Disclosure in the Digital Age

Independent Review of Disclosure and Fraud Offences

Jonathan Fisher KC

March 2025

CP 1285

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Presented to Parliament
by the Secretary of State for the Home Department
by Command of His Majesty

March 2025

CP 1285

This publication is available at www.gov.uk/official-documents

Any enquiries regarding this publication should be sent to us at: disclosure-andfraudreview@homeoffice.gov.uk

ISBN 978-1-5286-5492-0

E03309269 03/25

Printed on paper containing 40% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of
the Controller of His Majesty's Stationery Office

Contents

Acknowledgements

Throughout my Review, I have consulted with a range of key stakeholder groups across the criminal justice system, law enforcement and academia, through interviews meetings, roundtables and panel sessions.

I am grateful to all those who have willingly participated and provided valuable insights that have helped support the findings of this Review and enabled me to construct a suite of informed recommendations. A complete list of all stakeholders contributing to this Review can be found in Annex D.

Finally, I wish to thank Anita Clifford (Red Lion Chambers, London) and Alex Davidson (2 Bedford Row, London) for their contribution to the Independent Review, and the secretariat team.

Jonathan Fisher KC

Chair of the Independent Review of Disclosure and Fraud Offences

November 2024

Introduction

1. At its most simple, the disclosure of unused material is the process whereby information gathered during an investigation is passed from the prosecution to the defence. The information disclosed should assist the defence in arguing the most compelling version of their case. The obligation placed upon the prosecution to disclose certain pertinent material acts as an essential safeguard. We have learnt through bitter experience that disclosure errors, whether deliberate or through negligence, can lead to cases collapsing or worse, a miscarriage of justice. Such events are lamentable and erode the public's trust in the criminal justice system.

2. When in the autumn of 1981 I started practice at the Bar, my Opinions, Advices and Pleadings were written in manuscript or dictated into a hand-held tape-recording machine. They were then typed by a professional typist, using an Imperial typewriter with carbon paper to produce a copy. Similarly, most business records were kept on paper and retained manually in files. Rules regarding disclosure of unused material generated in a criminal investigation were governed by the innate fairness of the common law which required a prosecutor to pass information to a defendant where the material assisted the defence case.

3. Fifteen years later, it was recognised that a more sophisticated approach to disclosure was required. This followed a series of cases in which failure to disclose information to a defendant was responsible for some grievous miscarriages of justice. At the same time, reliance on documentary evidence and expert witness testimony increased. When the Criminal Procedure and Investigations Act 1996 (CPIA)[1] was enacted, the new statutory based rules of disclosure were regarded as state of the art, providing a sound foundation for criminal trials to proceed on a sure footing in the new millennium. Since then, the technological revolution has brought radical changes in work practices, and the position now looks rather different.

4. Nearly 30 years have passed since the CPIA was enacted. At that time, internet connections were typically made via dial-up modems, with downloading speeds sufficient for basic web browsing and email, but little more. As technology improved and information could be stored electronically, the volume of unused material generated in a criminal investigation grew exponentially. This development occurred against a background in which the CPIA did not directly address the way in which digital information should be reviewed by a prosecutor and made available to a defendant when the test for disclosure[2] of unused material was satisfied.

[1] Criminal Procedure and Investigations Act 1996.

[2] CPIA s 3(1)(a). The prosecutor must disclose to the accused any prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

5. Concern regarding the operation of this process is the reason why previous Reviews were established.[3] Yet the world has not stood still since the last Independent Review on this subject over a decade ago. Indeed, society in the United Kingdom continues to embrace technological advancements, including artificial intelligence, in many aspects of our lives.

6. Furthermore, the very nature of criminal offending, as it has done throughout history, continues to evolve, taking advantage of new online enablers. The rise in digital material across the whole gamut of criminal cases, and its implications for the disclosure regime, is the very reason why I was tasked to consider, once again, whether the regime is fit for the modern age.

7. Today, the largest investigation case on the Serious Fraud Office (SFO) system has 48 million documents (6.5 terabytes of data). With this volume of digital material, it is inconceivable that the totality of unused material generated in the investigation can be accurately reviewed and scheduled by investigating officers manually, in the traditional way. It is also a gross waste of resource for investigating officers to spend time on banal and unproductive activity. Electronic material has become commonplace in even the smallest of cases. Body camera material features (or should feature) in every case where a motorist is stopped by the police, and it is estimated that on average there are 7.4 digital devices in every home. Each of these devices can retain thousands of pieces of information which might be relevant to a prosecutor or defendant in a criminal case.

Terms of Reference

8. The *Terms of Reference* for this Review are set out in Annex A and were published in October 2023. Primarily, the Review was asked to rapidly consider the operation of the disclosure regime in all criminal cases, with a focus on its efficacy in the most serious, complex or otherwise voluminous cases, where it had been suggested that unique and significant challenges have arisen. Whilst undertaking this assessment, I was asked to "consider legislative and non-legislative modifications that could improve the regime". The task proved to be a sizable one. The very process and practice of disclosure is inherently intertwined with the way crimes are investigated, prosecuted, and ultimately argued in court. Furthermore, disclosure and the right to a fair trial are inseparable. Even a cursory glance at the recent history of landmark cases in the English and Welsh criminal justice system demonstrates this fact, and we must learn from it or be bound to repeat past mistakes.

9. Part one of the Independent Review was established to consider the disclosure regime as it applies in England and Wales. I am mindful, however, that the CPIA also applies in Northern Ireland.

[3] Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (2011) and Attorney General's Office, *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (2018).

Whilst focused on the English and Welsh criminal justice system, I hope that the findings and recommendations of the Review will also be useful in considering changes to the Code of Practice there.

Methodology

10. Regarding *methodology,* I was keen to employ a practical grassroots strategy by first speaking with practitioners and those who work with the regime daily, from law enforcement officers to regional prosecutors.[4] It is these individuals who apply the legislative tests and are responsible for discharging disclosure duties. In over 80 evidence-gathering sessions, I met more than 200 individuals across our criminal justice systems and internationally. My consultations included, but were not limited to, investigators, prosecutors, defence professionals, judges, academics, and charity representatives.

11. Furthermore, I wanted to draw upon the expertise of experienced legal practitioners, senior members of the judiciary, representative bodies and those overseeing all major law enforcement agencies. In pursuing this, I was greatly supported by two advisory panels, a Judicial Sub-Committee and several JUSTICE facilitated roundtable events. The Bar Council and the Law Society also convened committee meetings to canvass views on behalf of their members. An overview of the Review's stakeholder engagement can be found in Annex D, with summary meeting minutes already published.[5] I remain very grateful to the many individuals who lent this Review their time and insights.

12. I am also appreciative of those who took up the public offer of contacting the Review with their assessment of the CPIA.[6] Hearing first-hand the experiences of those who navigate the disclosure regime daily has been invaluable, combined with views from senior practitioners across the criminal justice system, I am confident that the findings discussed are reliable. In parallel, I have also sought to understand, from a quantitative angle, whether the mischiefs described are also borne out in the data collected by the system. The unavailability of such data[7] remains a limitation of this Review and, without improvement, it will hinder further evaluation of the current regime and accurate modelling of future scenarios, including the impact of increasing volumes of digital material on the criminal justice system.

[4] Independent Review of Disclosure and Fraud Offences, *Stakeholder Engagement Overview.*
[5] Independent Review of Disclosure and Fraud Offences, *Summary Meeting Minutes.*
[6] Independent Review of Disclosure and Fraud Offences, *Preliminary Findings Paper* (2024), para 40.
[7] *Criminal Courts Ministry of Justice data* - The release of statistics in early 2024 had been postponed for further quality assurance following concerns of possible inaccuracies. I understand these issues have been resolved.

Findings and Recommendations

13. As foreshadowed in the Preliminary Findings paper which I published in April 2024, the problems besetting the application of the disclosure regime are not confined to complex cases. Rather, there are multiple problems which require attention for the disclosure regime to be restored to a state where it can be described as fit for purpose.

Digital Material

14. The proliferation of digital material and the progressively complex nature of offending in both magistrates' court and Crown Court cases means that disclosure is an increasingly time, and resource-intensive process for all parties, which has the impact of slowing down case progression. This is acutely felt in the prosecution of 'disclosure-heavy' cases such as fraud, organised crime, and rape and serious sexual offences (RASSO), where digital material is frequently found. I do not doubt that, if the current disclosure regime is not adapted to meet the rising tide of digital material, the ability of the Crown to investigate and prosecute criminal cases will be severely hindered.

15. However, we should not be afraid to fight fire with fire. The same technology that supercharged the proliferation of digital material may well provide, at least in part, a panacea for the difficulties we presently find ourselves in. To that end, I make recommendations regarding the establishment of a Criminal Justice Digital Disclosure Working Group but, more importantly, proposals to update the CPIA framework to allow the use of advanced technology in the disclosure process.

16. There is no silver bullet which can be deployed to resolve the issues, but collectively my recommendations should shift the dial. The objective is to render a viable and efficacious regime, for the disclosure of unused material in criminal cases, which maximises the use of technology in supporting the discharge of a prosecutor's obligation, whilst ensuring that a defendant has access to material which undermines the prosecutor's case or advances the defendant's case. In large part, technological developments have precipitated the pressures on the disclosure regime. It is only natural, therefore, that technological developments should provide the solution, with the making of comparatively minor adjustments to the legislation and associated guidelines, and the implementation of appropriate safeguards to protect a defendant. Furthermore, as technology develops, I expect the disclosure process to become easier to perform.

Legislative Framework

17. I agree with the consensus that the structure and architecture of the CPIA is broadly sound, with problems crucially occurring in its practical application. This Review heard of the burden created by the confluence of disclosure duties and digital material and, as a partial remedy, the way case law has sought to keep pace with modern practices. I recommend that additional guidance is created for the

application of the section 3 CPIA test, and that the legislation is updated to reflect recent judgments regarding disclosure best practices in the digital age.

Alternative Models

18. I have given careful and earnest consideration as to whether the regime for handling unused material set out in the CPIA is structurally sound, or whether an alternative system, whereby a prosecutor affords a defendant open access to all unused material, should be preferred. This system is sometimes referred to as 'giving the keys to the warehouse', in which a defendant is given access to all the prosecution's material. I have concluded that this would not be the best way forward, as it simply cannot be transplanted into the English and Welsh criminal justice system without a substantial change to our underlying philosophy on justice, revision to data protection legislation and an appetite to substantially increase the State's spending on criminal justice. However, I have come to the view that there is space for greater flexibility in the prosecution's consideration of sharing material that a defendant owned or had access to. A new route for such disclosure is recommended.

Training, Resources and Culture

19. Affecting the heart of the disclosure regime, I discovered a lack of clarity amongst some officers as to whether the test for disclosure in section 3(1) of the CPIA is an objective or a subjective one. In other instances, I came across uncertainty amongst disclosure officers when applying the criteria for the redaction of personal data from unused material prior to its disclosure to the prosecution, and subsequently the defence. Finally, I encountered accounts of unique problems in magistrates' court cases where the requirements to make disclosure had been overlooked, necessitating unnecessary adjournments and on occasion the dismissal of a case. This is concerning. Approximately 95% of criminal cases are determined in the magistrates' court. All my engagement has pointed to a need for better training and resources for disclosure issues across all parts of the criminal justice system.

20. I have considered 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. To tackle these issues, the Review recommends all major law enforcement agencies should together agree national disclosure learning standards for new recruits and those who go on to train as investigators or disclosure officers. Furthermore, to retain officers in this field, a bespoke Senior Disclosure Officer accreditation pathway should be created. Not only will law enforcement officers receive suitable recognition for their work in disclosure, but agencies will also have a pool of qualified officers who will have the appropriate competencies and skills to manage material for the most complex and serious criminal cases.

Investigating Criminal Offences

21. The role of the investigator is an important one. They stand at the initial gateway to the disclosure process, and they are tasked with the critical duty of gathering information which forms the building blocks for the case for the prosecution. Throughout my engagement with investigators, I have heard of the burdens created by the requirement to redact and schedule ever increasing volumes of digital material. This is equivalent to 306 officers spending all of their working hours during 2023 building case files, scheduling and redacting material, for cases that ultimately terminated with the Crown Prosecution Service (CPS).[8] I have heard that this is likely an underestimate. Furthermore, in cases where investigating officers seek charging advice from the CPS, a question arises as to whether the requirements to produce a full schedule of unused material needs to be prepared. If a case does not proceed, or proceeds as a guilty plea, valuable police resources will have been wasted.

22. In recognition that this is a poor use of law enforcement time and resources, this Review recommends that the CPIA and Code of Practice be updated to move away from the archaic expectation that an officer must write a detailed description for each and every item of relevant material in a case. The ability of a prosecutor to discharge the obligation to review unused material by use of advanced technology should be recognised in legislation. Changes should also be made so that use of complementary metadata and traditional descriptive schedules in relation to material held digitally will be sufficient indexation in high volume cases. Technology should be used (and in some instances already is used) to create modern schedules. Also, measures should be introduced to remove the scheduling requirement in relation to unused material which belongs to a defendant standing trial alone.

23. The requirement to complete the scheduling of unused material pre-charge or where a defendant indicates a guilty plea can also be substantially reduced. Regarding redaction, I am told that, under the current data protection legislative framework, significantly less pre-charge redaction could be done by investigators. Therefore, I recommend clear guidance, to that effect, should be issued by the responsible bodies. If, however, significant dividends are not realised with the current framework, then more radical legislative solutions should be considered for the sharing of unredacted material between investigators and prosecutors.

24. The Review also heard how poor communication between an investigator and prosecutor, at the outset of a criminal case, can have significant ramifications down the line. For an investigator to 'get it right the first time' and avoid spending precious time revisiting disclosure decisions, they must

[8] Home Office, *Policing Productivity Review* – p 20. In 2022/23 532,000 officer hours were used building case files and scheduling and for cases that terminated with the Crown Prosecution Service. Officer working an average of 47 weeks of the year, 37 hours a week.

receive input from the designated prosecutor. While officers and prosecutors are keen to improve communications, a more structured approach is required to move beyond the recommendations made by predecessors. Therefore, I recommend that there be an expectation for an investigator to speak with a prosecutor at the pre-charge stage, to agree the approach to disclosure and discuss reasonable lines of inquiry, in every case (excluding motoring offences). I am not naive to the fact that this new approach will require resources but given criticisms of the current levels of engagement I have no doubt this will be time well spent and deliver savings in due course.

A fair process: Defendants, Complainants and Victims

25. The people at the centre of any criminal trial are those whose lives have been affected by the events that have taken place. In a system where the defendant is indeed innocent until proven guilty, and where we must also ensure that victims receive justice, the rights, responsibilities, and welfare of all of those participating in a criminal trial must be carefully considered in all aspects of its proceedings. The State's responsibilities in this regard are two-fold: criminals must be brought to justice and a suitable punishment administered without any miscarriage of justice. However, in that process both their rights and those of victims, as defined by law, must be upheld. Upholding these rights and responsibilities has been central to my considerations and are reflected in the recommendations made.

Dispensing justice: Courts and the Judiciary

26. The courts and the judiciary play a vital role in dispensing justice and throughout my engagement with those across the criminal justice system, including the judiciary themselves, there is a significant appetite for judges and lay magistrates to play a more active part in ensuring that disclosure issues do not impede case progression.

27. To assist parties to focus and engage on the real issues in the case, whilst also swiftly agreeing on disclosure strategy and execution, I make the following proposals. First, the disclosure process for the average Crown Court case is updated, with formal obligations being placed on the prosecution to serve the newly revised Disclosure Management Document (DMD) at least 7 days prior to the plea and trial preparation hearing (PTPH), enabling the defence sufficient time, in the 'average' case, to engage with the detail. New expectations should be introduced to ensure that, having had sufficient time to scrutinise the DMD, all parties, including the judge, use the PTPH to confirm a disclosure strategy and resolve outstanding concerns where possible.

28. Regarding serious, complex, or otherwise voluminous cases, a new Intensive Disclosure Regime (IDR) pathway should be introduced. Shortly after transfer to the Crown Court, the case should be designated as an IDR case and a Disclosure Management Hearing (DMH) should be set at which

disputed matters will be judicially resolved. These matters will involve consideration of issues such as identifying additional reasonable lines of inquiry, and a prosecutor's approach to disclosure in the case. Unlike the situation in criminal cases, generally when a defendant is encouraged but not legally obliged to engage with the prosecution on matters involving disclosure of unused material, a defendant would risk averse consequences if they decided not to engage with disclosure issues in an IDR case.

29. Early identification of issues relating to disclosure is vital if delay to trial is to be avoided. Moreover, swift scoping of the issues will assist a prosecutor in refining the prosecution case and streamlining the allegations. From a defence perspective, early identification of disclosure issues will focus attention on the detail of the defence and should encourage prompt reflection on the relative strengths and weaknesses of the prosecution and defence case, and whether a plea of not guilty is maintained. To facilitate and encourage early engagement, arrangements need to be made to ensure that solicitors and trial counsel in legally aided cases are adequately remunerated for this work.

30. In considering my recommendations I have been concerned to safeguard the right to fair trial. Strengthened disclosure obligations must apply to both sides. My recommendations ensure that the prosecution will be bound in IDR cases to provide greater clarity and transparency on its approach to disclosure at an early stage in the proceedings, and this should be scrutinised by the defence with robust judicial oversight. The swift return of material that a defendant owned, or to which they once were entitled to access, is a measure which should assist the prosecution and defence alike. In addition, to facilitate the seamless transfer of schedules and disclosable material, I recommend that, going forward, defence firms should be afforded licensed access to advanced material management technological tools that the investigating authorities procure.

31. Additionally, the Review heard anecdotal evidence from both prosecutors and defence professionals as to the limited tactical use of section 8 requests,[9] which are essential in the pursuit of a just regime. To reduce the risk of section 8 requests being used to ambush the prosecution, a recommendation is made that judges should take into consideration, when presented with such a request, the degree to which the defence has engaged with the DMD.

32. There are also *unique* problems in the magistrates' court where there are shorter statutory timelines for case progression. I have heard that requirements of the CPIA are frequently not complied with. Failings are cited on all sides police, prosecution, and defence. The result is wasted court time through avoidable adjournments. As part of my Review, I have carefully considered the operation

[9] An application to the Court can be made by a defendant under section 8 of the CPIA following service of the defence case statement for items of unused material held by the prosecution in the case.

of the disclosure regime in the magistrates' courts and make recommendations to assist inexperienced officers in their efforts to come to court with disclosure schedules completed.

Miscellaneous

33. Through this Review, I also make recommendations regarding the value of a single Consolidated Disclosure Guidance document and the ongoing oversight of the disclosure regime's performance. Other matters of concern, for which I make proposals, include disclosure in confiscation proceedings, the obligations of private investigators and prosecutors, and the process of post-conviction disclosure.

A Regime Fit for the Future

34. In this Review, I have endeavoured to find ambitious but realistic proposals to assist in the creation of a modern disclosure regime built upon the pillars of *transparency, clarity, efficiency,* and *proportionality* – all serving to reinforce the central tenet of *justice.* The sum of these proposals aims to create a modern disclosure regime,[4] that I hope will embrace technology to minimise needless administrative burdens on law enforcement agencies, freeing up police resource to be better used proactively tackling crime. Where time taken on disclosure is significantly reduced, this will assist in allowing the court backlog to be tackled more swiftly. It will also ensure that there is a system that retains vital safeguards against the miscarriage of justice, and that parties are clear on their roles and responsibilities. An upgraded framework that promotes greater transparency regarding the management and disclosure of material but also recognises that one size may no longer fit all, and that a flexible, pragmatic approach is required in the most complex cases. A modern regime that ultimately delivers for defendants and complainants, laying the foundation for increased confidence in our criminal justice system.

35. To that end, I propose a miscellany of measures designed to improve understanding of the disclosure process.[10] Each of these measures is free standing but not without significance. There are a total of 45 recommendations in this Independent Review and I commend them to the Home Secretary.

[10] Although I have received expert advice, I make clear that all views and recommendations expressed in the Independent Review are mine, and mine alone.

Review Aims

36. In undertaking this Review, I set out to understand how efficacious the criminal disclosure regime is in today's digital world. I shall assess how far disclosure, in its current form, delivers fair criminal justice outcomes for victims[11] and defendants and how effectively it safeguards against miscarriages of justice.

37. To assess the strain placed on the current system, it is important to understand the extent to which digital material has pervaded all manner of criminal cases, from motoring offences to rape and serious fraud. To aid this understanding, I seek to establish how veritable reports of serious problems experienced in high-volume digital cases are, to comprehend the reality of issues faced. Furthermore, I aim to determine whether the disclosure regime is operating differently in the magistrates' courts and Crown Court to assess the ramifications this presents when considering the application of the regime.

38. In this regard, this Review shall establish how the disclosure regime can be modernised, making the most of the limited resources available and ensuring that the rights and responsibilities of all parties in the criminal justice system are appropriately balanced.[12]

Review Context

39. The disclosure process is a critically important part of criminal legal proceedings. It guards against injustice by ensuring that the defence is made aware of material that 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. As discussed later, I am conscious 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.

40. Additionally, in undertaking this Review, I consider two further matters. First, I am conscious that there have been several Reviews of the unused material[13] 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

[11] 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).

[12] Annex A – Terms of Reference.

[13] Unused material – Material that is relevant to the case but is not being used as part of the prosecution evidence presented to the Court.

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 and defendants will lose confidence very quickly in a criminal justice system that cannot handle the disclosure of unused material in the digital age.

Part one

A Short History of Disclosure

1. A History of Disclosure and the Right to Fair Trial

The Creation of a Legislative Disclosure Obligation

41. In undertaking my Review of the criminal disclosure regime, I began by considering two things. Firstly, the reasons why a disclosure obligation is necessary, and secondly, the conclusions to which those who have considered the matter before me have come. There is much that remains constant about why we need the obligation. However, the nature of modern offending, including a proliferation of digital evidence in an age when we as citizens inevitably spend more of our time in the 'online' world, means that it is now more important than ever to consider whether the way that obligation is discharged has adequately stood the test of time.

42. It is a fundamental principle of common law in England and Wales that all criminal proceedings should uphold the values of fairness and integrity. That can be no less important today and, considering very recent disclosure-related miscarriages of justice of the type, that we have seen relating to the Post Office 'Horizon' private prosecutions and the wrongful conviction of Andrew Malkinson, it is vital that we strive to protect those values. The total number of overturned convictions as of 31 April 2024 is 111.[14] We must do this whilst also keep at fore of mind that the pursuit of justice is equally important.

43. The practice of disclosure did not exist in any meaningful way before the mid-1940s. That changed in 1946 when the Court of Appeal in *R v Bryant and Dickinson* imposed, for the first time, a disclosure obligation on the prosecution.[15] Two defendants had appealed their convictions for robbery. In what is now regarded as a landmark decision, the Court ordered the prosecution to provide the defence with details of witnesses that were able to support their case. Here began the creation of the prosecution's disclosure obligation.

44. Almost two decades later, in 1965, the Court of Appeal considered the case of *Dallison v Caffery*.[16] This time, it was the police who failed in their duty to disclose documents that supported the defence case at trial. Upon hearing the appeal, Lord Justice Denning referred to the idea that the prosecution should conceal evidence that may assist the defence as "*reprehensible*," demonstrating that courts were

[14] Post Office, *Overturned Convictions and Compensation: Information on Progress*
[15] *R v Bryant and Dickson* [1946] 31 Cr App R 146, 151.
[16] *Dallison v Caffrey* [1965] 1 QB 348.

taking an increasingly dim view of those who were found to be either intentionally or recklessly disregarding their disclosure duties.

45. The burning platform for change came in the 1970s. Successive high-profile miscarriages of justice placed public confidence in the criminal justice system at an all-time low. During this period, law enforcement practices came under intense scrutiny. The cases of *Laszlo Virag (1969)* and *Luke Dougherty (1972)*, both convicted of theft offences, with the former also having been charged with attempting to escape from the police, cast doubt upon the reliability of eye-witness accounts and the way in which the police handled those testimonies.

46. In *Virag's* case, concerns were intensified by the discovery of fingerprint evidence relating to another known criminal in the vehicle involved. Virag's application to the Court of Appeal was refused in 1970. However, disclosure failings arising from the handling of this evidence by the prosecution later came to light and resulted in the then Home Secretary Roy Jenkins deciding to recommend Virag's immediate release from custody in 1973.

Lord Devlin Report (1976)

47. Recognising the need for an official inquiry into what had happened, the Home Secretary appointed a High Court Judge, Lord Patrick Devlin, to chair a committee to consider matters relating to failings arising from the visual identification of criminal suspects. One of Lord Devlin's key recommendations contained within his report *Evidence of Identification in Criminal Cases* (1976) was for a more thorough approach to pre-trial disclosure.

Fisher Report (1977)

48. In 1972, three youths deemed to be 'educationally subnormal' were convicted of the murder of Maxwell Confait. The conviction, which was based on evidence arising from confessions made without the presence of an appropriate adult at police interview, raised new questions about the prosecution's disclosure obligations. In 1973, following an unsuccessful bid in the Court of Appeal, the parents and supporters of the boys renewed efforts to clear their names. New evidence from leading pathologists combined with greater media scrutiny led to increasing political and judicial interest in the case. In 1974, Lord Justice Widgery gave his opinion that the case could be referred back to the Court of Appeal, which the Home Secretary did in 1975. Upon appeal, all three convictions were overturned.[17]

[17] *R v Lattimore* (1976) 62 Cr. App. R. 53.

49. It was clear that the matter called for a formal inquiry, and the Home Secretary asked High Court Judge Sir Henry Fisher to look into the matter. In his Review, Sir Henry carefully considered the events that took place in the Maxwell Confait case. He was highly critical of the conduct of the police, in particular the failure to interview the young suspects in the presence of an appropriate adult. Sir Henry recommended that a disclosure obligation should be placed upon the prosecution to the defence, whether or not the defence specifically request it. He also recommended the introduction of time limits for disclosure, with appropriate penalties for non-compliance, to ensure that the pre-trial disclosure takes place in a timely manner. Recognising that his recommendations had implications for more comprehensive criminal justice reform, Sir Henry further recommended the establishment of a Royal Commission that could consider the issues more broadly.

Royal Commission on Criminal Procedure (1981)

50. Established in 1978, the Royal Commission on Criminal Procedure was chaired by Sir Cyril Phillips.[18] The purpose of the Phillips Commission was to make recommendations on the powers and duties of the police and the prosecution of criminal offences, balanced against the rights of suspects and defendants. The Review produced by the Commission, included a substantial research programme that supported its recommendations and led to three major changes to the criminal justice system in England and Wales.

51. The first of these changes was the creation of the Crown Prosecution Service. In light of previous miscarriages of justice, the Commission highlighted the need for separation between investigation and prosecution functions. The new organisation was created under the Prosecution of Offenders Act of 1985 and brought police prosecution services together under a Director of Public Prosecutions (DPP).[19]

52. Secondly, the Commission resulted in the enactment of the Police and Criminal Evidence Act (PACE) 1984[20] and accompanying Codes of Practice,[21] which set out the rules for police investigating offences and the interview and detention of suspects. Since then, both the legislation and codes have frequently been updated to clarify police powers in other important areas, such as stop and search and identification.

53. Finally, to ensure that the police discharge their responsibilities appropriately under PACE, a new Police Complaints Authority (now known as the Independent Office for Police Conduct) was

[18] *Royal Commission on Criminal Procedure (Philips Commission)* (1981).
[19] Prosecution of Offences Act 1985
[20] Police and Criminal Evidence Act 1984
[21] Police and Criminal Evidence Act 1984 – Code of Practice

created. This replaced an existing Police Complaints Board that had been criticised for its inability to investigate complaints against the police effectively.

54. Over a period of three decades, significant progress had been made in improving police accountability and protecting the defendant's right to a fair trial. Whilst there had been a clear shift towards prosecutors taking their disclosure obligations more seriously, there was still scope to improve the disclosure regime further and offer greater clarity.

Attorney General's Guidelines on Disclosure (1981)

55. In 1981, the Attorney General issued new guidelines (AG's Guidelines) on the criminal disclosure process. The Guidelines defined the new concept of 'unused material,' which refers to witness statements and other documents that do not form part of the evidence that the prosecution relies on to make its case. Unless the material could be regarded as 'sensitive', the guidelines created a new test to identify material which should be considered for possible disclosure to the defence. This test set out that material in a case should be made as unused material "if it has some bearing on the offence(s) charged and the surrounding circumstances of the case".

56. However, in the late 1980s and early 1990s further legacy miscarriages of justice, which originated in the 1970s, came to light. The highest profile of these cases related to the wrongful pursuit of terrorism offences in the *Guildford Four* and *Birmingham Six* in 1975 and the *Maguire Seven* in 1976. Following the discovery of significant anomalies in police evidence, combined with allegations of police coercion and intimidation, the convictions of the Guildford Four[22] were quashed by the Court of Appeal in 1989, with those of the Birmingham Six[23] and Maguire Seven also being overturned in 1991.[24]

57. A further significant miscarriage of justice from the 1970s was also revealed in 1992 in the case of *R v Ward*.[25] Judith Ward was convicted of several terrorist murders in 1974, including the M62 coach bombing, in which 12 soldiers and their families died, and IRA bombings at Euston station and the National Defence College. Although Judith Ward had confessed to the offences, there was significant doubt about the reliability of that confession, both because of changing accounts believed to be attributable to a personality disorder and selective use of certain parts of her statements by the prosecution.

[22] R v Richardson and Others, The Times (20 October 1989).
[23] R *v McIlkenny and Others* (1991) 93 Cr App R 287.
[24] R *v Maguire and Others* (1992) 94 Cr App R 133.
[25] R. *v. Ward* [1993] 1 W.L.R. 619.

58. Further investigation also cast doubt upon the reliability of the forensic evidence, including that many important aspects had not been disclosed by the prosecution. The case of *Ward* demonstrated wilful negligence by the prosecution regarding their disclosure obligations. As a result, in 1992, the Court of Appeal overturned the conviction. However, by this time, Judith Ward had already spent eighteen years in prison, undeniably a grave and most serious miscarriage. In the wake of *Ward*, there was a culture shift towards a much greater volume of disclosure from the prosecution to the defence, which, in publicly funded cases, had an inevitable increase in legal aid expenditure.

The Royal Commission on Criminal Justice (1991)

59. With further historic miscarriages of justice having come to light, the then Home Secretary Kenneth Baker (later Lord Baker of Dorking) established the Royal Commission on Criminal Justice (also known as the Runciman Commission) in 1991. He appointed Viscount Runciman, a British historical sociologist and senior research fellow at Cambridge University, as Chair. The purpose of the Commission was to examine the behaviour of the police and investigators, the process for prosecutors, the role of forensic science and the professional witness, the balance, range, powers and processes of the courts and the overall efficiency of criminal justice, including the process relating to rights of appeal.

60. The Commission reported to Parliament in July 1993. It made 352 recommendations.[26] One of the most significant recommendations was to create an independent body to consider suspected miscarriages of justice and refer appropriate cases to the Court of Appeal. This led to the establishment of the Criminal Cases Review Commission in 1997.

61. Runciman's key finding about disclosure was that the responsibilities of prosecution and defence were not equally balanced. For the first time, it was recommended that the Government set out a legislative framework for the prosecution's disclosure obligations. There was also a recommendation for a new general requirement on the defence to disclose their case following receipt of the first stage of disclosure from the prosecution. Whilst the principles of an adversarial system prevent obligations being placed on the defence to cooperate in a specific way, or indeed at all, this set the expectation that full participation in the disclosure process from both sides, where the defence is in a position to do so, should take place.

The Criminal Procedure and Investigation Act (1996)

62. Following parliamentary debate of the Runciman Report, in October 1993, there was broad consensus to accept most of the Commission's recommendations, with support for the creation of a

[26] Home Office, *Report of the Royal Commission on Criminal Justice* (Cm 2263, 1993).

disclosure regime enshrined within legislation.[27] Runciman had advocated for a broad two-stage disclosure test whereby the first stage of primary disclosure, with provisions for appropriate exceptions, would be automatic. There would then be a secondary stage for further disclosure, where it would be open to the defence to make a further application for additional disclosure if they could establish its relevance to their case. Applications for secondary disclosure would, according to Runciman, be subject to judicial adjudication.

63. The Government published interim proposals for a new disclosure regime in March 1994 in a joint paper published by the Home Secretary, Lord Chancellor, and Attorney General, with a more detailed consultation in May of the following year.[28] The Criminal Procedure and Investigations Bill was introduced to Parliament in November 1995. The disclosure provisions in the Bill differed from those recommended by Runciman. The Government's disclosure plans sought to narrow the test proposed by the Commission, to reduce law enforcement burdens.

64. Additionally, whilst the Commission considered that the defence need only give a general indication of their case, the Bill also proposed that the disclosure process should seek to narrow the issues in dispute between the prosecution and defence as far as possible before the trial commences. This addressed concerns that the defence could request large volumes of material, which would place a disproportionate burden on the prosecution that could undermine or delay the swift administration of justice.

65. The Bill received significant criticism during its passage through Parliament, with concern about the speed of its introduction. It was subject to heavy scrutiny in the House of Lords, with one peer, Lord Rogers of Quarry Bank, referring to the proposed legislation as "ill-prepared and carelessly drafted", a view that was shared by many others in the chamber.[29]

66. Eventually, after being subject to over 100 Government amendments, the Bill received Royal Assent in July 1996 and became the Criminal Procedure and Investigations Act (CPIA), applying to England, Wales, and Northern Ireland. The CPIA placed disclosure duties on both the prosecution and the defence, set out in Part 1 of the Act. Part 2 made provision for the creation of a Code of Practice which details the way in which investigators are required to record, retain, and reveal material to the prosecution.

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[27] Home Office, *Report of the Royal Commission on Criminal Justice* (Cm 2263, 1993); *Report of the Royal Commission on Criminal Justice: Government response to recommendations* HO 558/37; and *Report of the Royal Commission on Criminal Justice: final government response HO 558/63.*

[28] Home Office, Disclosure, a consultation response (Cm 2864, 1995).

[29] Hansard (HL) 18 December 1955, vol 567.

Attorney General's Guidelines on Disclosure (2000)

67. In 1999, a wide-ranging inspection by Her Majesty's Crown Prosecution Service Inspectorate found an increasing inaccuracy in disclosure decisions, with concerns about the standard of disclosure schedules. Other organisations, including the police, the Law Society and the Bar Council, undertook their own research, producing findings consistent with those of the inspectorate. To address these problems, the Attorney General, Lord Williams of Mostyn, issued new guidelines on disclosure, aiming to clarify all parties' roles and responsibilities.

The Auld Report (2000)

68. Against this background, in 1999, the Lord Chancellor, Home Secretary and Attorney General, appointed Lord Justice Auld (Sir Robin Auld) to chair a Review of the criminal courts in England and Wales. Sir Robin had cause to comment on the operation of the criminal disclosure regime as part of his Review, which was wide ranging in scope. His findings identified two main problems with the CPIA. Firstly, there was an overlap between the definitions of primary and secondary disclosure, which was confusing, particularly for law enforcement. Secondly, he found significant evidence that the defence failed to comply with the legislation regarding their duty to provide adequate defence case statements. Further comment was passed on the need to rationalise legislation and guidance into a single instrument clearly setting out responsibilities and rights.[30]

69. Sir Robin recommended the creation of a single disclosure test. He described this as "material which in the prosecutor's opinion may reasonably weaken the case for the prosecution or assist the defence".[31] There was also a recommendation concerning the need to improve defence case statements. Additionally, he highlighted a need for the criminal justice system to be better resourced to undertake its disclosure duties more effectively.

70. The Home Office (HO) responded to Sir Robin's recommendations with the publication of a white paper entitled *Justice for All* which set out wider reforms to criminal procedure and sentencing.[32]

Criminal Justice Act (2003)

71. The Government implemented the two-stage disclosure test through the Criminal Justice Act 2003. The Act placed the prosecution under a 'continuous duty' to disclose evidence. New requirements for defence case statements were also put in place, setting out any issues with the prosecution's evidence, as well as details of any defence witnesses to be called. In multi-handed cases a provision

[30] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001), chapter 10, para 184.
[31] Ibid.
[32] Home Office, *Justice for All* CM 5563 (July 2002).

was also included, but never implemented, which facilitated the sharing of disclosure of defence statements.[33]

Jubilee Line Case Collapse (2005)

72. In 2005, an infamous two-year long fraud trial, *Regina v. Rayment and others,* collapsed. The case centred on allegations of financial corruption of London Underground personnel, in connection with the extension of the Jubilee Line in the 1990s. The Crown argued that the tender process had been corrupted by the unauthorised sharing of sensitive financial information.[34] After numerous issues, including the discharge of multiple members of the jury, the case finally collapsed. The total estimated cost to taxpayers was £25 million, including £22 million spent on legal aid. [35] Jurors spent 21 months in limbo before being dismissed, having not commenced their deliberations.

73. In a review of the case, HM Crown Prosecution Service Inspectorate concluded that disclosure played a major factor in the case's ultimate demise.[36] Specifically, it was noted that 70 million pages of possibly relevant third-party material, combined with fundamental disagreements as to real issues of the case, significantly delayed proceedings and increased costs. Further, it was noted the Crown did not have sufficient workforce to undertake disclosure in an accurate and timely manner. The prosecution was criticised for its opaque disclosure strategy approach.

Lord Chief Justice's Heavy Fraud Protocol (2005)

74. On the same day the Jubilee Line case ended, a protocol was published by the Lord Chief Justice to encourage members of the judiciary to take a more active case management role in trials expected to last longer than four weeks.[37] The protocol was designed to complement the Criminal Procedure Rules, providing best practice in managing trials that could otherwise become unwieldy. The protocol strongly advised against judges authorising 'keys to the warehouse'.[38]

Lord Justice Gross Review (2011)

75. Between 2003 and 2011, how individuals in society went about their daily lives and communicated with each other changed radically. Mobile telephones and email had become commonplace by this time, and their impact on the criminal justice system was far more acutely felt. This inevitably affected how law enforcement and legal professionals discharged the disclosure regime. This provided

[33] Criminal Justice Act 2003.
[34] HMCPSI, *Review of the investigation and Criminal Proceedings Relating to the Jubilee Line Case,* Annex 1.
[35] Ibid, para 1.4. The media at the time estimated the total cost to the taxpayer to be circa £60 million. The Independent, 'Jubilee line fraud trial collapse', 12 November 2024
[36] Ibid, chapter 5.
[37] Lord Chief Justice, *Control and Management of Heavy Fraud and other Complex Criminal Cases* (2005).
[38] Ibid, para 4.iii. See Chapter 5.1.

the impetus for a further Review of the disclosure regime in 2011, led by Lord Justice Gross (Sir Peter Gross).[39]

76. Lord Justice Gross considered in detail the obligations placed upon investigators and concluded that the width of the CPIA relevance test, which requires investigators to retain material which has "some bearing", on the investigation unless it is "incapable" of having an impact on the case, was a significant burden. He also highlighted mischiefs relating to requirements for examining and scheduling material, as well as compliance with various guidance. Whilst Gross concluded that his findings did not warrant any changes to the CPIA, he pointed to a need for more resources for the system and better judicial case management. He also made several practical suggestions for improving the disclosure regime, including greater use of 'block listing' in cases with a high volume of material, the introduction of the 'disclosure management document', formalising the approach to undertaking disclosure, more consistency in case management and the consolidation of guidance on disclosure. Some, but not all, of these recommendations were implemented by the Government.

77. Lord Justice Gross's Review led to the overhaul of *The Attorney General's Guidelines on Disclosure for Investigators, Prosecutors and Practitioners*, in 2013 which replaced the 2000 guidelines. Alongside this, the *Judicial Protocol on Disclosure* was also published in the same year. Both documents were designed to set out clear guidelines on the practical application of the CPIA.

The *Cardiff Five* and *R v Mouncher & Others*

78. In the same year that Lord Justice Gross delivered his recommendations, a further high-profile miscarriage of justice was brought before the courts. The '*Cardiff Five*' case began in 1988 and concerned the murder of Lynette White, a 20-year-old sex worker from Cardiff. Later that year, five men were charged with her murder despite the lack of any substantial forensic evidence. Following a lengthy trial in 1990, three of the five men were convicted and sentenced to life imprisonment.

79. Advancements in DNA profiling resulted in irrefutable evidence that the convicted men had not committed the murder. As a result, the real killer was identified. He confessed and was sentenced to life imprisonment. The convictions of the three men originally serving life sentences for Lynette White's murder were eventually quashed by the Court of Appeal in 1992.[40]

80. Four witnesses from the original trial were charged with perjury, with three eventually convicted and one deemed unfit to stand trial. Following suggestions of police corruption resulting from the original wrongful convictions, the Independent Police Complaints Commission (IPCC) investigated the

[39] Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (2011).
[40] R v Paris, Abdullahi and Miller [1993] 97 Cr App R 99.

conduct of several serving and retired police officers involved in the investigation, including further allegations of perjury. Some years later, the decision was taken that there was enough evidence to pursue criminal charges against the officers concerned. As a result, in 2011, the trial of *R v Mouncher & Others* took place and represented the largest and most serious police corruption trial in British criminal history. However, as the trial began, disclosure failings by the prosecution emerged, and several critical documents were found to be missing. Therefore, the prosecution had no option but to offer no evidence, and the trial collapsed.

81. Many regarded what had happened in this case as a severe miscarriage of justice, as, whilst there was compelling evidence of wrongdoing by the officers concerned, the failures in the disclosure process meant that they could not be tried. Public outrage was further fuelled by the fact that the officers proceeded to take civil legal action against their employer, South Wales Police, for reputational damage. Whilst their claim was unsuccessful, it highlighted that the impact of disclosure failings can be felt far beyond the criminal courts.

82. In 2015, the then Home Secretary, the Right Honourable Theresa May MP, appointed Richard Horwell QC to examine what had happened in the failed *R v Mouncher* prosecutions. Horwell published his *Mouncher Investigation Report* in July 2017, which made a total of 26 recommendations, many of which related to disclosure failings.[41] Key recommendations included the need for improvements in police officer training and accreditation on disclosure, better information sharing between the police and the Crown Prosecution Service (CPS),[42] improvements in procedures for handling third-party material and the adoption of a better digital case management system.

Review of Disclosure Sanctions (2012)

After Lord Justice Gross has completed his Review into the criminal disclosure regime, he, and Lord Justice Treacy, were tasked by the Lord Chief Justice and Lord Chancellor to consider what sanctions were available for disclosure non-compliance.[43] Whilst changes were suggested regarding the need for greater clarity on disclosure failure consequences, ultimately, no additional sanctions against either the prosecution or the defence were recommended.

Judicial Protocol on the Disclosure of Unused Material (2013)

83. As a direct result of the recommendations made in the 2011 *Review of Disclosure in Criminal Procedures*, a revised judicial protocol on the disclosure of unused material in criminal cases was published in

[41] Richard Horwell KC, *Mouncher Investigation Report* (2017).
[42] The principal agency for conducting conduction criminal prosecutions in England and Wales.
[43] Lord Justice Gross and Lord Justice Treacy, *Further review of disclosure in criminal proceedings: sanctions for disclosure failure* (2012).

December 2013.[44] The document replaced the previous *Disclosure: a Protocol for the Control and Management of Unused Material in the Crown Court*.[45] It revised provisions within the 2005 Lord Chief Justice's Protocol on Heavy Fraud and Complex Cases.[46] This document provided a central source of guidance for the judiciary on the application of the regime to all criminal cases and intended to "clarify procedures" and encourage all parties to take an active role in the process. The Protocol has since been retired.

Magistrates' Courts Disclosure Review (2014)

84. In response to concerns that disclosure issues extended beyond the Crown Court, then Senior Presiding Judge Lord Justice Gross asked the Lord Chief Justice to undertake a review of disclosure in magistrates' courts.[47] The merits of a unique distinct regime for the magistrates' court were considered by HHJ Christopher Kinch KC and then Chief Magistrate Howard Riddle. However, no significant legislative changes were recommended. The Report suggested that the defence must play their part by identifying the issues in dispute and that the prosecution should engage with disclosure at an earlier stage to be prepared before the first hearing.

R v Richards & Ors (2015)

85. In parallel, the Court of Appeal continued to review cases where disclosure was the central issue of disagreement. Five years into *R v Richards & Ors*,[48] a fraud investigation with seven terabytes of data where the prosecution had failed to complete primary disclosure, the Crown Court ordered a stay of prosecution. The judge considered that delays and disclosure non-compliance meant the trial could not proceed fairly. The prosecution appealed this decision.

86. The Court of Appeal, upholding the decision, went on to distil the following disclosure principles:
    a. First, the prosecution is ultimately responsible for initial disclosure, which includes setting out their strategy, choosing appropriate software, and suggesting search terms.
    b. Second, the prosecution is expected to prompt defence engagement in a constructive and proactive manner.
    c. Third, when faced with overwhelming volumes of material, it should not be expected that the prosecution can do the impossible by analysing each item. It was suggested that, where appropriate, technology should be used to streamline the process.

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[44] Judiciary of England and Wales, *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (2013).
[45] Protocol supported by the Court of Appeal in *R v K* [2006] EWCA Crim 724, [2006] 2 All ER 552
[46] Section 4 replaced.
[47] Judiciary of England and Wales, *Magistrates' Court Disclosure Review* (2014).
[48] *R v Richards* [2015] EWCA Crim 1941, [2016] 1 WLR 1872 at [27].

d. Fourth, judges should be empowered to use the levers available to them in managing a case to pursue the agreement of key issues and resolve disclosure challenges.

e. Finally, the Court of Appeal suggested that flexibility and common sense should prevail. Learning lessons from civil procedure, it was recommended that having discussed with both parties, judges should consider creating a bespoke disclosure process for complex cases.

Joint Inspectorate Review on Disclosure (2017)

87. In 2017, Her Majesty's Inspectorate of Constabulary (HMIC) and Her Majesty's Crown Prosecution Inspectorate (HMCPI) also carried out their own joint investigation into what happened in *R v Mouncher* and set out their findings in a report entitled *Making it fair: The Disclosure of Unused Material in Volume Crown Court Cases.*[49] This coincided with a period in which the CPS was identifying a growing number of cases that were collapsing as a direct or indirect result of disclosure failings.

88. The report criticised the culture surrounding the disclosure process that existed within the criminal justice system and concluded the prosecution in the *Mouncher case* had applied the disclosure test too narrowly and had not fully met its obligations to release material that had the potential to assist the defence. It identified no problems with the CPIA as a piece of legislation and pointed to failings arising in its application rather than any deficiencies within the legislation itself.

R v Allan (2017)

89. In 2017, a student, Liam Allan, was charged with 12 counts of rape and sexual assault. This was a particularly significant case with grave disclosure failings by the police and the CPS. The trial collapsed when the court ordered the police to hand over a computer disk containing 40,000 messages, amongst which there was critical material showing that the complainant in the case had repeatedly requested casual sex. Had this very serious failing not been uncovered and Allan had been convicted, he was likely to be facing a 12-year custodial sentence. The case drew attention to failures in communication between different parts of the criminal justice system and the challenges that it faced in terms of handling increasing volumes of digital evidence.[50]

National Disclosure Improvement Plan 2018

90. In January 2018, to address the recommendations of the joint Inspectorate report on the CPS, the National Police Chiefs' Council (NPCC), College of Policing (CoP) and CPS jointly published the

[49] HM's Inspectorate of Constabulary and Fire & Rescue Service, *Making it fair: A joint inspection of the disclosure of unused material in volume Crown Court cases* (2017).

