of disclosure depending on the capabilities of the enforcement agency. This has been criticised for not being optimally efficient. Ontario also does not use electronic disclosure for sensitive material relating to confidential informers – a hard copy must be produced instead.[95]

III. ARE THERE ANY SPECIFIC LEGAL RULES AND/OR POLICY GUIDELINES APPLICABLE TO DISCLOSURE IN COMPLEX ECONOMIC CRIME CASES, SUCH AS FRAUD AND CORRUPTION?

[89] ibid.
[90] ibid.
[91] Government of Canada, 'Financial Transactions and Reports Analysis Centre of Canada's 2024-2025 Departmental plan at a glance' <https://fintrac-canafe.canada.ca/publications/dp/2024-2025/1-eng> accessed 16 April 2024.
[92] ibid.
[93] Alberta Crown Prosecution Service, 'Criminal Prosecutions – Electronic Discovery' <https://www.alberta.ca/electronic-disclosure> accessed 16 April 2024.
[94] ibid.
[95] ibid.

79. Generally, Canada's administration of justice operates on the 'open court' principle meaning that court registries containing documents filed by both sides are public documents. Even in antitrust cases where other jurisdictions protect from disclosure on investigative methods – the Supreme Court has upheld that all investigative decisions must be disclosed and thus become public information, even if confidential information relating to individuals is redacted, leading to greater public scrutiny of these cases.[96]

80. As mentioned above, the Crown's disclosure obligations are not absolute and information which is relevant to the defence may be withheld on the basis of the existence of a legal privilege. Specifically, regarding economic crime cases, there are a variety of privileges which may impact disclosure obligations:

a) Police Informants

81. Disclosure of information that may tend to identify a confidential police informer is not permitted.[97] This will be especially relevant in corruption cases where there has been an undercover police officer/informant involved in the investigative process. The Crown - like the Court - is under an obligation to protect the identity of a confidential police informer. The privilege cannot be waived unilaterally by the informant or by the Crown. This obligation is not limited to protecting the name of the informer: it extends to any information that may tend to reveal the identity of the person who provided information to the police. The police informer privilege is subject to only one exception: where the accused's factual innocence is at stake.

b) Ongoing police investigations

82. Information that may prejudice an ongoing police investigation should not be disclosed.[98] It is important to note that the Crown may delay disclosure for this purpose but cannot refuse it, i.e., withhold disclosure for an indefinite period.

c) International relations and national defence

83. Section 38 of the Canada Evidence Act creates a scheme for the protection of 'sensitive

[96] Reynolds KC (n 61).
[97] PPSC Guidebook (n 61).
[98] *Stinchcombe* (n 62).

information' and 'potentially injurious information', as defined in that section, with respect to international relations, national defence, or national security.[99]

d) Solicitor-client privilege

84. Information protected by solicitor-client privilege cannot be disclosed, subject to waiver or any of the exceptions.[100]

e) Work product privilege (litigation privilege)

85. This privilege, whose object is to ensure the efficacy of the adversarial process, protects information or documents obtained or prepared for the dominant purpose of litigation, either anticipated or actual. Thus, Crown counsel generally need not disclose any internal notes, memoranda, correspondence, or other materials generated by the Crown in preparation for the case for trial unless the work product contains material inconsistencies or additional facts not already disclosed to the defence.

86. Unlike solicitor-client privilege, this privilege has a limited lifespan and comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege.

87. However, in the fraud context, it ought to be noted that in the case of *R v Peterson* it was held that spreadsheets prepared by the police regarding different theories as to how the accused had committed a complex fraud were held to fall within the work product domain.[101]

IV. HAVE THERE BEEN NOTABLE CASE LAW DEVELOPMENTS IN RECENT YEARS RELATING TO DISCLOSURE IN COMPLEX ECONOMIC CRIME CASES, SUCH AS FRAUD AND CORRUPTION?

88. Although not case law, the Canadian government has been recently reviewing the federal response to financial crime. On June 6, 2023, the Department of Finance published its Consultation on Strengthening Canada's Anti-Money Laundering and Terrorist Financing Regime (the

[99] Canada Evidence Act 1985 (CA) s 38.
[100] *R v Campbell* [1999] 1 SCR 565 (CA).
[101] *R v Petersen* [1997] 155 Sask R 133 (QB) (CA).

