Report on Phase 2 of the CCRC Disclosure Review

Introduction

The CCRC's own experience of reviewing cases demonstrates that the most common underlying feature of unsafe convictions generally – and not just rape and serious sexual offence cases – is disclosure failure coupled with failure to pursue lines of enquiry which should have been pursued by investigators and prosecutors but which were left undone.

Where we find examples of non-disclosure that matter to the safety of the conviction, we invariably refer the case to the appropriate appeal court. This review therefore does not address the cases that the CCRC did refer to the appeal court, rather it involved the CCRC taking a further look at cases which it had already reviewed and decided it could not to refer for further appeal. Above all, the CCRC wanted to check whether it had missed anything significant in its original review of the cases sampled.

The CCRC's disclosure review was conceived in July 2018[1], following significant media attention highlighting a number of rape prosecutions in which failings in disclosure had been identified. Prosecutions were discontinued because of failures to reveal to the defence matters which either may have assisted the defence or undermined the Crown's case.

Allied to the Crown's duty of disclosure is the obligation on the police to pursue all reasonable lines of enquiry, whether they point towards or away from a suspect.

The purpose of the CCRC's disclosure review was twofold:

- To consider the approach of and the interaction between the CPS and the relevant police force to disclosure in each individual case; and
- To examine the CCRC's approach to review of the disclosure process as it unfolded prior to and during trial.

Summary of the findings

i. The Phase 2 review did not identify any evidence that any of the convictions considered had suffered from a significant and persisting disclosure failure or was potentially unsafe.

[1] CCRC statements about the review and updates on progress, including the completion of stage one of the review, can be found here: Announcement - 25th July 2018 ccrc.gov.uk/ccrc-issues-update-in-relation-to-disclosure/: Update - 21 September 2018 ccrc.gov.uk/update-on-ccrcs-review-of-disclosure/: Update - 14 February 2019 ccrc.gov.uk/ccrc-disclosure-review-update/

ii. Numerous minor failings in the operation of the disclosure process were identified but they were usually addressed by the CPS prior to trial. Where they were not, the Phase 2 review did not identify any of sufficient magnitude to potentially impact on safety.

iii. There was confusion apparent relating to the correct scheduling of unused items. Entries frequently appeared on the incorrect schedule or were absent entirely. Where unused items were absent from schedules they were often disclosed by letter.

iv. Inadequately completed Disclosure Record Sheets were frequently encountered. This led to difficulties in establishing the audit trail for disclosure related work.

v. Disclosure was generally better handled in the more complex cases or those in which the potential for the generation of significant volumes of material was recognised from the outset.

vi. Practices appeared to differ regionally within the CPS and between police forces.

vii. Identifying and obtaining potentially relevant third party material and digital communication evidence presents particular problems for police investigations.

viii. The CPS has not routinely provided the CCRC with its full file of papers on first request, especially when the prosecution proceeded via its digital case management systems.

ix. The CCRC needs greater understanding of, and ideally access to, the CPS and Crown Courts' digital case management systems.

x. 93.2% of the applicants to the CCRC whose cases were considered in the Phase 2 review were not legally represented when they made their original application. 54.2% had not previously sought leave to appeal.

xi. The cases reviewed demonstrated that the CCRC's current policies regarding disclosure and exceptional circumstances were appropriate. Whilst the CCRC keeps under review its case working policies, no evidence was identified to indicate that current CCRC policies and guidance regarding disclosure, witness credibility and exceptional circumstances require revision. In the absence of evidence there is no reason to consider that policies are acting to applicants' detriment.

Context of the Review

During the past two years the significant media attention given to the issues of disclosure and, in particular, rape and serious sexual assault cases, has led to a number of relevant reports and measures to address shortcomings in the procedure and its application.

