

**REPORT PREPARED BY
THE HONOURABLE GEORGE FERGUSON, Q.C.**

ON THE

**REVIEW AND RECOMMENDATIONS CONCERNING VARIOUS
ASPECTS OF POLICE MISCONDUCT**

VOLUME II

COMMISSIONED BY:

**JULIAN FANTINO
CHIEF OF POLICE
TORONTO POLICE SERVICE**

JANUARY 2003

VOLUME II
TABLE OF CONTENTS

TAB 1	The Law of Disclosure in Ontario with Respect to Police Misconduct Records	1
TAB 2	The Criminal Justice System and the Law of Disclosure in England.....	12
TAB 3	The Criminal Justice System and the Law of Disclosure in Australia.....	16
TAB 4	The Criminal Justice System and the Law of Disclosure in New Zealand.....	23
TAB 5	The Criminal Justice System and the Law of Disclosure in the United States	29

THE LAW OF DISCLOSURE IN ONTARIO **WITH RESPECT TO POLICE MISCONDUCT RECORDS**

INTRODUCTION

The case law in Ontario with respect to the content and extent of disclosure of misconduct information by the police to the Crown or by the Crown to the defence is both unclear and inconsistent. However, there is no doubt about the overall obligation of the police to assist the Crown to discharge its disclosure duties to the defence. The main issue surrounds the characterization of police disciplinary records. The prevailing perspective characterizes them as third-party records and thus, subject to access through a procedure outlined in the case of *R v. O'Connor*. However, some argue that these records or files are more properly described as documents in the possession of the Crown and thus, presumptively disclosable under the Crown duty established in *R v. Stinchcombe*.

Since, under *Stinchcombe*, counsel for the defence is entitled to all material that is not clearly irrelevant, when information in police misconduct files is characterized as being within the Crown's possession, it is more likely that the defence will have access to such files. When, however, the records are viewed as third party records governed by *O'Connor*, they are granted a much greater degree of privacy. In the majority of cases decided in Ontario on the possession issue, the courts have held that disciplinary files, as a whole, are third party records and can only be accessed pursuant to the method outlined in *O'Connor*.

Before providing an analysis of the case law with respect to the disclosure of police disciplinary records, by either the police or the Crown, it is necessary to briefly outline the principles established by the leading cases of *Stinchcombe* and *O'Connor*. These two decisions provide the Ontario framework in dealing with this issue.

THE CROWN DUTY OF DISCLOSURE TO THE DEFENCE

The cornerstone case that lays the foundation for the Crown's duty of disclosure is the Supreme Court of Canada's decision in *R. v. Stinchcombe*¹. From that decision, emerged the general legal principle that the Crown is obliged to disclose to the defence all relevant information in its possession or control. The Crown must disclose all evidence that may assist the accused, even where the Crown does not intend to call that evidence. As Mr. Justice Sopinka stated, "the

general principle... is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence."²

Under *Stinchcombe*, there is a duty upon the Crown to disclose to the defence anything that bears some relevance to the issues in a case and there is a duty to err on the side of inclusion. It is only where information is clearly irrelevant or is protected by privilege that the Crown is relieved of its burden of disclosure. The Court found that the Crown owes this duty to disclose all relevant information to the accused in order to "advance the overall fairness, justice, efficacy and truth finding elements of criminal proceedings". A broad disclosure regime was seen by the Court to be necessary to ensure that the accused's right to full answer and defence was protected".

The standard for disclosure in *Stinchcombe* is that of likely relevance. Mr. Justice Sopinka broadly defines this standard as "anything that may be helpful to the defence."³ *Stinchcombe* also recognized that information discovered through a police investigation does not belong to the Crown; rather, this information belongs to the public. Sopinka J. stated "the fruits of the investigation which are in the possession of the counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done."

THE O'CONNOR PROCEDURE FOR THE DISCLOSURE AND PRODUCTION OF THIRD-PARTY RECORDS

The landmark case of *R. v. O'Connor*, which involved a man charged with several sexual offences, outlined the proper procedure to be followed when an accused sought the production of therapeutic records relating to a complaint from third parties.⁴

The Court held that where the defence sought the production of such records, it must bring a formal written application, supported by affidavit evidence. Notice must be given both to those in possession of the material as well as to those with a privacy interest in such material and have standing before the Court.

¹ *Stinchcombe v. The Queen* (1991), 68 C.C.C. (3d) 1 (S.C.C.).

² *Ibid.* at 14.

³ *Ibid.* at 7.

⁴ *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.).

Under *O'Connor*, there is a two-stage process for determining whether an applicant can have access to those confidential therapeutic records. At the first stage of the process, there is an initial burden placed on the defence to satisfy the court that the contents of the records are likely relevant either to an issue at trial or to the competence of a witness who is to testify.

As Sopinka J. and Lamer C.J., writing for the majority, stated:

In the disclosure context, the meaning of 'relevance' is expressed in terms of whether the information may be useful to the defence...In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. When we speak of relevance to an 'issue at trial', we are referring not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events), but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case.⁵

If this stage is satisfied, the records are then produced to the court for the second stage. At this second stage, the judge examines the records to determine if and to what extent the records should be produced to the accused. In making this determination, the judge must weigh the "salutary effects" of a production order against its "deleterious effects" and balance the accused's right to a fair trial and to make full answer and defence against the third party's privacy interest in the records. Again, Lamer C.J.C. and Sopinka J. state:

We agree with L'Heureux-Dube J. that 'upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused' (para. 153). We also agree that in making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence.⁶

The Court in *O'Connor* held that the accused's right to disclosure is a principle of fundamental justice and an integral part of the constitutional right to make full answer and defence.

⁵ *Ibid.* at 19.

⁶ *Ibid.* at 23.

REFERENCE TO POLICE FILES IN THE CASE OF O'CONNOR

Madame Justice L'Heureux-Dube, in a portion of her reasons, not disagreeing with the majority, specifically refers to police complaint records as an example of third-party records where she refers to the cases of *R. v. Gratton*⁷ and *R. v. Callaghan*.⁸ She says in *obiter*: "I see no reason to treat a sexual assault complainant any differently, or to accord any less respect to her credibility or privacy, than that which was accorded police officers and convicted criminals in the above-mentioned cases".⁹

In *Gratton*, the accused was charged with the obstruction of a police officer. Arguing that the officer had assaulted him, he sought access to the officer's personnel files. The accused had made a formal complaint to the police. The Crown and the police argued that the records should not be disclosed on the bases of privilege and relevance. The court ordered that any material relating to the complaint should be produced but otherwise dismissed the application. The court held that reports of alleged prior violence or aggression were not to be produced. In the case of *R. v. Callaghan*¹⁰, the production of police discipline files was denied except in relation to the complaint of the accused with respect to the charge that he was facing.

The specific inclusion of police records in L'Heureux-Dube J.'s comments to the Court lends support to the submission that the *O'Connor* procedure is appropriately applied to cases where the disclosure of police records is at issue. However, many argued that the *O'Connor* procedure was never meant to apply to police records and that the analogy is an improper one that distorts the very basis upon which the decision is founded.