"Consultation").[102] The government announced it will create a new, dedicated lead enforcement agency called the Canada Financial Crimes Agency ("CFCA").

89. A piece by Genevieve McInnes which has been used throughout this research outlined recent changes in how the prosecution had to respond to cases with a high volume of documents to be disclosed.[103]

V. HAVE THERE BEEN ANY RECENT ACADEMIC STUDIES OR GOVERNMENT REVIEWS OF HOW THE CRIMINAL DISCLOSURE REGIME IS OPERATING IN PRACTICE?

90. Of use throughout the report is a paper from a senior lawyer from Ontario which includes a summary of the history of criminal disclosure in Canada, but also importantly, a comparative approach with other disclosure obligations in different areas of Canadian law, such as competition law.[104]

91. Of further assistance was a state report also from 2011 regarding criminal disclosure. This report provides a helpful summary of the principles of criminal disclosure but also a list of thorough recommendations on how the law ought to be improved.[105]

92. The Canadian Bar Association recently conducted a review into post-conviction disclosure and the overturning of wrongful convictions related to failures in disclosure, with conclusions that reviews of the disclosure regime have not been extensive enough to prevent miscarriages of justice. It also includes a comparison with the legal systems of the United States and the United Kingdom, although no cases mentioned relate to economic crime or fraud.[106]

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[102] Canada Department of Finance, 'Consultation on Strengthening Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime' (2003) <https://www.canada.ca/content/dam/fin/consultations/2023/Consultation-amlatfr-rclrpcfat-eng.pdf> accessed 16 April 2004.

[103] Genevieve McInnes, 'Disclosure in Large Project Cases: Recent Developments' (2017),29th Annual Criminal Law Conference) <www.canlii.org/en/commentary/doc/2017CanLIIDocs3831#!fragment/zoupio-_Toc3Page1/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgGYAFMAc0ICMASgA0ybKUIQAiokK4AntADkykREJhcCWfKWr1m7SADKeUgCElAJQCiAGVsA1AIIA5AMK2RpMACNoUnYhISA> accessed 16 April 2024.

[104] Reynolds KC (n 61).

[105] Canada Department of Justice, 'Steering Committee on Justice Efficiencies and Access to the Justice System – Report on Disclosure in Criminal Cases' (June 2011) <www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/rod-crc/toc-tdm.html> accessed 16 April 2024.

[106] Tamara Levy KC, 'Post Conviction Disclosure in the Canadian Context' (*The innocence Projec*t, 2024) <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1762&context=fac_pubs> accessed 16 April 2024.

93. Transparency International recently published a whitepaper concerning the underenforcement of fraud offences in Canada, and recommending bringing a 'failure to prevent' offence to Canada for serious fraud. The whitepaper – whilst not wholly relevant to present considerations – does make reference to increasing voluntary disclosure and gives background to these discussions in Canada.[107]

[107] Transparency International, 'Bringing a "Failure to Prevent" Offence in Canada' (November 2023) <https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/t/654d2d4ca73fb3558e9fcdb7/1699556685253/Failure_to_Prevent_Whitepaper.pdf> accessed 16 April 2024

UNITED STATES OF AMERICA

INTRODUCTION

94. In the United States, reforms to the disclosure regime and discussions around it have centred on ensuring the guarantee of fair trial rights for accused criminals and ensuring that instances of wrongful conviction due to non-disclosure of evidence by the prosecutorial team are not repeated. Following *Brady v Maryland,* prosecutors and law enforcement have an obligation to surrender material evidence, but there remains a degree of subjectivity in determining what is 'material' and this might have significant ramifications for the case's outcome.

95. Similarly, in criminal cases involving large volumes of evidence or digital evidence, the principles of reciprocity and early disclosure are particularly emphasised. The Joint Working Group on Electronic Technology (JETWG) developed a protocol for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases, which emphasise the need for on-going dialogue between the parties through a meet and confer process, to facilitate the management of electronic discovery and reduce disputes relating to ESI. Additionally, a pocket guide for judges on e-discovery highlights the need to factor in eventual lack of resources and/or knowledge on the part of the defence when deciding on electronic discovery issues. This is further shown as a necessity by commentators who have pointed to increasing police surveillance and technology use which feeds into evidence. Criticisms remain that disclosure failures are then incumbent on Judges in cases of review post-wrongful conviction.