[50] Metropolitan Police Service and Crown Prosecution Service, *Joint review of the disclosure process in the case R v Allan* (2018).

National Disclosure Improvement Plan (NDIP).[51] This was a collective aim to improve how the justice system deals with disclosure, with a focus on police and CPS collaboration. The plan focused on five key themes: capacity, capability, leadership, governance, and partnership. One of the key actions in the plan was to update and disseminate improved training on disclosure for police officers.

91. The NDIP was subsequently reviewed, and an update was published in 2020 that explained the action that had been taken since its initial publication. It was found that, whilst improvements had been made to the way disclosure was managed, there was still far more work to be done. A further review of the NDIP was published in July 2021 evaluating progress to date, identifying areas for further improvements, and opportunities for best practices to be disseminated nationally.

Justice Committee Report on Disclosure in Criminal Cases (2018)

92. In a sign of intensified public scrutiny over the performance of the regime, the House of Commons Justice Committee published their Report titled *Disclosure of Evidence in Criminal Cases* in July 2018.[52] In light of the concurrent Attorney General's Review that was focused on the CPIA, the Committee's Report focused on how systemic issues within the criminal justice system contributed to high-profile disclosure failures. It found that, despite concerted action to address these issues, disclosure challenges continued to plague the English and Welsh system. Concern was raised that the number of cases failing with disclosure errors were significantly underestimated.[53] Recommendations were made regarding the improvement of disclosure learning, training, and guidance. It concluded that sufficient funding for the criminal justice system was the best non-legislative solution to improve adherence to the disclosure regime.

Attorney General's Review of Disclosure - Cox Review (2018)

93. Having been announced shortly before the collapse of *R v Allan* under the leadership of the previous Attorney General, Sir Geoffrey Cox KC MP, upon his appointment, began his Review of disclosure. The purpose of the Review was to examine the effectiveness of the existing guidelines, protocols and codes of practice on disclosure, as well as the effective use of technology and case management systems.

94. In the *Review of the efficiency and effectiveness of disclosure in the criminal justice system*,[54] published late 2018, Cox considered the adequacy of the CPIA and concluded, as his predecessors did, that the legislation

[51] Crown Prosecution Service and the National Police Chiefs' Council, *National Disclosure Plan* (2018).
[52] House of Commons Justice Committee, *Disclosure of evidence in criminal cases* HC 859 (2018).
[53] Ibid, p 3 "Data collected by the CPS might have underestimated the number of cases which were stopped with disclosure errors by around 90%".
[54] Attorney General's Office, *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (2018).

still offered an appropriate framework and the problems experienced were rooted in its practical application. He also considered what more might be done to reinforce the need for investigators to make reasonable lines of inquiry and, in doing so, apply the disclosure test correctly from the outset rather than as an afterthought.[55]

95. Cox was cognisant of the increasing volume of material involved in the disclosure process, and his Review explored what action could be taken to improve disclosure preparation and performance. The Review examined how the defence and judiciary could best engage in the disclosure process in a meaningful way. Cox also considered the role of technology and data and opportunities for sustained oversight and improvement of the criminal disclosure regime.

96. In his findings, Cox heavily criticised the culture around disclosure across the criminal justice system, citing evidence of a lack of compliance by the police and the prosecutors, particularly in relation to their duty to 'record, retain and review' material collected during the course of an investigation. He concluded that, whilst the CPIA was still fit for purpose, there was scope to improve the accompanying guidance.[56]

***Regina v Gohill*; *Regina v Preko* (2018)**

97. In the same year, both defendants in *R v Gohill* and *R v Preko*, sought leave to appeal their convictions for money laundering. The grounds for the applications centred around the non-disclosure of information relating to corruption amongst the police officers who were responsible for the investigation. The Crown admitted responsibility, citing poor communications between the CPS and Metropolitan Police Service as a key factor for the disclosure failings. Although the Court of Appeal refused leave to appeal, the prosecution was criticised for frequently favouring the Crown's perspective on disclosure matters throughout the case.[57]

***Regina v Bater-James & Anor* (2020)**

98. A few years later, the Court of Appeal considered two unrelated but important conviction appeals, which both concerned issues of retention and disclosure of electronic records held by prosecution witnesses in the context of a sexual offence prosecution. The second appellant contested his conviction on the basis that the prosecution had used search terms to identify messages on the complainant's phone that met the disclosure test, but a full review of each message had not been undertaken.

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[55] Ibid, p 24.
[56] Ibid, p 3.
[57] *R v Gohil* [2018] EWCA Crim 140, [2018] 1 WLR 3697.

99. On the appeal, the Court noted that, given the significant change over time to the way individuals gather and store data, investigators must have a "proper basis" and "good cause" to seek to review a witness's digital material. Digital records, it was deemed, are no different to other forms of records.[58] Citing the Attorney General's 2013 Guidelines on Disclosure, it was determined that in situations where there is an enormous amount of material it is "perfectly proper" to search it by way of sample, key words or other analytical techniques to locate relevant passages. If a more extensive inquiry is required, the contents of the device should be downloaded with the minimum inconvenience to the complainant.

Attorney General's Guidelines on Disclosure (2020)

100. The Cox Review resulted in several changes to the AG's Guidelines on Disclosure and the CPIA Code of Practice. These changes included the introduction of the 'rebuttable presumption', whereby investigators and prosecutors start from the presumption that certain categories of material will be listed as disclosable unless that presumption can be 'rebutted' through a considered application of the disclosure test.

101. Changes were also made to reflect the need to balance the defendant's right to a fair trial with individual privacy rights. This made it clear that investigators and prosecutors should only pursue inquiries relating to personal information where it is in the interests of justice and that a fair trial could not take place without doing so.

102. The guidelines were also updated to encourage early disclosure and engagement between all the parties, with a move towards 'frontloading' of disclosure activity and where possible for this to take place in advance of any Plea and Trial Preparation Hearing. This is with the aim of identifying all reasonable lines of inquiry at as early a stage as possible.

103. In the same year, the DPP issued, under section 37 of PACE, a sixth edition of the *Director's Charging Guidance*.[59] This document sets out the arrangements prescribed by the DPP for charging decisions; the information to be sent when a charging decision is sought; the other material required to support a prosecution; and the joint working framework for police officers and prosecutors during the investigation and prosecution of criminal cases.

[58] *R v Bater-James* [2020] EWCA Crim 790, [2021] 1 WLR 725.

[59] Crown Prosecution Service, *Director's Guidance on Charging* (6th edition) (2020).

R v Woods & Marshall (2021)

104. Despite these revisions, large and complex cases continued to run afoul of disclosure requirements. In 2013, the Serious Fraud Office (SFO)[60] commenced an investigation into Serco and G4S, subsequently charging two Directors, Nicholas Woods and Simon Marshall, with fraud. The trial began in March 2021 and collapsed one month later after significant disclosure failings had been uncovered.[61] In his report on the case, published in July 2022, Brian Altman KC pointed to an organisation that was under resourced and which under prioritised disclosure.[62] It was suggested that, although disclosable items were identified, they were not subsequently scheduled with sufficient accuracy or detail to allow prosecuting counsel to identify them as disclosable. The lack of a robust, standardised, and consistent quality assurance process was heavily criticised, as was the inexperience of those appointed to disclosure officers.[63]

Hamilton & Ors v Post Office Limited (2021)

105. The Court of Appeal continued to hear disclosure-related cases, including *Hamilton & Ors v Post Office Limited*, a case referred to them by the Criminal Cases Review Commission. The case involved 42 appeals against conviction for fraud and other offences of dishonesty in the context of private prosecutions of sub-postmasters and Post Office employees by Post Office Limited, and from 2012, the Royal Mail Group. The grounds for appeal fundamentally related to the failure of the private prosecutor to make adequate disclosure in relation to errors, defects, and bugs in the Horizon data system that was used by every post office. Financial irregularities, reflected in the Horizon data system, had been a key part of the evidence in support of each prosecution.

106. In all but three cases, the Court concluded that Horizon data was essential to the prosecution, and in the light of wholly deficient disclosure, it overturned the convictions. The Court observed that the private prosecutor had been under a duty to investigate claims made by many of the defendants at the time of the prosecution that there were problems with Horizon and to consider and make appropriate disclosure.[64] There had also been evidence that, at the time of several of the prosecutions, the private prosecutor had expressed concern that disclosure in one case of Horizon problems could have an impact on other cases. The Court made clear that such considerations have no place when assessing material against the test for disclosure. It was determined that "public confidence in

[60] The Serious Fraud Office (SFO) is a specialist prosecuting authority tackling top level serious or complex fraud, bribery and corruption.

[61] The SFO secured a £19.2 million fine against Serco in 2019.

[62] Brian Altman QC, Review of R v Woods & Marshall - Serious Fraud Office (2022).

[63] Ibid, paras 16–21.

[64] *Hamilton v Post Office Limited* [2021] EWCA Crim 577, [2021] Crim LR 684 at [165].

the criminal justice system would be severely damaged if a prosecuting authority were permitted to give priority to such a consideration over compliance with its duties as a prosecutor".[65]

Regina v Akle & Anor (2021)

107. In 2021 the Court of Appeal also handed down the decision in *R v Akle & Anor*.[66] A former executive at Unaoil who had been convicted of paying bribes to secure a US$55 million contract for the company, Akle argued that, if correct disclosure had been made in relation to the SFO's dealings with a private investigator a stay of prosecution for abuse of process would have been granted.

108. When considering the case, the Court of Appeal determined that, as a principle, the prosecutor's doubts in respect of the disclosure test should be resolved in favour of the defence. The purpose of disclosure is to enable the defence to present their case in the 'best light'. It was accepted that there was material that would have been relevant to the issue of abuse of process which had not been disclosed and this failing had undermined the safety of Akle's conviction, which was quashed.

109. Published the following year, Sir David Calvert Smith's Review of the case found that, whilst some events were "beyond the control of the SFO or its superintending Ministers", there were indeed failures that were a result of individual mistakes and cultural problems.[67] Poor communication, lack of resource and inadequate record keeping featured as recurrent themes in the report and were identified as matters that exacerbated disclosure challenges.[68] The report made recommendations regarding how the SFO could improve its compliance under its CPIA duties.

The Ongoing Debate

110. The disclosure regime continues to evolve. In February 2024, the AG's Guidelines[69] were updated to provide further direction on the management of digital material, now ubiquitous in criminal cases. Additionally, in July, Southwark Crown Court published a practice note offering further guidance for its practitioners dealing with complex disclosure issues.[70]

111. It is evident that the criminal disclosure regime has been the subject of much debate and many Reviews for more than 40 years. Therefore, there is an obvious and perfectly legitimate question concerning why it needs to be reviewed again now.

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[65] Ibid, at [135].

[66] *R v Akle* [2021] EWCA Crim 1879.

[67] Sir David Calvert-Smith, *Independent Review into the Serious Fraud Office's handling of the Unaoil Case* (2022).

[68] Ibid, pp 97–98.

[69] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024)

[70] Judicial Control and Management of Heavy Fraud and Other Complex Criminal Cases Southwark Practice Note No.1/2024

112. We live in unprecedented times. The digital footprint of companies and individuals is larger than ever, and criminality leaves a much longer and more complex trail of evidence than ever before.[71] The justice system has operated under significant resource constraints for a considerable period, and this pressure has been exacerbated by the challenges of the pandemic.

113. Moreover, the need for public institutions to be accountable for fair and just outcomes for citizens looms large in society's consciousness, which is evident from the recent Post Office miscarriages of justice, to which I have already referred.

114. By considering these matters afresh, there is an opportunity for significant gains to be made and in not doing so there is a risk that the criminal justice system will be ill-prepared to cope with the increasingly complex nature of evidence and offending in the future. These, I believe, are essential reasons to undertake a Review of the criminal disclosure regime once again.

[71] HMICFRS, *State of Policing Annual Assessment* (2024) p 28.

1.1 The Development of the Right to a Fair Trial

115. Today's disclosure regime was not developed in isolation from the central tenets of the English and Welsh criminal justice system. Therefore, there is value in also reflecting on the development of *the right to fair trial* and its inextricable relationship with disclosure.

Trial of William Ireland & Others (1678)

116. One of the earliest uses of the term 'fair trial', in *The Procedures in the Old Bailey,* appeared in 1678 regarding a high treason case, where it was alleged that the defendants had contrived to murder the King, Charles II.[72] Whilst the term was not defined, the surrounding context implies that 'fair trials' follow the appropriate procedure, in which the prisoner was told clearly of the evidence that stood against them. Yet, it would take until 1898, before a defendant held a right to testify on his or hers behalf.[73]

117. Historically, the prosecutor was seen as an impartial 'minister of justice', and it was assumed that they would undertake their duties in good faith.[74] However, a prosecutor's power remained largely unchecked, as there was no appellate criminal court to which a judge could refer a case on a point of law, until the creation of the Court of Appeal in 1875.

European Convention on Human Rights (1951)

118. Following the Second World War, 46 European member states established the Council of Europe and the European Convention on Human Rights (ECHR). The ECHR, an international treaty, sought to embed, across Europe, the foundation for lasting democracy, human rights and the rule of law. The UK Government was a key architect behind this legislation and was one of the first states to ratify it in 1951, with the Convention coming into force two years later.[75]

119. The ECHR Article 6 confirmed the importance of a level playing field regarding a defendant's rights, by codifying two sets of obligations.[76] The first set deals with the expectation that an individual will get a public and fair hearing before an impartial panel without undue delay. The second set relates to rights in criminal cases, specifying that an individual be presumed innocent until proven guilty.

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[72] The tryal of William Ireland & Others, Old Bailey 1678-1689.
[73] *R v H* [2004] UKHL 3, [2004] 2 AC 145 at [14].
[74] *Banks* [1916] 2 KB 621.
[75] Ministry of Justice, *The UK's international human rights obligations* (2022).
[76] European Convention on Human Rights (1953).

Latterly, the UK Government enacted the Human Rights Act 1998 (HRA), which incorporated into domestic legislation the 16 rights set out in the ECHR, including the right to a fair trial.[77]

120. Despite progress in codifying fair trial rights, concerns arose regarding the regular use of police officers as prosecutors and their subsequent influence over criminal trials. This issue was also echoed in the 1962 Royal Commission on the Police.[78] As discussed in chapter 1, a series of serious miscarriages of justice in the 1960s and 70s compelled the courts to issue orders regarding disclosure in an effort to safeguard the right to fair trial.[79]

Equality of Arms (1981)

121. The 1981 AG's Guidelines further tethered together the right to fair trial and disclosure by popularising the concept of *equality of arms*,[80] supporting the propositions that the defence should be privy to existing relevant material. In the 1986 Guinness trial, the judge ruled that the relevance of the material was not for the prosecution to determine but for the defence.[81] Whilst this ruling was not binding, it indicated a broader issue, that entrusting such obligations to the police may lead to a conflict of interest and endanger the right to a fair trial.

R v Ward (1993)

122. In *R v Ward* 1993,[82] the Court of Appeal went further still, ultimately tethering together the expectation of disclosure to the right to a fair trial.[83] And so, the perception of a 'right to a fair trial' evolved again. Plainly, the concept of a 'fair trial' and precise rights thereunder have morphed over time. Whilst the term invokes certain defining characteristics, such as impartiality, transparency and parity between defence and prosecution, it is often difficult to perfectly put these into practice. What is clear, however, is that disclosure and the right to fair trial are hitched together.

> ***R v Ward [1993] 1 WLR 619, 674***
>
> **An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case** relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or

[77] Human Rights Act 1998.

[78] Home Office, Report of the Royal Commission on Police (Cmnd 1728, 1962).

[79] Practice Directions (Crime Antecedents) (1966) 50 Cr App R 271; *Knightsbridge Crown Court, ex parte Goonatileke* (1986) 1 Q B 1; *R v Liverpool Crown Court, ex parte Roberts* (1984) Crim L R 62.

[80] Equality of arms requires that there be a fair balance between the opportunities afforded the parties involved in litigation.

[81] *R v Saunders* (unreported T881630) CCC 29 August 1989, p 7.

[82] See chapter 1 of this Review.

[83] *R. v Ward* [1993] 1 W L R 619.

assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial.

The Right to Appeal

123. The right of appeal may be seen as a corollary of the right to a fair trial as it permits for a second hearing and to correct for miscarriages of justice. The International Convention on Civil and Political Rights (ICCPR), which the UK ratified in 1976, maintains the right of appeal in criminal proceedings with Article 14 (5) stating: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[84]

124. There are three means of appealing a decision made by the magistrates' court:[85]

a. **An appeal to the Crown Court.** Defendants may appeal decisions made by the magistrates' court, without seeking permission, within 15 days of this decision being reached. New material may be presented during this appeal.

b. **An appeal to the High Court by way of case stated.** A defendant or any "aggrieved" party may seek an appeal to the High Court asking the Court to provide an opinion or decision on how the law applies to a particular set of facts.

c. **An application to the High Court for judicial review.** Both defendants and the prosecution may seek a judicial review from the High Court on the ground that the decision reached by the magistrates' court was unlawful or irrational. The High Court may quash the initial decision or return the case to the magistrates' court with its findings.

125. In proceedings on indictment, an individual may appeal a conviction to the Court of Appeal. They are required to do so within 28 days of the conviction, but the court may express leniency in cases deemed "unsafe". Unsafe is not limited to an individual being factually innocent but also includes cases where there was insufficient evidence; there was not a fair trial, or the prosecution amounted to an abuse of process.

126. Where a conviction is quashed, the court may order a retrial within two months, but an extension may be sought at the court's discretion. Individuals may also seek an appeal of their sentence following their conviction. In cases where a miscarriage of justice has been found, the defendant may be entitled to compensation.

[84] International Covenant on Civil and Political Rights (1976), 999 UNTS 171, art 14(5).

[85] Law Commission, Criminal Appeals: Summary of the Issues Paper (2023) p 6.

127. Whilst out of the scope of this Review, it is essential to recognise the mechanism of appeal as a safeguard and remedy against disclosure failings. The Law Commission has been asked to conduct a review of criminal appeals, and as of the time of writing, is continuing work on this project.[86]

128. Whilst the courts strive to minimise the risk of a miscarriage of justice, it is not a perfect system, and thus, such incidents do happen, often with devastating consequences. Recent high-profile cases have demonstrated the importance of allowing individuals, who wish to appeal their case, the ability to access key material used by the prosecution. To facilitate post-conviction disclosure, the AG's Guidelines state that "where, at any stage after the conclusion of the proceedings, material comes to light which might reasonably be considered capable of casting doubt upon the safety of the conviction, the prosecutor should disclose such material".

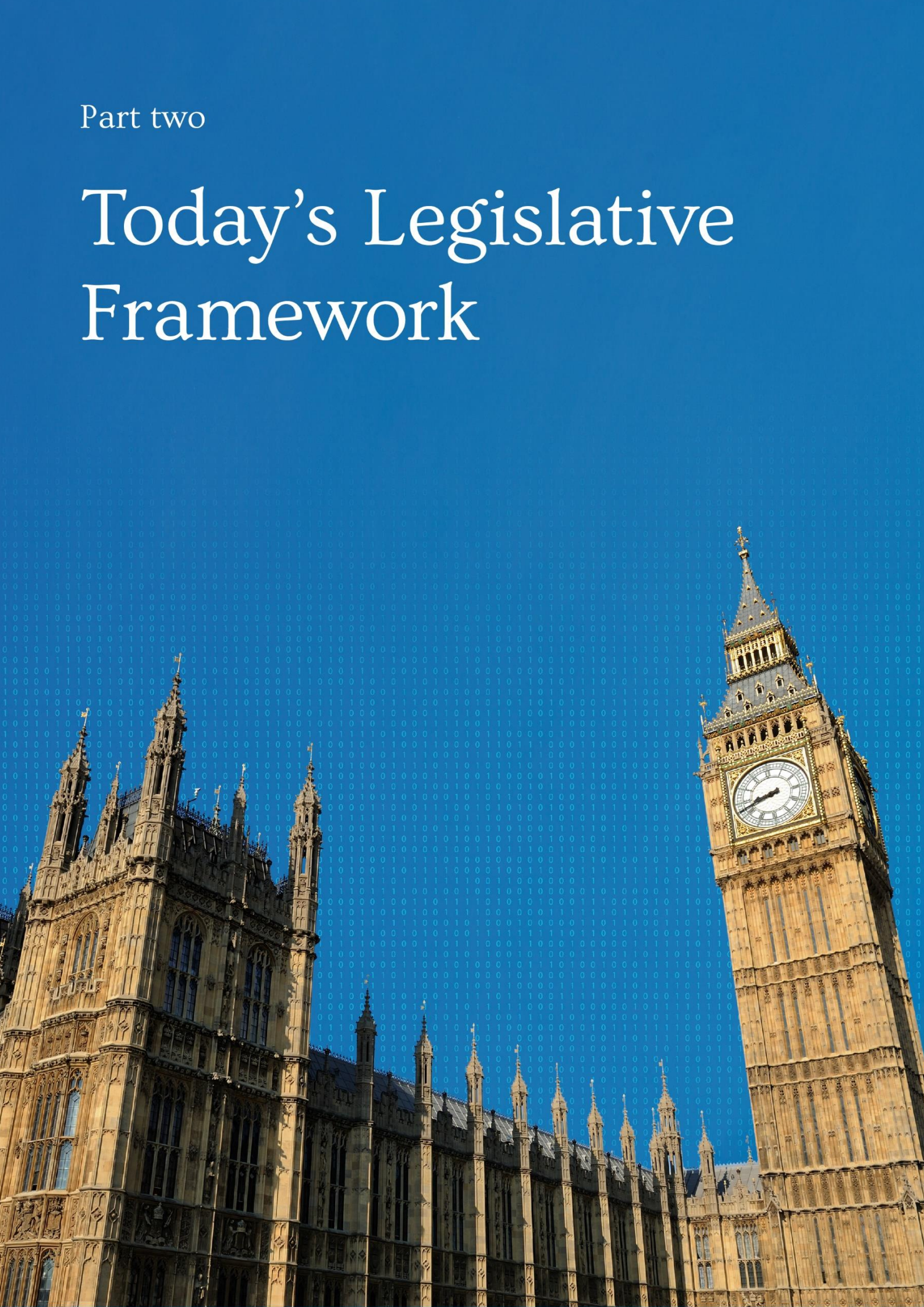
129. Despite this inclusion, I heard evidence that defendants, and their legal teams, can face challenges in obtaining access to copies of material, with some pointing to the Supreme Court judgment *R v Chief Constable of Suffolk Constabulary* as the main hurdle.[87] The chief concern regards the Court's ruling that police officers are only obligated to disclose new material if there is a "real prospect"[88] it would undermine the safety of the conviction. This is a high bar. It has also been suggested that an over-reliance on Conviction Integrity Units can cause avoidable miscarriages of justice to go undetected.

130. It must not be forgotten that material which undermines the prosecution's case or supports the defence's case must be disclosed in order to uphold the right to a fair trial. This right sits at the very heart of the English and Welsh criminal justice system. In evaluating the regime and proposing improvements, I am mindful that any reforms must not stray from this fact, lest we risk repeating past errors and injustices.

[86] Law Commission, *Views sought on criminal appeals process* (2023).
[87] R (Nunn) v Chief Constable of Suffolk Constabulary [2014] UKSC 37, [2015] AC 225.
[88] Ibid, para 39. UKC 37.

Part two

Today's Legislative Framework



2. The Legislative Framework

131. Given the substantial evolution of disclosure over the past 30 years, it can be possible to lose sight of the current regime and the legislative structures that uphold it. In this chapter, I shall discuss each constituent part of the disclosure regime, its purpose, primary audience, and practical effect. I shall begin by outlining the roles and responsibilities of law enforcement officers as they apply the disclosure test and relevance test set out in the Criminal Procedure and Investigations Act 1996 (CPIA) and Code of Practice. Next, I turn to discuss legislative provisions that require officers to schedule and redact material before it is provided to the prosecution. Subsequently, this chapter considers the practices that govern pre-trial engagement between the prosecution and defence before finally examining the process of prosecution disclosure, obligations on the defence to engage with proceedings, and the mechanism for further disclosure. The aim is to provide a broad overview of the finely balanced rules, provisions and obligations that constitute today's legislative framework.

132. The building blocks of the legislative framework are as follows:

a. **Primary Legislation –** The CPIA 1996, including regulations and rules made thereunder.[89]

b. **Common Law –**

i. *R v DPP ex parte Lee* [1999] 2 All ER 737[90] concerns the position prior to the engagement of the CPIA.

ii. *Gohil* [2018] EWCA Crim 140[91] concerns the position following a conviction.

c. **Secondary Legislation –** The CPIA Code of Practice issued under section 23 of the CPIA.[92]

d. **Secondary Legislation –** The Criminal Procedure Rules 2020 (Part 15).[93]

e. **Non-statutory guidance –** The Attorney General's Guidelines on Disclosure 2024.[94]

f. **Non-statutory guidance –** Further Law Enforcement 'In-House' Instructions (i.e., Crown Prosecution Service Disclosure Manual).[95]

133. Firstly, the CPIA provides a statutory foundation for the way in which criminal procedure and criminal investigations are to be undertaken. Provisions within the Act cover a range of matters including, but not limited to, disclosure, preparatory hearings, rulings, and magistrates' courts. The disclosure regime under the CPIA, as amended by the Criminal Justice Act 2003, envisages a staged approach

[89] 48 unique statutory instruments have been made in exercise of the powers in the CPIA. These include regulations prescribing defence disclosure time limits, rules governing expert evidence, and orders revising the CPIA Code of Practice.

[90] *R v DPP ex parte Lee* [1999] EWHC Admin 242, [1999] 2 All ER 737.

[91] *R v Gohil* [2018] EWCA Crim 140, [2018] 1 WLR 3697.

[92] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 21(3)) Code of Practice* (2020).

[93] Criminal Procedure Rules 2020.

[94] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024).

[95] Crown Prosecution Service, *CPS Disclosure Manual* (2022).

to the disclosure of unused material in the possession of the prosecution. Part I and II of the CPIA create duties for the prosecution and defence.

134. Two key documents support the practical application of the CPIA: the CPIA Code of Practice (the Code) and the Attorney General's Guidelines on Disclosure (AG's Guidelines). The Code is a statutory instrument that was last revised when it was laid before Parliament on 10 September 2020 and was subsequently approved by the affirmative resolution of both Houses. In contrast, the AG's Guidelines are non-statutory guidance, with the current version coming into force on 29 May 2024.

The CPIA Code of Practice

135. The Code, which applies to all criminal investigations carried out by police officers, details an investigator's responsibilities in relation to unused material. Unused material is material which is in the possession of the prosecution but is not relied upon as evidence. The Code does not only apply to police officers. Any other persons charged with the duty of conducting criminal investigations must have regard to it.[96] It is worth noting that, strictly speaking, the Code does not apply to a private prosecutor, who is not "charged with the duty of conducting criminal investigations", I shall return to the point latterly.

136. The Code sets out "the manner in which police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation and which may be relevant to the investigation, and related matters". The Code articulates clear and distinct roles for the investigator, disclosure officer, and the officer in charge of the investigation. Whilst these roles are theoretically and practically distinct in complex criminal cases, a single individual may assume responsibility for all three when leading an investigation into a less serious offence or due to resourcing constraints.

137. These three roles are described as follows:
    a. *Investigator* – The role of the investigator is to explore possible criminality through the gathering of information and material to determine whether a suspect should be charged with an offence. Under the Code, investigators must follow "all reasonable lines of inquiry," whether these point towards or away from a suspect. Investigators are also tasked with recording information and retaining records relating to the investigation.

[96] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 - Code of Practice* (2020) para 1.1.

Reasonable Line of Inquiry – Code of Practice

Paragraph 3.5

A reasonable line of inquiry is that which points either towards or away from the suspect. What is reasonable will depend on the circumstances of the case and consideration should be had of the prospect of obtaining relevant material, and the perceived relevance of that material.

b. *Disclosure Officer* – A disclosure officer is similarly tasked with retaining material gathered by officers during an investigation, but they also hold an ongoing duty to examine and assess material. This process involves the application of the statutory test set out in the CPIA and the Code. Once certified that disclosure duties have been correctly discharged, it is the disclosure officer's responsibility to 'reveal' material to the prosecutor to assist in the charging decision. If a person is charged, the disclosure officer plays an important role in assisting the prosecution to discharge their disclosure duty. The disclosure officer will provide material to a defendant at the request of the prosecutor. If a defence case statement is served, the disclosure officer will look again at the material retained and draw to the prosecutor's attention any material which meets the disclosure test and reveal such material.

c. *Officer in charge* – Under the Code, the officer in charge of an investigation is the individual responsible for directing the criminal investigation and ultimately ensuring that the proper procedures are followed when recording and retaining material.

Relevance Test

138. Chapter 2 of the Code states that officers are under an obligation to identify material relevant to the case. Relevant material then must be recorded, retained and revealed to the prosecutor.[97]

Relevance Test – Code of Practice

Paragraph 2.8

Material may be *relevant to an investigation* if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, 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.

[97] Ibid, pp 4–5.

139. In the investigation phase, the relevance test is used to initiate the requirement to retain and record relevant material that has been identified or generated by the investigator.[98] Material which may be relevant must be recorded. Later in the investigation, the test is used by the disclosure officer to determine what material, seized, gathered or generated during the investigation, qualifies as relevant and therefore needs to be listed on a schedule.[99]

Scheduling

140. Detailed in the Code, scheduling is the mechanism by which the disclosure officer reveals to the prosecutor any relevant material which the disclosure officer believes will not form part of the prosecution's case and, of this material, the items that they consider meet the disclosure test.

141. Further consideration is given to this matter in chapter 6 of the Code of Practice which explains how the relevant material identified should be set out on a schedule, noting that any sensitive material, such as information relating to covert human intelligence sources or relating to a witness's private life, should be recorded on a separate sensitive schedule.[100]

Scheduling Requirements – Code of Practice

Chapter 6

6.8 Each item of material is listed separately on the schedule.

6.9 The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether they need to inspect the material before deciding whether or not it should be disclosed.

6.10 In some investigations it may be disproportionate to list each item of material separately. These may be listed in a block or blocks and described by quantity and generic title.

6.11 Even if some material is listed in a block, the disclosure officer must ensure that any items among that material which might satisfy the test for prosecution disclosure are listed and described individually.

[98] Ibid, paras 4 to 4.4.
[99] Ibid, para 6.2.
[100] Ibi, paras 6.1 and 7.1.

142. The Code also suggests that certain types of material, such as incident logs, CCTV footage, interview records and custody records, should be presumed likely to contain items that meet the disclosure test. It is expected that these items will be scheduled and carefully considered to see if they do indeed contain material that meets the disclosure test.[101]

143. In a recognition that a pragmatic approach can be taken, the Code states that a schedule must be prepared in all criminal cases except for those where the "accused is charged with a summary offence or an either-way offence, and it is considered that they are likely to plead guilty".[102] Should the accused subsequently change their position and indicate or plead not guilty, then a full schedule must be produced.

144. Chapter 10 of the Code outlines the obligations placed upon the prosecutor to review the schedules of unused material and any material likely to meet the disclosure test. The prosecutor must decide what is subsequently provided to the defence, recording the reasoning behind their decisions. The non-sensitive schedule of unused material is also provided to the defence.

145. In summary, the Code sets out critical obligations placed upon investigators and disclosure officers to retain and record relevant material, to review it, and to reveal it to the prosecutor. Investigators should ensure that all reasonable lines of inquiry are investigated. Disclosure officers must inspect, view, listen to or search relevant material and personally declare that this task has been completed. The prosecutor is then bound to review the schedules and material provided to them, deciding what is to be disclosed to the defence.

The AG's Guidelines on Disclosure

146. The AG's Guidelines provide practical information regarding the duties of investigators and disclosure officers, translating primary and secondary legislation into clear, comprehensible instruction. The Guidelines are described as "high-level principles which should be followed when the disclosure regime is applied" and "not an unequivocal statement of the law" or "substitute" for "thorough understanding of the relevant legislation".

147. With an awareness that not all material is created equal, the AG's Guidelines provide advice about the types of material investigators might seek, seize, and process during an investigation. Guidance is also given regarding the appropriate handling of third-party material, electronic material, sensitive material and sensitive personal information.

[101] Ibid, para 6.6.
[102] Ibid, para 6.4.

Third-Party Material

148. The AG's Guidelines define third-party material as "material held by a person, organisation, or Government department other than the investigator and prosecutor".[103] Detail is given regarding how the duty to follow all reasonable lines of inquiry also applies to material held by third parties in the UK, stating that such material should only be requested if it has been identified as relevant to an issue in the case. To further support law enforcement, the Crown Prosecution Service (CPS) and National Police Chiefs' Council issued a joint protocol on dealing with third-party material.[104]

Electronic and Digital Material

149. Annex A of the AG's Guidelines gives particular consideration to the proportionate examination of digital material.[105] The Annex sets out a common approach to be adopted when seeking to obtain and handle digital material. Direction is given regarding how relevant material and consequently material satisfying the test for disclosure can best be identified, revealed, and if necessary disclosed to the defence without imposing unrealistic or disproportionate demands on the investigator and prosecutor.[106]

Data Protection

150. Once relevant material has been identified by an investigator and before it is revealed to the prosecution, the disclosure officer must be mindful of obligations regarding the disclosure of sensitive personal information and data. This material may have been seized from a suspect or obtained from a third party or complainant. Legislation and policy dictate that there is a balance between protecting an individual's right to privacy and the need for the prosecution to be suitably informed as to relevant material so that a charging decision can be made, and the disclosure duty discharged in due course. In determining what information may need to be obscured or 'redacted', the investigator will consider whether the material contains sensitive personal data.

151. Regarding the sharing of sensitive personal information and data, the investigator needs to be mindful of the overarching data sharing duties that are governed by UK General Data Protection Regulations (GDPR),[107] as implemented through the Data Protection Act 2018 (DPA).[108] Combined, the Regulations and Act sets out strict requirements regarding the handling, storage and sharing of

[103] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) paras 26.
[104] Crown Prosecution Service, *Protocol between the Police Service and the Crown Prosecution Service on dealing with third party material* (2023).
[105] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) paras 28-37.
[106] Ibid, p 28, para 1.
[107] *Regulation (EU) 2016/679 of the European Parliament and of the Council* (2016)
[108] Data Protection Act 2018.

personal data which apply to the transfer of information from the police, or other law enforcement agencies, to the CPS as well as to the onward sharing to the defence.

152. Part 3 of the DPA establishes six principles that investigators and prosecutors must consider. That information is used fairly, lawfully; used for specified, explicit purposes: used in a way that is adequate, relevant and limited to only what is necessary; accurate and, where necessary, kept up to date; kept for no longer than is necessary; and handled in a way that ensures appropriate security, including protection against unlawful or unauthorised processing, access, loss, destruction or damage.[109]

Data Protection Act 2018

Part 3

Chapter 2, s 34.

(1) This chapter sets out the six data protection principles as follows—

(a) section 35(1) sets out the first data protection principle (requirement that processing be lawful and fair);

(b) section 36(1) sets out the second data protection principle (requirement that purposes of processing be specified, explicit and legitimate);

(c) section 37 sets out the third data protection principle (requirement that personal data be adequate, relevant and not excessive);

(d) section 38(1) sets out the fourth data protection principle (requirement that personal data be accurate and kept up to date);

(e) section 39(1) sets out the fifth data protection principle (requirement that personal data be kept for no longer than is necessary);

(f) section 40 sets out the sixth data protection principle (requirement that personal data be processed in a secure manner).

153. Furthermore, the officer must, in parallel, also apply the 'necessity test', which is designed to challenge whether the CPS prosecutor does, in fact, require sight of personal data in order to make an informed charging decision. The AG's Guidelines suggest that, in applying the test, the reasons in favour of disclosing must outweigh those against and that assessments must be made on a case-by-case basis.[110]

[109] Ibid, ss 34 to 42.

[110] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) Annex D, para 11.

Necessity Test – AG's Guidelines

Annex D

10. Where the data is relevant, personal and there is a reasonable expectation of privacy, investigators will need to go on to consider whether it is nonetheless necessary or strictly necessary to provide it to the CPS in an unredacted form for the purposes of making a charging decision. Where it is necessary or strictly necessary to do so, the data need not be redacted; where data does not meet this standard, it should be redacted.

154. An officer must also be mindful of their obligations under Article 8 of the European Convention on Human Rights [or Human Rights Act 1998], namely "Everyone has the right to respect for his private and family life, his home and his correspondence."[111] Article 8 is a qualified right and therefore has to be balanced against other matters such as national security, public safety and the rights of others,[112] similar to the way that the relevant principles in the DPA are applied.

European Court of Human Rights

155. In considering what unredacted material can and should be disclosed, the investigator and prosecutor must weigh up the competing obligations and make a judgement. In 2003, the European Court of Human Rights considered a case where the prosecution had disclosed, to the public, CCTV of the appellant, in a public place, without sufficient cause to do so, thus violating Article 8.[113]

Legal Professional Privilege

156. The preservation of Legal Professional Privilege (LPP) is a fundamental principle in common law. Confidential communications between a lawyer and client for the purposes of legal advice or between a lawyer, client and/or third party for the purposes of litigation cannot be disclosed without the permission of the client. During an investigation, an officer may not seize material they believe is subject to LPP[114] unless it would not be practicable to identify and separate such material at the time and place of a lawful search.[115] Recognising that LPP is sacrosanct, the AG's Guidelines make

[111] European Convention on Human Rights (1953), Art 8.
[112] Ibid, Art 8(2).
[113] *Peck v United Kingdom*, App no 44647/98 (ECtHR, 28 January 2003).
[114] Police and Criminal Evidence Act 1984, s 19(6).
[115] Criminal Justice and Police Act 2001, ss 50, 51 and 65.

clear that, if law enforcement suspect that LPP material or material containing LPP has been seized, it must be isolated from other material and reviewed by an independent lawyer.[116]

Public Interest Immunity

157. Material held by the prosecution, which meets the disclosure test, may not be able to be disclosed to the defence, fully or even at all, if it cannot be done without the risk of prejudice to an important public interest.[117] Examples of such material include matters relating to national security, the intelligence agencies, and police surveillance methods. In such circumstances, the court may order that the material is withheld from disclosure, but this must only be to the minimum extent necessary to protect the public interest in question and must never imperil the overall fairness of the trial (see *H* [2004] UKHL 3 in which the House of Lords provided a template by which courts are to make public interest immunity decisions).[118]

158. Material which if disclosed would risk serious prejudice to an important public interest must be recorded by investigators in a 'sensitive schedule'.[119] In relation to any such material which meets the test for disclosure but which the prosecutor considers should not be disclosed for reasons of public interest immunity, the prosecutor must then apply to the court in writing and explain why, in their view, it would not be in the public interest to disclose the material.

Redaction

159. The practical result of CPIA and DPA provisions is that certain information, within the material gathered during an investigation, may need to be obscured before it can be first passed to the prosecution for a charging decision. Further redactions may be required before the prosecution is able to pass material on to the defence. Broadly such material falls in to three categories:

a. **Sensitive material** such as information regarding national security, intelligence methods and sources etc. As well as utilising sensitive schedules, officers must have regard to chapter 6 of the CPIA Code when determining what may qualify for redaction.

b. **Sensitive personal information and data** such as reference to a medical condition, religion, political affiliations, race or ethnicity. This material will only fall to be redacted at the stage of transfer from police to CPS for the purposes of seeking a charging decision if it cannot be viewed by the CPS because it would be unfair to the data subject.

[116] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) Annex A, para 28.
[117] Criminal Procedure and Investigations Act 1996, ss 14 to 16.
[118] *R v H* [2004] UKHL 3, [2004] 2 AC 145.
[119] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 – (section 21(3)) Code of Practice* (2020) paras 6.14 to 6.17.

c. **Other personal information or data** such as a person's date of birth, address, email, and phone number. This information can be shared by the police to the CPS, however, it falls to be redacted before being used in court or passed to the defence in order to protect the data subject and ensure that victims or witness contact details are not further shared.

160. The AG's Guidelines do make provision for an officer to seek approval not to redact information for a CPS charging decision if they are of the view that the redaction exercise will be disproportionately burdensome.[120] The AG's Guidelines suggest that such an approach would only be appropriate in a small number of qualifying cases. Should the CPS decide to proceed with a charge, redaction would then be required before relevant schedules and disclosure material could be shared with the defence.

Pre-charge Engagement

161. The AG's Guidelines, Annex B, provide further advice concerning how parties, including the suspect and their legal representative, may wish to undertake voluntary engagement regarding an investigation. Termed 'pre-charge engagement', such voluntary meetings can take place after the initial PACE interview but prior to an official charge. Pre-charge engagement is likely to be appropriate where it may lead to the defence volunteering additional information that might assist in identifying new lines of inquiry.[121]

Charging Decision

162. In a small number of cases concerning less serious offences such as shoplifting, the police may be responsible for making the charging decision. This applies to summary only offences and either way offences, with an anticipated guilty plea, so long as it is suitable for sentence in the magistrates' court.[122]

163. Most cases follow the standard procedure as set out in the CPS *Director's Guidance on Charging* (6th edition), last revised in 2020, with the expectation that officers should submit case files under a new 'National File Standard' matrix.[123] This matrix, combined with further procedural detail in Annex 3, creates, in effect, a front loading of case preparation whereby all evidential material and completed schedules are provided to a prosecutor before a charging decision will be considered.[124]

[120] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) Annex D, paras 14 to 18.
[121] Ibid, Annex B, paras 1 to 30.
[122] Crown Prosecution Service, *CPS Director's Guidance on Charging (6th edition)* (2020) Annex 1.
[123] Ibid paras 9.3 to 9.10 and Annex 5.
[124] Ibid, Annex 3.

164. Having received the files, the prosecutor considers if there are any further lines of inquiry that need to be followed and if any material is missing. Outstanding tasks are collated into an 'action plan' and a deadline is set. The officer is then responsible for collating the requested information and submitting the revised files.

165. Once the prosecutor has received this material from the investigation team and they are satisfied that all reasonable lines of inquiry have been followed, it is open to the prosecutor to take a charging decision. [125] Investigators are under a duty to continuously review the material in their possession throughout the lifetime of a case and consider if it is likely to meet the disclosure test.[126]

Prosecution Initial Duty of Disclosure

166. The statutory disclosure regime, set out under Part I of the CPIA, is triggered at the point a person is charged with an offence. The regime applies regardless of whether proceedings remain in the magistrates' courts or are sent to the Crown Court.[127] The regime also applies regardless of the type of prosecutor, be that a public body such as the CPS or a private prosecution brought by an individual or company.[128]

167. When reviewing material provided by investigators and/or disclosure officers, including schedules of unused material, a prosecutor must adhere to the prosecution's initial disclosure duty in section 3 of the CPIA.[129]

Initial Disclosure Test – CPIA

3 (1) The prosecutor must—

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

168. The test is designed to be objective and to be approached impartially. The Court of Appeal held in *Barkshire* [2011] EWCA Crim 1885 that the statutory test extends to "anything available to the

[125] Ibid, para 4.8.
[126] Criminal Procedure and Investigations Act 1996, s 7A.
[127] Ibid, s 1.
[128] Ibid, s 2(3).
[129] Ibid, s 3(1)(a).

prosecution which may undermine confidence in the accuracy of evidence called by the prosecution, or which may provide a measure of support for the defence at trial".[130]

169. The AG's Guidelines consider that there are further matters to have regard to when applying the test. These include, but are not limited to, how material could be used in cross-examination, its capacity to support court applications such as a stay of proceedings, and its capacity to undermine the reliability or credibility of a prosecution witness.[131]

170. In addition to providing the defence with material under section 3, under section 4 of the CPIA the prosecutor must at the same time serve any schedule of unused material given by a police officer.[132] Regarding timings, for matters in the magistrates' court, initial disclosure should be made as soon as reasonably practicable after a not guilty plea is entered. In the Crown Court, initial disclosure should take place prior to the Plea and Trial Preparation Hearing (PTPH), where possible or otherwise when the prosecution serves its case and in accordance with any direction made by the court.

171. The AG's Guidelines require the prosecutor to facilitate fair disclosure. This is done by probing the actions taken by investigators, advising on further reasonable lines of inquiry, and raising concerns about inadequate inspection or disclosure schedules.[133] The prosecutor is helped in this task by the CPS Disclosure Manual,[134] an 'in house' handbook designed to provide practical and legal guidance in relation to disclosure, with the aim of ensuring statutory duties are adhered to consistently and efficiently.

172. In *R v R & Others* (2015), the Court of Appeal gave guidance on the role of the prosecution and application of the disclosure test in long and complex fraud cases involving the seizure of large volumes of material.[135] It observed that the prosecution must be in the driving seat at the stage of primary disclosure, encouraging dialogue and prompt engagement with the defence. The Court endorsed the practice of 'dip sampling' material and the use of search tools to satisfy the disclosure obligation in a practicable and effective manner. It emphasised that the prosecution's approach should be transparently set out in the Disclosure Management Document (DMD).[136]

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[130] *R v Barkshire* [2011] EWCA Crim 1885, [2012] Crim LR 453 at [9].

[131] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) para 84.

[132] Criminal Procedure and Investigations Act 1996, s 4. The concept of a 'schedule' is not explicitly used in the CPIA but chapters 6–7 of the CPIA Code of Practice set out the mechanism through which officers should reveal material to a prosecutor.

[133] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) paras 76 and 83.

[134] Crown Prosecution Service, *Disclosure Manual* (2022).

[135] *R v Richards* [2015] EWCA Crim 1941, [2016] 1 WLR 1872.

[136] Ibid, at [94].

173. Furthermore, the guidance made clear the expectation for robust judicial case management, holding the prosecution to account for initial disclosure and ensuring that the defence serve a sufficiently detailed (and timely) statement. It was suggested that this would assist parties in crystallising the real issues in the case. With the fundamental principles set out by the CPIA and the Code, parties are urged to take a flexible approach to how obligations are delivered.

174. To assist the prosecution in its approach to disclosure, the 2018 Attorney General's Review of Disclosure reflected on the need to implement more widely the DMD, which had been created through the National Disclosure Improvement Plan and previously piloted by the CPS in rape and serious sexual offences (RASSO) cases.[137] The DMD encourages the prosecution to detail its disclosure strategy and include further comment on matters such as lines of inquiry, timescales, material analysis methods and their understanding of the defence case.[138] It is to be prepared by the prosecutor using information provided by the investigator. A DMD should be prepared in all Crown Court cases and be served to the defence and the court at an early stage.[139]

Criminal Procedure Rules

175. The Criminal Procedure Rules (Rules) provide a procedural framework for criminal court proceedings.[140] The rules apply to the magistrates' courts, the Crown Court, the Court of Appeal and the High Court. Segmented into 50 parts, the Rules cover matters pertaining to preliminary proceedings, custody and bail, disclosure, evidence, trial, sentencing, confiscation, appeals, costs and extradition.[141]

176. Part 15 of the Criminal Procedure Rules, as amended in April 2024, makes explicit reference to the way in which the disclosure process is expected to work as a case progresses through court, drawing upon provisions in the CPIA. Rule 15.2(2) provides that the prosecution must discharge its disclosure obligations, including service of a DMD, as soon as reasonably practicable.[142]

[137] Attorney General's Office, *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (2018) p 23.
[138] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) pp 20–21.
[139] Ibid.
[140] Criminal Procedural Rules 2020.
[141] Ibid.
[142] Ibid, r 15.2(2).