CROWN POLICY WITH RESPECT TO DISCLOSURE TO THE DEFENCE

The duty of disclosure to the defence by the Crown imposed by the *Stinchcombe* decision, is clearly outlined in this excerpt from the most recent edition of the Ontario Crown Policy Manual below:

The governing principle is that Crown counsel is under a duty to disclose all information in his or her possession relevant to the guilt or innocence of the accused unless the information is excluded from disclosure by a legal privilege. Crown counsel's duty to disclose any relevant information in his or her

⁷ *R. v. Gratton* (27 November 1996), Doc. Ottawa (Ont. Ct. (Prov. Div.)).

⁸ *R. v. Callaghan*, [1993] O.J. No. 2013 (QL) (Ont. Ct. (Prov. Div.)).

⁹ *Ibid.* at p. 59.

¹⁰ *R. v. Callaghan* (30 July 1993), Doc. Toronto (Ont. Ct. (Prov. Div.)).

possession, whether favourable or unfavourable to the accused extends to any information, which is not clearly irrelevant. All decisions by Crown counsel not to disclose on grounds of either privilege or relevance are reviewable by the trial judge. Crown counsel will have satisfied himself or herself during the charge screening process that the police have provided all such information to the Crown.¹¹

A *Memorandum of Understanding* dated September 7, 1995 between the Ontario Ministry of the Attorney General and the Ontario Association of Chiefs of Police provides the formal protocol between the police and the Crown on the matter of disclosure. It states:

Whereas the police are responsible for preparing and delivering a full and complete Crown Brief and the Crown is responsible for screening, disclosure and early resolution, based on that Crown Brief.¹²

The Crown's responsibility on disclosure, as outlined in its own 1994 Crown Policy Manual, is totally consistent with the comment contained in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*. That committee was established by the provincial government and chaired by the Honourable G. Arthur Martin [the *Martin Report*].¹³ In fact, except for the last sentence about the Crown screening process, the Crown policy is taken verbatim from that report.

POLICE DUTY TO PROVIDE INFORMATION TO THE CROWN

While *Stinchcombe* clearly places the onus on the Crown to make disclosure to the defence and to make decisions with respect to likely relevance, cases have established that a police service is also required to play a role in providing information to the Crown. "There is a duty on the Crown to make full disclosure and, accordingly, the Crown has a duty to obtain from the police -- and the police have a corresponding duty to provide for the Crown -- all relevant information and material concerning the case."¹⁴

Guidance in determining the police role in disclosure can also be taken from this excerpt from the *Martin Report*, when the Committee states:

¹¹ Crown Policy Manual D-1, 15 January 1994, Disclosure

¹² Memorandum of Understanding between the Ministry of the Attorney General and the Ontario Association of Chiefs of Police, 7 September 1995.

¹³ *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto, Ontario: Queen's printer for Ontario, 1993).

A police officer investigating a criminal offence is bound to act diligently and fairly, and is bound to pursue all leads that a competent investigator would pursue, including leads that seem likely to uncover relevant information favourable to the person being investigated. Subsequently, full disclosure requires that everything uncovered during that investigation be made available to the defence, unless it is clearly irrelevant, or otherwise properly withheld pursuant to the principles enunciated in *Stinchcombe, supra*.

POLICE DISCIPLINE AND COMPLAINT FILES DISCLOSED UNDER O'CONNOR

What follows is a summary of the major cases in Ontario that have applied the *O'Connor* procedure to the disclosure and production of police discipline and complaint files. This review of the case law, not being exhaustive, is intended to provide an overview of the way in which the majority of the courts in Ontario have characterized both the issue itself (as one necessitating a third party application) and the nature of the records (as private and personal).

In the Ontario Court of Appeal case of *R. v. Girimonte*¹⁵, the accused was charged with a number of firearms offences after a police investigation involving both Canadian and American police agencies. The defence, on the belief that full disclosure had not been made, brought an application for the disclosure of a number of items before the preliminary inquiry justice who ruled that he had no jurisdiction to make the order. The defence then brought an application in the then-Ontario Court of Justice (General Division) for an order in the nature of *mandamus* to compel the judge to order the Crown to make the disclosure demanded by the appellant. At the same time, the defence brought a motion under s. 24(1) of the *Charter* seeking an order from a Superior Court judge compelling the Crown to provide disclosure sought by the appellant. The court dismissed the *mandamus* application but ordered limited disclosure under s. 24(1) and the defence appealed to the Court of Appeal.

In *Girimonte*, a number of specific items were requested but there were also some very broad demands made, for example, "all disciplinary records, internal discipline records, [and] documentation from personnel files."¹⁶

¹⁴ *R. v. T. (L.A.)* (1993), 84 C.C.C. (3d) 90 at 94 (Ont. C.A.).

¹⁵ *R. v. Girimonte*, [1997] O.J. No. 4961 (C.A.).

¹⁶ *Ibid.* at para 8.

Mr. Justice Doherty, writing on behalf of the Court, recognized that full disclosure is fundamental to the right of an accused to make full answer and defence and further, that “the Crown has both a legal and ethical obligation” to make that disclosure¹⁷. However, Doherty J.A., rejected the far-reaching requests of the defence and held that:

Disclosure demands, which are no more than “fishing expeditions” seeking everything short of the proverbial kitchen sink, undermine the good faith and candor, which should govern the conduct of counsel. For example, counsel's demand for "documentation from personnel files" of all Canadian and American police officers involved in the investigation can only be described as frivolous and abusive. No reasonable person would suggest that personnel records of all police officers involved in a criminal investigation must be turned over to the defence at the outset of a prosecution. It would be obvious to anyone that the prosecution would resist compliance with such a far-fetched demand. Disclosure demands like some of those made in this case seem calculated to create needless controversy and waste valuable resources rather than to assist the accused in making full answer and defence.¹⁸

In the case of *R. v. Tomlinson*¹⁹, the accused was charged with assaulting police officers. Counter charges had also been laid. It was agreed that the accused was entitled to the officers' Use of Force reports. Mr. Justice Cole, of the now Ontario Court of Justice, concluded that there had been no showing of relevance to require the disclosure of complaint records relating to other cases investigated by the officers. He held, however, that any convictions under the *Police Act* and findings under the successor *Police Services Act* were relevant. In addition, general records held by the Special Investigations Unit were not relevant but its known records into one named officer in an unrelated assault may be relevant.

Cole J. held that:

Although it was important to have a clear understanding of where the various 'complaint' records sought by the accused are located, I wish to stress that in analyzing whether the PCIB records should be disclosed, ultimately I have not been impressed with the distinctions between whether the Crown or the police (and which units of the Toronto Police Service) are in possession or control of them. As Ms. Gauthier noted in her argument, the Martin Committee pointed out

¹⁷ *Ibid.* at para 11.

¹⁸ *Ibid.* at para 12.

¹⁹ *R. v. Tomlinson* (1998), 16 C.R. (5th) 333 (Ont. Ct. (Prov. Div.)).

that 'the issue of whether information in the possession of the police is in the possession or control of Crown counsel is of no moment (at 199). If relevant material is in the hands of the police, it should be disclosed to the defence, because a failure to do so means that 'there has been a failure of the machinery of justice to disclose relevant information to the defence.'²⁰

In the case of *R. v. Shepherd*²¹, the court reinforced the notion that police files are closer to third party records as opposed to material under the Crown's control and disclosable under *Stinchcombe*. In *Shepherd*, the defence sought access to the discipline files of a number of investigating officers in relation to an unrelated alleged illegal search. Mr. Justice Dilks found that the material sought was not in the constructive possession of the Crown, as the defence had argued. Further, Dilks J. held that police records "are more in the nature of employment records" than records of the Crown or even of the police and thus, should be treated as third-party records. As support for this conclusion, Dilks J. noted that firstly, these records are not created for the purpose of the prosecution or investigation, secondly, that the Crown's office plays no part in their creation and thirdly, that there is an expectation of privacy as supported by the *Police Services Act*. As Dilks J. found that this was merely a fishing expedition, he quashed the subpoena for the documents in issue.