I. WHAT IS THE LEGAL TEST FOR DETERMINING WHAT MATERIAL SHOULD BE DISCLOSED OR MADE ACCESSIBLE TO THE DEFENCE IN CRIMINAL CASES?

96. In the United States, the legal test for determining what material should be disclosed or made accessible to the defence in criminal cases is based on the principle of Brady disclosure**.** This principle, established in the landmark Supreme Court case *Brady v. Maryland* (1963), requires prosecutors and law enforcement to surrender material and exculpatory evidence to defence counsel.[108]

[108] rdalessandro, 'Mandatory Prosecutorial Disclosure: Safeguarding Our Right to a Fair Trial | Harvard Civil Rights-Civil Liberties Law Review' (*Harvard Civil Rights - Civil Liberties Law Review,* 2023) <https://journals.law.harvard.edu/crcl/mandatory-prosecutorial-disclosure-safeguarding-our-right-to-a-fair-trial/> accessed 7 April 2024.

97. The current standard for materiality was further developed in subsequent cases, including *United States v. Bagley* (1985), where the court held that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different.[109]

98. Prosecutors are expected to adopt a broad view of materiality, seeking exculpatory and impeachment information from all members of the prosecution team, including law enforcement officers and government officials involved in the case.[110] This obligation extends beyond evidence directly impacting guilt or innocence, encompassing information that is significantly probative of the issues before the court.[111] Moreover, prosecutors must disclose evidence inconsistent with any element of the charged crime or that establishes an affirmative defence, irrespective of its perceived impact on conviction.[112] Impeachment information that casts substantial doubt on prosecution evidence or witness testimony must also be disclosed.[113] The timing of disclosure is critical to ensure due process, allowing the defence sufficient time to utilise the disclosed information effectively during trial.

a) Security Law

99. In the United States, the legal test for determining what material should be disclosed or made accessible to the defence in criminal cases involves a thorough analysis akin to the materiality standard applied in securities law. This test revolves around assessing whether the disclosed information would be significantly important to a reasonable investor, beyond merely influencing their decision-making process.[114]

100. Key considerations include evaluating the likelihood that proper disclosure of the information would have assumed actual significance in the defence's preparations and deliberations.[115] The test

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[109] ibid.
[110] '9-5.000 - Issues Related to Discovery, Trials, and Other Proceedings' (*Justice.gov*, 20 February 2015) <www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings#:~:text=Materiality%20and%20Admissibility.,667%2C%20676%20(1985).> accessed 8 April 2024.
[111] ibid Policy Regarding Disclosure of Exculpatory and Impeachment Information.
[112] ibid Cumulative impact of items of information.
[113] ibid Impeachment information.
[114] Jerry Carnante, 'Is it Materia: Top 10 Questions to ask' (*Thomsonreuters.com,* 2015) <https://store.legal.thomsonreuters.com/law-products/news-views/corporate-counsel/is-it-material-the-top-10-questions-to-ask-when-determining-materiality> accessed 7 April 2024.
[115] ibid.

also involves weighing the probability and significance of contingent or speculative events that could impact the case's outcome.[116] Quantitative factors, such as the magnitude of financial impact, are assessed alongside qualitative considerations, including the context and nature of any misstatement.[117] Moreover, the test requires an examination of potential cumulative effects, where even individually immaterial details could collectively impact the fairness and effectiveness of the defence.[118]

101. This nuanced approach seeks to ensure that the defence has access to essential information critical for preparing and presenting its case, aligning with principles of due process and fairness in the criminal justice system.

