



Attorney
General's
Office

Review of the efficiency and effectiveness of disclosure in the criminal justice system

November 2018



Review of the efficiency and effectiveness of disclosure in the criminal justice system

Presented to Parliament
by the Attorney General
by Command of Her Majesty

Published November 2018



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This document is also available from www.gov.uk/government/publications

Print ISBN: 978-1-5286-0873-2
CCS reference: CCS1118969028

Printed cost-effectively in-house



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Foreword

The disclosure to the defence of material obtained during a criminal investigation, that the prosecution has not used as part of its case is fundamentally important to ensuring a fair trial. Yet, I suspect that no one who has regular professional involvement with the criminal courts can have avoided the conclusion, often from painful experience, that for too long the system of disclosure has not operated effectively enough.



This Review was announced by my predecessor at the end of 2017, in part as a result of the new difficulties now presented by the sheer scale of digital material generated by police investigations, particularly in complex cases such as serious fraud. Shortly after the Review was announced, a series of prosecutions were halted as a result of troubling disclosure failures in the context of allegations of serious sexual assault and rape. These cases were stopped far too late in the proceedings and made the Review even more urgent.

The Review builds on previous reports conducted by members of the judiciary and the policing and prosecution inspectorates over recent years. It also takes place against the background of operational improvements now being driven by senior leaders from the police and the Crown Prosecution Service in executing the National Disclosure Improvement Plan. I recognise the considerable value of this work and have undertaken a wider examination of the systemic problems of disclosure within the criminal justice system from the inception of an investigation to the conclusion of proceedings.

This document should be seen as a plan of practical actions to tackle those problems from the point an allegation is considered by the investigator to the end of the case. All those handling a case – investigators, prosecutors and defence lawyers – have an important part to play, underpinned by oversight from the judiciary. Prosecutions must not be brought based on insufficient evidence, and both the accused and accuser must not be caused unnecessary suspense and uncertainty.

The central importance of the duty of disclosure must be seen from the twin perspective of fairness to the accused and as a vital guarantor of a secure conviction. Cases that collapse or are stayed and convictions that are quashed because of serious deficiencies in disclosure are fair neither to the complainant and the defendant nor to the public and they undermine confidence in the administration of criminal justice.

It is clear that there must be a new emphasis on compliance with the duty of disclosure much earlier in the process than is currently the practice, supported by better training and methods, an appropriate use of technology, improved data collection and management information on the performance of the obligation, and by strengthened oversight by the Criminal Justice Board, where ministers can hold the system to account.

That emphasis has already begun with the National Disclosure Improvement Plan introduced by the previous Director of Public Prosecutions and police leaders to whom I am grateful for this vital initiative. It is also clear that each of the parties to our system must assume the responsibility for making it work by providing the consistent leadership and impetus that it requires. To that end, I shall be following up the publication of this Review by writing to the new Directors of the Crown Prosecution Service and the Serious Fraud Office, the judiciary



and to each Chief Constable and the Metropolitan Police Commissioner setting out the next steps in the necessary process of change that the situation requires, and I shall be holding a "disclosure summit" to discuss the progress of the National Disclosure Improvement Plan and the new Attorney General's guidelines on disclosure, which I shall publish in the Autumn.

This Review is the result of constructive engagement from parties throughout the criminal justice system and I thank all those who have contributed to it. I am also grateful to the Justice Select Committee for the focus and scrutiny they have provided to this important subject by conducting an inquiry alongside my Review. As they noted in their recent report, the duty to ensure "*the right person is prosecuted for the right offence*" is paramount.

As others have said already, there is now a real recognition of the complex combination of problems that affects the proper performance of the duty of disclosure and, I believe, a joint commitment from all those with a part to play to achieving permanent change and improvement. The task ahead is for everyone involved in disclosure within our criminal justice system, of which despite some justifiable criticisms we can be rightly proud, to make that happen. It is powerfully in the public interest that we should.

The Rt. Hon. Geoffrey Cox QC MP
Attorney General



Introduction

Disclosure is the process in a criminal case by which someone charged with a crime is provided with copies of, or access to, material from the investigation that is capable of undermining the prosecution case against them and/or assisting their defence. Without this process taking place a trial would not be fair.

Investigators, prosecutors, defence teams and the courts **all** have important roles to play in ensuring the disclosure process is done properly, and promptly.

The stages of the current disclosure process during an investigation and a prosecution include:

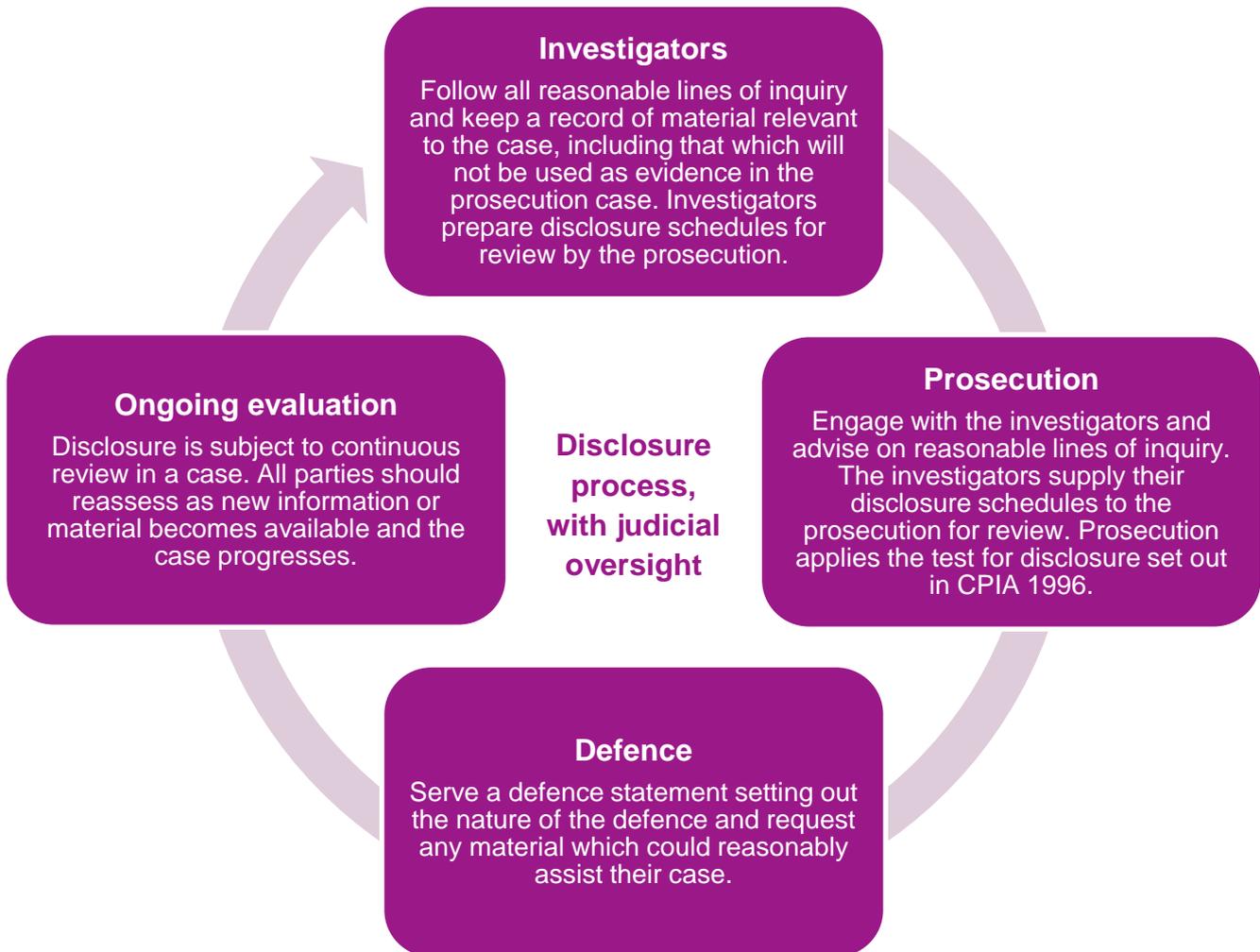
- When an allegation is made against someone, the investigator will begin an investigation. From the outset the investigator has a duty to record, retain and review material collected during the course of the investigation. The investigator reveals this material to the prosecutor to allow for effective disclosure to the defence.
- Disclosure obligations begin at the start of an investigation, and investigators have a duty to conduct a thorough investigation, manage all material appropriately and follow all reasonable lines of inquiry, whether they point towards or away from any suspect.
- If the investigator believes there is strong evidence to suggest someone committed a crime they will present the evidence to the prosecutor, who decides if the person should be charged.
- If a person is charged with an offence the investigator will review all material gathered during the investigation. This could include CCTV footage, statements from witnesses, mobile phone messages, social media conversations or photographs.
- Some evidence will be used in the prosecution and will be part of the case. Some material will be irrelevant and have no bearing on the case at all.
- The remainder is referred to as the 'unused material'. This material is relevant to the case but is not being used as part of the prosecution evidence presented to the Court. The investigators¹ create a schedule of the unused material to aid the disclosure process.
- The unused material is reviewed by the investigator and if any of it is capable of undermining the prosecution case or assisting the defence it will be brought to the attention of the prosecutor.
- Prosecutors must provide the defence with a schedule of all of the non-sensitive unused material and provide them with any material that undermines the case for the prosecution or assists the case for the accused.
- The accused must serve a defence statement on the prosecution in Crown Court cases and may do so in magistrates' court cases, which sets out their defence to the allegations and can point the investigator to other lines of inquiry. The investigator will review all their material again and decide whether, in the light of the defence statement, additional material is now relevant or meets the test for disclosure because it supports the case for the accused.

¹ Investigator is used here as short hand for a police officer or investigating officer. The scheduling and review of unused material is carried out by an officer appointed as 'disclosure officer' for the case, a role sometimes performed by the same person carrying out the investigation.



- The investigator produces a further report to the prosecutor who makes the final decision on whether further material should be disclosed. The accused has a right to challenge that decision by making an application to the court.
- The investigator and prosecutor have a continuing duty to keep disclosure under review throughout the life of a case.

The below diagram provides a high level illustration of the process:



Attorney General's Disclosure Review

On 11 December 2017 a Review of disclosure procedures in the criminal justice system was announced, led by the Attorney General. This followed a comprehensive joint inspection of disclosure in volume Crown Court cases by Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) and Her Majesty's Inspectorate of Constabulary² which concluded earlier in 2017. The decision to undertake a review was additionally influenced by Richard Horwell QC's investigation report³ into disclosure failure in a complex case called *Moucher*,

² Now Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS).

³ Richard Horwell QC, '[Moucher investigation report](#)' (July 2017)



also published in 2017, and the recommendations of the project to review the government response to economic crime commissioned by the Prime Minister.

The scope of the Review was wide, covering cases in the magistrates' courts as well as more complex Crown Court cases and specialist types of cases, including economic crime and sexual offences. The Review examined existing codes of practice, protocols, guidelines and legislation, as well as case management initiatives and capabilities throughout the criminal justice system, including the use of digital technology. The terms of reference of this Review are set out at [Annex A](#) and a list of the stakeholders whose evidence was considered during the Review is included at [Annex B](#).

After the Review commenced, the Crown Prosecution Service (CPS), National Police Chiefs' Council (NPCC) and the College of Policing came together to publish the joint National Disclosure Improvement Plan⁴ (NDIP) in January 2018, a package of measures to improve how the criminal justice system deals with disclosure. The NDIP provided an unprecedented level of senior leadership and oversight to disclosure improvement. It set out what had already been done to improve the disclosure process and the further steps that would be taken. A schedule of the key improvements and initiatives that the NDIP has developed and implemented during the Review is set out at [Annex D](#). This work has complemented the work of this Review and means that the recommendations herein are focussed in the main on system-wide issues.

In summary, the Review analysed the evidence and, while recognising that important operational improvements are currently being implemented through the NDIP, diagnosed the cross-cutting problems with the disclosure process as:

- a. Reasonable lines of inquiry not always being followed in line with the Criminal Procedure and Investigations Act Code⁵ duty to do so;
- b. This duty and disclosure obligations are not being considered with sufficient attention from the outset of a criminal investigation;
- c. Investigators not always identifying material as relevant for inclusion on the disclosure schedules they create as an audit trail for the unused material in the case, then prosecutors not always asking the right questions to uncover the error;
- d. Investigators and prosecutors not always applying the disclosure test correctly, which means that material that should be disclosed is not disclosed;
- e. Disclosing the right material too late;
- f. The engagement of the defence and the judiciary with disclosure issues where they have a role in the process;
- g. Not having the necessary technological tools;
- h. Not collecting or measuring disclosure performance data adequately;
- i. In the past, insufficient prioritisation of disclosure improvement at a senior level in policing and prosecuting.

⁴ CPS, NPCC and College of Policing, '[National Disclosure Improvement Plan](#)' (January 2018)

⁵ Ministry of Justice, '[Criminal Procedure and Investigations Act Code of Practice](#)' (February 2015)



These are the problems. The practical proposals to tackle the root causes of these issues can be ordered under the following headings, with each of which this Review will deal in turn:

1. Primary legislation continues to provide an appropriate disclosure regime, but in practice the system is not working as effectively or efficiently as it should.
2. Practical reinforcement of the duty to make reasonable lines of inquiry and apply the disclosure test correctly.
3. Pursuing a fair investigation and considering disclosure obligations from the outset, rather than as an afterthought.
4. Proportionate 'frontloading' of disclosure preparation and performance.
5. Early and meaningful engagement with disclosure issues by the defence and the judiciary.
6. Harnessing technology.
7. Data management.
8. Sustained oversight and improvement.

The central analysis of this Review is that there are significant improvements to be gained from performing some disclosure obligations earlier than is currently the case at each stage in the process. While this frontloading of the system might mean some additional resource requirements arising earlier for each of the parties involved, there should also be consequential efficiencies and improvements realised as well, particularly resulting in fewer non-effective trials that are currently charged and stopped at a late stage. Effective end-to-end disclosure management should avoid these cases being charged in the first instance or bring them to an end sooner.

House of Commons Justice Select Committee inquiry into disclosure of evidence in criminal cases

On 20 July 2018 the Justice Select Committee published a report following their inquiry into disclosure of evidence in criminal cases⁶ which had been announced on 25 January 2018. The report and the written and oral evidence underlying it, generated parallel to this Review, have all been a valuable part of the evidence base for the Review itself.

Many of the Justice Select Committee findings intersect with those in this Review and are clarified in more detail in the body of the Review below. That said, given the breadth of the Committee's report this Review does not constitute a full response to each and every one of their recommendations, which will be provided separately by the appropriate government departments.

The Justice Select Committee report recommended⁷ that efforts to resolve issues with disclosure, including the recommendations of this Review, should also be applicable in the magistrates' court. The inference is that the focus has been on Crown Court prosecutions, whereas the vast majority of criminal cases are dealt with in magistrates' courts. The government agrees it would be ill-advised to restrict disclosure reforms to a particular type or

⁶ Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018)

⁷ Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018), paragraph 151



category of case and the majority of the recommendations below are as applicable to, and expected to make significant improvements to, the effectiveness of disclosure performance in the magistrates' courts as well as the Crown Court.