In compiling its report the CCRC has noted the following significant recent publications that bear on the disclosure regime operated by the police and CPS:

- Making it Fair – A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases, produced jointly by HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary (July 2017);
- National Disclosure Improvement Plan, produced jointly by the National Police Chiefs' Council, the College of Policing and the CPS (January 2018) and subsequent updates;
- Disclosure – Guidelines on Communications Evidence, produced by the CPS (26 January 2018);
- National Disclosure Standards, produced jointly by the National Police Chiefs' Council and the CPS (25 May 2018);
- Protocol between the Police Service and the CPS on dealing with third party material (May 2018);
- Rape and serious sexual offence prosecutions – Assessment of disclosure of unused material ahead of trial, produced by the CPS (June 2018);
- House of Commons Justice Committee – Disclosure of evidence in criminal cases (July 2018);
- A guide to "reasonable lines of enquiry" and Communications Evidence, produced by the CPS (July 2018);
- The Attorney General's Office publication, "Review of the efficiency and effectiveness of disclosure in the criminal justice system" (November 2018);
- Attorney General's Guidelines on Disclosure (updated 17 December 2018).

Much of what is commented upon, below, will be of historical interest in the sense that the current, amended, disclosure regime is not that which applied when the cases considered by the CCRC were investigated and prosecuted. It will be some time before the CCRC receives applications from persons convicted under the new disclosure regime. Matters coming to the attention of the CCRC inevitably lag behind the rest of the criminal justice system.

A summary of the disclosure process, which the CCRC has extracted from the Attorney General's Office publication, "Review of the efficiency and

effectiveness of disclosure in the criminal justice system" (November 2018) is included in the appendix at the end of this document.

Methodology

Between April 2016 and March 2018 the CCRC considered and declined to refer to the Court of Appeal a total of 306 applications which included a conviction for rape. Those 306 cases became the focus of the disclosure review undertaken.[2]

During Phase 1 of the review each of the 306 cases was considered, by analysis of the CCRC's digital case record, to identify to what extent disclosure featured as an issue in the review and to compile basic statistical information regarding each case. On 23 October 2018 the Disclosure Review Group reported its preliminary findings, on conclusion of Phase 1 of its review.

Following completion of Phase 1, 61 cases (20% of the original sample size) proceeded to Phase 2 for more detailed review. These 61 cases comprised 28 cases that were identified during Phase 1 as warranting closer attention and a randomly selected 33 additional cases.

The 28 cases that were identified during Phase 1 as warranting closer attention were selected for the following reasons:

- Where it was unclear from the review of the digital case record to what extent disclosure had been considered when it was raised by an applicant to the CCRC; or
- Where it was considered that disclosure appeared to have been an important issue in the case; or
- When the Phase 1 reviewer felt unable to form an adequate view or otherwise felt the application justified closer attention.

In Phase 2, once the CPS and police files were obtained, the disclosure process was considered in the context of the individual case, including any issues raised by the applicant.

It has not been possible to complete one review. The CPS has advised the CCRC that its file has been destroyed, contrary to its retention policy, and so disclosure could not be considered from the CPS perspective. The destruction of the file is concerning bearing in mind the applicant was only a third of the way through an IPP sentence at the time of destruction.

[2] The sample size, which represents two full business years, was selected to provide information to assist the CCRC in identifying whether any wider or additional review was considered appropriate.

In addition, one further case remains under review at this time. The CCRC wishes to review further aspects of the defence in order to clarify aspects of the operation of the disclosure process pre-trial. No reason has been identified to date to consider that a significant and persisting disclosure failing has occurred in that case. There are, however, issues that require further clarification. An update will be posted on the CCRC's website regarding this case, in due course. Publication of this report was not to be delayed further, because of a single case.

The statistics and conclusions below, therefore, arise from the completion of 59 cases under Phase 2. As identified at the conclusion of Phase 1, the sample size was in fact 273 cases, rather than 306, due to the elimination of cases in which disclosure was not an issue for the CCRC.[3] The 59 cases, therefore, represent 21.6% of the total sample size.