II. ARE THERE ANY SPECIFIC LEGAL RULES AND/OR POLICY GUIDELINES APPLICABLE TO DISCLOSURE IN CRIMINAL CASES INVOLVING LARGE VOLUMES OF EVIDENCE OR DIGITAL MATERIAL?

a) Digital disclosure and evidence guidelines

102. In criminal cases involving large volumes of evidence or digital material, specific legal rules and policy guidelines have been developed to address the challenges associated with digital disclosure. In 1998, the Government formed the Joint Electronic Technology Working Group (JETWG) to address best practices for the efficient and cost-effective management of post-indictment electronic evidence discovery between the Government and defendants charged in federal criminal cases.

103. In 2012, JETWG published a protocol with several relevant recommendations concerning cooperation between parties on managing strategies for Electronic Stores Information (ESI) disclosure in federal criminal cases, especially in cases where the nature and/or volume of material increases the case's complexity. The document acknowledge that electronic discovery involves the balancing of different goals and that there is not a single approach suited to all cases, recommending a continuous dialogue between the parties about ESI discovery in complex cases. Additionally, JETWG explains that 'ESI discovery should be done in a manner to facilitate electronic search, retrieval, sorting, and management of discovery information' and that 'the parties

[116] ibid.
[117] ibid.
[118] ibid.

should look for ways to avoid unnecessary duplication of time and expense for both parties in the handling and use of ESI'.[119]

104. In 2015, the Federal Judicial Center published a pocket guide for judges on Criminal Electronic Discovery.[120] The document recognizes the lack of guidance on criminal electronic discovery matters and presents some ideas to address several challenges of electronic discovery in present days, including the issue of funding the Defendant's additional costs of reviewing, organizing and working with ESI, the lack of experience of criminal practitioners with electronic discovery and litigation technology, as well as disorganized and duplicated ESI. The guide also encourages early discussions of electronic discovery issues, particularly in complex cases involving large volume of material, to assess the expertise and resources of the parties, and align their expectations.[121]

105. In addition, in 2016, JETWG published another guidance on ESI, addressed specifically to the situation of Detainees.[122] The document acknowledges that most federal pretrial detainees can only access and review paper discovery, not digital discovery. However, considering that most of the information is currently created and stored electronically, it is inevitable that detainees also need access to e-Discovery. JETWG recommends the creation of Points of Contact and a Working Group composed at the least of judicial, CJA, FDO, DOJ, BOP, and U.S. Marshal representatives, to discuss the technical requirements necessary to provide detainees with access to ESI. The guidance argue that this measure will also 'result in greater efficiency, reduced delay, and cost savings for the entire criminal justice system'.[123]

b) Electronic Communications Privacy Act

106. The guidelines outlined in the Electronic Communications Privacy Act (ECPA) are crucial for understanding the disclosure of customer or subscriber information held by communications services providers in criminal cases involving digital evidence. ECPA protects various types of

[119] United States Joint Electronic Technology Working Group, 'Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases' (February 2021) <www.justice.gov/archives/dag/page/file/913236/dl> accessed 16 April 2024
[120] 'Criminal e-Discovery: a Pocket Guide for Judges' (*Federal Judicial Center,* 2015) <https://www.fd.org/sites/default/files/litigation_support/pocket-guide_criminal-e-discovery.pdf> accessed 25 May 2024.
[121] ibid.
[122] United States Joint Electronic Technology Working Group, 'Guidance for the Provision of ESI to Detainees' (October 2016) <https://www.fd.org/sites/default/files/litigation_support/jetwg-esi-to-detainees-final_0.pdf> accessed 25 May 2024
[123] ibid.

records and files, including billing records, email communications, and uploaded files, from unauthorized access or disclosure.[124]

107. The level of the legal process required to compel a provider to disclose specific information varies based on the sensitivity of the data sought; basic subscriber information may be obtained with a subpoena while accessing the content of stored communications typically necessitates a search warrant.[125] ECPA applies when law enforcement agencies seek records directly from communications providers like Internet service providers (ISPs) or cellular phone providers, governing the scope of permissible disclosures and placing restrictions on voluntary disclosures to government entities.[126]

108. By aligning the required legal process with the sensitivity of the information sought, ECPA ensures privacy protections for customers and subscribers while facilitating lawful access to relevant data in criminal investigations.