Indeed the Committee's central recommendations on the need for a culture shift, the right skills and technology, and fair handling of personal and private material are issues that – if tackled effectively – will lead to improvements in all cases, simple and complex. The evidence considered in the course of this Review supports the assessment of the Committee that disclosure problems can blight any type of case, that the impact of the problem goes wider than just cases being stopped, and that this can have a life-changing impact on those affected⁸.

As was recognised in the course of the oral evidence sessions held by the Committee, some of the performance of disclosure duties in the most serious and complex cases by the Crown Prosecution Service is excellent – “world class” and “immaculately done”⁹ – with counter-terrorism prosecutions cited as a very good example of that. A particular focus of this Review has therefore been seeking to identify areas of good practice in specialist or complex cases that can be scaled down, or good practice generally that can be shared and deployed uniformly to drive improvements in all types of cases.

⁸ Justice Committee, ['Disclosure of evidence in criminal cases inquiry'](#) (July 2018), paragraphs 18-21

⁹ Justice Committee, ['Oral evidence: Disclosure of evidence in criminal cases'](#) (March 2018), questions 34 and 36



Findings and recommendations

1. Primary legislation continues to provide an appropriate disclosure regime, but in practice the system is not working as effectively or efficiently as it should

While the government does not rule out revisiting the Criminal Procedure and Investigations Act 1996 in the future, it believes that primary legislation continues to provide an appropriate disclosure regime, but that in practice the system is not working as effectively or efficiently as it should.

Recent authoritative reviews and reports¹⁰, and most recently the disclosure inquiry by the House of Commons Justice Select Committee¹¹, have concluded that there is nothing wrong with the primary legislation or the disclosure test itself. The disclosure test is set out in the Criminal Procedure and Investigations Act 1996 (CPIA 1996). CPIA 1996 provides a legal requirement that the prosecutor disclose to the defence any unused investigative material which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused. CPIA 1996 has been upheld by the courts to be compliant with the right to a fair trial. It ensures equality of arms and fairness between the power of the State and the rights of the individual.

CPIA 1996 gives the defence a legal right to disclosure of the material which satisfies the disclosure test, but no more than that. Prior to this, a common law¹² obligation developed on the prosecution to disclose evidence which was or may be material in relation to the issues which were expected to arise, or which unexpectedly did arise, in the course of the trial. In 1981 the Attorney General issued guidelines which introduced the concept of 'unused material' and described the test for disclosing it as whether the material had "some bearing on the offence(s) charged and the surrounding circumstances of the case". In practice, this was interpreted in some cases as giving the defence a right to disclosure of virtually all non-sensitive material gathered and created by the investigators¹³. This led to the Runciman Commission¹⁴, which took the view that the law on disclosure imposed unnecessary burdens, requiring too much from the prosecution and too little from the defence. CPIA 1996 was passed by Parliament in that context, and against a background of high profile miscarriages of justice and police reforms of the 1980s.

Notwithstanding that, some stakeholders, including lawyers and academics, suggested during this Review that there is an irreconcilable conflict at the heart of CPIA 1996 disclosure procedures in England and Wales. Their argument is that it is unrealistic to expect investigators and prosecutors, who are working to secure convictions, to exercise due care

¹⁰ For example: The Rt Hon. Lord Justice Gross, '[Review of Disclosure in Criminal Proceedings](#)' (September 2011) and HMCPSI and HMICFRS, '[Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases](#)' (July 2017)

¹¹ Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018)

¹² Derived from custom and decisions of the courts ('precedents'), rather than an Act of Parliament.

¹³ History and case law set out in The Rt Hon. Lord Justice Gross, '[Review of disclosure in criminal proceedings](#)' (September 2011), from page 14

¹⁴ Royal Commission on Criminal Justice, '[Report of the Royal Commission on Criminal Justice](#)' (July 1993)



in searching for and identifying material that might assist an acquittal. This, they would argue, is particularly apparent in relation to serious or emotive crimes like rape, where the officer in the case is encouraged to believe in and build a rapport with the victim. These stakeholders favour giving the defence access to all non-sensitive unused material.

Another alternative posed during this Review was to move to a system more akin to that in Scotland, where the prosecutor has the power to 'direct' the police in what to do; or to that in many European jurisdictions where the criminal process is more 'inquisitorial' and led by a prosecutor who wields powers more like a judge or magistrate, assembling all the relevant evidence on their file, to which the defence lawyers will then have access. The distinction made in England and Wales between 'used' evidence and 'unused' material is an unfamiliar concept in these jurisdictions, where decisions on guilt or innocence are made by a judge – rather than the system we have in England and Wales¹⁵ where a judge oversees the trial and makes rulings on the law, but the decisions on the facts and the verdict itself are the responsibility of a jury. Such a change would have much broader implications beyond disclosure and was therefore considered outside the ambit of the Review.

The conclusion of the Review is that, on balance, the structure of CPIA 1996 is sound. It continues to provide an appropriate disclosure regime, suited to the structure of the trial processes in England and Wales. The vast majority of stakeholders were of a similar view. The most persuasive arguments against giving the defence access to all non-sensitive unused material are:

- There is no barrier in principle to investigators and prosecutors presenting their case robustly, while independently and fairly under the law ensuring the defence have all the information they need.
- The dramatic increase in the volume of digital material seized during some modern investigations makes giving the defence access to everything near impossible.
- The burden of redacting irrelevant and sensitive material from everything in possession of the prosecution team before giving defence access would be hugely resource intensive and very inefficient as it would have to be done for all material, even if of no assistance to the defence whatsoever.
- It would be wasteful duplication to have investigators, prosecutors and defence lawyers all reviewing everything, no matter how irrelevant.

It was suggested in a review of disclosure in the magistrates' courts in 2014¹⁶ that consideration should be given to a more pragmatic approach in magistrates court proceedings by sharing the whole digital file with the defence. The Review considered this, but it was concluded that there is no justification to give the defence access to everything in the magistrates' courts. Most cases are simpler, but not all, and some can involve large quantities of digital material if smartphones or computers have been seized in the course of the investigation. It would send a confusing message to practitioners and the public for CPIA 1996 only to apply in the Crown Court.

Nevertheless, although the primary legislation is adequate, the government recognises the weight of arguments that, in practice, there have emerged difficulties with its interpretation in

¹⁵ In Crown Court cases.

¹⁶ Judiciary of England and Wales, '[Magistrates' Court Disclosure Review](#)' (May 2014), paragraphs 203-206 and 232



some cases. This can manifest itself through investigators and prosecutors interpreting the disclosure test too narrowly or placing too much focus on what the defence asserts to be its case, disregarding other matters unknown to the defence that would be part of the defence case if only they were made aware of them¹⁷ or other possible defences which the facts might support. In his investigation into the *Mouncher* case, Richard Horwell QC expressed disapproval of the phrase “strict interpretation of the disclosure test”¹⁸. Disclosure must be carried out according to law, but his recommendation that “if in doubt disclose” is an important steer to ensure everything that might assist the defence is, in fact, disclosed to them. The government is satisfied that the legislative scheme is sound, provided the statutory test is interpreted by investigators and prosecutors who are sensitive to the risks that an overly inflexible approach could cause.

It is also important to observe that whether material is relevant, or whether it satisfies the disclosure test, can be cumulative. In isolation, a document or piece of information may seem irrelevant, but when taken together with several other items might be significant. Furthermore, even material that may appear to have a negative impact on a defence, or a fact relied on by the defence, can assist in establishing the boundaries within which it can practically be advanced or the weight that can be placed on it at the trial.

These are all issues dealt with in the secondary legislation and guidance that sits below the CPIA 1996 regime, and later sections of this Review explore how to ensure those principles are understood and observed.

Investigators and prosecutors suggested to the Review team that, in some respects, the secondary legislation and other sources of guidance had not kept pace with some of the modern types of evidence and problems they encounter. Some simplification took place in 2013 following the 2011 review by Lord Justice Gross¹⁹, but it was suggested by some interested parties during this Review that more could be done. In terms of modernisation and updating in particular, it was suggested that the Attorney General's 2013 guidelines on disclosure for investigators, prosecutors and defence practitioners²⁰ and the CPIA 1996 Code of Practice²¹ could provide more assistance on how the disclosure scheduling process can be improved or adapted in very large cases where scheduling many thousands of items is resource intensive and not always the most helpful approach for either party.

There were differing opinions about when an investigator is expected to review all material in their possession and what counts as an ‘enormous’ amount of material in the guidelines that would justify the use of dip-sampling or search terms to identify the relevant parts of the data or material. There is wide acceptance that company servers contain an enormous amount of material, but many would now argue that an everyday mobile smartphone is enormous in data terms. One police leader explained to the Review how his team refers to smartphones in terms of an “articulated lorry full of paper” each. Plainly, many modern smartphones do now contain an enormous amount of material in the sense meant in the Attorney General's guidelines.

¹⁷ For example, material known only to the investigators that might assist the defence challenge the lawfulness of the evidence gathered or fairness of the investigation.

¹⁸ Richard Horwell QC, '[Mouncher investigation report](#)' (July 2017), page 223, and see also page 284

¹⁹ The Rt Hon. Lord Justice Gross, '[Review of Disclosure in Criminal Proceedings](#)' (September 2011)

²⁰ Attorney General's Office, '[Attorney General's guidelines on disclosure for investigators, prosecutors and defence practitioners](#)' (December 2013)

²¹ Ministry of Justice, '[Criminal Procedure and Investigations Act Code of Practice](#)' (February 2015)



Clarity concerning 'block listing' items and the use of automated metadata readouts to describe items were also identified as areas where existing processes could be modernised. In particular it is suggested that the CIPA 1996 Code of Practice and guidelines should embed the key principles of the 2016 "Operation Amazon" judgment²²:

- The prosecution is, and must be, in the driving seat at the stage of initial disclosure;
- The prosecution must then encourage dialogue and prompt engagement with the defence;
- The law is prescriptive of the *result*, not the *method* of disclosure;
- The process of disclosure should be subject to robust case management by the judge, utilising the full range of case management powers;
- Flexibility between the parties is crucial.

These are matters that will be subject to consultation processes before implementation.

Finding 1A

Frontline investigators and prosecutors would benefit from simpler, clearer, and more practical assistance in performing their duties.

Recommendation 1A

Make changes to simplify and modernise secondary legislation, guidelines, guidance and protocols that sit underneath CIPA 1996.

A consolidation exercise is not recommended at this stage, but there is a role for the Attorney General's guidelines to bridge and bind the different sources of guidance in a practical and more easily understandable way.

Implementation

Updating codes, guidance and guidelines:

- Attorney General's guidelines on disclosure for investigators, prosecutors and defence practitioners (Attorney General's Office)
- CIPA 1996 Code of Practice (Ministry of Justice)
- Guidance manuals and training products²³ (CPS, College of Policing and NPCC)
- Consider updating the Judicial Protocol on the Disclosure of Unused Material in the Crown Court (Judiciary)

Timescale

Implementation by Autumn/Winter 2019.

²² *R v R* (2016) 1 WLR 1872

²³ The CPS were already reviewing their disclosure manual in 2017, and a co-ordinated programme of updating and revising police and CPS guidance began following the recommendations of HMCPSI and HMICFRS, '[Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases](#)' (July 2017), and continues as part of the police and CPS joint NDIP. More information at: www.cps.gov.uk/disclosure.



2. Practical reinforcement of the duty to make reasonable lines of inquiry and apply the disclosure test correctly

Better training and guidance are important, but to combat some of the habitual and systemic disclosure problems firm practical solutions and a different way of working is required.

Disclosure test

CPIA 1996 establishes a disclosure test which requires the prosecution to disclose any unused material (i.e. material not relied on by the prosecution) that might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused. Those who supported the proposition that CPIA 1996 is an appropriate regime did not identify any need to change the wording of the disclosure test itself. On one view there might be said to be an element of tautology in the test because anything that undermines the prosecution case will, logically, also assist the defence case²⁴, but of itself that does not cause disclosure failure. There is practical sense in focussing those who perform disclosure tasks on both the prosecution and defence cases.

CPIA 1996 also recognises that the power of investigation lies with the investigator (generally the police but not always²⁵). The police and CPS in England and Wales are independent of each other but are each co-dependent on the other performing their respective disclosure obligations. When a charge is brought against a person, in good time before trial, the prosecution must serve the evidence that it will rely on in court to prove its case. The prosecution also has an initial disclosure duty which obliges the prosecutor to disclose²⁶ to the defendant any unused material that satisfies the disclosure test. There is underlying guidance to assist practitioners with the application of the test and setting out the role of the investigator and the prosecutor in the overall process. There is also a significant amount of case law dealing with the test.

Relevance test

This Review considered the relevance test²⁷ which is set out in the CPIA 1996 Code of Practice. This test dictates the parameters of unused material seized during an investigation which the investigator is obliged to schedule. It is the items on this schedule that the investigators review and apply the disclosure test to. The prosecutors oversee and make the final decision on whether items should be disclosed, this involves reviewing the schedule and any of the items the prosecutor considers necessary to inform their disclosure decision.

²⁴ The current version of the Act, as amended, developed from earlier iterations where CPIA 1996 took the test in two stages. 'Primary' disclosure entitled the defence to material that undermined the prosecution case. 'Secondary' disclosure followed service of the defence statement, which then entitled the defendant to both material that undermined the prosecution case but also that which assisted their stated defence.

²⁵ For example, the investigative powers of the Serious Fraud Office, HM Revenue and Customs and the National Crime Agency also conduct criminal investigations.

²⁶ Or allow inspection of the material if it is not practicable to serve a copy.

²⁷ Material may be relevant to an investigation if it appears that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case.



It is essential that the schedule contains a description of the unused material that is sufficiently useful and informative to enable critical initial judgments to be made by both prosecution and defence as to its relevance and potential importance to the case²⁸. The non-sensitive schedule of unused material is served on the defence, endorsed with the prosecutor's decisions²⁹.

CPIA 1996 creates a regime for the defence to challenge the prosecutor's decisions, which starts with the accused serving a defence statement setting out their case and the reasons why they are requesting further material.

Some stakeholders suggested that there should be no relevance test and the investigator should schedule *everything* they come into possession of during an investigation, otherwise there is a risk of items being missed off the schedule. While there is some evidence of this happening, this Review has concluded that, provided a broad and flexible approach is taken to the concept of relevance, it would create a disproportionate and illogical burden on the investigator to require them to schedule all obviously irrelevant material. It would cause further delay for victims, witnesses and suspects while scheduling and reviewing took place and there is no evidence that it would improve outcomes. However, the Review has also concluded that the problem must be dealt with by better training and oversight, moving to electronic systems that make it easier to keep robust audit trails, and more rigorous checking and challenging by prosecutors at all levels when reviewing and performing their disclosure obligations.

