Home Office disclosure and fraud review: Roundtable minutes

In October 2023, the Home Office launched an independent review into disclosure and fraud offences (the '**Review**'). The Review, chaired by Jonathan Fisher KC, forms part of the Fraud Strategy published by the previous government in May 2023[1].

The Review will report in two parts. Part 1 (to be published in due course) will address the criminal disclosure regime as set out in the Criminal Procedure and Investigations Act 1996 (the '**CPIA**'). There will be a focus on cases which involve a large volume of digital material. The Attorney General's Guidelines on Disclosure will also be assessed, and consideration given to legislative and non-legislative modifications that could improve the regime. This part of the Review will not be limited to fraud offences. Part 2 is due to focus on fraud offences, including whether the offences as currently defined capture modern fraud offending.

In March 2024, JUSTICE hosted four roundtable events in connection with the Review.

- 12 March 2024 – Academics' Roundtable
- 12 March 2024 – Practitioners' Roundtable
- 26 March 2024 – Technology and Artificial Intelligence (AI)
- 26 March 2024 – Victims' Rights

A summarised record of the meeting minutes is provided below.

Introduction

(Please note that this introduction was used for all roundtables)

The host welcomed all participants to the roundtable and introduced the Chair of the Independent Review, Jonathan Fisher KC. The aims and terms of reference of the Review were summarised: the Review aimed to understand whether the CPIA was working or not and, if not, in what respect. The bottom-up engagement approach taken by the Review was also set out.

12 March 2024 – Academics' Roundtable

Attendees:

Chair: Jonathan Fisher KC

Host: Tyrone Steele - Deputy Legal Director, JUSTICE

Rebecca Crump - Cardiff University

Dr Cerian Griffiths - Northumbria University

Dr Ed Johnson - University of Northampton

Professor Michael Levi - Cardiff University

Dr Hannah Quirk - Kings College London

Anita Clifford – Barrister, Red Lion Chambers

Alex Davidson – Barrister, 2 Bedford Row

Home Office Officials

1. The topic for discussion was introduced. In summarising what the review had previously heard the following key points were made. First, there were few criticisms of the CPIA itself and its structure; there was little enthusiasm for redesigning the legislation from scratch. Second, both prosecution and defence practitioners were keen to achieve engagement early on in the disclosure process, including by means of pre-charge engagement. Third, it was felt that whilst technology was useful it would not be able to solve all problems which fell to be addressed.

2. The Review was very interested in speaking to academics about some of the proposals being put forward in relation to early engagement. Another area pertinent for academics was the availability of sanctions, for example a temporal limit on the availability of section 8 CPIA[2] applications. It was noted that some had proposed even stronger sanctions, such as adverse inferences and cost orders.

3. The Review has also heard support for the idea of a disclosure hearing at an early stage in proceedings. At this hearing, judges would be invited to consider what the prosecution had to say about its approach to disclosure and the response of the defence. The defence would also be able to outline the key aspects of the defence relied upon in sufficient detail to allow certain decisions to be made (such as which reasonable lines of inquiry ought to be pursued). The judge would be able to set directions as to how the disclosure process would proceed and under what time limits.

Early disclosure hearings/ non-engagement

4. Participants began the discussion with a consideration of how the defence might respond to the opportunity of early disclosure hearings. Would such hearings be seen, for example, as a means of mitigating charges or of resolving the case? What were the incentives for different actors in the system? It was suggested that those contemplating pleading guilty might be receptive to an early disclosure hearing. There was also an advantage to the defence in hearing the prosecution lay out its case early on and to have an opportunity to press on

disclosure issues. However, the question still remained as to how to deal with defendants who refused to cooperate.

5. It was thought that early engagement was good from a case management point of view but could be problematic given that it is for the prosecution to prove guilt. Specifically, it arguably contravened the presumption of innocence for the defendant to have to put their case forward.

6. It was observed that there are no issues with the architecture of the CPIA itself. However, disclosure is only as good as the party carrying out the process. Discomfort was expressed at the blame for disclosure failings being placed on defence non-engagement. Experience showed that often the fault lay with prosecution delays with completing disclosure, and the difficulty in contacting those responsible.

