Preliminary Findings and Direction of Travel

Independent Review of Disclosure and Fraud Offences

Part 1: Disclosure - April 2024

Introduction

1. In October 2023, the Home Secretary appointed me to undertake an Independent Review of Disclosure and Fraud Offences. I was asked to undertake that review in two parts and since that time I have been focussed on Part 1 which relates to the criminal disclosure regime.

2. In these preliminary findings, I shall outline the themes that have emerged from the evidence gathering phase of my review, and which I intend to develop in my final report to the Home Secretary. In addition, I have begun the process of seeking to identify measures which might improve the way in which the disclosure process operates.

Context of the Review

3. The process of disclosure is a critically important part of criminal legal proceedings which guards against injustice by ensuring that the defence is made aware of information or material which undermines the prosecution case or assists the defence case. As the Court of Appeal (Criminal Division) made clear in *R v Ward (Judith)* [1993] 1 WLR 619, timely disclosure of relevant unused material by the prosecution to the defence is integral to a defendant's right to a fair trial.

4. In undertaking the review at the present time, I am conscious of the fact that there continue to be instances where non-disclosure of relevant material has led to miscarriages of justice which have scarred the criminal justice system. Non-disclosure played a part in *Malkinson (Andrew) v R* [2023] EWCA Crim 954 where a conviction for rape was quashed after the defendant had been imprisoned for

seventeen years. Similarly, the question of whether disclosure issues may have contributed to miscarriages of justice in the prosecution of sub-post office managers has been raised.[1] The total number of overturned convictions as of 29 February 2024 is 103.[2]

5. Additionally, in undertaking this review, I bear in mind two further matters. First, I am conscious of the fact that there have been several reviews of the unused material[3] regime since the Criminal Procedure and Investigations Act 1996 (CPIA) was enacted. The conclusions reached in these reviews command serious attention and they have assisted me with my task. Given the considerable experience of former Reviewers, it is evident that a perfect solution does not exist. Secondly, I am cognisant of the significant challenges presented to the unused material regime by the exponential rise in digital material, which if not tackled swiftly, will likely further hinder the ability of the criminal justice system to deliver swift and fair justice. Victims[4] and defendants will lose confidence very swiftly in a criminal justice system which is unable to handle the disclosure of unused material efficaciously in a digital age.

Digital material

6. The proliferation of digital material and the progressively complex nature of offending in both volume and serious crime means that disclosure is an increasingly time and resource intensive process for all parties, which has the impact of slowing down case progression in the criminal courts. This is acutely felt in the prosecution of 'disclosure heavy' crime types such as fraud and also rape and serious sexual offences cases (RASSO) where digital evidence is frequently found. The volume of material generated and gathered in criminal cases continues to rise.

[1] The Post Office Horizon IT Inquiry, currently live, was established on 29th September 2020 and is led by Sir Wyn William. https://www.postofficehorizoninquiry.org.uk/
[2] https://corporate.postoffice.co.uk/en/horizon-scandal-pages/overturned-convictions-and-compensation-information-on-progress
[3] Unused Material – Material that is relevant to the case but is not being used as part of the prosecution evidence presented to the Court.
[4] Victim – Someone who has had a crime committed against them or someone who is the complainant in a case – Crown Prosecution Service, note on terminology.

7. Currently, the average SFO case has around 5 million documents. To date, the largest case on the SFO system has 48 million documents (6.5TB or 6,500GB). If printed, the average volume of material in an SFO case would stack considerably higher than the Shard.[5]

8. However, problems encountered when dealing with unused material are not confined to SFO or RASSO cases. Although the scale is smaller, the handling of unused material in other criminal cases, whether tried in the Crown Court or Magistrates' Court, presents similar challenges which need to be met. As the House of Commons Justice Committee heard,[6] "police say that the average UK home contains 7.4 digital devices" and "there are also the devices we interact with–bank cash machine ATMs, shop sale systems, restaurants, transport payment systems, when we use public wifi […] when we get caught on CCTV". As barrister Joanna Hardy told the Committee, "it is not a digital footprint; it is a digital crater", explaining in detail that a single phone can tell you "what time [the user] woke up because they have an alarm app […] what they had for breakfast because they have a health app […] 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".