Other stakeholders suggested that the relevance test is far too wide and needs an overt reference to proportionality. Their view is that too much time is already spent scheduling and reviewing items that meet the relevance test but are in fact of no real help to the issues in dispute between the prosecution and the defence. Lord Justice Gross recognised in his 2011 Review that on paper there is merit in the argument for proportionality, but did not recommend this due to strong representations from stakeholders that it would lead to miscarriages of justice³⁰. The same arguments are valid today. The Review does not recommend a narrowing of the relevance test.

Problems in practice across the system

While not present in every case, this Review identified the following deficiencies within the system:

- Investigators not pursuing reasonable lines of enquiry that might exculpate the accused;
- Investigators and their supervisors not thoroughly checking the case papers before a submission to the prosecutors;
- Poor quality and insufficiently informative disclosure schedules;
- Investigators not completing the action plans advised by the prosecutor;
- Prosecutors failing to challenge or probe gaps in the investigation and signing off on inadequate unused schedules;

²⁸ But HMCPSI and HMICFRS, '[Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases](#)' (July 2017), found that police scheduling is routinely poor.

²⁹ See also: CPS and NPCC, '[The National Disclosure Standards](#)' (May 2018)

³⁰ The Rt Hon. Lord Justice Gross, '[Review of Disclosure in Criminal Proceedings](#)' (September 2011), paragraphs 8(v) and 56



- CPS managers failing to use relationships with the investigator to drive improvement or recognise problems³¹;
- Late or inadequate defence statements, or a failure to serve one at all³²;
- Lack of engagement by the defence with prosecution disclosure initiatives like service of a Disclosure Management Document (DMD)³³;
- Defence teams challenging every disclosure decision, making imprecise and unnecessarily wide ranging requests that lead to court applications and abuse of process arguments;
- Prosecution teams getting lost within lengthy lists of items and combative correspondence on irrelevant disclosure issues, which can also lead to unnecessary hearings;
- Lack of effective sanctions or consequences when parties do not comply with disclosure obligations.

Practical solutions

This Review builds on previous reports, inspections and reviews which have captured and highlighted similar problems over a number of years. It includes practical recommendations of general application, intended to bring significant improvement, including building on the reforms already underway as part of the NDIP.

Rebuttable presumption in favour of disclosure of certain types or categories of unused material

Existing evidence³⁴ and stakeholder submissions suggest regular failings in the quality of disclosure performance in 'volume crime' cases (non-specialist cases in the magistrates' and Crown courts³⁵). The Review assessed that there are certain items of material that almost always assist the defence and therefore meet the test for disclosure. However, they are frequently not disclosed until there has been significant correspondence and challenge from the defence³⁶. This wastes time and resources that could be better spent by both sides.

This Review recommends that a rebuttable presumption should be created through the CPIA 1996 Code of Practice that certain types or categories of unused material meet the

³¹ HMCPSI, ['The operation of Individual Quality Assessments in the CPS'](#) (March 2018) revealed a difference of 26.5% between the CPS opinion of whether procedural obligations like disclosure had been fully met and the inspectors' opinion.

³² HMCPSI and HMICFRS, ['Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases'](#) (July 2017) showed (a) in nearly a quarter of Crown Court cases no defence statement was served at all; (b) of those that were served, many were served late and sometimes very close to the trial itself; and (c) of the defence statements that were served, over a quarter were inadequate and so of insufficient quality for the prosecution to work with.

³³ The benefits of a Disclosure Management Document (DMD) are explored later in this report.

³⁴ HMCPSI and HMICFRS, ['Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases'](#) (July 2017) and HMCPSI, ['A report from the findings of the Area Assurance Programme \(AAP\) in 2016-17 and 2017-18'](#) (July 2018)

³⁵ 'Volume' signifies there are a lot of these types of cases going through the system, not the amount of paperwork involved.

³⁶ HMCPSI and HMICFRS, ['Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases'](#) (July 2017), found it was rare for the police to identify any material to the CPS that satisfied the disclosure test.



disclosure test. A full consultation will be conducted on this proposal, but it is suggested these might include:

- Crime reports
- Computer Aided Despatch records of emergency calls to the police
- Existing investigators' notes
- Any record of the complaint made by the complainant
- Any previous account of a witness, including draft witness statements
- CCTV footage, or other imagery, of the crime in action
- Previous convictions or cautions of witnesses
- Basis of pleas of co-accused
- Defence Statements of the co-accused

If there is a rebuttable presumption, the focus for the investigator and the prosecutor shifts to whether there is good reason that those items do *not* satisfy the disclosure test. This should ensure that fewer mistakes in application of CPIA 1996 are made than at present because these are items that usually are disclosable. It is suggested that the legal presumption would prioritise the need to review this material and make a reasoned decision, where presently it appears that too often all items on the disclosure schedule in volume crime cases are marked as "Clearly Not Disclosable" when some of them do in fact meet the disclosure test.

These proposals are aimed at getting the balance right in light of evidence that the investigators are not drawing disclosable material to the prosecutor's attention, and that prosecutors are failing to hold the process to account. A number of stakeholders were supportive of the proposal for a presumption, but some expressed concerns that it could be misinterpreted as 'automatic' disclosure and run counter to the 'thinking approach' that existing training and guidance seeks to encourage. This Review emphasises that only a presumption is proposed, nothing should ever be automatic about disclosure, and irrelevant sensitive personal information contained in these documents must be redacted (as is the case at present). This must not lead to a 'box ticking' approach. The proposals are intended to secure the right result under CPIA 1996 in light of clear evidence that the wrong decision is frequently being reached in the first instance in these volume cases, sometimes remaining unresolved until the day of trial.

Focus on reasonable lines of inquiry

The NDIP programme³⁷ led by the CPS, NPCC and College of Policing has already sought to focus the attention of investigators on pursuing reasonable lines of inquiry (whether pointing towards or away from the suspect). The College of Policing has introduced online training for all police officers which includes guidance on how to review and record relevant material so that the prosecutor is able to make an informed disclosure decision. There is further face-to-face training aimed at officers dealing with complex cases and disclosure 'champions' have been appointed to improve and maintain disclosure standards. This training equips the champions to provide oversight and guidance to officers in relation to disclosure and to drive cultural change. This Review recommends that investigative training materials continue to be revised to reflect this change in emphasis and approach more broadly.

³⁷ CPS, NPCC and College of Policing, '[National Disclosure Improvement Plan](#)' (January 2018)



In the preparation of disclosure schedules, the Review also considered that there is room to explore methods of making the disclosure schedule more informative, perhaps by standardisation of terminology, particularly in cases with larger volumes of material. Changes to processes and training could make the task simpler for officers, more informative for the lawyers using the schedules, and encourage a commonality of approach.

A particular disclosure difficulty encountered in some cases is 'third party' material – material that is not held by the investigation or prosecution team, but into which it is reasonable that inquiries are made. Through the NDIP programme the CPS and police have created a new joint protocol drawing together the existing guidance and best practice in order to standardise and improve nationally how these issues are dealt with in practice³⁸. In a good example of cross-system working, the protocol was developed by the CPS and police but shared in draft through the National Disclosure Forum³⁹ so all stakeholders had an opportunity to comment and identify potential problems or improvements before it was finalised.

There are also new and emerging challenges caused by the changing nature of evidence that the investigators encounter in a modern investigation as people increasingly live their lives (and so leave trails of evidence and information) on smartphones and social media.

Reasonable lines of inquiry into a street robbery in a London Borough might involve 'house-to-house' inquiries into neighbouring streets looking for evidence or witnesses who may have observed part of the incident. There would be general acceptance that it would be unreasonable to conduct those house-to-house inquiries in the entirety of the Greater London region. With physical forensic science too there would be consensus that sending every item in a burgled house for fingerprinting and DNA testing would be unreasonable. However, with digital forensics, some practitioners see this in a more binary way, asking for 'full downloads', all data from a phone or device, when the facts and circumstances of the case do not merit it.

This is considered further in [Chapter 6](#). The NDIP programme has also drafted new guidance on communications evidence to assist investigators and prosecutors in managing these issues⁴⁰.

Sensitive material

Sensitive unused material⁴¹ is generally better handled by investigators and prosecutors due to its nature. However, the 2017 joint inspectorate report identified concerns in volume crime cases⁴². Where problems do occur, they appear to have the same root cause as problems with non-sensitive unused material, and the practical solutions proposed in this Review will improve performance overall.

³⁸ CPS and NPCC, '[Protocol between the Police Service and the Crown Prosecution Service on dealing with third party material](#)' (May 2018)

³⁹ Itself a structure created by NDIP and welcomed by all stakeholders.

⁴⁰ CPS, '[A guide to "reasonable lines of enquiry" and Communications Evidence](#)' (July 2018)

⁴¹ 'Sensitive' material is material which, if disclosed, would give rise to a real risk of serious prejudice to an important public interest. For example, the identity of a police informant.

⁴² HMCPSI and HMICFRS, '[Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases](#)' (July 2017), paragraph 1.3



The handling requirements for sensitive material do, however, bring their own particular problems. The Review observed that there is too much reliance on individual skills and knowledge, and an insufficient audit trail on how the material is handled. A mix of paper and electronic systems, different local or historic practices, and security requirements are inefficient and have not kept pace with process and system changes.

All those involved in discharging disclosure obligations in relation to sensitive unused material (including prosecution advocates) should receive a minimum level of training and have their attention drawn to a memorandum of understanding (or other mechanism in which their responsibilities are set out in writing) in each case which features or may feature sensitive unused material. Processes should be reinforced to ensure clear audit trails are maintained and linked to the investigator's and prosecutor's files in a way that alerts the user to the existence of sensitive unused material or issues but respects the security classification of the audit trail.

The Attorney General's guidelines will be updated to reinforce the level of expectation and responsibility placed on each member of the prosecution team in relation to sensitive disclosure handling. Law enforcement and prosecutors, under the leadership of the NDIP programme, should update their own national guidance and operating procedures alongside this.

Sanctions

Within any system accountability is necessary to ensure standards are met.

There is a range of potential legal sanctions which can be imposed upon the parties where there is a failure to progress disclosure in accordance with CPIA 1996. The issue of imposing these sanctions has been considered in detail by previous reviews including *Gross*⁴³, *Gross and Treacy*⁴⁴, and *Leveson*⁴⁵. This Review endorses the reasoning set out in *Leveson* that the imposition of financial penalties in criminal litigation where the majority of parties are publicly funded does not assist with ensuring compliance⁴⁶. There was wide consensus on this among the interested parties.

The government also wholly supports *Leveson's* conclusion that the police, CPS and defence practitioners must be held accountable for repeated default in relation to disclosure. One of the conclusions was that Presiding and Resident Judges "should consider how best this [compliance] can be achieved locally". This Review recommends that the Criminal Justice Board (CJB)⁴⁷ gathers examples of national good practice and, working with the judiciary, the CPS and the defence, considers how to deepen the application of this good practice.

Performance management response

It is clear that all police officers and prosecutors charged with disclosure responsibility must discharge their obligations in a professional and timely way. It has been acknowledged that

⁴³ The Rt Hon. Lord Justice Gross, '[Review of Disclosure in Criminal Proceedings](#)' (September 2011)

⁴⁴ The Rt Hon. Lord Justice Gross and The Rt Hon. Lord Justice Treacy, '[Further review of disclosure in criminal proceedings: sanctions for disclosure failure](#)' (November 2012)

⁴⁵ The Rt Hon. Sir Brian Leveson, '[Review of Efficiency in Criminal Proceedings](#)' (January 2015)

⁴⁶ The Rt Hon. Sir Brian Leveson, '[Review of Efficiency in Criminal Proceedings](#)' (January 2015), paragraph 198

⁴⁷ More information at: www.gov.uk/government/groups/criminal-justice-board



there must be a shift in culture to bring about the sustained improvement required, and there is a commitment to deliver comprehensive training in both services to bring about that change.

In cases where the performance of individual police officers or prosecutors falls below that required of them, the public will rightly expect it to be dealt with through formal management procedures.

This Review does not propose changes to existing performance management arrangements. It recognises that it is for senior leaders and managers in the police and the CPS to determine whether such reforms are needed or how best to apply the current regimes to ensure that the required overall systemic culture changes are made.

Police officers

Early intervention via management action should achieve the desired effect of improving and maintaining a police officer's performance to an acceptable level but there will be cases where line managers should use formal performance management procedures. The Unsatisfactory Performance Process is a three-stage process set out in regulations. Where an officer is alleged to have breached the Standards of Professional Behaviours for policing, set out in the Police (Conduct) Regulations 2012, they could be subject to an investigation and possible sanctions under the police disciplinary regime. The government is introducing reforms early next year to overhaul the handling of performance and misconduct to focus more on individual and organisational learning.

Prosecutors

It was noted during this Review that significant improvements were made in prosecutors' compliance with time limits for Custody Time Limit breaches through a range of measures, which included the use of performance management processes for poor performance⁴⁸. It is acknowledged that Custody Time Limits are an issue only in custody cases and that disclosure is an issue in a larger number of cases. Effective performance management will depend on clear objectives being set for individuals about their disclosure responsibilities.

Finding 2A

There have been failings in the rigour and application of the disclosure test in 'volume crime' cases⁴⁹. One aspect of this is the need to consider more carefully categories of key documents/material that almost invariably satisfy the disclosure test in every case (e.g. the crime report and records of what a witness said, in addition to their witness statement).

Recommendation 2A

There should be a rebuttable presumption in favour of disclosure for categories of key documents/material that usually assist the defence. By making it a rebuttable presumption the approach by investigators and prosecutors will change; such items will be disclosed unless they do *not* satisfy the disclosure test. Consideration should also be given to standardising methods of succinctly indicating in the schedule more information that will

⁴⁸ HMCPSI, '[Custody Time Limits: Follow-up review of the handling of custody time limits by the Crown Prosecution Service](#)' (July 2013), paragraph 3.6

⁴⁹ Routine cases in the magistrates' and Crown courts, not dealt with by specialist teams or units.



better help prosecutors and defence representatives identify important material.

Implementation

A change to the CPIA 1996 Code of Practice (Ministry of Justice)

Timescale

Consult in Spring 2019 with a view to amendment by Autumn/Winter 2019.

Finding 2B

Oversight and handling of sensitive unused material is inconsistent.

Recommendation 2B

Roles and responsibilities between different law enforcement units and agencies, prosecutors, and advocates need to be clarified.

Implementation

- Update Attorney General's guidelines on disclosure (Attorney General's Office)
- Update guidance manuals and training products (CPS, NPCC, CoP)

Timescale

Law enforcement revisions by Spring/Summer 2019. NDIP should keep effectiveness under yearly review thereafter.

Finding 2C

The prosecution team will benefit from an internal written summary of the agreed sensitive disclosure strategy.

Recommendation 2C

A sensitive disclosure strategy document ought to be created for all cases in which sensitive lines of enquiry and sensitive unused material exists.

Implementation

Prosecution led process change (CPS)

Timescale

By Autumn/Winter 2019.



3. Pursuing a fair investigation and considering disclosure obligations from the outset, rather than as an afterthought

There is wide support for the proposition that a fair investigation requires consideration to be given to disclosure from the outset. There is an ingrained cultural problem that sees disclosure as an administrative or bureaucratic issue that only arises at the mid-point of litigation.