In the often-cited decision of *R. v. Altunamaz*, the court, in analyzing the nature of police records again arrived at the conclusion that police files are properly classified as third party records, subject to one very narrow exception.²² In *Altunamaz*, the court examined a number of categories of police discipline and complaint records and looked to the nature of the complaint agencies from which the records were being sought in order to classify the files. The defence in this case was seeking the records of investigations by the Police Complaints Commission; the Public Complaints Investigative Bureau; the Ontario Civilian Commission on Police Services; actions taken by the Chief in relation to misconduct; records of Internal Affairs investigations; and all records of discipline proceedings. Mr. Justice Beaulieu found that, in all but one case, the records sought were not in the hands of the Crown and should be characterized as third party records.

With respect to the specific categories of files being sought, Beaulieu J. found that files of the Public Complaints Commissioner clearly had to be viewed as third-party records, as to deem the PCC to be an agent of the Crown would undermine the autonomy of the independent complaints mechanism. The records of the Public Complaints Investigative Bureau were in the

²⁰ *Ibid.* at 355.

²¹ *R. v. Shepherd*, [1998] O.J. No. 6427 (Prov. Div.).

²² *R. v. Altunamaz*, [1999] O.J. No. 2262 (Prov. Div.).

actual possession of the Chief of Police but in his capacity as an agent for the Solicitor General and not the Attorney General. Thus, these records were also third party records. As for the discipline records held by the Chief of Police, these were generated when the Chief was acting as "the administrative agent for the Solicitor General" and not the Attorney General and thus, as the Crown was divisible, the Solicitor General was a stranger to the prosecution. Moreover, because the records had an employment-related character, there were privacy considerations. Where, however, the Chief ordered a broad inquiry or caused an information to be laid and referred a complaint to the Crown Attorney for prosecution, the records would "still and totally" be in the hands of the Attorney General and as such, subject to *Stinchcombe* disclosure. Records in the possession of the Ontario Civilian Commission on Police Services, a part of the Ministry of the Solicitor General should also be considered third-party records, subject to *O'Connor* disclosure.

Thus, with the exception of one limited situation, *Altunamaz* reinforces the notion that police discipline and complaint files should be treated as third-party records whose production is properly governed under *O'Connor*. Indeed, Beaulieu J.'s methodical characterization of the nature of the records has been a favoured approach in the determination of how police discipline and complaint files should be treated.

In the decision of *R. v. Fudge*²³, Mr. Justice Eberhard supported the reasoning in *Altunamaz* and concluded that police complaint files are third party records and thus, the *O'Connor* procedure should be followed.

While Eberhard J. agreed "that the Crown cannot assert that it cannot make disclosure of information about the case gathered by the police in their investigation which they have not turned over to the crown," she squarely rejected the notion of "all-encompassing indivisibility" upon which *Scaduto* (discussed *infra*) was based. The subject police complaint records were held to be third party records. The court deemed that an officer's earlier conviction for discreditable conduct was not relevant and it dismissed the *O'Connor* application.

The disclosure issue as it relates to the records of the Special Investigations Unit (S.I.U.) was specifically examined in the case of *R. v. Cruise*.²⁴ In this decision, Justice Sharpe characterized the files as third-party records that are subject to the *O'Connor* procedure for disclosure. The court held that the subpoenas for access to the S.I.U. files should be quashed.

²³ *R. v. Fudge*, [1999] O.J. No. 3121 (Prov. Div.).

²⁴ *R. v. Cruise* (April 16), [1997] (Ont. C.J.) Sharpe J.

The approach of most courts in Ontario thus far has been to view police records as those of a third party. Not every case, however, has characterized the issue of the disclosure of police records as one to be pursued under *O'Connor*. In one notable exception, *R. v. Scaduto*, the court ordered the disclosure of police complaint files held by the Attorney General and the Chief of Police on the basis that these files were in the Crown's control and thus, subject to being disclosed under the Crown's general duty of disclosure established in *Stinchcombe*.²⁵ In *Scaduto*, the defence presented to the court news reports of an unrelated disciplinary hearing involving a number of officers who had investigated the case and who, it was alleged, had made an improper warrantless search of a residence. The defence then sought disclosure of the complaint investigation and disposition records made by the Public Complaints Investigation Bureau, the Ontario Civilian Commission on Police Services and all records of action taken by the Chief of Police in relation to this misconduct and any other relevant misconduct. The defence brought an application for an order under s. 24(1) of the *Charter*, compelling disclosure of these records. Some of the material was subpoenaed and some was not.

In a rare departure from the line of reasoning that views police complaint files strictly as third-party records, Mr. Justice Dambrot concluded that both the Attorney General and the Chief of Police were agents of the Crown for the purposes of disclosure and, thus, dismissed the argument that the request should be treated as an *O'Connor* application. The records in their hands were to be treated as records within the possession of the Crown and thus, subject to disclosure under *Stinchcombe*. Dambrot J. specifically and emphatically rejected the argument that information should not be subject to *Stinchcombe* disclosure if it is obtained in functions other than through criminal investigation or prosecution:

It was argued, however, that where the Attorney General or the Chief of Police come into possession of relevant material not in the exercise of their investigative or prosecutorial functions, but as a result, for example, of their responsibility to deal with personnel matters, their disclosure obligations are not engaged. This seems to me to be a dangerous proposition. Surely the ancient, honourable and important responsibilities in support of the proper administration of justice imposed on both office holders do not wax and wane depending on which of their many hats they are wearing when they come into possession of information which may be helpful to an accused faced with a criminal indictment.²⁶

²⁵ *R. v. Scaduto*, [1999] O.J. No. 1906 (Sup. Ct.).

²⁶ *Ibid.*

Thus, Dambrot J. concluded that the application should be treated as an ordinary disclosure application, subject to the ordinary disclosure rules and ordered disclosure of the complaint files at issue.

THE CRIMINAL JUSTICE SYSTEM AND THE LAW OF DISCLOSURE IN ENGLAND

LEGAL STRUCTURE

The British constitution is not set out in a single document and is, instead, a blend of statute law, precedent and tradition. The *Magna Carta*, the *Bill of Rights* and the *Act of Settlement* represent the three major statutes that define British legal and political history. There is no written constitution. Although Britain is a unitary state, England and Wales, Scotland and Northern Ireland all have their own legal systems, with considerable differences in law, organization and practice. The legal system in England and Wales is adversarial in nature and is governed by legislation, common law and equity.

In addition, as a member of the European Union, England and Wales must adhere to European Community law, which takes precedence over both legislation and common law.