Review Aims

9. In undertaking my review, I have set out to understand what works well and what requires improvement in the criminal disclosure regime as it stands. I want to assess how far disclosure, in its current form, delivers fair criminal justice outcomes for victims and defendants, and how effectively it safeguards against miscarriages of justice.

10. My review seeks to establish how the disclosure regime can be modernised for all crime types to deliver maximum efficiency and effectiveness, whilst upholding the

[5] 80gsm bond paper has a thickness of 0.1mm and the assumption is that each document is printed on no more than 1 sheet of A4. At its tallest point the Shard stands 309.6 metres high.
[6] House of Commons Justice Committee, Disclosure of Evidence in Criminal Cases, 11th Report of session 2017-19, HC 859 published on 20 July 2018, paragraph 52.

principles of justice and ensuring that the rights and responsibilities of all parties in the criminal justice system are appropriately balanced.

Engagement Approach

11. Whilst the criminal disclosure regime has been the subject of several previous reviews and similarly debated in academic circles, I wanted to start my review from a very practical perspective by speaking to those who uphold the disclosure regime and deliver its important functions on a daily basis.

12. Since the start of my review, I have held over 50 meetings with a wide range of interested parties across the criminal justice system including, but not limited to investigators, prosecutors, and defence professionals, as well as members of the judiciary and academics (Annex A).

13. I have been supported by my two advisory panels of practitioners and representatives of organisations that uphold the disclosure regime. The Bar Council and the Law Society have also convened meetings of their committees to canvass views on behalf of their members.

14. I have also participated in several roundtable discussions facilitated by JUSTICE[7] on some key themes relevant to the review. There are common issues around resources, culture, and the timeliness of engagement on disclosure that have emerged from these meetings which I will expand on both here and in my final report.

Emerging Themes

Legislative Framework

15. I have consulted widely about whether those who uphold the disclosure regime consider that the CPIA is still fit for purpose. There seems to be a consensus that the structure and architecture of CPIA is sound, and the problems occur largely in its practical application. There are views that there are aspects of the legislation which might be either too restrictive or ambiguous. I have received feedback that

[7] JUSTICE is a law reform and human rights charity. https://justice.org.uk/

in cases where the burden of disclosure is high, it is commonplace for the practical application of the disclosure process to not always entirely reflect the provisions of the legislation. Whilst I currently see there to be no compelling case for radical reform of the CPIA, I would like to consider where there may be scope for the legislation to be modernised to simplify some of its provisions to support greater consistency of application and to enable better use of technology.

16. There is also the question of the scope and extent of the prosecution's obligations of disclosure to the defence and if, in effect, there is any justification for unlocking 'the keys to the warehouse'[8] (or parts of the warehouse) and providing access to some or all prosecution material in bulk form. On the one hand, there is the argument that in some cases the prosecution would often only be providing back to the defence material, albeit in a rationalised format, that came from them in the first place, such as mobile phone data or computer hard drives.

17. On the other hand, there are cases where unused material comes from a variety of sources and there are concerns about safeguarding privacy interests in terms of data protection. I will be considering whether these concerns are erroneously exaggerated. There is clearly merit in exploring these avenues further, however the issues are far from straightforward.

18. In relation to the 'keys to the warehouse approach', I am also giving consideration to whether the current safeguards and sanctions are sufficient to ensure material that is disclosed, is only used in connection with the proceedings.[9] Also, there are other matters to consider, such as redactions where legal privilege and other sensitive issues arise, and that defence solicitors do not always have sufficient infotech or staffing resources to perform review work where the firm specialises in legal aid work. I shall be exploring these matters in my final report.