Early Disclosure

177. Outside of the CPIA framework, the common law applies in all cases (*R v DPP ex parte Lee [1999] 2 All ER 737*).[143] In the interest of justice and fairness, if the prosecution is aware of material that ought to be disclosed at an earlier stage, it should be done as soon as reasonably possible. In more serious cases this will mean that material is disclosed following arrest and prior to a matter being committed to the Crown Court. Advance disclosure may be necessary so that, for example, informed decisions can be made on seeking a stay of proceedings for abuse of process at an early stage, bail applications can be sufficiently prepared, or representations made that the defendant should be committed on a lesser charge.[144]

Defence Disclosure

178. The CPIA also sets out the expectation of disclosure by the defence through voluntary and compulsory routes.[145] In the Crown Court, a defendant is required to provide a defence statement setting out points of law, issues of disagreement with the prosecution's case, and facts on which they wish to rely. The defence is also under a duty to disclose the details of any witnesses they wish to call.[146]

179. In regard to timings, the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011 sets out, in conjunction with section 6 of the CPIA, that a defence statement should be served no later than 14 days after the prosecution has served its initial disclosure for summary proceedings, and within 28 days for Crown Court proceedings.[147] These limits can be extended by the court as long as an application is made within the prescribed 14/28 days.[148]

180. Section 11(5) of the CPIA provides for sanctions for defence statement failures. Those sanctions are of comment and inference: "the court or any other party may make such comment as appears appropriate"; and "the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned." The accused, however, cannot be convicted of an offence solely on such inferences being drawn.[149] Case law has repeatedly made clear that those are the only sanctions available for CPIA defence disclosure failures.[150]

181. Rule 15.2(5) of the Rules provides that, as soon as is reasonably practicable after the prosecutor serves a DMD or revised such document, the defendant must make such observations on the

[143] *R v DPP ex parte Lee* [1999] EWHC Admin 242, [1999] 2 All ER 737.
[144] Ibid.
[145] Criminal Procedure and Investigations Act 1996, ss 5 and 6.
[146] Ibid, ss 6A and 6E.
[147] Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011, SI 2011/209.
[148] Ibid, reg 3.
[149] Criminal Procedure and Investigations Act 1996, s 11(10).
[150] See chapter 4.12 of this Report.

content of that document as the defendant wants the court to take into account when giving directions for the preparation of the case for trial.[151]

Prosecution Continuing Duty of Disclosure

182. Although the initial disclosure test, under section 3 of the CPIA, is explicitly applied before and after a defence case statement is served, the overriding duty remains throughout the lifecycle of a case, as set out in section 7A. Therefore, if at any time before the accused is acquitted or convicted, the prosecutor forms the view that there is material which meets the test in s.3, it must be disclosed as soon as reasonably practicable.[152]

183. In practice, the duty of continuing disclosure crystallises on service of the defence statement, which both the Code and AG's Guidelines recognise. Following the service of the defence case statement and the identification of the issues in the case, the prosecution must consider whether any further material falls to be disclosed.[153] Material may also become disclosable during the trial as unforeseen issues arise.

Application for Further Disclosure

184. After the accused has submitted a defence statement, they become eligible to apply to the court for disclosure under section 8 of the CPIA. Under this provision, the defence can apply to the court where there is reasonable cause to believe that the prosecution has not adhered to its duty under section 7A and disclosed material that meets the disclosure test.

185. The disclosure obligation only relates to "prosecution material", which is in the hands of the prosecution rather than a third party. Requests for specific disclosure of unused prosecution material which are not referable to any issue in the case identified by the defence case statement should be rejected.[154]

Consequences of Non-Compliance with Disclosure Obligations

186. As explained above, section 11(5) of the CPIA provides for sanctions for defence statement failures, those being inference and adverse comment. Failure by the prosecution to comply with disclosure obligations may lead to an application to stay proceedings as an abuse of process or form the ground of a subsequent appeal against conviction. I shall return latterly in this report to discuss the matter of sanction development and efficacy.

[151] Criminal Procedure Rules 2020, r 15.2(5).
[152] Criminal Procedure and Investigations Act 1996, s 11(10).
[153] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 21(3)) Code of Practice* (2020), para 8.3.
[154] *DPP v Wood* [2006] EWHC 32 (Admin), [2006] ACD 41 at [18].

Conviction

187. The statutory duties of disclosure under the CPIA terminate once a defendant is convicted.[155] However, between conviction and sentence there is a common law duty on the prosecution to disclose any material not known to the offender which may be relevant to sentence.[156] This common law duty obliges a prosecutor to continue to review unused material following the receipt of any response to a confiscation statement.[157] The AG's Guidelines also recognise that, once proceedings have concluded, the prosecution are still required to disclose any material which might reasonably be considered capable of casting doubt on the safety of the conviction.[158]

Conclusions

188. Today's regime is made up of a complex web of overlapping obligations, each addition and revision reflective of a past miscarriage of justice or concern regarding disproportionate burdens. The volumes of guidance, protocols, and manuals speak to the reality that the original legislative framework requires illumination for investigators, prosecutors, defence professionals and judiciary alike. In a sincere effort to assist practitioners in understanding their disclosure duties better, the criminal justice system may well have muddied the water through the proliferation of such documents. Therefore, it is no surprise that during the course of my Review I heard that, although the vast majority felt that the disclosure test is sound, some are overwhelmed by the plethora of guidance and prefer to ask a colleague for disclosure advice instead.

[155] Criminal Procedure and Investigations Act 1996, s 7A(1)(b).
[156] *R v Gohil* [2018] EWCA Crim 140, [2018] 1 WLR 3697.
[157] *R v Onuigbo* [2014] EWCA Crim 65, [2014] Lloyd's Rep FC 302.
[158] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) para 140.

Fig.1 – Disclosure Regime Process

Duties and Obligations

Stage	Action	Actor	Rule or Guidance
Investigations	Pursue all reasonable lines of inquiry.	Law Enforcement	Code of Practice – Para 3.5
	Record and retain relevant material.	Law Enforcement	Code of Practice ▪Relevance Test – Para 2.8 ▪Record duties – Chapter 4 ▪Retain duties – Chapter 5 Police and Criminal Evidence Act 1984, s.22 – retention
	Isolate and return legal professional privilege material.	Law Enforcement	*R (McKenzie) v SFO* [2016] EWHC 102 (Admin) – duty to isolate Criminal Justice and Police Act 2001, s.54 – privileged material
	Schedule relevant material and material that may meet the disclosure test, with a separate schedule for sensitive material.	Law Enforcement	Code of Practice – Chapter 6 AG's Guidelines – Para 59 onwards
	Identify and reveal to the prosecutor material that may meet the disclosure test.	Law Enforcement	Code of Practice – Chapter 7 CPIA, s.3(1)(a) – Disclosure test
	Early advice from a prosecutor can be sought, by an investigator, for certain case types.	Law Enforcement & CPS	Charging (The Director's Guidance) - sixth edition, December 2020 – (Chapter 7 & Annex 6).
	Disclose material to suspect that may meet the disclosure test pre-charge.	Law Enforcement & CPS	*R v DPP ex parte Lee* [1999] 2 All ER 737 Code of Practice – Paras 6.3 and 7.1
	Redaction of personal data.	Law Enforcement	DPA 2018 - Part 3 Joint Principles for Redaction (CPS & NPCC)
	Pre-charge engagement.	All Parties	AG Guidelines – Annex B
	Case files, including schedules and any material that may meet the disclosure test, are provided to the CPS for a charging decision to be made.	Law Enforcement & CPS	AG's Guidelines – Para 72 Charging (The Director's Guidance) - sixth edition, December 2020 – (Para 4.1).
	Case files reviewed and a charging decision is made (summons, postal requestion or no further action).	CPS	Charging (The Director's Guidance) - sixth edition, December 2020
Charge	Case reviewed and a charging decision is made (summons, postal requestion, or no further action). Case may be charged on the 'Full Code Test' or the 'Threshold Test'.	CPS	Charging (The Director's Guidance) - sixth edition, December 2020

Stage	Action	Actor	Rule of Guidance
CPIA Part 1 (Disclosure) applies (s.1(1))			
Post–charge	Initial disclosure to be served prior to first hearing in magistrates' court if (1) case expected to remain in magistrates' court; and (2) case charged on the Full Code Test (unless guilty plea is anticipated). In the Crown Court, initial disclosure is to be made prior to the PTPH where possible or otherwise when the prosecution serves its case. Generally, prosecution to discharge disclosure obligations as soon as is reasonably practicable.	CPS	AG's Guidelines – Para 102 Criminal Procedure Rules 2020, r.15.2(5)
	Disclosure Management Document should be served at the same time as initial disclosure.	CPS	AG's Guidelines – Para 99
First hearing in Magistrates' court	Defendant charged with either: • Summary only offence – plea taken. • Either way offence – (1) plea before venue; and (2) allocation to determine mode of trial. • Indictable only offence – case sent forthwith to the Crown Court.	Magistrates' Court	Magistrates' Courts Act 1980, s.9 Magistrates' Courts Act 1980, ss.17A and 18(1) Crime and Disorder Act 1998, s.51(1)
Plea and Trial Preparation Hearing	Initial disclosure to be served prior to the PTPH as best practice, unless (1) case charged on Threshold Test; or (2) complex case (in which case phased disclosure may be appropriate).	CPS	AG's Guidelines – Paras 105-108
	Defendant arraigned on indictment and enters plea(s).	Crown Court	Criminal Procedure Rules 2020, r.3.32
	If not guilty plea, focus on the prosecution disclosure strategy, including scrutiny of the DMD	All Parties	AG's Guidelines – Paras 113 -116
Defence Disclosure	[Magistrates' court] Defence statement (voluntary) served 14 days post initial prosecution disclosure in the magistrates' court.	Defence	CPIA, s.6 – voluntary disclosure in summary proceedings CPIA (Defence Disclosure Time Limits) Regulations 2011

	[Crown Court] Defence statement (compulsory) served 28 days post initial prosecution disclosure in the Crown Court.	Defence	CPIA, s.5 – compulsory disclosure in Crown Court proceedings CPIA (Defence Disclosure Time Limits) Regulations 2011
	As soon as is reasonably practicable after the prosecutor serves a DMD the defendant must make any observations.	Defence	Criminal Procedure Rules 2020, r.15.2(5)
Pre-Trial	Review disclosure in light of defence statement and disclose prosecution material which meets the disclosure test.	Law Enforcement & CPS	CPIA, s.7A – continuing duty of disclosure
	Defence application for further disclosure, if defence statement served.	Defence	CPIA, s.8 – application for disclosure
Trial	Prosecutors must be fully informed about disclosure and ensure all prosecution material which meets the disclosure test has been disclosed.	Law Enforcement, CPS, and Prosecution Counsel	AG's Guidelines – Para 135
	Keep disclosure under review and disclose prosecution material which meets the disclosure test.	Law Enforcement, CPS, and Prosecution Counsel	CPIA, s.7A – continuing duty of disclosure AG's Guidelines – Para 135
CPIA Part 1 (Disclosure) no longer applies			
Post-Trial	Post-conviction common law duty to disclose material where it is in the interests of justice/fairness (including in the context of sentencing and confiscation).	Law Enforcement and CPS	*Gohil* [2018] EWCA Crim 140

2.1 Judicial Case Management

189. As the disclosure regime has developed, so has the judiciary's role. The first part of this chapter will track the broad development of judicial case management powers, including their promotion through specific schemes and protocols. The second part will consider the extent to which the judiciary are currently involved in managing the disclosure process. The third and final part will briefly discuss academic literature on the growth of judicial case management.

Criminal Procedure Rules

190. The creation of a new criminal procedure rule-making regime was a recommendation from Lord Justice Auld's 2001 *Review of the Criminal Courts of England and Wales*. The Criminal Procedure Rules (CrimPR) were introduced in 2005 to govern all aspects of criminal procedure in all criminal courts. The Rules are supplemented by Criminal Practice Directions (CrimPDs) issued by the Chief Justice. At present, both documents exist in their current iteration as the Criminal Procedure Rules 2020[159] and Criminal Practice Directions 2023.[160]

191. The CrimPR was designed to promote a cultural change within the criminal justice system, with an overriding objective to ensure that all criminal cases are dealt with justly. On the part of the judiciary, this involved encouraging the active management of cases. To that end, Part 3 of the CrimPR places a duty on the court to "further the overriding objective by actively managing the case" and equips the court with extensive case management powers. The CrimPR also places a duty on all parties to support the court in the active management of cases. The Rules require the parties to engage about the issues in a case from the earliest opportunity and throughout proceedings.

192. When first created, the CrimPR was supported in its designed aim to embed desired culture change by the Criminal Case Management Framework (CCMF). The CCMF was issued in July 2004 by the Lord Chief Justice, the Lord Chancellor and Secretary of State for Constitutional Affairs, the Attorney General, and the Minister of State at the Home Office. The CCMF set out the framework for the conduct of criminal proceedings and provided guidance on how cases could be managed efficiently and effectively from pre-charge through to conclusion. A second version was issued in July 2005 following the enactment of the CrimPR.

[159] Criminal Procedure Rules 2020.
[160] Criminal Practice Directions 2023.

193. Several cases have reinforced the importance of managing criminal cases effectively. In *Chaaban* [2003] EWCA Crim 1012,[161] the Court of Appeal noted what it described as "a significant recent change" that nowadays, as part of their responsibility for managing the trial, the judge is expected to exercise firm control over the timetable. Since the implementation of the CrimPR, other constitutions of the Court have reaffirmed this, highlighting the importance of active case management and adherence to the duties imposed on all parties involved in a criminal trial from start to finish.[162]

Better Case Management

194. January 2016 saw the introduction of the 'Better Case Management' (BCM) concept, which formed part of the implementation of Sir Brian Leveson's 2015 report, *Review of Efficiency in Criminal Proceedings*. One of the key principles of Leveson's Review was the promotion of "consistent and robust judicial case management", which was sought to be implemented through BCM.

195. Accordingly, a BCM Handbook was published in January 2018 which set out the courts' and the parties' key responsibilities. On the part of the prosecution and defence, these duties included early and continuous engagement with each other, and compliance with the CrimPR and CrimPD. As for the court, the Handbook reaffirmed the importance of "consistent, robust case management by the judiciary", stating that PTPHs "need to be more focused and interrogative than the old Preliminary Hearings" and that "all courts should have robust systems in place to monitor case progression". The BCM Handbook also dealt with disclosure, observing that "disclosure is a vital part of the preparation for trial". The BCM procedure aimed to bring early focus on disclosure, with the defence invited to make requests for disclosure at the 'stage 2' date when providing a defence statement.

196. In January 2023, a revised and updated BCM Handbook was published. The view of the post-Covid assembled 'Crown Court Improvement Group' was that the principles of BCM were sound but that there was a need for parties and courts to recommit to those existing principles. The revised BCM Handbook is intended to remind everyone of those principles and identify good practices. There is an acknowledgement that how the principles are put into practice may have to vary between court centres; however, "Resident Judges are required to ensure effective case management within their court centre and are responsible for leading the judges at their court in applying consistently the principles in this guidance."

[161] *R v Chaaban* [2003] EWCA Crim 1012, [2003] Crim LR 658 at [37] and [38].
[162] *R v Jisl* [2004] EWCA Crim 696 at [116] and *R v K* [2006] EWCA Crim 724, [2006] 2 All ER 552 at [6].

197. Other parties' responsibilities remain, along with the notion that their fulfilment is vital to enabling the court to manage cases effectively. For the defence, there is an expectation that a conference will have been held with the defendant prior to the PTPH. This should include a review of the adequacy of any DMD and consideration of any reasonable lines of inquiry or data extraction issues to which the prosecution should be alerted. The PTPH form is then there for these issues to be raised and reviewed at the PTPH.

Topic Specific Protocols

198. As alluded to earlier in the report, topic-specific protocols have been developed to provide guidance and best practice on case management in certain types of cases or stages of proceedings. In 2005, the *Protocol for the Control and Management of Heavy Fraud and Other Complex Criminal Cases* came into existence. Whilst a lack of case management had contributed to problems across the criminal justice system, nowhere was this said to be more acute than in fraud and other complex cases, justifying a bespoke protocol.

199. The Protocol acknowledged that effective case management of heavy fraud and other complex criminal cases requires the judge to have a much more detailed grasp of the case than may be necessary for many other types of cases. Regarding disclosure, the Protocol observed that the volume of documents is likely to be immense. It warned against a 'keys to the warehouse' approach for two reasons: first, it is said to be an abrogation of the responsibility of the prosecution, and second, defence teams may spend a disproportionate amount of time and incur disproportionate costs trawling through a morass of documents.

200. More recently, the Protocol has been replaced with a Practice Note,[163] which covers matters pertaining to judicial directions, utilising additional hearings to resolve points of contention, encouraging defence engagement and, more broadly, the application of case management powers in keeping a complex case to an acceptable timetable. It is noted that preparation time is required so that the judge can "exercise firm control over the conduct of the trial".[164] This Practice Note has been issued to those sitting in Southwark Crown Court but can be adopted by other Crown Court Centres.

[163] Judicial Control and Management of Heavy Fraud and Other Complex Criminal Cases Southwark Practice Note No.1/2024.

[164] Ibid, para 10.1.

Judicial Case Management in the Context of Disclosure

201. The disclosure regime's architecture, coupled with procedural rules and guidelines, effectively means that the judiciary are intended to be heavily involved in the disclosure process in the pre-trial and trial phases. Active participation by the court in the disclosure process is a critical means of ensuring that delays and adjournments are avoided, given that failures by the parties to comply with their obligations may disrupt and (in some cases) frustrate the course of justice.

202. As outlined above, the court is required to oversee the disclosure process by setting realistic time-tables, examining defence statements to ensure compliance with the formalities, and ensuring disclosure requests are focused and relate to an identified issue.

203. One of the ways in which the court may become engaged in the disclosure process is through section 8 CPIA applications. If a defendant has served a defence statement, they may apply under section 8 of the CPIA 1996 for an order for disclosure of material which should have been disclosed. Any application must describe the material subject to the application and explain why there is reasonable cause to believe that the prosecutor possesses the material and why it meets the test for disclosure. It then falls to the judge to decide whether the material should be disclosed.[165] Another way the court may become involved in the disclosure process is when issues of public interest immunity arise. In such circumstances, the courts may have to rule on whether the material ought to be withheld from disclosure.

204. Although, less frequently, the court may become involved in disclosure issues at a pre-charge stage as a result of dealing with an application under the Criminal Justice and Police Act 2001 (CJPA).[166] Under the CJPA**,** law enforcement has powers to seize material and sift it off site where it is not practicable to do so on the premises. This power is routinely exercised when investigators encounter devices that contain large volumes of electronic data or may likely contain legally privileged material.

205. Additionally, section 59(2) of the CJPA provides anyone with a relevant interest in the seized property the right to apply to a Crown Court judge for its return. Section 59(5) then provides that, on an application made by any person with a relevant interest in seized property (i.e., the prosecution or defence), the Crown Court may give such directions as it thinks fit in relation to the whole

[165] The case *R v B (David John)* [2000] Crim L R 50, whilst decided under the previous subjective formulation of the CPIA 1996, s.3, suggests that it is inappropriate for a judge to review material for the purpose of determining whether it meets the disclosure test under the CPIA 1996.

[166] A unique area of judicial pre-charge management is through the exercise of statutory powers under Part 2 of the Criminal Justice and Police Act 2001 (sections 50 to 70).

or any part of the seized property. In practice, this requires a Crown Court judge to engage pre-trial with a host of issues, including disclosure.[167]

Academic Literature on Judicial Case Management

206. It is widely recognised that judicial intervention in trial management has steadily expanded since the advent of the CPIA in 1996, almost three decades ago. Reflected in the CPIA 1996 and the later introduction of the CrimPR, in judicial protocols applicable to specific case types and in the AG's Guidelines is the expectation that judges will proactively manage the trial process from the point that a case is sent from the magistrates' court to the Crown Court. In practice, this will be from the time of the PTPH.

207. During the life cycle of a criminal proceeding in the Crown Court, the matters that a judge is expected to manage are not limited to disclosure. At the outset of proceedings in the Crown Court, judges have a duty to manage litigation, enforce the CrimPR and ensure directions are complied with.[168] These duties also extend to fixing timetables for the service of prosecution evidence and applications such as for special measures to assist a vulnerable witness in giving evidence at trial or to adduce hearsay or bad character evidence.

208. Inevitably, at the PTPH, there is an inquiry by the judge into the likely issues in the case, and the length of the trial will be estimated in consultation with counsel. As the case proceeds through the Crown Court, the judge may engage in further timetabling and, in larger cases, may direct the provision of witness lists, jury bundle indexes, prosecution case summaries, and draft agreed facts. In relation to pre-trial issues for determination, the judge may require written rather than oral submissions.[169]

209. At the trial itself, a judge may also play a role in limiting the number of witnesses to be called by the prosecution or defence given the matters in dispute, preventing certain witnesses from being called and limiting time for examination in chief and cross-examination.[170] Underpinning all of these actions is a desire for efficient use of court time and resources. Although the rise of case

[167] *R (on the application of LXP) v Central Criminal Court* [2023] EWHC 2824 (Admin), [2024] ACD 17 illustrates this, where directions were made to download electronic material, identify search parameters, and instruct independent counsel. In *Business Energy Solutions ltd v Preston Crown Court* [2018] EWHC 1534 (Admin), [2018] 1 WLR 4887 Lord Justice Green observed how broad the section 59(5) power is and the relevance of the Attorney General's Guidelines on Disclosure when making directions.

[168] Jenny McEwan, *From adversarialism to managerialism: criminal justice in transition*, Legal Studies 31(4) (2011), p 529.

[169] *K & Ors* [2006] EWCA Crim 835.

[170] *R v Lee* [2007] EWCA Crim 764 at [28]; *R v B* [2006] Crim LR 54.

management is not necessarily a product of constrained resources, it is, as has been observed, much more significant in "straitened times".[171]

210. The rise of judicial case management is fundamentally driven by efficiency considerations, but it is not without its detractors. Compelling criticisms have been made by criminal law academics and some defence practitioners of the perceived dilution of the adversarial structure through active judicial case management and other procedural initiatives. An adversarial approach has long been the bedrock of the criminal justice system in common law jurisdictions which has "at its root the notion of party rather than judicial control over a case".[172]

211. The application of procedural measures, which require the defence to engage and reveal details of their case at an early stage or risk an adverse inference being drawn by the jury in the future, interferes with the defendant's right to silence and has been described as an alteration of the adversarial system.[173] In the context of complex fraud trials, which are subject to the Fraud Protocol issued by the Lord Chief Justice in 2005, a concern that has been expressed is that a requirement to cooperate pre-trial may "prevent the defence from launching adversarial tactics designed to offer protection and a fair trial".[174]

212. For some, the move towards a management-based criminal justice system also has far more in common with criminal justice systems in civil law jurisdictions. These operate on an inquisitorial model, where the judge will take on an active role in investigating the facts of the case and overseeing the entire proceedings. The academic writer Cerian Griffiths, for example, contends that active case management, which extends to matters of disclosure, is a concern as it draws judges into "far greater scrutiny of investigations", which is "reminiscent of the inquisitorial tradition".[175]

213. Others in the academic community suggest that the growth of judicial case management has given rise to a new form of criminal justice system entirely, one that has been shaped by *ad hoc* changes to pre-trial and trial procedures. There is an argument that efficiency-based modifications of the criminal justice system have not been accompanied by the careful consideration that changes to a fundamental institution deserve.[176] It is also a risk that changes to the criminal justice system, which

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[171] Liz Campbell, Andrew Ashworth, Mike Redmayne, *The Criminal Process* (2019), Oxford University Press, pp 16–18.

[172] Aleksandra Jordanoska, *Case management in complex fraud trials: actors and strategies in achieving procedural efficiency*, International Journal of Law in Context 13(3) (2017), pp 336-355.

[173] Cerian Griffiths, *Getting people thinking and talking: An exploration of the Attorney General's 2020 guidelines on disclosure*, The International Journal of Evidence & Proof 26(4) (2022), p 366.

[174] Ibid.

[175] Griffiths, p 366.

[176] McEwan, p 523.

shifts the dial away from adversarial principles and towards a new model, will render the criminal justice system "incoherent".[177]

214. Concerns about the erosion of defence safeguards through more active case management have received scrutiny before. For some, they are considered not to pose a fundamental problem to the expansion of case management in the criminal courts. In a 2010 article, His Honour Judge RL Denyer QC (as he then was), highlighted Sir Robin Auld's view "that it is not inconsistent with the presumption of innocence to ask the defence to indicate the issues in contention in advance of the trial, just as had the long-established alibi procedure." Adverse inferences also attract judicial control and may be rejected by the jury, and for that reason, are compatible with Article 6 rights.[178] Judicial intervention and management of a criminal trial is, furthermore, not unchecked. Judges are required to refrain from "excessive intervention and maintain courtesy". The failure to do so can lead to a conviction being overturned by the Court of Appeal.[179]

215. Overall, the academic commentary on the growth of judicial case management raises a compelling argument about the modification of the traditional adversarial structure and the move towards a new style of criminal justice system which places a value on efficiency, conserving resources and reducing delay in the criminal courts. A fair trial remains the centrepiece of the criminal justice system, but judicial case management is also an embedded part of that system. This perhaps may reflect a new style of criminal justice system – one that is founded upon, but no longer exclusively guided by, traditional adversarial principles.

[177] Griffiths, p 372.
[178] HHJ Denyer KC, *The Changing Role of the Judge in the Criminal Process*, The International Journal of Evidence & Proof 14(2) (2010) p 97.
[179] Ibid, p 100.

2.2 Current Technology

216. As has been discussed, the disclosure legislative framework did not develop in a vacuum. Instead, it has been adjusted, where possible, to meet the ever-changing nature of offending and the peculiarities of the 21st century, which can most clearly be seen in our use of technology. We would be naive to believe that the criminal justice system is impervious to this digital revolution.

217. Since the introduction of the CPIA in 1996, we have seen an extraordinary technological advance. It is estimated that, as of March 2022, 93% of households in the UK have access to at least one mobile telephone, and 91% of households a home computer.[180] This development of powerful and affordable technology has made data manipulation and storage a daily habit for us all; from sending emails, taking photos, and browsing the internet. It is therefore not unreasonable to expect that technology can be co-opted to resolve the very disclosure challenges that it exacerbates. In this chapter, I set out my exploration of the role that advanced technology[181] and artificial intelligence[182] (AI) are already playing in material management and disclosure.

218. The use of technology to assist decision making in the criminal justice system is not novel: for example, fingerprinting technology as we currently know it has existed since the 1980s,[183] and the first electronic breathalyser was invented in the 1970s.[184] Lord Steyn's introductory observations in his speech in *R(S) v Chief Constable of the South Yorkshire Police* (2004), which concerned DNA analysis technology, emphasised the benefits of embracing this new technology: "It is of paramount importance that the law enforcement agencies should take full advantage of the available techniques of modern technology. Such real evidence has the inestimable value of cogency and objectivity. It is in large measure not affected by the subjective defects of other testimony. It enables the guilty to be detected and the innocent to be rapidly eliminated from inquiries."[185]

219. More recently, Lord Justice Haddon-Cave observed, in the judgment of *R v The Chief Constable of South Wales Police and others* (2019): 'Fifty years ago, the world of forensics and policing was very

[180] Office for National Statistics, Family spending workbook 4: expenditure by household characteristic, table A45.

[181] Technology – The application of scientific knowledge for practical purposes – any machinery or equipment, developed using scientific principles.

[182] Artificial intelligence – A form of technology that can perform tasks that normally require human intelligence, such as perceiving, reasoning, learning and problem solving.

[183] Marcus Smith, Seumas Miller, The Rise of Biometric Identification: Fingerprints and Applied Ethics, *Biometric Identification, Law and Ethics*, Springer (2021)

[184] Tom Parry Jones invented the first electronic breathalyser in 1974.

[185] *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196 at [1]-[2].

different. The ability of the police to identify people suspected of criminal offences was largely limited to fingerprint or eyewitness evidence. Advances in modern technology have led to dramatic advances in forensic policing."The judgment went on to note that, because of civil liberty concerns, the State legislated (i.e, Police and Criminal Evidence Act 1984 and Protection of Freedoms Act 2012) to ensure police use of such technology was within the law.

220. In taking such an approach, courts are granted the ability to scrutinise the way law enforcement agencies seize, use and retain information. It was proposed that there is indeed a balance to be found between "the protection of private rights…and the public interest in harnessing new technologies to aid the detection and prevention of crime".[186] It has taken many years for these technologies to be trusted by the public and wider criminal justice system, becoming the tools that we rely on today and often take for granted.

Reviewing Material

221. Regarding disclosure, most law enforcement agencies use well-established material management and eDiscovery platforms to assist users with reviewing digital files by enabling them to store, interrogate, analyse, and produce data. Standard functions include, for example, word searches and the application of date ranges to filter material. It should be noted that each tool/software has its own strengths and weaknesses, i.e., some tools may be more proficient at processing MP3 Audio files, others financial data in Excel files.

Utilising Search Terms

222. Keyword searches is one established analytical function within such software. Documents uploaded onto the platform have their text (if they contain any) extracted and indexed. This allows keyword searches to be run against this index to identify documents responsive to that search. The metadata fields[187] associated with the documents are also able to be searched in the same way, either separately or in conjunction with document text.

223. Keyword and metadata searches can also be layered, i.e. following one keyword search run, the hits from that search can be subject to further searches. The group of identified files can also be re-ordered by their metadata, for example, filtering documents by the date they were created.

224. Search terms can also be exact (only the exact term is returned), be stemmed (returning words with the same stem) or in concept mode (returning words that are conceptually similar). Wildcards can

[186] *R (Bridges) v South Wales Police* [2019] EWHC 2341 (Admin), [2020] 1 WLR 672 at [3]-[4].

[187] Metadata – Data that describes other data. Examples of basic document file metadata are author(s), date modified, and file size. A list of example meta-data fields can be found at Annex E.

also be used to represent one or more letters in a query (allowing a search for "fav*rite" to find "favourite" and "favorite" for example). Users must be certain of the modes and methods that they use in order to conduct examinations, to ensure that the keyword searches properly reflect the intent of the officer.

225. Keyword searches can also use 'Boolean operators'[188] and syntax[189] to combine or chain searches. Operators such as AND, NOT, OR can be used to combine keyword search parameters. Proximity characters can also be used to search for words separated by a specified distance. Many of these features are used daily by the average person when searching for emails. Moreover, the application of search terms, as a method of reviewing material, is commonplace within law enforcement and the criminal justice system more broadly.

Emerging Use of Artificial Intelligence in Disclosure

226. As discussed later, while these tools have supported law enforcement agencies adequately, there are growing concerns that the present approach cannot keep pace with the rise in digital material.[190] Therefore, several agencies are exploring how more advanced methods, such as applying AI, could be used in the disclosure process.

227. The application of AI is relatively established, with its research recognised as an academic discipline in 1956. It has however flourished in recent years, seen most clearly in the rise of generative tools such as ChatGPT and Gemini.[191] The majority of us, whether we are aware or not, are interacting with AI every day. Common uses of machine learning,[192] a subset of AI, include image recognition, translation tools, filtering spam emails and fraud detection, to name a few. Law enforcement agencies and defence firms are capitalising on the recent development of AI powered tools to review investigative material. Such tools can be utilised in a myriad of ways, with a few key applications described below and set out in figure 2.

228. **Material Prioritisation**: AI tools can be used to search large data sets and produce a prioritised list of files, from most to least likely to be relevant. The officer will first create a 'training data' set based on a manual review of investigative files and labelling the files as either 'relevant' or 'not relevant'.[193]

[188] Boolean operators are words and symbols, such as AND or NOT, that expand or narrow search parameters when using a database or search engine.

[189] Syntax – The grammatical arrangements of words in a sentence.

[190] See chapter 3.2

[191] AI chatbots that can respond to questions and prompts. They are large language models trained on volumes of text, which can learn and improve through human feedback.

[192] Machine learning – A subset of AI that uses algorithms to analyse data and then learn from it. It can then make predictions or decisions without being explicitly programmed by a human.

[193] Training – A process where a machine learning programme is given a significant volume of labelled data and a set of instruction on how to sift/categorise the data.

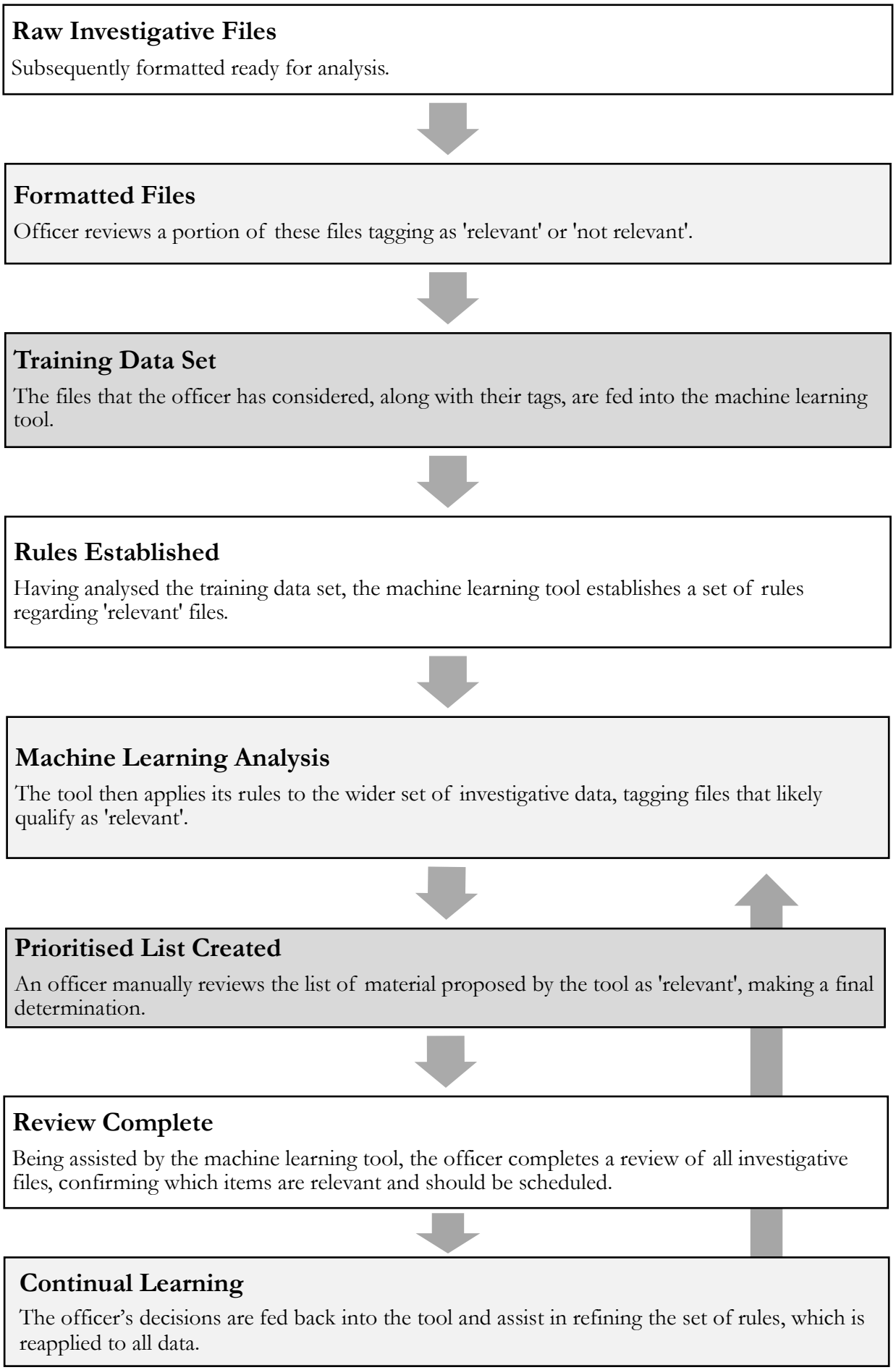
Every individual decision made by an officer is recorded. This labelled data set is then fed into the machine learning tool, which creates a set of rules that will assist in determining what features 'relevant' or 'not relevant' files might contain. The tool will then apply the rules to a new set of data and calculate the likelihood of whether a file is relevant or not. In finishing the process, the tool will produce a list of files, prioritised from most to least likely to be relevant, for an officer to review. The officer reviews the list to confirm whether a document is indeed relevant or not and the decisions are fed back into the tool for continuous learning. This increases the accuracy of future prioritised lists. The machine learning tool can then use the ever increasingly refined rules to re-review material already previously considered, in turn creating a positive feedback loop. This process relies on early accurate decisions made by officers.

229. **Quality Assurance** – Furthermore, the tool can be used to pick up on discrepancies and errors. Where an officer has decided a file is not relevant, but the AI tool suggests that it may be, the file is flagged for review by a human.[194]

230. **Concept Groups –** Machine learning can also organise material into up to 70 different concept groups based on key themes (such as cash, money, monies, finances, fees etc). Each concept group has 20 keywords that give an indication as to why those documents have been grouped together.

[194]This process would likely be used alongside existing mechanisms for quality assurance, such as dip sampling. Decisions on whether something is disclosable or not would still be taken by the prosecutor.

Fig.2 – Machine Learning and Material Review Pathway



Real-World Example

231. It is these advanced AI powered tools that are now on offer to those in the criminal justice system who can afford them. One such tool, used by the Serious Fraud Office (SFO) to identify undermine or assist material at much faster rates compared to a human, is OpenText Axcelerate.[195] Using machine learning, the tool, once trained, can analyse all formatted digital material and display material most likely to meet the disclosure test at the top of the search results.[196] Under their CPIA duties, a human reviewer will then consider each item in this newly prioritised order.

232. In February this year, the SFO identified an issue which had occurred in the process of configuring Axcelerate for use by the agency. As a result, searches did not return all expected results, with a number of documents being omitted due to formatting. I discussed the matter with the Director of the SFO and understand that, once identified, action was taken to ensure it would be swiftly rectified. The software was subsequently reconfigured to address the issue for new material, and the issue was in the process of being remediated for pre-existing material. Where necessary investigation material is being re-analysed. I am told that no new significant results have been flagged thus far and that changes to the programme have been made to safeguard against this in the future.

233. As with any technology, including applications on smartphones and laptops, updates are required to maintain a software and frequent checks should be carried out to ensure the tool is running as intended. This is much the same with the service of a car. If and when any errors are identified, work should be undertaken to patch them as quickly as possible, with full and frank transparency of what remedial work has taken place. This has not discouraged me from making any recommendations on this matter. If anything, it has clarified my view that emerging technology can be used, however, only in concert with a greater emphasis on regular maintenance and rigorous performance evaluation.

Scheduling

234. Scheduling, as detailed in chapter 3.2, has been identified as a particular time and resource intensive part of the disclosure process. Two approaches are currently being trialled to streamline the scheduling process and reduce burdens:

a. **Metadata schedules -** Use standard software functions (non-AI) to generate a schedule that only includes the metadata of files (example Annex E).[197]

[195] Other platforms are available.

[196] Annex G provides further detail of existing material management software and their features.

[197] Metadata – Data that describes other data. Examples of basic document file metadata are author(s), date modified, and file size. A comprehensive list of examples can be found at Annex E.

b. **AI-generated written schedule -** Use generative AI to 'read' documents and produce a schedule of written descriptions of each item.

235. Regarding approach (a), this is already being used in large cases. Specifically, I know of the SFO's case BGC01,[198] in which the directors and employees of three UK-registered companies were investigated and prosecuted for fraud. The case generated an approximate 8.5 million documents, with the defendant's company providing an estimated 2.5 million documents. Most of these documents were in digital format and an examination by the prosecution of the relevancy search terms yielded over 140,000 individual hits.[199] Manually scheduling items of this amount could take years. Comparing this to readily available technology that can extract metadata to produce schedules within, at most, a few hours, it is clear that this viable solution could be extremely beneficial if implemented more widely in high volume cases. The type of data provided within such a schedule, for example, document author, sent date, recipients, save folder, subject title and attachments, is often more categorical in nature than 'written' schedules.

236. Turning to approach (b) there is software being designed which aims to use AI to support considerations of relevance and to generate descriptive schedules, in conjunction with digital platforms such as Relativity. Software of this nature has been piloted on cases by His Majesty's Revenue and Customs (HMRC),[200] where generative AI has been used to schedule relevant material[201]. Whilst I know of its ability, I remain vigilant about the hallucinations[202] that generative AI can have. I am also aware, however, that a human writing a description of an item may be able to pull out certain salient pieces of information as a result of their wider knowledge of the case, which will be more challenging for an AI model to do. The aim should be in reducing the administrative burden of creating schedules, not inadvertently hiding important information from the defence.

Redaction

237. Redaction is another step that adds to the lengthy disclosure regime process; not necessarily the menial job of removing the sensitive material itself, but more so determining what needs to be redacted. I am aware of ongoing work in the Home Office to develop tools that can perform redaction, for both textual and audiovisual material.

[198] HM Crown Prosecution Service Inspectorate, *An inspection of the handling and management of disclosure in the Serious Fraud Office* (2024) para 5.55.

[199] Ibid, paras 6.72, 5.62 and 5.67.

[200] HMRC is the UK's authority for tax, payments and customs.

[201] Annex G provides further detail of existing material management software and their features.

[202] AI hallucination – A phenomenon wherein generative AI does not have the complete information it needs to respond to prompts, and therefore generates a nonsensical or altogether inaccurate output.

238. This includes the welcomed Home Office funded work carried out by the Police Digital Service to design and deliver automated text redaction frameworks, announced in March this year. Forces can now procure from four suppliers, who have qualified to be part of the framework. I have been told that up to 80% time-efficiency savings are estimated, when compared to the tools currently used.[203] The framework has now novated to BlueLight Commercial. We await to see the real-world result of the initial roll-out.

[203] Police Digital Service, 'Police Digital Service redaction tool framework will save police time', news release 6 March 2024.

Part three

Findings – The Challenges

3. Findings

239. In April this year, I published my preliminary findings[204] to this Review.[205] I reiterate those findings here, together with further observations. I am no less convinced now than I was at the start of my Review of the importance of the disclosure process within criminal legal proceedings and the challenges it faces. The Review's findings and my primary concerns therein are discussed in the following broad themes:

[204] Independent Review of Disclosure and Fraud Offences, *Preliminary Findings Paper* , (2024).

[205] Independent Review of Disclosure and Fraud Offences, Summary Meeting Minutes (2024).

3.1 Digital Material

240. As discussed in chapter 2.2, when the Criminal Procedure and Investigations Act 1996 (CPIA) was introduced, few would have predicted quite how swiftly and pervasively technology would enter almost every area of our lives. With this rise in technology also came the proliferation of digital material, stored in myriad formats and locations such as phones, laptops, smartwatches, and the cloud,[206] to name just a few.

241. The criminal justice system has not been immune to this explosion of material. The House of Lords Science and Technology Committee heard evidence that "90% of crime…has a digital element".[207] The volume of material generated and gathered in criminal cases continues to rise. Combined with the progressively complex nature of offending, disclosure has become an increasingly time, and resource-intensive process for all parties. This is acutely felt in the prosecution of crime types such as fraud, and rape and serious sexual offences cases (RASSO), where digital evidence is frequently found.

242. By way of example, the average Serious Fraud Office (SFO) case has around 5 million documents. To date, the largest case on the SFO system has 48 million documents (6.5 terabytes or 6,500 gigabytes). If printed, the volume of material in an average SFO case would stack considerably higher than the Shard.[208]

243. However, problems when dealing with unused material are not confined to serious fraud or RASSO cases. Although the scale is smaller, handling unused material in other criminal cases, whether tried in the Crown Court or magistrates' court, presents similar challenges that need to be met. As the House of Commons Justice Committee heard,[209] "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". Barrister Joanna Hardy-Susskind 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

[206] Cloud storage uses remote servers to store data, allowing for instant access.

[207] House of Lords Science and Technology Select Committee - *Forensic science and the criminal justice system: a blueprint for change* HL Paper 333, (2019), para 145.

[208] 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. (Data on document numbers provided by the SFO).

[209] House of Commons Justice Committee, *Disclosure of evidence in criminal cases* (2018), HC 859, para 52.

show what time they left". Accurately reviewing, analysing, and disclosing such material in a timely and resource effective manner, is no mean feat.

244. Plainly, investigators have a significant job gathering and triaging digital material. The Police and Criminal Evidence Act 1984 (PACE) gives investigators the power to seize material from a subject pursuant to a warrant under certain circumstances to "prevent it being concealed, lost, altered or destroyed".[210] The Criminal Justice and Police Act 2001 (CJPA) contains provisions to seize and sift material off site where it is not reasonably practicable to determine what can and cannot be seized whilst on premises.[211] Officers must also be mindful of provisions in the Victims and Prisoners Act 2024 when seeking material from a third party about a victim. The Act states that such requests can only be made if it is "necessary and proportionate".[212]

245. In an effort to encourage a thinking approach to digital material gathering, as set out by the Court of Appeal in *R v Bater-James (2020),* "there is no presumption that a complainant or witness's mobile telephone or other devices should be inspected, retained, or downloaded, any more than there is a presumption that investigators will attempt to look through all material held in hard copy".[213] Once seized, digital material, as with other types of material, is subject to obligations set out in the CPIA and CPIA Code of Practice (the Code).[214]

246. It has been suggested that, in this digital age, officers simply need to seize less material, which will, in turn, reduce the disclosure burden. I am inclined to agree insofar as investigators should carefully consider the charges that may be brought, focusing on the real issues in a case. That being said, many criminal investigations with live and complex operations, such as human trafficking, may not have the luxury of being able to pick and choose what they seize. Every investigator is bound to follow all reasonable lines of inquiry and is under a duty to identify, record and retain relevant material, and not doing so would leave them open to fair criticism. It is naive to believe that disclosure burdens can be radically reduced if only officers 'seized less material', though a more focused investigation would certainly be beneficial in certain circumstances.

247. Once digital devices have been seized during an investigation, the next hurdle is to extract, analyse and interpret the data stored. This process is undertaken by highly skilled digital forensic units, who then pass back material and insights to the investigator for further analysis. Larger law enforcement

[210] Police and Criminal Evidence Act 1984, s 19.2(b).
[211] Criminal Justice and Police Act 2001, ss 50 and 51
[212] Victims and Prisoners Act 2024, s 28 (not yet in force as of November 2024).
[213] *R v Bater-James* [2020] EWCA Crim 790, [2021] 1 WLR 725.
[214] See chapter 2 – Today's Legislative Regime.

agencies have in-house units, whilst most local police forces will send digital devices to Police Digital Forensic Units and independent private providers.

248. Investigators and academics advised me that the rise in digital devices and disparity in access to digital forensic units has created a backlog of devices, which is significantly delaying the progression of criminal cases and needlessly impacting victims.[215] In December 2022, an inspection of regional forces and organised crime units found that the national backlog of devices, yet to be examined by digital forensics units, stood at 25,000 items. It was discovered that some forces take up to 18 months to examine devices.[216] Plainly, this is an unacceptable and avoidable delay to case progression.