7. It was suggested that sanctions for non-engagement must therefore be across the board, and there should be equality of sanctions between the prosecution and defence. Sanctions were being unequally applied and it was necessary to think about the culture of the trial. It was difficult to envisage what sanctions for the prosecution in relation to disclosure failures could look like, other than a stay of proceedings. Costs were suggested as a possible option. Another suggestion was a reduction in sentence in the event of a conviction. Concern was expressed that further sanctions would penalise people for things beyond their control. It was also noted that judges tend not to sanction the prosecution for disclosure failings, and there is a culture that things need to 'keep moving along'. Some participants also observed that the Court of Appeal can be unsympathetic to disclosure failures and that there is a high bar for convictions to be overturned.

8. Further, introducing an additional hearing in magistrates' court cases added expenses to counsel who might be working for a fixed fee and so not paid for attending that hearing. Any proposals need to be funded.

The 'keys to the warehouse' approach

9. Discussion then turned to who should take on responsibility for disclosure. Participants were invited to contribute views on whether the system should return to the 'keys to the warehouse' approach. It was suggested that practitioners tend to deal with 'what is in front of them' and are less keen to consider bigger questions about ethics and the right to silence, for example. One of the reasons that the issue of disclosure was being tied to fraud was that disclosure is much easier to manage in fraud cases. The 'keys to the warehouse' approach is much easier to implement now than when cases were dealt with non-electronically.

10. It was observed that the 'keys to the warehouse' approach might work well in financial crime cases where material is not particularly sensitive, however, the same might not apply to a sexual assault case. There was concern around complainants being discouraged from coming forward for this reason. Again, it was noted that perhaps a regime specific to fraud cases would be appropriate.

11. Some participants were of the view that the 'keys to the warehouse' approach appears to be working well in Hong Kong. Generally, lawyers there are happy with their disclosure regime, notwithstanding issues on timeliness and police understanding. There was a smaller volume of cases in Hong Kong as compared to London, but nonetheless participants were not convinced that the 'keys to the warehouse' approach ought to be discarded. In England and Wales, more training for police officers and prosecutors is required – there were issues in relation to incomplete disclosure.

12. Concerns were, however, expressed about whether legally aided defendants would have the resources to deal with disclosure under a 'keys to the warehouse' system.

13. Practical issues were raised regarding how evidence is shared between the prosecution and the defence. Barristers and digital defence experts had reported that 'old fashioned' ways of supplying data (such as PDFs of spreadsheets showing phone records) were still being used. It was also noted that it is difficult to get effective online platforms and that lots of evidence is slipping through the nets of massive digital hauls.

14. Consideration was given to a hybrid system where the defence are given the keys to 'part of the warehouse'. Suggestion was made that the prosecution would no longer be required to schedule the material in its possession, on the basis that scheduling would be time consuming and inefficient. Both the prosecution and defence struggle to get through large volumes of information: digital experts were saying the difficulty was digital extraction, and police were saying they did not have the requisite expertise. It was acknowledged that disclosure officers and prosecutors do not necessarily have the knowledge or resources to go through large volumes of data. To improve this, participants suggested that a way should be found of analysing data in an effective way, and one that allowed for better communication of what the data contained to all parties. AI was a potential route in this regard.

The judicial role

15. Participants were asked to consider the role judges should play in managing disclosure, for example whether judges should become more involved and how this would impact reasonable lines of inquiry. The Review aimed to formalise the engagement between the prosecution and defence on the issue of disclosure, and to do so in the format provided by the courts, particularly post charge.

16. It was suggested that the proper judicial function was an administrative one for the most part. If the prosecution and defence are expected to agree as to events and dates, a judge would become involved only if agreement could not be reached. Participants noted that it would not be appropriate for a judge to become involved pre-charge.

17. Participants were generally comfortable with the idea of judges becoming involved in timetabling and case management. There was more consternation with judges having greater involvement in determining *what* should be disclosed, and in particular with judges becoming inquisitorial before the commencement of the trial. A distinction was identified between, on the one hand, a judge ruling on a dispute between the prosecution and defence and, on the

other, directing the prosecution's approach to disclosure more generally; it was the latter which participants felt crossed a line.

18. It was noted that greater judicial involvement in disclosure would require more training, particularly in relation to digital material. Defence and prosecution advocates had also experienced problems with digital literacy. Many recognised that expert evidence may also be required early on in proceedings to gauge what is achievable, which may take days of court time.