Working practices should be adjusted to drive the cultural change that is required. In particular, transparent emphasis on an auditable record of what the investigator and prosecutor have actually done to discharge their disclosure obligations (or the reasons why they did not do something) can be more useful to each participant in the process than simply a list of items of unused material.

Recent events have highlighted yet again how much damage to public confidence in our justice system is caused when disclosure in individual cases is mishandled. Representations to the Review indicate that there is more to this than poor procedures or lack of training – although these must also be improved. The very word “disclosure” has been described as a misnomer, as it refers to the administrative end of the investigative and prosecution process – handing material to the defence. All too often it is regarded by investigators and prosecutors as an inconvenient task to be performed after the evidence proving the accused is guilty has been prepared. As referred to in [Chapter 2](#), this approach must change. Investigators must pursue all reasonable lines of inquiry pointing towards *and away* from the suspect. It is an essential part of any investigation that the investigator should ask themselves where the weaknesses of the case that they are building are or might be.

In his 2011 review⁵⁰, Lord Justice Gross recommended that police training should underline the importance of “the investigative mindset”, which should be part and parcel of professional development – an inquiring, open-minded approach, capable of sensing what might be material from the defence perspective. In 2017 the joint inspectors identified a basic lack of knowledge by police of the disclosure and scheduling process, with officers failing to understand why they needed to provide good descriptions of material. There was also confusion among officers as to what constituted relevant unused material⁵¹. The inspectors found existing training to be inadequate; a lack of direction at a national level; and potential for inaccuracy and inconsistency, as well as duplication, where individual forces designed their own bespoke courses.

One of the persistent messages that emerges, both in the Justice Select Committee report⁵² and the evidence gathered during this Review, is that resolving problems with disclosure will necessitate a shift in culture, driven by clear leadership. This echoes the findings of the *Mouncer* Investigation Report⁵³ by Richard Horwell QC, which concluded:

⁵⁰ The Rt Hon. Lord Justice Gross, '[Review of Disclosure in Criminal Proceedings](#)' (September 2011)

⁵¹ HMCPSI and HMICFRS, '[Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases](#)' (July 2017), paragraph 4.6

⁵² Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018), paragraph 7.1

⁵³ Richard Horwell QC, '[Mouncer investigation report](#)' (July 2017), paragraph 14.6



"[d]isclosure errors were not designed to pervert the course of justice; they were the consequence of inexperience, poor decision making and inadequate training, leadership and governance."

The joint inspectorate report described a "culture of acceptance" that must change⁵⁴.

Disclosure Management Documents

An important finding of this Review was that many disclosure problems are caused by a lack of understanding or information about investigative decision making between investigator and prosecutor, but also between prosecutor and counsel, and prosecution and defence. Transparent emphasis on what the investigator and prosecutor have actually done to discharge their disclosure obligations (or the reasons why they did not do something) can be more useful to each participant in the process than simply a list of items of unused material on a schedule.

Through the NDIP programme, the CPS has conducted trials of the use of Disclosure Management Documents (DMDs) in Rape and Serious Sexual Offence and Complex Casework Unit cases. The Review strongly supports this initiative. The use of DMDs is an example of good practice already in use by the CPS and SFO in the biggest cases prosecutors handle.

The benefit of the DMD is that it details the approach that the investigation and prosecution has taken with regard to disclosure and sets out the prosecution strategy. It affords the defence an opportunity to engage and comment on this at an early stage in proceedings and make representations that additional lines of inquiry should be pursued if they are of the opinion that the investigation has been too narrow. The pilot testing of the use of DMDs in these medium sized cases is still ongoing, but initial feedback from the defence and the judiciary concerning their use is positive about improvements to both the quality of disclosure discussions and ensuring they are happening earlier in the process.

It is also clear, however, that for maximum benefit there needs to be full investigator engagement with the prosecutor in drafting the document and then, once served, defence and often court engagement too. This should be evaluated, but the Review recommends that DMDs should be routinely used in all volume Crown Court cases as an avenue for early engagement. The simplest cases would only need very simple DMDs, perhaps just a couple of paragraphs, but the focus on the approach the prosecution team has taken, not just on a schedule of items generated by that approach, facilitates meaningful engagement and dispute resolution. Together with a more informative disclosure schedule the capacity for misunderstanding can be significantly reduced in this way.

Currently, police investigators document the various stages of an investigation on prescribed forms set out in the police Manual of Guidance. These forms should be updated to reflect the changes recommended in this Review. In particular, it is important to ensure the correct flow of information from investigator to prosecutor, and then if appropriate to advocate, court and defence in an efficient way.

⁵⁴ HMCPSI and HMICFRS, ['Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases'](#) (July 2017)



Code for Crown Prosecutors and the Director's Guidance on Charging

The government considered evidence which suggested that, in some cases stopped due to disclosure difficulties, there were questions which could and should have been addressed pre-charge. To support a change in investigator and prosecution culture, and earlier consideration of the impact of disclosable material on the decision to charge, the Review recommends that the documents which influence an investigator's or a prosecutor's decision to charge a case (the Code for Crown Prosecutors⁵⁵ and the Director's Guidance on Charging⁵⁶) make explicit the requirement for adequate assurance on disclosure issues before a case is charged.

Strong evidence was given to the Review that, in some cases, it is only if the investigators have prepared draft disclosure schedules pre-charge that the prosecutor is able to identify possible defects in disclosure that ought to be remedied before charges are brought, or that might reveal that the case ought not to be prosecuted at all.

Finding 3A

Lack of transparency in the approach to reasonable lines of inquiry pursued by investigators from the outset, and throughout the life of, an investigation.

Recommendation 3A

- a. The current source of policing forms, the Manual of Guidance, to be amended to reflect the need to document all reasonable lines of inquiry;
- b. Electronic or paper audit trails to be prepared in a way that converts to evidential or unused material disclosure schedules if an investigation proceeds to charging stage⁵⁷;
- c. Electronic or paper audit trails to be prepared in a way that converts to supplying the key information to the prosecutor (and court or defence if appropriate), for example in relation to what lines of inquiry were pursued and how and why digital media were (or were not) examined⁵⁸;
- d. In cases where the investigator seeks a charging decision (from a supervisor or prosecutor), the type of information referred to at c) above that would be needed to populate a draft DMD to be supplied as part of the pre-charge file;
- e. Deploy DMDs in all Crown Court cases.

Implementation

Implement a package of changes in systems and processes to fit these recommendations

⁵⁵ CPS, 'The Code for Crown Prosecutors' (October 2018)

⁵⁶ CPS, 'Charging (The Director's Guidance) 2013 – fifth edition' (May 2013)

⁵⁷ Some police forces already have such a system. The Metropolitan Police use 'COPA' and large or complex cases are run through the 'HOLMES' system. It is recognised that 43 different police forces are at different stages in their technical development, but technology offers significant benefits in making these processes more efficient and effective.

⁵⁸ This is something the joint CPS and police NDIP programme is implementing in rape cases with an insert on 'reasonable lines of inquiry' to the "MG3" form police complete when requesting a decision on criminal charges from a prosecutor.



(CPS, College of Policing, NPCC)

Timescale

By Summer 2019 (ready for implementation of amended CPIA 1996 Code of Practice in Autumn/Winter 2019).

Finding 3B

Law enforcement supervisors and prosecutors need a greater level of assurance and understanding of the disclosure position from investigating officers before making a charging decision.

Recommendation 3B

Director of Public Prosecutions to update the Director's Guidance on Charging to clarify the decision maker's duty to ensure adequate disclosure assurance before a charging decision is made. This is to embed the change now made in an updated version of the Code for Crown Prosecutors brought into force in October 2018⁵⁹.

Implementation

Revise Director's Guidance on Charging (CPS)

Timescale

By Summer 2019.

⁵⁹ CPS, '[The Code for Crown Prosecutors](#)' (October 2018)



4. Proportionate frontloading of disclosure preparation by the prosecution

Too many disclosure issues and tasks are left until too late a stage in litigation. Bringing disclosure performance forward in some cases would reap significant benefits and electronic working makes this achievable. Certain processes can be streamlined to remove work that is unnecessary or duplication.

Most agree that disclosure obligations ought to be considered from the outset of a prosecution. A failure to do so leads to litigation 'drift' and a flurry of activity before and after court hearing dates. This is detrimental to victims, witnesses, suspects and the wider criminal justice system by using expensive court hearings to resolve issues.

The Review explored how it might be possible to tailor investigation and prosecution processes to fit that approach, as well as facilitating defence engagement.

Full Code Test cases

A Full Code Test case is one where the investigation is complete, and the prosecutor decides to charge, or not charge in that context.

If charged, initial disclosure ([Chapter 2](#)) occurs at different stages in the litigation process, depending upon the type of case:

- In any case where a guilty plea is anticipated⁶⁰, there is no obligation to perform initial disclosure and so a smaller amount of paperwork is required by the prosecutor from the investigator.
- Where a guilty plea is anticipated, which is expected to be dealt with in a magistrates' court⁶¹ a Streamlined Disclosure Certificate⁶² is used to perform initial disclosure. This is expected to be served on or before the first hearing.
- In anticipated not guilty plea cases expected to proceed to the Crown Court, initial disclosure is not served until 70 days after that first hearing.

The Review observed examples of good practice in some of the most complex Crown Court cases handled by the CPS where draft disclosure paperwork⁶³ was provided in advance of even the charging decision, allowing the prosecutor greater assurance of the efficacy of the disclosure exercise, and to probe weaknesses in the unused material or disclosure questions that might emerge during proceedings and bear on whether there is a realistic prospect of a conviction⁶⁴.

The Review team saw evidence in some regions of informal local arrangements for draft disclosure paperwork to be provided pre-charge in less complex Crown Court cases. This put the prosecutor in the 'driving seat' to perform their initial disclosure obligations at the

⁶⁰ For example, because the defendant confessed the crime.

⁶¹ Which deals with less serious offences, usually much simpler than Crown Court cases.

⁶² A certificate signed by the police officer and prosecutor either confirming that there is no material satisfying the disclosure test or supplying material which satisfies the disclosure test.

⁶³ For example, draft disclosure schedules and meaningful summaries of the lines of inquiry pursued, or not pursued and why.

⁶⁴ And see finding/recommendation 3B above.



outset of the case⁶⁵. These cases were of a type regularly seen in the Crown Court but of a medium complexity, more likely than others to involve a significant emphasis on disclosure management. These included, for example, Rape and Serious Sexual Offence cases in London and some other regions, and volume cases involving long term fraud, money laundering or any case with sufficient complexity to merit early investigative advice from a prosecutor in Wessex CPS. These were impressive examples of regional CPS leaders recognising where and how the problems and pressures arise in the interaction of prosecutors and investigators and agreeing new processes with police counterparts to solve those problems.

The Review recommends moving to a national position where there is a better balance between streamlining work and performing disclosure obligations earlier in order to facilitate engagement with any points of contested disclosure much earlier in proceedings. The Wessex example was a particularly good one.

It will be important to avoid creating delay, which is why it is vital that standardised systems and processes are constructed in a way that supports a mind-set that considers and manages disclosure obligations from the start. As police, CPS and court systems evolve from paper to digital, there are significant benefits and efficiencies of digital working yet to be realised. In particular, it is important that electronic working does not *just* recreate paper processes digitally. If material can be captured in a way that avoids having to re-enter data every time a task involving that item is performed (i.e. populating a disclosure schedule) as it enters police systems, then the true benefits of digital working emerge – better quality case files and audit trails, coupled with a reduction in administrative data entry. A number of policing led, Home Office supported, initiatives are already working towards this goal, as is the Ministry of Justice Common Platform programme.

The use of Disclosure Management Documents (DMDs, see [Chapter 3](#)) and earlier provision of better designed disclosure schedules, where appropriate, should enable more effective Plea and Trial Preparation Hearings (PTPH), particularly with regard to disclosure. A pre-emptive stance should be taken by the parties regarding disclosure progression in accordance with the Criminal Procedure Rules (CPR), with non-compliance flagged to the court as early as possible to enable resolution.

At a later stage in proceedings, but well in advance of trial, it is recommended that a 'Disclosure Readiness Certificate' should be filed with the court ahead of the trial readiness certificate.

Supporting prosecutors where proportionate frontloading of disclosure preparation would be of benefit

Currently, not guilty cases that proceed to the Crown Court will have the first hearing at that court (the PTPH) within 28 days of the first magistrates' court appearance. This has been introduced to avoid delays, as previously there could be a period of months between those hearings, causing distress and anxiety to victims, witnesses and defendants. Nothing

⁶⁵ In the Crown Court, the Criminal Procedure Rules presently require initial disclosure to be performed by the prosecutor within 50 days of the first court hearing in a custody case and 70 days in a bail case. However, this is a limit not a target and there is nothing in law or procedure to prevent a prosecutor performing initial disclosure early. Indeed, there are clear benefits to doing so.



recommended by the Review is intended to undermine the significant progress that has been made in shortening this time period.

Early discussions between the prosecution and the defence at this stage ensure better quality defence case statements, identifying actual issues for the trial and helping the prosecutor to better perform the disclosure exercise. In the current system, both prosecution and defence frequently fail to engage with this process until very close to the trial date and often during the trial itself.

However, with the wider use of DMDs, and investigators and prosecutors moving in more types of case to frontload disclosure preparation, and with the benefits that is intended to bring in the early engagement and resolution of issues, in exceptional circumstances a slightly longer period of time may be warranted between these two hearings than is currently available.

This would allow a defence statement to be filed in advance of the PTPH and for a greater level of substantive further engagement to take place in the interim period, to get the most out of that PTPH by affording the defence and prosecution the best opportunity to identify and resolve any problems early.

The Better Case Management Handbook⁶⁶ currently allows PTPH adjournments of up to 7 days. There is little evidence of the extent to which such applications are currently made and how the additional time is spent. The Review recommends that the Criminal Procedure Rule Committee considers whether it is possible to gather such evidence and, in any event, that the Committee should consider proposals for amending the rules on the extension of PTPHs for good reason beyond the current 7 days.

Some also suggested that to obtain the maximum benefit from service of a DMD by the prosecutor in advance of the PTPH, it would help to amend the PTPH case management form to encourage the early identification by the defence of any challenge to, or representations on, the prosecution approach to disclosure set out in the DMD. Where such matters are not capable of resolution at the PTPH itself, a timetable can then be set for further engagement between the parties, and for a judicial ruling if required.

The Rule Committee is presently considering amendments to the PTPH form to include case management questions based on the DMD and the Review supports that approach.

Threshold Test cases

Threshold Test cases are emergency cases where there is cause to charge the defendant before the investigation is complete and to seek to remand him or her into custody. In those cases, frontloading of disclosure is not possible, and the investigation proceeds alongside the court timetable but to strict Custody Time Limits.