249. Over the past decade, it has taken law enforcement increasingly more time and resource to wade through digital material, discharge disclosure obligations and bring a case to court. As illustrated in figure 3, in 2014 it took an average of 60 days to bring a case to court. In 2023, it took over double the number of days to achieve the same task.[217] The correlation between case complexity and delay in progression remains when comparing offences (figure 4). [218]

250. Offenders are also aware of the challenge that the rise in digital material poses to a successful prosecution. Sir Peter Gross reported, a decade ago, that sophisticated criminality included actions such as deliberately generating significant material, hiding incriminating evidence by labelling it Legal Professional Privilege (LPP) and "creating international trails of third-party material".[219]

251. Notwithstanding the steps taken, such as the production of guidance, and the emerging technology and AI being trialled by law enforcement,[220] it has been argued that the criminal justice system's inability to manage the rise of digital material effectively is at the very heart of the many disclosure mischiefs that follow. Lessons must be learnt from the creation of the CPIA. We should be under no illusion, and we must not be caught unaware; all the signs suggest that the future is increasingly digital, and it is vital that our disclosure regime is fit to deal with it.

[215] Cerian Griffiths et al, *Digital Forensics within the Criminal Justice System: Use, Effectiveness and Impact* (2024).
[216] His Majesty's Inspectorate of Constabulary and Fire & Rescue Service, *An inspection into how well the police and other agencies use digital forensics in their investigation.* (2022).
[217] Ministry of Justice, Criminal court statistics quarterly: July to September 2024 (18 December 2024).
[218] Ibid.
[219] Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (2011), para 56.
[220] See chapter 2.2.

Fig.3 – Increasing delay in bringing a criminal case to court

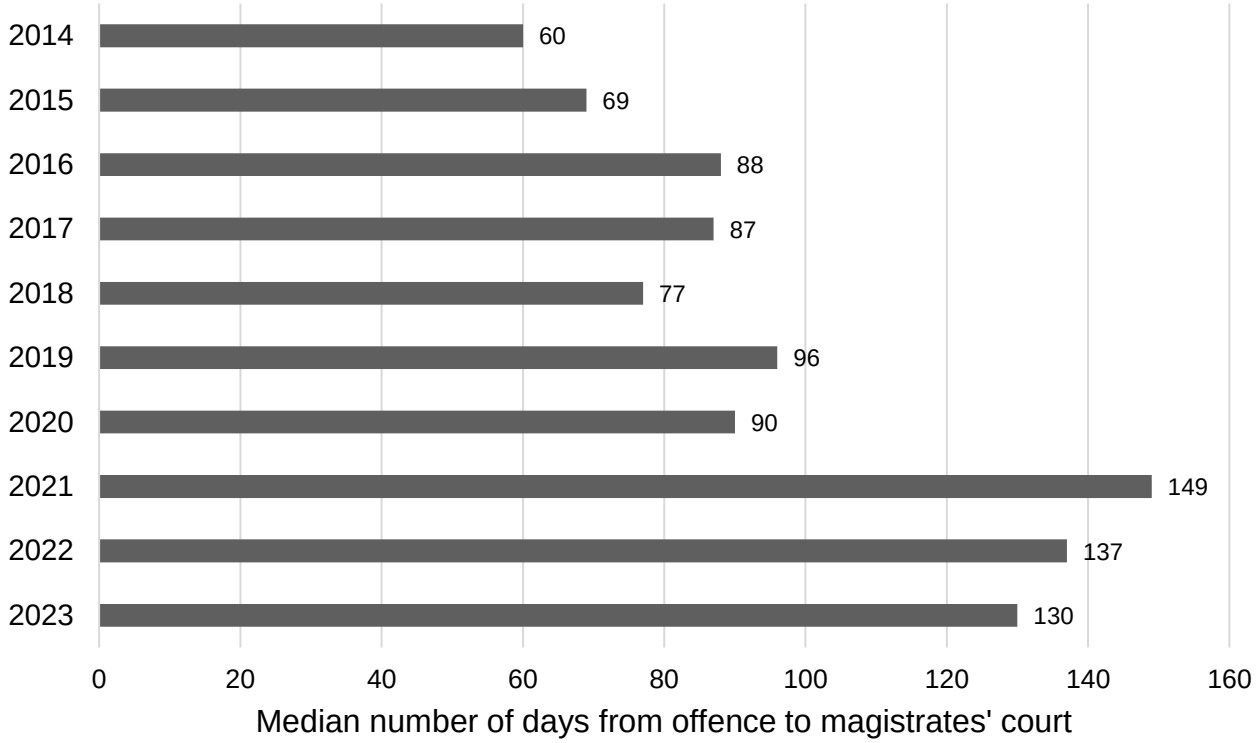
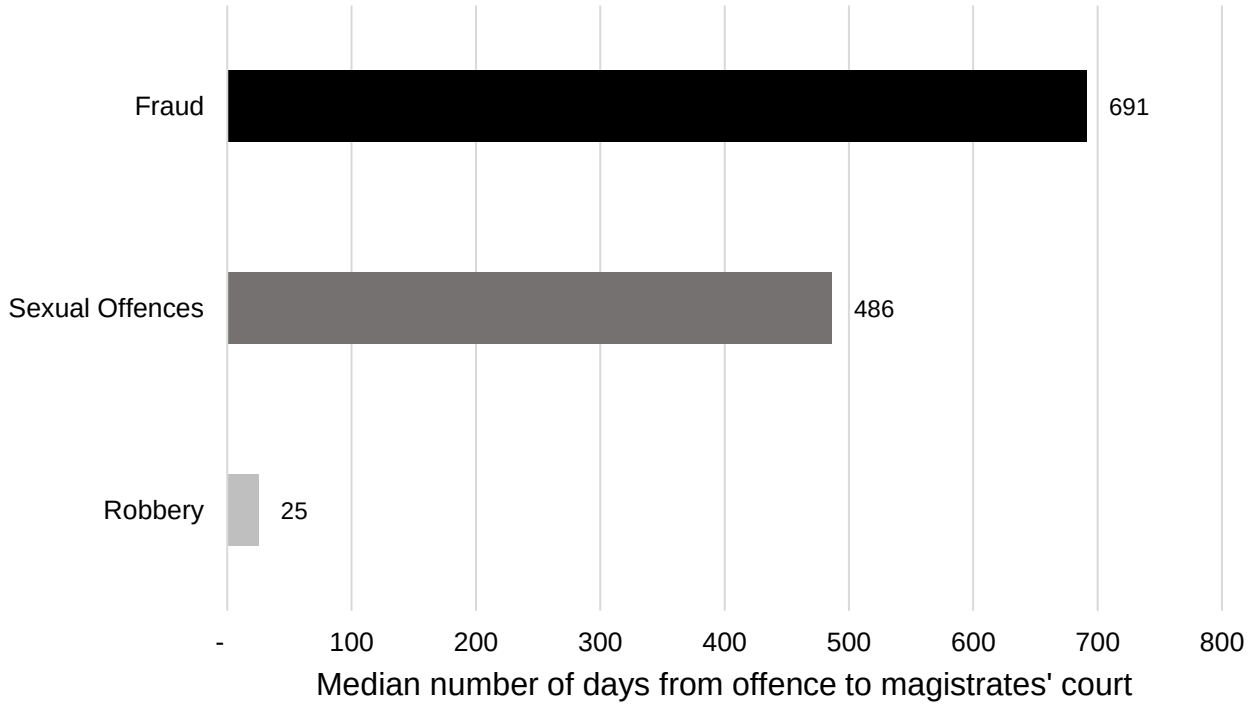


Fig.4 – Complex criminal cases take longer to reach court (2023)



3.2 Applying the Regime

252. Giving appropriate consideration to the exponential rise of digital material in criminal cases, I turn next to the evidence this Review has heard regarding the real-world application of the CPIA and Code of Practice by law enforcement officers and the subsequent arising concerns. As those on the front line are responsible for gathering and analysing material, investigators and disclosure officers must understand how to apply the legislative principles accurately and consistently during their day-to-day activities. Dysfunction during this initial stage of the disclosure process can have severe downstream consequences.

Relevance Test

253. Turning first to the Code of Practice *relevance test* as applied both in the investigation stage and in discharging disclosure duties.[221] The test was a significant topic of debate during my engagement. Practitioners and members of the judiciary observed that concerns regarding the width of the test are not unfounded, and part of the mischief can be traced back to the inclusion of the wording "some bearing" within the test.

254. Many were of the view that law enforcement officers when interpreting the already wide test, broadened it further to avoid compromising the prosecution's case by missing material. The combination of a wide test, the speculative interpretation of 'some bearing' and a well-meaning but nervous approach by officers often leads to the determination that almost all material in an investigation could fall within the definition of relevant material.

255. There are clear concerns that the confluence of these factors has created a disparity between the sheer mass of material that an officer has deemed 'relevant' and that material which may actually be of any interest or use to the prosecution and defence. This issue is aggravated by the increasing volume of digital material,[222] which not only takes more time and resources to analyse but also magnifies scheduling burdens, in turn delaying case progression. The relevance test, though noble in aim, was designed in a pre-digital age and is presently straining under the weight of thousands, sometimes millions, of investigative documents.

256. Conversely, I have heard views from investigators, defence professionals and rights groups that the current width of the relevance test provides a vital safeguard against miscarriage of justice. In casting the net wide, investigators are less likely to wrongly consider significant material as irrelevant and

[221] See chapter 2.

[222] See chapter 3.1.

more likely to capture relevant and disclosable material useful to the defendant, thereby reducing the risks associated with a narrow material gathering approach.

Disclosure Test

257. Many investigators, from a range of law enforcement agencies, were of the view that the CPIA section 3 disclosure test is too subjective in nature.[223] I have heard that it is not uncommon for two disclosure officers, looking at the same material, to arrive at entirely different conclusions as to whether the item in question should be disclosed. Investigators referred to the "might reasonably be considered capable" provision as the primary cause of confusion.[224]

258. *Prima facie*, the concepts of undermining and assisting are indeed accessible and comprehensible. I was told that this formulation is well understood by legal practitioners and members of the judiciary. However, I am of the view that the wording *"*might reasonably be considered capable of*"*, requires significant attention when seeking to understand the finely balanced 'sub-tests' that must be considered. An inexperienced investigator, considering significant volumes of material, must appreciate the following subtleties when applying the test:

a. which *might* – a widening provision, involving an element of speculation.

b. *reasonably* be considered – a narrowing provision, injecting a requirement of objective assessment, the decision to disclose must be made on reasonable grounds, implying the application of rationally defensible analysis.

c. *capable of* – a widening provision, looking beyond whether the material does undermine the prosecution case or assist the defence case, to whether it may, or may not, have this effect.

d. *undermining* – a narrowing provision, which weakens the prosecution's case.

e. *the case* for the prosecution against the accused – a widening provision, not limited to undermining the charge brought by the prosecution but the case for the prosecution.

f. or of *assisting* the case for the defence – a widening provision, the material does not need to strengthen the defence case, but rather it is sufficient to trigger disclosure if it assists, in the sense of supporting, the defence case.

[223] Criminal Procedure and Investigations Act 1996, s 3(1)(a) provides "The prosecutor must disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".

[224] Ibid.

259. There is potential for undesirable outcomes at both ends of the interpretation spectrum. At one end, there is the possibility of a miscarriage of justice arising from a failure to disclose something critical and, at the other, over-disclosure arising from a risk-averse approach, which undermines the court's confidence in the prosecution's ability to discharge its CPIA obligations accurately. In both instances, the pressure is then on the designated prosecutor to rectify mistakes. Notwithstanding these observations, the majority of criminal justice stakeholders were of the view that the current test is fundamentally sound, with the primary mischief arising from insufficient training for law enforcement regarding how the test should be interpreted and applied.[225]

260. The tenor of the test is for the prosecution to lean in favour of disclosure when the significance of the material is in doubt. Considering the above, I do have sympathy for the many investigators who told this Review that they struggle to objectively apply the test as a direct result of the not insignificant number of moving parts discussed.

Rebuttable Presumptions

261. The 2018 Attorney General's Guidelines confirmed that there are certain types of material which an officer should expect to disclose. The burden is then on the prosecution to provide evidence as to why such material should not be disclosed. Police have indicated that this rebuttable presumption list is too ambiguous and encourages excessive disclosure, above and beyond that which satisfies the disclosure test. Individuals raised concerns that the current method discourages a 'thinking' approach and turns disclosure into a tick-box exercise, subsequently increasing the risk that key material is not critically reviewed.

262. A 2023 National Police Chiefs' Council (NPCC) data collection exercise[226] with five forces found:
    a. Revelations to the Crown Prosecution Service (CPS) has increased by an average of 167% since the introduction of rebuttable presumptions.
    b. The current rebuttable presumption categories capture an average of 65% of the unused material.
    c. On average, between 60%-80% of rebuttable presumption material does not meet the test for disclosure.

263. Similarly, the current Criminal Practice Direction, drawing upon rule 19 of the Criminal Procedure Rules which deals with expert evidence, contains a non-exhaustive list of examples of potentially relevant information which must be disclosed regarding the assessment of an expert witness.[227]

[225] For example see *Practitioners Advisory Panel Session 1* and *Representatives Panel Session* summary meeting minutes.
[226] National Police Chiefs' Council, *Improving Policing Efficiency: Redaction Savings Exercise Project*, (2023), [unpublished].
[227] Criminal Practice Direction 2023, paras 7.1.4–7.1.6. Criminal Procedure Rules 2020 r.19.3(3)(c).

Scheduling

264. Broadly, there is agreement that, in cases where a non-guilty plea is likely, both the prosecution and defence require insight regarding the relevant material the investigation has gathered. This matter is not in dispute. However, the scheduling mechanism by which this is currently achieved has been criticised by every major stakeholder group with whom I spoke. I set out those views below.

265. Firstly, the current scheduling burdens placed upon investigators are substantial for the average Crown Court case and almost inoperable for the most complex or otherwise voluminous case. A risk-averse approach to *relevance*, combined with a strict adherence to individually describing items and limited use of blocklisting, results in law enforcement allocating significant resource in undertaking the scheduling process.

266. In 2015, City of London Police (CoLP) began an investigation into a Ponzi-style investment scam worth an estimated £70 million,[228] which experienced significant delays largely attributable to the disclosure process. The investigation required a full-time member of staff and deputy disclosure officer to complete 12 sets of schedules and review almost 11,000 items. CoLP provided circa ten lines of text describing each item. The final schedule was signed off eight years later in 2023.

267. As discussed, in all cases likely to end up in the Crown Court, an investigator is now expected to provide the CPS with complete disclosure schedules before a charging decision can be made. The Policing Productivity Review estimated that in 2022/23, approximately 532,000 officer hours were used to build full files including schedules for cases that were deemed by the CPS as 'no further action'.[229]

268. Given the number of hours and total cost dedicated to creating schedules, one could hope that the resulting products would achieve the purpose for which they were created, namely, to inform the prosecution and defence of all material relevant to a case. In 2017, a joint inspection of the disclosure of unused material in 146 volume Crown Court cases found almost a quarter of all schedules inspected to be "wholly inadequate".[230]

269. Poor quality schedules not only hinder the ability of a prosecutor to make an informed charging decision, but as deficiencies are identified and challenged, further delays are created when disclosure officers are asked to amend, improve, or simply rewrite schedules containing thousands of items.

[228] Crown Prosecution Service, *'Former boss of a City of London foreign exchange company jailed for an around £70 million'*, news release (2023).

[229] National Police Chiefs' Council, *The Policing Productivity Review* (2023), p 20.

[230] This is the latest statistic that the Review has been able to source on this issue.

Such events are particularly regrettable in time-sensitive cases where it is in the complainant and defendant's interest to achieve a swift resolution.

270. Yet, matters only worsen if the prosecution fails to spot such mistakes. I have heard that, for reasons latterly discussed, it is not uncommon for instances to arise where the designated prosecutor fails to challenge inadequate disclosure, thereby creating disclosure 'timebombs' that detonate shortly before trial at great cost to the Crown, or worse still, they remain undiscovered.

Block Listing

271. In a desire to reduce scheduling burdens, the 2011 AG's Guidelines, and current AG Guidelines,[231] highlighted that there are provisions within the Code for the 'block listing' of items. Compared with traditional descriptive schedules, block listing purports to offer a separate, more pragmatic method to fulfil obligations. Yet, block listing has failed to meaningfully alleviate burdens. It has been suggested that the relevant provision within the Code itself is unclear, which in turn is causing confusion both at the investigation and court level.[232]

CPIA Code of Practice – Blocklisting

Paragraph 6

6.7 - Material which the disclosure officer does not believe is sensitive must be listed on a schedule of non-sensitive material, which must include a statement that the disclosure officer does not believe the material is sensitive…

6.8 - The disclosure officer should ensure, subject to paras 6.10-6.11 below, that each item of material is listed separately on the schedule, and is numbered consecutively (which may include numbering by volume and sub-volume).

6.9 - The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether they need to inspect the material before deciding whether or not it should be disclosed.

6.10 - In some investigations it may be disproportionate to list each item of material separately. These may be listed in a block or blocks and described by quantity and generic title.

6.11 - Even if some material is listed in a block, the disclosure officer must ensure that any items among that material which might satisfy the test for prosecution disclosure are listed and described individually.

7.3 - The disclosure officer should draw the attention of the prosecutor to any material an investigator has retained (including material to which paragraph 6.15 applies) which it is considered may satisfy the test for prosecution disclosure in the Act, explaining the reasons for coming to that view.

[231] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2011) para 51.

[232] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 - Code of Practice* (2020) paras 6.8 to 6.11.

272. Upon examination, it seems that those drafting the Code determined that, at the time, the traditional scheduling method was the most appropriate scheme of revealing relevant and disclosable material to the prosecution and ultimately the defence. This is demonstrated through the easily comprehensible use of strong directives such as 'should' and 'must'. However, when turning to the option of block listing, this language is replaced with the more opaque, and arguably more reluctant, use of 'may'.

273. Paragraph 6.10 is the central cause of this concern. The wording does not commit to the obvious statement that in some cases it will be disproportionate to list every item but instead prefers to qualify that "it *may* be disproportionate". Furthermore, even in instances where it would be disproportionate to list every item, the ability to use the block listing provision remains vague, "these [items of material] *may* be listed in a block". It is understandable, therefore, that investigators and courts are unclear as to how this provision should be appropriately and consistently used. The inability to effectively utilise this tool, already provided for in legislation, has resulted in the inefficient use of law enforcement time and resource spent writing traditional schedules for material in cases where it is disproportionate to do so.

Schedule Quality

274. Poor quality schedules also leave the prosecution open to fair criticism from the defence over a failure to follow procedure. Whilst it is rare for a case to be dismissed on this basis, I have been alerted to the frequent occurrence of adjournments and protracted proceedings, which beyond incurring financial costs, effectively means that justice is delayed for all parties.

275. Further, whilst the investigator and prosecutor undertake this resource-intensive and slow process, a defendant can be left in a state of ambiguity as they await the service of the initial schedules, which may be numerous, inaccessible and imprecise. The defence then need to employ sufficient resource to interrogate thousands of pages of item descriptions. Such an exercise is more challenging for those legally aided defence practitioners who, unlike their privately funded counterparts, are much less likely to have access to advanced technology and smart search tools.

276. It begs the question in complex cases of who - if anyone- is well served by the current expectation that public money is being used to individually describe, often to insufficient levels of detail and quality, thousands of possibly relevant items of material. As the volume of digital material in an average criminal case continues to climb, so will the time and resource required to undertake descriptive scheduling.

277. Finally, I have also carefully considered matters relating to the preparation of the unused material schedule in guilty anticipated plea cases. As a matter of course, at the present time, the CPS requires a comprehensive schedule to be prepared before a charging decision is made. Both police and prosecutors raised concerns that time and resource is wasted in developing an initial schedule, particularly in cases when the evidence is strong and/or a suspect, who has already made significant admissions, goes on to enter an early guilty plea.

Sensitive Schedules

278. Concerns were raised regarding the sharing of sensitive material between the police and the prosecution. Many investigators are still expected to travel around England and Wales with a physical copy of sensitive material (papers or portable hard drive) and sensitive schedules to seek a prosecutor's view. The outdated assumption that this process must happen in person could be argued to be a poor use of investigators' time when secure platforms[233] for sensitive material sharing are already available and used by government departments and some law enforcement agencies.

Redaction

279. From recent joiners to experienced seniors, all law enforcement stakeholders made known their frustration regarding the burden created by redaction. The first concern centred on the amount of time and resource required to redact material, all of which is expected to be completed before the CPS reviews case files and makes a charging decision. The Policing Productivity Review estimated that in 2023 for each pre-charge file, an average of 5.5 hours was required to redact material, which may include complex material such as audio and video files from body worn cameras.[234]

280. The Review heard from investigators who, cognisant of the significant workload generated by redaction, decided not to progress certain cases with merit because of the estimated redaction and scheduling work created. This is a lamentable state of affairs as, in essence, a freezing effect has been created, disincentivising officers from pursuing criminal cases with large volumes of material.

281. Even with these challenges, there was a recognition that, for cases which ultimately progress beyond a charging decision, appropriate redaction of personal and sensitive material is important. The second but greater concern raised was the poor use of resources regarding 'no further action' cases. The Policing Review calculated that 210,000 hours were spent, in 2023, redacting material for cases

[233] Cabinet Office, *Guidance – Working at SECRET* (2024) para 1.
[234] National Police Chief's Council, *The Policing Productivity Review* (2023) p 21.

that do not progress beyond the CPS. The Review suggested that this time could have instead been used to attend 130,000 burglaries or 100,000 domestic abuse incidents.[235]

282. More recently, in its response to the *Policing Productivity Review*, the last Government committed to exploring "options for creating a streamlined redaction process that reduces administrative burdens", including through the use of new technology, updated guidance and changes to legislation.[236] It is indeed crucial that this challenge is gripped and a less burdensome approach to the current state of affairs is pursued, particularly for a process that could be rationalised and partially automated.

283. Yet, there are further complexities. I have frequently been told that officers often have an insufficient understanding of their obligations under the CPIA and the Data Protection Act 2018 (DPA), which is leading to widespread misinterpretation of the legislation. The result is often the redaction of important information, obscuring the prosecution's understanding of the case. This indiscriminate approach to redaction can waste a significant amount of time and resource during an investigation. In 2022, the NPCC and CPS issued an internal *Joint Principles for Redaction* paper, which focuses on the roles and responsibilities of the investigator. This document alone did not affect the magnitude of change required to meaningfully reduce the redaction burden.

284. On the contrary, it is argued that the *Joint Principles*, combined with the Sixth edition of the CPS Director's *Guidance on Charging*, have further entrenched the expectation that the police undertake a task that was traditionally a prosecution responsibility. Current processes are designed to frontload redactions in anticipation for onward sharing with the court and defence. The result is that officers are, for example, redacting non-sensitive data (e.g, names, addresses, emails, telephone numbers) before casefiles are sent to the prosecutor, whereas under the DPA these redactions do not have to be carried out at this pre-charge stage.

Communication

285. Navigating the case building process can prove an intricate task; however, it is made significantly easier when prosecutors and investigators work in tandem. In reality, the Review heard that communications between investigators and prosecutors have been stymied. A recent joint inspection of law enforcement found circa 40% of cases had "no communication or evidence of communication" between the officer in the case and the CPS prosecutor.[237]

[235] Ibid.
[236] Home Office, *Improving police productivity: a response to the recommendations of the Policing Productivity Review* (2024).
[237] Criminal Justice Joint Inspection, *Joint case building by the police and the Crown Prosecution Service* (2024) para 3.60.

286. Investigators and disclosure officers articulated their frustrations regarding the challenge of getting hold of the designated prosecutors, who in their opinion were often over-stretched, prior to the submission of schedules to discuss an initial disclosure approach or seek advice regarding particular unused material items. I was also told of occasions where investigators had produced unused material schedules believing certain material would form part of the prosecution case only to later learn that due to a lack of communication the belief was incorrect and, consequently, unused material had not been scheduled.

287. In turn, prosecutors asserted that they were available for consultation; however, in run-of-the-mill Crown Court cases, investigators rarely reached out promptly. Further, it was suggested that prosecutors' time is wasted as they endeavour to contact the police for disclosure updates, particularly in instances where cases progress at the minimum speed possible to meet statutory requirements and not 'time out'. These issues are compounded by the performance of current software, used to transfer case files between the police and CPS, which can only deal with small files.[238]

288. It is difficult to tell where precisely the miscommunication mischief originates; however, it is likely that the reality lies somewhere between the two accounts. Fundamentally, this breakdown of communication is a contributing factor to the waste of substantial law enforcement resource and impacts victims and defendants.[239] Nonetheless, as was frequently raised in my meetings with officers and prosecutors, there is agreement between the parties as to the benefits of improved communication and a clear desire to explore better ways of working.

Pre-Charge Engagement

289. As an investigation develops, there may arise the opportunity for pre-charge engagement which can take place after the first police interview and before a suspect has been formally charged.[240] Both the AG's Guidelines on Disclosure[241] and the Code for Crown Prosecutors[242] encourage such dialogue. When used effectively, pre-charge engagement has the potential to improve the efficiency of the investigation process by clarifying lines of inquiry, confirming consent to access records, agreeing search terms and expediting access to electronic devices. For cases that progress to charge, such

[238] Ibid, para 3.13 "The two-way interface between the police and the CPS cannot process anything over 1MB in size. Material exceeding this must be compressed by police…broken down into smaller file sizes and sent in parts or sent via email then uploaded by CPS operational delivery staff."

[239] The CPS takes an average of 101 days to make a charging decision on a fraud case (FY 2023/24). This figure is not published.

[240] The following can initiate pre-charge engagement: investigator, the prosecutor, the suspect's representative or an unrepresented suspect.

[241] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024) Annex B, pp 38–42.

[242] Crown Prosecution Service, *The Code for Crown Prosecutors* (2018) para 3.4.

engagement can reduce the disclosure burden. There can also be benefits for the suspect in directing law enforcement to reasonable lines of inquiry that could assist the defence case.

290. However, I have heard there are several substantial reasons why such engagement is rarely used and has not delivered the promised benefits. Primarily, the suspect may see no value in assisting the prosecution, whose duty it is, to bring and prove the case. Based on their own knowledge of the circumstances of the offence and the risk of conveying information that may later be used against them, suspects are likely to reject pre-charge engagement. There are also fair concerns that this collaboration between a suspect and the Crown undermines adversarial principles[243] and, if left unchecked, can erode important safeguards.[244]

291. Secondly, there is the practical matter of reimbursement. Under legal aid, a solicitor is paid a fixed fee for police station work irrespective of case complexity, with regional attendance fees varying significantly. Regarding pre-charge engagement work, the hourly rate paid to solicitors is £58.97 in London and £54.57 outside of London, with an upper limit of £314.81.[245] Despite a 15% increase, it has been suggested that the current legal aid fee structure for pre-charge engagement does not provide a sufficient incentive for legal representatives.[246] Therefore, in run-of-the-mill cases, solicitors are less likely to spend time considering the details of a case before it reaches the magistrates' court.

292. The former Government's response[247] to the *Independent Review of Criminal Legal Aid*,[248] made clear the desire to improve pre-charge engagement utilisation through the rate increase. Uptake so far has been low, although increasing, with only £53,000 claimed in 2023/24 compared with an estimated spend of £5 million p.a., suggesting the scheme is not yet incentivising the desired behaviour.[249]

Charging Decision

293. Having gathered material, identified suspects and possibly undertaken pre-charge engagement, officers will then seek a charging decision from a prosecutor. Firstly, it should be acknowledged that the publication of the CPS *Director's Guidance on Charging (6th edition)*[250] in 2020 fundamentally shifted

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[243] Ed Johnston, Pre-charge (lack of) engagement: An empty gesture?, Criminal Law Review 9 (2022), pp 737–754.

[244] Griffiths.

[245] The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2022, Schedule 4. S 5.

[246] This 15% increase was in response to the *Independent Review of Criminal Legal Aid* and came into effect on 30 September 2022.

[247] Ministry of Justice, *Government's full response to the Criminal Legal Aid Independent Review and consultation on policy proposals* (2022).

[248] Sir Christopher Bellamy, *Independent Review of Criminal Legal Aid* (2021) chapter 16.

[249] Legal Aid Statistics England and Wales – Tab 2.2, Column J.

[250] Crown Prosecution Service, *Director's Guidance on Charging, sixth edition, December 2020, incorporating the National File Standard* (2020).

the relationship between investigators and Crown prosecutors. To avoid repeating past miscarriages of justice, greater expectation was placed on investigators to complete all relevant documentation, before seeking a charging decision. When interviewed, the majority of law enforcement practitioners did understand that 'front loading' was designed to pay dividends later in the court process and reduce the number of poor-quality cases that progress and ultimately collapse before, or at, trial.

294. However, simply being alert to the value of 'front loading' does not make case building any more straightforward or less time-consuming. As previously discussed, this Review was told of instances where, after months, if not years, of investigatory work, inexperienced investigators and disclosure officers submitted deficient schedules of unused material.

295. Notwithstanding the benefits of 'front loading' cases, a regional Crown prosecutor, often responsible for several cases, is presented with substantial documentation to consider when making a charging decision. Furthermore, the combination of an increase in both complexity and weight of the CPS caseload[251] which stands above 72,000 (July 2024), cannot be considered conducive to the robust scrutiny required to evaluate the accuracy of an investigator's approach to disclosure.[252] It is therefore no surprise that under-resourced prosecutors may fail to provide vital constructive challenge to investigators regarding disclosure decisions.

[251] Cases for CPS consideration.

[252] Crown Prosecution Service, Annual Report and Accounts 2023–2024 (HC 58 2024)Caseload at publication 72.262.

3.3 Trial Preparation

296. Once a suspect has been charged, the detailed process of preparing for a criminal trial begins. What follows is designed to be a tightly choreographed sequence of events which include prosecution initial disclosure, service of the Disclosure Management Document (DMD) and the production of a defence statement.[253] The mischiefs that subsequently arise can be tied to the reality that not all parties are willing participants.

Preparing for a Criminal Trial

297. Both prosecutors and defence practitioners see the value of post-charge engagement, including an ongoing dialogue regarding disclosure, but agree it is underutilised, often compounding discrete issues that reappear at trial.

298. There was disagreement as to why, precisely, pre-trial issues such as disclosure are not consistently being resolved between the two parties. Some professionals are of the view that the defence cannot be asked to meaningfully engage with the prosecution without sufficient time and knowledge of the case details. Furthermore, it was suggested that, in large cases, the CPS is reluctant to pursue early engagement outside of set structures and timeframes. Others noted experiences where the defence tactically chose to reject early engagement regarding search terms and other disclosure matters, only to criticise the prosecution's disclosure strategy at a later stage. Despite these issues, I have heard of recent examples in high volume cases where both parties have engaged constructively.

Initial Disclosure

299. Defence practitioners raised concerns that, in complex cases, the prosecution, in their view, failed to discharge initial disclosure obligations sufficiently. It was suggested that at one end of the spectrum, the prosecution over-disclosed to 'cover their backs', which places a burden on the defence to sift through material. Conversely, practitioners had an experience of under-disclosure, where requests for material went unanswered until just before trial, when volumes of material were disclosed. An HM Crown Prosecution Service Inspectorate (HMCPSI) inspection found that disclosure, when made, was deemed timely in 453 of the 552 (82.1%) Crown Court cases.[254] The Inspectorate did raise concerns, however, regarding instances where no initial prosecution disclosure was offered.[255]

[253] See table 1 in this report, p 60.
[254] HMCPSI, *Disclosure of unused material in the Crown Court* (2020) para 5.20.
[255] Ibid, para 5.21.

Disclosure Management Document

300. All law enforcement agencies with whom I spoke were of the view that the DMD, which is typically served with initial disclosure, is a very useful tool in expressing the prosecution's strategy to disclosure. There was a desire to see greater engagement by the court and defence at the Plea and Trial Preparation Hearing (PTPH) as to the contents of the DMD and proposed approach to disclosure.

Defence Statement

301. In Crown Court cases, after initial prosecution disclosure, the defence have a duty to serve a defence statement setting out the nature of the defence, including particulars.[256] Whilst a relatively new development, the majority of practitioners recognised the reality that criminal justice systems must evolve, and a degree of defence engagement is now expected. It was noted, however, that philosophical concerns remain regarding the move away from an adversarial system to a perceived managerialism.[257]

302. Today, the prosecution uses a defence statement to narrow the case further to the real issues, triggering a second review of material and further disclosure. From the prosecutor's viewpoint, a vague and/or late statement hampers case progression, wastes judicial time and denies further disclosure which may assist the defence. The 2020 inspection found that defence statements were served on time in only 37.6% of cases. However, when served, 90.3% of the statements were deemed adequate.[258] Concerns were raised as to the ability of the court to adequately hold the prosecution and defence to account for their obligations. I shall return to this matter later in the report.

303. In an encouraging sign, the Inspectorate found very few cases where the prosecution and defence were ultimately unable to agree on what material should be disclosed. The defence made a formal application to the court for the disclosure of unused material in only six of the 555 live trials examined.[259] This very much echoed the evidence I heard from prosecutors and defence professionals who, on the whole, wanted to engage with one another.

Section 8 Applications

304. As previously discussed, having provided a statement, the defence can make a section 8 application.[260] All those with whom I spoke with agreed that the defence must have the ability to make

[256] It is optional for the defence to serve a statement in magistrates' court cases.

[257] Hannah Quirk, *The significance of culture in criminal procedure reform: Why the revised disclosure scheme cannot work*, The International Journal of Evidence and Proof 10(1) (2006), pp 42–59.

[258] HMCPSI, *Disclosure of unused material in the Crown Court* (2020) para 2.8.

[259] Ibid, para 2.9.

[260] Criminal Procedure and Investigations Act 1996, S 8.

reasonable requests for further disclosure. What was in dispute, however, was the timing of such applications. Late requests, whether justified or not, often have the effect of introducing significant delays to proceedings, resulting in delayed justice for all parties. Legal practitioners admitted that the late submission of section 8 applications can, albeit rarely, be weaponised by the defence in large volume cases to derail a trial.

305. Whilst late disclosure requests can present significant issues for the prosecution, ensuring that the defence has access to material that meets the disclosure test is critical to the execution of a fair trial. Furthermore, as cases such as that of Liam Allan demonstrate, there may be incidents where critical omissions have occurred and, therefore, processes to enable sufficient scrutiny are essential.[261]

Other prosecuting bodies

306. I digress, for a moment, to discuss how the CPIA applies to other types of prosecuting outfits, namely private prosecutors, and local authorities. Despite the focus of this Review centring on high volume cases, it should not be forgotten that the prosecution of criminal cases happens through several routes.

Private Prosecutors

307. Recent events demonstrate that disclosure failures are not limited to traditional prosecuting bodies. The untold misery caused by the Horizon cases[262] should encourage the criminal justice system to ask what action can be taken to reduce the risk of future similar miscarriages of justice.

308. Under the Prosecution of Offences Act 1985,[263] any person can bring a private prosecution. The private prosecutor, just as a public prosecutor, is bound by the CPIA and the disclosure obligations therein.[264] Most notably, this includes the requirement to disclose material that meets the section 3 CPIA test. However, there is a disparity between how the Code of Practice applies to a police officer, and non-police investigators, such as those acting on behalf of a private prosecutor. While the police officer "must carry out a prescribed activity which the Code requires",[265] a non-police investigator is only required to "have regard" to the Code and its duties.[266]

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[261] Metropolitan Police Service and Crown Prosecution Service, A joint Review of the Disclosure Process in the case of R v Allan (2018).

[262] *Hamilton v Post Office Limited* [2021] EWCA Crim 577, [2021] Crim LR 684.

[263] Prosecution of Offences Act 1985, s 6(1).

[264] Criminal Procedure and Investigations Act 1996, s 2(3) provides: "References to the prosecutor are to any person acting as prosecutor, whether an individual or a body."

[265] Criminal Procedure and Investigation Act 1996, s 23(2)(a).

[266] Ibid. s 26(1) provides: "A person other than a police officer who is charged with the duty of conducting an investigation…shall in discharging that duty have regard to any relevant provision of a code which would apply if the investigation were conducted by police officers."

309. Therefore, while a police officer must abide by the Code's requirements for recording, retaining and revealing to the prosecutor material obtained in a criminal investigation, a non-police investigator may choose to adhere to the Code in discharging its disclosure duties but, strictly speaking, is not bound to comply in the same way.[267]

Local Authorities

310. As set out by section 222 (1) of the Local Government Act 1972 (LGA), local authorities (LAs) can also "prosecute or defend or appear in any legal proceedings", where they "consider it expedient for the promotion or protection of inhabitants of their area".[268] Notably, LAs are able to pursue prosecutions outside of their geographic area, where they determine it as in the interest of their residents. Whilst the LGA grants them the power to pursue prosecutions, they are not obligated to do so.

311. As LAs are able to prosecute crimes that occur outside of their area, it is possible that multiple local authorities identify an incident and collectively decide to bring this case before a court which is in a different area from where the crime occurred.[269] The benefit of this is that it permits several LAs to be heard in a single place and be handled by a single solicitor acting on their behalf, save for rare cases of conflict of interest.[270]

312. During the Review, concerns were raised regarding some LAs' inadequate grasp of CPIA duties, resulting in disclosure failings. In *R v Knightland Foundation & Friedman*,[271] a defendant was prosecuted for non-compliance relating to an enforcement notice. The case ultimately collapsed when it came to light that the LA had been improperly influenced by the prospect of financial gain through a possible future Proceeds of Crime Act order. Only after pressure did the LA disclose the crucial information the day before the trial was due to start. It has been suggested to this Review that internal communications within a prosecution body, regarding the chance of financial gain through a prosecution, is likely to be material that assists the defence, and which should be disclosed.

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[267] See, for example, the Code for Private Prosecutors issued by the Private Prosecutors Association, a membership organisation, that provides that members should adhere to the Code when discharging disclosure obligations. The Code for Private Prosecutors gives 'guidance' to its members.

[268] The ability of LAs to engage in prosecutions is also supported by the Trade Descriptions Act 1968, s 26 and the Consumer Protection Act 1987, s 27.

[269] The Local Government Act 2000 further enables LAs to make decisions by means of "executive arrangements". This means that they may form a cabinet which is less hierarchical than traditional committees and may delegate a function to another local authority.

[270] Additionally, the Consumer Rights Act 2015, s 5 details the investigator powers held by "domestic enforcer", which includes district councils/local authorities.

[271] *R v Knightland Foundation & Friedman* [2018] EWCA Crim 1860.

3.4 Judiciary and Courts

313. Having navigated the pre-trial phase, the prosecution and defence should arrive at court ready to argue their case. In this chapter, I shall discuss the main concerns raised by practitioners and members of the judiciary regarding the manifestation of disclosure challenges during the court process.

Crown Court

314. Before detailing disclosure-related issues in the magistrates' courts, I shall briefly touch on the Crown Court, where the most serious criminal cases are heard. Across England and Wales, there are over 70 court centres in which the Crown Court sit, and in the last quarter of 2023 alone, there were 26,593 case receipts into the Crown Court – 13% above levels seen in the last quarter of 2022.[272] The majority of the disclosure challenges already discussed relate primarily to serious, complex and otherwise voluminous cases dealt with in the Crown Court. Therefore, I shall not reiterate those specific mischiefs, but in summary, note that the larger the volume of material in a case, the greater the redaction and scheduling burdens and the slower a case progresses to and through court (see chapter 3.1). In 2023, it took on average over a year for a case to progress from offence to completion in a Crown Court. On average, for cases of robbery it took 301 days, sexual offences 811 days and fraud 1,176 days.[273]

315. Regarding disclosure in the courts, the first challenge I shall consider is that of limited judicial resource, which can further impair the swift resolution of disclosure disputes. Members of the judiciary have told me that limited capacity combined with a substantial caseload can make early engagement challenging. In that same vein, prosecutors have raised concerns that the DMD is not regularly covered in sufficient detail at the PTPH to meaningfully iron out disclosure issues. It is not uncommon for multiple judges to oversee the progression of a trial. While this may be efficient in the average Crown Court case, it is a less-than-ideal strategy in complex cases where judicial continuity is vital to the effective management of case progression.

316. A minority of defence practitioners were of the view that courts are overly sympathetic to the lack of law enforcement resource and, therefore, are too lenient with regard to failings, which leads to the persistence of a poor disclosure culture.

[272] *Criminal court statistics quarterly: October to December 2023*.
[273] Ibid, Crown Court timelines tool.

Magistrates' Courts

317. Turning next to the role of magistrates, which has changed considerably since the introduction of the Justices of the Peace Act in 1361.[274] Today, magistrates' courts try summary offences such as common assault and either way offences, such as burglary, which are not transferred to the Crown Court. A case in the magistrates' court is heard by either a District Judge or two to three magistrates (also known as justices of the peace or lay justices) supported by a justices' legal adviser.

318. There is a recognition that magistrates' courts, within our tiered legal system, must continue to evolve to meet the needs of changing criminal trends and resource constraints. Over the past ten years, magistrates' courts have increasingly heard more serious cases, which is reflected in their recently extended powers to pass sentences of up to 12 months in prison.

319. In 2015, the Transforming Summary Justice (TSJ) Renewal Programme was launched.[275] In developing this action plan, the Ministry of Justice (MoJ) came to the following diagnosis regarding magistrates' court justice: the quality of case files produced by law enforcement were inadequate and magistrates had insufficient disclosure knowledge. It was proposed that the new TSJ strategy would simplify cases, increase early guilty pleas and ensure smoother case progression.

320. Indeed, it must not be forgotten that, whilst disclosure scrutiny tends to focus on Crown Court cases, where the most public failures tend to arise, around 95% of all criminal cases in England and Wales commence and complete in a magistrates' court.[276] Embedded in local communities, these courts serve tens of thousands of victims and defendants each year, all of whom have the right expectation of a fair trial and therefore disclosure.

321. Disclosure duties, created by the CPIA, apply uniformly to all criminal cases, irrespective of where the case is heard or the seriousness of the charge. However, the volume of material gathered in a motoring offence compared with a complex fraud are obviously different and therefore, the practical manifestation of the disclosure process has had to be adapted.[277]

322. For example, in respect of either way or summary offences heard in magistrates' court, a schedule of unused material does not need to be prepared if the prosecution anticipates a guilty plea.[278] If, however, the accused pleads not guilty at the first hearing, the disclosure officer would still be

[274] Justices of the Peace Act 1361.
[275] Courts and Tribunals Judiciary, *Transforming Summary Justice (TSJ) Renewal Programme* (2023).
[276] Courts and Tribunals Judiciary, *About Magistrates' courts*.
[277] See chapter 1 – Development of a Legislative Disclosure Regime.
[278] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 21(3)) Code of Practice* (2020) para 6.4.

required to complete a schedule[279] and submit it as soon as is reasonably practical. This pragmatic approach reflects the number of cases heard in magistrates' courts and the reality of limited resources, whilst not compromising on core CPIA obligations regarding undermine and assist material.

323. A variation on a theme previously discussed, one challenge facing the progression of magistrates' cases is the increasing digital footprints of victims and defendants. Where once a minor offence would have little digital material for the investigators and prosecutors to manage, it is now not unusual for defendants to own multiple digital devices.

324. The combination of increased digital material and the short statutory timeline for case progression in magistrates' courts is a toxic mix, often leading to an inability of law enforcement to process material swiftly enough to meet disclosure deadlines.[280] Prosecutors and defence practitioners have raised concerns that the prosecution regularly arrive at summary trial, without a schedule or streamlined certificate, or acknowledgement that disclosure obligations have been satisfied.

325. The Review has heard that magistrates, in a desire to be flexible, are being over-lenient and granting adjournments to give the prosecution enough time to get their house in order. The result is increased delays, piling further pressure on the court backlog. Anecdotally, District Judges are more likely to refuse an adjournment where the prosecution has been unable to demonstrate a sufficient grip on disclosure leading, in turn, to the case being dismissed. I have heard that cases in the magistrates' court are failing not on the weakness of the evidence but on the Crown's inability to discharge its CPIA duties.

326. Much of the evidence I have heard on this matter has been qualitative and anecdotal. HM Courts & Tribunal Services (HMCTS) data suggests that in 2023 a total of 311 magistrates' court cases were ineffective because the prosecution explicitly failed to disclose unused material. In the same year 746 magistrates' court cases were deemed ineffective due to defence disclosure problems (figure 5).[281] Between October 2014 and September 2023, disclosure accounted for almost 7% of all ineffective trials in magistrates' courts.[282] I am cognisant, however, that when cases fail there is usually a combination of contributing factors, with the ability to mask influences such as disclosure. In my estimation, the criminal justice system would greatly benefit from understanding in greater detail why

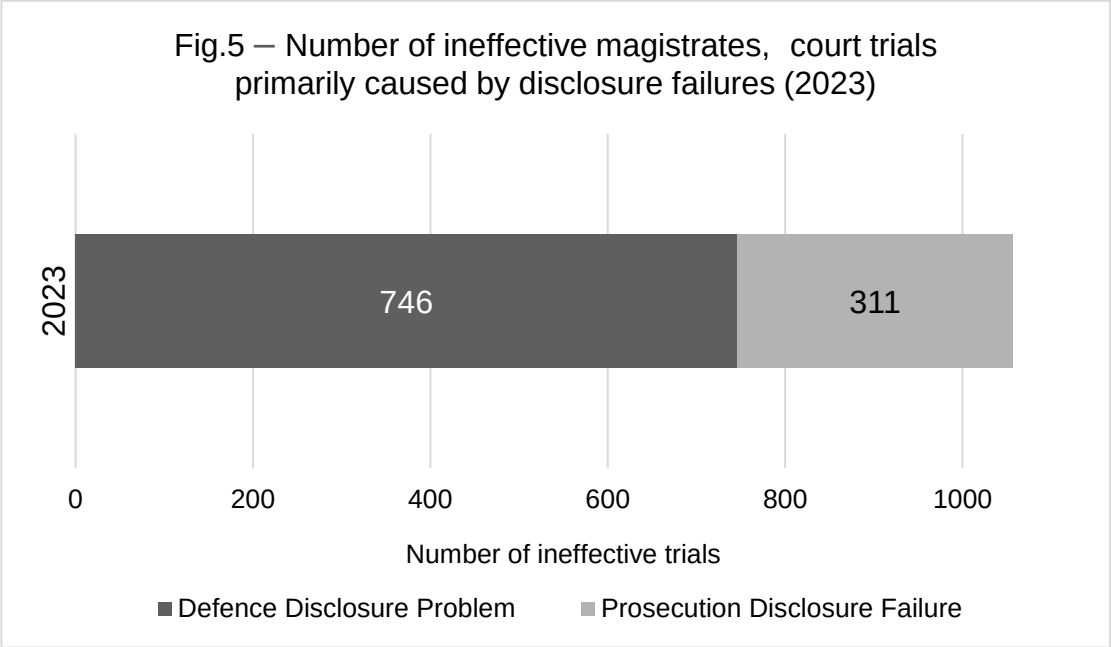
[279] Until recently a 'streamlined disclosure certificate' was preferred, however this Review has heard that forces are increasing using the MGC6 for all cases.

[280] Magistrates' Court Act 1980, s.127(1),Criminal Procedure Rules 2020, Part 15.

[281] Ministry of Justice, Criminal court statistics quarterly: October to December 2023, trial effectiveness at the criminal courts tool. 'Ineffective reasons: Prosecution failed to disclose unused evidence' and 'Defence not ready – disclosure problems'.

[282] Ibid. Ineffective trials where disclosure failure was deemed primary cause: 13,869. Total ineffective trials: 202,070.

cases are adjourned. Such a metric would assist in elucidating the degree to which disclosure issues are impacting magistrates' court cases. I note that such information would need to be aggregated as to avoid inadvertently assessing judicial decision making.



