Response to the Justice Committee's Disclosure of Evidence in Criminal Cases Inquiry

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Introduction

1. Established in 1957, JUSTICE is an all-party human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. JUSTICE has and continues to be concerned with the processes surrounding disclosure and the ability of both prosecutors and defence lawyers to obtain all relevant material in an expedient and efficient manner. Failures in disclosure can cause delays and increase the risk of miscarriages of justice occurring.

2. In 2016, JUSTICE published its *Complex and Lengthy Criminal Trials*[1] report, chaired by Sir David Calvert-Smith. The report details practical and effective ways to improve disclosure, including the use of tools to increase efficiency, routine communication with disclosure officers, and disclosure of the documents as early on in the process as possible.

3. As such, the Working Party's remit covered the subject-matter of this consultation and our response is based on its recommendations. The increased complexity of cases progressing through the criminal justice system show the continued relevance of these recommendations to the Committee.

4. The Committee has been provided with responses from the Criminal Bar Association, the National Police Chiefs' Council and Crown Prosecution Service, the Centre for Criminal Appeals and Cardiff Law School Innocence Project and the Criminal Cases Review Commission, among others. These responses have set out the current system and the problems that exist within it. We will therefore try to avoid duplication and will only highlight areas we feel have not been fully focussed on. Where we do not comment on a particular issue, it should not be assumed that we agree with it

5. We will, however, make these brief observations. The current disclosure system is clearly not working. However, failings in disclosure are not a modern affliction and it is not simply a case of there being too much data or too few resources, although these issues exacerbate the problem. There needs to be a radical shift in how disclosure is undertaken and who undertakes it to ensure effective disclosure takes place.

6. If policies, rules and procedures on disclosure are currently not being adhered to, it may be that these policies, rules and procedures are not appropriate. In an adversarial system, it is difficult for those involved in investigating and prosecuting crimes to remain wholly objective throughout. Unconscious bias can lead to material being deemed irrelevant even if correct procedures are followed, which may in fact be very significant to the issues in the case. Placing the responsibility for disclosure with someone independent, and allowing secure access to the defence to view all material, may be the best way to ensure that unused material is accessible to the parties.

[1] Available at https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/03/CLT-FINAL-ONLINE.pdf

7. Failings in disclosure can have serious consequences. For instance, Sam Hallam and John Kamara both spent significant periods in prison having been wrongly convicted.[2] Sam Hallam's conviction was quashed following analysis of his phone which did not take place prior to charge or at any point during his trial and initial appeal. John Kamara's conviction was quashed after it emerged that the police had not disclosed 201 witness statements that showed his innocence.

Current issues with disclosure

Limited and delayed disclosure

8. PACE Code C requires some pre-interview information to be provided at the discretion of the police.[3] In practice, the disclosure of that information is limited, which often results in no-comment interviews. This is because it may not be possible for a solicitor to fully advise their client on the strength of the evidence against the suspect or the investigative approach the police are taking.

9. Similarly, in preparation for trial, disclosure is often limited and delayed. Police staff manually schedule the material. A prosecutor then determines whether or not it is disclosable. The process causes inordinate delay. Too little material is disclosed at the beginning of the case and too much close to the trial date. Of particular concern in serious crime cases is the late service of visual footage from CCTV or other cameras, which prevents the trial taking place until all parties have viewed it and its length has been cropped to the relevant section(s). These delays can lead to trials being vacated. In lengthy and complex cases delays can be over 12 months.

10. The process of disclosure under the Criminal Procedure and Investigations Act 1996 (CPIA) contributes to the problem. It requires the disclosure officer to determine what undermines the prosecution case and what may assist the defence. This will come at a time when there may have been little indication by the defence of what their case is.