CRIMINAL COURT SYSTEM

All cases first appear in Magistrates' court, which is usually comprised of three lay members. The Magistrates' court decides if the nature of the offence is appropriate for that court and whether the parties consent to try the offence in that court. Summary offences, which make up the majority of criminal cases, are tried in Magistrates' court. Alternatively, the court may decide to commit the accused for trial in the Crown Court, which tries more serious offences. The Crown Court is located in approximately 90 centres in England and Wales. Judges, who sometimes sit with lay magistrates, adjudicate with a jury in these courts. If convicted by a Magistrates' court, a person may appeal to the Crown Court or the High Court. Appeals from the Crown Court are brought to the Court of Appeal (Criminal Division). A final appeal may be brought to the House of Lords.

Magistrates' courts have limited civil jurisdiction. Appeals may subsequently be made to the High Court, the Court of Appeal (Civil Division) and the House of Lords respectively. England and Wales also have a number of specialized courts, such as Youth Courts.

The Lord Chancellor is the head of the judiciary in England and Wales.

POLICE SERVICES IN ENGLAND

There are over 40 police services in England and Wales, each responsible for a certain area of the country. A separate police authority maintains each police service. Other police services, such as the British Transport Police, the Ministry of Defence and the Port of London Authority Police are responsible for policing specifically defined areas. The Metropolitan Police Service polices London and is directly responsible to the UK Government Minister. Some common functions, such as the compilation of criminal record information, are provided centrally for police services.

The Home Secretary is responsible for the organization, administration and operation of all policing services. In addition, all police services are subject to inspection by HM Inspectorate of Constabulary (HMIC). Reporting to the Home Secretary, the HMIC are responsible for examining and improving the efficiency of policing services in England and Wales.

POLICE CORRUPTION IN ENGLAND

In recent years, several high-profile, miscarriage of justice cases resulted in waning public opinion and confidence in police services. In an effort to reverse these effects, a number of reviews and inspections were conducted to root out police corruption.

CRIMINAL PROSECUTIONS IN ENGLAND

The Crown Prosecution Service (C.P.S.), headed by the Director of Public Prosecutions, is responsible for the prosecution of persons charged with a criminal offence. The C.P.S. is completely independent of the police although it works closely with them at all times. The police are responsible for laying a charge but it is the C.P.S. that makes the decision of whether or not to prosecute.

The Joint Operational Instructions [*J.O.I.*], adopted in England, Wales and Northern Ireland and established by a working committee of both police and prosecution representatives, provide a comprehensive framework for interaction between the police and the C.P.S.

In addition to the C.P.S., there is a Serious Fraud Office (S.F.O.) that operates in England and Wales. Established in 1988, its role is to investigate and prosecute cases of serious or complex fraud.

CRIMINAL LAW AND LEGISLATION

The criminal justice system in England and Wales is the foundation of the common law legal system and thus, criminal law is largely based on the common law. The criminal law of England and Wales is also now codified in a number of different statutes including *the Criminal Procedure and Investigations Act 1997*, the *Crime (Sentences) Act 1997*, the *Criminal Appeal Act 1995* and the *Proceeds of Crime Act 1995*.

The Home Secretary has overall responsibility for the criminal justice system in England and Wales. The Home Office deals with matters relating to criminal law, the police, prisons, probation and immigration.

DISCLOSURE PROCESS IN CRIMINAL CASES

All alleged criminal offences in England, Wales and Northern Ireland investigated after April 1, 1997 are subject to the reciprocal pre-trial disclosure regime established by the *Criminal Procedure and Investigations Act 1996* [the *C.P.I.A.*], which expressly excludes the previous common law rules relating to pre-trial disclosure.

The *C.P.I.A.*, under what is called "primary prosecution disclosure" imposes a continuing duty on prosecutors to disclose to the defence any material that it does not intend to use at trial and that the prosecution considers might undermine its own case.²⁷ Where the prosecution has provided primary disclosure in a trial for an indictable offence, the defence is required to disclose the general nature of the defence and the aspects of the prosecution case that the defence will dispute, providing reasons.²⁸

Defence disclosure triggers a subsequent, further duty on the part of the prosecutor to disclose any additional undisclosed material, which might reasonably be expected to assist the case disclosed in the defence statement. This is referred to as secondary prosecution disclosure.²⁹

The court may stay the trial where it considers that a person has been denied a fair trial as a result of non-disclosure.³⁰ The *C.P.I.A.* also specifically includes a pre-trial disclosure

²⁷ *Criminal Procedure and Investigations Act 1996* (U.K.), 1996 (C.25) ss. 3, 4 and 9.

²⁸ *Ibid.* at s. 5(6).

²⁹ *Ibid.* at s. 7. This is an objective test as opposed to the subjective test, which applies in relation to primary prosecution disclosure.

³⁰ *Ibid.* at s. 10.

procedure or routine for long or complex cases, which can be invoked by either party or by the court.³¹

INFORMATION PROVIDED BY THE POLICE TO THE CROWN

The new *C.P.I.A.* legislation provides for a Code of Practice [*Code*], which regulates information to be given by the police to prosecutors and retaining material obtained during criminal investigations. The police must record, retain and provide prosecutors with all information that may be relevant to the investigation including material that will not form part of the prosecution case.

In addition, prior to the *C.P.I.A.* being enacted, police and Crown representatives established a set of guidelines entitled the Joint Operational Instructions [*J.O.I.*]. These guidelines detail police and Crown interaction and specifically address how each will meet their disclosure obligations.³² The *J.O.I.* mandate officers to report their prior misconduct to the C.P.S. Relevant information, as enumerated in the *J.O.I.*, is provided to the C.P.S. on a specific form entitled "Police Officer's Disciplinary Record." The *J.O.I.* require police officers to provide information relating to criminal charges and convictions and information regarding disciplinary matters, where there has been a finding of guilt or conviction. In addition, police officers may be required to provide information concerning an investigation for a criminal or disciplinary matter.

It is clear that under the *J.O.I.*, the fact that this information is given to the C.P.S. by the police does not necessarily mean that it will be disclosed to the defence. A relevance assessment must still be made by the C.P.S.

³¹ *Ibid.* at ss. 28-34.

³² The *Joint Operational Instructions* are discussed above in s. 3(a).

THE CRIMINAL JUSTICE SYSTEM AND THE LAW OF DISCLOSURE IN AUSTRALIA

LEGAL STRUCTURE

The federal system of law in Australia is derived from the Commonwealth Constitution. It places responsibility for a number of matters on the Commonwealth Parliament. All other matters are legislated by the states. Except where it relates to a specific head of Commonwealth power, criminal law is a state responsibility. While Commonwealth law may override state law, the states have responsibility for most areas of criminal law and may make laws on any subject of relevance to them.

Australia has a written Constitution that is binding upon the Commonwealth Parliament and the Parliament of each state.

The structure of the Australian legal system is similar to that of Britain and incorporates legislation enacted by Parliaments and the common law. The common law was inherited from the English courts and has been developed and modified by Australian courts.

COURT SYSTEM

Australia has a hierarchical court system. The High Court of Australia is the top and final court of appeal and has the sole responsibility for interpreting the Australian Constitution.

Within each state and territory there is a Supreme Court. In larger jurisdictions, the Supreme Court is immediately preceded by the District Court, District and Criminal Court, or County Court depending on the jurisdiction.

Below the intermediate courts, there are Magistrates Courts, which are the courts of summary jurisdiction. Virtually all civil and criminal proceedings commence at the Magistrates Courts and approximately 95% of criminal cases are resolved at this level. There is a Federal Court that is primarily concerned with the enforcement of Commonwealth law. There are also a number of specialty courts in Australia such as Children's Courts, Coroner's Courts and Industrial Court.