The Review Timetable and Resources

It was originally anticipated that Phase 2 would be completed by 15 February 2019 and that the final report would be issued by 29 March 2019. Unfortunately it has not proved possible to abide by those deadlines.

Some reviews were delayed due to slow production of files to the CCRC (a not uncommon occurrence), incomplete files being provided (discussed specifically below) or the need to obtain additional information for clarification.

In addition, some of the cases comprised vast quantities of paperwork[4] and so required substantial time to review the operation of the disclosure process. In order to address that problem the CCRC utilised additional internal staff resources and, commissioned several independent practising barristers (working both for prosecution and defence) who had previous experience of working at the CCRC. Expanding the resource in this manner has significantly hastened the eventual production of this report and reduced disruption to the CCRC's central work of investigating current applications.

[3] Of the 33 cases eliminated at that stage, 28 were sentence only applications to the CCRC. One was a specific investigation undertaken under instruction from the Court of Appeal (section 15 of the Criminal Appeal Act 1995). The remainder were either ineligible or withdrawn.

[4] The amount of material received has varied between a slim A4 file of a few dozen pages and more than 30 boxes full of material amounting to many thousands of pages. Two boxes full of papers has been typical. The material has included written records in digital format and various types of digital media such as CCTV footage on DVD, but has overwhelmingly consisted of paper files.

Factors Relevant to the CCRC's Review

There are a number of factors that are relevant to the CCRC's disclosure review and how the information generated should be interpreted.

The date of prosecution: Although the cases selected for Phase 2 came from those applications made to the CCRC between April 2016 and March 2018, the conviction concerned was often much older. There is no time bar to making an application to the CCRC and, therefore, convictions were often longstanding. Of the cases reviewed during Phase 2, seven involved convictions more than six years old at November 2018. The oldest dated from 2006. It is necessary to bear in mind changes in law, procedure and the organisational structures of the police and CPS during the intervening period. Also, that the breadth and scope of an investigation potentially has widened significantly during the same time period due to the proliferation of digital communications devices and social media platforms. It is not appropriate, for instance, to compare directly a prosecution from 2006 with a prosecution in 2016. For the purposes of Phase 2, however, each case was considered in the context of current standards of fairness.

The availability of information: In a number of cases it was not possible to complete the review from one source due to the lack of adequate information as documentation had often been 'weeded' for retention in older cases. The degree of destruction appeared to vary regionally and possibly subjectively at the discretion of the individual performing the task. Whether evidence of appropriate pre-trial disclosure should be retained appeared to be viewed differently between police forces and between CPS regions. For the purposes of the Phase 2 review, however, it was usually possible to 'piece together' the disclosure regime when considering the CPS file alongside the police file or, for example, inferring that disclosure must have been made by reference to the content of the Summing-up at trial. This has inevitably led to some reviews taking longer than they would have, if the files had been complete.

In six more recent convictions the CCRC had difficulty because of the limited range of material provided by the CPS. When a prosecution proceeded via the digital Case Management System ("CMS"), the CCRC was often not provided with all components of the CPS file. Practice in a number of cases appeared to be to provide only a "prosecution bundle", which did not, as a matter of course, include disclosure related documentation or correspondence. Where this occurred additional time was spent obtaining adequate documentation. Cases that fell during the transitional period between paper and digital prosecutions were more problematical still. Again, when necessary, the disclosure regime was considered taking into account different sources of information.

The sample size: The CCRC notes the CPS report "Rape and serious sexual offence prosecutions", published in June 2018. For the purposes of that review of 'live' CPS prosecutions, 3,637 cases were considered, of which 47 (1.29%) were identified by Chief Crown Prosecutors as having been stopped prior to

trial due to disclosure related issues. For the purposes of Phase 2, the CCRC considered in detail 59 cases of rape. Having regard to the fact that cases coming to the attention of the CCRC have, by that time, received much greater scrutiny during the pre-trial, trial and appeal phases, it ought to be the case that proportionately fewer cases will contain significant and persisting errors in disclosure.