11. We are advised by specialist prosecutors[4] that regularly meeting with the disclosure officer is crucial to understanding what processes they are using to sift material, and to agree the parameters to the exercise and disclosure strategy. Disclosure is greatly assisted by the early involvement of prosecutors. In contrast to standard crime,

[2] Sam Hallam spent over seven years in prison for murder before his conviction was quashed. John Kamara spent nearly 20 years in prison for murder before his conviction was quashed. For more information on the serious implications of disclosure failings see our *Supporting Exonerees: ensuring accessible, consistent and continuing support* report, available at https://justice.org.uk/our-work/areas-of-work/criminal-justice-system/supporting-exonerees-ensuring-accessible-continuing-and-consistent-support/

[3] Code C para 11.1A requires that, prior to interview, a suspect and their solicitor must be given sufficient information to enable them to understand the nature of any alleged offence, and why they are suspected of committing it (see paragraphs 3.4(a) and 10.3), in order to allow for the effective exercise of the rights of the defence. Note 11ZA further clarifies that a sufficiency of information:
"[W]ill depend on the circumstances of the case, but it should normally include, as a minimum, a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question. This aims to avoid suspects being confused or unclear about what they are supposed to have done and to help an innocent suspect to clear the matter up more quickly."

[4] At the CPS Organised Crime and Specialist Fraud Divisions.

Serious Fraud Office and Financial Conduct Authority investigations have in-house lawyers to carry out the disclosure function as part of the investigation team, which enables them to start from the outset of the case and to advise the prosecution team on what should be disclosed. It also means that they are usually able to disclose before the first appearance at a magistrates' court, despite cases involving large amounts of material.

Large amounts of data

12. The volume of material that is collected – such as emails, CCTV, phone records, social media, and a whole host of other material – is causing significant problems for investigators and is usually manually reviewed. In accordance with the Attorney General's Supplementary Guidelines on Digitally Stored Material (2011),[5] the aim should be for investigators to seize as little as possible during an investigation. However, once seized, it must be accessed, secured, sifted for relevance, stored and shared. This requires huge resources. Having lawyers solely focussed on disclosure would appear to us to be a good solution.

13. Material must be served electronically in accordance with the Crown Court Digital Case System. Forces have multiple software programmes in order to capture and analyse material, but these produce a vast range of formats, which are not often compatible within force case management systems, never mind across other forces or the Crown Prosecution Service. Given the vast amount of digital material now being captured - and the reliance upon forensic experts to process the material - backlogs are occurring across the country.

Adversarial system

8. An inherent problem with the current disclosure framework is the adversarial nature of our criminal justice system. Although police are objective investigators, it is easy to stray into tunnel vision if they believe the suspect committed the offence, resulting in alternatives not being explored. Faced with an abundance of material and less resources, when cases get passed to prosecutors it is understandable that they focus on the issues that will strengthen their chance of success.

9. The problems with legal aid are well known to the Committee. Defence practitioners often do not have the time or the resources to properly scrutinise all unused material and must rely on those who are effectively their opposition to have carried out their duties fully, fairly, and objectively. In an adversarial system, which aims to have equality of arms, the current situation is unsatisfactory.

Solutions

Earlier and fuller disclosure

[5] Annexed to the Attorney General's 2013 Disclosure guidelines at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf

10. We believe that as much disclosure as possible should be given as early as possible. There may be good reasons in an individual case – such as risk of reprisals against a witness or destruction of evidence – for the police not to reveal certain information to the suspect, but in general the more information provided ahead of interview, the fairer the interview and the more likely it is an account will be provided. If an account is not provided, the stronger the negative inference later at trial (where the suspect answers a question to which he must then have known the answer if his defence is true). Alternatively, the strength of the evidence may encourage an admission of guilt. This recommendation will ensure that the interview forms an important part of the case at trial, and offers a real opportunity for the suspect to respond to allegations. Further, in our view, EU law requires far more disclosure to be provided than is currently the case.[6] We believe that fuller provision of information pre-interview – especially in cases with complex material which involves a planned arrest and interview – would considerably shorten subsequent proceedings.

11. Disclosing as much as possible as early as possible will also help the defence provide an indication early on of what the issues in the case may be, aid the CPIA process and contribute suggested search terms for analysis of the material seized. In extreme cases, it would lead to cases being abandoned before charge because of disclosure problems rather than, as too often happens at present, the case being abandoned at the door of the court after much time and expense has been wasted.