POLICE SERVICES IN AUSTRALIA

Australia has one police force for each state and the Northern Territory. There is also a Commonwealth agency known as the Australian Federal Police which provides police services for the Australian Capital Territory and is involved in preventing, detecting and investigating crimes committed against the Commonwealth. The National Crime Authority also has a policing role. In the state and Northern Territory police forces, the administration is divided into geographical districts, which are then divided into divisions and sub-districts.

With the exception of the Australian Federal Police and the National Crime Authority, all police forces in Australia are under the control of the state or the Northern Territory Governments.

Different authorities in different jurisdictions investigate complaints against the police. The principal agencies involved in the investigation of complaints include the Ombudsman, Internal Affairs departments, Complaints Authorities and various Commissions.

POLICE CORRUPTION IN AUSTRALIA

A number of different Commissions dealing with police corruption in Australia have been conducted in recent years. One of the most well known, the Wood Royal Commission conducted in 1994, examined the New South Wales Police Service and found evidence of systemic corruption. The Commission was established with specific terms to inquire into, *inter alia*, the nature and extent of corruption within the Service, particularly of an entrenched or systemic form, and into the activities of the Professional Responsibility and Internal Affairs branches in dealing with the problems of corruption and internal investigations. A key recommendation of the Royal Commission was the establishment of the Police Integrity Commission, which was an external, focused and highly trained agency that would build on the work of the Commission. Pursuant to the recommendation, the Police Integrity Commission, an independent state Commission, was established and is currently operating in New South Wales.

In March of 2002, a new Royal Commission was commenced to examine whether there has been any corrupt or criminal conduct by Western Australian police officers. As part of this Commission, an amnesty was announced "whereby, subject to certain exceptions and conditions, police officers and former police officers who have been found guilty of corrupt or

criminal conduct may avoid prosecution and serving police officers may be permitted to resign from the Police Service until a designated date."³³

CRIMINAL PROSECUTIONS

Each state has a Director of Public Prosecutions (D.P.P.), as does the Commonwealth. The Commonwealth D.P.P. prosecutes federal offences and the state D.P.P. prosecutes state offences. While various police forces are responsible for laying charges and can prosecute summary matters, more serious offences must be referred to the D.P.P. for prosecution.

CRIMINAL LAW LEGISLATION

The states are primarily responsible for the development of criminal law. Queensland, Western Australia and Tasmania, known as "code states", have enacted criminal codes. New South Wales, Victoria, and South Australia, regarded as "common law" states, have not attempted codification, but rely on a combination of state legislation and the common law. In practice, however, there is little difference in the elements of the criminal law between the "code" and "common law" states.

Whether arising under Commonwealth, state or territorial law, the state or territorial courts deal with most criminal matters.

There is a defined area of criminal law covering federal offences for which the Commonwealth Parliament has passed laws under a specific head of power under the Constitution. While there is no specific head of power covering criminal law, there are a number of different instances where, by legislation, the Commonwealth has created criminal offences, for example, in the area of drugs.

Crimes can be classified as felony, misdemeanor or minor offences but are more commonly classified as indictable or non-indictable offences. Indictable offences are heard by the superior courts and may require a jury. Non-indictable offences, which comprise the vast majority of cases, are heard in Magistrates Courts, where juries are not employed.

³³ Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct By Western Australian Police Officers under the Honourable Geoffrey Alexander Kennedy AO Q.C.

DISCLOSURE TO THE DEFENCE IN CRIMINAL CASES

There is no general common law right to disclosure in criminal trials in Australia, although courts have the discretion to require disclosure on the ground of fairness. In particular cases, non-disclosure can amount to a miscarriage of justice.³⁴ Because criminal law is a matter of state jurisdiction, rules on disclosure vary within the various parts of Australia. The major highlights from the disclosure regimes of the different jurisdictions are detailed below.

New South Wales

Prior to the enactment of the *Criminal Procedure Amendment Act (Pre-trial Disclosure) Act 2001*, on November 19, 2001, there existed no legislative regime requiring general pre-trial disclosure in criminal trials within New South Wales. At that time, it was regulated by a combination of common law rules; guidelines issued by the Director of Public Prosecutions; rules issued by the Bar Association and the Law Society; and directions issued by the Supreme Court of New South Wales. Along with the new legislation, there has also been the addition of a new section 15 A to the *Director of Public Prosecutions Act 1986* which states:

- (1) Police officers investigating alleged indictable offences have a duty to disclose to the Director all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person.
- (2) The duty of disclosure continues until one of the following happens:
 - (a) the Director decides that the accused person will not be prosecuted for the alleged offence;
 - (b) the prosecution is terminated;
 - (c) the accused is convicted or acquitted.
- (3) Police officers investigating alleged indictable offences also have a duty to retain any such documents or other things for so long as the duty to disclose them continues under the section. This subsection does not affect any other legal obligation with respect to the possession of the documents or other things.³⁵

³⁴ See for e.g. *Maddison v. Goldrick*, [1976] 1 NSWLR 651 and *Carter v. Hayes* (1994), 16 SASR 451.

³⁵ *Director of Public Prosecutions Act 1986*, s. 15A.

While information on criminal history is not routinely requested for prosecution witnesses, police forces would typically inform the prosecution of criminal convictions or pending charges by reason of the Prosecution Guidelines and Barristers Rules. If the information is relevant to the credibility of a witness or to an issue in the proceedings, the prosecution will disclose the information to the defence.

Under the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, there is a mechanism in place for police to disclose to the prosecution relevant information not contained in the brief of evidence. This is done by way of a disclosure certificate, which is prescribed in the Regulations to the *Director of Public Prosecutions Act*.

Any Information provided is subject to any claim for public interest immunity in relation to ongoing investigations or restrictions on dissemination, such as under the *Police Integrity Commission Act*.

Under the Prosecution Guidelines of the New South Wales D.P.P., prosecutors have a continuing obligation to make full disclosure to the accused of all facts and circumstances and the identity of all witnesses reasonably regarded as relevant to any issue likely to arise at trial.³⁶

The Director of Public Prosecutions in New South Wales also maintains a database of police officers that were adversely mentioned in the Police Royal Commission or the Police Integrity Commission. Police witnesses are checked against this database and where there is relevant information pertaining to a police witness, the Director of Public Prosecutions will provide it to the defence, subject to a claim of public interest immunity.

APPLICATION TO THE COURT FOR DISCLOSURE

In addition to obtaining disclosure through a statutory regime, defence counsel can subpoena the police records, the records of the Director of Public Prosecutions or the records of a relevant third party.

Where a court is making a decision with respect to disclosure where public interest immunity is claimed, it is a question of balancing that interest against the interest of the other party. These decisions are made on a case-by-case basis.

³⁶ Prosecution Guidelines of other jurisdictions in Australia have similar provisions.

Victoria

In the state of Victoria, a reciprocal disclosure regime exists. This regime is governed by legislation that requires both the prosecution and the defence to provide disclosure.³⁷ Evidence that is not disclosed under legislation or which involves a substantial departure from the disclosed case may only be introduced at trial with leave of the court.

Western Australia

In criminal trials for indictable offences, the defence is required to disclose alibi evidence but fewer particulars are required in Western Australia than in other jurisdictions. Western Australia also has draft Criminal Practice Rules that establish a pre-trial disclosure regime for indictable offences. The Law Reform Commission of Western Australia has recommended that the Rules be incorporated into a statutory pre-trial disclosure regime.