19. Suggestion was made that, in the magistrates' court, more problematic cases are heard by a district judge, who would be more likely to understand the CPIA, rather than a lay bench.

Police training

20. It was noted that there are further issues raised by magistrates' court proceedings – case are routinely being adjourned (or collapsing altogether) because of disclosure failings. This was as opposed to the Crown Court, in which participants felt that there was greater familiarity with the CPIA. Participants were therefore asked to comment on the level of training that is given to police officers and who was responsible for it.

21. In that regard, it was understood that the initial police training contained just one hour on fraud. Unless an officer becomes a specialist in fraud, it is unlikely that they would receive any specific training. It was observed that the average police officer is less likely to become a detective or a digital expert. Participants noted that whilst more training on the CPIA would be a good thing in principle, there are heavily competing demands on resources.

22. It was suggested that the police are the wrong organisation to carry out disclosure; their role was to investigate. On smaller cases, the arresting officer would charge the case without paying the necessary attention to disclosure. Again, participants were more inclined towards the 'keys to the warehouse approach', even in a small case, where there is less material in any event. In relation to serious offences, however, the disclosure tends to be superb because more resources are allocated to it.

23. It was suggested that there are broader cultural issues in the way in which investigating officers approach the CPIA. It appears that the issue of unused material is not considered, and officers do not see the value of doing so because it does not advance the prosecution case. Police officers do not see themselves as investigators of crime but as 'society's bouncers'. The CPIA Code contains a lot of material about police as investigators. However, concern was expressed that, if the police are not given responsibility for disclosure, they will stop looking for evidence that might be exculpatory. There was a general consensus that further training around disclosure is needed, and ought to be delivered by someone with recent and up to date knowledge. It was noted that training needs to ensure that police understand the importance of disclosure. Current training does not appear to be achieving this, and police officers still do not see it as their role to progress the investigation through exculpatory evidence.

Conclusions

24. Although the CPIA was legislation passed in 1996, it is still not properly embedded in the criminal justice system. This also affects Crown Court proceedings. The CPIA and unused material must be strictly bound up with the investigation.

25. A disclosure regime should make sure that the defence has access to all necessary material to build the best case possible, in a way that does not delay justice. In that case, effective disclosure should make the proceedings quicker. The defendant could build a case or plead guilty earlier; conversely the prosecution could offer no evidence earlier. Disclosure is the bedrock for just outcomes.

12 March 2024 – Practitioners' Roundtable

Attendees:

Chair: Jonathan Fisher KC

Host: Fiona Rutherford – Chief Executive, JUSTICE

Patrick Rappo – Partner, Reed Smith LLP

Anand Doobay – Partner, Boutique Law LLP

Allison Clare KC – Barrister, Red Lion Chambers

Leila Gaafar – Barrister, 6KBW College Hill

Timothy Folaranmi – Managing Associate, Barrister, Mishcon de Reya LLP

Sam Brown – Senior Legal Advisor, Jersey Law Officers' Department

Alex Davidson – Barrister, 2 Bedford Row

Ross Dixon – Partner, Hickman & Rose LLP

Faye Rolfe – Barrister, Red Lion Chambers

Charlotte Atherton – Barrister, Exchange Chambers

Anita Clifford – Barrister, Red Lion Chambers

Home Office officials

1. It was highlighted that a number of findings have emerged from stakeholder meetings undertaken thus far. First, all stakeholders had been clear that the CPIA's framework was broadly acceptable, with no significant statutory changes required. Second, on both sides – prosecution and defence – there was a wish expressed for early engagement with the

disclosure process. The question was as to precisely *how* early: pre-charge appeared to be less popular than immediately after transfer to the Crown Court. It became more complex to ascertain precisely what this would look like, particularly in relation to different types of cases, whether serious fraud, RASSO[3] cases and the more general run of criminal cases before the courts. If there were early disclosure hearings, for example, there was a question of how that would work in practice, in particular where the defence team did not, or did not want to, engage. This raised the question of sanction.

2. There was some support for the 'keys to the warehouse' approach, however, the majority on both sides agreed that there was no hurry to go down that road. The defence would, especially in legal aid cases, struggle to deal with it. Issues of data protection and redaction also arose.