The nature of the case: Although the 59 cases considered during Phase 2 all involved a conviction for rape, the context of the offence varied. Sexual offences occur in a wide variety of situations. The Phase 2 cases included examples of:

- Historical sexual abuse of children;
- Sexual abuse in the context of marriage, a relationship or where the complainant otherwise knew the alleged offender;
- 'Stranger' rape, including situations where the parties had met only on-line or on the day of the alleged offence.

Disclosure considerations can be subtly different depending upon the scenario in which the offence was alleged to have occurred. For example, a defendant in a 'stranger' rape case will have no knowledge of the complainant's character or history, whereas a father accused of abusing his children will have a great deal of personal knowledge. Although the obligation to disclose remains the same, the consequences of possible non-disclosure can be different.

The effect of non-disclosure on the safety of a conviction varies from case-to-case. It does not automatically follow that non-disclosure of one item, even where it would potentially have been of assistance to a defendant at trial, renders a trial unfair or conviction unsafe. Any evidence identified as not having been disclosed has to be considered for its impact on safety in the context of all the evidence in the case known at the time of assessment. The Court of Appeal will only quash a conviction if it considers it to be unsafe.

The onerous nature of disclosure: In an increasingly digitalised age, the range and volume of material to be considered during the disclosure process has increased dramatically. Social media and digital communications devices have brought about additional, but problematical, opportunities for the creation of evidence. All potentially relevant sources of evidence must be considered during the investigation and disclosure process. The availability of often extensive social media or digital messaging evidence has added a significant new dimension to the police investigation and CPS disclosure obligations.

The CCRC approach: In the last three years the CCRC has worked to eliminate its backlog of applications awaiting review. Waiting times had become unacceptable and procedures were radically revised to target resources more appropriately. Insofar as this is relevant to disclosure during the pre-trial process, current CCRC casework guidance states, *"It is not the CCRC's function to repeat the trial disclosure exercise based on generalised*

speculation that something might have gone wrong with disclosure – there should be a specific and tangible reason for reviewing disclosure." Consideration was given to that guidance during Phase 2 and whether any evidence existed to indicate that it might require revision.

It is also necessary to consider whether a potential non-disclosure issue would have been of assistance to a defendant in any event. If the CCRC cannot envisage that a potential non-disclosure might have made a significant difference at trial, then it would not investigate that issue; 'more of the same' or matters already within the knowledge of the defendant are unlikely to be of assistance to an applicant post-conviction. Similarly, there are occasions when evidence potentially of assistance to a defendant comes with a consequence. Attacking the credibility of a complainant or prosecution witness, for example, can, in certain circumstances, lead to the admission at trial of evidence of the defendant's bad character or other matters detrimental to him. In considering whether unused evidence would truly have been of assistance it is necessary to bear this in mind.

A significant proportion of applicants to the CCRC (54.2% at Phase 2) had not sought leave to appeal against their convictions. Such 'no appeal' cases will only be referred to the Court of Appeal by the CCRC if it can identify exceptional circumstances justifying a decision to do so in the absence of a previous attempt to appeal. CCRC policy in relation to no appeal applications is to look for any potential exceptional circumstances before accepting an application for full review. The CCRC's Casework Policy, "Exceptional Circumstances", is published on its website.[5] Only if an issue is incapable of being addressed by an applicant without the CCRC's assistance – and which therefore raises potential exceptional circumstances – will an application proceed for review on those issues. A submission to the CCRC that disclosure has not been conducted appropriately will not automatically trigger the finding of potential exceptional circumstances. The Phase 2 review considered, with hindsight, whether that policy had disadvantaged applicants.