Northern Territory, South Australia, Tasmania and the Australian Capital Territory

Defence disclosure requirements also apply in respect of alibi evidence in trials for indictable offences in the jurisdictions of Northern Territory, South Australia, Tasmania and the Australian Capital Territory.³⁸ The defence is required to give written notice of particulars of intended alibi evidence to the Director of Public Prosecutions.

Queensland

In Queensland, in criminal trials for indictable offences, the defence is required to disclose intended alibi evidence in the form of written notice of particulars of the alibi to be given to the Director of Public Prosecutions.³⁹

³⁷The *Crimes (Criminal Trials) Act 1999 (Vic.)* commenced operation on 1 September 1999, and established a number of new pre-trial procedures for the Victorian County and Supreme Courts.

³⁸*Criminal Code (NT)* s. 331, *Criminal Code (Tas)* s. 368A, *Criminal Procedure Act 1986 (NSW)* s. 111, *Criminal Law Consolidation Act 1935 (SA)* s. 285C.

³⁹*Criminal Code (Qld)* s. 590A.

INFORMATION PROVIDED BY THE POLICE TO THE CROWN

In Australia, there has been no consistent practice relating to the issue of disclosure of police misconduct to the prosecution. This fact is "largely attributable to dependence by the Director of Public Prosecutions upon police case officers who may not always be entirely forthcoming, whether through inadvertence or ignorance of their responsibilities, or by reason of the fact that internal investigations have remained confidential."⁴⁰

⁴⁰ Letter from the Hon. Justice James Wood QC, April 17, 2002.

THE CRIMINAL JUSTICE SYSTEM AND THE LAW OF DISCLOSURE IN NEW ZEALAND

LEGAL STRUCTURE

The laws of New Zealand consist of the common law, statute law enacted by the New Zealand parliament, several United Kingdom laws that are still in force, regulations, by-laws, and other forms of supporting legislation. When applying common law, the courts take into account the common law principles developed in New Zealand and in countries like England, Australia and Canada. New Zealand does not have a Constitution that is written in a single document. Instead it has a number of basic laws, such as the *Treaty of Waitangi*, which established British sovereignty; the *Human Rights Act* (1994); and the *New Zealand Bill of Rights Act* (1990). Other civil rights are safeguarded by the operation of the common law.

COURT SYSTEM

The District Court, having both criminal and civil jurisdiction, is found in most towns and cities and is usually the court of first instance. The majority of indictable offences are dealt with summarily by the District Court judges, who have jurisdiction over all property crimes and all but the most serious of other crimes, such as treason, murder, rape and perjury. Next in the hierarchy is the High Court of New Zealand, which sits in main centres throughout the country. The High Court may conduct trials for all indictable offences, but in practice, limits itself to more serious and complex cases. It also has jurisdiction over major civil matters. The Court of Appeal, being the court of final jurisdiction in most cases, hears appeals from the High Court and the District Court. In New Zealand, appeals may still be made to the Privy Council in some circumstances although the creation of a New Zealand Supreme Court is currently under active consideration. New Zealand also has a number of courts having special jurisdiction, such as, Maori Land Court, Family Court, and Youth Court.

POLICE SERVICES IN NEW ZEALAND

The New Zealand Police is a de-centralized organization divided into 12 districts. Each district has a central station that manages subsidiary and suburban stations. The New Zealand *Police Act* is the legislation that governs the police.

Internal police discipline in New Zealand is governed under a Regulation to the *Police Act*. An administrative tribunal, usually made up of a retired judge or Q.C., holds hearings.

POLICE COMPLAINTS AUTHORITY

The New Zealand Police Complaints Authority, an independent body, is appointed by the Governor-General to deal with any complaints of misconduct or neglect of duty by police and to investigate incidents involving death or serious bodily harm in which the police are involved. The Authority is entirely independent of the police.⁴¹

POLICE AND CROWN PROSECUTORS

There are two streams of criminal prosecutions in New Zealand. The police typically handle summary matters, which are usually less serious, although the Crown has discretion to handle these prosecutions. More serious, indictable matters are handled by a Crown prosecutor who may be a principal in a private legal firm holding a warrant from the Governor General as a Crown solicitor.

CRIMINAL LAW

Various Acts passed by a national Parliament now codify criminal law throughout New Zealand that was based originally on the common law. The *Crimes Act* groups most of the main criminal offences. Other key statutes include the *Sentencing Act*, the *Parole Act*, the *Summary*

⁴¹ This is contained in section 32(1) of the *Public Complaints Authority Act* 1988 which states that: "[t]he Authority, and every person holding any office or appointment under the Authority, shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions, and shall not communicate any such matter to any person except for the purpose of carrying out their functions under or giving effect to this Act." *Public Complaints Authority Act* 1988 002.

Proceedings Act, the *Bail Act* and the *Evidence Act*. Criminal legislation is relatively similar to that operating in Canada and in the Australian states of Queensland and Western Australia.

DISCLOSURE IN CRIMINAL CASES

The law in New Zealand, relating to Crown disclosure to the defence in criminal cases, is not contained within any single statute. The relevant rules are found in a combination of statute law and common law. The disclosure of "personal information" is administered by the *Privacy Act 1993*. The *Official Information Act 1982* gives an accused the right to obtain information held by the police but information such as internal memoranda file notes and instruction will commonly be protected from disclosure.

In New Zealand, only evidence which would or might detract from the prosecution's case, assist the defence or incriminate another person is material and, therefore, disclosable by the Crown to the defence. The crown's duty of disclosure is now stated to be limited to providing the defence with information, which is material to it.⁴²

The *New Zealand Bill of Rights Act 1990* does not have an equivalent to section 7 of the *Canadian Charter of Rights and Freedoms*, which contains the concept of full answer and defence. However, it has been held that the right to a fair hearing and the right to adequate time and facilities to prepare a defence combine to implicitly require full pre-trial criminal disclosure by the Crown.⁴³

The disclosure of third party records to a court is a developing area of law in New Zealand but, as in the classic *O'Connor* scenario in Canada, it has generally pertained to material like medical records.

INFORMATION PROVIDED BY THE POLICE TO THE CROWN

Currently, there is no legislation or regulations imposing any obligation on the police to provide information relating to police misconduct to the Crown. Further, there is no internal police policy that covers this area. Issues with respect to police providing records to the Crown are handled on a case-by-case basis according to relevance.

⁴² *R. v. Mason*, [1975] 2 NZLR 289. In addition, the Court of Appeal in *R. v. Quinn*, [1993] 3 NZLR 146 at 152 stated, "the Crown's duty of disclosure is limited to providing the defence with information which is material to it.

⁴³ *Simpson v. MAF* (1996), 3 HRNZ 342 at 354.

DISCLOSURE OF POLICE MISCONDUCT

It is understood that the Crown has a duty at common law to disclose to the defence details of the convictions of Crown witnesses that are relevant to the witness' credibility.⁴⁴ However, there is no formalized process for the Crown advising the defence of the records of misconduct of police officers who are giving evidence. The general principle utilized in this area is whether the records are relevant to a witness' credibility.