3. The Review had been told that there are real problems in the magistrates' courts because disclosure is not happening as envisaged. Thought was given to how this might be dealt with and to consider what is going on with respect to training, particularly of police officers. There was a general awareness of artificial intelligence (AI), and an understanding that it was not a silver bullet albeit may be of some use.

The CPIA

4. Participants were asked to comment on whether they considered the CPIA fit for purpose. One participant observed that the CPIA placed the burden for disclosure on the prosecution whereas it was primarily the defence who wished to see the material. It was suggested that gathering and recording material should remain with the prosecution, but determining relevance is conceptually beyond the prosecution. When considering Data Protection Act 2018 ('**DPA**') issues, it was noted that these would generally arise before an investigation begins. The participant felt that disclosure was too much of a burden to place on the prosecution, and therefore favoured a 'keys to the warehouse' approach so long as there was the ability to redact as necessary. Furthermore, it was suggested that the CPIA is overly onerous and prone to problems, which has been exacerbated by large volumes of data and lack of proper AI and/or review mechanisms by either side. It was agreed that whilst the CPIA worked and was fit for purpose, the question is about its application in practice. Another issue that was raised was that, even with defence engagement and the service of detailed defence statements, no update by way of disclosure was necessarily provided by the prosecution.

5. Discussion turned to SFO cases that had failed in recent years. It was suggested that, in each case, the problem was not the volume of material. Rather, disclosure failures had arisen after the SFO had identified and reviewed the relevant material but had taken the decision not to disclose it. It was therefore suggested that something was going wrong with how the CPIA was being applied in those cases. It was suggested that one solution might be the 'keys to the warehouse' approach, but there are also practical problems with this, particularly in relation to defendants who were not well-funded. Legal aid firms were more concerned about the 'keys to the warehouse' approach because they would not be in a position to review the relevant material.

Block listing

6. There was discussion regarding the use of 'block listing' in high volume cases, as a way of relieving some of the scheduling burden on the prosecution. Participants considered how this provision could be used effectively to flag to the prosecution and defence material which met the disclosure test but reduce the require to write a description for all relevant items. It was noted that this approach is used effectively in some live cases, however there remains a dissonance between and within the AG's Guidelines and Code of Practice about what precisely is permissible.

7. One participant reported that there appears to be a broad agreement amongst financial professionals that, in fraud cases, the defence should be entitled to their own documents. This includes their own emails, outlook calendar and other documents to which a defendant would have had authorised access to during the indictment period. It was noted that free access to these documents worked in fraud cases because the defence would know what to look for, rather than being overwhelmed by the volume of material. It was also acknowledged that the defence usually end up getting this material late in proceedings, when the prosecution have done the work, which does not necessarily place the defence in a good position. Participants suggested that this could perhaps be changed by means of amending the CPIA Code, rather than the CPIA itself. Some participants observed that the downside to the CPIA is that sometimes prosecutors can see the force in the argument for disclosing certain material but cannot justify it by reference to the disclosure test, and there was a fear of setting a precedent. There was a general agreement that the Attorney General's Guidelines on Disclosure sets out an effective presumption in favour of disclosure in relation to certain categories of material. Such disclosure could be achieved very early in the process.

8. On that theme, the view was expressed that the 'keys to the warehouse' approach would not be feasible in relation to third party or prosecution material because the defence would not know what it was looking for as it did with its own material. There were also issues in relation to cross disclosure and multi-handed cases. This should be directed in relation to certain categories of material to allow a level playing field. Another participant noted that, sometimes, one defendant will have looked ahead and copied their emails which created unfairness between defendants. Stricter provisions could be put in place where GDPR issues arose.

Data protection

9. Discussion turned to data protection. It was felt that there is generally an issue with over redaction of documents. Whilst caution is understandable, redaction takes up a huge amount of time and is not always required to the extent that it is done. It was observed that serious fraud cases normally concern allegations of offences committed in the course of a defendant's employment as a CEO, for example. There is therefore a need to be able to look back at what the defendant may rightly have had access to.

10. Whilst it was suggested that this analysis applied only to fraud cases, consideration was also given to how it might apply to other cases which might involve large volumes of digital

material, such as modern slavery cases. It was proposed that there is sometimes a presumption in favour of disclosure in relation to certain categories of material, and/or certain categories of case. One example might be where a person was charged in the context of their employment. Generally, the issue was achieving access to devices other than the defendant's own; ordinarily the defendant would have access to their own phone.