[8] Keys to the warehouse – A model where the defence is permitted direct access to all material held by the prosecution.
[9] CPIA Section 17 - Confidentiality of disclosed information.
https://www.legislation.gov.uk/ukpga/1996/25/section/17

CPIA Tests

19. I have sought opinions regarding the key tests within the CPIA. Concerning the 'disclosure test', the present wording in section 3(1) of the CPIA requires a prosecutor to disclose to the defence "any prosecution material … which might reasonably be considered capable of undermining the case for the prosecution against the accused or assisting the case for the accused".

20. The Code of Practice 'relevant material'[10] test states that "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."

21. Given the width of the relevant material definition, but notwithstanding the objective element referenced in the test, there is some concern around the potential for subjective decisions to be made, with a lack of consistency across the system and sometimes a degree of confusion about what the term 'relevant material' itself means in practice. I shall be exploring the definition of relevant material and whether there is scope to narrow and/or clarify its application.

Technology and Artificial Intelligence (AI)

22. There is significant interest in what solutions AI might have to offer and whilst many acknowledge that technology has its limitations, I am keen to explore its potential to positively support the criminal disclosure regime and improve case progression. My discussions with investigators and prosecutors have made it clear that the material scheduling requirements[11] are one of the factors that create a significant burden on time and resources, and I want to explore options for the continuing practice of scheduling, and the efficacy and utility of these requirements as they stand, and in so far as these practices assist the defence in their work.

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[10] CPIA Code of Practice 2.7-2.8.
https://assets.publishing.service.gov.uk/media/5f9af5e6d3bf7f1e3a29321b/Criminal-procedure-and-investigations-act-1996.pdf

[11] CPIA Code of Practice Chapter 6, pages 10-12.
https://assets.publishing.service.gov.uk/media/5f9af5e6d3bf7f1e3a29321b/Criminal-procedure-and-investigations-act-1996.pdf

23. As part of this work, I intend to explore the full range and capabilities of the technological and AI solutions which may be available. I shall consider whether the current practice whereby each law enforcement agency and police authority procure their own technological solution is the most expedient way to proceed. I shall also consider the possible benefits of economies of scale that can be realised through the central procurement of technological and AI tools.

Early Engagement

24. There seems to be a consensus that early engagement between the prosecution and defence, post charge, has the potential to produce enormous benefits for case progression. Others have pointed to advantages which might flow from pre-charge engagement. I will be exploring what procedural changes could assist pre-charge and/or post-charge engagement. For example, some have raised the argument that the current timetable for the submission of defence case statements is not conducive to efficient disclosure and I am considering ways in which the system could be reformed to create greater incentives and obligations around the practice of disclosure for both the prosecution and defence.

25. Far greater attention needs to be given to disclosure at an earlier stage. One option worth exploring is the utilisation of existing hearings, such as the Plea and Trial Preparation Hearing, [12] to agree and resolve the prosecution's approach to disclosure. Another possibility is whether in a case where there are significant unused material issues, either due to volume or complexity, to consider if there is scope for a prosecutor or the defence to seek an early court hearing to specifically consider disclosure issues shortly after committal or transfer to the Crown Court. The hearing, which could be in person or held remotely, would deal exclusively with disclosure matters and might precede the service of the full defence case statement, with the significant advantage of judicial oversight or direction of the process from that early point.

[12] Plea and Trial Preparation Hearing - The first hearing at the Crown Court during which the defendant will hear the list of offences they are charged with before entering a plea of 'guilty' or 'not guilty'.

26. On that matter, I am also considering the practical application of the requirements, recently inserted into rule 15.2 of the Criminal Procedure Rules,[13] that certain steps by both parties regarding disclosure be carried out as soon as is reasonably practicable. This includes the obligation on the defendant to "make such observations on the content of [the disclosure management document] as the defendant wants the court to take into account when giving directions for the preparation of the case for trial".