Some evidence examined in the Review demonstrated that disclosure failings occurred when the case overall was not progressed as expeditiously as possible. There can be complex and competing demands in such a case. The Review recommends that a scaled down version of the 'Early Case Planning Conference' (ECPC), which is currently standard practice by the CPS in the most complex cases, should be followed in all Threshold Test charged cases within 7-10 days of charge. In smaller cases it could be short and conducted

⁶⁶ Judiciary of England and Wales, '[The Better Case Management \(BCM\) Handbook](#)' (January 2018)



by telephone. The ECPC is structured using a form which prompts the investigator and prosecutor to discuss all likely scenarios, including disclosure and digital forensic strategy at the outset. This incentivises and promotes a practical conversation which leads to clear advice and actions on how to move the investigation and disclosure exercise forward in a timely way.

The Review also recommends that Threshold Test cases should be more overtly identified to the court at each hearing to enable the court to monitor progress of outstanding actions in that context.

Finding 4A

Too many disclosure issues and tasks are left until too late a stage in litigation. Bringing disclosure performance forward in some cases would reap significant benefits and electronic working makes this achievable. Certain processes can be streamlined to remove work that is unnecessary or duplication.

Recommendation 4A

The Review recommends moving to a national position where there is a better balance between streamlining work and performing disclosure obligations earlier in order to progress any contested disclosure issues or problems much earlier in proceedings.

Implementation

- CPIA 1996 Code of Practice (MoJ)
- Attorney General's guidelines (AGO)
- Police and prosecution changes; keep under review through the NDIP programme (CPS, NPCC, College of Policing)

Timescale

Make changes by Autumn/Winter 2019.

Finding 4B

With the wider use of DMDs, and investigators and prosecutors moving in more types of case to frontload disclosure preparation, and the benefits that is intended to bring in terms of early engagement and resolution of issues, this may warrant a slightly longer period of time in exceptional circumstances between the first hearing in the magistrates' court and the PTPH in the Crown Court than is currently available.

Recommendation 4B

It is recommended that the Criminal Procedure Rule Committee consider proposals for amending the rules around extension of PTPH for good reason beyond the current 7 days and consider amending the PTPH form to support the DMD initiative.

Implementation

Criminal Procedure Rule Committee asked to consider proposal.



Timescale

Consideration by the end of Spring 2019.

Finding 4C

Closer monitoring of disclosure in Threshold Test cases is needed by prosecutors.

Recommendation 4C

Prosecutors to adapt an Early Case Planning Conference approach from complex cases to ensure progress is assessed and monitored on a tight timetable.

Implementation

Scaled down ECPC procedure for volume crime cases (CPS and NPCC)

Timescale

By Spring 2019.



5. Early and meaningful engagement between prosecution and defence

The evidence given by almost all stakeholders to the Review is that early and meaningful engagement between the prosecution team and the defence is crucial to improve the disclosure process.

This is not a new idea, far from it, but the recent increases in the volume and complexity of digital material encountered in investigations make it ever more important and urgent. Both the prosecution and the defence have a responsibility to identify the issues in a case as early as possible. Magistrates and judges already play a vital role in ensuring that this identification of issues is taking place at the right time and in making appropriate directions where this is not happening. The Review endorses the recommendations on this issue made in both the Lord Justice Gross and Lord Justice Leveson reviews⁶⁷.

The role of the defence lawyer is to represent the best interests of the defendant, and nothing said in this Review is intended to undermine that. The disclosure regime was created to ensure that defendants receive a fair trial. While acknowledging the frustration the Review heard from the professions about difficulty with, or lack of, any engagement from prosecutors, it is vital also that the defence does engage on behalf of the defendant. This must include fulfilling the statutory obligations to serve a defence statement, which identifies the actual issues in the case and ensuring requests for disclosure are based on the defence set out in their defence statement or on other good reason. It is of course the defendant's right to instruct their lawyers not to engage with the prosecution and not to serve a defence statement, but if the defendant makes that tactical choice, later complaints that a line of inquiry was not pursued or that the digital forensic strategy should have been wider should have far less force with the court. In appropriate cases, the courts will no doubt consider the drawing of inferences, as envisaged under CPIA 1996.

Pre-charge

Nothing in common law prevents the prosecution and defence having a discussion at any stage of an investigation. On the contrary, defence engagement at the pre-charge stage could identify reasonable lines of inquiry pointing away from the suspect to be taken into account when considering a charging decision. This would allow for the identification of undermining material at the outset of the investigation, meaning weak cases could be finalised at an early stage.

The suspect has a statutory right to silence and nothing set out here seeks to undermine that. Suspects and their representatives are, however, aware that if a case goes to trial, inferences can be drawn if they have failed to mention a fact they could reasonably have been expected to mention when questioned⁶⁸.

The Review has identified areas of good practice, which were of benefit to disclosure management at the pre-charge investigation stage:

⁶⁷ The Rt Hon. Lord Justice Gross, '[Review of Disclosure in Criminal Proceedings](#)' (September 2011) and The Rt Hon. Sir Brian Leveson, '[Review of Efficiency in Criminal Proceedings](#)' (January 2015)

⁶⁸ [Criminal Justice and Public Order Act 1994](#), sections 34-37



- Investigators asking complainant and suspect whether they are aware of, or can provide access to, digital material that has a bearing on the allegation;
- Investigators and defence representatives agreeing a summary of lines of inquiry that have arisen from an interview under caution;
- Standard questions for interviewers to identify common disclosure issues and barriers like encryption keys;
- Defence representatives setting out clear representations on potential lines of inquiry in a prepared statement or at the beginning of the interview;
- Investigators using the MG3 request for advice from prosecutor form to draw defence representations on lines of inquiry to the prosecutor's attention (and what they had done about them) at the charging stage.

There is usually only very limited information or 'pre-interview disclosure' provided in advance of an interview under caution. There is nothing wrong with that as the investigators will wish to get a frank account of what took place from the suspect. However, evidence provided to the Review reveals a gap pre-charge where, (i) if the defence knew more about the prosecution case they might volunteer more information, and (ii) if the investigator and prosecutor knew about that information it would help them identify new lines of inquiry, particularly in relation to where exculpatory material might be on a digital device or social media. These circumstances are likely to be rare, but the Review was provided with examples by some parties that suggest pre-charge engagement between prosecutor and defence might have avoided a case being charged that was stopped later in proceedings when the issue was raised post-charge.

NDIP is setting up a working group to consider guidance to fill that gap in the rare cases that might benefit from prosecutor and defence lawyer engagement pre-charge. The revised Attorney General's guidelines on disclosure will also include guidance on pre-charge engagement. There is nothing in the law that prevents it, and examples of its effectiveness were provided during the Review, however attention was drawn to a lack of a formal pathway.

Funding

The current police station attendance legal aid fee structure is not designed for a large amount of pre-charge work by the defence after the initial police station interview. If a more formal pre-charge engagement model is created, then the Ministry of Justice should review how such work is remunerated.

Post-charge

The Better Case Management (BCM) procedure in the Crown Court clearly sets out the duty of direct engagement on both the prosecution and defence. It emphasises the importance of ensuring that questions of disclosure are dealt with at the early stages of a case. Effective early engagement is crucial to guarantee that the disclosure timescales are complied with ahead of the trial date.

As Lord Justice Gross said in his 2011 Review⁶⁹:

⁶⁹ The Rt Hon. Lord Justice Gross, '[Review of Disclosure in Criminal Proceedings](#)' (September 2011), page 7, paragraph xiii



“Provided...the prosecution does have its tackle in order...it is or ought to be unacceptable for the defence to refuse to engage and assist in the early identification of the real issues in the case. Defence criticism of the prosecution approach to disclosure should be reasoned, as indeed defence applications [for disclosure] already must be. There should be scant tolerance of continual, speculative sniping and of late or uninformative defence statements.”

However, the Review heard evidence that if disclosure schedules are not served by the prosecution until relatively late in the proceedings, usually after the PTPH, the view of some defence practitioners is that there is little point engaging with the prosecution until this has occurred.

Practitioners have also reported their frustration at being unable to contact individual prosecutors because their details are not provided on case papers. This administrative failing has a significant impact on the parties' ability to effectively progress cases and cannot continue. The Review strongly recommends that the CPS makes it mandatory to provide the defence with full prosecutor details in all cases in which a not guilty plea is anticipated when the paperwork is served before the first hearing⁷⁰. The CPS should also create effective structures for monitoring early engagement with defence teams and providing assurances that this is taking place where possible.

Prosecutors have reported similar frustrations with identifying which firm is on record in a case (where they wish to serve papers and engage in advance of the first hearing) or identifying the decision maker in a firm with whom to engage. A recent practice has commenced of generating an 'engagement log' for court hearings so the judge and advocates can see where failed or ineffective attempts to engage have been made.

Prosecution and defence stakeholders have all provided evidence of examples of good levels of communication and engagement in some cases. The NDIP National Disclosure Forum is working to capture that good practice and share it nationally.

This Review identified a number of examples of good practice by prosecutors, including sending prompt warning letters about potential sanctions when an inadequate defence statement was filed or the deadlines for serving one was missed.

Many stakeholders revealed concerns that one of the barriers to effective engagement can be the lack of a useful audit trail and an understanding between each participant in the process as to the disclosure that has been served. It is not uncommon in court to observe submissions by one party that something has not been served which, in the absence of a clear record being available to those in court, leads to confusion. For example, an investigator may have submitted some new material to the prosecutor, but the prosecutor may not have served it yet or the prosecutor may have served it on the defence litigator, but it has not yet been given to the defence advocate.

Stakeholders spoke highly of the Digital Case System (DCS) in the Crown Court on which the prosecution evidence is uploaded⁷¹. In a lecture in June 2018 the Lord Chief Justice

⁷⁰ Presently known as “Initial Details of the Prosecution Case” (IDPC).

⁷¹ Although some evidence given to the Justice Select Committee (Justice Committee, ['Disclosure of evidence in criminal cases inquiry'](#) (July 2018), paragraph 67) suggested it has resulted in a diminution of effective communication between the CPS and the defence and a lack of 'ownership' of case material and coherence.



described DCS as “one of the most remarkable successes”. Judges and practitioners find it very useful and it has been calculated to have avoided the need to print somewhere between 40 and 50 million pieces of paper. Although the system was originally only designed as a repository for evidence it has been developed by users into a useful case management tool as it records what has been uploaded and when, including interactive forms that the parties can complete. However, it is not built for disclosure of unused material which is carried out using different processes – disc, secure e-mail or on paper⁷². As the court system moves to a more ambitious case management system, known as the Common Platform, it is important that the requirements of disclosure of unused material, as well as service of the prosecution evidence, is catered for. This is a cross-system issue that will be important for the CJB to keep under review (see [Chapter 8](#)).

Payment

The Review recognises that, as a consequence of an emphasis on earlier work on disclosure, it follows that the structure of fees and timing of payments will have to be adjusted. Further data would need to be gathered to understand how best to do this. The Review also heard practitioner concerns about having to deal with cases with huge volumes of material, particularly arising from analysis of digital material. However, no record is maintained of the volume, nature and work done on unused material. The Review considers the impact of technology in [Chapter 6](#), both in terms of the increasing amount of relevant material potentially subject to disclosure, and in providing solutions to analysing that material.

Defence representatives have also urged a review of legal aid payments to deal with these cases. The Review recommends that the CJB commissions a working group to lead the examination of this aspect of its conclusions and feed any relevant findings into the Ministry of Justice’s review of the Advocates’ Graduated Fee Scheme (AGFS) in Spring/Summer 2020, as well as the continuing work to redesign the Litigators’ Graduated Fee Scheme. This should include consideration of whether changing some of the structure and timing of legal aid payments would facilitate earlier and more effective defence engagement.

The Review recommends that data is gathered within the next 12 months by this working group from the Ministry of Justice, investigators, Her Majesty’s Courts and Tribunals Service (HMCTS), CPS and with the involvement of both the legal professions. The working group should quickly decide on how this data will be gathered and continually evaluate the findings and implications of it.

Finding 5A

In some pre-charge cases a lack of pre-charge discussion between investigators/prosecutors and those representing the suspect hamper early resolution of evidential issues, particularly where there is a large quantity of digital material.

Recommendation 5A

- Attorney Generals’ guidelines to include guidance on pre-charge engagement;
- NDIP working group to consider guidance on pre-charge engagement;

⁷² As to the problems this can cause, Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018), paragraphs 64-66



- If a more formal pre-charge engagement model is created, then the Ministry of Justice should review how such work is remunerated.

Implementation

- Amend Attorney General's guidelines (AGO)
- Revise guidance (CPS)
- Following a period of data gathering, consider whether legal aid position needs review (MoJ)

Timescale

Guidance changes in Autumn/Winter 2019, consulting where necessary.

Finding 5B

Better Case Management engagement and lines of communication need to be better used.

Recommendation 5B

CPS to mandate provision of prosecutor details.

Implementation

Revise service level agreement and standard operating procedures between CPS, HMCTS and defence.

Timescale

To be agreed by HMCTS/CPS and defence by Autumn/Winter 2019

Finding 5C

Early preparation and engagement between defence and prosecution should be incentivised.

Recommendation 5C

CJB to commission a working group to lead on data gathering to assess categories, volumes and utilisation of unused material.

MoJ to consider the outcome of the CJB commissioned working group and ensure this forms part of the re-design or future review of fee schemes.

Implementation

Co-ordinated through CJB.

Timescale

Data gathering to be completed by Autumn/Winter 2019 and relevant findings fed into MoJ's review of the AGFS scheme in Spring/Summer 2020.



6. Harnessing technology

In meeting the complications caused by technology in the digital age, it is right that we adopt technological solutions, including Artificial Intelligence where appropriate, while recognising that there is no technological “silver bullet”. It is equally important to respect and protect complainant, witness and third-party privacy rights.

In October 2016, McKinsey & Co calculated that about 90% of the digital data ever created in the world had been generated in just the previous 2 years⁷³. The authors predicted that by 2020, some 50 billion smart devices will be connected, along with additional billions of smart sensors, ensuring that the global supply of data will continue to more than double every 2 years.

The Review has considered how this vast increase in digital material affects the fulfilment of the duty of disclosure in criminal investigations and trials in England and Wales. It is clear that investigators and prosecutors are facing an unprecedented challenge in dealing with the ever-increasing amount of digital material presented to them. This exacerbates the other problems with the disclosure process explored earlier in this report and creates new ones.

At the top end of the spectrum, there was very clear evidence from many interested parties that the impact of the increase in and complexity of digital material in the more serious cases is very significant indeed. Modern investigations into major criminal offences like serious fraud, counter terrorism or organised crime have always involved large quantities of data; what is being seen in the most complex cases today is that the volume of relevant data is increasing and new challenges like cloud storage and encryption of that data are emerging. To put this into context, early mobile telephones only had the capacity to hold a handful of saved messages or communication details – the average mobile phone today is capable of holding the data equivalent of about 5 million A4 pages. The average human reader working a 40-hour week would take 40 years to read all that content. It is clear that the right thing to do in these cases is to adopt new, technology-based approaches to managing this scale of material because its growth is outpacing human capacity to handle it.