327. I have heard concerns that, in the majority of cases where the prosecution does indeed uphold their disclosure duties, further issues arise when lay magistrates allow speculative defence disclosure requests. With substantial material to review and limited law enforcement resource, such requests can make a case unsustainable.

328. As identified in the Lord Chief Justice's 2014 Report, it has been suggested that there is room for improvement regarding magistrates' understanding of disclosure. I am aware that, as part of the HMCTS & Judicial College 2022-23 Annual Agreement on the National Core Training Provision for Magistrates, training on applying the Criminal Procedure Rules and Practice Directions was introduced for all magistrates sitting in the adult crime jurisdiction.[283] A parallel set of training materials was delivered to legal advisers. This learning aimed to improve awareness regarding the distinction between evidence and unused material, and the circumstances in which a court may order disclosure of unused material.

329. In evaluating the probable causes of disclosure dysfunction, I have concluded that resources and training, or lack thereof, are in part to blame. As I shall latterly discuss, insufficient initial training and local training often leave inexperienced officers unaware of their duties under the CPIA. Limited resources further aggravate these issues, creating the requirement for an inexperienced officer to juggle multiple cases, whilst acting as both the lead investigator and the disclosure officer. It is no

[283] Judicial College, *Judicial College Activities Report 2022-2023* (2023) pp 8–9.

surprise that the Review heard that many officers are significantly stretched beyond their learnt competence.

330. Notwithstanding the vital need for further quantitative analysis, I am not convinced that, regarding the Crown's duties, the disclosure regime is working as intended in the magistrates' courts. I am concerned that this Review's findings echo those articulated almost a decade ago.[284] Whilst it may be true that disclosure has mildly improved in that time, I have not seen evidence that the current approach supports the criminal justice system's aim for swift and fair justice.

Post-Conviction

331. Whilst the courts strive to minimise the risk of a miscarriage of justice, it is not a perfect system, and thus, such incidents do happen, often with devastating consequences. Recent high-profile cases have demonstrated the importance of allowing individuals who wish to appeal their case the ability to access key material used by the prosecution. To facilitate post-conviction disclosure, the AG's Guidelines state that "where, at any stage after the conclusion of the proceedings, material comes to light which might reasonably be considered capable of casting doubt upon the safety of the conviction, the prosecutor should disclose such material".[285] Despite this inclusion, I heard evidence that defendants, and their legal teams, can face challenges in obtaining access to copies of material,[286] with some pointing to the Supreme Court judgment *R v Chief Constable of Suffolk Constabulary* as the main hurdle.[287, 288] It has also been suggested than an over-reliance on Conviction Integrity Units can cause avoidable miscarriages of justice to go undetected.

[284] Judiciary of England and Wales, *Magistrates' Court Disclosure Review* (2014).

[285] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024), para 140.

[286] Carole McCartney and Louise Shorter, *Exacerbating injustice: Post-conviction disclosure in England and Wales*, International Journal of Law, Crime and Justice 59 (2019).

[287] *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225.

[288] Holly Greenwood, Dennis Eady, *Re-evaluating post-conviction disclosure: A case for 'better late than never'*, International Journal of Law, Crime and Justice 59 (2019).

3.5 Complainants and Victims

332. The people at the centre of any criminal trial are those whose lives have been affected by the events that have taken place. In a system where the defendant is innocent until proven guilty and where we must also ensure that victims receive justice, the rights, responsibilities, and welfare of all of those participating in a criminal trial must be carefully considered in all aspects of criminal proceedings. The Crown's responsibilities in this regard are twofold: criminals must be brought to justice, and a suitable punishment must be administered without any miscarriage of justice. However, in that process both their rights, and those of victims, as defined by law, including those relating to the gathering of evidence and the protection of privacy, must be upheld. Protecting these rights and responsibilities has been central to my considerations throughout the Review.

333. I am acutely aware that my evaluation of the disclosure regime is not simply an academic exercise but, instead, it must consider the impact that the regime has on victims and their pursuit of swift justice. Victims remain at the very heart of the criminal justice system and, for that reason, I seek to assess the efficacy of the disclosure regime in the knowledge that victims and defendants will lose confidence very swiftly in a criminal justice system that is unable to handle the disclosure of unused material in a digital age.

334. Over the past decade, previous Governments have introduced initiatives to support victims of crime, and I remain alive to the fact that there are profound concerns relating to the disclosure of personal information about victims to the defence that could, in turn, be disclosed to a defendant. These initiatives include, but are not limited to, the *Victims' Code*,[289] *End-to-End Rape Review Report*[290] and the Police, Crime, Sentencing and Courts Act (PCSCA) 2022.[291]

335. Through the Victims and Prisoners Act,[292] a series of measures have been introduced focused on improving victims' experience of the criminal justice system. Separately, the Law Commission has been asked to explore issues surrounding the disclosure of third-party material in RASSO cases.[293] This project, due to report in Summer 2025, is considering misconceptions about the reasons why

[289] *The Code of Practice for Victims of Crime in England and Wales* (Victims' Code) (2021) sets out the minimum standard of support and information that victims of crime should receive from criminal justice agencies.

[290] The *End-to-End Rape Review Report on Findings and Actions* (2021) sets out the Government's action plan for improving the Criminal Justice System's response to rape in England and Wales.

[291] Police, Crime, Sentencing and Courts Act 2022 is a law in England and Wales that sets out a series of measures for the protection of the police and public. This Act provides officers with the necessary powers and tools needed to keep themselves and the public safe.

[292] Victims and Prisoners Act 2024.

[293] Law Commission, *Evidence in sexual offence prosecutions* (2025).

complainants delay reporting crimes, use of evidence including complainants counselling records, and the way in which witness evidence is given in such cases.

336. Notwithstanding the positive intent that lies behind these initiatives, victims' confidence in the criminal justice system has deteriorated, primarily as a result of the considerable length of time often taken from the reporting of an offence to trial, arising from a significant court backlog. In this chapter, I shall explore victims' rights and expectations during a criminal case.

Privacy Concerns

337. Having consulted widely across the legal profession and victims' groups on their reflections upon victims' experience of the disclosure process, privacy was raised as a notable concern. Depending on the issues in the case, the defence may be given access to a victim's personal data which may include medical and education records, social service reports, and counselling records. In many cases, victims understand that the disclosure of sensitive information, when done appropriately and proportionately, is intended to advance the fairness of the trial.

338. We cannot, however, underestimate the intrusive nature and impact of the disclosure process on victims, most notably in RASSO cases. At present, the accessibility and use of counselling records in both the investigation process and at court is widely debated. Following a traumatic event, many victims are faced with routine police requests to grant access to personal counselling records. Undoubtedly, such requests can cause further distress to the victim, who may consider this to be an invasion of their right to privacy [294] and may be unclear about its relevance.

339. In some cases, such concerns about privacy have proved to be well founded and there have been occasions upon which counselling notes have been used in a way that might be perceived to undermine or discredit a victim unfairly. I have heard that it is often this fear that leads to victims opting out of counselling until a verdict has been reached on their case. We cannot have a justice system where victims of serious crimes choose not to seek professional support out of fear that personal material will be disclosed and subsequently used against them inappropriately.

340. Regrettably, these issues are causing victims to disengage with the criminal justice process, ultimately highlighting a loss of confidence in the very system put in place to deliver justice for them. As highlighted in the Victim Commissioners 'Victim's Experience' Survey published in November 2023, only "10% of respondents were confident that the criminal justice system was effective".[295]

[294] Equality and Human Rights Commission, Guide on Article 8 - Right to respect for private and family life, home and correspondence (coe.int).

[295] Victims' Commissioner, *Victim's Experience: Annual Survey 2022* (2023).

341. There is a fine balance between ensuring that sufficient information is disclosed to allow a fair trial to take place and avoiding a miscarriage of justice, whilst also ensuring that victims receive adequate support as their material is being processed. The *End-to-End Rape Review*, published in 2021, highlights that there are still "notable differences between the police and CPS's understanding of requirements and investigative thresholds" that need to be met to determine whether material is relevant to the case. As a result, victims are frequently handing over more material than is necessary.[296]

342. This may be symptomatic of a cultural change arising from *R v Allan*,[297] a case that clearly demonstrated why the expectation of privacy is a qualified right. It must not be forgotten that not all complainants are victims, though officers have a duty to take seriously claims of an alleged offence. I have heard that, because of *R v Allan*, police officers are more risk-averse when retrieving material. In turn, this is leading to the over seizure of unnecessary information and excessive digital downloads that are often irrelevant to the case. As noted by the Information Commissioner in his 2022 report, these 'fishing expeditions' often lead to the victim feeling re-victimised as they face a far greater level of scrutiny in relation to their personal information than the suspect.[298]

343. In an attempt to mitigate this issue, the new Code of Practice for powers under the PCSCA 2022 sets out guidance for all authorised persons[299] on the "use of the powers, including how they should determine the correct legal power …. and how they should confirm that extraction of information is necessary and proportionate".[300] This legislation offers victims safeguards to ensure that the extraction of digital material is essential to the completion of the investigation.

Victims and Prisoners Act 2024

344. The Victims and Prisoners Act, part one, makes provision about victims of criminal conduct.[301] The Act aims to strengthen the rights of victims and improve the way they are treated throughout the criminal justice process and the support services available to them. The measures as outlined in the Act should wholly improve victims' experience of the criminal justice system.

345. The Act sees a particular focus on providing victims with additional protection during criminal investigations and addressing concerns around access to counselling notes. Notably, the Act states that a "counselling information request may be made only if the authorised person has reason to believe that the information sought is likely to have substantial probative value to a reasonable line

[296] Ministry of Justice, *The end-to-end rape review report on findings and actions* (2021), p 38.
[297] Metropolitan Police Service and Crown Prosecution Service, *Joint review of the disclosure process in the case R v Allan* (2018).
[298] Information Commissioner's Office, *Who's Under Investigation? Information Commissioner's Opinion* (2022), p 7.
[299] Authorised Persons – A person named under the Police, Crime, Sentencing and Courts Act 2022, Schedule 3 who is permitted to exercise the extraction of information powers.
[300] Police, Crime, Sentencing and Courts Act 2022.
[301] Victims and Prisoners Act.

of inquiry".[302] It is envisaged that this will increase victims' confidence that proper consideration has been given to the need to access personal or sensitive information so that they can feel empowered to engage with support services without the fear of their personal information being accessed without good cause. Such changes should provide victims with better legal protections and give them the confidence to come forward and seek justice, without undermining the disclosure process.

346. Alongside the Act, as required in legislation, the *Victims' Code*[303] is being updated to make provision for services which reflect the principles that victims require:

a. Information to help them understand the criminal justice process

b. Access to services which support them (including, where appropriate, specialist services)

c. The opportunity to make their views heard in the criminal justice process

d. The ability to challenge decisions which have a direct impact on them.[304]

347. Whilst I acknowledge that the Act indicates many positive changes, we must not forget that the real-world application of the legislation is another matter entirely, as demonstrated by the CPIA. Therefore, the benefit of the legislation to victims remains dependent on how well it is applied in practice.

Delay and Attrition

348. Victims across all crime types are also often impacted by significant delays, partly caused by disclosure, between investigation and trial. As previously referenced, it takes over three years, for the average fraud case to be dealt with at court.[305] I heard from victim groups that increasing numbers of victims are being disincentivised from reporting a crime and seeking justice for this reason. When cases do finally get to trial, some victims see their cases dropped not due to the strength of evidence, but because of the Crown's inability to discharge their disclosure obligations. When cases reach court, it is not uncommon for them to be adjourned or for no evidence offered due to a failure to disclose relevant material. For the final quarter of 2023, disclosure issues were responsible for over 4,000 non-conviction outcomes.[306]

349. In addition, we are now witnessing unprecedented court backlogs. As of December 2023, there were 67,284 outstanding cases in the Crown Court and 291,494 outstanding cases in the magistrates'

[302] Ibid, chapter 3A, (4).

[303] *The Code of Practice for Victims of Crime in England and Wales* (Victim's Code) (2024) sets out the minimum standards that must be provided to victims of crime by organisations in England and Wales.

[304] Ibid, para 2.3.

[305] Criminal court statistics quarterly: July to September 2024, timeliness tool.

[306] *CPS quarterly data summaries*, prosecution tables 1.1 and 3.2.

courts.[307] At the time of writing, Crown Court backlogs for RASSO cases have reached a new record high, highlighting clear failures in the system. Rape Crisis England & Wales estimates that there are 10,141 sexual offence cases awaiting trial in the Crown Court, up 21% from last year.[308]

350. The impact of delays on victims must not be underestimated, with many forced to relive distressing events or put their lives on hold due to delays which can span over many years. In addition to the personal impact, such delays give rise to other issues, such as the credibility of the witness being able to recall events to be questioned. Alas, for many victims, these impacts cause them to withdraw from the process and erode their belief in the very system that should be delivering swift justice.

[307] Ministry of Justice Courts Data Dashboard.

[308] Rape Crisis England and Wales, *Breaking Point* (2023).

3.6 Training and Learning

351. I return to the matter of training and learning; a subject which stakeholders suggest is at the heart of many disclosure-related difficulties. The vast majority of those with whom I spoke raised concerns that inexperienced police officers do not fully appreciate and understand their obligations under the disclosure regime. The cause of these issues has purported to be the training that officers receive or lack thereof. It is paramount that disclosure-related training which law enforcement officers receive reflects the centrality of their role in upholding the regime.

352. It should be noted, that following the launch of the National Disclosure Improvement Plan (NDIP) in 2018, there was a renewed focus on disclosure learning within police forces. Consequently, newer programmes were specifically built to focus on the subject and are separate from the training for the initial entry route. Disclosure Champion roles were created to support officers in seeing the centrality of disclosure to investigations. Despite initial efforts to nationally record the number of officers completing disclosure-related training, the College of Policing (CoP) handed this responsibility to local forces.

Initial Training

353. Regarding the training of new police constables, CoP[309] sets the standard for training as part of the National Police Curriculum, which includes modules on the criminal justice system and disclosure. Delivery partners, such as local forces, police training centres and universities, are then expected to teach content to cover the topics set in the curriculum. This model is designed to support a variety of entry routes into policing whilst also giving flexibility for local forces to tailor the curriculum to the needs of their officers.

354. Concerning prospective police constables, there are four entry routes; the police constable degree apprenticeship (PCDA); a degree in professional policing (PPD); the degree-holder entry route; and the newly established Police Constable Entry Programme (PCEP). Whilst the length of these routes differ, the core curriculum remains broadly the same, covering the criminal justice system and disclosure basics.[310]

355. Having set the syllabus, CoP then seek to evaluate the content and quality of the learning delivered by partners.[311] Primarily, this is achieved by vetting organisations that apply to become a learning

[309] A non-government body with powers established in the Anti-Social Behaviour, Crime and Policing Act 2014, ss 123-130.
[310] College of Policing, *Police constable entry routes* (updated 2024).
[311] College of Policing, Quality Standards Assessment (QSA) framework (unpublished).

provider. Some higher education institutes are also evaluated separately by the Quality Assurance Agency.[312]

356. Further quality assurance includes measuring learning outcomes and requesting that delivery partners, such as forces and education providers, submit evidence demonstrating how their programme and learning outcomes meet set standards. In addition, CoP is piloting onsite audits of learning delivered by forces.[313]

357. I am encouraged to see the direction of travel regarding on-site quality assurance as without robust in-person evaluation of precisely what and how material is being taught by delivery partners, particularly higher education institutes, CoP can have little confidence that complex matters, such as the importance and operation of the criminal disclosure regime, are being taught correctly. Further, a variety of delivery partners each interpreting the curriculum in their own way will inevitably create variation in the quality of disclosure-related learning, leading to a regional disparity of training. The quality of learning for new recruits should not be a postcode lottery.

358. Almost without fail, stakeholders, including many prosecutors, raised concerns that inexperienced officers, who had completed their police constable training, lacked sufficient knowledge regarding the disclosure regime by the time they are required to carry out disclosure-related tasks. Whilst I understand that many new recruits may go on to have careers within policing that do not require a detailed understanding of the CPIA, the very principle of disclosure as it relates to the right to fair trial should be taught to all.

Investigators

359. During initial learning, officers complete the Professionalising Investigations Programme (PIP) Level 1 and 2. These national standards focus on fundamental policing skills, namely the gathering of evidence to ascertain whether a person should be charged with an offence in priority and volume cases. PIP 1 and 2 are considered the bare curriculum and are embedded into the initial entry routes for officers. PIP 2 includes some self-directed and online learning, designed to enable investigators to "explain and implement effective procedures for managing the recording and dissemination of decisions, as well as for disclosing and presenting evidence throughout the investigation".[314]

360. Those officers wishing to develop further can undertake PIP Levels 3 and 4, which provide additional training covering serious criminal investigations, major crime and strategic management of

[312] The Quality Assurance Agency for Higher Education.

[313] The audits consist of focus groups and interviews to assess compliance with the programme requirements that COP has set.

[314] College of Policing, *Professionalising Investigations Programme Policy* (2023), pp 22–23.

highly complex cases. Training for PIP 3 and 4 is delivered by CoP with support from partners through a mixture of class-based teaching and on the job learning.

Disclosure Officers

361. The training of disclosure officers, however, differs entirely. Despite being explicitly referenced in the Code, there is no standard set of skills required to undertake the role. Furthermore, a disclosure officer can be a civilian. It is up to each law enforcement agency and force to decide what qualifies as a disclosure officer. I have heard from some organisations who offer comprehensive classroom style disclosure training for officers, while others are content with a few hours of online training. Some disclosure officers learn 'on the job'; however, the quality of such learning varies as does the subsequent competence of officers.

362. Given the often-technical nature of the role, which requires officers to analyse large data sets and take on significant decision-making responsibility, the criminal justice system should do more to ensure that officers are suitably trained. The danger of a poorly trained officer extends beyond simply the waste of resource, when inevitably work must be re-completed, but also increases the risk of a trial being derailed.

Professional Development

363. The Review was also told of the lack of incentives for disclosure officers to stay in such roles and hone their skills. In turn, this has created a reduction in experienced disclosure officers with the ability to support serious and complex cases. Plainly, there is a real need to train and retain competent individuals who can manage and analyse millions of items of material in the most serious and complex cases that pass through the English and Welsh system. It is right that practitioners have high expectations of such officers, but they must also be provided with the learning required to further develop this vital skill set and adequate recompense for choosing to carry out a task that is fundamental to any prosecution. Without such an offering, potential disclosure officers leave these roles, taking with them a rich corporate memory of disclosure best practice.[315]

Culture

364. Linked with training and learning, I have given thought to the perception of a culture in some parts of law enforcement that appears to prioritise the pursuit of convictions over a thorough and thoughtful approach to disclosure. The Attorney General's 2018 Review notes that it may be argued

[315] A Metropolitan Police civilian disclosure officer earns the following – Salary: £29,201 to £31,415 and a London Location Allowance of either Zone 1 – £2,148 or Zone 2 – £1,043 depending on the location.

there is an "irreconcilable conflict at the heart of disclosure", where it is "unrealistic to expect investigators and prosecutors, who are working to secure convictions, to exercise due care in searching for and identifying material that might assist an acquittal".[316] This view is reflected in some of the academic analysis of police culture[317] and the Review has heard from individuals who share this view.

365. Additionally, in the average criminal case there appears to be little culture of carrying out an assessment of the level of resource required to undertake disclosure from the outset of an investigation, which subsequently leads to investigators and disclosure officers becoming overburdened. To counter this culture, agencies such as His Majesty's Revenue and Customs (HMRC) appoint a disclosure officer at the beginning of an investigation, implementing a robust Disclosure Management Plan which considers future resource considerations. This approach, however, cannot be described as typical and I recognise that HMRC is able to adopt such an approach because it prosecutes far fewer cases than other authorities such as the CPS.

366. Many of the cultural issues discussed can be summarised as a 'disclosure last' attitude, where duties and obligations are considered processes that can be bolted-on at the end of an investigation. I was concerned to hear that, while disclosure culture has reportedly improved over the last five years, disclosure officers are often not held in sufficient esteem with the adage holding true that the 'last officer in room' is assigned the role. Frequent turnover of law enforcement staff further intensifies these problems.

[316] Attorney General's Office, *Review of the efficiency and effectiveness of disclosure in the criminal justice system* (2018), p 10.

[317] Ed Johnston and Tom Smith, *The Law of Disclosure: A Perennial Problem in Criminal Justice*, (2020) Routledge, chapter 3, p 35.

3.7 Keys to the Warehouse

367. Having examined the key issues facing the English and Welsh disclosure regime, I have given thought to whether we should embrace a 'keys to the warehouse' (keys) approach of the kind in place in some United States of America (US) states (further detail provided in Annex F – International Comparisons). The keys approach has different permutations but at its heart refers to a system of disclosure in criminal proceedings which allows the defence controlled access to all materials in the possession of the prosecution relating to the case. This includes not just material that plainly must be given to the defence so that they understand the case to meet, but all material gathered or generated as part of the investigation. A wholesale approach to disclosure, such as this, would stand in stark contrast to the current obligation on the prosecution to disclose only material that meets the section 3 CPIA disclosure test.

368. In 2011, Lord Justice Gross gave careful consideration to the keys approach as part of his Review and rejected its adoption at that time. More than a decade on, however, I am aware that the keys approach continues to be discussed amongst criminal practitioners grappling with the exponential growth of digital material and concerned about the prospect of disclosure failings. This was reflected in some of the meetings that I chaired as part of this Review. The keys approach, or a modification of the keys approach (i.e., keys to a cabinet if not the whole warehouse), often featured as a suggestion for debate.

369. In light of this, I have taken the view that there is a case for considering the keys approach afresh. In exploring these matters, I have been assisted by contributions from prosecutors and defence practitioners, including those with legally aided as well as privately funded practices, and practitioners with first-hand experience of jurisdictions where the keys are provided.

The Concept

370. Fundamentally a 'keys to the warehouse' approach involves allowing the defence access to all material gathered or generated as part of the investigation. During the course of my meetings with various criminal justice stakeholders, a range of models were discussed, all of which fall under the broad banner of 'keys to the warehouse'.

371. At one end of the spectrum, the approach proceeds on the basis that all material in the possession of the prosecution is not reviewed and, instead, all of it, other than information that is clearly sensitive, is provided to the defence who may use it as they see fit.

372. Other US 'keys' systems involve the prosecution identifying and disclosing exculpatory material to the defence and, in tandem, also providing all material for completeness. When such material is provided it is accompanied by strict judicial discovery and protective orders to safeguard its confidentiality.[318] Jurisdictions that use the keys model, such as the US, also rely on a judicial culture that is willing to stringently enforce confidentiality by utilising tools such as contempt charges to hold legal representatives personally and professionally accountable.

373. A variation of the keys approach involves only a certain type or category of unused material in the possession of the prosecution being handed over to the defence without being fully inspected first by the prosecution. In this scenario, only the keys to a 'cabinet' within the warehouse are given.

374. A keys approach is not entirely foreign to our system of disclosure in criminal proceedings. Paragraph 9 of the Attorney General's *Guidelines on Disclosure* published in 2000 contemplated a keys approach where large volumes of material have been seized. If such material was considered too large to examine and schedule, but the prospect of it containing disclosable material could not be removed, the defence could be permitted to inspect it. Provision for this, however, has not appeared in subsequent iterations of the Guidelines. Notwithstanding this, during the course of meetings conducted as part of this Review, I learnt that there have been rare occasions where, at the request of defence and/or with defence agreement, keys to a particular cabinet have been provided by the prosecution.

Advantages

375. The keys approach contains several attractive features. The most commonly advanced argument is that the system serves as an important safeguard for the fairness of a criminal trial by providing transparency. With access to all unused material, the defence is able to conduct their own review, consider the materials in the context of the defendant's instructions, and ensure that any material that may assist or undermine is captured and, if appropriate, deployed in the trial process. With an eye trained on the defence or defences that the defendant is likely to run or may wish to explore, those that represent the defendant are best placed to identify helpful material.

376. It follows that supporters of a keys approach contend that the risk of material helpful to the defence being overlooked is reduced. This is because there is no filtering of material based on what the prosecution perceives as undermining the prosecution case or relating to the defence case. There is an argument that there is far less risk of a conviction being unsafe because material has been overlooked or withheld or, in other words, because a disclosure failure has occurred.

[318] *United States v Carriles*, 654 F. Supp. 2d 557, 562 (W.D. Tex. 2009).

377. The ability for the defence to see all material that has been generated in an investigation may carry an advantage in that it encourages informed decision-making by a defendant at a relatively early stage of a case. Sight of everything that relates to a case can lead to the earlier resolution of criminal proceedings. If the defence have access to all materials that have been gathered as part of an investigation shortly after proceedings commence and a review reveals nothing that undermines the prosecution case or provides support to a defence, it is likely that a guilty plea would be entered.

378. Giving access to the defence of all material also has the potential to carry distinct benefits for the prosecution. The need to undertake a thorough review of all material in the possession of the prosecution and sufficiently describe such material in a way that is intelligible to the defence, so that they can make an informed decision about requesting material, would be entirely removed. There is an argument that a keys approach would free up prosecution resources if all material was provided to the defence as a matter of course, other than material which is sensitive. This has considerable value in an age where large quantities of digital material may be seized as part of an investigation, and it can be expected that the volume of relevant digital material will only increase in the future.

Challenges

379. Although I see advantages to a keys approach, the model has several disadvantages which cannot be underestimated and, in my view, weigh heavily against it being adopted in England & Wales.

Fundamental Philosophy

380. Chief amongst these is my concern that a keys approach, which would see the defence gain access to everything relevant to a criminal investigation, means that the prosecution would be abrogating their responsibilities. Our criminal justice system is underpinned by a philosophy that the prosecution must bring the case against a defendant and, as part of a fair trial, it is the prosecution that is responsible for disclosure. It is, furthermore, a responsibility of a prosecutor to consider all material available in an investigation in order to properly understand the strength of the prosecution case.[319] To adopt a keys approach would require a serious and considered change to the philosophy of our criminal justice system. Debate regarding wholesale change to the architecture of the roles and responsibilities within the English and Welsh criminal justice system goes far beyond the scope of this Review.

[319] Similar conclusions appear in the Protocol issued by the Lord Chief Justice for the Control and Management of Heavy Fraud and Other Complex Criminal Cases in 2005 where a keys approach was said to be "undesirable".

Transferring Burdens

381. A keys approach requires transferring part of the disclosure review burden onto the defence, which may not be adequately resourced to handle the task. Of concern is the fact that 86% of Crown Court cases in England and Wales are legally aided.[320] It is beyond the terms of reference of this Review for me to consider the adequacy or otherwise of legal aid funding. However, it is abundantly clear that, under the current funding model, criminal firms that engage in legally aided work would be unable to afford the task of carefully reviewing material provided as part of a keys approach. Even if there was a radical increase in legal aid funding for the review of unused material, there remains the question of human resourcing.

382. I am conscious that many criminal defence firms that engage in legal aid work are small and/or overburdened. It could also be expected that a keys approach would be criticised on the basis that, whilst it may free up resources for the prosecution, it would inevitably put the squeeze on legal aid funding and defence representatives. An unmanageable task would be shifted onto the defence, which would inevitably lead to delays.

383. Furthermore, legally aided firms are less likely to have access to the required technological tools that could enable them to more swiftly and effectively review material. Conversely, privately funded defence teams may well have the resources to conduct a review of all material relevant to an investigation but, even in these cases, there is a risk that defence teams could become overwhelmed by the volume of material for review, causing the careful preparation of a defendant's defence to suffer.

384. Although proponents of a keys approach may be attracted to it because it seemingly promotes the fairness of a criminal trial, there is the potential for the approach to have the opposite effect. Throwing open the doors to the warehouse and allowing a defendant's legal team to do what they wish with it involves, on any view, a dump of data. There is a danger that the defence would struggle to analyse all the material and may fail to identify material that may undermine the prosecution case. If this occurred, it could be said that the defendant was not properly represented at trial. I am concerned that a keys approach, which would require the defence to wade through a large volume of material, could lead to infringement of the right to a fair trial in Article 6.[321]

[320] Ministry of Justice, *Criminal court statistics quarterly: October to December 2023*, table C1; *Legal aid statistics quarterly: July to September 2023.* Latest full annual data set 2022; this data is for the financial year 2022-2023.

[321] Concerns about data dumping making it harder for the defence to analyse material in a criminal trial were expressed by Judge Pavli (partly dissenting opinion) in *Sigurdur Einarsson v Iceland* [2019] ECHR 412.

Duplication

385. Moreover, a keys model inherently necessitates significant and often costly duplication. First, investigators and prosecutors must thoroughly review the material gathered to build a case theory and determine, who, if anyone, should be charged with an offence. The prosecution would also be obligated, unless significant changes were made to legislation,[322] to redact material deemed sensitive and or personal. The prosecution would also need to satisfy themselves that in allowing the defendant(s) access to the warehouse, they are not inadvertently sharing criminal material, or material that may facilitate further criminality. In summary, even if relieved of the burden to schedule, the prosecution would still be required to meticulously review all material gathered in an investigation.

386. Subsequently, the defence, when given access to the same warehouse, will undertake their own searches. As discussed, it currently takes law enforcement years to bring and prove a complex and/or otherwise serious criminal case. In adopting a keys approach, duplication of material review will only cause further delay to case progression, and therefore to justice for victims and defendants. The State must then pay not only the prosecution but also the defence to search for material in the warehouse. It is difficult to see, in the current fiscal environment, where such funding may come from.

Satellite Litigation and Ambush

387. Furthermore, the need for the defence to review all material generated as part of an investigation risks distracting from the real issues in the case. There is a danger that full access to all the material in an investigation could encourage the unnecessary exploration of irrelevant satellite issues at trial, resulting in lengthier proceedings at a time when the courts are heavily backlogged.

388. Additionally, concerns regarding the keys approach include the drift away from a criminal justice system that focuses on the real issues, to one that enables ambush strategies. The keys model has very few safeguards against the defence introducing new evidence just before trial without the prosecution having adequate time to verify or challenge the reliability or veracity of the new material produced. The risk of ambush extends beyond the prosecution but also to co-defendants, who would likely have access to the same warehouse.

[322] See chapter 2 – The Legislative Framework – Data protection.

Data Protection and Sensitive Material

389. I am further concerned that a keys-style approach would undoubtedly risk materials containing sensitive information and LPP being disclosed unless the same careful approach to identification and redaction, in place currently, were to continue. With this in mind, I am doubtful that a keys approach would actually deliver time or cost savings. Under the keys model, the prosecution would be relieved of the requirement to provide a schedule of material but would still need to ensure that the material was properly examined.

390. As discussed in chapter 2, sensitive information, which may take the form, for example, of highly personal data relating to witnesses and/or persons spoken to as part of the investigation who have declined to provide a witness statement, must be redacted to be compliant with the Code and UK General Data Protection Regulations (GDPR). Separately, any material that may include LPP must also be isolated and reviewed by independent counsel. Currently, any material that is disclosed pursuant to section 3 of the CPIA has undergone a redaction process.

391. If a keys approach were adopted, it is clear to me that the prosecution would still need to review all of the material and appropriately redact it before handing it to the defendant and their representatives. The resources required would be considerable as all of the material generated or gathered as part of an investigation would fall to be considered for redaction purposes. In complex cases, the size of the material to be considered and redacted could be in the terabytes. Notwithstanding possible future redaction assistance software, the current redaction workload for investigators would, in fact, increase.

392. Further, in cases where there is a large volume of material to be reviewed and provided, the risk of sensitive information being inadvertently disclosed, which itself carries serious consequences, cannot be ignored. On the most basic level, a person's Article 8 right to privacy is infringed. At the most serious end of the spectrum highly sensitive information that falls into the wrong hands can lead to harassment, intimidation, or worse. Although section 17 of the CPIA prohibits any disclosed material being put to extraneous use, the prohibition, in my view, lacks bite. There is no easy solution to expect that a Crown Court judge could simply assume oversight of a keys to the warehouse approach and impose sanctions if anything went wrong. In countries such as the US, where a keys approach is a more established concept, courts are used to far greater coercive management of cases such as judicial protective orders, which more stringently hold legal representatives to account. This is an important point which distinguishes the approach in the US from the model for disclosure of unused material which historically has been applied, and continues to be applied, in England and Wales.

393. Finally, I note that a shift to a full keys approach would require radical reform of the CPIA. As the Court of Appeal observed in *R v Hayes* [2015] EWCA Crim 1944, "the legislative scheme is not intended to require disclosure of a document simply on the basis that it may be relevant in some undefined or diffuse way other than undermining the prosecution or assisting the case for the defence". I do not see that there is a proper basis for such an overhaul to the CPIA in light of the considerable challenges that would arise if a keys to the warehouse system were introduced.

Consideration

394. Having turned my mind to each of the issues above and remained very much cognisant of the compelling arguments for radical change, I am of the view that a wholesale keys to the warehouse approach should not be adopted, though there may be room for targeted data sharing solutions.[323] Having rejected this alternative model, the question remains, what can and must be done to bring the disclosure regime in England and Wales into the 21st century?

[323] See chapter 5.7 – Defendant's Own Material.

3.8 Conclusions

395. As noted in chapter 1, the first statutory disclosure obligation was created in an effort to both reduce law enforcement burdens and strengthen safeguards against future miscarriages of justice. Having heard from a range of practitioners and given it much consideration, I am of the view that the CPIA framework for disclosure of unused material remains the right one. However, it has been the real-world manifestation of this legislation that has caused serious problems.

396. I am inclined to agree that the unforeseen explosion of digital material has further exposed the difficulty of translating the legislative framework into operational reality. However, at the very heart of the matter, the section 3 CPIA test, although sophisticated in its formulation, can, and regularly is, made to work. But for how much longer, in the absence of some changes in practice to the way in which the regime works, can our model of disclosure be expected to operate?

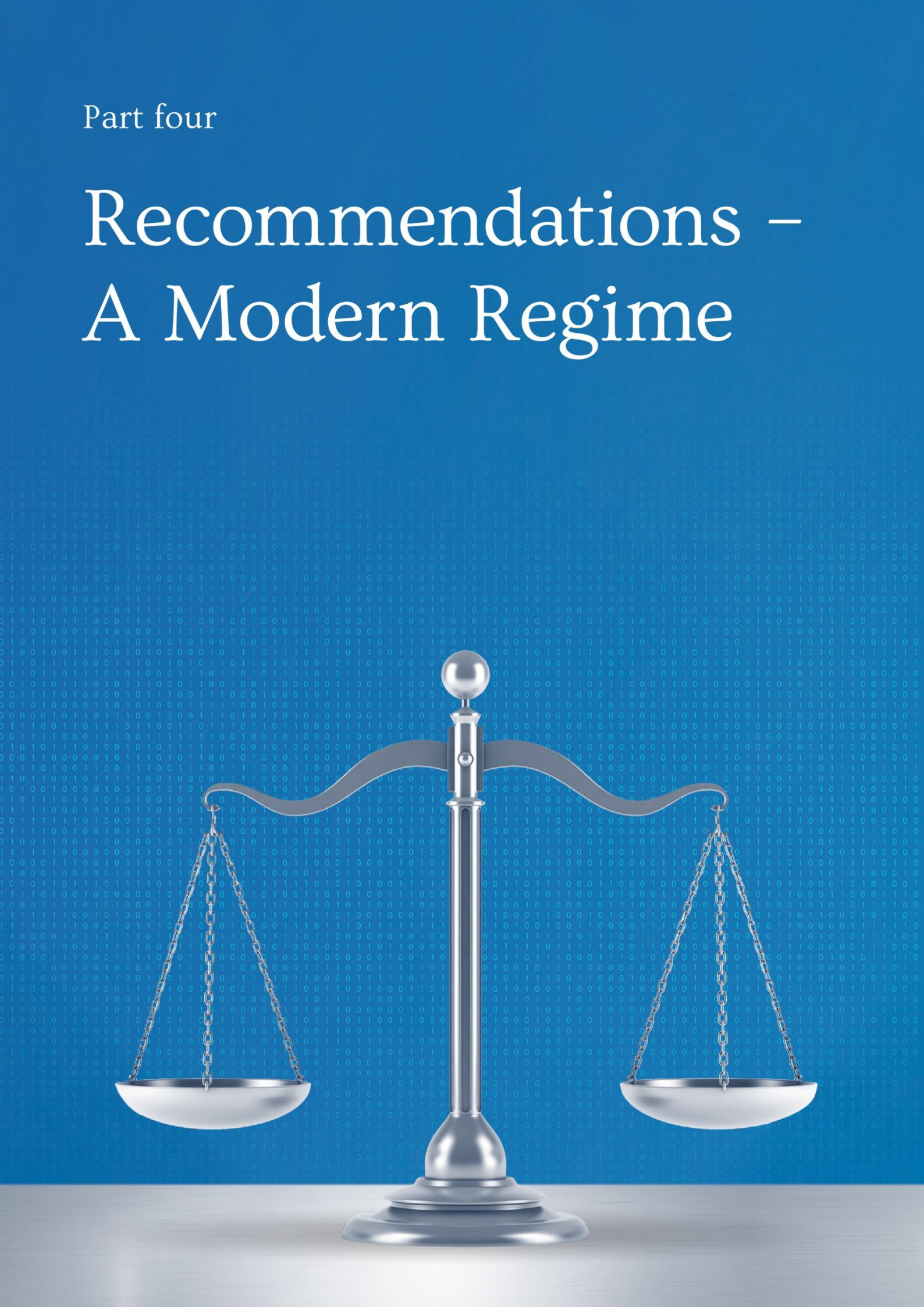
397. At present, it is almost unimaginable for the average citizen to go a day without their phone or laptop, which each contains massive quantities of information. If we compare an iPhone's maximum storage capacity, in 2014, of 128 GB to the current capacity of 1 terabyte, we see an eight-fold increase. It is not surprising, therefore, that digital material in the average criminal case is only trending in one direction – up.

398. This rising tide of digital material will, without doubt, continue to cause difficulties, disincentivising law enforcement from tackling complex crime. As outlined in chapter 3.7, and Annex F – International Comparisons, no jurisdiction has found a perfect disclosure model which is impervious to the challenges posed by digital material.

399. Whilst supportive of the framework, I am acutely aware that, without modernisation, the current regime will be choked of its already limited ability to facilitate the prosecution of serious and voluminous crimes, further eroding trust in the criminal justice system. However, it is not only law enforcement that will suffer; a dysfunctional regime hinders the ability of the Crown to find relevant, disclosable and exculpatory material, thereby undermining the very objective for which the regime was created, namely, to reduce the risk of miscarriage of justice.

Part four

Recommendations – A Modern Regime



4. Recommendations

The Characteristics of a Modern Disclosure Regime

400. Throughout my discussions, it has been repeatedly noted that the current regime was designed in a pre-digital, paper-based world. To withstand the myriads of challenges that it presently faces, a certain degree of modernisation is required to ensure that the regime does not hinder the delivery of timely and efficient justice, both now and in the future. The ability of the criminal justice system to rise to this challenge will be critical in ensuring that the fundamental principles of justice are not compromised.

401. To that end, a modern criminal disclosure regime, as I envisage it, should be founded on the five key principles of justice, clarity, transparency, efficiency and proportionality. The overarching principle I consider integral to the disclosure regime is *justice*. We must have a system that is able to secure justice for victims while guaranteeing all the right to a fair trial. Secondly, there is *clarity*. All those involved must be clear about how the law applies to them and their specific roles and responsibilities. There is also a need for *transparency*. We require a system that has a clear line of sight throughout the disclosure process.

402. This calls for the prosecution to be transparent about their approach to disclosure from the start. Alongside this is the expectation of cooperation and engagement from the defence whilst upholding the rights of all parties. We must also consider *efficiency*. It follows that, in a world of constrained public finances and increasingly complex offending, we must strive for the most efficient system that champions integrity and takes advantage of modern technology to deliver speedy justice. Finally, there is *proportionality*. In the interests of justice and recognising the ever-increasing volumes of digital material, it is necessary to have a system of disclosure that is proportionate, particularly in complex cases where pragmatic and flexible approaches are encouraged.

Justice

403. The objective of the criminal justice system is to convict the guilty and acquit the innocent in a fair and just manner. In pursuit of this goal the disclosure regime was designed, so that a defendant may be able to present their case in the best possible light. Fundamentally, it is the duty of the prosecution, as minister of justice, to uphold the values of the criminal justice system. As a result, they must present and prove a case but do so in a fair and just manner. When in doubt, there should be erring on the side of disclosure to avoid the risk of injustice. Also finely balanced is the requirement of

proper and timely justice for victims and defendants. We must not be content to witness our criminal justice system collapse under the growing pressure of increased digital material without the courage to recognise that change is needed. In its very purpose, a modern disclosure regime supports the primacy of justice above all else and remains at the forefront of my considerations.

Clarity

404. To improve the performance of the criminal disclosure regime, all parties must fully understand the law and their roles and responsibilities regarding its application. The CPIA and the Code of Practice (the Code) currently fulfil that function to an extent, but there is scope for greater clarity. The rules of engagement must be explicit and, by clarifying obligations, parties can be more easily held accountable for their actions. Better clarity is likely to improve the way in which disclosure obligations are discharged. However, this relies on consistent and high-quality training for those carrying out disclosure tasks to ensure a sound understanding of the regime and its application in practice, narrowing the margin of error.

405. Instead of wading through a plethora of guidelines, protocols and manuals (some of which despite being out of date remain 'live' online), a modern regime should be one where parties know precisely where they can find authoritative, contemporary guidance. Successful implementation of any changes to the disclosure regime will require close judicial oversight of case management hearings. By setting out clear timelines and expectations, judicial case management can assist in creating a system where delay, caused by ambiguity, is avoided by explicitly stating what is expected of each party before, during, and after hearings. Such an approach will promote early resolution of contentious issues, increased co-operation, and better compliance with statutory obligations.

Transparency

406. To uphold fundamental principles and ensure transparency, the court must hold both the prosecution and defence accountable at all stages of criminal proceedings. We all need to see justice being administered fairly and openly in the context of just outcomes and accountability for public spending. A modern disclosure regime must require the prosecution to be honest concerning the reasonable lines of inquiry that have been pursued and how investigative material has been gathered, handled, and interrogated. With that, both the court and defence must be capable of rigorously scrutinising their approach. It is also incumbent on the defence to assist within the limits of their instructions to identify the real issues in the case and the arguments on which they intend to rely so that these matters can inform the prosecution's approach to disclosure.

407. More broadly, to increase the public's faith in the criminal justice system, greater transparency must be provided regarding the disclosure regime's performance and its impact on the delivery of fair and just outcomes. The performance of any changes to the criminal disclosure regime can only be properly assessed through the collection of sufficient pertinent data. This will enable an increasingly detailed assessment of whether the identified issues persist or improve over time.

Efficiency

408. Timely justice for all parties is of paramount importance and we should not be content with wasting public funds and the delay to criminal case progression frequently attributed to the current regime. To allow for a proficient disclosure regime efficient enough to withstand the ever-increasing material produced in this digital age, we must explore the safe and ethical use of advanced technology in an open and transparent manner. As has been the case with many previous technological advancements, the use of technology has the potential to reduce administrative burden and increase accuracy.

409. We must have a system that takes a pragmatic approach to disclosure, using ethical, secure, and accurate advanced technology to streamline the processing, redaction, and scheduling of large volumes of digital material. This will effectively free up resources to focus on the complex aspects of investigation and prosecution rather than arduous administration, increasing the speed of justice for both victims and defendants.

410. There is an understandable concern that any further drive towards efficiency and managerialism may hinder the right to a fair trial. However, we must recognise that prolonged delays in the proceedings of criminal cases perpetuates the denial of justice for victims and the opportunity for defendants to clear their name. Efficiency and the right to fair trial need not be mutually exclusive.

Proportionality

411. Finally, we must acknowledge the importance of developing a proportionate disclosure system and recognise the limitations of a "one size fits all" approach in today's digital age, with limited time and resources. Whilst the underlying principles of disclosure must undoubtedly apply to all crime types, I am of the view that there should be flexibility in the way in which disclosure obligations are discharged. This should and can be done proportionately, when considering the context of a case. As reflected in the Attorney General's Guidelines and widely understood in case law, there is a place

for proportionality to ensure that cases are heard in a timely manner, particularly when handling complex cases.[324]

412. As the courts have already recognised, the expectation of manually reviewing all items in a material-heavy case is no longer practicable. I echo the importance of this approach and recognise that pragmatism can be used to reverse the "chilling effect" that is slowly gripping law enforcement.

413. In making the following recommendations, which are to be considered in light of the challenges detailed in this report, I have kept all five principles at the forefront of my mind. I hope that this will pave the way for an effective modern disclosure regime that will increase public confidence in the delivery of justice.

[324] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024), para 20; Annex A, paras 50 to 52; and Annex D, paras 14 to 18.

Introduction

414. Having assessed the serious challenges faced by many of those operating and navigating the criminal disclosure regime in today's digital age, I have given considerable thought to the construction of an ambitious, yet pragmatic, suite of recommendations which are discussed in the following themes:

4.1 Technological Solutions
4.2 Investigations
4.3 Private Prosecution Duties
4.4 Training and Improving Policing Culture
4.5 Case Building Communication
4.6 Streamlining Court Process
4.7 Section 8 applications
4.8 Magistrates' courts
4.9 Intensive Disclosure Regime
4.10 Defendant's Own Material
4.11 Consolidating Guidance
4.12 Sanctions
4.13 Legal Aid and Funding
4.14 Oversight and Evaluation

4.1 Technological Solutions

415. Central to this Review, has been an evaluation of the impact of digital material upon the State's ability to discharge its disclosure obligations. As discussed in chapters 3.1 and 3.2, it can be said that technology-enabled proliferation of data caused several of the disclosure mischiefs we see today, and therefore, many are of the view that technology and AI will ultimately provide the panacea to relieve burdens, reduce bias, and safeguard justice.

Considerations

416. Before I set out my recommendations, it is important to acknowledge the concerns one may have about introducing artificial intelligence (AI) into the disclosure process. The purpose of this Review was to examine current issues within the regime with the view to prevent future miscarriages of justice. Therefore, it would be unwise not to consider potential concerns that the public and members of the criminal justice system may understandably have regarding AI.

417. Technological advancements are happening rapidly and AI is already being utilised across many sectors. There are already AI powered tools on the market which could be used in the disclosure process. However, just because AI is capable of performing disclosure-related tasks it does not simply mean such tools should be procured and implemented blindly – this would undoubtedly lead to disaster. Disclosure, being so inexorably linked with the right to fair trial, is at the sharp end of the criminal justice system and therefore any advancements in this area must be approached with forethought. Furthermore, the criminal justice system demands that, ultimately, there is a rational human who can take accountability for decisions made by law enforcement officers and prosecution counsel. It is imperative that this element of human accountability remains central to our approach to justice. So too should the defence be provided with the fullest possible access to technology to ensure equality of arms.[325]

418. Principally, whilst I do believe that AI can help alleviate many of the pressures caused by the volume of digital material in disclosure, it will not be the silver bullet to solving all the problems in their totality – many of the mischiefs previously discussed have causes other than the rising volume of digital material.

419. The provision of adequate training for users of advanced tools is important to note. Through my engagement I have heard that police officers must fully appreciate the disclosure process and their duties; it is fundamental that they have this understanding as a minimum before they can consider

[325] See the partly dissenting opinion of Judge Pavli in *Sigurdur Einarsson v Iceland* [2019] ECHR 412.

operating any new tools introduced to aid the disclosure process. Many AI tools are heavily dependent on the initial human input, and it is crucial that specialist officers have the technical training to confidently operate such software, so that these tools are not used inaccurately, potentially leading to new routes of injustices. As I have been frequently reminded, the software is only as good as the data it is fed and the competence of its operator.