III. ARE THERE ANY SPECIFIC LEGAL RULES AND/OR POLICY GUIDELINES APPLICABLE TO DISCLOSURE IN COMPLEX ECONOMIC CRIME CASES, SUCH AS FRAUD AND CORRUPTION?

a) Brady and Giglio Disclosures

109. In the context of complex economic crime cases such as fraud and corruption in the United States, the Brady and Giglio rules are particularly relevant.

110. As previously mentioned in Question I, the *Brady v. Maryland* (1963) Supreme Court case established the constitutional obligation of the government to disclose material exculpatory evidence to criminal defendants.[127] Exculpatory evidence is any evidence that may be favourable to the defendant and could potentially affect the outcome of the trial. The Brady rule applies regardless of whether the defendant makes a request for exculpatory evidence.[128]

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[124] Gonzales A, Schofield R and Hagy D, 'Digital Evidence in the Courtroom: A Guide for Law Enforcement and Prosecutors' (*US Department of Justice, OJP, NIJ,* 2007) <www.ojp.gov/pdffiles1/nij/211314.pdf> accessed 8 April 2024.
[125] ibid.
[126] ibid.
[127] 'What is a Giglio Defence?' (Carolina Law Blog, Powers Law Firm PA 14 January 2019) <www.carolinaattorneys.com/blog/what-is-a-giglio-disclosure/> accessed 9 April 2024
[128] ibid.

111. Later, the *Giglio v. United States* (1972) Supreme Court case extended the Brady rule to include impeachment evidence.[129] Impeachment evidence is any evidence that could be used to challenge the credibility of the prosecution's witnesses, including law enforcement officers. The Giglio rule requires the prosecution to disclose such evidence to the defence, even if not specifically requested by the defendant or their defence attorney.[130]

112. These rules are part of the constitutional guarantee of a fair trial and are designed to prevent miscarriages of justice. They apply to all stages of the criminal justice process, from investigation through trial.[131]

b) Guidance for Prosecutors Regarding Criminal Discovery

113. In complex economic crime cases such as fraud and corruption in the United States, specific legal rules and policy guidelines govern the disclosure process, particularly concerning the composition of the prosecution team and the scope of discoverable information.

114. The prosecution team typically includes law enforcement agents and officers from the relevant district, and in multi-district investigations or cases involving parallel civil and criminal proceedings, this team may expand to include Assistant United States Attorneys, litigators from Department of Justice components, or other US Attorney's Offices.[132] The determination of which agencies or entities constitute part of the prosecution team for discovery purposes hinges on various factors. These factors include whether there was a joint investigation with regulatory agencies (such as the SEC, FDIC, or EPA), the extent of collaboration in the investigation, the sharing of information and resources, and whether agencies played an active role in arrests, searches, witness interviews, or strategy development.[133]

115. Furthermore, the prosecutor's awareness of discoverable information held by other agencies and the extent of mutual decision-making regarding civil, criminal, or administrative charges are key

[129] ibid.
[130] ibid.
[131] ibid.
[132] '165. Guidance for Prosecutors Regarding Criminal Discovery' (*Justice.gov*, 20 February 2015) <www.justice.gov/archives/jm/criminal-resource-manual-165-guidance-prosecutors-regarding-criminal-discovery> accessed 9 April 2024.
[133] ibid Step 1A.

considerations. In cases involving multi-agency task forces or state law enforcement agencies, prosecutors must assess the level of control over state or local agents, the degree of collaboration between state and federal entities, and the accessibility of evidence.[134] It's essential for prosecutors to understand local circuit law and office practices to navigate discovery obligations effectively, especially when state or local agencies are involved in investigations.[135] Prosecutors are advised to adopt an inclusive approach when identifying members of the prosecution team for discovery to minimise issues related to *Brady* and *Giglio* disclosures and to ensure compliance with legal obligations.[136]

IV. HAVE THERE BEEN NOTABLE CASE LAW DEVELOPMENTS IN RECENT YEARS RELATING TO DISCLOSURE IN COMPLEX ECONOMIC CRIME CASES, SUCH AS FRAUD AND CORRUPTION?