27. One outcome of a successful disclosure hearing is that it could serve to limit the amount of unused material the prosecutor is required to review and enable the parties to focus attention on the issues likely to be in dispute between them, to the mutual advantage of both the prosecution and defence teams. The hearing may provide the prosecutor with an opportunity to describe their proposals for the handling of unused material and for the parties to make suggestions on matters such as whether there are additional reasonable lines of inquiry to be pursued. Where there is a large volume of digital material, the prosecution's approach to reviewing and scheduling will be discussed. In that same vein, I am considering whether the current scheduling requirements are an effective and appropriate approach for all categories of unused material. The proportionality of the prosecutor's approach, and the return of unused material not required in the prosecution, would be considered and adjudicated upon.

28. Such a hearing would also provide the defence with an opportunity to respond to the prosecutor's proposed approach to disclosure, lines of inquiry and search terms. Where there are differences in approach to the disclosure of unused material between the prosecution and defence, the court would be required to determine the issues. This might involve setting a timetable for the disclosure of unused material to take place. Consideration could also be given to new sanctions in scenarios where the prosecution does not adhere to the agreed disclosure timetable and for defendants who fail to engage at a disclosure hearing. Savings in legal costs generated as a result of a successful disclosure hearing will need to be balanced against the cost incurred by the holding of a hearing, alongside consideration of the most efficacious use of judicial time.

[13] Criminal Procedure (Amendment) Rules 2024. https://www.legislation.gov.uk/uksi/2024/62/made

29. It would be necessary to consider whether any amendments to the CPIA, Code of Practice, Attorney-General's Guidelines and Rules of Court would need to be made to facilitate these changes. In this regard, I note that section 23(7) of the CPIA provides that the Code of Practice "may (a) make different provision in relation to different cases or descriptions of cases, (b) contain exceptions as regards prescribed cases or descriptions of [the] case".

30. The role of the judiciary is central to making any system work and I will be exploring this in further detail.

The Magistrates' Courts

31. There are unique problems in the magistrates' court where there are shorter statutory timelines for case progression and fewer case management hearings which provide an opportunity for parties to engage with disclosure. From my discussions across the criminal justice system, there has been feedback that the requirements of the CPIA are frequently not complied with. Failings are cited on all sides including investigators, prosecutors, and the defence. I am considering if there needs to be a different approach and perhaps a bespoke solution for managing disclosure in the magistrates' courts and I will deal with this matter in my final report.

32. One approach might be to populate the template form in the Annex to the Code of Practice with a list of prescribed items which would be required to be disclosed in all cases, with additional space for listing any other unused material which it is required to disclose. However, there may be other approaches that could assist, and I would like to consider all options before determining my final position on this matter.

Training and Resources

33. All my engagement has pointed to a need for better training and resources for disclosure issues across all parts of the criminal justice system. I will be considering what action should be taken to address these concerns within the context of limited public funds. Many of those with whom I have spoken have referred to a poor culture around disclosure and the insufficient value placed upon this work in different parts of the system. I intend to explore this matter in further detail, with particular attention to the training of investigating officers as well as lay magistrates who are required to deal with disclosure issues on a regular basis. The importance of disclosure must be embedded as an inextricable part of the criminal trial process.

CPS engagement

34. With regard to early CPS engagement, I shall consider the position regarding the preparation of the unused material schedule prior to the commencement of charge. As a matter of course, at the present time, the CPS requires a comprehensive schedule to be prepared before a charging decision is made. However, a question arises as to whether the preparation of a full schedule prior to a charging decision is necessary in all cases. One such example is time used to create a schedule, when the evidence is strong and/or a suspect has already made significant admissions. In cases where a defendant gives interview answers indicating a not guilty plea, the possibility of a middle way arises, but with the understanding that a full schedule would be produced as soon as the not guilty plea was entered. I shall be exploring this further.

Miscellaneous

35. Inevitably, as I proceed with the Review, other matters will arise for consideration. I mention four unconnected matters at this stage.

36. First, I shall consider whether it might be possible to establish a formal role or expand the role of an existing relevant public body to provide advice on best practice in all disclosure matters and uphold standards with regard to the application of the disclosure process by all parties.