Also relevant to the CCRC's review of disclosure and its review of, in particular, sexual offences, is its Casework Policy "Enquiries as to Witness Credibility". That policy is published on the CCRC's website. Enquiries conducted by the CCRC relating to a witness's credibility are guided by the "necessary and reasonable" test discussed therein. The Phase 2 review considered also the application of that policy during the review of applications.

[5] https://ccrc.gov.uk/

Statistical Information

The cases considered during this review consisted of a wide variety of convictions in terms of the age of the conviction, the distance in time from the index event and the nature of the offence itself. The following statistics indicate the range of scenarios considered during the process.

Age of conviction at November 2018	Number
0-2 years	6
2-4 years	25
4-6 years	21
6-8 years	4
>8 years	3
Total	59

Age of incident at date of conviction	Number
0-5 years	38
5-10 years	7
>10 years	14
Total	59

Type of case	Number
Historical sexual abuse of children	28
Complainant and defendant known to each other	17
Complainant and defendant not known to each other	14
Total	59

Although, the same questions were raised of all cases reviewed during Phase 2, it would be wrong to compare directly a 2006 prosecution with a 2016 prosecution. The following information, relating to the MG6 disclosure schedules[6] themselves and the procedure identified, does not take into account what might have been local practice at the time the actual schedule was completed.

The MG6 disclosure schedules were identified on either the CPS or police file in all 59 cases completed.

[6] The MG6 schedules comprise three pro-formas a police officer is required to complete and submit to the CPS detailing all unused material, both sensitive and non-sensitive, together with an explanatory report

Were the schedules fully completed?	Number	%
Yes	46	78.0
No	13	22.0
Total	59	

Was there anything missing that you would expect to see?	Number	%
Yes	18	30.5
No	41	69.5
Total	59	

Were the descriptions adequate?	Number	%
Yes	48	81.3
No	7	11.9
Uncertain	4	6.8
Total	59	

The findings in relation to this question were lower than those recorded for a similar question asked in the "Making it Fair" report. This is believed to be due a) to the additional scrutiny the disclosure regime will have had, though the trial and appeal process, before a case comes to the CCRC's attention and b) to the fact that 38.4% of the cases sampled in the Making it Fair report had already been identified as cases having suffered from disclosure failures.

Was material properly identified by police as sensitive / non-sensitive?	Number	%
Yes	45	76.3
No	10	16.9
No MG6D[7]	4	6.8
Total	59	

[7] The schedule used by the Disclosure Officer to list material that (s)he thinks relevant but sensitive and that if it were disclosed, it would give rise to a real risk of serious prejudice to an important public interest.

Did receipt of the Defence CaseStatement[8] trigger a review of disclosure?	Number	%
Yes	51	86.4
No	2	3.4
Uncertain[9]	6	10.2
Total	59	

Does the CPS lawyer appear to have considered the schedules adequately?	Number	%
Yes	57	96.6
No	2	3.4
Total	59	

Was clarification requested and addressed?	Number	%
Yes	46	78.0
No	2	3.4
No (and not sought)	11	18.6
Total	59	

Were requests for disclosure responded to appropriately?	Number	%
Yes	49	83.0
No	0	0
None made / No DCS	8	13.6
Unclear[10]	2	3.4
Total	59	

[8] The Defence Case Statement ("DCS") is sent to the CPS by the defence, outlining the defendant's case, from which the police consider again their obligations regarding disclosure and potential further enquiries

[9] In four of these cases no DCS could be found on either the CPS or police file. In one, the DCS was served so late as to prevent a disclosure review in the normal sense. In the final case, questions raised in the DCS were addressed at trial rather than by the formal response process

[10] See footnote five

Was disclosure considered on an ongoing basis?	Number	%
Yes	53	89.9
No	5	8.4
Unclear[11]	1	1.7
Total	59	

Was sensitive material identified correctly by CPS?	Number	%
Yes	52	88.1
No	0	0
None / No MG6D	4	6.8
Unclear	3[12]	5.1
Total	59	

For the purposes of the above question the CCRC has not included the absence of an MG6D schedule, where there was no relevant sensitive unused material, as a failure – although correct procedure, as emphasised by the National Disclosure Standards, is for the disclosure officer to endorse a blank MG6D and submit it to the CPS.

