



Ministry  
of Justice

# **Government Response to the Justice Select Committee's Eleventh Report of Session 2017-19: Disclosure of Evidence in Criminal Cases**

December 2018

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Presented to Parliament  
by the Lord Chancellor and Secretary of State for Justice  
by Command of Her Majesty

December 2018



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## Contents

Introduction	3
Justice Select Committee Recommendations	4
Recommendations made to the Attorney General	4
Recommendations made to the Ministry of Justice	8
Recommendations made to the Home Office	9

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**Government Response to the Justice Select Committee's Eleventh Report of Session 2017-19:  
Disclosure of Evidence in Criminal Cases**

## Introduction

1. This cross-government response addresses recommendations made to the Ministry of Justice, Attorney General's Office and Home Office by the Justice Select Committee's report on *Disclosure of Evidence in Criminal Cases*. A comprehensive analysis of disclosure procedures is to be found in the Attorney General's Review, published on 15 November 2018<sup>1</sup>, which makes a number of recommendations as to the next steps which have been agreed across the criminal justice agencies.
2. Ensuring that the process of disclosure is done correctly and consistently is essential to maintaining a fair justice system. All agencies with a part to play in the process have accepted that for too long it has not operated effectively enough. There is now real recognition of the systemic problems with disclosure and a joint commitment to delivering sustainable culture change and improvement. Whilst we recognise that substantial improvements must still be made, a number of significant steps have already been taken towards improving and prioritising disclosure across the system.
3. The joint National Disclosure Improvement Plan (NDIP) was established in January 2018 by the Crown Prosecution Service, National Police Chiefs' Council (NPCC) and College of Policing to improve how the justice system deals with disclosure and has provided an unprecedented level of senior leadership to disclosure improvement. The CPS and NPCC have responded separately to the Select Committee report, including an update on the NDIP's progress. We are pleased to note that the NDIP moved to a second phase on 21 November 2018. This represents a longer term, more strategic approach, with a focus on embedding measures already introduced and driving improvements at a local level, including a review of disclosure in the magistrates' courts.
4. Following a comprehensive joint inspection of disclosure in volume Crown Court cases by Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary in 2017, the then Attorney General commenced a wide review of disclosure procedures in the criminal justice system. The decision to undertake a review was additionally influenced by Richard Horwell QC's investigation report into disclosure failure in a case called *Mouncher*, also published in 2017, and the recommendations of the project to review the government response to economic crime commissioned by the Prime Minister. The Justice Select Committee announced their own inquiry in parallel to this, with the intention of feeding in to the Government review, for which we are grateful. The Attorney's General's Review extensively cross-references the overlaps between the Committee's findings and the Attorney General's.

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<sup>1</sup> Review of the efficiency and effectiveness of disclosure in the criminal justice system (November 2018) [www.gov.uk/government/publications/review-of-the-efficiency-and-effectiveness-of-disclosure-in-the-criminal-justice-system](http://www.gov.uk/government/publications/review-of-the-efficiency-and-effectiveness-of-disclosure-in-the-criminal-justice-system)

## Justice Select Committee Recommendations

5. We welcome the cohesion between the Justice Select Committee's key recommendations and the cross-cutting issues identified in the Attorney General's Review of Disclosure. The Committee identified that there needs to be:

**a) A shift in culture towards viewing disclosure as a core duty, and not as an administrative add on.**

The Attorney General's Review, like the Committee's report, found an ingrained cultural problem which needs to be addressed through new working practices. It identified that reasonable lines of inquiry are not always being followed in line with the Criminal Procedure and Investigations Act 1996 (CPIA) Code duty to do so, and disclosure obligations are not being adequately considered from the outset of a criminal investigation.

**b) The right skills and technology to review large volumes of material that are now routinely collected by the police.**

The challenges created by digital data are widely acknowledged by Criminal Justice agencies. Investigators and prosecutors are facing an unprecedented task in dealing with this material, and the Attorney General's Review acknowledges the need for an increased use of technology and digital forensics, including where appropriate Artificial Intelligence, to deal with this modern challenge.

**c) Clear guidelines on handling sensitive material.**

While the Attorney General's Review focuses on disclosure of unused evidence to the *defence*, it also makes clear recommendations regarding victim's rights, privacy, and data protection, and recognises the particular challenges posed by such sensitive personal material.

6. Each of the issues identified is explored in more detail below, and the responses to the Committee's recommendations should be read in conjunction with the Attorney General's Review, reference to which is made throughout.