It is the prosecuting party, whether it is the police or the Crown that makes the determination as to what will be disclosed in any given case. In general, previous criminal convictions tend to be disclosed, as they are typically deemed relevant to credibility. Outstanding criminal charges are not usually seen as meeting the requisite relevancy threshold.

The entire police internal discipline system in New Zealand is completely closed. There is no publication of any part of the process. As a consequence, the defence would generally not know that an officer in a particular case had any type of internal record of misconduct and would have no way of obtaining this information, absent personal knowledge of the case. The only exception would be where the judge presiding over the internal discipline process deems the hearing to be open to the public, but this is an extremely rare situation.

Records of the Police Complaints Authority are never disclosed. The Authority, an independent body, has its own legislation requiring the Authority to maintain secrecy with respect to all matters that come to its knowledge in the exercise of its functions. If any disclosure application relates to a matter that has been designated a Police Complaints Authority investigation, all information sought is protected by legislation. The protection afforded to Police Complaints Authority files has also been firmly upheld by the Court of Appeal.⁴⁵

APPLICATION TO THE COURT FOR DISCLOSURE

It is the Crown's responsibility to disclose material evidence.⁴⁶ If a ground of exception is claimed, for example, public interest, it is for a court to decide if information can be withheld. If the Crown refuses to disclose information on the grounds of public interest or some other

⁴⁴ The leading case on this issue is *Wilson v. Police* (1991), 7 CRNZ, 699 (C.A.). In this decision, it was held that "the District Court has jurisdiction to order the prosecution to disclose convictions of prosecution witnesses."

⁴⁵ See *Attorney-General v. Hekenberg*, [1988] 3 NZLR 257, in which it was held that "the Authority is not required to release the information."

⁴⁶ See *Mason*, *supra* note 1.

recognized exception and the defence argues that material evidence is being withheld, the Court will have to decide whether the issue should be disclosed.⁴⁷

In a process similar to an *O'Connor* application in Ontario, defence counsel in New Zealand may make an application to the court for the disclosure of police records. This type of application is rare.

In deciding whether disclosure should be ordered, the court will look at the nature of the records being sought to determine whether they are relevant to the credibility of a police witness. If the judge deems the records relevant, he or she will order them to be disclosed.

In New Zealand, defence requests to the police for any information contained within police discipline files are normally opposed until a court orders disclosure.

OFFICIAL INFORMATION ACT 1982

When refused by the crown, a defence request for information pertaining to prior police misconduct may also be reviewable by the Ombudsman. Under the *Official Information Act 1982*, defence counsel can request the Ombudsman to review a refusal to provide information. While requests under the *Act* are a collateral way to approach disclosure generally, they are not usually used to obtain police misconduct information. Disclosure will only be ordered if the public interest in disclosing the information outweighs the privacy interests involved. Under this test, relevance is not an issue and decisions are made on a case-by-case basis

CRIMINAL DISCLOSURE REFORM

The New Zealand Law Commission has recommended that a new comprehensive statutory disclosure regime be introduced. The Commission recommends two types of disclosure. The first is initial disclosure of the charge, its statutory authority, the maximum penalty for conviction, a summary of the facts and any information relevant to sentence. This should be made available as soon as possible before the accused is required to enter a plea. The second type of disclosure is full continuing disclosure of all information relevant to the charge.

⁴⁷ In the case of *Commissioner of Police v. Ombudsman*, [1988] 1 NZLR 385 at 400, Cooke P. stated that "there are exceptions in special cases where disclosure would prejudice the maintenance of the law and in cases of dispute, a Judge of the Court where the proceedings are pending will be able to determine the issue."

The Commission also recommends that the Crown should be able to withhold information if necessary, in the public interest. It is advocated that the disclosure regime should operate alongside the *Official Information Act 1982* and the *Privacy Act 1993*; and that the general law of evidence using a test that requires a showing of relevance should deal with disclosure of material that is held by third parties.

THE CRIMINAL JUSTICE SYSTEM AND THE LAW OF DISCLOSURE IN THE UNITED STATES

LEGAL STRUCTURE

The United States is a common law country. With the exception of Louisiana, which relies on the French civil code, every U.S. state has a legal system that is based on the common law.

The powers of the federal government are extensive. The Supremacy Clause of the U.S. Constitution governs potential conflicts between state and federal regulation in all areas. The Supremacy Clause states that federal laws and international treaties are supreme to state and local laws. Where state and local laws contradict federal laws or international treaties, they are pre-empted and can be declared unconstitutional by a federal court.

The United States Constitution is the supreme law of the land. It provides the framework for government and for the rights of all citizens. No law may violate the Constitution and all governmental authority must be in compliance with it. The federal courts have the sole authority to interpret the Constitution and to determine the constitutionality of federal and state laws.

Subject to the United States Constitution, state constitutions are the supreme law within each state and statutes within each state must conform to that state's constitution.

COURT STRUCTURE

The majority of state court systems are composed of at least one appellate court of last resort, usually called the "Supreme Court"; one or more intermediate appellate courts; at least one trial court of general jurisdiction; and various trial courts of limited and/or special jurisdiction. The structure and jurisdiction of trial courts vary substantially from state to state. Limited and special jurisdiction courts commonly handle misdemeanors; traffic and municipal ordinance violations; probate; and small claims cases. Most limited jurisdiction courts do not have jury trials.

The 94 U.S. federal judicial districts are organized into 12 regional circuits, each having a court of appeals. The court of appeals, for each regional circuit, hears appeals from its own district courts and from the federal administrative agencies. In addition, the court of appeals has nation-wide jurisdiction to hear appeals in specialized cases. The district courts are the trial

courts of the federal court system. Within some limits, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters.

The Supreme Court of the United States is comprised of the Chief Justice and eight Associate Justices. Power to nominate the Justices is vested in the President, who makes appointments with the advice and consent of the Senate. The Supreme Court hears only a limited number of cases. Those cases may begin in the federal or state courts and usually involve important questions on the Constitution or federal law.

LAW ENFORCEMENT IN THE UNITED STATES

In 2000, there were approximately 796,500 full-time sworn law enforcement officers in the United States. This represents a blend of federal, state and local police. The vast majority of officers are members of local and state police departments. It is anticipated that an additional 650,000 state and local law enforcement officers will be hired over the next several years in response to the events of September 11th.

Among the federal agencies, the Federal Bureau of Investigation (FBI), based in Washington, D.C., is the principal investigative arm of the United States Department of Justice. It has the authority and responsibility to investigate specific crimes assigned to it and to provide investigative assistance to other law enforcement agencies. The FBI has approximately 11,500 Special Agents assigned across the U.S. and abroad. The FBI is currently in the process of major reorganization arising from September 11th. This transition will address the weaknesses exposed by the terrorist attacks, with the inclusion of a stand-alone Security Division, a Records Management Division and the Office of Law Enforcement Co-ordination.

In addition, there is a specialized organization, the Drug Enforcement Agency (DEA), which is the premier agency for the domestic enforcement of federal drug laws and has sole responsibility for co-ordinating and pursuing U.S. drug investigations abroad. The DEA also works alongside federal, state, local and international law enforcement agencies.

PROSECUTION

The United States Attorneys serve as the nation's principal litigators under the direction of the Attorney General. There are 93 U.S. Attorneys throughout the United States, Puerto Rico, the Virgin Islands, Guam and the Northern Mariana Islands. U.S. Attorneys are appointed by, and

serve at the discretion of the President, on the advice and consent of the Senate. In most cases, one U.S. Attorney is assigned to each of the judicial districts. Each U.S. Attorney is the chief federal law enforcement officer of the U.S. within his or her particular jurisdiction.