Statistics relevant to the CCRC review of application

Had the applicant already tried to appeal?	Number	%
Yes	27	45.8
No	32	54.2
Total	59	

The percentage of 'no appeal' cases[13] considered during the Phase 2 review was slightly higher than that considered during Phase 1 (51.6%).

[11] Trial documents confirm disclosure was conducted appropriately but the CPS file appeared incomplete and relevant letters could not be identified

[12] In two of these cases the relevant material was absent from the CPS file reviewed. In the third, it appeared on the police file and was correctly identified as sensitive.

[13] What amounts to a 'no appeal' case, and how they are approached is discussed above, at page seven

Was the applicant to the CCRC legally represented?	Number	%
Yes	4	6.8
No	55	93.2
Total	59	

In its 2018 annual report[14] the CCRC noted, “Historically, 68% of people applying to the CCRC have done so without the help of a lawyer; more recently we have seen that proportion approaching 80%.” During the business year 2018/19, the proportion of unrepresented applicants to the CCRC increased to 91.5%. The finding from Phase 2 (i.e. those applications between April 2016 and March 2018) suggests that the proportion of unrepresented applicants in rape cases is slightly greater than the most recent figures for all convictions.

The CCRC and submissions regarding disclosure

When a convicted person makes an application to the CCRC a wide variety of submissions can be raised, without any restriction, although it is for the CCRC to decide which matters to pursue. If a submission was considered at trial, was known about at that time or was raised in any previous appeal, then the CCRC would be unlikely to consider it to any detailed extent. Generally, only new evidence or new legal submission can raise a real possibility that the Court of Appeal would find a conviction unsafe. Even if not raised by an applicant, the CCRC investigates issues which it considers may amount to grounds for referral. In exceptional circumstances the CCRC may refer a conviction to the Court of Appeal on grounds previously pursued. Such exceptional circumstances are extremely rare.

Disclosure is a subject frequently raised by an applicant to the CCRC. The nature of the submission varies from case-to-case. In Phase 2, the CCRC found the following:-

Was a disclosure issue specifically raised?	Number	%
Yes	22	37.3
No	37	62.7
Total	59	

[14] Available through the CCRC website, via Press Release dated 5 July 2018

If a disclosure issue was raised, had the CCRC obtained files in its original review?	Number	%
Yes	12	54.5
No	10	45.5
Total	22	

Which files were obtained?	Number	%
CPS	8	66.6
Police	2	16.7
Both	2	16.7
Total	12	

If a disclosure issue was not raised, had the CCRC obtained files in its original review?	Number	%
Yes	10	27.0
No	27	73.0
Total	37	

Which files were obtained?	Number	%
CPS	9	90
Police	0	0
Both	1	10
Total	10	

The CCRC was twice as likely to obtain the CPS and/or the police file if a disclosure issue was specifically raised by an applicant (54.5% cf. 27.0%).

Whereas 48.1% of applicants (13 of 27) who had already attempted to appeal their convictions raised a disclosure related submission with the CCRC, only 28.1% of applicants (9 of 32) who had not attempted to appeal did so.

There was evidence in 27.1% of the cases (16 of 59) that disclosure had been considered by the CCRC in a broad sense, during the review of the application. During Phase 2 the CCRC did not find any cases where further analysis of disclosure had an impact upon the safety of the conviction.

Of those cases in which disclosure had been considered in a broad sense, the CCRC was almost twice as likely to do so when a specific disclosure issue was raised compared to when one was not (37.3% cf. 18.9%). That percentage increased further, to 44.4%, when specifically considering applicants who had not previously attempted to appeal. The numbers involved, however, were small (4 of 9).