420. It was also brought to my attention many times that the procurement of technology across law enforcement is not standardised and can be disjointed, even between police forces themselves. I was told of a recent example where multiple law enforcement agencies were negotiating separately with the same software provider for access to a material management tool, unaware of others seeking the same.

421. This issue is wider than disclosure, and therefore outside the scope of this Review. However, I deemed it worthwhile to comment on the subject as I believe it would be valuable to consider. Aside from the benefits of economies of scale, it is also important to ensure that all tools in use are at a similar standard, with equal access. I believe exploring central procurement, where one body is responsible for negotiating on behalf of forces looking for similar tools, could help mitigate this risk. This should not hinder forces' current flexibility in local procurement.

422. It should also be noted that this Review considers the application of the disclosure regime for all crime types, from motoring offences to rape and serious sexual (RASSO) offences. In turn, the large variety affects the amount of work a disclosure officer would need to carry out for any one case – which may even differ greatly for two cases charged under the same offence. For this reason, consideration should be given as to how AI can be applied in a tailored way during the different steps of the disclosure regime – it will not be as simple as one size fits all. For example, in cases like the Serious Fraud Office's (SFO) with such great volumes of material, there is a stronger argument to support the use of advanced technology as it would not be practically possible to complete investigations without it otherwise. Conversely, for cases with smaller volumes of material, procuring and using novel tools may not be cost efficient. Instead, current methods and technology may suffice. A proportionate approach is required.

423. More broadly, law enforcement agencies looking to procure advanced technology must be aware of, and willing to manage, data security risks. These include consideration of where investigative material is stored and who could gain access. Many of the material management software tools on the market are cloud-based; that is to say, the data is not stored locally on storage devices or hard drives

but instead stored in servers[326] that can be accessed via the internet. Both local storage and cloud-based systems,[327] have their own respective advantages and associated security risks. Without sufficient stress-testing and mitigations, law enforcement agencies will expose themselves to data breaches and data loss. It is incredibly important that, whatever the storage system used, it must be secure enough to protect victims, witnesses and defendants.

424. Furthermore, law enforcement agencies must be cognisant that many large language models (LLMs),[328] which represent the most popular mainstream AI tools available today, often do not keep a user's 'input' private. In the process of utilising a public LLM to analyse data or information, a user must be aware that this material will be ingested by the model and can be extracted/viewed by other users. Data security and protection considerations must remain at the fore, as the criminal justice system considers how it should best utilise AI.

425. Next, there is the matter of cost. Cutting-edge AI powered tools, that could be used in the disclosure process, come at a significant cost. In time, as more providers enter the market, the cost of such tools may decrease. However, in the short term, stringent cost-benefit analysis will be required before tools can be rolled out to police forces and law enforcement agencies. Value for money remains a significant consideration, particularly in the current fiscal environment.

426. Finally, I recognise that any recommendations made regarding the use of technological tools to assist with disclosure will have little positive impact if the criminal justice system, including the jury, does not have confidence in said tools. The Horizon Post Office scandal has understandably caused significant distrust, and highlights the importance of transparency when using technology. There must be an honest approach as to how tools are configured, operated, and assured.

427. Considering all of the above, I have settled on what I believe to be the most effective solutions regarding the use of technology and AI to assist with carrying out disclosure obligations. With the pace technology is developing, we should seriously consider grasping the opportunities provided and significantly lessen the disclosure burden on parties involved.

Criminal Justice Digital Disclosure Working Group

428. The development of advanced technology and AI is happening presently,[329] and material management tools are already being used to assist with disclosure, albeit in a siloed manner across law

[326] Server – A computer that provides functionality or services to other computers over a network. There are multiple categories of servers – one common example is file servers which provide a space for files to be stored centrally, almost like an electronic filing cabinet.

[327] Government Cloud First policy - GOV.UK (www.gov.uk).

[328] For example, Chat GPT and Google Gemini.

[329] See chapter 2.2

enforcement agencies. Therefore, I recommend the creation of a new Criminal Justice Digital Disclosure Working Group, with members from all relevant parties, including the judiciary, responsible for exploring off-the-shelf technological solutions. I believe that including defence practitioners in these conversations will be beneficial, particularly when discussing opportunities to offer the defence access to future tools, mirroring practices in the Civil Courts, so that material such as schedules can be seamlessly shared via a single platform. Furthermore, as the technology evolves, a plausible future development is the combination of material management software with law enforcement investigative tools, thereby minimising the total number of separate digital tools required to carry out disclosure. I am keen that all parties are sighted on this development if and when it occurs, which this working group could provide the outlet for.

429. As well as examining the accuracy of the tools when managing and identifying material, the working group should also consider the security of the tools and their value for money. I believe there are large benefits for a criminal justice system that can identify, procure, and make technological solutions widely available to improve disclosure. As much of this technology is already in use, this group provides an opportunity to reflect on the utility of these tools in practice; the current practices; and whether guidance on their operation should be circulated nationally. Such a group could report their findings to a lead Minister, Disclosure Tsar or Disclosure Scrutiny Joint Committee, all discussed latterly.

Recommendation 1

A Criminal Justice Digital Disclosure Working Group, comprising law enforcement, prosecution, defence and judicial representatives, should be created to consider:

a. Existing advanced technological tools for the management of disclosure and evidential material across the criminal justice system and the functionality that these tools provide, including in facilitating access for the defence and judiciary.
b. Metrics required to evaluate the accuracy, security and value for money.
c. The skills and training required to operate such software.
d. The degree to which all criminal justice partners can have confidence in such tools.
e. The requirement to regularly review the use of such tools.

Cross-Agency AI Disclosure Protocol

430. Undoubtedly, as AI develops further, there will be more technological solutions introduced not only for material management but for use across all sectors. Regarding disclosure specifically, it is imperative for all parties involved to be able to confidently say they are using AI safely and accurately.

431. In 2020, there was litigation regarding the use of Automated Facial Recognition technology (AFR),[330] when the lawfulness of South Wales Police's use of AFR was challenged. Although the claim was dismissed by the Divisional Court,[331] the appeal was allowed by the Court of Appeal[332] on the basis that South Wales Police did not use the technology in line with data protection laws. I highlight this case as an example that there needs to be clear guidance on the use of advanced technology, both from a technical and ethical standpoint.

432. This is why I recommend that the National Police Chiefs' Council (NPCC) and the Home Office (along with other relevant government departments) create a protocol covering the ethical use of AI in the disclosure regime, which could sit as part of the wider work on the use of AI in policing[333]. Such a protocol will reduce the risk of disparate practices and ensure consistency across law enforcement agencies. It should also assist agencies as they seek to procure and utilise emerging AI technologies.

> **Recommendation 2**
>
> To support the wider use of advanced technology in the criminal justice system, a cross-agency protocol should be created, covering the ethical and appropriate use of artificial intelligence in the analysis and disclosure of investigative material.

433. As discussed earlier, the approach to procuring new technology across law enforcement is disjointed. If unaddressed, there remains a risk that law enforcement agencies continue to pay above the odds for contracts with software providers. Therefore, I invite the NPCC and the Home Office to consider whether the introduction or bolstering of a unit responsible for monitoring any overlap of technological gaps in police forces, could help with this issue – not only for disclosure software but more broadly. There is a balance to be found that retains the best in law enforcement autonomy but also capitalises on economies of scale.

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330 Automated Facial Recognition technology (AFR) – Equipment that can automatically detect and compare the similarity of facial images through the extraction of biometric data.

331 *R (Bridges) v Chief Constable of South Wales Police & Ors* [2019] EWHC 2341 (Admin), [2020] 1 WLR 672 at [158].

332 Ibid, at [209] and [210].

333 National Police Chiefs' Council, *Covenant for Using Artificial Intelligence (AI) in Policing* (2023).

Recommendation 3

To capture economies of scale and increase join-up, Law Enforcement should consider the benefits of a central technology procurement unit, which could negotiate on behalf of multiple forces who seek to procure a tool from the same provider.

434. Although not a direct recommendation on the use of technology and AI to assist with disclosure burdens, there were other technology-related issues that were highlighted throughout my engagement. I heard of one problem at the beginning of an investigation: the delay in initially unlocking and extracting data from seized digital devices. I understand there to be a geographic disparity in police forces' and law enforcement agencies' access to digital forensic units and laboratories. If this is indeed a reality, then the problem should be addressed. Improving equality of access to such units is likely to increase the speed at which cases progress and a charging decision is made. Therefore, I encourage the Home Office to consider a new governance model for digital forensics, to allow for these disparities to be addressed for all investigations.

Recommendation 4

That a new governance model for digital forensics be created to streamline decision-making and standardise access to digital forensic capabilities in all investigations.

435. Another technology-related matter I heard to be a cause of delay in the disclosure process is the access to secure platforms when sharing sensitive material. Under Cabinet Office guidance,[334] there are strict limitations around the sharing of both hard copy and electronic sensitive materials. I have heard that not all agencies and forces have access to secure platforms for sharing digital material, which leads to investigators inconveniently travelling the country to deliver material in hard copy or USB form. Improving access to such platforms would assist officers and prosecutors in reaching swifter decisions in time-sensitive investigations. I therefore invite the Home Office to conduct a review of whether the current access to secure platforms is sufficient.

Recommendation 5

Undertake a review of law enforcement and local police force access to secure platforms for the sharing of sensitive material.

[334] Cabinet Office, *Guidance 1.3 Working at TOP SECRET*.

436. Finally, I strongly suggest a regular review of the AI tools used in disclosure (see recommendation 1). This will ensure that procured technological tools work as intended and make use of the latest AI developments. The criminal justice system would do well to stay abreast of advancements.

4.2 Investigations

437. I am of the view that our current regime falls short of the principles of justice, clarity, transparency, efficiency and proportionality that a modern disclosure regime should enshrine. In light of the challenges detailed in this report, which I shall not repeat, I presently set out recommendations for the reform of the current *modus operandi*. In doing so, I propose to retain a framework familiar to all parties whilst laying the groundwork for a modern, future-proofed disclosure regime.

The Disclosure Test

438. Law enforcement agencies have stressed the challenge inexperienced officers face in applying the section 3 Criminal Procedure and Investigations Act 1996 (CPIA) disclosure test, and in particular, confusion over the "might reasonably be considered capable" provision. A majority of officers were also of the view that the test is too subjective. A failure to adequately comprehend the section 3 test leads to a waste of time and resource due to over disclosure, or risks injustice through non-disclosure.

439. Throughout my engagement, professionals and practitioners have repeatedly made clear their assessment that the issue arises from the application of the test rather than the language of the test itself, which is well understood by experienced practitioners and the judiciary. Therefore, I suggest retaining this known test, which has been fine-tuned in light of previous miscarriages of justice.

440. Instead, more needs to be done to support officers' comprehension of this test, so that it can be applied with greater accuracy and consistency. The proposal aims to reduce perceived ambiguity by steering inexperienced officers away from a risk-averse approach. Officers, having properly understood the test, must have the courage of their convictions to apply it critically and accurately, thereafter, providing the prosecution and defence with the right disclosable material. In proposing additional guidance, I hope to help focus the mind of the investigator and prosecutor and move away from an approach that currently adds to the disclosure obligation.

Recommendation 6

Make clear in Consolidated Guidance that the section 3 CPIA test is an objective assessment.

Searching Seized Material

441. I am of the view that it is unreasonable and highly impracticable, in this digital age,[335] to expect investigators and disclosure officers to manually review each item in search of possibly relevant and disclosable material, within a reasonable timeframe and in such a manner that does not waste the finite resources of all parties. This reality is already reflected in case law[336] and noted in the Attorney General's Guidelines.[337]

442. As discussed, technology is already being used to assist with the identification of disclosure material[338] and many court centres have adopted a pragmatic and balanced approach towards law enforcement's use of technology assisted review.

443. Significant and costly disclosure case collapses, often attributed to a combination of poor training, human error and large administrative burdens, are not destined to forever haunt the English and Welsh criminal justice system. As has been demonstrated in landmark cases,[339] the appropriate and regulated use of technology can increase the speed and accuracy at which disclosure obligations can be discharged, in turn, benefitting all key parties.

444. To bring the legislative framework in line with current practices, I recommend that it should be made clear in the Code of Practice that the disclosure duty can be discharged with the aid of technology. This legislative footing will empower prosecutors to set out proposals for technology-assisted disclosure strategies in all cases and provide judges confidence that they may challenge/ endorse such an approach as part of their case management powers. The Code, which, unlike the CPIA, focuses on how disclosure principles should practically manifest, is proposed as the most suitable and natural vehicle for these changes. Furthermore, as the Code is secondary legislation, it can be more swiftly and easily updated to meet today's demands.

445. Whilst recognising the significant benefits advanced technology offers, I am well aware of the potential pitfalls. Improper use of technology may lead to the overlooking of relevant material and increase the chance for a miscarriage of justice. It is therefore important to look at this technology

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[335] See chapters 2.2, 3.2 and 3.3

[336] *R v Pearson* [2006] EWCA Crim 3366 at [20] per Hughes LJ VP: "[we do not agree] that it was the duty of the Crown to trawl through every word or byte of this material in order to see whether any of it was capable of undermining the Crown's case or assisting that of the appellant […] Where there is an enormous volume of material, as there was here, it is perfectly proper for the Crown to search it by sample or, as here, by key words"; and *R v Richards & Ors* [2015] EWCA 1941 at [27] per Leveson P "the prosecution is not required to do the impossible […] common sense must be applied. In such circumstances, the prosecution is entitled to use appropriate sampling and search terms and its record-keeping and scheduling obligations are modified accordingly".

[337] Attorney General's Office, *Attorney General's Guidelines on Disclosure* (2024), para 56.

[338] See chapter 2.2.

[339] Serious Fraud Office, *Rolls Royce PLC* (2014).

as an instrument to aid officers in discharging their duties. It must not diminish from their accountability over the process. In fact, as with the advent of DNA analysis tools, such technology when used correctly may reinforce vital safeguards against miscarriage by mitigating the natural bias of an officer. As discussed later, a greater degree of transparency and accountability must accompany the formalised use of technology. The defence and judiciary must and will have their say on the prosecution's approach to disclosure.[340]

Recommendation 7

Identifying relevant material

Amend the Code of Practice, creating a new section, 'Reviewing Material', to make clear that technology can be used to identify material which may be relevant to an investigation (as defined in paragraph 2.1 of the Code of Practice) and that there is no duty for every item of prosecution material to be manually reviewed.

Identifying material that may meet the disclosure test

Amend paragraphs 7.2 and 7.3 of the Code to make clear that the duty on the disclosure officer to draw to the attention of the prosecutor material in possession that may meet the disclosure test does not require every item to be manually reviewed. In cases involving a large volume of material, a disclosure officer can be aided by technology to identify material that may meet the disclosure test.

Reviewing material for disclosure

Amend paragraph 10.2 of the Code to make clear that, in cases where the disclosure officer has identified a large volume of material that may meet the disclosure test, the prosecutor can similarly be assisted by technology when reviewing the material for the purposes of determining whether it meets the disclosure test.

None of the above affects the ability of the defence to object to the approach taken to identifying or reviewing such material and if the defence take objection, it should be raised at the earliest opportunity and be linked to the defence statement.

[340] See Recommendation 25.

Relevance Test

446. Alongside concerns over the disclosure test, prior Reviews, including those of Lord Justice Gross and Sir Geoffrey Cox KC MP, have raised alarm regarding the breadth of the relevance test. I share this sentiment and the assessment that the current definition, particularly concerning the use of the words 'some bearing', may be so wide as to be capable of capturing a significant majority of the total material gathered during an investigation.

447. Whilst I recognise concerns regarding the breadth of this test, I believe that it should not be narrowed. Its width is there to provide a safeguard during the investigation phase and to encourage inexperienced officers to cast their net wide as they record and retain relevant material, allowing them to pursue all reasonable lines of inquiry. Narrowing this test may encourage a dangerous culture where important material is not seized, thereby increasing the risk of miscarriage of justice. Inexperienced officers must not be incentivised to cherry-pick material at the outset of an investigation but should instead be encouraged to pursue all reasonable lines of inquiry and gather relevant material identified.

448. Digging further into the concerns of law enforcement regarding the width of the test, it has become apparent that their chief concern sits less with the philosophy behind the test but rather the practical burdens created, when such a large number of items have been deemed relevant, namely scheduling and redaction. This is where I believe advanced technology and AI must assist in taking the full gamut of material seized and not only locating relevant and disclosable material but also rapidly presenting it in an accessible way. Utilising such tools will likely make the volume of relevant material gathered a secondary issue.

Scheduling

449. Following the review of material, disclosure officers are obligated, as discussed in chapter 3.1, to compile a schedule of unused material, which is often fraught with difficulties given the volume of items they must sift through.

450. As discussed, all parties have criticised the current scheduling method. Law enforcement have expressed frustration that not only is the process onerous, but that they are asked to provide full schedules for defendants who are likely to plead guilty. They view the current requirements as leading to excessive work, which drains their limited resources. Prosecutors have told the Review that the schedules produced by law enforcement often fall short of their standards and require revision, which causes delays to cases.

451. To address these issues, I first recommend that section 6 of the Code be updated to provide provisions for the use of technology to aid the creation of schedules. It is important to note that, in

practice, some law enforcement agencies are already successfully utilising technology in this way, but there are substantially more efficiencies that can be realised. [341] This proposal lays the groundwork for investigators to use software to swiftly and accurately extract, and then present, salient information in a format helpful for the prosecution and the defence. Experts I spoke to are confident this emerging technology will soon provide a viable alternative to the burdensome and resource draining method of manually writing traditional schedules. Therefore, it would be wise to proactively prepare for the increased opportunities presented by these technologies.

Recommendation 8

Section 6 of the Code of Practice should make provision for the use of technology to assist in the creation of modern, resource-efficient schedules.

452. Furthermore, the legislative framework should be updated to match that which is already happening in certain large volume criminal cases, namely the service of tailored complimentary metadata[342] and traditional schedules. The onerous and subjective process of writing a description for each and every relevant item has been replaced with the acceptance, in these cases, that metadata can almost instantaneously provide sufficient detail for many items of material, particularly those which have almost no bearing on the offence or defence case.

453. I recommend this model should become an integral part of the approach to disclosure in high volume cases. The lightning-fast extraction of metadata and the creation of such schedules presents an opportunity to recalibrate the way digital material is presented in the digital age. Making provision for such an approach would significantly reduce the time invested by law enforcement to create traditional descriptive schedules. It also enables the defence to access initial metadata schedules much earlier in a case's lifecycle.

454. I recognise the fact that meta-data schedules (example Annex E), provide categorical data[343] and not narrative information. Nevertheless, this metadata can provide sufficient insight for 'less relevant' items. For example, the Review heard of instances in live complex trials where the prosecution and defence have come to an agreement where a large bulk of peripherally 'relevant items' have been served on meta-data schedules and other items, thrown up by agreed search terms, have been provided on a traditional descriptive schedule.

[341] See chapter 2.2 – Scheduling.
[342] HM Crown Prosecution Service Inspectorate, *An inspection of the handling and management of disclosure in the Serious Fraud Office* (2024), para 5.55. See chapter 2.2 of this Report.
[343] Annex E – Metadata fields: author, recipients, attachments, subject, date/time sent, email thread, file location etc.

455. As with currently live complex cases, the defence and prosecution should, where possible, come to an early agreement about what types of items should be served on a traditional schedule and what items served using meta-data schedules. Ultimately, at the Plea and Trial Preparation Hearing (PTPH), the prosecution will have to detail, through the Disclosure Management Document (DMD), its scheduling strategy. The court and defence shall then scrutinise the approach taken, with the defence making representation where it is believed narrative information is required, with the judge able to order the production of traditional written descriptions of further items.

456. As discussed earlier, future technology should assist officers in auto-generating descriptions of 'written' documents; however, if no action is taken until that time, the prosecution of serious, voluminous, and otherwise complex criminal cases will grind to a halt. To that end, I recommend that the use of meta-data schedules be put on a legislative footing. The Consolidated Guidance can include case studies of 'appropriate' use, whilst providing courts enough flexibility to find the most effective application of this provision.

457. It should still stand that a disclosure officer, regardless of the method of scheduling, must clearly mark those items that are likely to meet the CPIA disclosure test.

Recommendation 9

Section 6(b) of the Code of Practice should be updated to allow the appropriate use of 'metadata schedules', in conjunction with descriptive schedules and block listing.

458. Where the accused is charged with an offence likely to stay in the magistrates' court and it is considered that the accused will likely plead guilty, a schedule is not required unless a not guilty plea is subsequently entered or indicated.[344] This provision does not, however, extend to cases expected to go to the Crown Court. Law enforcement agencies have expressed to me their frustration over the significant resource required to complete pre-charge schedules for Crown Court cases where a guilty plea is likely.

459. In the quarter ending December 2023, the guilty plea rate stood at 65%.[345] It is therefore not unreasonable to estimate that significant time and resource could be saved in extending the provision already in the Code of Practice, to include Crown Court cases. This will substantially reduce the burden on both law enforcement and the prosecution, helping to focus their resources on cases which are likely to go to trial.

[344] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 21(3)) Code of Practice* (2020) para 6.4.

[345] Ministry of Justice, *Criminal court statistics quarterly: October to December 2023*. Guilty plea rate is the number of defendants pleading guilty to all counts as a proportion of those with a plea.

460. However, I am alert to the fact that "likely to plead guilty" is not a guarantee that the defendant will plead guilty. As such cases will vary on an individual basis, I recommend that approval be sought from the designated prosecutor, which will serve as a useful counterbalance. The requirement to provide a schedule if a non-guilty plea becomes likely, or is entered, should remain.

Recommendation 10

In circumstances when a defendant has indicated that he/she is likely to plead guilty to an indictable only or either way offence unlikely to remain in the magistrates' court, the investigator, with the agreement of the designated prosecutor, should not have to produce a full schedule of unused material before a charging decision is taken. Section 6.4 of the Code of Practice should be updated to reflect this.

Redaction

461. The task of redacting sensitive and personal information is another serious obligation placed on police forces, which is currently draining far too much time and resource. As previously discussed, there is broad agreement that some inexperienced officers misunderstand their obligations under the Data Protection Act 2018 (DPA) and CPIA and, consequently, often engage in time-wasting excessive redactions which hinder case progression.

462. Whilst the legislative framework places the burden of redaction obligations on prosecutors, in practice, guidance has shifted this obligation to the police in the name of 'front loading'. There remains the expectation of full redaction even in cases ultimately deemed 'no further action', which in 2023 accounted for over 21% of all cases sent to the CPS.[346]

463. Therefore, it can be easy to sympathise with the critique that the effort spent redacting material for cases that do not progress is, when all is said and done, a waste of time and resource. Ensuring that police have a thorough understanding of their redaction obligations will effectively reduce much of the self-imposed burden and allow for a more efficient process. There is scope under the current framework to significantly reduce pre-charge redaction. Therefore, I urge the Information Commissioner's Office (ICO) and NPCC, working with the Crown Prosecution Service (CPS), to issue guidance dispelling the incorrect assumptions regarding pre-charge redaction obligations.

[346] National Police Chiefs' Council, *The Policing Productivity Review* (2023) p 83, note 46. CPS considered 201,253 defendant decisions in 2022/23. The Review conducted a sample review of 200 files, which showed an average of 1.12 defendants per file. Extrapolated to the 201,000 defendant decisions, this would equate to 179,690 files. The 'no further action' rate in 2022/23 has now decreased to 21.3%. This means that 38,274 files did not progress to charge. This is considered a conservative estimation.

Recommendation 11

The Information Commissioner's Office and National Police Chiefs' Council should issue guidance regarding redaction expectations in a law enforcement context. This change should be reflected in section 6(c) of the Code of Practice, single Consolidated Guidance, and in the College of Policing Learning Standards.

464. If a clarification in pre-charge redaction obligations fails to relieve the concerns, I believe a more ambitious approach should be explored. Whilst recognising the need to redact sensitive personal information, which may place individuals at risk or would be a gross intrusion of privacy, I am concerned by claims that cases are being delayed by the unnecessary and excessive redaction of non-sensitive material, which has no bearing on the case. The delay caused by the current practice of redaction, and the additional workload for police officers on cases which do not proceed to charge, raises questions as to whether amendments are needed to the DPA, CPIA and European Convention on Human Rights (ECHR).[347]

Recommendation 12

There should be consideration of the establishment of a 'data bubble' between law enforcement and the Crown Prosecution Service so that data and information can be shared unredacted for the purposes of a charging decision.

465. In my evidence-gathering sessions, law enforcement agencies have provided ample support for the idea of a data-sharing bubble between themselves and prosecutors, so that material can be shared broadly unredacted for the purpose of making a charging decision. If prosecutors decided to proceed with a charge, then subsequent redaction would be undertaken to ensure material and schedules could be shared with the court and defence. In shifting this initial redaction obligation to a later stage, prosecutors would be able to access and review relevant material in a more transparent fashion, which will improve efficiency and entirely eliminate unnecessary redaction for the fifth of cases that do not proceed further.[348] If this proposal is taken forward, the legislative framework would require some amendment, whilst continuing to recognise the obligation on investigators to review and redact sensitive material (i.e, such as information regarding national security, intelligence methods and sources etc). Moreover, redaction must still take place for material shared with the defence.

[347] Jonathan Fisher KC, *Disclosure: the full picture*, Counsel Magazine, July 2024.
[348] National Police Chiefs' Council, *The Policing Productivity Review*, (2023) p 83.

4.3 Private Prosecution Duties

466. More broadly, I have found that there remains significant confusion over disclosure obligations for private investigators and prosecutors. In my assessment, private prosecutors are bound by Part 1 but not Part 2 of the CPIA and the Code, insofar as they only must have regard to it. The duties set out in the Code create a series of robust safeguards relating to the gathering, reviewing, retaining, and disclosing of material. There is concern that, without further clarification, some non-state investigators and prosecutors may not discharge their disclosure obligations with sufficient zeal. As discussed, disclosure oversights and mistakes, at the outset of a case, are likely to cause significant issues later down the track, with prosecutors none the wiser regarding crucial material not gathered. To address this confusion, I am recommending that consideration be given to amending the CPIA to provide clarity for all parties.

467. In making this recommendation I acknowledge the practical and legal issues which flow. The CPIA Code is a police-centric document, with the CPIA permitting the Secretary of State to prepare a code of practice concerning police investigations. A statutory amendment may be necessary to ensure that the Secretary of State does not stray beyond the legal authority of the CPIA in placing duties on non-police investigators. Thought will also have to be given to the way non-police investigators are addressed by the Code. For example, guidance notes attached to the Code could be utilised with non-police investigators in mind, as is the case with Police and Criminal Evidence Act 1984 (PACE) codes.[349] The approach to be taken by investigators may also have to permit variance to account for differing institutional structures and capabilities.

Recommendation 13

Consideration should be given to whether the CPIA and Code of Practice obligations should apply to anyone undertaking a criminal investigation.

[349] Guidance note 3J of Code C of PACE provides guidance to "non-police investigators" in respect of informing suspects of their right to legal advice.

4.4 Training and Improving Policing Culture

468. The recommendations suggested above will have limited impact without the recognition of the importance of training for police officers to ensure that they understand their obligations under the refreshed regime. As part of this re-envisioning of the current regime, I believe that a three-tier, bronze, silver and gold, learning framework would be beneficial in providing a clear progression path.

Updating Learning Standards

469. Law enforcement agencies would benefit from an agreed national learning standard, covering matters including the criminal justice system and disclosure, that can be delivered separately by each agency to all new law enforcement trainee officers. At the bronze level, all officers should be expected to learn about the right to fair trial and broad disclosure principles, even if their future careers do not require them to apply this knowledge practically. Such an approach would help overcome the disparity in disclosure-related initial training and start driving all-important cultural change. I am of the view that, as the right to a fair trial is central to the operation of our criminal justice system and the impact of disclosure failures is so regrettable, it would not be unreasonable to expect new officers to also grasp the weight of these matters as culturally an inextricable part of the investigating and prosecuting process.

470. At the silver level, a new national learning standard will ensure that investigative officers, regardless of which law enforcement agency they work for, will comprehensively understand the CPIA legislative framework. Targeted specifically at those officers, such as investigators and disclosure officers, who deal with the regime daily, this compulsory training, delivered flexibly by each agency as they see fit, should emphasise how the legislative framework is translated into real-world obligations. Again, high-quality, consistent, inter-agency training should begin to turn the tide on a contemporary reluctance to invest in disclosure training and skills.

471. Furthermore, in support of a national standard, law enforcement agencies should record and report on training completion rates. Such data will be invaluable in understanding the uptake of training, and if further incentives are required.

Recommendation 14

All major law enforcement agencies should agree a national learning standard, for new officers, regarding content on the operation of the criminal justice system and the importance of disclosure.

Each agency should ensure the required content be taught but be given the flexibility to do so with-in the context of their introductory training programmes. (Bronze)

Recommendation 15

a) A cross-agency disclosure learning standard, for investigators and disclosure officers, should be created. The standard should cover:

i. The role of an investigator within the criminal justice system.
ii. Their obligations created by the Criminal Procedure and Investigations Act and Code of Practice.
iii. The practical application of the disclosure regime and use of technology in material management.

(b) Law enforcement agencies and police should record and report on training completion. (Silver)

472. A concern raised by law enforcement agencies was staff turnover and the lack of specialist knowledge. I have found that the role of the disclosure officer, and the subject of disclosure more generally, is often not viewed favourably amongst police officers contributing to a culture in which disclosure is undervalued.

473. To retain, train and incentivise officers to become specialist disclosure officers, an accredited "Senior Disclosure Officer Pathway" should be developed. Gold level training could include specific teaching regarding the management of material in serious, complex and other voluminous cases, as well as covering the use of AI and smart search tools.

474. Establishing such an accredited pathway should offer more technically minded officers an interesting and rewarding career path. It would also provide law enforcement agencies with a pool of qualified senior disclosure officers from which to draw. I would suggest that the Police Remuneration Review Body may wish to consider what would constitute fair remuneration for an accredited senior disclosure officer.

Recommendation 16

A Senior Disclosure Officer accreditation pathway, for use across law enforcement agencies, should be established to set consistent standards for officers managing disclosure in complex criminal cases. (Gold)

Quality Assurance

475. The utility of this new framework will be underpinned by the ability of officers to maintain and update their knowledge. In light of regular developments, it would be naive to consider disclosure training as a 'one-off', which never needed to be repeated. Such an attitude could risk officers not properly discharging their disclosure obligations. To combat this, I recommend that officers undertake 'refresh training' at set intervals and that the curriculum for the new national learning standards for disclosure (recommendations 14 and 15) should be updated as the regime evolves.

Recommendation 17

Bronze and Silver training and learning standards, referred to earlier, should be reviewed and refreshed by the College of Policing at regular intervals. Law enforcement officers should be expected to undertake 'refresh training' at set intervals.

476. A further matter of concern is the lack of awareness of what precisely is being taught by delivery partners in regard to disclosure and the CPIA. Naturally, this needs to be addressed as, without insight into the quality or content of the training, it would be very challenging to provide assurances that an officer's understanding of disclosure is correct.

477. The College of Policing is currently exploring a more stringent quality assurance process and is piloting on-site audits for 'in-house' police force training. These audits, however, are intended to be more supportive and not inspection based. I support the College's drive towards more stringent quality assurance of the training delivered by itself, forces, Higher Education Institutes, and other delivery partners, and believe that all assessments made should be shared with the NPCC, who could then pinpoint and tackle underperforming delivery partners.

478. Disclosure training is not a peripheral matter, far from it. Without sufficient engagement and quality learning, law enforcement officers will not adequately grasp the importance of the CPIA or how to effectively discharge their disclosure duties in this digital age.

Recommendation 18

There should be more stringent quality assurance regarding the delivery of disclosure learning by the College of Policing, Higher Education Institutions and other delivery partners. The results of these assessments should be shared with the National Police Chiefs' Council.

4.5 Case Building Communication

479. One difficulty that was raised, in almost every interview with investigators and prosecutors, was the lack of early communication regarding file building and disclosure strategy. A flawed initial disclosure strategy significantly increases the likelihood of late-stage case failure or, worse, miscarriage of justice. This Review is not the first to conclude that the remedy is improved communication. Indeed, the 2011 Independent Review of Disclosure recommended "early, sensible and sustained cooperation between prosecutors and investigators…in respect of disclosure matters".[350]

480. Nonetheless, the present performance demonstrates that the 2011 recommendation did not go far enough to affect the desired improvement. Investigators and prosecutors have significant workloads, and therefore making time to liaise on matters of initial disclosure strategy is often, understandably, not the priority it should be. Law enforcement should not, however, be content to let the urgent drown out the important in regard to vital disclosure strategy planning.

481. Encouragingly, there is a strong desire to make improvements in this area, as demonstrated by His Majesty's Revenue and Customs (HRMC), which is taking steps to embed disclosure strategy and early communication as standard practice. I agree with many criminal justice stakeholders who assess that early communication between investigators and prosecutors should minimise disclosure failures by assisting officers to 'get it right the first time'. This principle is even more vital in serious or otherwise complex cases, where ongoing communication is paramount.

Recommendation 19

The Consolidated Guidance should include an expectation for an investigator to speak with a prosecutor at the pre-charge stage, and to agree on a disclosure strategy and reasonable lines of inquiry, in every case (excluding motoring offences).

Recommendation 20

The Consolidated Guidance should set out an expectation that investigators and prosecutors, on complex cases or cases with large volumes of digital material, should meet at least quarterly to discuss disclosure approach.

[350] Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (2011), paras 129 to 131.

482. Although I appreciate that engagement between investigators and prosecutors can be time consuming, I do believe that substantial dividends can be reaped through the joint early identification of reasonable lines of inquiry and the creation of a disclosure strategy. That which is valuable is worth achieving.

483. Furthermore, I was told that, in a minority of cases, officers were unable to get hold of the designated prosecutor to discuss a pressing disclosure-related matter. The result will certainly include case progression delay but may also force an investigator to make an uninformed disclosure decision. To combat this, I recommend that the CPS ensure that, even when a designated prosecutor is unavailable, someone is on hand to provide investigators with disclosure-related advice at short notice. I appreciate that this review will take time and resource, but improving communication at the outset of a case will likely pay dividends in later stages.

Recommendation 21

The Crown Prosecution Service should review, set out and communicate arrangements to assist investigators who seek urgent advice regarding disclosure matters in instances where they have been unable to contact the designated prosecutor.

4.6 Streamlining Court Process

484. Having considered but decided against radical revision of the CPIA, I am of the view that the disclosure process, especially when a case reaches court, can be modernised. Whilst retaining the 'one size fits all' approach regarding the CPIA tests, we must recognise that a serious fraud case cannot meaningfully be compared to an assault bodily harm offence and, therefore, they will be dealt with differently. Considering the present use of judicial case management powers, I make the below recommendation, which I expand upon in the following proposals.

> **Recommendation 22**
>
> A revised system for judicial case management of disclosure should be put in place for Crown Court cases, including an Intensive Disclosure Regime for the most serious, complex, or otherwise difficult cases. This process should be set out in Criminal Procedure Rules, with any further detail added to the single Consolidated Guidance.

485. The first aspect of this revision should include capitalising upon the Disclosure Management Document (DMD), which all law enforcement agencies viewed as a positive development in the disclosure story. The DMD is a mechanism through which the prosecution can transparently detail the approach taken to disclosure. Indeed, academics have reflected that such transparency is unique when compared with other jurisdictions.[351]

486. Therefore, I believe that the DMD can be more effectively utilised in drawing the prosecution and defence together to resolve disclosure disputes where they arise. However, if the defence and court are to be invited to engage with and critique the prosecution's DMD formally, they must be given sufficient time to do so. Therefore, I recommend that the prosecution provide a copy of the DMD at least seven days before the PTPH.

487. Some prosecutors have explained that serving a comprehensive DMD seven days before the PTPH is impractical. However, it should be feasible to produce an irreducible minimum amount of information, including material types seized, analysis approach and software used within this timeframe. The DMD, as a living document, will likely never be considered 'complete'. The prosecution should provide a copy, to the best of their ability, at least seven days before the PTPH, including an estimate for when a fully fleshed version will be served. In this way, the defence and court can still engage

[351] Joanne Philipson, *To make comparative assessment of the strategies to effectively manage prosecution disclosure*. (2019) Churchill Fellowship, pp 65–67.

with the approach to disclosure at the PTPH. In any event, it is unreasonable to expect the defence to meaningfully engage in the disclosure process without sufficient time and detail to consider the prosecution approach.

488. Therefore, even in complex and voluminous cases, an early DMD served seven days before the PTPH that facilitates a constructive conversation on disclosure is better than no DMD at all. Prosecution and defence disclosure engagement is a two-way street, and both parties must be willing to invest in the preparation required to reap the benefits.

489. Furthermore, for meaningful engagement to take place, there needs to be an expectation that, in all Crown Court cases, the DMD shall be discussed in sufficient detail, otherwise either party will take the chance and fail to prepare, in the hope the judge does not cover the matter of disclosure strategy.

490. Tangentially, in preparation for greater use of technology in the disclosure process, I recommend that the revised DMD form include certification by a relevant officer regarding the steps taken to ensure correct configuration and competent operation of any advanced technology used. If the prosecution is keen to employ advanced technology and AI, they must also be willing to do so in a transparent manner. Therefore, I see no reason why the chief technology officer, or other "relevant officer" such as a "Senior Disclosure Officer" (recommendation 16), cannot provide detail on this matter. The following recommendations seek to further both clarity and transparency in the prosecution's approach to disclosure for Crown Court cases.

Recommendation 23

Update the Criminal Procedure Rules to include a requirement for the prosecution to provide the defence with a copy of the Disclosure Management Document (DMD), at least seven days before the Plea and Trial Preparation Hearing.

In particularly serious, complex and/or voluminous cases, where this is not deemed possible, for the judge to set a timetable for service of the DMD.

This new requirement should apply in full code test anticipated not-guilty plea cases and not in Threshold Test cases or guilty anticipated plea cases.

Recommendation 24

Confirm the existing requirement that a Disclosure Management Document be prepared in all Crown Court cases. Extend requirements for the prosecution to provide details including but not limited to:

a. Understanding of case issues.
b. Reasonable lines of inquiry.
c. Categories and volume of material in possession.
d. Disclosure strategy.
e. Approach to digital material and any potential video footage.
f. Technology used and the steps taken to quality assure such tools.
g. Approach to third-party material.
h. Approach to scheduling material.
i. Primary disclosure duty progression.
j. Estimated time required to execute strategy.
k. [Where relevant] Linked investigations.
l. [Where relevant] Approach to obtain international material.
m. Complexity of the disclosure issues.
n. Whether, in the prosecution's opinion, the case should be considered for the Intensive Disclosure Regime.

Certification by [relevant officer] on the steps taken to ensure correct configuration and competent operation of any advanced technology used during the disclosure process.

491. Having prepared and provided a detailed DMD, there should be an anticipation that parties follow through on their obligations under the Criminal Procedure Rules and engage with it at the PTPH. This is the moment where many disclosure disagreements can be resolved, though it will require proper preparation. The categories in the proposed updated DMD template provide ample opportunity for the defence and judge to understand, in detail, the manner in which the prosecution has approached disclosure. With robust judicial case management, the prosecution and defence should be able to come to a position regarding disclosure, search terms, software and timetables that can be agreed upon by the end of a PTPH in an average Crown Court case.

492. In making this recommendation I am alive to the realities of those who participate in the court process, including members of the Criminal Bar. The high volume of cases, coupled with the steady decline in the number of criminal barristers undertaking certain types of work, means that the advocate dealing with a PTPH is often not instructed counsel for trial but is instructed to cover the case at short notice. While I greatly sympathise with these pressures, it is not, in my view, a sufficient

reason for parties not to be properly prepared and ready to engage with disclosure at the PTPH. In chapter 4.13, I discuss the importance of sufficient funding for criminal practitioners, so they have the time and resources required to engage with the detail of disclosure.

Recommendation 25

Set out in Criminal Procedure Rules the expectation that, at the Plea and Trial Preparation Hearing (PTPH) in all Crown Court cases, all matters in the Disclosure Management Document will be discussed – with particular focus on matters in dispute. That this process is overseen by the judge, utilising their case management powers, with the expectation of defence engagement.

4.7 Section 8 applications

493. As discussed, I am of the view that late, unreasonable section 8 applications can significantly derail a trial. In the revised disclosure court processes, there should be adequate chance for the defence to challenge the prosecution's disclosure approach and seek further relevant material. However, courts would benefit from being more robust in their assessment of late section 8 applications. Late applications should be rigorously scrutinised and, in addition to the importance of the material sought, the consequential disruption to the trial should be carefully considered.

494. The judge, in studying the request, should first contemplate the substance of the claim but also with reference to the defendant's engagement with the disclosure process, as they are obliged to do so under the Criminal Procedure Rules. We should ensure that there remains an avenue for legitimate section 8 requests, whilst simultaneously denying those whose only motive is to burden the prosecution beyond the point at which it can function. Many of those I spoke with, both prosecutors and defence professionals, agreed with the desire to ensure that an English and Welsh criminal justice system makes the 'real issues' the central focus of debate.

Recommendation 26

That the Criminal Procedure Rules be amended so that the following factors are considered when deciding whether to grant permission for the making of a late application under section 8 of the CPIA:

a. If the material requested is necessary for a fair trial.
b. The disclosure of the material would not be a breach of data protection legislation.
c. The degree to which the defence has engaged with the Disclosure Management Document.
d. Reasons for delay in section 8 application.
e. The potential delay/disruption to trial.

4.8 Magistrates' Courts

495. Turning next to the magistrates' court specific disclosure challenges, previously discussed. The criminal justice system would benefit from understanding whether magistrates are indeed being overly lenient to inexperienced officers, who fail to attend court with complete schedules. Leniency leads to adjournment, which is not only a material cost to the court system but also reinforces the belief of the officer that such conduct is acceptable. The criminal justice system should not enable such derogation of duties, and a firmer approach should assist in changing the culture.

496. I appreciate that new investigators have many responsibilities, and the creation and production of schedules for magistrates' court cases is likely one of them. Notwithstanding their workload, I am of the view that a more prescriptive approach is required to encourage investigators to consider which items should be scheduled. To avoid creating further burdens through the rebuttal presumption mechanism, I propose that the NPCC ensure that schedule templates used by officers in magistrates' court cases have suggestions regarding the types of categories of material that would typically be disclosed. This may gradually encourage a greater proportion of inexperienced officers to come prepared with disclosure schedules to magistrates' court cases, in turn reducing case failure and adjournment rates.

Recommendation 27

A research study should be undertaken to determine whether there are any significant differences in decision making on disclosure between lay magistrates and district judges to determine whether there are any resulting training and development needs for magistrates.

Recommendation 28

Ensure officers, presenting material as part of a summary only magistrates' court case, are supported in their consideration of what material should be scheduled by the increased use of the MG6C or other template. This may include suggested categories of material or examples of the types of material typically disclosed in such cases.

Additional Material

497. On that same theme, I am concerned with reports that prosecutors are not disclosing key material regarding potential financial gain through a Proceeds of Crime Act (POCA) order, which can have a degree of bearing on a decision to prosecute. Though, indeed, disclosing such material may not always be relevant and/or in the public interest, I am of the view that there should be a greater expectation of such material to be shared with the defence.

498. Transparency must be a key pillar of a modern disclosure regime. This recommendation will reduce the admittedly limited possibility of important information being concealed from the defence, in instances where a financial arrangement agreement may make a material difference in the prosecution's decision to take forward a case.

Recommendation 29

Add wording to the Consolidated Guidance reminding investigators and prosecutors to apply the disclosure test to any material showing that a financial matter has impacted a decision to prosecute.

4.9 Intensive Disclosure Regime

499. As has been identified, cases with exceptionally high volumes of digital material pose a unique set of challenges to the way in which they are investigated, prosecuted, and defended. As outlined in part three of the report, several cases proceeded over many years, only to finally collapse before a jury could return a verdict. This not uncommon occurrence, especially in serious or complex fraud cases, demonstrates the dysfunction of the current process.

500. To address these challenges, I propose the establishment of a bespoke process for these high-volume cases, termed the Intensive Disclosure Regime (IDR). I believe a new regime will deliver upon the five pillars of a modern disclosure regime by creating a more effective and efficient process, for all parties to come to an agreement on material that should be sought and shared, coupled with an oversight of the court's requirements. An example of how this new regime could work is set out in Annex I and is illustrated in figure 6.

501. I am very grateful to members of the judiciary for their constructive engagement with me regarding the following recommendations.

502. Through an IDR case, I recommend that disclosure be managed as a discrete issue by the allocated trial judge. In the event the trial judge is unknown, pre-trial disclosure should be managed throughout the life of a case by, ideally, the same judge to ensure continuity of approach. A constant change of judges at these hearings would either result in a waste of judicial time or hearings being conducted by judges with a less-than-perfect understanding of the case.

503. As with other Crown Court cases, the PTPH should be used to discuss and resolve disclosure-related matters, using the pre-circulated DMD, where possible.[352] It may become apparent to the prosecution or judge, before or at the PTPH, that a certain case is of such complexity or volume that it will require more robust judicial case management to ensure its progression. I have given consideration as to whether a criterion for IDR cases should be created but have decided that, in order to retain flexibility in the system, the Crown Courts will be best placed to evaluate the context of a case, its volume and relative complexity. [353]

[352] See Recommendation 24.

[353] The Consolidated Guidance will offer courts direction on what type of cases would benefit from the Intensive Disclosure Regime.

Recommendation 30

Set out in Criminal Procedure Rules that having heard representations from the prosecution and defence at the PTPH, the judge has the discretionary power to designate a case an 'Intensive Disclosure Regime' case, including in instances where the prosecution has not applied for the provision.

504. Once a case has been designated as an IDR case and the complexity or volume has become apparent, the PTPH judge should have the ability to, having heard initial critiques from the defence, order that a prosecution's disclosure strategy be updated and a revised DMD be produced.

505. I consider it important that this occurs at an early stage for two principal reasons, both of which are grounded in the right to a fair trial. First, judicial oversight of the prosecution's approach can be exercised at a preliminary stage. Second, the defence will be in a position to meaningfully engage with the prosecution's disclosure strategy.[354]

Recommendation 31

Once a case has been designated an Intensive Disclosure Regime case, make the following provisions:

a. The prosecution will provide the court with an updated Disclosure Management Document containing full details regarding the configuration and operation of any advanced technology they have or propose to use, for material management and disclosure purposes.

b. A judge may order the prosecution to provide further detail on matters within the Disclosure Management Document where required.

506. The DMD is to remain a live document and will include full details of any technology intended to be used for disclosure review or data management. A date will be set at the PTPH by which the defence must respond to the DMD. The response to the DMD (RDMD) will identify the current trial issues and whether the prosecution's proposed approach to disclosure is appropriate. If required, an alternative approach will be proposed for consideration, and material that does require further examination set aside. This process will also allow the defence to positively engage in the

[354] See the partly dissenting opinion of Judge Pavli in *Sigurdur Einarsson v Iceland* [2019] ECHR 412.

disclosure process at an early stage of the case. This is an extension of the obligation under the Criminal Procedure Rules 15.2(5).