12. In addition, we are aware that there is no discrete disclosure training module for police officers. The College of Policing and Crime Operational Support Unit should ensure that disclosure training should take place in its own right and that appropriate professional guidance is produced to enable the early disclosure and planning we recommend to become standard.

<u>Early Engagement</u>

14. To improve the disclosure process under the CPIA, we recommend that the defence is engaged early. The Attorney General's Digital Guidelines acknowledge that this is necessary.[7] CPS guidance on very high cost cases indicates that in complex cases, disclosure management documents (DMDs) should now be used as they reveal the approach that the prosecution has taken to the disclosure exercise.[8] In our view they should be routinely used for all cases involving a significant amount of material. Early engagement will assist the disclosure officer with what is relevant and can assist in the formation of the Disclosure Management Document.

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[6] EU Directive 2012/12/EU on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1-10, came into force in June 2014. It is given effect by PACE Code C and the pre-existing CPIA regime. Article 6 requires that suspects are provided with information about the criminal act they are suspected of committing promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. Recital 28 clarifies that this should be, at the latest, before their first investigative interview.

[7] At A42-44

[8] These must be served on the defence and the court. The document should set out the position that the prosecution takes in dealing with unused material and enable prosecutors to take a more proactive and transparent approach to disclosure. It must be tailored to the individual case and explain the approach taken to the different types of material and aspects of disclosure, see CPS, Very High Cost Cases: A Guide to Best Practice, December 2012, pp. 31-33.

15. Prosecutors should assist investigators in the preparation of the disclosure schedule alongside or very soon after preparation for interviews. As well as encouraging investigators to produce pre-interview disclosure, this would identify the difficult disclosure issues at the outset, assist in the formation of the DMD and ensure they are fully considered by the prosecution.

16. We believe that a collaborative approach to disclosure will help to blunt the worst of the adversarial system; it will ensure that disclosure is not the privilege of only one side. Additionally, it will ensure that legally trained individuals will be involved in the development of the disclosure schedule.

Technology

17. The technology exists to avoid the pitfalls created by large volumes of digital data, and it is being used by specialist prosecutors, such as the FCA, and some defence firms in financial cases. There are programmes which can process and store multiple types of file and audit how the material is accessed and manipulated, enabling easier compliance with the police data management guidelines and disclosure rules. They provide an intuitive interface that can enable less qualified officers to review material, rather than requiring the services of forensic experts, who are then free to focus on complex cases.

18. Document and case management platforms can be used to manage large and complex evidence and, once reviewed, to support efficient electronic disclosure exercises. They enable not only rudimentary word searches but also phrase, concept, and image searches as well as duplication, date and geographical filters.[9] The automated processes also increase efficiency and therefore provide significant resource and cost savings.

[9] The Home Office's Centre for Applied Science and Technology reviewed some of these tools in 2014, and explains in more detail how they can facilitate investigations in its report, D. Lawton et al, *e-discovery in digital forensic investigations*, CAST Publication No. 32/14 (Home Office, 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/394779/ediscovery-digital-forensic-investigations-3214.pdf The US has pioneered what is termed "e-discovery" use in corporate litigation, and it is increasingly being used in the UK by specialist prosecuting agencies. For example, Simmons and Simmons which supported our working party on Complex and Lengthy Criminal Trials, described its Relativity database as "robust, flexible and configurable, which allows the creation of a database structure and document store that can be aligned to the specific requirements of the matter." Other corporate firms and agencies have similar document management systems, such as Intella and ediscovery.com (from Kroll Ontrack). The FCA uses Nuix for initial forensic investigation and Autonomy for review and disclosure. In the civil sphere, Practice Direction 31B of the Civil Procedure Rules provides procedural guidance for use of electronic review tools. Six years ago, when the technology was far less developed, Jackson LJ explained (at para 37.2.2 of the Jackson Report (Review of Civil Litigation Costs Final Report, 2009)):
"On 22nd June 2009 I attended an e-disclosure demonstration at 4 Pump Court chambers. Three different specialist providers each took data from the Enron case and demonstrated how their respective software systems could search, sample, categorise and organise the data. The object of each of these systems is (i) to whittle down as far as possible the potentially relevant documents which will be passed to the lawyers for review and (ii) to enable the lawyers to search and organise documents passed to them. I am bound to say that the systems developed by each of those specialist providers are extremely impressive. I am sure that it would assist other members of the judiciary to know what technological help is available to the parties, to enable them to manage the disclosure process."