37. Secondly, I shall consider whether the obligation on a private prosecutor to apply the CPIA tests requires clarification. Relatedly, I will explore whether statutory changes are needed in order to guarantee that the duty of disclosure continues past the point of conviction.

38. Thirdly, I should like to consider whether there is a case for simplifying the procedures relating to disclosure by consolidating the Code of Practice, the Attorney-General's Guidelines and various judicial protocols and practice directions into a single document.

39. Finally, whilst this review focuses on the criminal disclosure regime, I shall also consider any cross-over with other jurisdictions such as civil or family, including disclosure in the context of confiscation proceedings.

Next Steps

40. During my engagement, I have endeavoured to meet with a wide range of interested parties and individuals. I am aware, however, that there may still be others with views to share with the Review. Therefore, I am happy to consider reflections on this preliminary findings paper sent to the secretariat.[14]

41. I intend to submit my recommendations and final report to the Home Secretary in the summer. I am immensely grateful to all those with whom I have spoken so far, and for your stimulating intellectual debate and thoughtful contributions.

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24 April 2024

[14] Any reflections should be sent to disclosureandfraudreview@homeoffice.gov.uk and limited to 2000 words where possible.

Annex A – Summary of Engagement

Engagement

Attorney General
Bar Council
City of London Police
College of Policing
Crown Prosecution Service
Criminal Cases Review Commission
Digital Police Service
Experienced Defence Practitioners
Financial Conduct Authority
HM Crown Prosecution Inspectorate Service
HM Revenue and Customs
Home Secretary
Information Commissioner
Insolvency Service Seniors
Judicial sub-group
JUSTICE
Lady Chief Justice
Law Commission
Law Society
London Criminal Law Courts Solicitors' Association
Lord Chancellor
Magistrates Association
Metropolitan Police
National Crime Agency
National Police Chiefs' Council
Parliamentarians
Practitioners Advisory Panel
Regional and Organised Crime Units
Representatives Advisory Panel
Serious Fraud Office
Solicitor General
Victims' Commissioner

JUSTICE Roundtables

Academics Session
Legal Professionals Session
Technology and AI
Rights and Victims' Groups

Representatives Advisory Panel Membership

Nik Adams – Temporary Assistant Commissioner, City of London Police

Rick Atkinson – Vice President, Law Society

Stephen Braviner Roman - Director, Legal Division, Financial Conduct Authority

Mark Cheeseman OBE – Chief Executive, Public Sector Fraud Authority

Jamie Daniels – Chief Superintendent, Criminal Justice Lead, College of Policing

Tim De Meyer - Chief Constable, Disclosure lead, National Police Chiefs' Council

Nick Ephgrave QPM - Serious Fraud Office Director

Mark Francis - Director, Enforcement & Markets Oversight, Financial Conduct Authority

Lee Freeman KPM – HM Inspectorate of Constabulary & Fire and Rescue Services

Rob Jones – Director, National Crime Agency

Edward Jones – President, London Criminal Courts Solicitors' Association

Emily Keaney – Deputy Commissioner for Regulatory Policy, Information Commissioner's Office

Richard Las – Chief Investigations Officer, His Majesty's Revenue & Customs

David Lloyd - Commissioner, Association of Police and Crime Commissioners

Stephen Parkinson – Director of Public Prosecutions, Crown Prosecution Service

Anthony Rogers - Interim Chief Inspector, HM Crown Prosecution Service Inspectorate

Alex Rothwell – Chief Executive Officer, NHS Counter Fraud Authority

Andrew Thomas KC – Executive Member, Criminal Bar Association

Sam Townend KC - Chair, The Bar Council

Paul Trevers - Assistant Commander Operations, Met Police

Mark Watson – Ex officio secretary, Criminal Bar Association

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Rebecca Hadgett – Three Raymond Buildings

Sue Hawley – Spotlight

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Louise Hodges – Kingsley Napley

Riel Karmy-Jones KC – Red Lion Chambers

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