## Recommendations made to the Attorney General

7. **Recommendation:** *Resolving issues in the disclosure process and rebuilding public confidence in the justice system requires an ongoing commitment from the new Attorney General, the Director of Public Prosecutions, the Minister for Policing, and the National Police Chiefs' Council, and from partners across the justice system. The Attorney General should lead on seeking the support of HM Courts and Tribunals Service, the Judiciary, and the defence community. (Paragraph 27)*



8. **Response:** The government recognises that sustained oversight by ministers and senior leaders will be necessary in order to deliver operational change. The Attorney General's Review concluded that the implementation of its recommendations would best be overseen by the Criminal Justice Board (CJB). The government agrees, and the CJB has agreed to take ownership of disclosure oversight; it has established a sub-group to focus on this issue. Through this group, partners from across the justice system will work to implement the recommendations in the Attorney General's Review. This will be in addition to improvements to the practice of disclosure that have already been made by the police and CPS through their National Disclosure Improvement Plan.
9. **Recommendation:** *The Government should consider what level of investment it deems necessary to ensure that the police and CPS are getting disclosure right, to prevent the costs associated with disclosure failures, and to prevent miscarriages of justice. We expect the Attorney General and Ministers from the Home Office to write to this Committee before the end of the financial year to explain what investment is needed, where, and over what time period. (Paragraph 49)*
10. **Response:** The Attorney General and Ministers at the Home Office and Ministry of Justice will write to the Justice Select Committee by 1<sup>st</sup> April 2019 on this topic. The Attorney General's Review addresses resource issues as part of its central analysis, which is that there are significant benefits and improvements to be gained from performing some disclosure obligations earlier than is currently the practice. This "frontloading" of the system might mean some additional resource requirements arising earlier for each of the parties involved, but there will be consequential savings too, both in the human and financial cost of disclosure failure.
11. The Attorney General's Review proposes that early preparation and engagement between defence and prosecution should be incentivised, and to this end recommends that the CJB commission a working group to lead on data gathering to assess categories, volumes and utilisation of unused material. The Ministry of Justice will consider the outcome of the CJB commissioned working group and ensure this forms part of the future review of fee schemes.
12. The Lord Chancellor has a duty to uphold the rule of law and to ensure the provision of resources for the efficient and effective support of the courts. This is a duty that the Lord Chancellor and the Government take extremely seriously. In terms of access to justice, the Government is committed to reviewing the delivery of criminal legal aid through reviews of both the Litigators' Graduated Fee Scheme (LGFS) and Advocates' Graduated Fee Scheme (AGFS). To ensure the efficient and effective support of the courts, Her Majesty's Courts and Tribunals Service is investing £1 billion into modernising the courts system. The Home Office is helping the police to respond to changing demand with a £460m increase in overall funding 2018/19, including increased funding to tackle counter-terrorism and increased funding for local policing through Council Tax precept. Overall, public investment in policing is growing by over £1bn from £11.9 billion in 2015/16 to £13 billion in 2018/19, including counter-terrorism policing, local policing and funding or national programmes.

13. As a Spending Review approaches, the Ministry of Justice, the Attorney General's Office and the Home Office are working together to understand how the whole criminal justice system is performing. This work is already underway and will inform the Government's plans to maintain and improve the world-class justice system of England and Wales.
14. **Recommendation:** *The new Attorney General should take his appointment as an opportunity to clarify what is meant by 'to superintend' the Crown Prosecution Service, and it should be very clear that he is accountable to Parliament for the performance of the CPS. As a demonstration of his ongoing responsibility for disclosure, he should personally sign off on his guidelines at regular, defined intervals, either stating that they remain sufficient, or noting amendments. We expect that ongoing review will incorporate restatement or amendment of the current guidelines, and we request that it include a commitment to sign off at stated intervals. We expect the next Director of Public Prosecutions to proactively address disclosure throughout their tenure. The culture of 'it didn't start on my watch' is pervasive and undermining of public confidence. It must not continue. (paragraph 81)*
15. **Response:** On the issue of overall accountability of the CPS, the Attorney General's Office had already begun work with the CPS to strengthen the superintendence and sponsorship relationship and the framework that underpins this. While Ministers are accountable for the prosecutors, it is important to note that the CPS, like the police, is operationally independent from government.
16. The Attorney General's Review recommends a wholesale updating of the Attorney General's guidelines, the Criminal Procedure and Investigations Act (CPIA) Code of Practice and, if appropriate, the Judicial Protocol. It is important that the nature and timing of significant changes be co-ordinated across those who control these documents, and in conjunction with the range of stakeholders who use or are affected by that guidance. The Government suggests that the Criminal Justice Board is the most appropriate body through which to co-ordinate this work, and an important forum through which each party to the system can raise concerns that change or additional guidance is necessary. Disclosure will be a regular agenda item at the Criminal Justice Board, and the Attorney General has undertaken to present a paper on progress in Summer 2019.
17. **Recommendation:** *The new Attorney General should make it clear, in the review, that the duty to ensure "the right person is prosecuted for the right offence" is paramount, even if this is at the expense of timeliness or conviction rate. The Director of Public Prosecutions should set measures that enable her (and her successor) to report against this objective. We expect this to include improving data on cases that fail to ensure that the CPS are capturing and reporting on a true number of cases where errors have played a part. Although we welcome the National Disclosure Improvement Plan, we also think a more thorough review of the data, that goes beyond just rape and sexual assault cases, is required. The CPS should also consider what data they can capture on cases which proceed with disclosure errors but are not stopped. We expect CPS performance measures to be updated before the end of the 2018-19 financial year so they can be outlined in the 2018-19 Annual Report and Accounts and reported against in the Annual Report and Accounts from 2019-20. (paragraph 96)*