11. Another participant observed that in relation to the defendant's own material no data protection issues should arise, whereas others took a different view, noting that complications arose where a defendant's material contained criminal material. Some defendants were still working for the same employer at the time of the prosecution which caused inherent unfairness.

Digital materials – reverse burden of reviewing material?

12. There was a question as to whether a separate category did or should exist for digital materials. The CPIA rests on the supposition that in investigating, the prosecution have read everything in its possession. This is not the case in relation to digital material, which is simply collected, and the investigation team makes its own decision about what should be reviewed and how to review it. It was suggested that there should perhaps be a separate category for digital material where the position is reversed in terms of who bears the burden of review. Issues about data protection could then be addressed at the other end of the process – there is sufficient protection in the CPIA to allow the material to be shared with the defence team. The material can then be checked for data protection issues before anything is deployed at trial.

13. It was observed that this approach meant that that the prosecution do not get ambushed. The burden did not fall on the prosecution and in a way it could not do so, because the prosecution are only reviewing material in order to comply with the CPIA. Some noted that review and scheduling is not helpful for digital material at present. Furthermore, it is thought that this approach can significantly reduce the volume of unused material and that any dispute around search ranges can be resolved. However, if the search results still produced is too much, this would become a case management issue.

14. It was pointed out that where a defendant is not at the top of the indictment, they may not have visibility of the issues being explored by the defendants who are. Such a defendant would have no way to understand what issues to look for when reviewing the material. It was pointed out that many solutions that had been discussed assumed that the defendant knows what is in the material when that is not necessarily the case.

15. It was then noted that there would be some defence teams who may find it difficult to manage disclosure obligations in this way, namely those who are publicly funded and lack the resources, whether financial or technical, to be able to engage with the analysis of material as a privately funded team might. A privately funded defendant may want full access to emails and be represented by a firm that is able to look at that material when required. The position is likely to be different for a client in custody represented by a legal aid firm of solicitors and a legal aid barrister. Participants were of the view that there is a

risk of creating a two-tier system if too much onus is placed on the defence to carry out the review of digital material. It then becomes a question of who can afford to review potentially exculpatory material.

The position in Jersey

16. It was noted by one participant that defence statements have not been a feature of criminal proceedings in Jersey until relatively recently. Historically, there has been a reluctance to plead defences at all and the defence are not encouraged to do so. The statutory requirement to file a defence statement was expressly resisted at debate stage by the president of the Jersey Law Society, relying on pre-1996 cases. Disclosure is therefore now a prosecution led process, and there was little engagement from the defence for the reasons identified and because most of the experience came from English-trained lawyers within the Law Officers' Department. Often there are no requests at all for disclosure, or very many which are irrelevant, misconceived or seeking the keys to the warehouse. In Jersey, there are no section 8 provisions, so there is an enormous amount of pressure on individual prosecutors to second guess defences which may or may not arise, meaning the position is almost pre-1996. So far, there have been no major problems and the courts have been quick to intervene to manage any pre-trial disclosure difficulties. It was recognised that similar themes are present, but there are struggles with a culture that has not previously encouraged defence pleadings at all.

Non-engagement and sanctions

17. Participants were also asked to consider how the courts might deal with a situation where the defence does not engage with an early hearing to discuss issues in the case and identify reasonable lines of inquiry. One suggestion was to simply give the defence their own material and carry on with the proceedings. Another was for the judge to order section 8 applications by a particular date; although not all participants were persuaded that this would work in practice, some were more optimistic that it would if a clear structure for it was set up. It was observed that there could also be lack of engagement on the part of the prosecution. Therefore, there ought to be a relevant sanction on the prosecution. This might take the form of financial consequences.

Early engagement

18. One potential downside to early engagement was suggested: namely that if the defence do not have access to the material for a very long time then it may be difficult to identify the issues in the case at at early stage. It is important to recognise that serious fraud cases take time and placing too much pressure could create its own problems, e.g. by fixing a trial date too soon. Under the current process, longer timelines are arguably more realistic, whereas trying to push disclosure into the early part of the timeline is not. Others noted that, where a defence team is not ready to identify the issues early in proceedings, this can be explained to the court However, there may be other cases where the position is quite different. Another observation participants made is that early engagement should avoid disclosure issues being raised close to trial; this should include section 8 applications.