Recommendation 32

Extend current provisions, in the Criminal Procedure Rules, to oblige the defence, in Intensive Disclosure Regime cases, to respond to the Disclosure Management Document through a 'Response to Disclosure Management Document' (RDMD), mirroring the prosecutions' form. In doing so, the defence would be required to comment on matters such as:

a. Identifying the trial issues (as they appear at that stage).
b. Detailing their agreement/disagreements with the prosecution's disclosure approach, explaining their reasons with reference to CPIA obligations.
c. Proposing further categories of material for review.
d. Stating their agreement or disagreement with digital material search methods.
e. Identifying other third parties with relevant material and address any scheduling issues.
f. Agreeing material that does not require examination and search terms to be deployed for any electronic material.

507. Finally, at the PTPH, in an IDR case, the judge should exercise their case management powers ensuring that a firm timeline is agreed upon for the service of documentation and identifying a date for a future Disclosure Management Hearing (DMH) that could take place in person or remotely.

Recommendation 33

At the Plea and Trial Preparation Hearing, in an Intensive Disclosure Regime case, the court should set a date for:

a. [Where required] When a revised Disclosure Management Document needs to be provided by the prosecution.
b. When the defence should serve their Response to the Disclosure Management Document (RDMD).
c. The Disclosure Management Hearing and when parties must submit an agenda in advance, setting out areas for judicial guidance and directions.

508. A DMH will be held approximately four weeks after the RDMD and defence case statement have been served. This will allow sufficient time for the prosecution and defence to consider the other's

proposed disclosure approach. Both parties must submit an agenda in advance of the DMH setting out areas for judicial guidance and directions. This process will help increase transparency and support greater efficiency as issues are raised from the outset and avoid delay once the trial has begun. In cases where the first DMH has resolved outstanding issues, no further hearings would be required. In other such cases, the Court would be expected to set regular DMHs between the time of the first DMH and trial.

Recommendation 34

The Disclosure Management Hearing should be used by the judge, exercising their case management powers, to oversee the following:

a. To resolve outstanding issues between prosecution and defence relating to disclosure strategy.
b. Agree how the defence will be provided information about and possibly access to disclosure software tools used by the prosecution.
c. That the lead Disclosure Counsel, Trial Counsel and the Disclosure Officer must attend the DMH.
d. Whether further DMHs are necessary.

509. I fully appreciate that the proposed IDR will add even more pressure to limited judicial time and resource. I expect that listing officers and other independent judicial functions would need to consider how trial judges will be afforded the pre-reading time required to make the most effective use of the PTPH and DMH sessions. I wish also to be clear that the proposed IDR does not abdicate responsibility from the prosecution or defence to resolve as many of these matters as possible, between one another, without taking up precious judicial time to resolve disputes that could be sensibly settled outside of court.

510. I understand that training would be required, should this new process be adopted. I recognise that this will require more focus on a judiciary whose commitment are already extensive. However, I am certain that time invested in the IDR process will, in the long run, offer greater efficiency, supporting the aim of swift justice for all.

Recommendation 35

I invite the Judicial College to consider specific training on judicial case management of disclosure matters, the Intensive Disclosure Regime, and the use of a new Consolidated Guidance (should these recommendations be accepted).

Lessons from Disclosure Failings

511. Having met with various enforcement and prosecuting authorities, it is apparent to me that when a trial is derailed, or a conviction is quashed on appeal for disclosure failings, some authorities are better than others at distilling the lessons emerging from a particular case. There is a need, in my view, for authorities to reflect on what went wrong in a particular case, consider whether changes are needed to internal processes and share their findings within their organisation as well as with other enforcement authorities.

Recommendation 36

Where the Court of Appeal quashes a conviction for disclosure failings, the relevant prosecution authority should perform a review of the case to ascertain the reasons for the error(s). The result of the review should inform changes to internal processes if required.

The potential impact of the failings in other cases, where convictions have been recorded, must be considered. Learnings from the failing should be passed to the College of Policing to update learning standards.

Fig.6 – Intensive Disclosure Regime Process

General case

First Hearing

The Intensive Disclosure Regime (IDR) process is designed to capture serious, complex, or otherwise voluminous cases which are heard in the Crown Court (rec 22).

Pre-PTPH

At least seven days before the first hearing in the Crown Court (Plea and Trial Preparation Hearing (PTPH)), the prosecution must serve a Disclosure Management Document (DMD) (rec 23). The defence is expected to consider the DMD, in preparation for the PTPH.

PTPH

At PTPH, the court is to ensure all parts of the DMD are discussed, focusing on areas where the defence disagrees with the approach taken by the prosecution (rec 25).
In certain cases, it will become apparent that greater disclosure scrutiny/engagement is required. Both the prosecution and defence can argue for/against a case being transferred to the IDR process, with the final decision resting on the judge (rec 30). In making the determination, the judge will consider a set of criteria.

Decision Made

Intensive Disclosure Regime

IDR Case

If the case is designated for IDR pathway, the judge must then set dates for the service of an updated Disclosure Management Document (DMD), Response Disclosure Management Document (RDMD), agenda for the Disclosure Management Hearing (DMH) and the DMH (rec 33).

General case

If the judge decides that the case does not meet the threshold for an IDR case, it will proceed as normal to defence statement service and on to trial.

Pre-DMH

In preparing for a DMH, the prosecution is expected to serve an updated DMD with additional information regarding the configuration and operation of any advanced technology used (rec 31). Having received the DMD, the defence are under an obligation to respond using an RDMD, raising any concerns about the prosecution approach to disclosure (rec 32).

DMH

With both parties having engaged with the DMD and RDMD, the subsequent Disclosure Management Hearing is intended to resolve any outstanding issues between prosecution and defence relating to disclosure strategy. They are to be attended by the lead Disclosure Counsel, Trial Counsel, and the Disclosure Officer. They are to be attended by the lead Disclosure Counsel, Trial Counsel and the Disclosure Officer.
The DMH should agree on how the defence will be provided information about and possible access to disclosure software tools used by the prosecution. The DMH should also confirm if any further

Pre-Trial

In preparing for trial, the prosecution is bound to identify material which undermines the prosecution case or assists the defence case. A defence statement must then be served.
The prosecution must reconsider their approach to disclosure in light of the contents of the defence statement. A single trial judge is to oversee the process of preparing for and undertaking a trial, including further disclosure or Section 8 requests for disclosure.

4.10 Defendant's Own Material

512. As previously discussed, this Review has considered not only the practicalities of prosecution disclosure, but also why this process is fundamental to the model of justice used in England and Wales. During my engagements, both prosecutors and defence professionals articulated frustrations regarding the inability of the prosecution to hand back to a defendant material they previously had access to, even if both parties consent. Instead, the prosecution is bound to spend time and resources searching for disclosable material and creating traditional written schedules. We must ask ourselves the following: Should defendants be denied this opportunity? Is the current approach in keeping with the philosophy of the English and Welsh criminal justice system? I am persuaded that there is a better way.

513. Having wrestled with this matter at great length, I have come to the view that there would be strong utility in creating a flexible provision, within the current regime, to accommodate the returning of material to the suspect/defendant in single handed cases. This approach could offer substantial benefits to both parties and is worth exploring further.

Law Enforcement and Prosecution Duties

514. Law enforcement officers would still be required to review the material and ensure that sensitive information is removed; however, they would be relieved of the duty to schedule all relevant items. Furthermore, in handing back material, law enforcement officers would also be relieved of their duty, implicit under the CPIA Code of Practice, to search for disclosable material.[355] If officers were still bound to undertake this task, then I have no doubt the subsequent trial would simply become an exercise in comparing what the defence thought the prosecution should have identified and what was actually scheduled. Such satellite litigation would certainly disincentivise any officer or prosecutor from proactively using this provision.

515. To safeguard against the miscarriage of justice, duties under section 3 of the CPIA would remain, insofar as the prosecution must make the court aware, at the earliest opportunity, of any material that may meet the section 3 test, that investigators and disclosure officers have identified during the investigation. We cannot countenance an instance to occur where a prosecutor identifies exculpatory material, within a group of items handed back to the defence, but decides not to identify it as disclosable material, in the hope that the defence might overlook it.

[355] CPIA Code of Practice Chapters 6 and 7.

Defence Benefits

516. Throughout this review, experienced defence practitioners have articulated their desire to see a more transparent system, in which a defendant can access material they previously owned, held or controlled. I can see that, for some defendants and their representatives, having the ability to search their own personal material would be a great benefit. Given the defendant's intimate knowledge of this material and the context surrounding an alleged offence(s), items critical to the defence will be more swiftly located. This would enable the defence to put forward their strongest possible case – which is the overriding objective of a just disclosure regime; the safeguarding of the right to fair trial and minimising the risk of a miscarriage of justice.

Limitations

517. After serious consideration, I have concluded that there are hard limitations to this provision. Firstly, the material that could be handed back to the defence must constitute material that the defendant previously and lawfully had access to. Plainly, it is a waste of the prosecution's time scheduling all relevant items when, in some instances, the defendant has retained and still has access to a copy of the material in question (i.e, a copy of a hard drive or laptop). Further, in pursuit of a modern disclosure regime that strives for *justice,* it can be argued, with some force, that the prosecution should not deprive the defendant of his/her own material. In utilising such a provision, the prosecution's chance of being ambushed may increase; however, I would expect the substantial benefits will outweigh the risks.[356]

518. I must make clear that this provision must not enable the prosecution to abrogate their responsibility or overburden the defence. In considering whether to use this provision and return material to the defence, the prosecution should have regard to a number of factors that act as a safety net against the potential of overwhelming the defence. In seeking to use this provision, judges will ultimately have the say, regarding the balance of burdens. Legal aid defence firms, who may not have the resource and tools to undertake a thorough search of the defendant's material should not be forced to do so.

519. Furthermore, there remain serious data privacy concerns regarding the returning of material to a defendant, which is why such a provision could only practicably apply in single handed cases. Given the strict redaction obligations under the CPIA, DPA and ECHR, it would be immensely time consuming and very challenging to redact all items of material in such a way that totally prevents defendants, in the same case, from using sensitive information for intimidation or co-defendant

[356] This refers to a situation in which defence evidence has not been adduced in advance to the prosecution, leading to their inability to rebut it.

ambush purposes. Similarly, this recommendation could only work if the relevant law enforcement agency had suitably reviewed the material to assure themselves that it did not contain anything which constituted criminal behaviour unrelated to the investigation or was subject to Legal Professional Privilege (LPP) or otherwise sensitive/illegal.

520. To maximise the potential benefits of this provision for all parties, the prosecution should be able to return material to a suspect from the pre-charge stage. However, the option to use the provision should remain 'live' throughout a case's lifecycle, with the judge, having considered a set of criteria at the PTPH, including potential appeals from the defence, able to support the prosecution's use of the provision or order that such an approach be abandoned. This draft provision, which requires further careful consideration, is offered with the aim of creating a new flexible and pragmatic avenue, with real benefits for all parties. Engaging on this course of action early will be vital, as by trial the prosecution will have invested time scheduling and redacting material, thereby drastically reducing the incentive to hand back material so late in the day.

521. Having spoken with the CPS, it has explained that, whilst it does not keep a record of the number of multi-handed or single-handed cases, it is estimated that the majority of the prosecutions (87% in 2023) were dealt with as single defendant cases.[357] Whilst I expect the following proposal to have most utility in serious, complex or otherwise voluminous cases, it may be available to a significant proportion of criminal proceedings. However, serious further consideration must be given as to the real-world applications of this provision.

Recommendation 37

Update the CPIA and Code of Practice to allow the prosecution, in a single defendant case, to hand back to a suspect/defendant material (or copies) they previously had access (i.e, they previously owned, held or controlled).

There should be no obligation for the prosecution to provide a schedule to the defendant, describing the items in the class of material returned.

In considering whether to use this provision, the prosecution should have regard to the following factors:

a. The extent to which provision of the class of material may expedite case preparation by the defence and/or prosecution.
b. The amount of material involved.

[357] This figure also includes cases in which two defendants were charged together, at the commencement of a case, but where the prosecution ultimately decided to split the case and pursue the defendants separately. It is estimated such instances make up a minority of the headline 87% figure.

c. The ease by which the material may be redacted for sensitive material, LPP or personal confidential information.
d. The ability of the suspect/defendant to review the material.
e. Whether the suspect/defendant and their legal representation wish to receive the returned material.
f. The extent to which the order may affect the timing of trial.

If a class of prosecution material is provided, the prosecution duty to search for material that satisfies the section 3 CPIA test no longer applies. However, if the prosecution becomes aware of such material, they are obligated to highlight its existence to the court and defence, at the earliest opportunity.

At the PTPH both the prosecution and defence, within the context of a given case, can voice their support or concern regarding the use of this provision. The judge, having heard representation and in the interests of justice, can order the prosecution to return certain material or order the scheduling of items in instances where the defence are unable/unwilling to accept returned material.

Consolidated Guidance should set out that the above is designed to provide a degree of flexibility in large and complex cases.

522. This Review heard that section 21 of PACE could provide a path to facilitate this change in legislation. Having carefully considered that option, I am not satisfied that the relevant PACE provision was designed with disclosure in mind and, therefore, amending it to allow for wider material sharing will likely not create the desired outcome. I do, however, hope that this proposal provides an ambitious way forward, which is in keeping with the philosophy of our current framework and demonstrates the desired principles of a modern regime.

4.11 Consolidating Guidance

523. I am aware, that such a suite of recommendations risks adding further complication to the multiple guidelines and protocols that support the translation of the CPIA and the Code of Practice into real-world obligations. Therefore, I see immense benefit in assisting investigators, legal professionals and members of the judiciary alike by rationalising the key documents into a single Consolidated Guidance document.

524. Instead of practitioners becoming overwhelmed by the disparate nature of the regime's many puzzle pieces, there is a chance to bring together the key components into a coherent and instructive single guidance document. In doing so, we may also be forced to face and resolve the inconsistencies already discussed throughout this Review. A single Consolidated Guidance document could cover the full complement of disclosure obligations and their real-world application.

525. In pursuing a single guidance document, consideration must be given to ensure there is no perceived interference with the separation of powers. This can be achieved through a clear delineation between the audiences of the Attorney General's and Lady Chief Justice's advice – I have no doubt that this issue is surmountable. I trust that this proposal will bring some order out of chaos, and clarity instead of confusion.

Recommendation 38

Consolidate the Attorney General's Guidelines and Judicial Protocols into a refined single guidance document referenced in legislation. The Consolidated Guidance should cover:

a. The principles that uphold the regime.
b. Technical advice for investigators, prosecutors and defence professionals regarding the real-world application of the CPIA, Code and Criminal Procedure Rules.
c. The Court disclosure process, including the Intensive Disclosure Regime pathway.
d. The roles and responsibilities of all key parties including engagement expectation and judicial case management.
e. Annex – Regional Judicial Practice Notes on Disclosure.

Investigators, prosecutors and defence professionals are to have regard to guidance throughout the course of the criminal case. In determining a disclosure issue, the court must consider whether the Consolidated Guidance, which was issued at the time, has been followed.

526. Alongside this, the Government could improve practitioner engagement in disclosure by creating a single GOV.UK webpage that contains up-to-date links to all key and current documents, legislation and guidance. Accompanied by some narrative, this page should become the central 'landing pad' for all those seeking information about today's legislative regime.

527. At the time of writing, there are multiple outdated versions of the CPIA and Code of Practice currently live on GOV.UK, without any labelling, to make the reader aware that they have been superseded. The role of the Government in this instance should be to make access to the CPIA, Code and Guidance documents as simple and accessible as possible. If we want new officers and experienced practitioners alike to engage in the details of disclosure, we must remove any additional inadvertent barriers.

Recommendation 39

A central GOV.UK depository webpage be created with links to the following:

a. Criminal Procedure and Investigations Act.
b. Code of Practice.
c. Criminal Procedure Rules.
d. [New] Consolidated Guidance.

That the Government archive GOV.UK links to outdated versions of the Code and Attorney General's Guidelines, that are still accessible.

528. Furthermore, should the Government decide to take forward proposals set out in this Review, I would encourage all key criminal justice stakeholder groups, including the independent judiciary, to consider how they may wish to upskill themselves and stay abreast of the changes required to build a modern regime.

4.12 Sanctions

529. I turn next to the rather intricate matter of sanctions. Throughout my Review, I have given considerable thought to how both the prosecution and defence can be held to account for many obligations. This includes, but is not limited to, initial ongoing disclosure, service of defence case statements and, more widely, engagement. The majority of stakeholders with whom I have spoken have raised the concern that there are no sufficient sanctions in place at present. Fundamentally, there is a desire to see greater emphasis placed on the consequences of failing to discharge those obligations.

530. The matter of sanctions was previously explored by Lord Justice Gross and Lord Justice Treacy in 2012, who concluded that no new sanctions should be introduced for prosecution disclosure failures.[358] Instead, they found judges should use the powers already afforded to them which are deemed sufficient to deal with any such failures. After substantial consideration of this matter, I have reached a similar conclusion, which is that, although there are some solutions that at face value appear to work, the reality is markedly different. I am mindful of the fact that there are indeed very few tools the court can use effectively to hold all parties to account. Ultimately, if a solution cannot be sought, a culture change may be required to ensure that there is adequate incentivisation for all parties to discharge their obligations, making the use of a sanction less likely.

Current Law – Defining Sanctions

531. To effectively discuss sanctions, I shall first lay the foundations of the term to establish a common understanding of its background. The term 'sanctions' is used to refer to any legal mechanism, be it an order or direction, which is designed to enforce or encourage compliance with legal rules, or to mark or punish their non-compliance. In the context of criminal proceedings, sanctions may take the following forms:

a. Legal directions to the jury which permit the drawing of adverse inferences, or the passing of adverse comment by an advocate or judge.

b. The making of punitive orders, such as costs orders or orders which require some positive action to be taken, including legal representatives being required to provide written explanations for their conduct or appear at court.

[358] Lord Justice Gross and Lord Justice Treacy, *Further review of disclosure in criminal proceedings: sanctions for disclosure failure* (2012).

c. Orders which deprive one side or the other of the opportunity of advancing an aspect of their case, including refusing a party's application for a particular order.

532. Non-compliance with a court order may also amount to a civil contempt. The sanctions for civil contempt include a power to fine and commit to prison (per section 14 of the Contempt of Court Act 1981).[359] For completeness, the power of a court to stay a prosecution as an abuse of process may also be viewed as a sanction.

533. As it stands, the two points at which virtually all defendants are invited to set out their case prior to the trial are in interview under caution, and in the defence statement. Failure to disclose in interview a matter that is later relied upon in court may – provided that the trial judge deems it appropriate to include the direction as part of his or her legal directions – permit a jury to draw an adverse inference from the defendant's failure.

534. The content of the defence statement is dictated by section 6A of the CPIA. Section 11(5) of the CPIA provides for sanctions for defence statement failures. Those sanctions are of comment and inference: "the court or any other party may make such comment as appears appropriate"; and "the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned". Case law has repeatedly made clear that those are the only sanctions available for CPIA defence disclosure failures. A court therefore cannot:

a. Punish by way of contempt of court a failure to comply with its direction to amend (or provide) the defence statement;[360]

b. Rule as inadmissible the evidence of alibi witnesses on the basis that no defence statement had been served providing details of them;[361] or

c. Decline to allow the accused to put forward matters in cross-examination which go to a relevant issue because the material on which such cross-examination is based is produced at a very late stage with no advance notice.[362]

535. The Court of Appeal rejected the argument that s.11(5) of the CPIA is incompatible with the right to a fair trial under Article 6 of the ECHR.[363] The Court said that the use of s.11(5) is subject to

[359] Contempt of Court Act 1981.
[360] *R v Rochford* [2010] EWCA Crim 1928.
[361] R (Tinnion) v Reading Crown Court [2009] EWHC 2930 (Admin).
[362] *R v T* [2012] EWCA Crim 2358.
[363] R *v Essa* [2009] EWCA Crim 43.

judicial control. The judge can interfere and stop the cross-examination if it is unfair, and, if unfair cross-examination has been embarked upon, it is open to the judge to tell the jury to disregard it.

536. Whilst other sanctions are not designed specifically to prevent or punish disclosure failings, their general nature allows them to be used for this purpose.

Abuse of Process

537. Failure to obtain or disclose third-party material may lead to an application to stay proceedings as abuse of process and form the ground of a subsequent appeal against conviction.

538. The court has a power to stay of proceedings for abuse of process in two categories of case:

a. First, where the defendant cannot receive a fair trial; or,

b. Secondly, that it would be unfair for the defendant to be tried.[364]

539. The first limb focuses on the trial process and whether the accused can receive a fair trial. The case may be argued to fall within the first category on the ground that there has been a breach of duty by the investigators in failing to seize or obtain material evidence, such that the defendant could not have a fair trial because of the missing evidence.[365]

540. The second limb concerns the integrity of the criminal justice system, irrespective of the potential fairness of the trial itself. The Court of Appeal has recognised that, in an extreme case, it might be so unfair for a prosecution to proceed in the absence of material which a third parties declines to produce that it would be proper to stay it, regardless of whether the prosecutor is in breach of the Guidelines.[366]

Judicial Orders

541. The court has broad case management powers, including the power to impose sanctions for breaches of rules or directions. This is explicit within the Criminal Procedure Rules: rule 3.5(6) provides: "If a party fails to comply with a rule or a direction, the court may;

a. Fix, postpone, bring forward, extend, cancel or adjourn a hearing;

b. Exercise its powers to make a costs order; and

c. Pose such other sanction as may be appropriate."

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[364] *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837] at [13].

[365] *R v E* [2018] EWCA Crim 2426; *R v Charnock* [2021] EWCA Crim 100; *R (Ebrahim) v Feltham Magistrates Court* [2001] EWHC Admin 130, [2001] 1 WLR 1293.

[366] *R v Alibhai* [2004] EWCA Crim 681 at [64].

542. Such sanctions may relate to the admission of evidence and applications regarding disclosure.

543. In *Musone* [2007] EWCA Crim 1237, the appellant sought to introduce bad character evidence of his co-defendant; however, no notice had been given in accordance with Part 35 of the Criminal Procedure Rules (CrimPR), and the judge declined to extend the time limit for such notice. The court concluded that, in these particular circumstances, where "the appellant had deliberately manipulated the trial process" and deliberately intended "to ambush his co-defendant", the judge had been right to exclude the evidence and had the power to do so.

544. In *R (Hassani) v West London Magistrates' Court*,[367] the Divisional Court, after disposing of a complex private motoring case which was marred by an excessive number of technical points, emphasised (at [18]) that "this judgment is an intentional reminder to criminal courts that active case management using the Criminal Procedure Rules is their duty. Increased rigour and firmness is needed." The Divisional Court also discussed (at [12]) the duty of the defence to cooperate in the achievement of the overriding objective: "If the defence are going to suggest that some document or some piece of service is missing, they must do so early. If they do not, then it is open to the court to find that the point was raised late, and any direction then sought to produce a document or to apply for an adjournment may properly be refused."

545. In *SVS Solicitors* [2012] EWCA Crim 319, the Court of Appeal upheld a wasted costs order made against solicitors who were complicit in their client's breach of the CrimPR and manipulation of the criminal process to suit the client's own ends. The Court observed that in such circumstances a solicitor should withdraw from the case in the event that a client refuses to comply properly with the obligations imposed by rules governing criminal procedure. To avoid difficulties in such a situation, solicitors will normally list the case for mention. Accordingly, where a failure to provide a defence statement results in additional expense for the prosecution, a wasted costs order may be appropriate.

Previous Proposals for Reform

546. Lord Justice Gross published his Review of Disclosure in Criminal Proceedings in September 2011.[368] At the request of the Lord Chancellor, the Lord Chief Justice asked Lord Justice Gross and Lord Justice Treacy to conduct a further Review into the specific issue of sanctions for disclosure failure, which was published in November 2012.[369]

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[367] *R (Hassani) v West London Magistrates' Court* [2017] EWHC 1270 (Admin).

[368] Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (2011).

[369] Lord Justice Gross and Lord Justice Treacy, *Further review of disclosure in criminal proceedings: sanctions for disclosure failure* (2012).

547. As outlined in the terms of reference, it was to be considered as to whether or not sanctions for disclosure failings, alongside judicial case management powers, are enough to guarantee fulfilment of disclosure duties.[370] The recommendations of Lord Justices Gross and Treacy, in summary, were as follows:

a. There should not be the creation of any additional sanctions against either the prosecution or the defence.

b. Sections 6B (updated disclosure by the accused) and 6D (notification of names of experts instructed by accused) of the CPIA ought to be brought into force.

548. There were then several ancillary recommendations:

a. Warnings about the consequences of disclosure failures, such as those under section 11 of the CPIA, ought to be placed on the Plea Case Management Hearing form, and the judge should also provide an oral warning at hearings. I note that this is reflected in the now PTPH form, which provides a box for the judge to tick, confirming that a number of judicial warnings have been given, including: "That failure to provide a sufficiently detailed Defence Statement may count against the defendant."

b. That the prosecution articulates in writing any deficiencies of the defence statement, copying the document to the court and the defence and seeking an order from the court, if appropriate, in a process akin to a section 8 application. I understand that this often happens in fraud cases; it appears to me, though, a matter of trial strategy for the prosecution in any given case.

c. That there should be a pro forma so that defence disclosure requests are not made in correspondence but are always in an addendum to the defence statement, justified and signed by both solicitor and counsel. In practice, disclosure requests virtually always form part of the defence statement.

549. The following observations were made about potential alternative defence and prosecution sanctions:

a. **Exclusion of defence evidence** – There is no demand for a general exclusionary rule as "it would potentially permit the conviction of a factually innocent defendant because the evidence to exonerate them could be excluded. Whatever safeguards were put in place and whatever care were to be exercised by the judge, the existence of such a power would carry the risk of serious miscarriages of justice."

[370] Ibid, p ii.

b. **Costs** – "Wasted costs orders should not be used more frequently for the following reasons. Wasted costs orders are a penalty against the defence representative, not against the defendant, and therefore can only be appropriately used when it is the representative who is at fault. However, it can be very difficult to determine whether the fault lies with the defendant or with the representative, in particular, due to the restrictions of legal professional privilege. There is further the problem of costs. It has been the experience of the courts that it can be vastly more expensive to make a wasted costs order, if the order is resisted as almost all are, than the value of the order itself." However, there are rare circumstances in which wasted cost orders can be used appropriately[371] but, for the reasons outlined, their use is not encouraged.

c. **Expansion of contempt** – "The use of contempt carries the same difficulties as the use of wasted costs, both in terms of legal professional privilege, and also the increased costs of further satellite litigation."

d. **Professional sanctions** – "We invite the professional bodies to consider emphasising that full compliance by all parties with their duties of disclosure is professional best practice and a failure to do so may constitute professional misconduct. However, the same difficulties of legal professional privilege apply as they do for wasted costs orders and contempt of court. In any event, the sins of the lay client are not to be visited vicariously upon the representative."

e. **Abuse of process** – "An application to stay the proceedings against a defendant on grounds of abuse of process due to prosecution disclosure failures is possibly the most well-known and certainly the most significant sanction available against the prosecution. However, it ought to be only a remedy of last resort, and there are other remedies available to the trial judge".

Potential Proposals

550. Whilst considering potential solutions, I have remained aware of the inherent difference between civil and criminal litigation. Most fundamentally, a defendant who is ultimately convicted has far more to lose than simply the financial cost ordered by the judge. In many cases, we must bear in mind that a defendant's freedom is at stake, or the risk of other penalties being placed upon them which can have a profound impact on their lives. Consequently, the stakes remain much higher in criminal litigation in comparison with civil litigation, therefore the issue of fairness is under greater scrutiny as the liberties of an individual are in the balance.

551. This Review has also considered the possibility of cost orders and what this might look like in practice. However, for the reasons mentioned and the complexities around the fairness and practicalities

[371] *R v SVS Solicitors* [2012] EWCA Crim 319.

of how one would impose a cost order on a legal aid defendant, I have reached the same conclusion as previous Reviews and do not see this being effective in practice.

552. In light of the above and after much deliberation, I am of the same view as Lord Justice Gross and Lord Justice Treacy, a novel sanction that applies fairly to both privately funded and legal aid defendants has eluded me. Therefore, given the current barriers, I am keen to make the most of the powers already available, drawing on all existing provisions. We must encourage judges to exercise the full extent of their power where possible and their ability to direct that a person attend court to explain a disclosure delay or lack of engagement with the disclosure process. This will allow the judge to gain a full understanding of what has arisen and taps into one of a legal practitioner's most valuable resource, their time. The following recommendation applies to all criminal cases.

Recommendation 40

Highlight in Consolidated Guidance, that where there is a disclosure failing by prosecution or defence, it is open to the Judge to require that the relevant legal representative, officer and/or legal aid contract manager, provide further explanation to the court either in writing or in person at a future mention.

4.13 Legal Aid and Funding

553. In developing my recommendations, I have remained mindful of the current fiscal environment in which we find ourselves and the reality that a modern disclosure regime requires to make the most of the limited resources available. I am conscious of the fact that it is beyond the scope of my Review to provide recommendations directly on legal aid; however, I wish to draw attention to the matter of pay and investment.

554. To ensure that the disclosure regime works as it stands and that the system operates to maximum efficiency, we must recognise the need to pay legal professionals adequately in line with the work they are required to carry out. With increasing caseloads and time demands of both prosecution and defence professionals, pre-charge and post-charge, sufficient remuneration is needed. As suggested in my recommendations, increased engagement should be encouraged to resolve issues early on, including engagement on the detail of disclosure. For this to happen, legal professionals must be properly incentivised to participate in early engagement and additional hearings if required.

555. This matter remains entirely for the Ministry of Justice to consider. However, I emphasise the importance of ensuring that necessary funding is in place as a well-funded disclosure regime will ultimately reduce the burdens currently weighing on the system, increasing the speed of cases to and through court, whilst minimising the chance of avoidable disclosure failings. Furthermore, as defendants are presented with material and disclosure, at an earlier stage, including a supporting methodology (DMD), there may also be an increase in early guilty pleas.

556. More broadly, the suite of recommendations I have made may require some relatively small financial investment in the short term. However, in the long run, this investment should provide a more cost-effective system, streamlining the disclosure process and ridding the system of heavy inefficiencies. With that in mind, there is great potential to deliver significant savings in policing, legal aid, prosecution costs and court expenditure in due course. I expect some of the cost savings mentioned to materialise from several of my recommendations. For example, improved training will increase the likelihood of new and experienced officers completing disclosure tasks correctly the first time around. As a result, less time will be spent redacting and scheduling material and there will be a far greater awareness of disclosure obligations. Combined, this will amount to notable time and cost savings in the long term.

557. Additionally, as discussed in chapter 4.1 with regards to the recommendations I have made on the use of technology and AI, I expect this to also have a profound and extensive impact on the time spent scheduling and redacting.

558. I recognise the importance of legal aid, with many requiring access to its services, with the latest data showing that the overall expenditure for criminal legal aid closed claims stands close to £540 million for the first half of 2024.[372] In spite of that, I encourage more funding to be made available to ensure professionals are paid adequately for their work, this investment would be supported by the savings made as forecast above, ensuring better use of public funds. In consideration of this, I make the following recommendation.

Recommendation 41

The Ministry of Justice and the Criminal Legal Aid Advisory Board should consider whether current funding arrangements adequately support early engagement with the disclosure process and engagement with a new intensive disclosure regime. The application process for pre-charge engagement legal aid should be streamlined.

[372] Ministry of Justice and Legal Aid Agency, *Legal aid statistics data visualisation tools* (updated 2024).

4.14 Oversight and Evaluation

559. I have outlined a series of recommendations impacting all parties in the criminal justice system. However, to move from mere good intentions to measurable positive impact, consideration should be given as to how any new policies would be effectively implemented and evaluated. This will undoubtedly require a multi-tiered approach if the desired benefits are to be achieved and a modern disclosure regime is established.

560. Should new policies be put in place, it is of paramount importance that the three government departments ultimately responsible for upholding the criminal justice system, namely the Ministry of Justice, the Attorney General's Office and the Home Office, continue to work more closely together on the matter of disclosure. Presently, the Ministry of Justice 'own' the CPIA and the Code, while the Attorney General's Office superintends the CPS and SFO[373] and remains responsible for updating the AG's Disclosure Guidelines. The Home Office, in partnership with policing and other law enforcement agencies, are tasked with tackling crime. Given the spread of equities, each department is partly responsible for the health of the regime.

561. With so many other urgent matters in the criminal justice system that require attention, we must not lose sight of the importance of improving chronic issues such as disclosure. Therefore, I recommend that there be great value in establishing a Disclosure Scrutiny Joint Committee to oversee policy implementation, drawing upon the insights and evidence of law enforcement and legal professionals where possible. The Committee must also consider how best to work with the independent judiciary, who play an increasingly vital role in resolving disclosure issues.

Recommendation 42

Establish a Disclosure Scrutiny Joint Committee, made up of representatives from the Home Office, Ministry of Justice, and Attorney General's Office, to monitor implementation of new disclosure policies.

562. In assessing the future performance of the regime, the Joint Committee may wish to consider filling the current gap in quantitative disclosure-related data. This is a pressing issue as, without a comprehensive baseline, it will be challenging to draw meaningful conclusions regarding the outcome of new policy interventions.

[373] Has overall responsibility for the work delivered by those bodies it superintends.

563. Therefore, I recommend that the Government give consideration to the quality and type of disclosure-related data that could be collected. This Review proposes several avenues worth exploring. First, as detailed in chapter 3.7, the system needs greater insight as to the proportion of officers, across the many law enforcement agencies, who undertake initial and further disclosure training. Gathering this data will assist in determining the strength of the correlation between increased training and greater adherence to disclosure obligations. Second, it has been challenging to accurately assess the magnitude of disclosure challenges in the magistrates' courts. Set out in chapter 5.5, there are concerns that inadequate preparation by inexperienced officers is forcing increasing instances of adjournments, which in turn impacts case progression. Such a hypothesis can only be proved, or disproved, if relevant pilot data is collected.

564. Thirdly, while many law enforcement agencies have raised concerns about the burden created by disclosure-related tasks, such as scheduling and redaction, there has been little work done to evaluate the precise financial costs of these burdens. A time and motion study pilot could be one solution to obtaining granular information on this issue. Finally, should a new IDR process be adopted, data will be required to determine if the new pathway is achieving the benefits for which it was conceived: the swift and fair resolution of disclosure issues and reduction in instances of case collapse and miscarriage of justice. There are likely other assessment methods; however, the overarching principle stands that, without quantitative data, the criminal justice system can only ever have limited knowledge about the performance of the disclosure regime.

Recommendation 43

There needs to be an improvement in the quality and type of data available regarding the performance of the disclosure regime in all parts of the criminal justice system. Additional data gathered should include but not be limited to:

a. Law enforcement disclosure training compliance in reference to training and learning recommendations.
b. Broad reasons for adjournments in both the magistrates' and Crown Court.
c. Time and motion studies regarding law enforcement time spent undertaking disclosure in its various phases and a commitment to repeat the process after a set number of years.
d. Quantitative assessments of IDR case progression.

565. As discussed, there is a diffuse spread of accountability, both within Government and in the criminal justice system, for the performance of the disclosure regime. While perfectly serviceable, such a model is less effective at swiftly identifying and remedying issues that arise, instead relying on external Reviews to diagnose dysfunction before the system itself takes action.

566. Therefore, there may be value in greater centralisation of public accountability regarding the criminal justice system's 'disclosure performance'. This could be achieved through increased clarity on Ministerial responsibilities, or through the creation of a 'Disclosure Tsar', whose role would be twofold: to maintain oversight of the disclosure regime, and to make agile recommendations for adjustments where appropriate; and to monitor the quality and delivery of training on disclosure for law enforcement agencies to ensure that this is maintained to a high standard. Finally, a programme of continuous oversight and improvement will help break out of the cycle of the 'wholesale Review' approach.

Recommendation 44

Appoint an individual responsible for oversight of the implementation of policy change, keeping under regular review the application of the disclosure regime in the criminal justice system, recommending any reforms which need to be made, and reviewing the quality of disclosure-related learning delivered by higher education institutes, law enforcement agencies and police forces.

Miscellaneous

567. Finally, I turn to a matter previously raised by the Law Commission in its "*Confiscation of the proceeds of crime after conviction"* Report.[374] Under the current disclosure regime, there is no explicit obligation for the prosecution to review material afresh for relevant/disclosable files, during post-conviction confiscation proceedings. Though it is broadly agreed that the prosecution do undertake such action, there would be value, as with the recommendation to clarify the disclosure obligations of private prosecutors, in codifying what is already established practice.

Recommendation 45

The Law Commission's recommendation at paras 4.104 and 4.106 of its confiscation report should be reflected in the Consolidated Guidance. I invite the Criminal Procedure Rules to consider if, following receipt of the defence response to the statement of information under section 17 of POCA 2002, the prosecution should review disclosure and update the defence about the outcome of that new review.

[374] Law Commission, *Confiscation of the proceeds of crime after conviction: a final report* (2022).

5. Recommendations List

1. A Criminal Justice Digital Disclosure Working Group, comprising law enforcement, prosecution, defence and judicial representatives, should be created to consider:
    a. Existing advanced technological tools for the management of disclosure and evidential material across the criminal justice system and the functionality that these tools provide, including in facilitating access for the defence and judiciary.
    b. Metrics required to evaluate the accuracy, security and value for money.
    c. The skills and training required to operate such software.
    d. The degree to which all criminal justice partners can have confidence in such tools.
    e. The requirement to regularly review the use of such tools.

2. To support the wider use of advanced technology in the criminal justice system, a cross-agency protocol should be created, covering the ethical and appropriate use of artificial intelligence in the analysis and disclosure of investigative material.

3. To capture economies of scale and increase join-up, Law Enforcement should consider the benefits of a central technology procurement unit, which could negotiate on behalf of multiple forces who seek to procure a tool from the same provider.

4. That a new governance model for digital forensics be created to streamline decision-making and standardise access to digital forensic capabilities in all investigations.

5. Undertake a review of law enforcement and local police force access to secure platforms for the sharing of sensitive material.

6. Make clear in Consolidated Guidance that the section 3 CPIA test is an objective assessment.

7. Regarding the identification of relevant and disclosable material, that the following changes be made:
    a. **Identifying Relevant Material –** Amend the Code of Practice, creating a new section, 'Reviewing Material', to make clear that technology can be used to identify material which may be relevant to an investigation (as defined in paragraph 2.1 of the Code of Practice) and that there is no duty for every item of prosecution material to be manually reviewed.
    b. **Identifying Material that may meet the Disclosure Test** – Amend paragraphs 7.2 and 7.3 of the Code to make clear that the duty on the disclosure officer to draw to the attention of the prosecutor material in possession that may meet the disclosure test does not require every item to be manually reviewed. In cases involving a large volume of material, a disclosure officer can be aided by technology to identify material that may meet the disclosure test.
    c. **Reviewing material for disclosure** – Amend paragraph 10.2 of the Code to make clear that, in cases where the disclosure officer has identified a large volume of material that may meet the disclosure test, the prosecutor can similarly be assisted by technology when reviewing the material for the purposes of determining whether it meets the disclosure test.

None of the above affects the ability of the defence to object to the approach taken to identifying or reviewing such material and if the defence take objection, it should be raised at the earliest opportunity and be linked to the defence statement.

8. Section 6 of the Code of Practice should make provision for the use of technology to assist in the creation of modern, resource-efficient schedules.

9. Section 6(b) of the Code of Practice should be updated to allow the appropriate use of 'metadata schedules', in conjunction with descriptive schedules and block listing.

10. In circumstances when a defendant has indicated that he/she is likely to plead guilty to an indictable only or either way offence unlikely to remain in the magistrates' court, the investigator, with the agreement of the designated prosecutor, should not have to produce a full schedule of unused material before a charging decision is taken. The Code of Practice section 6.4 should be updated to reflect this.

11. The Information Commissioner's Office and National Police Chiefs' Council should issue guidance regarding redaction expectations in a law enforcement context. This change should be reflected in section 6(c) of the Code of Practice, single Consolidated Guidance, and in the College of Policing Learning Standards.

12. There should be consideration of the establishment of a 'data bubble' between law enforcement and the Crown Prosecution Service so that data and information can be shared unredacted for the purposes of a charging decision.

13. Consideration should be given to whether CPIA and Code of Practice obligations should apply to anyone undertaking a criminal investigation.

14. All major law enforcement agencies should agree a national learning standard, for new officers, regarding content on the operation of the criminal justice system and the importance of disclosure.

Each agency should ensure the required content be taught but be given the flexibility to do so within the context of their introductory training programmes. (Bronze)

15. Regarding the further training of law enforcement, the following changes be made:

a. A cross-agency disclosure learning standard, for investigators and disclosure officers, should be created. The standard should cover:
    i. The role of an investigator within the criminal justice system.
    ii. Their obligations created by the Criminal Procedure and Investigations Act and Code of Practice.
    iii. The practical application of the disclosure regime and use of technology in material management.
b. Law enforcement agencies and police should record and report on training completion rates. (Silver)

16. A Senior Disclosure Officer accreditation pathway, for use across law enforcement agencies, should be established to set consistent standards for officers managing disclosure in complex criminal cases. (Gold)

17. Bronze and Silver training and learning standards, referred to earlier, should be reviewed and refreshed by the College of Policing at regular intervals. Law enforcement officers should be expected to undertake 'refresh training' at set intervals.

18. There should be more stringent quality assurance regarding the delivery of disclosure learning by the College of Policing, Higher Education Institutions and other delivery partners. The results of these assessments should be shared with the National Police Chiefs' Council.

19. The Consolidated Guidance should include an expectation for an investigator to speak with a prosecutor at the pre-charge stage, and to agree on a disclosure strategy and reasonable lines of inquiry, in every case (excluding motoring offences).

20. The Consolidated Guidance should set out an expectation that investigators and prosecutors, on complex cases or cases with large volumes of digital material, should meet at least quarterly to discuss disclosure approach.

21. The Crown Prosecution Service should review, set out and communicate arrangements to assist investigators who seek urgent advice regarding disclosure matters in instances where they have been unable to contact the designated prosecutor.

22. A revised system for judicial case management of disclosure should be put in place for Crown Court cases, including an Intensive Disclosure Regime for the most serious, complex, or otherwise difficult cases. This process should be set out in Criminal Procedure Rules, with any further detail added to the single Consolidated Guidance.

23. Update the Criminal Procedure Rules to include a requirement for the prosecution to provide the defence with a copy of the Disclosure Management Document (DMD), at least 7 days before the Plea and Trial Preparation Hearing.

In particularly serious, complex and/or voluminous cases, where this is not deemed possible, for the judge to set a timetable for service of the DMD.

This new requirement should apply in full code test anticipated not-guilty plea cases and not in Threshold Test cases or guilty anticipated plea cases.

24. Confirm the existing requirement that a Disclosure Management Document be prepared in all Crown Court cases. Extend requirements for the prosecution to provide details including but not limited to:

a. Understanding of case issues.
b. Reasonable lines of inquiry.
c. Categories and volume of material in possession.
d. Disclosure strategy.
e. Approach to digital material and any potential video footage.
f. Technology used and the steps taken to quality assure such tools.
g. Approach to third-party material.
h. Approach to scheduling material.
i. Primary disclosure duty progression.
j. Estimated time required to execute strategy.
k. [Where relevant] Linked investigations.
l. [Where relevant] Approach to obtain international material.
m. Complexity of the disclosure issues.
n. Whether, in the prosecution's opinion, the case should be considered for the Intensive Disclosure Regime.
o. Certification by [relevant officer] on the steps taken to ensure correct configuration and competent operation of any advanced technology used during the disclosure process.

25. Set out in Criminal Procedure Rules the expectation that, at the Plea and Trial Preparation Hearing in all Crown Court cases, all matters in the Disclosure Management Document will be discussed – with particular focus on matters in dispute. That this process is overseen by the judge, utilising their case management powers, with the expectation of defence engagement.

26. That the Criminal Procedure Rules be amended so that the following factors are considered when deciding whether to grant permission for the making of a late application under section 8 of the CPIA:

a. If the material requested is necessary for a fair trial.
b. The disclosure of the material would not be a breach of data protection legislation.
c. The degree to which the defence has engaged with the Disclosure Management Document.
d. Reasons for delay in section 8 application.
e. The potential delay/disruption to trial.

27. A research study should be undertaken to determine if there are any significant differences in decision making on disclosure between lay magistrates and district judges to determine whether there are any resulting training and development needs for magistrates.

28. Ensure officers, presenting material as part of a summary only magistrates' court case, are supported in their consideration of what material should be scheduled by the increased use of the MG6C or other template. This may include suggested categories of material or examples of the types of material typically disclosed in such cases.

29. Add wording to the Consolidated Guidance reminding investigators and prosecutors to apply the disclosure test to any material showing that a financial matter has impacted a decision to prosecute.

30. Set out in Criminal Procedure Rules that having heard representations from the prosecution and defence at the PTPH, the judge has the discretionary power to designate a case an 'Intensive Disclosure Regime' case, including in instances where the prosecution has not applied for the provision.

31. Once a case has been designated an Intensive Disclosure Regime case, make the following provisions:

a. The prosecution will provide the court with an updated Disclosure Management Document containing full details regarding the configuration and operation of any advanced technology they have or propose to use, for material management and disclosure purposes.
b. A judge may order the prosecution to provide further detail on matters within the Disclosure Management Document where required.

32. Extend current provisions, in the Criminal Procedure Rules, to oblige the defence, in Intensive Disclosure Regime cases, to respond to the Disclosure Management Document through a 'Response to Disclosure Management Document' (RDMD), mirroring the prosecutions' form. In doing so, the defence would be required to comment on matters such as:

a. Identifying the trial issues (as they appear at that stage).
b. Detailing their agreement/disagreements with the prosecution's disclosure approach, explaining their reasons with reference to CPIA obligations.
c. Proposing further categories of material for review.
d. Stating their agreement or disagreement with digital material search methods.
e. Identifying other third parties with relevant material and address any scheduling issues.
f. Agreeing material that does not require examination and search terms to be deployed for any electronic material.

33. At the plea and trial preparation hearing, in an Intensive Disclosure Regime case, the court should set a date for:

a. [Where required] When a revised Disclosure Management Document needs to be provided by the prosecution.
b. When the defence should serve their Response to the Disclosure Management Document (RDMD).
c. The Disclosure Management Hearing and when parties must submit an agenda in advance setting out areas for judicial guidance and directions.

34. The Disclosure Management Hearing should be used by the judge, exercising their case management powers, to oversee the following:

a. To resolve outstanding issues between prosecution and defence relating to disclosure strategy.
b. Agree how the defence will be provided information about and possibly access to disclosure software tools used by the prosecution.

c. That the lead Disclosure Counsel, Trial Counsel and the Disclosure Officer should attend the DMH.
d. Whether further DMHs are necessary.

35. I invite the Judicial College to consider specific training on judicial case management of disclosure matters, the Intensive Disclosure Regime, and the use of a new Consolidated Guidance (should these recommendations be accepted).

36. Where the Court of Appeal quashes a conviction for disclosure failings, the relevant prosecution authority should perform a review of the case to ascertain the reasons for the error(s). The result of the review should inform changes to internal processes if required.

The potential impact of the failings in other cases, where convictions have been recorded, must be considered. Learnings from the failing should be passed to the College of Policing to update learning standards.

37. Update the CPIA and Code of Practice to allow the prosecution, in a single defendant case, to hand back to a suspect/defendant material (or copies) they previously had access (i.e. they previously owned, held or controlled).