18. **Response:** The Attorney General's Review sets out recommendations in Chapter 7 to ensure that disclosure data provides an appropriate basis for managing performance. As the CPS set out in their response to the Committee, the "*duty to ensure the right person is prosecuted for the right offence*" is the fundamental duty of the Crown Prosecution Service. It is explicit in the Code for Crown Prosecutors and it is never ignored in order to meet other targets. They have undertaken to consider what further measures they can introduce to ensure that the CPS is measuring the right aspects of its performance.
19. **Recommendation:** *The Attorney General's review should consider whether guidelines on large volumes of material remain appropriate in light of changes to the nature and volume of digital evidence collected by police in the course of routine and complex investigations. The Attorney General should also consider providing greater clarity on the handling of sensitive material and personal data, in light of evidence about the impact on complainants, and breaches of data protection rules raised by the Information Commissioner. (paragraph 135)*
20. **Response:** The Attorney General's Review found that investigators and prosecutors would benefit from simple, clear, practical assistance in performing their duties relating to digital material, including on the legitimacy of appropriate use of technological solutions, such as Artificial Intelligence. This will require amendments to the CPIA Code of Practice, and the Ministry of Justice will lay a revised Code before Parliament in 2019. Changes will also be made to the Attorney General's guidelines, and other guidance and protocols that deal with the practicalities of working with digital evidence and unused material. This should provide more clarity on the legitimacy of using Artificial Intelligence, and increased flexibility and freedom to use innovative processes that are more efficient and effective.
21. The government is committed to ensuring that victims have the confidence to come forward and report criminal offences; they should never be discouraged from doing so through fear of private information about them being unnecessarily divulged. The Attorney General's Review affirms the right of complainants not to be subject to unwarranted intrusion into their privacy and makes clear that competing rights, privacy and data protection issues need to be settled to assist victims, witnesses, police and prosecutors. The evidence concerning so called "Stafford statements" given to the Committee was noted. The Attorney's General's Review recommends that national guidelines and procedures should be amended and implemented with input from (inter alia) the Victims Commissioner and the Information Commissioner.
22. Regarding sensitive personal information, the Attorney General's Review emphasises that irrelevant information must be properly handled and not disclosed to the defence, and that material to be disclosed should be properly redacted. In addition, the victim or witness must give an informed agreement to their personal data being examined. More generally, the Attorney General's Review focuses on a number of crucial principles which will have a significant and positive impact on all parties to a case. The underlying message of the Attorney General's Review is that disclosure obligations should be prioritised from the outset, thus reducing cases being dropped at a late stage and trials being adjourned or delayed. Defence teams are also discouraged from making imprecise and unnecessarily wide-ranging disclosure requests, and the Attorney General's Review focusses on reasonable lines of inquiry, rejecting calls for all unused material to be disclosed.

23. **Recommendation:** *The new Attorney General, Crown Prosecution Service, National Police Chiefs' Council and College of Policing should ensure that their efforts to resolve issues with disclosure, including their recommendations, are also applicable in the magistrates' courts. The joint inspectorate should consider a review of disclosure in the magistrates' courts, much as it did the Crown Court. (para 151)*
24. **Response:** The scope of the Attorney General's 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.
25. The majority of the recommendations made by the Attorney General's Review are applicable to cases in both the Crown and magistrates' courts, including the Attorney General's Review's overarching strategy of ensuring that disclosure obligations are considered earlier in all cases. While most cases in the magistrates' courts are simpler, they can still involve large volumes of digital material too and so face many of the same challenges as more complex Crown Court cases.
26. The Attorney General's Review makes a number of cross-cutting recommendations, but one that will have significant impact on magistrates' procedures is proposed changes to the way the disclosure test is approached by the police and Crown Prosecution Service. In response to the finding that there have been failings in the application of the disclosure test in 'volume crime', the Attorney General's Review recommends that there should be a *rebuttable presumption* in favour of disclosure for categories of key documents and material that usually assist the defence, thereby ensuring that items will be disclosed unless they do *not* satisfy the disclosure test. The Ministry of Justice will consult on making changes to the CPIA Code of Practice to bring this change into play.