19. It was thought by some participants that if disclosure management documents are completed at an early stage, with early judicial and defence engagement, the system could work much more effectively. This would only work, however, if there was an obligation to produce the document and a corresponding obligation for the defence to respond to it. Furthermore, it was suggested that there ought to be a uniform standard for disclosure management documents across the board, otherwise their utility would be limited.

AI

20. Some participants had used AI and found it to be a useful tool. It was noted that private defence firms are already using advance technology, with AI functions, to perform material review tasks. Some programmes were not necessarily good for reviewing, but were more effective for scheduling purposes. Questions were raised as to whether the summaries produced by AI for schedules were sufficiently nuanced. AI could refocus the algorithms when the issues changed, which could not be achieved manually. The considerable fees associated with the use of such programmes was acknowledged. Centrally hosted databases that defendants could access, with suitable firewalls in place, could help to address funding issues.

21. At present, AI is not being fully utilised owing to wariness and the lack of judicial stamp of approval. Participants felt that it worked if the prosecution shared the data set. Some participants had been doing the same but in reverse, identifying processes that would satisfy the section 2 notice[4]. It was proposed that the defence were given the metadata as a list, even if there was block listing of material. Metadata was thought to be potentially very helpful generally.

26 March 2024 – Technology and Artificial Intelligence (AI)

Attendees:

Chair**:** Jonathan Fisher KC

Host: Fiona Rutherford – Chief Executive, JUSTICE

Anita Clifford – Barrister, Red Lion Chambers

Professor Mark Watson-Gandy – Biometrics and Forensics Ethics Group (Chair)

Sarra Fotheringham – College of Policing (Policing Standards Manager for Digital, Cyber & Data)

Caroline Dorman – CPS (Serious Economic Organised Crime & International Directorate)

Fran Begley – Ernst & Young LLP (Director, Forensic & Integrity Services)

Liz Archer – Ernst & Young LLP (Associate Director)

James Raymond – HMRC (Head of Forensics)

Ian Spencer – HMRC (Operational Lead, Cyber, Crime & Forensic Services)

Hamera Asfa Malik-Wright – SFO (Deputy Head of Policy)

Nicholas Jinks – UBS (Regional Head, Switzerland/ EMEA eDiscovery)

Home Office officials

Disclosure officers and AI

1. It was noted that the CPS need to be able to prosecute quickly and with confidence.

2. One participant felt that if technology was introduced as a tool, the job of the disclosure officer would change. The officer would need to undertake further training on how to use the technology at a basic level as well as use their disclosure knowledge to operate it correctly. Another participant suggested that further training for disclosure officers may not be necessary as they could work with a professional who understands the tool; reservations were expressed about whether there was sufficient funding to facilitate this.

3. It was suggested that there would be a higher level of confidence if only one tool was used by everyone. On the other hand, consideration would need to be given to whether this would lead to a monopoly forming.

4. It was observed that disclosure officers would need a good understanding of relevance given that the AI would learn from humans. If the operator classed every file as relevant, the AI would not know what to look for. Understanding the defence position would be key to the assessment of relevance.

Advance material management software

5. Discussion turned to the use of specific advance material management software such as, but not limited to, Axcelerate and Relativity. Participants noted that previously when using such tools, screenshots of how searches were conducted on schedules have been included to build confidence and allow the defence an opportunity to question the methodology used.

6. In terms of redaction, some such software have built in an auto-redact tool. Mistakes have been previously found in a small number of results, though problems mainly lay in Excel spreadsheets and the way names and numbers were recorded as raw data rather than the tool itself or the way it was being used. Concerns were expressed about the idea of automating redaction, as it would be difficult to justify decisions taken if they were questioned by a judge. It was noted that it would soon be possible for AI to start explaining its decisions, rather than just giving results.

Further issues

7. A number of further points were raised including the issue of hallucinations regarding generative AI, which was suggested to be the biggest problem with ChatGPT. OpenAI are aware of this issue, and so this would likely be a priority for them to fix. It was noted that AI models will continuously improve and new versions will be released. Statistical sampling and elusion testing could be used to check that they were working as intended. Whilst dip sampling is still currently necessary, it was thought that we are probably less than 5-10 years away from AI being widely used and trusted.