116. In one of the Enron financial fraud cases, in which the founder of Enron was convicted of multiple counts of fraud in 2002, the prosecutors' open file discovery practice led them to turn over eighty million pages of documents without identifying anything in particular, thereby highlighting the problem of overwhelming evidence by the prosecutor without highlighting evidence which fulfils the *Brady* criterion.[137] Albeit some time ago, this case helped to spur on criticisms of the regime and considerations of how to improve disclosure through ensuring accessibility of disclosure in instances of large quantities of data, whilst also ensuring that all relevant evidence is disclosed, reflected in the aforementioned JETWG protocol.

V. HAVE THERE BEEN ANY RECENT ACADEMIC STUDIES OR GOVERNMENT REVIEWS OF HOW THE CRIMINAL DISCLOSURE REGIME IS OPERATING IN PRACTICE?

a) Evidence Discovery and Disclosure in Common Law Jurisdictions

117. Recent academic studies and government reviews have indeed scrutinised the effectiveness and operation of criminal disclosure regimes in the United States. One key area of focus has been on the practical challenges and trade-offs associated with disclosure in criminal justice systems,

[134] ibid.
[135] ibid.
[136] ibid.
[137] Daniel S. Medwed, 'Brady's Bunch of Flaws' [2010] 67 Wash & Lee L Rev 1533.

particularly concerning exceptions to disclosure to protect interests like witness safety and victim privacy, as well as ensuring the efficacy of ongoing law enforcement operations.[138]

118. Brown acknowledges the need to balance competing goals of adjudicative accuracy, fundamental fairness, and procedural efficiency within disclosure schemes. Moreover, the discourse around disclosure laws reflects a shift towards broad pretrial disclosure as opposed to the limited disclosure rules of earlier common law eras.

119. However, scholars recognise that broad disclosure is not without potential drawbacks, as it may, in certain circumstances, impede accurate fact-finding despite its overall benefits to fairness and accuracy, such as in the *Enron* case.[139] The effectiveness of disclosure laws is also intertwined with broader features of criminal justice systems. For instance, the case for early disclosure gains strength when considering that most criminal cases never proceed to trial. The role and culture of prosecution agencies and defence lawyers are also crucial determinants in the implementation and compliance with disclosure rules, especially concerning the disclosure of sensitive information.[140]

120. Despite general consensus in principle for broad, reciprocal disclosure schemes, there are inherent tensions within adversarial systems of justice, particularly regarding the obligations of parties to share information with opponents. In the United States, reform efforts have been fuelled by documented instances where prosecution nondisclosures have led to wrongful convictions.[141] Arguments favouring unfettered prosecutorial discretion over what evidence to withhold are increasingly seen as outdated. Instead, there is a growing trend towards oversight by judges to manage exceptions to disclosure, which has been implemented successfully in several U.S. state justice systems. The persistence of limited disclosure duties in many U.S. jurisdictions is often attributed to political and law reform processes that favour entrenched preferences of local prosecutors and inertia of traditional practices, rather than well-informed policymaking based on empirical evidence and best practices.[142] As such, despite some evidenced reform in guidelines and protocols issued since the *Enron* case, it is clear from this review that it has not gone far enough to ensure oversight in the disclosure process, and more limited obligations on prosecutors when dealing with extensive disclosure is still favoured as a practice, despite evidence that it can lead to unmeaningful disclosure and lead to wrongful convictions.

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[138] Brown, 'Evidence Discovery and Disclosure in Common Law Jurisdictions' (n 49), p.560
[139] ibid
[140] ibid.
[141] ibid.
[142] ibid.

121. A 2022 report of the US Department of Justice in relation to criminal activity concerning digital assets, also contains some relevant considerations of the issues of disclosure of digital evidence in these complex cases. In particular, the report highlights recommendations to extend the statute of limitations where the investigation must consider complex digital asset-related economic crimes to account for the additional complexities in evidence gathering.[143]

b) Mandatory Prosecutorial Disclosure

122. A recent Harvard Law Review study has delved into the operation and efficacy of the criminal disclosure regime in the United States, examining its impact on the fairness and integrity of trials. The principle of prosecutorial disclosure is central to ensuring fair trials, as highlighted by the landmark case of *Brady v. Maryland* (1963), which suggested that justice is not only served by convicting the guilty but also by ensuring fairness in criminal trials.[144]

123. The Harvard Law Review study accentuates the necessity of mandatory complete disclosure to defendants for a trial to be truly fair. Defendants, often under-resourced compared to the prosecution, face substantial challenges in gathering evidence and securing expert witnesses to build a strong defence. The asymmetry in resources between defendants and the government showcases the critical role of prosecutors in sharing all evidence, and categorised in a way that makes it accessible, not just what is legally required by current standards.