### Recommendations made to the Ministry of Justice

27. **Recommendation:** *We expect the Ministry of Justice to write to this Committee in response to this report, outlining what it has done to assess the impact of operational and funding changes it has made over the last five years, on the administration of justice and specifically on disclosure. We are concerned about criminal legal aid arrangements and have taken evidence on this matter. We are undertaking further work on legal aid which we intend to conclude shortly. (Paragraph 51)*
28. **Response:** The Ministry of Justice will write to the Justice Select Committee by the end of the financial year to update them on this recommendation, though our response to the Committee will be focused on legal aid changes and the impact of funding on the disclosure of unused material.
29. The Government is currently conducting an evidence-based assessment of the impact of the legal aid changes made by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 and subsequently. This post-implementation review includes several changes to legal aid fees made prior to LASPO as well as amendments made subsequently as part of the 'Legal Aid Transformation' programme.

30. The MoJ recently announced that it intends to launch a cross-cutting review of criminal legal aid fees in January 2019. In light of the Committee's recent reports on both criminal legal aid and disclosure in criminal cases, the Attorney General's review of disclosure, and broader changes across the criminal justice system, we believe it is time to think more widely about the future of criminal legal aid fees. We will set out further details in our response to the Justice Select Committee's report on Legal Aid shortly.
31. **Recommendation:** *We welcome the new commitment on the Digital Evidence Transfer System made in the National Disclosure Improvement Plan, and commitments made by the Minister in oral evidence to us. We expect the National Police Chiefs' Council and the Crown Prosecution Service to provide an update on progress with the business plan to this Committee by the end of 2018. We would welcome action by CPS and HMCTS to get disclosed material onto the Digital Case System and request that they keep us up to date on progress. (Paragraph 70)*
32. **Response:** Her Majesty's Courts and Tribunals Service are working to enable unused material to be held on the Digital Case System (DCS). This will require a change to the Standard File Structure, and HMCTS are working with the CPS and other stakeholders, including the judiciary, to agree the details of the change and a timeline for implementing it. The majority of the information uploaded to DCS by the CPS is sent via an interface between the two systems, and for that interface to work with a new 'unused' section on DCS a complementary change is required to CPS's Case Management System (CMS). The timing of that change will be a key factor in determining when this recommendation can be progressed.

### Recommendations made to the Home Office

33. **Recommendation:** *The Home Office, in consultation with the CPS, the National Police Chiefs' Council and the College of Policing, should lead on producing a comprehensive strategy to ensure that all 43 police forces are equipped to handle the increasing volume and complexity of digital evidence. This strategy must consider skills as well as technology and should be underpinned by appropriate investment. This strategy need to infringe on the operational independence of the police. We expect the Minister for Policing to report to this Committee on the status of the strategy by the end of 2018. When the Minister reports to us we expect that he will have identified key actions and dates the strategy will include, and the key date by which we can review a final draft. (paragraph 63)*
34. **Response:** It is clear that the growth in digital material is challenging to policing and that police use of technologies has historically been fragmented, resulting in varying digital and technological capabilities across forces. The Home Office is already providing significant investment to support developing digital capability within forces in England and Wales, via the Police Transformation Fund (PTF). For example, over the last two years, the PTF has provided £17m to the Digital Policing Portfolio and plans to provide a further £22.5m in 2018/19 to deliver national programmes which include the development of police capability to respond to digital crime types, which will help policing manage increasing volumes of digital evidence, and allow for a seamless interface of information between policing and the Criminal Justice System.

35. The Home Office has also supported policing's Information Management and Operational Requirements Co-ordination Committee to develop an 'Exemplar Plan' for building consistent digital capability nationally across forces. This has provided a blueprint for local plans that forces have developed to build digital capability, setting out the key digital outcomes all forces need to achieve, including in the management of digital evidence. By assessing the local plans against the Exemplar, we are working with the Information Management and Operational Requirements Coordination Committee to identify gaps in building digital capability across forces and how we can address them. We agree that the range of activity, both current and proposed, should be drawn into a comprehensive strategy.
36. **Recommendation:** *The Minister for Policing told us that the Home Office were reviewing the Strategic Policing requirement, and we recommend that the Minister and the Home Office should consider whether capability to execute core criminal justice duties, including disclosure, should be included. (paragraph 111)*
37. **Response:** The purpose of the Strategic Policing Requirement is to execute the Home Secretary's statutory duty to set out what, in his view, the national threats are, and the appropriate national policing capabilities required to counter those threats. These threats are identified on the basis that they affect multiple police areas or may require resources to be brought together from multiple force areas to be countered efficiently and effectively. The Home Office is currently assessing the suitability of the current document and as part of this work will consider whether direction on core policing functions would be best supported by inclusion in the Strategic Policing Requirement.



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