While there is no definitive analysis available, it seems likely that the majority of the hundreds of thousands of criminal prosecutions each year still have very little or nothing to do with digital forensics in the course of their investigation. These are simple cases like motoring offences, low level public disorder and assaults that are investigated under short timescales. It would be rare for a reasonable line of inquiry in those cases to merit seizure and interrogation of computers, tablets and smartphones.

That said, the proliferation of smartphones and tablets, the way people now live their lives through electronic communications, and the way that traces of that can be forensically recovered from the sender's and recipient's devices, online, from third parties or stored in the cloud, mean that these issues are now encountered more regularly in everyday, non-specialist, magistrates' and Crown Court cases. This was very clear in the evidence gathered by this Review and through the Justice Select Committee inquiry.

⁷³ Henke N, Libarikian A, and Wiseman B, '[Straight talk about big data](#)', McKinsey Quarterly (October 2016)



In particular, the recent high-profile disclosure failures in rape cases and the Rape and Serious Sexual Offence review⁷⁴ by the CPS have highlighted the particular impact of this in rape cases, where the complainant and the accused are acquainted with each other. Messages on mobile phones or social media can be highly relevant in understanding what has occurred in these cases.

10 years ago, a routine investigation involving youths in a street robbery may have only generated a small amount of paper evidence – eye witness statements, an identity parade and police paperwork relating to suspects caught or seen nearby. Nowadays it is far more likely that those youths will be carrying multiple smartphones each, exchange relevant information about their whereabouts or activities on social media or via private messages, and potentially interact with other forms of digital evidence, including CCTV, automatic number plate recognition or police body-worn video.

This was described to the Justice Select Committee inquiry by one barrister as “not a digital footprint, it is a digital crater”⁷⁵. A single phone can tell you what time the user woke up, what they had for breakfast, what they put in their satnav, where they went, what time they got there, potentially how fast they drove, where they parked and what they had for lunch. If they go to a bar, a taxi app might show what time they left. A dating app or variety of social media platforms may record who they met.

Crime is changing, but so too are the capabilities and techniques available to the police to tackle it. These may allow a compelling prosecution to be brought, where previously justice would not have been possible without reliable eyewitness identification. However, hidden in this material could be significant exculpatory material that must be identified too.

Solutions to problems

Technology is a major part of the problem, but it can and should be a major part of the solution as well. However, the Review does not believe that technology can solve the *whole* of the disclosure problem – there is no digital ‘silver bullet’. There are different problems experienced in relation to collection, storage, collation, analysis and sharing material by different police areas and so a number of different solutions will be required.

Digital forensics

Digital forensics is “the application of science to the identification, collection, examination and analysis of data, whilst preserving the integrity of information and maintaining a strict chain of custody of that data”⁷⁶.

The increase in the numbers of digital devices and the amount of information stored on them has led to a corresponding increase in both demand and complexity in the use of digital forensics to solve crime.

A joint NPCC and Home Office review of the forensic market is ongoing and will report later in 2018.

⁷⁴ CPS, '[Rape and serious sexual offence prosecutions - Assessment of disclosure of unused material ahead of trial](#)' (June 2018)

⁷⁵ Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018), paragraph 52

⁷⁶ NPCC Digital Forensics portfolio board's definition.



Concerns were raised by some that digital forensic work takes too long. This causes delays in reaching charging decisions in bail cases and in Threshold Test custody cases (where the investigation takes place in parallel to the court timetable) and means that critical evidence like smartphones or computer analysis is not reviewed, served or disclosed until close to the trial.

However, examples of good practice, like that of the Staffordshire Digital Forensics Unit revealed how such work could be turned around much quicker if the investigators and lawyers had a clear, focussed and agreed strategy in what they were asking the forensic scientists to do⁷⁷.

Before commissioning resources on digital forensic work, the investigator, in conjunction with the prosecutor where appropriate, should agree a clear strategy as to what is required and why. There may be multiple digital exhibits and it will be important to decide on what the priorities are, perhaps submitting requests in appropriate phases so as not to overwhelm resources. With each piece of work, it is important to target the right data on the device. For example, where there is an allegation of rape involving two people who have known each other for 6 weeks, there may be no need to examine data on a smartphone preceding that period.

The primary objective of all concerned in the investigation and the consequent proceedings must be to achieve a clearly defined and focussed strategy between the investigator, forensic scientist and prosecutor, and thereafter between the prosecution advocate, the defence team and, where appropriate, the judge. The DMD is the essential means by which this critical requirement can be assured, especially with respect to digital material. At present, many of the parties in the proceedings are making decisions, preparing their case and making case management decisions before fully understanding the nature of the investigation and the lines of inquiry that were, or were not, pursued and why. This leads to misunderstandings and delay, when issues or remedial action could have been resolved much earlier if the digital forensic strategy and overall disclosure management was understood and, to the extent possible, agreed by those involved.

Role of government

Specific issues for police arise from the lack of any coordinated investment in advanced data analytics capabilities, especially for mobile phone interrogation. While pockets of good practice exist in the use of analytical technologies, there is no consistent application of methodology among investigators.

While overcoming these challenges is primarily an operational matter for policing, the government has a role to play both in ensuring the digital challenges to disclosure are effectively tackled by the police and providing support where necessary. The Home Office is currently supporting the police to solve these problems in 3 main ways:

- Working with policing and wider partners through participation in the NDIP Technology Group. The group, chaired by the CPS and reporting to the National Disclosure Delivery Board, is co-ordinating work across the criminal justice system to develop

⁷⁷ A number of examples were provided to the Review of delay caused by inappropriate requests for 'full downloads'. It was suggested by some stakeholders that system-wide comprehension and familiarisation needs to be improved so that lawyers and investigators understand what they are asking for and legal applications and directions are made in the right context.



technology solutions to aid effective disclosure and to ensure there is co-ordinated action in this area;

- Funding long-term police led work through the Police Transformation Fund which will aid the development of capabilities which support effective disclosure, in particular:
 - Mapping forces' current digital investigation and intelligence (DII) capabilities and making recommendations for improvement, covering capabilities all forces require in the extraction, analysis, storage and sharing of digital data, which support effective disclosure;
 - The development and piloting of a police Digital Evidential Transfer System (DETS) which will enable policing to easily share digital material with cross-criminal justice system partners. Once the pilots are completed in April 2019, the national service would be available from June 2019; and
 - Engaging experts in the technology sector to propose technical solutions to aid disclosure, both existing and for development, at each stage of the investigative process. This work will be completed by early Autumn with a focus on solutions which can be implemented quickly.

The Justice Select Committee inquiry into disclosure identified a need for a comprehensive strategy to ensure that all 43 police forces are equipped to handle the increasing volume and complexity of digital evidence⁷⁸. The Review agrees and adds that any strategy should acknowledge that technological advances and innovations in policing must fit with prosecutor, court and defence requirements. The Home Office is presently supporting a 'landscape review', which will conclude later in the year. The results of that review will be assessed at a Tech Summit in Spring 2019, co-chaired by the Policing Minister and Solicitor General. This will identify a way forward with police leaders, private tech specialists and companies, and other stakeholders in the criminal justice system.

Artificial Intelligence

The full potential of new technology is not currently being exploited. In some instances, paper processes have been transferred to electronic systems, but there are opportunities now to go further. In particular, in respect of the high-end cases, there must be greater acceptance that billions of pieces of information cannot be read by a human being alone⁷⁹. It is clear that a different approach, researching and developing appropriate solutions using predictive coding, or Artificial Intelligence (AI) is needed in such cases. For example, searching electronic communications to identify all exchanges between various individuals in an investigation. The Review supports the principle of the legitimate use of such approaches with further detail to be set out in relevant guidance.

Operational pilots

Following work by the NDIP Technology Group to define challenges and user requirements, the NPCC will be piloting two main information technology solutions to help police manage vast quantities of digital material and aid effective disclosure:

⁷⁸ Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018), paragraph 63

⁷⁹ *R v R* (2016) 1 WLR 1872



- Enhanced search/analysis capability, for both mobile phone records and video evidence, to enable relevant material to be identified swiftly and effectively. This will be tested with police forces in the East Midlands.
- Tools that attempt to assess the relevance of material using AI to assist decision-making. A joint working group has selected a software package and intend to pilot this with Surrey police.

The Review supports the exploratory work of these pilot programmes, which will report their findings to the NDIP Technology Group.

Training need

A century ago, the ability to drive a car was a specialist skill for a police officer. Today in policing, driving is commonplace, but data analysts are highly sought after. In tomorrow's world, everyone involved in criminal investigation will need a basic ability to understand the nuances of the technical landscape, navigate the outputs of technological solutions, and analyse data, coupled with traditional police work in the context of an investigation. As the amount of digital evidence continues to increase, the demand for officers to have both the tools and the skills to use them will become a critical matter for the future of policing. The Review endorses the Justice Select Committee recommendation that any strategy on digital evidence and technology must consider and invest not just in tools and equipment, but in the skills to use them most effectively.

Complainant, witness and third party privacy rights

A prerequisite of public confidence in the criminal justice system is the clear demonstration that the prosecution is motivated to achieve a fair trial, rather than gathering evidence helpful to the prosecution case and ignoring potentially exculpatory material.

Balanced against this is the right of complainants in criminal trials not to be subjected to unwarranted intrusion into their privacy. Complainants must not be deterred from reporting criminal offences and participating in the criminal process by the fear that private information about them will be unnecessarily divulged.

This is an issue which was carefully considered by the Justice Select Committee inquiry into the disclosure of evidence⁸⁰, through oral and written evidence from victim representatives like Rape Crisis, police and crime commissioners, forensic specialists, prosecutors and defence lawyers. The Review agrees that evidence of inconsistent, and possibly ill-conceived, local practices and a gap in guidance and approach leads to the conclusion that more national direction is required.

The Attorney General's guidelines will be revised to assist the prosecution in ensuring that privacy and data protection considerations are properly embedded in disclosure practices and procedures.

Lines of inquiry should be reasonable. Police and prosecutors have developed new guidance on communication evidence⁸¹ and the Attorney General's guidelines will be

⁸⁰ For example, see paragraphs 120-127 of Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018) and the published supporting evidence.

⁸¹ CPS, '[A guide to "reasonable lines of enquiry" and Communications Evidence](#)' (July 2018), referred to with approval in *R v E* [2018] EWCA 2426 (Crim)



updated to assist all involved in the process properly to balance their statutory duties under CPIA 1996, investigatory powers, the defendant's Article 6⁸² right to a fair trial, the Data Protection Act 2018 and the General Data Protection Regulation, bearing in mind Article 8 obligations⁸³. However, the primary duty of the investigator is to pursue all reasonable lines of inquiry, including into exculpatory material.

The guidelines will clarify the respective responsibilities of the prosecution when considering the disclosure of personal data material. The importance of clear police procedures ensuring that informed and qualified agreement is given by the data subject, firstly to the examination of the data, and, if necessary, to the disclosure of material, will be emphasised. They will highlight the need for systems to be implemented to record agreement at each stage.

The guidance will also emphasise the importance of police making arrangements to ensure that prosecutors are satisfied that informed agreement to disclosure has been given, and that complainants and witnesses are aware that disclosure is to be made before this happens. The guidance will detail the responsibilities of each party at each stage in the disclosure process to ensure that data material is properly handled and redacted to avoid excessive and collateral intrusion. In particular, redaction of digital material is an area where technical and practical capabilities of the police must be prioritised. The Review noted inefficient 'work-arounds', such as printing documents, only to scan them back in once they have been redacted by hand.

Although not the focus of this Review, it is recognised that similar issues arise where investigators obtain personal information about the defendant or a witness from a third party that is proposed to be adduced as prosecution evidence against the defendant. In situations where the defence assert that such material is not relevant, prejudicial, or unlawfully, improperly or unfairly obtained there are well-established procedures for the defence to make an application to the court seeking its exclusion from the trial.

Finding 6A

Frontline investigators and prosecutors would benefit from simple, clear, and practical assistance in performing their duties relating to digital material, including on the legitimacy of appropriate use of technological solutions, including AI.

Recommendation 6A

Make changes to secondary legislation (Code of Practice/Criminal Procedure Rules) and Attorney General's guidelines, guidance and protocols that sit underneath the legislation to deal with the realities of digital material. These should provide more clarity on the legitimacy of using AI and flexibility with innovative processes other than pure scheduling (which is not always as helpful as other methods in relation to enormous amounts of digital data).

Implementation

Updating codes, guidance and guidelines:

- Attorney General's guidelines on disclosure for investigators, prosecutors and

⁸² European Convention on Human Rights, Article 6 Right to a fair trial

⁸³ European Convention on Human Rights, Article 8 Right to respect for private and family life



defence practitioners (AGO)

- CPIA 1996 Code of Practice (MoJ)
- Consider updating the Judicial Protocol on the Disclosure of Unused Material in the Crown Court (Judiciary)

Timescale

Make changes by Autumn/Winter 2019, consulting where necessary.

Finding 6B

Technology does not offer all the answers. At present the criminal justice system has often converted paper processes into electronic process, but there is a need for greater exploration and adoption of the potential benefits of technology. There needs to be a systemic identification of the way in which AI can assist with the process of disclosure.

Recommendation 6B

Police forces need to understand and assess their capabilities and what products already exist on the market or ought to be developed, including AI.

Implementation and timescale

- Home Office supported Landscape Review to report in Autumn 2018.
- Tech Summit (co-chaired by Solicitor General and Policing Minister) to be held in Spring 2019 to assess the results of the Landscape Review and identify a way forward with police leaders, private tech specialists and companies, and other criminal justice system stakeholders whose requirements need to be taken into account.
- Police to continue with tech pilots and to report on evaluations to the NDIP programme.
- Joint National Police Chiefs' Council, Association of Police and Crime Commissioners, and Home Office Forensic Science Review (including digital forensics) published by the end of 2018.
- The police led Digital Intelligence and Investigations Programme are engaged with the College of Policing in supporting the development and delivery of digital investigative training, to ensure all officers have a base level of training and understanding of the principles.

Finding 6C

Competing rights, privacy and data protection issues need to be settled to assist victims, witnesses, police and prosecutors.

Recommendation 6C

Relevant national guidelines and practices should be updated to clearly take account of these issues.

Implementation

- Attorney General's guidelines to clarify the issues and process required (AGO)



- Police and prosecutors to update and nationalise their practices and procedures, with involvement from the government, victims groups and wider criminal justice system, including relevant commissioners (such as the Victims Commissioner, Information Commissioner, Investigatory Powers Commissioner, and Surveillance Commissioner)
- Implementation of, compliance with, and suitability of the arrangements under review, particularly in light of future technological advances (NDIP)

Timescale

Make changes by Autumn/Winter 2019, consulting where necessary.



7. Data and management information

The collection of data and management information to inform performance on the impact of disclosure on cases is not fit for purpose.

This Review found that existing data does not provide an appropriate basis for measuring, managing and tracking performance on disclosure. This must change. Previous reviews of the management of disclosure have provided sound recommendations, but the system has fundamentally lacked the necessary data to underpin a full understanding of whether problems have been resolved and where they persist.