U.S. Attorneys conduct most of the trial work in which the United States is a party. This includes criminal cases, civil cases and the collection of debts owed to the federal government.

CRIMINAL LAW AND LEGISLATION

State legislatures and the U.S. Congress enact criminal law based on the common law. Although there are still some common law crimes, most are now established by local, state and federal governments.

Since crime is considered a state, rather than a federal, concern, most crimes are covered by state criminal laws and thus vary from state to state. Congress does enact criminal laws in areas falling within the federal jurisdiction set out in the U.S. Constitution and concerning federal matters. In recent years, the list of federal crimes has grown. Statutes set the framework for criminal procedure in the states, which are subject to constitutional limits.

Crimes include both felonies, which are more serious offences, and misdemeanors, which are less serious. Generally, felonies are crimes punishable by imprisonment of a year or more, while misdemeanors are crimes punishable by less than a year.

DISCLOSURE IN CRIMINAL CASES

Generally, the United States operates under a reciprocal disclosure regime whereby both the prosecution and the defence are required to provide each other with certain specified information, documents and other materials, subject to a claim of privilege. Both parties are also bound by an ongoing disclosure obligation.

INFORMATION PROVIDED BY THE POLICE TO THE PROSECUTION

On December 9, 1996, the Attorney General issued a "Policy Regarding Disclosure⁴⁸ to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy").⁴⁹ The Giglio Policy applies to the Department of Justice, the Federal Bureau of Investigation, the Drug Enforcement Administration and other such federal agencies. The purpose of the Giglio Policy is to ensure that prosecutors receive sufficient information to meet their obligations as established in the *Giglio* case while protecting the privacy rights of government employees. The Giglio Policy recognizes that the precise limits of potential impeachment information are not easily determined. However, it states that information that may be provided by the police to the prosecution includes: (a) specific instances of witness' conduct for the purpose of attacking the witness' credibility; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased. Allegations that cannot be substantiated, are not credible or have resulted in an individual's exoneration are generally not considered to be potential impeachment information. It should be noted that this policy, although comprehensive and useful, is applicable only in the context of federal law enforcement agencies. No such similar regime exists for local and state police.

However, some states, such as California, have enacted legislation that specifically requires the police to maintain misconduct records and outlines the procedure for the disclosure of such records during litigation.⁵⁰

GENERAL DISCLOSURE POLICY ON POLICE MISCONDUCT⁵¹

The constitutional duty in the United States to disclose exculpatory evidence was established in the 1963 landmark decision of *Brady v. Maryland [Brady]*.⁵² In *Brady*, the prosecutor disclosed several statements but did not disclose the statement of the co-defendant admitting the murder. The defendant requested that he be able to examine the co-defendant's statements. The U.S. Supreme Court held that the government is required to disclose to the defence any evidence favourable to the accused and material to guilt or punishment. The violation of this duty

⁴⁸ While the Policy uses the term "disclosure," what is actually being referred to is the provision of information from the police to the prosecutor and is not actually disclosure, in its proper legal sense.

⁴⁹ 9-5.000: Issues Related to Trials and other Court Proceedings. 9-5.100: Policy Regarding Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy"), Department of Justice, USAM, Title 9, October 1997.

⁵⁰ See the *California Penal Code*, Stats. 1985, c. 367, §1 and the *California Evidence Code*, Stats. 1965, c. 299, §2.

⁵¹ Much of the information in the following section is taken from Lis Wiehl, "Keeping Files on the File Keepers: When prosecutors are forced to turn over the personnel files of Federal Agents to defence lawyers", 72 Wash. L. Rev. 73 (January, 1997).

amounts to a denial of due process. Moreover, a violation occurs irrespective of the good faith of the prosecutor in suppressing the information. The obligation to make disclosure is triggered upon request by the defence however this obligation exists even without a specific request by defence.

In the 1972 case of *Giglio v. United States [Giglio]*,⁵³ the court extended the principles outlined in *Brady* to include evidence affecting a government witness' credibility, when that witness' testimony was critical to the trier of fact's determination of guilt or innocence.

As a result of *Brady* and *Giglio*, the government is constitutionally required to disclose any evidence favourable to the defendant that is material to either guilt or punishment, including evidence that may impact on the credibility of a witness.

In 1991, in the case of *United States v. Cadet [Cadet]*,⁵⁴ a panel of the Ninth Circuit established the procedure that the prosecution must follow when confronted with a request by a defendant for the personnel files of testifying officers. The court held that the government must disclose information favourable to the defence where it meets the materiality threshold. If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an *in camera* review. The government has a duty to examine personnel files upon a defendant's request for their production. The obligation to examine the files arises by virtue of the making of a demand for their production; the defence need not make a prior showing of materiality. However, courts outside the Ninth Circuit have not followed *Cadet* and have held that the defence is required to make a prior showing of materiality before the court will compel the prosecution to review government personnel files for relevant material.

The case of *United States v. Henthorn [Henthorn]*,⁵⁵ also decided in the Ninth Circuit, changed the government's duty to disclose under *Brady*. Prior to this, prosecutors rarely had a duty to review, let alone disclose, the contents of an investigator's personnel file. The *Henthorn* case held that no materiality showing by the defence is necessary to trigger the disclosure obligation. When the defendant makes a request, the government must examine the file for evidence that could be used to impeach the agent's credibility. The prosecutor is then obligated to turn over any material that could be used to impeach the agent.

⁵² *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵³ *Giglio v. United States*, 405 U.S. 150 (1972).

⁵⁴ *United States v. Cadet*, 727 F. 2d 1453 (9th Cir. 1991).

⁵⁵ *United States v. Henthorn*, 931 F. 2d 29 (9th Cir. 1991).

Henthorn has not been followed outside of Ninth Circuit. Instead, a defendant must make a materiality showing before requiring the government to review the file. This requirement places the defendant in a "Catch-22" situation; a showing cannot be made without first having access to the file.

In *Kyles v. Whitley* [*Kyles*],⁵⁶ the defendant was convicted and sentenced to death for murder. The Supreme Court, in reversing the conviction, identified information that has been improperly suppressed by the government. The Supreme Court ruled that a prosecutor's constitutional duty to provide exculpatory evidence to a defendant includes a related duty to exercise reasonable diligence to discover or learn of the existence of such evidence. The "duty to learn" thus extends the prosecutor's obligation not only to ensure that all exculpatory information is provided to the defence but also to undertake reasonable steps to ensure that the prosecutor is aware of all such material in the government's possession.

However, the Ninth Circuit in *United States v. Herring*⁵⁷ distinguished *Kyles* and held that it did not require prosecutors to personally conduct searches of the personnel files of government agents for relevant material. In addition, the Ninth Circuit has refused to extend its *Henthorn* decision, which applies only to records kept by federal agencies, to include state and municipal law enforcement officers.

Thus, there is currently inconsistency across the country with respect to the review and disclosure of police files. Records may be disclosed depending on the area in which the case is being heard and depending on the level of law enforcement agency that is involved (i.e. federal, state or local police departments).

⁵⁶ *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

⁵⁷ *United States v. Herring*, 83 F. 3d 1120 (9th Cir. 1996).