124. The expansion of police surveillance capabilities and the growing complexity of criminal law have heightened the importance of complete disclosure. The ability of the government to gather extensive evidence demands a corresponding obligation to share this evidence pretrial, allowing for a robust examination of legal theories in an adversarial legal process as envisaged by the Bill of Rights.[145] The Fifth and Sixth Amendments of the U.S. Constitution provide extensive protections to defendants, including due process, the right to a fair trial, and the right against self-incrimination.[146] These constitutional safeguards are designed to curb the inherent advantages of

[143] Department of Justice, 'The Role of Law Enforcement in Detecting, Investigating and Prosecuting Criminal Activity Related to Digital Assets' (6 September 2022) <www.justice.gov/d9/2022-12/The%20Report%20of%20the%20Attorney%20General%20Pursuant%20to%20Section.pdf> accessed 16 April 2024.
[144] rdalessandro (n 108).
[145] ibid.
[146] ibid.

the state in criminal proceedings and to prevent abuses of power. The interconnectedness and weight of these rights argue for a forceful interpretation that mandates near-total prosecutorial disclosure to protect defendants' fair trial rights.

125. Despite the existence of the *Brady* rule, which requires prosecutors to disclose material and exculpatory evidence, critics argue that it falls short of ensuring a just outcome.[147] The rule's reliance on prosecutors to determine what evidence is "material" introduces inherent biases, particularly when prosecutors are incentivised to secure convictions rather than seek justice. This can lead to the suppression of exculpatory evidence and unjust outcomes for defendants, as demonstrated by cases like *Smith v. Cain* (2012).[148]

126. The challenges inherent in relying on post-conviction review by judges to rectify failures in disclosure further reinforce the inadequacy of the current regime. Judges' subjective assessments of the impact of withheld evidence on trial outcomes can lead to inconsistent decisions and perpetuate injustices against defendants. Moreover, institutional incentives within the prosecutorial system, such as the pursuit of convictions for career advancement or political motives, can undermine the principle of complete disclosure. This institutional bias can prevent prosecutors from fully complying with their obligation to disclose all relevant evidence, even when such evidence is crucial to establishing innocence.

127. In 2022, a survey of 50 United States' prosecutors highlighted specific issues in relation to using digital evidence, and in particular the need for specialised support and training for prosecutors in the use of digital evidence to prevent disclosure-related issues.[149]

128. In January 2024, the Senate Judiciary Subcommittee on Criminal Justice and Counterterrorism held a hearing regarding the use of artificial intelligence in criminal investigations and prosecutions. This focused on the issue of surveillance and bias inherent in artificial intelligence. However, witness Rebecca Wexler of the Berkeley Center for Law and Technology highlighted the importance of the disclosure of the use of artificial intelligence to assist defence counsel and Judges

[147] ibid.
[148] ibid.
[149] Christa Miller, 'A survey of prosecutors and investigators using digital evidence: A starting point' (2022) PubMed Central <www.ncbi.nlm.nih.gov/pmc/articles/PMC10311201/> accessed 16 April 2024.

in identifying flaws and weaknesses in the technology.[150]

129. In conclusion, recent academic studies and legal analyses highlight significant deficiencies in the current criminal disclosure regime in the United States. The call for mandatory complete disclosure by prosecutors, associated with the principles of fairness enshrined in the Constitution, represents a compelling solution to address systemic injustices and uphold defendants' right to a fair trial.

[150] Haarjah Gilani, 'Senators Explore AI in Criminal Investigations and Prosecutions' (*Tech Policy Press*, 26 January 2024) <www.techpolicy.press/senators-explore-ai-in-criminal-investigations-and-prosecutions/> accessed 16 April 2024.