Without reliable data, performance improvement cannot be consistently assessed. That said, the Review recognises that new methods of data collection need to be proportionate. They should not become an onerous distraction.

CPS data

The evidence to the Justice Select Committee inquiry that has run alongside this Review has demonstrated a clear need for more sophisticated data collection by the CPS. At present, recording practices are too narrow. They fail to take account of situations in which disclosure *may* have been a contributory factor in a case failing, but not, in the view of the prosecutor making the assessment, the primary reason for the failure. This issue lay behind the CPS's review of Rape and Serious Sexual Offence cases at the start of 2018⁸⁴. That time-limited, in-depth review showed the importance of being able to identify where and how disclosure flaws may have arisen in a case, even when those may not necessarily have been the principal factor in a case failing.

Work is already taking place, under the NDIP, to enhance performance – particularly by improving compliance and assurance practices. For example, improvements have been made to how Individual Quality Assessments (IQAs) in the CPS are undertaken, with legal managers completing the assessments on a sample of cases each month to draw out learning and good practice. Thematic IQAs to focus on disclosure have been designed, and feed into area performance measures monitored by CPS headquarters.

Building on this, it is essential that the CPS put in place new methods of recording data about disclosure. The CPS has begun work on designing new metrics for disclosure and have consulted HMCPSP on their proposals. This action must resolve the current weaknesses in the data collection so that the disclosure problems or concerns are identified when a case fails, but also to monitor disclosure performance throughout the life of the case.

Separately, at the invitation of the CPS, HMCPSP are also undertaking a rolling programme of internal management inspections area-by-area over the course of 6 months to provide independent assessment and challenge.

Alignment of performance measures across police and prosecutors

Given the systemic nature of the problem it is also essential to ensure that there is alignment of performance measures between the police and the prosecutors. One of the main benefits

⁸⁴ CPS, '[Rape and serious sexual offence prosecutions - Assessment of disclosure of unused material ahead of trial](#)' (June 2018)



of the NDIP programme is its joint ownership by police and prosecution senior leaders. The same joint working needs to be true in the manner in which performance is monitored in the services that they lead, deliberately avoiding the risk of perverse incentives emerging or gaming of the system. The NDIP Board should agree Key Performance Indicators (KPIs) for the police, with the oversight of police and crime commissioners and HMICFRS, which align with the disclosure performance measures for the prosecutors that are under development by the CPS.

Following last year's joint inspectorate report, HMICFRS have added questions on disclosure to this year's "PEEL" annual assessment of police forces⁸⁵, specifically looking at training, quality assurance and compliance with disclosure rules.

Finding 7A

Data collection on the extent to which disclosure is impacting cases is inadequate and does not provide an appropriate basis for managing performance.

Recommendation 7A

The CPS management system needs to capture data on more than one reason for a case failing so that secondary factors, including disclosure, are identified.

Implementation

New metrics for disclosure, which must include the CPS system capturing information on more than one reason for a case failing (CPS in consultation with HMCPSI)

Timescale

To be achieved by Autumn/Winter 2019.

Finding 7B

Performance measures need to be used to maintain and build on the positive collaboration built up under the NDIP programme.

Recommendation 7B

Performance indicators across police and prosecutors need to be aligned to ensure a joined-up approach.

Implementation

The NDIP Board to agree KPIs for the police and CPS, to be reviewed by joint inspectors, Home Office, and Attorney General's Office (NDIP)

Timescale

To be achieved by Autumn/Winter 2019.

It is understood that a set of joint police/CPS KPIs has been drafted and is in the final stages of agreement. The arrangements for longer term oversight and inspection requirements will be kept under review.

⁸⁵ More information at: www.justiceinspectorates.gov.uk/hmicfrs/police-forces/integrated-peel-assessments/



8. Sustained oversight and improvement

In order to deliver the necessary change in culture there needs to be sustained oversight by senior operational leaders and ministers.

The ultimate purpose of making improvements to data and performance is of course to deliver a change of culture that improves outcomes and the administration of justice. The Justice Select Committee rightly called for immediate action⁸⁶ but coupled this with recognition that solving long-standing problems also requires a long-term commitment:

“...This includes changes to the culture of police and the CPS as well as changes to the practice of disclosure. It can't be done overnight but it must start immediately. We consider that these issues are central to the administration of a fair justice system and to resolve them will need long term commitment underpinned by clear accountability by the most senior people. This is not the time for short term fixes...”

There can never be guarantees of perfect decision-making 100% of the time, which is why safeguards exist, such as the Criminal Cases Review Commission; but effective disclosure practices must become the norm throughout the system. The CJB, which brings together ministers and a range of other senior partners across criminal justice, is well-placed to provide oversight of change and improvement. The CJB should become the forum through which improvements are overseen. This should include a next phase of the NDIP programme reporting to the CJB so that the systemic nature of the problems we have seen are confronted, the lessons learned, and the practices improved at a deep cultural level, sustainably and for the long term.

Police and CPS leadership must ensure that the practical steps taken to deliver culture change that have started to be driven through the NDIP are sustained and permanently embedded in both services. The original focus of NDIP was a series of specific recommendations in the joint inspectorate report⁸⁷ and *Mouncher* investigation report 2017⁸⁸. The Review recommends that the NDIP programme now ought to move to evaluate its own success, look to other areas of disclosure that can be improved and maintain focus and joint senior leadership on this issue. This is something that the police and CPS have already agreed and have plans in place to do. The Attorney General will maintain a close interest and engagement in these actions.

In the report of their inquiry into disclosure of evidence the Justice Select Committee recommended that the Attorney General's guidelines on disclosure be “signed off” at regular, defined intervals, either stating that they remain sufficient or amending accordingly⁸⁹. These guidelines have an interdependent relationship with the CPIA 1996 Code of Practice, the Criminal Procedure Rules, the Judicial Protocol and operational guidance and training. In the past they have been amended in response to specific system-wide issues and in coordination with other relevant parties⁹⁰. It is suggested that the most appropriate forum to

⁸⁶ Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018), paragraph 16

⁸⁷ HMCPSI and HMICFRS, '[Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases](#)' (July 2017)

⁸⁸ Richard Horwell QC, '[Mouncher investigation report](#)' (July 2017)

⁸⁹ Justice Committee, '[Disclosure of evidence in criminal cases inquiry](#)' (July 2018), paragraph 81

⁹⁰ For example, in 2013 in response to recommendations made in the 2011 Gross review and in conjunction with amendments of the Judicial Protocol also re-issued in 2013.



elicit evidence as to whether changes are needed, and then to coordinate changes among those who 'own' the interlinked guidelines, codes, protocols and guidance is the CJB. The CJB might agree a standing agenda item to consider whether they remain sufficient or, if not, to commission a project to consider and coordinate any changes that might be necessary. As stated earlier in this Review, by the Justice Select Committee themselves and earlier judge-led reviews, there is a risk in issuing too much or too complex guidance. Simplification and use of plain English should be the principles on which any future changes are based, in order to provide maximum assistance to practitioners who have to deal daily with the vital task of disclosure.

Finding 8A

There is a system-wide problem that requires a systematic response. Previous reforms have to some extent been piecemeal or not fully followed through.

Recommendation 8A

The CJB is the appropriate forum to maintain ministerial and senior stakeholder oversight of the issue and the implementation of the recommendations in this Review.

Implementation

This Review was discussed at a CJB meeting on 5 July 2018 at which it was agreed that the CJB would oversee implementation, including by establishing a new sub-group specifically to monitor disclosure across the criminal justice system.

Timescale

Ongoing.

Finding 8B

It is necessary to maintain the operational focus and pace, built up under the NDIP programme, into the longer term.

Recommendation 8B

The NPCC and CPS should proceed to establish an 'NDIP 2' to evaluate the effectiveness of the measures that have already been taken, maintain continuous improvement and focus (e.g. on training, how 'Champions' are used, culture change) and identify new areas for improvement, reporting to the CJB twice a year.

Implementation

Structure of joint working should continue between the NPCC, College of Policing and CPS. The NDIP board are in the process of discussing and agreeing new terms of reference.

Timescale

By Spring 2019.



Annex A. Terms of reference

Review of the efficiency and effectiveness of disclosure in the criminal justice system

On 11 December 2017 it was announced that the Attorney General would lead a review of disclosure procedures to explore how to make prosecutorial processes more effective and efficient.

The terms of reference are to review the efficiency and effectiveness of disclosure in the criminal justice system, including specifically how processes and policies are implemented by prosecution and defence practitioners, police officers and investigators.

The Review will consider evidence under the following cross-cutting themes:

- a. Processes within 'volume' cases (within the Crown Courts and Magistrates' Courts) and 'complex cases' including economic crime;
- b. Guidance, including any Codes of Practice, Protocols or Guidelines and legislation;
- c. Case management, including initiatives such as 'Transforming Summary Justice', 'Better Case Management' and 'Digital Casework'; and
- d. Capabilities across the criminal justice system including staffing, training, existing tools and digital technology.

The Review team may consult private sector and representative bodies, academics and non-governmental organisations as appropriate, including through meeting groups of stakeholders, but will not publish a formal consultation or call for evidence.

The Review will aim to report by summer 2018.



Annex B. List of stakeholders

The Review considered evidence from a number of organisations and individuals, including:

Prosecutors
Crown Prosecution Service
Financial Conduct Authority
Serious Fraud Office
Whitehall Prosecutors Group
Investigators
Association of Police and Crime Commissioners
College of Policing
Her Majesty's Revenue & Customs
National Police Chiefs' Council
Judiciary
President of the Queen's Bench Division
Senior Presiding Judge
Lord Justice Gross
Her Majesty's Courts and Tribunals Service
Magistrates Association
Barristers
Bar Council
Criminal Bar Association
Solicitors
Criminal Law Solicitors' Association
Law Society
London Criminal Courts Solicitors' Association
Inspectorates
Her Majesty's Crown Prosecution Service Inspectorate
Her Majesty's Inspectorate of Constabulary & Fire and Rescue Services
Other
Criminal Cases Review Commission
Information Commissioner's Office
Investigatory Powers Commissioner's Office
National Disclosure Forum
Rape Crisis
Members of the public, academics, forensic scientists, individual and retired practitioners, and judges



Annex C. Template Disclosure Management Document

This Disclosure Management Document sets out the approach of the prosecution to relevant non-sensitive material in this case. Unless otherwise indicated, all the material on the non-sensitive schedule has been inspected by the disclosure officer.

R v [Name]

Prosecutor:

Disclosure officer:

Prosecution counsel instructed:

1. Reasonable lines of enquiry

The rationale for the identification and scheduling of relevant material is based upon the reasonable lines of enquiry that were conducted within this investigation. The

Disclosure Officer's understanding of the defence case is as follows;

- [What explanation has been offered by the accused, whether in formal interview, defence statement or otherwise. How has this been followed up? This should be set out.]
- [What are the identified/likely issues in the case eg identification, alibi, factual dispute, no intention etc]
- [Insert summary of reasonable lines of enquiry pursued, particularly those that point away from the suspect, or which may assist the defence]
- The time frame selected is considered to be a reasonable line of enquiry, and represents [e.g. the date that the victim first met the suspect to a month after the suspect's arrest]

2. Electronic material

This section should cover the following issues.

- What mobile telephones/communication devices/computers were seized during the investigation (from all suspects, complainants, witnesses).
- Identify the items with reference to the MG6C schedule – i.e. telephone, download
- Have the devices been downloaded? If not, why not. If so, what type of download?
- Set out the method of examination of each download – were key words deployed, was the entire download inspected, were date parameters employed?
- What social media accounts of suspect/complaint/witness have been considered a reasonable line of enquiry.
- Were any phones from the complainant or suspect not seized? If not, why not?
- Set out the method by which the defence will be given disclosure of material that satisfies the disclosure test explaining, if relevant, why the whole item is not being provided.
- What CCTV/multi-media evidence has been seized and how it has been examined?

A suggested presentation and wording of the information is set out below:



Exhibit ref	Description	Enquiry undertaken	Result
AB/1	I-phone seized from defendant	<p>This telephone has been downloaded using the XRY software. This has resulted in 40,000 pages of data which includes telephone calls to and from the suspect, contact list, text messages, whatsapp messages and internet search history. No further data has been downloaded from the phone.</p> <p>The internet search history does not appear to be relevant to the issues in the case and has not been reviewed.</p> <p>The contact list has been reviewed to identify whether the complainant is a contact, no further checks have been made.</p> <p>The telephone call list has been reviewed for any contact between the suspect and complainant between dates x and Y. All identified contact has been produced as exhibit AB/2.</p> <p>Text messages and whatsapp messages have been searched using the following keywords [A, B, C, D] all responsive messages which correspond with the keywords have been disclosed.</p> <p>No further checks have been conducted upon the phone.</p>	<p>Relevant evidential material has been served.</p> <p>Material which has been identified through keyword searching has been collated and scheduled. The defence are invited to identify any further keywords which might represent a reasonable line of enquiry. If further interrogation of the telephone is considered to be necessary the defence are invited to identify what enquiries should be undertaken and identify the relevance of such enquiries to the issues in this case.</p>

3. Third Party Material

The prosecution believes that the following third parties have relevant non-sensitive material that might satisfy the disclosure test if it were in the possession of the prosecution (e.g. Medical and dental records, Records held by other agencies, Records/material held by Social Services or local authority):

The reason for this belief is ...

The type of relevant material is...

The following steps have been taken to obtain this material:

The defence have a critical role in ensuring that the prosecution is directed to material that meets the disclosure test. Any representations by the defence on the contents of this document, including identifying issues in the case and why material meets the test for disclosure should be received by *[insert date/ timescale]*.

Signed:

Dated:



Annex D. NDIP update October 2018

PURPOSEFULLY BLANK

October 2018

National Disclosure Improvement Plan

Progress update



Delivery of the commitments in the National Disclosure Improvement Plan

The National Disclosure Improvement Plan (NDIP) was published in January 2018, to bring together for the first time the shared commitment of our three organisations to make sustainable change to the way we exercise our duties of disclosure. The NDIP set out all of the measures proposed under one cross-organisational plan.

Collectively, we acknowledged that disclosure had been devalued within the culture of investigations. A mind-set had developed in which disclosure was viewed as a bureaucratic addendum to the investigation. Public confidence in the disclosure process was further undermined by a series of high-profile cases in which disclosure had not been done as it should and these brought into sharp focus the very serious consequences of not getting it right.

The NDIP has brought structure to our efforts to tackle disclosure performance, ensuring we are joined up and collaborative. Disclosure is the joint responsibility of the investigation and prosecution team, and none of us can begin to make substantial improvements without the close cooperation of the other. We have also had constructive engagement from across the criminal justice system, with our monthly National Disclosure Forum bringing together representatives from the independent bar, defence solicitors and the judiciary to discuss challenges and proposed solutions and we thank all those who have contributed. There is a real recognition that there has been a widespread problem with disclosure across the whole criminal justice process and a corresponding joint commitment to improvement and change.