8. Finally, participants wondered whether data protection issues would arise if a big technology firm were to buy software used by UK law enforcement. It was noted that one technology firm is already looking to introduce their own eDiscovery tool and have already worked quite closely with such software companies. The issue of security (especially regarding government use) was flagged, as some such material management software is cloud-based. It was noted that these tools are not designed solely to assist with investigations in the criminal justice system.

26 March 2024 – Victims' Rights

Attendees:

Chair: Jonathan Fisher KC

Host: Fiona Rutherford – Chief Executive, JUSTICE

Emma Torr – Co-Director, APPEAL

Lucy Anderson – Which?

James Burley – Investigator, APPEAL

Alex Davidson – Barrister, Red Lion Chambers

Anita Clifford – Barrister, Red Lion Chambers

Home Office officials

1. The Review noted that it was interested to hear from rights and victims groups. In cases where a guilty party appears to walk free owing to a disclosure issue, this had an unfortunate impact, undermining confidence in justice. The problem on the other side – when an innocent person was convicted – was also acknowledged. A further issue arose where a complainant attends court to give evidence, namely how unused material disclosure is to work where it involves revealing private information which would normally be protected by the DPA. It was important not to discourage complainants from coming

forward. Redacted information should be looked at and consideration given to whether it could in fact take matters forward.

Appeals against conviction

2. Both Appeal and the Criminal Cases Review Commission ('CCRC') took the view that disclosure failings are the most common cause of miscarriages of justice in this country. It was noted that Appeal's work tends to focus on those who claim factual innocence seeking a fresh argument or evidence to take to the Court of Appeal. The post-conviction disclosure regime makes it difficult to get access to any information at all. It was also mentioned that real problems exist with the ability of lawyers to get access to material that may undermine the safety of convictions.

3. Participants were of the view that issues exist with the current disclosure regime, requiring root and branch reform. Unless the regime can be improved in various ways, it could lead to further miscarriages of justice. It was mentioned that reviews have taken place since 1996, and all have found that the regime is not working effectively, yet there has been no plan for substantive reform. This was raised as a concern.

Keys to the Warehouse

4. The question was posed whether the 'keys to the warehouse' approach would work in cases with high volumes of material and large amounts of digital material. In response, it was observed that the police must grapple with this at present anyway, but it would be better if the defence had the opportunity to do so as well. It was suggested that technology has to be used to make the task more manageable and this is feasible with proper resourcing.

5. It was noted that case law was moving towards the 'keys to the warehouse' approach prior to the CPIA. However, it was noted that this would require proper resourcing. Another concern around this approach was that there is an expectation of the police to perform their duties, although there was some hesitance as to the extent these duties are fulfilled. This led to participants raising whether the police should have the power to act as a filter, instead, suggesting that the defence should be allowed to see the material that is not deemed sensitive. It was suggested that this approach would see less trials collapse due to greater transparency.

Police and disclosure

6. It was suggested that the key issues leading to disclosure failures were as follows: the current regime places police as gatekeepers to obtain, retain and disclose unused material. In cases involving disclosure failures, the blame lay chiefly with the police. Police are not independent but have a stake in obtaining a conviction. Whilst the system allows for independent counsel review, it is impossible for any lawyer to make a common-sense decision about what documents ought to be disclosed if material is not properly recorded. Participants recognised that the burden is placed on both the police and prosecutors to

look at the defence statement and decide what should be disclosed as capable of assisting the defence case or undermining the prosecution case. However, concern was raised as to whether the police and prosecutors are rightly placed to do this. Previously, there was a system where the defence could inspect unused material. It was mentioned that giving the defence the opportunity to inspect might be a good start. In addition to this, Police should receive better trained in relation to scheduling. In turn, a competent lawyer should then be able to inspect and identify disclosable material. It was suggested that the prosecution should more freely share material with the defence, returning to a former model of disclosure.

7. Discussion turned to redaction. It was argued that redaction is a question of relevance in every case. In each case, there would be issues in contention between the prosecution and defence. Not every piece of unused material would be relevant. If material was properly scheduled, the defence could request it.

8. It was emphasised that, whilst there is a resource point, there is also a fairness point to be considered. Everyone lacks resources, but that is a different question to that of fairness to a defendant at trial. If we want a system where disclosure is better handled, a more open system is one that is right for the moment.