19. If all investigation and prosecution agencies could use similar software, the backlogs in case progression and disclosure processes might be significantly reduced. With the time savings and audit trail created by electronic tools, we consider that the initial investment will be returned through reduced investigation and prosecution costs.

20. We do not suggest that technology is a panacea, and we acknowledge that significant investment is necessary to enable every large-scale investigation access to, and training in, this technology. In the largest cases current technology will still struggle to produce a manageable case for review.[10] Document review/forensic experts will need to be engaged to limit what is seized ensure reviews are properly conducted.[11]

21. Electronic tools can use the metadata in digital files to identify whether they might be relevant. The value of this can be seen in the Child Abuse Image Database. This database has taken advantage of advances in facial and image recognition technology to build a national graded image log. This has helped to significantly reduce the time taken in device scanning for illegal images.[12]

22. It is clear to us that a single evidence management system is necessary so that all police forces and law enforcement agencies are able to create secure cases within it, with log in access for each user, that will enable review of all types of data, connect into national databases and produce an electronic file for disclosure. This will then connect easily into the digital court process. It is important that the right software is utilised and can be used across the country. Selecting programmes on a case-by-case and area-by-area basis is like reinventing the wheel every time suspicious activity is reported, yet this is what currently happens for most complex police investigations.[13] As such, it is our view that a national evidence management system, fit for operational requirements, should be developed.[14]

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[10] Our working party was told of a case where 30 million documents produced by a third party had to be reviewed, it took the software two weeks to process. This demonstrates the enormity of the task.

[11] The FCA meet as a full team of forensic, document management, disclosure, legal, as well as investigative, expertise prior to the seizure to develop a plan of what to look for so as to try to obtain only relevant documents. Where possible they do this through triage of the devices on site.

[12] The database provides an automated scan of all the images on a device to check for known and previously graded images – from standard software icons through to convicted offenders and indecent photographs. Where images have been shared between illicit rings or downloaded from the internet, this enables investigations into previous operations with a simple scan.

[13] Many police forces have to buy access to software to aid review of vast material in a particular case. In economic crime, e-discovery software has sometimes been purchased by agreement between the SFO and a defence firm for a specific case. We have been told that the software has not been consistent and has had limited functionality for the tasks required. The Met's Total Technology Strategy 2014-2017, envisaged using suppliers, although there is recognition of the difficulties caused with multiple contracts and proposals to avoid these in future, see Metropolitan Police, One Met, Total Technology: Digital Policing 2014-2017, available at http://content.met.police.uk/cs/Satellite?blobcol=urldata&blobheadername1=Content-Type&blobheadername2=Content-Disposition&blobheadervalue1=application%2Fpdf&blobheadervalue2=inline%3B+filename%3D%22140%2F125%2FTotal+Technology+Strategy+-+2014-2017.pdf%22&blobkey=id&blobtable=MungoBlobs&blobwhere=1283686449257&ssbinary=true

[14] We are aware of the NPCC's goal of 'Digital First' for integrating digitised policing into the reformed criminal justice system to ensure a chain of evidential integrity and accessibility on demand to all

E-Disclosure

23. The CJS Common Platform Programme (the Common Platform) will replace the existing IT systems of Her Majesty's Courts and Tribunals Service (HMCTS) & CPS with a single system. A single central database will hold all the material (including multi-media) necessary to deal with cases from charge to trial quickly and efficiently. All material will be available from a single database, ensuring the most complete versions of cases can be accessed by all parties, including the defence and judiciary, at any time.[15]

24. The Common Platform is not a commercial product. It is software built in-house by the CPS and HMCTS, dedicated to the needs of the criminal justice system. Without ties to commercial firms it can be constantly updated to better serve the criminal justice system's needs. It is developed according to Government Digital Service Principles and uses an agile development programme. Subject to costs and approvals, it would be possible to build in any technology available, including an analytical tool.[16] Universal uptake of the Common Platform will also ensure that police forces are not working with such a broad range of formats, ensuring seamless transfer.