The plan highlighted the key priorities to:

- strengthen the capacity of investigators and prosecutors in dealing with disclosure, with an emphasis on pursuing reasonable lines of enquiry, particularly in the context of significant volumes of communications and other digital material;
- improve capabilities by providing training that equips investigators to identify, review and record relevant material so that the prosecutor is able to make an informed disclosure decision;
- reinforce the messages on the “thinking approach” to disclosure by effective leadership both at the top of our organisations and by appointing disclosure champions to drive cultural change;
- ensure focused and continuous oversight and governance of the actions set out in NDIP to ensure progress and significant improvement.

We have provided regular [public updates on our progress](#) under the plan and the NDIP Board, chaired jointly by the Director of Public Prosecutions Alison Saunders and Chief Constable Nick Ephgrave, has overseen delivery of the actions on a monthly basis.

Overall progress on delivery

Significant progress has been made on implementing the 42 actions in the NDIP, with 40 actions having been delivered and the remaining 2 on track to be completed to their longer timescales. Joint CPS, College of Policing and police thematic working groups were established to focus on specific aspects of the NDIP, with each group assigned actions and recommendations that they were responsible for progressing.

Key actions included:

- implementation of the Disclosure Management Document in all rape and serious sexual assaults and other complex cases to ensure early and meaningful engagement between the prosecution and the defence;
- publication of National Standards on the quality and content of disclosure schedules and a third party material protocol and national forms and correspondence for the handling and recording of third party material;
- Regional Disclosure Conferences for police champions, training for all prosecutors and an enhanced online course for investigators.

Police forces and CPS areas have also agreed specific local improvement plans and appointed disclosure champions to act as a source of expertise and provide guidance and leadership at a local level.

Work is ongoing to deliver against the remaining actions in the NDIP. The next phase of disclosure improvements will be published later in the Autumn. This will include more comprehensive management and monitoring of disclosure performance throughout the course of the investigation and prosecution to assist in understanding whether problems have been addressed and where they continue to persist.

Key actions implemented

A full list of all of the actions under the NDIP is set out below but progress against key measures and initiatives is as follows:

Action: Develop best practice from the current CPS serious casework regime and extend this to other Crown Court cases. Disclosure Management Documents, which are routinely used in the casework divisions to identify the issues for the judiciary and the defence, will be used in all cases where there is a significant volume of material by March 2018.

Complete

It is essential that disclosure issues are addressed at the pre-charge stage where possible, particularly as to what should be considered a reasonable line of enquiry in each case. The CPS has developed best practice from the current serious casework process and adapted this to other Crown Court cases. Disclosure Management Documents are routinely used in terrorism, serious fraud and organised crime cases to identify the prosecution approach to the reasonable lines of inquiry, to digital and third party material and any other disclosure issues for the judiciary and the defence. They are now being used by the CPS in all rape and serious sexual offences (RASSO) and Complex Crown Court cases.

The updated training products from the College of Policing comprise a bespoke disclosure course that focuses on reasonable lines of enquiry and makes clear that disclosure is an integral part of an investigation from the start.

Action: Appoint CPS disclosure champions for the magistrates' court, the Crown Court and Rape and Serious Sexual Offences teams to work with those already appointed for Complex Casework Units in each Area by February 2018.

Complete

CPS Disclosure Champions have been established in all Crown Court and magistrates' court teams. These champions support Chief Crown Prosecutors to complete disclosure assurance, lead training in their Areas and drive forward the culture change in the organisation.

In addition to the CPS champions, the police have established a complementary network of champions. They are led at chief officer level in each force and work is coordinated by superintendents/chief superintendents. The College hosted a series of Regional Disclosure Events, enabling each force to nominate champions to receive updated information about the disclosure improvement initiatives and how to support their colleagues in dealing with disclosure issues in their investigations.

The champions' networks will work closely together, across organisations, helping to improve and maintain disclosure standards.

Action: Establish by March 2018 a jointly led police and prosecution-led national disclosure forum with representation from all agencies, including the judiciary and the defence community, to focus on practical action that can and should be taken to improve performance on disclosure and guard against disclosure failures.

Complete

Disclosure is a systemic issue across the whole of the criminal justice system, and there are important roles for the police, the prosecution, the defence and the court in ensuring it is done properly. We have engaged with criminal justice system stakeholders in regular meetings of the multi-agency National Disclosure Forum to ensure that improvements are working in practice. The Forum is encouraging discussion about what solutions look like for all parties involved, as well as generating feedback on the work underway to make sure we are getting it right.

These meetings include representatives from the Law Society, the Bar Council and Criminal Bar Association, defence solicitors and the judiciary and have successfully facilitated open discussions on these issues.

Action: Started work on a joint protocol to deal with the identification, handling and disclosure of third party material. This will be published by March 2018.

Complete

This Protocol draws together the agreement between the CPS and the police to use the standard correspondence and forms on a national basis regarding third party material. This includes a letter to be sent to third parties asking them to identify material they may hold, a pro-forma reply for third parties to use to respond, an index of material requested and a viewing log of the material inspected.

Action: Create national minimum standards on quality and content for the MG6 disclosure schedules. A memorandum of understanding between the police and the CPS will be published by March 2018.

Complete

A National Disclosure Standard has been published. This document contains a statement of the national standards for the completion of the MG6 schedules of unused material in the Crown Court

and the Streamlined Disclosure Certificate for use in the magistrates' court and sets out the process for the provision of schedules. The Standard will be subject to annual review and can be amended to reflect any new practice.

Action: Review the current provision of disclosure training with the College of Policing and report by May 2018 with recommendations.

Complete

Deliver regional awareness workshops with the College of Policing to address disclosure issues highlighted in recent cases from March 2018.

In April, the College of Policing released new training for all forces to use. This training takes account of the ongoing and significant changes in disclosure practice as a result of the increasing use and relevance of digital media and material. In addition, the College has issued learning standards to assist forces to equip their officers with the knowledge they need to carry out their disclosure duties – the College training product supports those standards and forces are able to augment it with local training that takes account of specific criminal justice processes and working relationships in each area.

A number of events for disclosure champions were held across the country so that every police force and CPS Area has a cohort of well-informed individuals to assist colleagues to fulfil their disclosure duties. Over 800 officers from across forces attended these events.

Action: Establish a joint technology working group to explore the use of a range of digital tools to assist in the review of digital material by March 2018.

Complete

In February we established a cross-agency technology working group, with senior representatives from the CPS, Policing, Home Office, Courts & Tribunals Service and Attorney General's Office.

Group members have overseen successful delivery/progress of three major initiatives (actions 2, 4 & 7 in Annex A below), all of which are significant transformations in their own right as well as having a positive disclosure impact. Beyond that, the group's primary focus has been identifying new tools to assist with the disclosure challenge. After articulating problem statements and user requirements, the group liaised extensively across government, industry and academia to gauge the most pertinent opportunity areas.

The Group then commissioned two pilots of specific products with police forces – one an advanced search and analytics package particularly targeted at mobile phone downloads, and one an artificial intelligence tool to assist with the review of material. The pilots are designed not only to examine the individual products but also to explore the wider implications of "tools like these". Activities on both pilots are underway at the time of writing.

Progress against all of the actions is in Annex A.

Next steps

Public confidence in the system of disclosure needs to be rebuilt and this continues to be a priority for all three of our organisations, both separately and working together.

As we approach the completion of the actions under the NDIP, we are now moving into the next stage of our disclosure improvement. We are not complacent about the scale of the challenge and recognise that systemic change will require a significant investment of time and resource. The actions we have completed under the first phase of this plan mean we are well placed to make the cultural changes we know are required.

We will shortly be publishing our next phase of improvement measures in which we will reflect the Justice Select Committee's recommendations as well as a focus on ensuring that the measures we have introduced at a national level translate into improvements at a local level. We recognise that more work is needed in the magistrates' and youth courts and so we will also examine our processes and performance in these settings and develop bespoke improvement measures based on what we find.

NDIP Phase 2 will set the direction for continued progress and development in disclosure to ensure that it remains focused, relevant and is effective in bringing about lasting improvements and sustained change at a national and local level.



Nick Ephgrave

National Police Chiefs' Council



Mike Cunningham

College of Policing



Alison Saunders

Crown Prosecution Service

Annex A: Progress against the actions

Item	NDIP actions	Timescale	Status
CAPACITY			
1	We have started work on a joint protocol to deal with the identification, handling and disclosure of third party material. This will be published by March 2018.	March 2018	Complete
2	We have developed a modernised interface to sections of the CPS case management system to make it easier for all users to find, sort and classify evidential material. Rollout will commence in February 2018.	April 2018	Complete
3	We have reviewed the police HOLMES computer system to ensure it allows for the correct handling, storage and disclosure of sensitive material.	Complete	Complete
4	We have developed a business case for funding, and started design activities, for a police Digital Evidential Transfer System (DETS). This will be a single national repository for multimedia seized by the police. This is expected to begin with pilots in 2018 and be fully live nationally in 2020.	High Level Design by May 2018/Full rollout March 2020	Design complete, pilot planning ongoing, currently on track for 2020 rollout as planned
5	We will develop a joint protocol by March 2018 for the examination of digital media to include an agreement on each case between the disclosure officer and the prosecutor as to the reasonable lines of enquiry proportionate to each investigation.	March 2018	Complete A Working Group is evaluating data from the pilot before extending it to other casework types.
6	We will develop best practice from the current CPS serious casework regime and extend this to other Crown Court cases. Disclosure Management Documents, which are routinely used in the casework divisions to identify the issues for the judiciary and the defence, will be used in all cases where there is a significant	March 2018	Complete A Working Group is evaluating data from the pilot before extending it to other casework types.

	volume of material by March 2018.		
7	We will provide all multimedia evidence from the CPS to the defence via direct electronic link by July 2018.	July 2018	Complete
8	We will develop a cadre of specialist and experienced disclosure experts in every force, available to conduct sampling, local training and assistance in complex cases from February 2018.	From February 2018	Complete
9	We will establish a joint technology working group to explore the use of a range of digital tools to assist in the review of digital material by March 2018.	March 2018	Complete
CAPABILITY:			
10	We have refreshed the CPS Disclosure Manual. This clarifies how contact with witnesses should be recorded and disclosed. This will be published by February 2018.	February 2018	Complete
11	We have provided all prosecutors with access to disclosure training via the Prosecution College.		Complete
12	We have initiated development of a suite of national standard forms covering third party material examination, retention and disclosure. These will be completed by June 2018.	June 2018	Complete
13	We have refreshed the online training 'Fair Investigations for Fair Trials' provided to officers via the College of Policing.		Complete - We have developed a new course.
14	We will deliver additional mandatory disclosure training through Chief Crown Prosecutors to all prosecutors in their Area by September 2018.	September 2018	On track.
15	We will create national minimum standards on quality and content for the MG6 disclosure schedules. A memorandum of understanding between the police and the CPS will be published by March 2018.	March 2018	Complete

16	We will review the current provision of disclosure training with the College of Policing and report by May 2018 with recommendations.	May 2018	Complete (see rec 13)
17	We will deliver regional awareness workshops with the College of Policing to address disclosure issues highlighted in recent cases from March 2018.	From February 2018	Complete
18	We will review, together with the College of Policing, whether there should be a requirement for officers to hold a Licence to Practice in respect of disclosure by January 2019.	January 2019	On track
LEADERSHIP:			
19	We have established CPS national and Area disclosure champions for our most complex casework. The Area champions provide an assurance for their part of the business through supporting the Chief Crown Prosecutors to complete disclosure assurance, taking forward strategic discussions with investigators and supporting training in their Areas.	February 2018	Complete
20	We have appointed a NPCC lead for disclosure.	N/A	Complete
21	We will appoint CPS disclosure champions for the magistrates' court, the Crown Court and Rape and Serious Sexual Offences teams to work with those already appointed for Complex Casework Units in each Area by February 2018.	February 2018	Complete
22	We will implement pre-charge case assurance discussions led by senior CPS legal managers with prosecutors in cases where there are likely to be significant disclosure complexities from February 2018.	February 2018	Complete
23	We will develop a joint CPS/police disclosure improvement plan for each force and CPS Area reflecting local issues and national agreed priorities by February 2018.	February 2018	Complete

24	We will appoint a nominated disclosure champion in each force at chief officer level by February 2018.	February 2018	Complete
25	We will appoint force disclosure experts from each region to the National Police Disclosure Working Group by February 2018.	February 2018	Complete
26	We will appoint a tactical disclosure lead at chief superintendent/superintendent level in each force by February 2018.	February 2018	Complete
PARTNERSHIP:			
27	We have held a disclosure seminar bringing together senior figures from across the criminal justice system to put forward solutions to the practical challenges of getting disclosure right in all criminal cases.	N/A	Complete
28	We have reviewed and amended the CPS disclosure assurance reporting to enable more rigorous assessment of performance in CPS Areas.	N/A	Complete
29	We have agreed improvement plans in a number of CPS Areas and this is now to be extended to all forces and CPS Areas.	February 2018	Complete See item 23 of this table.
30	We will establish by March 2018 a jointly led police and prosecution-led national disclosure forum with representation from all agencies, including the judiciary and the defence community, to focus on practical action that can and should be taken to improve performance on disclosure and guard against disclosure failures.	N/A	Complete
31	We will establish by March 2018 joint local CPS/police disclosure forums, where they do not exist already, to discuss and agree local themes and joint solutions.	March 2018	Complete
32	We will establish criteria for the identification of appropriate cases that require examination by a joint CPS and police Case Management Panel where there are significant and complex	March 2018	Complete

	disclosure issues by March 2018.		
33	We will repeat the disclosure seminar we held with senior figures from the criminal justice system on a bi-annual basis.	September 2018	The seminar took place on 19 September 2018.
GOVERNANCE:			
34	We have started work on a joint CPS/police review of national crime file standards which will incorporate disclosure issues and amendments to working practices.	March 2018	Complete
35	We have ensured that Individual Quality Assessments (IQA) in the CPS are completed by legal managers on a sample of cases each month drawing out learning and good practice. We have also now implemented disclosure-themed IQA.	February 2018	Complete
36	We have set up CPS Area Casework Quality Committees (ACQCs) who give consideration to disclosure themes identified through the Individual Quality Assessment process.	February 2018	Complete
37	We will establish a quarterly review of progress against this plan by the Director of Legal Services and National Police Chiefs' Council Lead on Disclosure.	N/A	This plan has been reviewed on a monthly basis.
38	We will include disclosure monitoring as part of the performance framework of every force.	July 2018	Complete
39	We will introduce the revised disclosure assurance process in the CPS by February 2018. Compliance with the process will be assessed through the existing Area performance reviews.	February 2018	Complete
40	We will reflect any work/actions identified by ACQC in CPS Area action plans and themes identified will be escalated to the National Casework Quality Committee.	February 2018	Complete
41	We will use local police/prosecution team performance meetings will review	March 2018	Complete

	progress against local action plans as a standing agenda item and review case-specific failures to ensure lessons are learned with immediate effect.		
42	We will ensure that delivery against the commitments in this plan will be overseen by the National Police Chiefs' Council, the Director of Public Prosecutions and the College of Policing.	N/A	The Delivery Board meets monthly.