9. It was proposed that, rather than the police still being relied upon to determine what should be scheduled, the entire file should be passed to the CPS to review. In the *Malkinson*[5]case, material which was important was not scheduled. As to whether this was due to incompetence or malevolence or somewhere in between, it was always naive to expect police to fulfil disclosure issues - they were dead set on a conviction. To expect full and fair disclosure was unrealistic. In *Malkinson*, the disclosure officer was the officer in the case.

10. Participants further discussed policing, expressing the view that current police funding incentives convictions, and this is likely to increase the chance of wrongful convictions. Some were of the view that culturally the police are blind to material that may assist the defence. It was agreed that police officers are only human; if they charge a person, they do so because they think that they have committed the offence. It was then discussed if whether, having charged a person, officers would be able to continue delivering upon their disclosure obligations in a fair manner. It was suggested that there was more than a ‘bad eggs’ problem, which was unlikely to be solved by means of reviews and attempts to change the culture of policing: police were inherently incapable of performing their disclosure duty.

11. A further problem raised was that prosecutors do not speak to police: nowadays, communication is primarily via email. This is problematic because of the level of ‘back and forth’ which is able to take place. However, it was recognised that the problem is not going to be solved by training police officers alone. Participants were aware that there might be human errors and mistakes may be made which are critical to the defence. However, if safeguards are going to be put in place, giving the defence the opportunity to inspect material is the safeguard that is needed.

Consumer Crime

12. It was noted that bodies such as Trading Standards have been advised that, when bringing prosecutions, it is imperative that they get the disclosure regime correct and a failure to do so may scupper the case. Trading Standards' annual report showed that they were only able to manage a handful of cases. This was partly due to the disclosure burden, but not exclusively. Another factor is a lack of confidence in the ability to successfully prosecute financial crime. It was also observed that almost all cases that are reported to Action Fraud are not investigated, let alone prosecuted and that complainants are often more keen to get their money back than go through a lengthy prosecution process.

13. One participant recalled a case in which a sentencing judge had declined to consider a victim impact statement presented to the court, holding that it was not relevant. The defendant was sentenced to a two-year suspended sentence order for an offence which involved scamming thousands of elderly women. It was acknowledged that the process has to be fair but consumer crime and especially fraud is epidemic. The system needs to work for all types of crimes and all types of prosecutors.

14. It was noted that local authorities still bear responsibility for prosecutions, but Trading Standards play a role in supporting the local authorities concerned. Some companies have liaison arrangements with particular local authorities. However, allocating cases to a prosecutor is not necessarily straightforward.

Post conviction disclosure

15. Post-conviction disclosure was discussed. The key authority on this issue (*Nunn*[6]) was noted. It was also noted that the Attorney General's Guidelines on Disclosure contain provisions on the post disclosure regime. In the majority of cases where disclosure failures occur, the post-conviction disclosure regime does not always help. Usually, disclosure failures would be unknown to the defence and they would not know of the existence of material which ought to be disclosed. As such, they are often unable to meet the *Nunn* disclosure test.

Concluding remarks

16. Finally, it was suggested that if material is relevant and non-sensitive, it should be shared with the defence, as they are best placed to know what they are looking for. Some were of the view that the trial process had huge privacy implications but the right to a fair trial had to come first and should not be sacrificed in the name of privacy. Some thought that this approach would save the police and CPS time and money. Others believed this was not the case, as law enforcement still needed to review all material in order to build a case, and a 'keys to the warehouse' approach would create duplication, swamp legally aided defendants, significantly increase cost to the public and run contrary to belief that the prosecution must bring and prove the case.

[1] Fraud Strategy: stopping scams and protecting the public, CP 839, May 2023, available here

[2] Section 8 of the CPIA provides a mechanism by means of which a defendant can apply to the court for an order requiring the prosecutor to disclose any material which he has reasonable cause to believe ought to be disclosed to him but has not been.

[3] Rape and serious sexual offences

[4] Section 2 of the Criminal Justice Act 1987 confers investigatory powers on the SFO. These include the power to require a person to answer questions (or otherwise furnish information) or to produce documents.

[5] *R v Andrew Malkinson* [2023] EWCA Crim 954

[6] [2014] UKSC 37