There should be no obligation for the prosecution to provide a schedule to the defendant, describing the items in the class of material returned. In considering whether to use this provision, the prosecution should have regard to the following factors:

a. The extent to which provision of the class of material may expedite case preparation by the defence and/or prosecution.
b. The amount of material involved.
c. The ease by which the material may be redacted for sensitive material, LPP or personal confidential information.
d. The ability of the suspect/defendant to review the material.
e. Whether the suspect/defendant and their legal representation wish to receive the returned material.
f. The extent to which the order may affect the timing of trial.

If a class of prosecution material is provided, the prosecution duty to search for material that satisfies the section 3 CPIA test no longer applies. However, if the prosecution becomes aware of such material, they are obligated to highlight its existence to the court and defence, at the earliest opportunity.
At the PTPH both the prosecution and defence, within the context of a given case, can voice their support or concern regarding the use of this provision. The judge, having heard representation and in the interests of justice, can order the prosecution to return certain material or order the scheduling of items in instances where the defence are unable/unwilling to accept returned material.
Consolidated Guidance should set out that the above is designed to provide a degree of flexibility in large and complex cases.

38. Consolidate the Attorney General's Guidelines and Judicial Protocols into a refined single guidance document referenced in legislation. The Consolidated Guidance should cover:

a. The principles that uphold the regime.
b. Technical advice for investigators, prosecutors and defence professionals regarding the real-world application of the CPIA, Code and Criminal Procedure Rules.
c. The Court disclosure process, including the Intensive Disclosure Regime pathway.
d. The roles and responsibilities of all key parties including engagement expectation and judicial case management.
e. Annex – Regional Judicial Practice Notes on Disclosure.

Investigators, prosecutors and defence professionals are to have regard to guidance throughout the course of the criminal case. In determining a disclosure issue, the court must consider whether the Consolidated Guidance, which was issued at the time, has been followed.

39. A central GOV.UK depository webpage be created with links to the following:

a. Criminal Procedure and Investigations Act.
b. Code of Practice.
c. Criminal Procedure Rules.
d. [New] Consolidated Guidance.

That the Government archive GOV.UK links to outdated versions of the Code and Attorney General's Guidelines, that are still accessible.

40. Highlight in Consolidated Guidance, that where there is a disclosure failing by prosecution or defence, it is open to the Judge to require that the relevant legal representative, officer and/or legal aid contract manager, provide further explanation to the court either in writing or in person at a future mention.

41. The Ministry of Justice and the Criminal Legal Aid Advisory Board should consider whether current funding arrangements adequately support early engagement with the disclosure process and engagement with a new intensive disclosure regime. The application process for pre-charge engagement legal aid should be streamlined.

42. Establish a Disclosure Scrutiny Joint Committee, made up of representatives from the Home Office, Ministry of Justice, and Attorney General's Office, to monitor implementation of new disclosure policies.

43. There needs to be an improvement in the quality and type of data available regarding the performance of the disclosure regime in all parts of the criminal justice system. Additional data gathered should include but not be limited to:

a. Law enforcement disclosure training compliance in reference to training and learning recommendations.
b. Broad reasons for adjournments in both the magistrates' and Crown Court.
c. Time and motion studies regarding law enforcement time spent undertaking disclosure in its various phases and a commitment to repeat the process after a set number of years.
d. Quantitative assessments of IDR case progression.

44. Appoint an individual responsible for oversight of the implementation of policy change, keeping under regular review the application of the disclosure regime in the criminal justice system, recommending any reforms which need to be made, and reviewing the quality of disclosure-related learning delivered by higher education institutes, law enforcement agencies and police forces.

45. The Law Commission's recommendation at paras 4.104 and 4.106 of its confiscation report should be reflected in the Consolidated Guidance. I invite the Criminal Procedure Rules to consider if, following receipt of the defence response to the statement of information under section 17 of POCA 2002, the prosecution should review disclosure and update the defence about the outcome of that new review.

Annexes

Annex A – Terms of Reference

Independent review of disclosure and fraud offences

Terms of Reference

(Published by the Home Office on 12 October 2023)

Context

There has not been an independent review of fraud since 1986.[375] Since that time, the nature and scale of fraud has evolved considerably, now constituting over 40% of all offences in England and Wales.[376] As the proportion of online-enable fraud has increased, so have the challenges facing investigators and prosecutors.

One significant challenge is the already large and continually increasing volume of digital material that fraud and other complex crime cases generate. As a result, significant time and resource is required to undertake an investigation and bring a prosecution to court.

The Government published the Fraud Strategy[377] in May 2023. The Strategy committed to launch an independent review into how the disclosure regime is working in a digital age and if fraud offences, which fall under the provisions of the Fraud Act 2006, meet the challenges of modern fraud.

Scope

The Review will investigate the application of the disclosure regime and the challenges arising for the investigation of all crime types, including fraud, that handle large volumes of digital material.

The Review will explore barriers to the investigation, pursuit, and prosecution of fraud offences in England, Wales and Northern Ireland. The Review will evaluate the nature of current penalties contained within the act and explore the role of civil powers to tackle fraud.

Key Objectives

Due to the broad nature of the Review, it will report in two parts:

1. **Part 1: Disclosure Regime**. The Review will assess the operation of the criminal disclosure regime, as set out in the Criminal Procedure and Investigations Act 1996. There will be a focus on disclosure application for crime types with a large volume of digital material. The Review will also assess the Attorney General's Guidelines on Disclosure and consider legislative and non-legislative modifications that could improve the regime.

2. **Part 2: Fraud Offences**. The Review will assess whether the nature of current fraud offences meet the challenges of modern fraud, including whether penalties fit the crime. The Review will explore if certain fraud offences should be summary only rather than triable either way. This phase will also consider making it easier for individuals to inform on associates in criminal fraud networks and

375 Serious Fraud Office, *The Roskill Report on Fraud Trials* (1986).
376 Office of National Statistics, *Statistics on Crime in England and Wales* (2025) table A1.
377 Home Office, *Fraud Strategy* (2023) p21-25.

investigate the scope of existing civil powers, and whether they go far enough, to tackle fraud, including exploring a fraud-specific order.

Process

As the department responsible for tackling fraud against individuals and businesses, the Home Office will provide the Review secretariat, with policy support from the Attorney General's Office and the Ministry of Justice.

Outputs

The Review chair will report their findings and recommendations, which the Government will respond to in the usual way. As the Review will be split into two parts, we would expect reporting on each part of the Review separately.

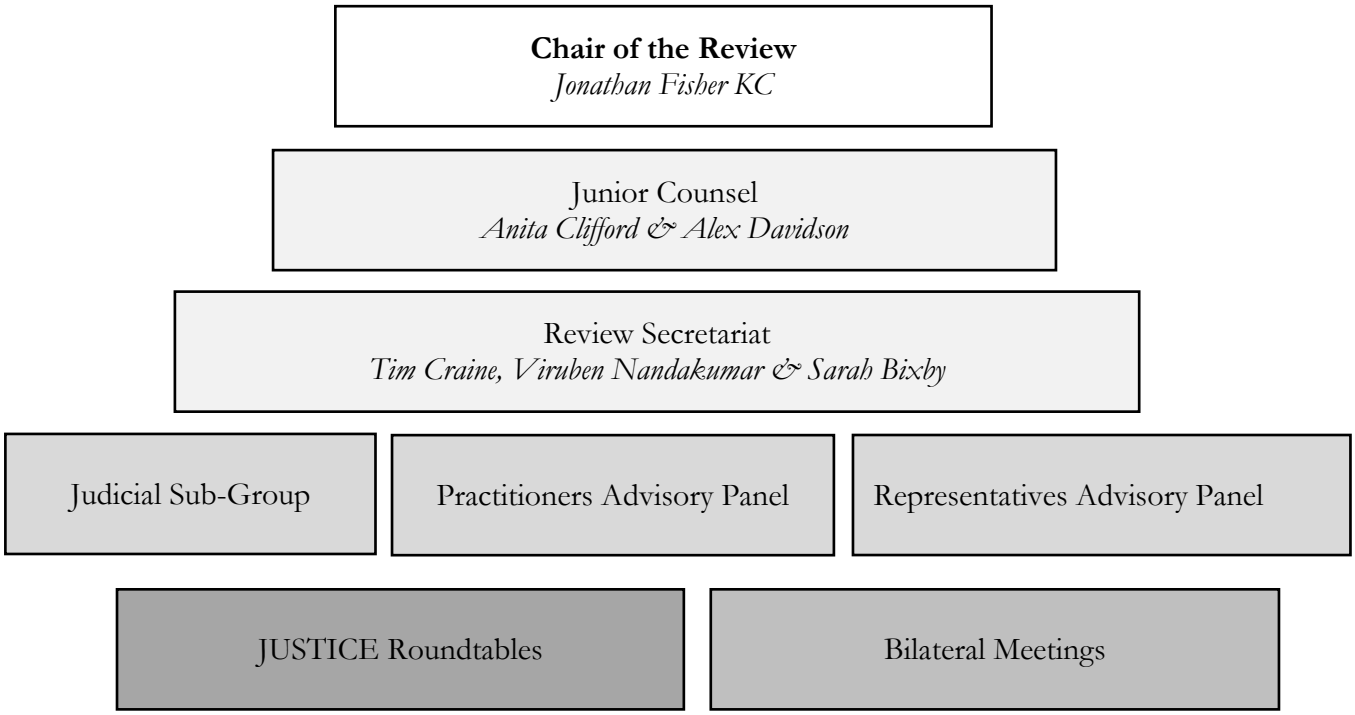
Timing [378]

The Review will report on each part in accordance with the following deadlines:

- Part 1: Disclosure Recommendations – Summer 2024
- Part 2: Fraud Offences Recommendations – Spring 2025

[378] In light of the 2024 general election and appointment of a new Government, these timings no longer stand.

Annex B – Governance



Annex C – Disclosure Timeline

1993 – Royal Commission on Criminal Justice.
1995 – Home Office Consultation on Disclosure Proposals.
1996 – The Criminal Procedure and Investigations Act 1996 (CPIA) receives Royal Assent.
1997 – Code of Practice comes into force.
2000 – Attorney General's (AG's) Guidelines on Disclosure – revised.
2001 – Lord Justice Auld, Review of the Criminal Courts of England and Wales.
2003 – Criminal Justice Act.
2005 – The Code of Practice revised for the first time, coming into force on 4 April 2005.
2008 – HM Crown Prosecution Service Inspector (HMCPSI) – Disclosure: A thematic review of the duties of disclosure of unused material undertaken by the CPS.
2011 – Lord Gross undertook a review of the CPIA and concluded that the legislation did not need changing.
2012 – Lord Justice Gross and Lord Justice Treacy, Further review of disclosure in criminal proceedings: sanctions for disclosure failure.
2013 – AG's Guidelines on Disclosure – revised.
2014 – Lord Justice Gross, Magistrates' Court Disclosure Review.
2015 – The second revision of the Code of Practice, which came into force 19 March 2015.
2015 – Sir Brian Leveson, Review of Efficiency in criminal proceedings.
2015 – Revised Code of Practice came into force on 19 March.
2017 – Richard Horwell KC, Mouncher Investigation Report.
2017 – HM Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) and HMCPSI, Making it fair: a joint Inspection of Disclosure of unused material in volume Crown Court cases.
2018 – Metropolitan Police and Crown Prosecution Service (CPS): A joint review of the disclosure process in the case R v Allan.
2018 – CPS Disclosure Manual.
2018 – The National Disclosure Improvement Centre National Police Chiefs' Council (NPCC) and College of Policing & National Disclosure Standards (NPCC and CPS).
2018 – Justice Select Committee, Disclosure of evidence in criminal cases, and Government Response.
2018 – Sir Geoffrey Cox KC MP (AGO), Review of the efficiency and effectiveness of disclosure in the criminal justice system.
2018 – AG's Guidelines on Disclosure – revised.
2018 – CPS – Streamlines Summary Disclosure.
2020 – Revised version of the Code of Practice came into force on 31 December 2020.
2024 – AG's Guidelines on Disclosure – revised.

Annex D – Summary of Engagement

The approach to stakeholder engagement and all key meeting minutes summaries have been published on the Independent Review of Disclosure and Fraud Offences webpage.

Stakeholders

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

Information Commissioner

Insolvency Service

Judicial sub-group

JUSTICE

Lady Chief Justice

Law Commission

Law Society

London Criminal Law Courts Solicitors' Association

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

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

Practitioners' Advisory Panel Membership

Faras Baloch – Red Lion Chambers

Jane Bewsey KC – Red Lion Chambers

John Binns – BCL Solicitors LLP

Cameron Brown KC – Red Lion Chambers

David Corker – Corker Binning

Mark Fenhalls KC – 23 Essex Street Chambers

Patrick Gibbs KC – Three Raymond Buildings

David Green KC – Cohen & Gresser – Former Director SFO

Rebecca Hadgett – Three Raymond Buildings

Sue Hawley – Spotlight

Sir Max Hill KCB KC – Red Lion Chambers – Former Director of Public Prosecutions

Louise Hodges – Kingsley Napley

Riel Karmy-Jones KC – Red Lion Chambers

Lord Ken Macdonald KC – Matrix Chambers – Former Director of Public Prosecutions

Ailsa McKeon – 6KBW Chambers

Alun Milford – Kingsley Napley

Clare Montgomery KC – Matrix Chambers

David Ormerod CBE – University College London

Amanda Pinto KC – 33 Chancery Lane

Fiona Rutherford - JUSTICE

Alison Saunders CB – Linklaters – Former Director of Public Prosecutions

Antony Shaw KC – Red Lion Chambers

Ian Winter KC – Cloth Fair Chambers

Judicial Sub-Group

His Honour Judge Michael Bowes KC

His Honour J Paul Farrer

Her Honour Judge Sally Hales KC

The Honourable Mr Justice Mark Wall

Annex E – Metadata Fields

An example of the types of data that can be extracted, collated and shared, as part of a metadata schedule.

Metadata schedule fields	**Description**	**Email Example**
Doc ID	The unique document ID associated with the document.	123456789
Parent ID	The document ID associated with the parent of the document.	0987654321
Family Group	The Family ID associated with the family group.	FG123456
Doc Type	*e.g.*, Email with attachments / email without attachments / File.	Email with attachments
Doc Date	The principal date associated with the document in format yyyy-MM-dd HH mm ss zzz	2024-10-17 09:45:00 GMT
Doc Application Name	The application associated with the filetype.	Microsoft Outlook
FILE_MIMETYPE	The filetype associated with the document.	Application/vnd.ms-outlook
File Modified Date	The file last modified date/time according to the filesystem in DD/MM/YYYY hh:mm, 24-hour GMT format.	17/10/2024 12:00
File Created Date	The file created date/time according to the filesystem in DD/MM/YYYY hh:mm, 24-hour GMT format.	17/10/2024 19:30
File Accessed Date	The date/time the file was last accessed according to the filesystem in DD/MM/YYYY hh:mm, 24-hour GMT format.	17/10/2024 12:05
File Name	The document filename including file extension (n.b. this is different to the file title, which is a different metadata field available for some document types).	Meeting_Agenda_20_Oct.msg
File Location/ Path	The original filepath for the file.	C:/Documents/Emails/

Metadata schedule fields	Description	Email Example
File Containing Folder	The original folder containing the file.	Emails
File Size	The size of the file in bytes.	105,024
File MD5	An MD5 hash value for the file. This is a unique cryptographic signature for the file which can be used to deduplicate against other documents and verify that the file has not been altered.	D41d8cd98f00b204e9800998ecf8427e
File Created By	The name of the person who created the file according to the relevant application (*e.g.*, Microsoft Word) metadata.	John Smith
Subject	The email subject line.	Weekly Team Finance Meeting Agenda and Comments
From Address	The name and email address of the person sending the email.	John.smith@example.com
To Address	The name(s) and email address(es) of the person(s) to whom the email is sent.	Jane.cook@example.com
CC Address	The name(s) and email address(es) of the person(s) to whom the email is copied.	Samuel.baker@example.com
BCC Address	The name(s) and email address(es) of the person(s) to whom the email is blind copied.	Rachel.eddy@example.com
Sent Date	The date/time the email was sent in DD/MM/YYYY hh:mm, 24-hour GMT format.	17/10/2024 09:45
Received Date	The date/time the email was received in DD/MM/YYYY hh:mm, 24-hour GMT format.	17/10/2024 09:46
Attachment File Name	The filename(s) of the attachment(s) to the email.	Finance_Weekly_Meeting_Agenda.pdf

Annex F – International Comparisons

1. In undertaking my Review, I have been keen to learn about the approach to disclosure in other jurisdictions. Evaluating the performance of our current domestic disclosure regime cannot be done in isolation. Such a position risks measuring the successes and failings of our system against a non-existent perfect scheme. There is much to be gained from exploring what other jurisdictions do. To that end, I have examined and will briefly discuss several international disclosure models, focusing on disclosure within both adversarial and inquisitorial systems.

Adversarial

The adversarial system consists of a competitive process between the prosecution and defence. Having independently gathered evidence, each side presents their argument before a judge, acting as a neutral arbiter, whose role it is to apply the law whilst ensuring the right to a fair trial is upheld. Adversarial trials tend to progress using motions and oral arguments, including the cross examination of witnesses. This is the system used in England and Wales.

Inquisitorial

In an inquisitorial system, an extensive pre-trial investigation is held as the court, or part of the court is actively involved in investigating the facts of the case independent of the prosecution and defendant. The judiciary are given significant powers to enable their *search for truth*. For example, a first judge undertakes responsibility for directing the gathering and examination of evidence and questioning witnesses, while a second judge will then hear the case.

As discussed below, there is variation within these legal systems. Further evolution has been borne out of changes to criminal justice philosophies and in response to practical matters such as digital material and court backlogs caused by the recent pandemic.

United States of America

2. First, I turn to the United States of America's (US) adversarial criminal justice system, as the country most frequently cited as providing an alternative philosophy to the English and Welsh approach. The US utilise four categories of disclosure, referred to as 'discovery', in the federal system.

    a. Under Rule 16 of the Federal Rules of Criminal Procedure (subdivisions a and b), the defence are entitled to submit a written request for certain categories of material – for example, statements the defendant has made to law enforcement in addition to certain expert reports.[379]

    b. Following *Brady v Maryland* (373 US 83, 1963), the Supreme Court established that all evidence must be "material" (relevant and important to the issues in the case) and the prosecution is required to disclose "exculpatory" material (material which may assist the accused).[380] This duty is termed the Brady rule, and it applies regardless of whether the defendant makes a request for exculpatory evidence.[381]

    c. Prosecutors must disclose impeachment information regarding the integrity or bias of a prosecution witness following *Giglio v United States* in 1972.[382]

    d. Under the Jencks Act (a), a prosecution witness or prospective witness's statement, "shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case".[383]

3. Formally, the Department of Justice's discovery practice is broader than these categories. A 'discovery agreement' is signed in federal cases and can be likened to the disclosure management document prepared by the prosecution in England and Wales. If the prosecution fails to comply with the discovery process, this can result in sanctions by the court, such as fines for the offending party, evidence prevented from being used and where particularly serious, the commencement of a new trial.

4. Prosecutors work more closely with investigators and are heavily involved in the conduct of investigations and therefore are typically already familiar with the material which has been seized, thereby gaining a better understanding of what meets the Brady test. Investigators do not have the legal authority to compel the production of certain records from third parties and therefore rely on prosecutors to go through the Department of Justice for court orders for records or search warrants.

5. Some states use an 'open-file' process which requires the prosecution to share all findings with the defence, redacting identifying information, with the aim of expanding the defendant's discovery rights.

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[379] Supreme Court of the United States, *Proposed Amendments to the Federal Rules of Criminal Procedure* (2022).

[380] *Brady v Maryland* 373 U.S. 83 (1963).

[381] Oxford *Pro Bono Publico*, *Criminal Disclosure Regime in the Digital Age: Comparative research of disclosure in common law jurisdictions* (2024) p 35.

[382] *Giglio v. United States* 405 U.S. 150 (1972).

[383] 18 U.S. Code § 3500, *Demands for production of statements and reports of witnesses*.

This is also termed 'keys to the warehouse', in reference to the pre-digital practice of allowing defendants and their representatives to physically inspect large volumes of printed material.

6. I note that there have been a range of differing conclusions as to the efficacy of this model. A study carried out in two states that use an 'open-file' system, namely North Carolina and Texas, provided little evidence that 'open-file' discovery affected plea bargaining, trial rates, or time-to-disposition. It is more likely that defence attorneys lacked the time and resources to capitalise on the material available through the 'open-file' to advantage their clients.[384] Conversely, a study carried out in Virginia and North Carolina, where Virginia protects certain critical documents, such as witness statements and police reports, from discovery, implied that 'open-file' discovery encourages more informed guilty pleas.

7. 'Open-file' discovery is also seen as more efficient in reducing discovery disputes and speeding up case dispositions. However, practitioners reported that, when the entire case file was turned over to the defence pre-plea, some information relevant to the case was frequently missing.[385] Avoiding a miscarriage of justice hinges on what material ultimately end up in the 'file' and it must be noted that even the 'keys the warehouse' approach does not preclude a malign investigative or prosecutorial actor from excluding important material.

8. It has been purported that 'open file' processes can also be partly linked to high guilty plea rates (90%+) rather than cases being taken to jury.[386] A recent study indicated that access to discovery impacts the defendant's perception of the information, affecting their plea decisions. Without access to 'open-file' discovery, particularly exculpatory information, defendants are unable to make fully informed plea decisions, arguably raising concerns about the fairness and validity of high plea rates in the US.[387]

9. There are continuing discussions around discovery sharing commitments in the US, highlighted by cases where prosecution non-disclosures have led to wrongful convictions or dismissed cases. *United States v. Giacobbe & Ors*[388] saw the prosecution of Morgan and his son (and others) in an alleged mortgage fraud conspiracy, causing around a US $500 million loss. The defence argued that the Government did not meet their requirements, such evidence not being shared in a "timely manner". In particular, discovery from several devices were 'missed', resulting in the belated production of over 600,000

[384] Ben Grunwald, *The Fragile Promise of Open File Discovery* Connecticut Law Review 49(3) (2017), pp 793 and 826.
[385] Jenia Turner, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, Washington and Lee Law Review 73(1) (2016), p 286.
[386] Joanne Philipson, *To make comparative assessment of strategies to effectively manage prosecution disclosure* (2019) Churchill Fellowship, pp 25–33.
[387] Samantha Luna and Allison Redlich, *Unintelligent Decision-Making? The Impact of Discovery on Defendant Plea Decisions*, Wrongful Conviction Law Review 1(3) (2020), pp 330–331.
[388] *United States v Giacobbe* 1:18-CR-00108 EAW.

pages of discovery. Partly due to these issues, the Judge dismissed the *Giacobbe case* and noted "issues surrounding electronic discovery are complicated", even more so "when dealing with the volume of information in this case".[389] It seems we are not alone in the wrestle with volumes of digital material and its impact on criminal justice. A recent 2022 report from the US Department of Justice recommended that, for investigations considering complex digital asset-related economic crimes, the statute of limitations be increased to account for the difficulty of evidence gathering.[390]

10. Furthermore, the 2002 Enron fraud case, where the founder of the American energy company was convicted of multiple counts of fraud, the prosecutors' 'open-file' approach saw over 80 million pages of documents provided with nothing applicable identified. This emphasises the problems with the prosecution turning over a vast amount of material without first identifying the items that may assist the defence.[391] The burden is then placed on the defendant to wade through the material provided.

11. To keep up with technological advancements, in 1998 the US Government created the Joint Electronic Technology Working Group (JETWG) to focus on best practice for the efficient management of electronic discovery between the Government and defendants in federal cases.[392] Having identified the continued lack of guidance for criminal electronic discovery, in 2015, the Federal Judicial Center published a guide for judges on Criminal Electronic Discovery. The guide suggests early discussions of electronic discovery issues to manage expectations around the expertise and capabilities of both parties.[393] Some states have successfully implemented oversight for judges managing exceptions to discovery.[394]

12. One risk of a broad discovery system is that sensitive material that is shared with the defence can end up in the public domain, significantly impacting the trial in question. To address this, a protective order can be issued to prohibit a party from disclosing specific information acquired in discovery, by demonstrating 'good cause'. A 'good cause' is determined if it can be demonstrated that disclosure will cause a clearly defined issue: "Annoyance, embarrassment, oppression, or undue burden".[395] The party seeking a protective order must file a motion, requesting to withhold otherwise discoverable evidence.[396] Protective orders can also be employed to protect the defendant against unnecessary or

[389] Sidley Austin LLP, *Recent Discovery Deficiencies in DOJ Cases: Examples and Takeaways* (2022).
[390] Oxford Pro Bono, *Criminal Disclosure Regime in the Digital Age: Comparative research of disclosure in common law jurisdictions* (2024) p 35.
[391] Ibid, p 33.
[392] Ibid, p 29.
[393] Ibid, p 30.
[394] Ibid, p 34.
[395] Federal Judicial Center, *Confidential Discovery: A Pocket Guide on Protective Orders* (2012) p 2–4.
[396] Grunwald, p 793–794.

confidentiality-breaking requests by the prosecution for disclosure of evidence.[397] This could allow the defence to better frame how the discovery process will unfold.

Republic of Ireland

13. The Republic of Ireland's criminal justice system, also adversarial in nature, first formalised prosecution disclosure obligations in 1983 as part of a legal judgment. The defendant in question was on trial for possessing explosives with intent to engager life. In his judgment, J McCarthy stated, "It is the duty of the prosecution…to make available all relevant evidence…in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so."[398]

14. Thus, a disclosure regime centring on the concept of 'relevant material' was created. Relevant material was later defined in 1999[399] and the duty was subsequently revised in a 2003 Supreme Court Judgment: "The prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution".[400] The 2019 Guidelines for Prosecutors give further detail regarding the expectation of disclosure of "relevant evidence", including presumed categories of material.[401] Where possible, the defence are provided with copies of the relevant material or allowed instead to inspect material where relevant items are voluminous.

15. In summary, prosecutors are under a significant obligation to disclose to the defence all relevant material within their possession. This duty is applied flexibly whilst considering the circumstances, matters and issues surrounding the case.[402] The prosecution is under no obligation to disclose irrelevant material but there is an expectation of erring on the side of caution. Like the English and Welsh system, sensitive material and material protected by legal professional privilege can be exempt from disclosure. The prosecution is also given specific direction regarding the disclosure of third-party material, which will only be granted where there is no "realistic alternative available to deal with the issues in the case".[403]

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[397] Law Offices of David H. Schwartz, *When to File a Protective Order in Business Litigation* (2021).
[398] *DPP v Tuite* 1983 WJSC-CCA 2336 (Court of Criminal Appeal of Ireland).
[399] *DPP v Special Criminal Court* [1999] 1 IR 60 (High Court of Ireland) – Material that "might help the defence case, help to disparage the prosecution case or give a lead to other evidence".
[400] *Michael McKevitt v DPP* [2003] - 18 March – Unreported.
[401] Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (2019) para 9.10.
[402] Ibid, para 9.3.
[403] Irish Legal Blog, *Third Party Discovery* (2024).

Australia

16. Australian criminal justice provides a further case study of disclosure in an adversarial system. Although there is not a uniform disclosure regime in Australia, as each State has their own procedural laws, fundamental disclosure obligations are set out in the Commonwealth Director of Public Prosecutions' Statement on Disclosure in Prosecutions conducted by the Commonwealth.[404] The Statement makes clear that proper disclosure must be made to ensure the accused can have a fair trial. Further, it is expected that an accused is entitled to know the evidence that supports the prosecution's case and material which "may be relevant to the defence of the charges".[405]

    Statutory requirements vary in different states, as some regions have Barristers Rules and Solicitors' Conduct Rules which set out their disclosure process. More formalised arrangements can be agreed with investigative agencies on the disclosure approach for a case, but this is not mandated across the board. There is also no formal practice of joint disclosure training between prosecutors and investigators.[406] Submission of large volumes of electronic evidence requires approval and external file management systems need to be agreed when courts lack resources. Once again, this is dealt with on a case-by-case basis.[407]

France

17. I turn next to France, which uses an inquisitorial legal system with its law applying within the Republic and overseas territories. In this system, there is no concept of 'used' or 'unused' material. Instead, the investigating magistrate objectively searches for implicating and exculpatory material. Findings of this investigation are filed and, if the case goes to trial, this file is turned over to the court and used as the evidentiary baseline. Theoretically, evidence at a trial could consist purely of this file.[408]

18. Judicial Secrecy is a core principle which applies to pre-trial investigations and all 'contributing' to proceedings – such as prosecutors, judges, clerks, police officers, experts etc. The suspect's lawyers are also bound by professional secrecy, forming 'shared secrecy' and all parties are obliged to keep the details of the investigation secret. Only the Chief Prosecutor of the Republic can communicate on aspects of the investigation protected by judicial secrecy. However, this is limited to ensure the public has access to the broad facts of the case. A breach of judicial secrecy would result in a one-year prison sentence and a fine of €15,000.

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[404] CDPP, *Statement on Disclosure in Prosecutions Conducted by the Commonwealth* (2017).
[405] Ibid. para 2.
[406] Philipson (2019), pp 74–75.
[407] Oxford *Pro Bono Publico*, p 11.
[408] Antoine Kirry and Frederick Davis, 'France' chapter 20 in *The International Investigations Review*, 9th edition (2019).

19. More broadly, the European Convention on Human Rights sets out the principles of fairness and the right to a fair trial which criminal trials in France must adhere to. Defendants can gain access to exculpatory evidence through the case file compiled by the impartial investigatory judge. A defendant also has the right to request further specific actions be taken to consider possible new routes to evidential material.

Netherlands

20. Finally, we consider the Netherlands, where an inquisitorial criminal justice system is also employed. At the investigation stage of a case, material is gathered by an investigative judge into one single file. There is a presumption that certain material, such as routine communication, will be added to this central file. This file can then be accessed by all parties.

21. There is a provision for a 'closed file' which is never disclosed to the defence. Such a file would likely contain material relating to covert tactics and techniques, though not necessarily the product of them.

Consideration

22. There are indeed lessons to be learnt from the inquisitorial and adversarial processes discussed – from the use of 'open' and 'closed' file approaches, disclosure training practices and varied statutory requirements within some countries. However, it is evident, when examining international processes, that each disclosure model has evolved within the unique criminal justice system wherein it lives. It would therefore be *unwise to presume* that entire models of disclosure can *simply replace the English and Welsh system of disclosure without considering the wider ramifications.*

Annex G – Vehicles for Change

Criminal Procedure and Investigations Act 1996 (CPIA)
[Rec 37] Alongside amendments to the Criminal Procedure Rules, section 3 of the CPIA should make clear that, in cases where a defendant has requested and is provided a class of prosecution material which they previously had access to, the prosecution is no longer obligated to search for material that may meet the CPIA s.3 test. However, if the prosecution becomes aware of material that would meet the test, they are obligated to highlight its existence to the court and defence, at the earliest opportunity.
Code of Practice
[Rec 7] That a new section 'Reviewing Material' should make clear that technology can be used to identify material which may be relevant to an investigation (as defined in Code of Practice paragraph 2.1) and that there is no duty for every item of prosecution material to be manually reviewed. Code paragraphs 7.2 and 7.3 amended to make clear that the duty on the disclosure officer to draw to the attention of the prosecutor material in possession that may meet the disclosure test does not require every item to be manually reviewed. In cases involving a large volume of material, a disclosure officer can be aided by technology to identify material that may meet the disclosure test. Amend paragraph 10.2 of the Code to make clear that, in cases where the disclosure officer has identified a large volume of material that may meet the disclosure test, the prosecutor can similarly be assisted by technology (i.e., use of key word terms, dip sampling) when reviewing the material for the purposes of determining whether it meets the disclosure test. [Rec 8] Section 6 should make provision for the use of technology to assist in the creation of modern, less resource-intensive schedules. [Rec 9] The Code of Practice section 6(b) be updated to allow the appropriate use of 'metadata schedules', in conjunction with descriptive schedules and block listing. [Rec 10] When a defendant is likely to plead guilty to an indictable only and either way offence unlikely to remain in the magistrates' court, the investigator, with the agreement of the designated prosecutor, should not have to produce a full schedule of unused material before a charging decision is taken. Section 6.4 of the Code should be updated to reflect this. [Rec 11] Section 6(c) to include new wording clarifying the limited redaction obligations for law enforcement. This wording should reflect the guidance issued by the Information Commissioner's Office and National Police Chiefs' Council. [Rec 13] Consideration should be given to whether the CPIA and Code of Practice should apply to anyone undertaking a criminal investigation.

Criminal Procedure Rules
[Rec 16] Update matters which a judge must take into consideration when evaluating a Section 8 request. [Rec 22] A revised system for judicial case management of disclosure should be put in place for Crown Court cases, including an Intensive Disclosure Regime for the most serious, complex, or otherwise difficult cases. This process should be set out in Criminal Procedure Rules, with any further detail added to the single Consolidated Guidance. [Rec 23] Where practicable, a requirement on the prosecution to serve the Disclosure Management Document (DMD) at least seven days before the Plea and Trial Preparation Hearing (PTPH). [Rec 25] Set out expectation that the DMD will be discussed, in sufficient detail, at all PTPH hearings. [Rec 30] To give the judiciary the power to designate a case an 'Intensive Disclosure Regime' (IDR) case. This should be after they have heard representations from the defence and prosecution at the PTPH and may include instances where the prosecution has not applied for the provision. [Rec 31] In IDR cases, there will be an expectation that the prosecution makes any required updates to the DMD post PTPH. That the judiciary will have the power to order such updates to be made. [Rec 32] To oblige the defence, in IDR cases, to respond to the DMD. [Rec 33] Set out dates for the issuing of a revised DMD; a response to the revised DMD; and a Disclosure Management Hearing (DMH), as well as the agenda for this hearing. [Rec 34] Set out the expectation that, in IDR cases, the judge will use their case management powers to oversee an agreement between the two parties as the broad approach to disclosure. That key personnel attend the DMH, including the lead Disclosure Counsel, Trial Counsel and the Disclosure Officer(s). [Rec 37] Create a provision to enable the prosecution, in single defendant cases to provide the defence with unused material that the defendant previously had access, (i.e, previously owned, held or controlled). [Rec 45] To consider if the Code should be amended to require that, following the receipt of the defence response to under section 17 of the Proceeds of Crime Act 2002 (POCA), the prosecution review disclosure and update the defence about the outcome of that new review.
Consolidated Guidance
[Rec 6] Guidance to make clear that the CPIA s.3 test is an objective assessment. [Rec 11] Consolidated Guidance to include detail to assist investigators accurately redact material and avoid risk-averse over-redaction.

[Rec 19] Include an expectation for an investigator to speak with a prosecutor at the pre-charge stage, and to agree on a disclosure strategy and reasonable lines of inquiry, in every case (excluding motoring offences).

[Rec 20] Include an expectation that investigators and prosecutors, on complex cases or cases with large volumes of digital material, should meet at least quarterly to discuss disclosure approach.

[Rec 22] Detail on the changes made to the Criminal Procedure Rules reflected in the Consolidated Guidance.

[Rec 24] For the DMD template to be updated and used in all Crown Court cases.

[Rec 29] Add wording to the Consolidated Guidance reminding investigators and prosecutors to apply the disclosure test to any material showing that a financial matter has impacted a decision to prosecute.

[Rec 32] Provide an example of a Response to DMD (RDMD) document template.

[Rec 37] Provide guidance as to the operation of the provision that would allow the prosecution to provide to the defence (after judicial approvement) material the defendant previously had access to (i.e., previously owned, help or controlled).

[Rec 38] Consolidate the Attorney General's Guidelines and Judicial Protocols into a refined single guidance document referenced in legislation.

[Rec 40] Highlight in Consolidated Guidance that, where there is a disclosure failing by prosecution or defence, it is open to the Judge to require that the relevant legal representative, officer and/or legal aid contract manager, provide further explanation to the court either in writing or in person at a future mention.

Annex H – Glossary

Adversarial – A justice system model where the prosecution and defence present their arguments before a judge, acting as a neutral arbiter, whose role it is to apply the law whilst ensuring the right to a fair trial is upheld.

Ambush defence – A situation in which defence evidence has not been adduced in advance to the prosecution, leading to their inability to rebut it.

Artificial intelligence – A computer model that can undertake tasks that traditionally required human input, such as evaluating and analysing large data sets.

Attorney General – The Attorney General is the chief legal adviser to the Crown and has a number of independent public interest functions, as well as overseeing the Law Officers' departments.

Attorney General's Guidelines on Disclosure – Guidance issued by the Attorney General, to investigators, prosecutors and defence practitioners on the practical application of the disclosure regime.

Bar Council – The professional body for barristers in England and Wales.

Court of Appeal – The Court of Appeal forms part of the Supreme Court of Judicature and exercises the power to hear appeals over all judgments and orders of the High Court and most determinations of judges of the county courts.

Criminal Justice System (CJS) – The criminal justice system in England and Wales is made up of several separate agencies and departments which are responsible for various aspects of the work of maintaining law and order and the administration of justice. The main agencies of the CJS include:

- Police Forces.
- Other law enforcement agencies (i.e. the Serious Fraud Office and National Crime Agency).
- The Crown Prosecution Service.
- Magistrates' courts.
- The Crown Court.
- The Court of Appeal, Criminal Division.
- The Prison Service.
- The National Probation Service.

The Home Office, Attorney General's Office and Lord Chancellor's Department are the three main government departments with responsibility for the CJS, setting the policy framework, objectives and targets.

Criminal Procedure and Investigations Act 1996 – The legislation governing the procedures that must be undertaken during a criminal investigation and prosecution, which include disclosure requirements and duties.

Criminal Procedure and Investigations Act Code of Practice – Secondary legislation that supports the CPIA in setting out the roles and responsibilities of law enforcement officers in regard to the recording, retention and revealing of investigatory material.

Criminal Procedure Rules – Secondary legislation that sets out how matters should be carried out in the criminal courts of England and Wales.

Crown Court – The Crown Court has unlimited jurisdiction over all criminal cases tried on indictment and also acts as a court for the hearing of appeals from magistrates' courts.

Crown Prosecution Service (CPS) – The Crown Prosecution Service, headed by the Director of Public Prosecutions, was set up in 1986 to prosecute criminal cases started by the police throughout England and Wales. It is answerable to Parliament through its superintending minister, the Attorney General.

Defendant – A person defending a court action which has been taken against them. This differs from a suspect, who the police consider may be responsible for an offence but have not yet filed a charging decision against. A charging decision is reached in agreement with the prosecuting authority when there is sufficient evidence.

Disclosure – The pre-trial and ongoing procedure whereby the prosecution shows to or informs the defence of all the material that has been gathered during the investigation which is relevant to the case but is not intended to be used at the trial. This includes material that may be capable of undermining the prosecution case or assist the defence case.

Disclosure Officer – The person responsible for examining material retained by the police during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it and certifying that they have done this; and disclosing material to the accused at the request of the prosecutor.

District Judges – Professionally qualified members of the judiciary. District Judges (Civil) sit in the county courts and deal with most of the business of those courts; District Judges for magistrates' courts, (previously known as stipendiary magistrates) hear cases in magistrates' courts either alone or alongside lay justices of the peace and can assist by hearing the lengthier and more complex matters.

Disclosure Management Document – A document prepared by the prosecution that details the approach taken in the pursuit of discharging their disclosure duties.

Either-way offence – A criminal offence that can be tried in either the magistrates' court or in the Crown Court. Usually, they are offences that may be, but are not always, serious or involving dishonesty. Magistrates' courts can decline to hear an either-way offence if they consider they do not have power to sentence appropriately. A defendant has a right to elect a Crown Court trial for either-way offences.

His Majesty's Inspectorate of Constabulary (HMIC) – For well over a century HM Inspectors of Constabulary (HMIs) have been charged with examining and improving the efficiency of the Police Service in England and Wales.

HM CPS Inspectorate (HMCPSI) – An independent statutory body to promote the efficiency and effectiveness of the CPS casework and supporting management functions through a process of inspection and evaluation, the provision of advice and the identification and promotion of good practice achieved through a process of inspection.

Ineffective trial – A trial that is unable to proceed on the day that it was scheduled to start. The reasons for this are various, including the non-attendance of a prosecution or defence witness, the failure of the defendant to appear, either the prosecution or the defence not being ready for trial, or a court room or judge not being available.

Inquisitorial – A justice model where the judge plays and active role in directing the criminal investigation in the search for the truth.

Investigator – any police officer involved in the conduct of a criminal investigation.

Keys to the warehouse – A model of disclosure where the defendant is given access to all material gathered in the process of the investigation and prosecution.

Lady/Lord Chief Justice – The head of the judiciary and the presiding judge of the Courts of England and Wales.

Large language model – A type of artificial intelligence (AI) program that can analyse and understand text. These models are trained on massive amounts of data to learn how language works.

Law Commission – A body established by the Law Commission Act 1965 to take and keep the law under review with a view to systematically developing and reforming it.

Law Enforcement Agency – A government agency responsible for enforcing the law (not including the Crown Prosecution Service).

Law Society – The professional body for solicitors in England and Wales.

Lord Chancellor – The cabinet minister responsible for overseeing the work of the Ministry of Justice.

Machine Learning – A subset of artificial intelligence (AI) that utilises algorithms to analyse and learn from data sets, enabling it to make predictions and assessments about new data sets.

Magistrates' courts – The principal function of magistrates' courts is to provide the forum in which all criminal prosecutions are initiated and most decided.

Managerialism – An approach to criminal justice that emphasises the importance of cost-effectiveness and efficiency.

Material – Anything in physical or electronic form gathered as part of the criminal investigation.

National Police Chiefs' Council - The body that brings together UK police leaders.

PACE – Police and Criminal Evidence Act 1984. PACE and the Codes of Practice set out police powers and procedures for arrest, detention and interviewing of those suspected of having committed criminal offences and for gathering and handling evidence.

Plea and Trial Preparation Hearing – A hearing held before the trial where the defendant is asked to enter their plea.

Pre-trial hearing – This is a non-statutory hearing held before the trial begins to assist the management of the trial.

Prosecutor – the authority responsible for the conduct, on behalf of the Crown, of criminal proceedings resulting from a specific criminal investigation.

Public Interest Immunity – A legal exemption that allows the state to withhold certain sensitive information that could harm the public interest if released.

RASSO – A crime relating to rape and other serious sexual offences.

Relevant material – Material that appears to have 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.

Sensitive material – Information protected by privacy. Or in the context of national security, material whose disclosure would be damaging.

Summary-only offence – A summary-only offence is an offence that can only be tried in a magistrates' court. Most traffic offences are summary-only, as are minor offences against public order.

Unused material – Material obtained by an officer which is relevant to the investigation, but which does not actually form part of the case for the prosecution against the accused.

Victim – Someone who has had a crime committed against them, or someone who is the complainant in a case

Annex I – Intensive Disclosure Regime Examples

New Disclosure Regime Stage	**Case 1 – High volume complex multi-defendant fraud**	**Case 2 – Affray outside a public house**

Investigation	• Multiple search warrants executed:
	  ○ 100 electronic devices seized (5 terabytes of data)
	  ○ 50 boxes of documents (100,000 documents totalling 1m pages)
	• Data from devices copied
	• Document review platform used
		• CCTV obtained from pub
		• Witness statements taken

Charge	• Five defendants charged with fraudulent trading	• Three defendants charged with affray
First appearance	• Case sent to Crown Court	• Case sent to Crown Court

Disclosure Management Disclosure (DMD) to be served 7 days before PTPH dealing with:
• Reasonable lines of inquiry
• Third-party material
• Treatment of electronic devices
• Technology used and steps taken to ensure correctly configured
• How unused material is/will be scheduled
	• DMD served which states:
	  ○ Reasonable lines of inquiry X, Y, and Z
	  ○ Relevant material may be held by third parties X, Y, and Z
	  ○ Electronic devices will be dip sampled using keywords to identify potentially disclosable material
	  ○ Prosecution will use X software
	  ○ Electronic material will be scheduled by way of identifying devices and providing metadata
		DMD served which states:
		• No reasonable lines of inquiry
		• No relevant material held by third parties
		• No electronic devices seized

Plea and Trial Preparation Hearing		
PTPH form filled out ahead of PTPH, including new Intensive Disclosure Regime (**IDR**) Case section	• Prosecution ticks box that, in their view, the case should not be designated as an IDR case • Defence ticks box that, in their view, the case should be designated an IDR case. This prompts the PTPH form to generate a new section, requiring the prosecution to provide brief reasons why, along with what specific directions are sought/information to assist the court in making an IDR case direction	Prosecution and defence both tick box that the case should not be designated an IDR case

PTPH takes place, directions/orders made. Judge considers whether to designate as an IDR case, Judge considers the new criteria in Rule 15 of the CrimPR, including:
  ○ The complexity by reference to the case papers
  ○ The likely complexity of disclosure by reference to the DMD (if any)
  ○ The views of the parties
	• Judge directs an IDR case.
	• Judge gives brief reasons and confirms what this means for all parties (in presence of defendants so aware):
	  ○ For the court/judiciary, more intensive judicial case management
	  ○ For the prosecution, an expectation of greater focus on disclosure and greater transparency on steps taken
	  ○ For the defence, greater engagement and expectation of trial counsel at all hearings
		Judge directs not an IDR case. The usual stage dates are set:
		• Stage 1 (prosecution case)
		• Stage 2 (defence statement)
		• Stage 3 (prosecution response)
		• Stage 4 (any s.8 applications)
		• Certificate of trial readiness (including whether any outstanding disclosure issues)
		• Pre-trial review (can be vacated if certificates confirm no issues)
		• Trial date

New Disclosure Regime Stage	Case 1 – High volume complex multi-defendant fraud	Case 2 – Affray outside a public house

If IDR case, judge to craft bespoke directions	Judge directs:
	• Case reserved to self
	• Usual stage dates set with extra dates:
	  ○ DMD to be served (or revised if necessary)/directions sought by +2 weeks
	  ○ RDMD to be served by defence +3 months (to ensure VHCC funding is in place)
	  ○ Prosecution to provide agenda 7 days before hearing
	  ○ Disclosure management hearing, held remotely at 9:30am to secure trial counsel's attendance; disclosure officer(s) also to attend remotely
		N/A

If IDR case, prosecution to serve DMD/revised DMD	Prosecution serve updated DMD, with the following added:
	• Particular questions it would like answered ahead of the stage 2 date to assist with discharging disclosure obligations (not just fishing expedition questions – answers admissible in same way as PTPH form):
	  ○ Do you have any other search terms you would like run?
	  ○ Are these devices yours?
		N/A

If IDR case, Response to DMD served (RDMD)	Defence serves RDMD, flagging:
	• Trial issue at that stage:
	  ○ D1 says not dishonest
	  ○ D2 says wrongly attributed to group chat
	• Answers to prosecution questions (or an explanation as to why cannot answer):
	  ○ D1 accepts device is his and that correctly attributed in group chat
	• Other reasonable lines of inquiry
	• Other third parties who might hold relevant material which meets the disclosure test
	• Wish to have access to software
	• Suggested search terms
	• Whether proposed approach to scheduling is adequate
		N/A

Disclosure management hearing	Judge makes orders: • Resolving disputes • To dispense with redaction for certain categories of information • Defence to be allowed to test/be supplied with technology • Further hearing in +2 months to monitor progress	N/A
Stage 2 date	Defence statement served	Defence statement served

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978-1-5286-5492-0