25. This could provide investigators, prosecutors and defence lawyers access to the case file and ensure e-disclosure takes place easily. The defence team would simply have to log into the system to find the DMD, disclosure schedule and material to which they have access pursuant to the CPIA separated into prosecution case and unused material. E-disclosure would provide access to all parties to trawl and filter the relevant evidence to disclosure, by applying their own analytical search terms. Ideally, the national evidence management system would be incorporated into the Common Platform. At the very least, it should be compatible with it.

26. Material produced and disclosed by way of e-disclosure tools would significantly shorten the disclosure exercise for the prosecution and preparation toward trial for all parties. E-disclosure on the Common Platform should prevent, as far as possible, late disclosure and the vacation of trial dates. The disclosure duty would remain upon the prosecution in compliance with the CPIA, but far less material would need to be deemed "Clearly Not Disclosable."

27. We note that even if e-disclosure means access for the defence of all materials uploaded, the current legal aid environment may mean that many defence practitioners lack the resources to search through all the material. This is something

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criminal justice partners, and hope that this entails such a system: http://www.npcc.police.uk/NPCCBusinessAreas/ReformandTransformation/Digitalpolicing.aspx

[15] It will introduce a unified business process and removing all duplication of effort and re-keying. It will deliver a digital by default user-centric system, taking away reliance on the current mixture of paper, digital material and DVDs and providing a streamlined, fully digital system. Digital tools will enable on-line case progression by the parties and the scheduling of cases for hearings.

[16] It differs from the Digital Case System, which depends on legacy systems to make case material available for hearings. We are also aware that the CPS is developing an internal evidence management system for complex cases, which should provide a full range of analytical tools for prosecutors, based on e-disclosure. See: https://insidehmcts.blog.gov.uk/2016/06/30/introduction-to-common-platform-programme/

that should not deter advances in e-disclosure. Rather, proper remuneration is needed.

Independent Disclosure Counsel

28. We believe that e-disclosure will nullify many of the problems with the adversarial system. However, until this is fully implemented, the use of an independent disclosure counsel where there are disputes regarding disclosure or in particularly complex cases would be advisable.

29. For instance, there are often concerns with access to potentially relevant third party material, and whether there is privilege attached to it or to other material, which delays progress of the case. Delay occurs over whose responsibility it is to seek such disclosure. Whether third party material is relevant must be identified as standard and a decision taken both as to whether its retention is necessary, and as to who should seek it, early on in order to ensure that it doesn't hold up proceedings. If legal privilege may attach to it, independent counsel may be required to resolve the issue, and time must be allocated promptly for this to take place.

30. The instruction of independent disclosure counsel would also usefully assist the process where agreement cannot be reached about the disclosure of items on the unused schedule. Both sides would be able to disclose confidential information, which independent counsel would be prevented from disclosing to the other party/parties, whilst using it to identify relevant material.

Cost Implications

31. Although our recommendations will require an initial front-loading of costs, they will have the following consequences:

    a. A reduction in police time spent on disclosure exercises;
    b. Trial lengths being shortened or avoided entirely;
    c. A reduction in delays caused by poor disclosure practice;
    d. Fewer miscarriages of justice.

32. Each one of these consequences will contribute significant savings to the criminal justice system. Further, the costs of the Common Platform have already been budgeted for and adding agile evidence management software may not incur significant extra cost on the budget as a whole.

33. Additionally, developing systems in-house will mean that police forces will not have to enter into agreements with commercial companies for disclosure software, freeing up their budgets and giving them greater flexibility with the functionality they require.

JUSTICE
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