Disclosure issues were raised in all four of the cases reviewed during Phase 2 in which the applicant to the CCRC had been legally represented. In three of them, broader consideration was given to disclosure than mere consideration of the submission. In two of the cases, files were obtained from the CPS. None of the four represented applicants had previously sought leave to appeal against their convictions.

There was evidence of electronic data of some description present in 61.0% (36 of 59) of the convictions reviewed. This figure includes mobile telephone analysis (including text-message retrieval), e-mail communication and other social media platform communication or data storage. Of those 36 cases, the applicant in 16 (44.4%) of them raised a specific issue with disclosure. Of those, broader disclosure issues were considered in 7 (46.7%) applications.

Observations arising from Phase 2

The detailed review of the 59 cases considered during Phase 2 did not identify any reason to consider that a particular conviction might be unsafe. No pre-trial disclosure failure of a sufficient magnitude was identified during Phase 2 on which a real possibility arose such that the Court of Appeal would consider a conviction unsafe. Nothing arose during the Phase 2 review, whether related to disclosure or not, to suggest that the CCRC's original decision not to refer an application to the Court of Appeal was wrong.

A number of 'minor' failings were identified in the operation of the disclosure process, although the CCRC concluded that such failings were usually identified and corrected prior to trial by the CPS. There was potential on a number of occasions for those failings to have become significant issues, had they not been resolved. For example, in three of the cases reviewed (5.1%) relevant previous convictions of the complainants or significant witnesses were not listed on the MG6C schedule. All three errors were corrected by the CPS.

The nature of the case

It was apparent from the review that disclosure obligations generally were completed more effectively and with greater clarity by both the police and CPS in the more complex cases. If a prosecution was recognised from the outset as being potentially complex or wide-ranging, greater focus was given to the need

to operate and account for an effective disclosure regime. This finding concurs with reviews conducted by other public bodies.

At page 2 of the National Disclosure Improvement Plan ("NDIP") it was noted:

"Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) and Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) conducted a joint inspection of the police and prosecution management of disclosure of unused material by the police service and the Crown Prosecution Service (CPS) during 2017. They generally found that specialist teams dealing with disclosure matters did this professionally and to a high standard. However, the inspection did identify a number of areas of concern in relation to volume crime investigations that would be heard in the Crown Court."[15]

Unlike previous investigations, the CCRC's review has been exclusively of convictions for the offence of rape, although there were often convictions for other offences arising from the same Indictment. There were, nonetheless, different levels of complexity in the various prosecutions that appeared to correlate to the degree of attention given to the adherence to a definite disclosure regime.

In Case A, for example, the applicant was one of ten suspects under investigation who had allegedly been part of a 'paedophile ring'. There were five vulnerable complainants in the case and potential existed for the generation of very significant volumes of material to be considered for relevance and, therefore, disclosure purposes. That potential was recognised very early in the investigative process and, consequently, a full-time disclosure officer from a specialist disclosure unit was appointed. At times, the work generated required the involvement of a number of officers from that disclosure unit. The CCRC found it easier to follow the disclosure process as it operated in that, complicated, case, than in many others of lesser complexity.

Case B was an investigation dealt with in a different area of the country. The case involved three complainants, a number of vulnerable potential witnesses and, initially, 15 suspects. The CPS gave careful attention to the collation and disclosure of information from early in the prosecution process which led to a more efficient and methodical approach to disclosure throughout the pre-trial phase.

The CCRC also noted that early involvement of a CPS lawyer or instructed counsel, at a pre-charge stage, appeared to lead to a greater focus, not only on whether routine investigations should be conducted, but on the disclosure issues that might arise as a result. In Case C, a case of historical sexual abuse allegations, the CPS lawyer, when asked to make a charging decision,

[15] A similar point was made in the Attorney General's Office review of November 2018, at page nine

directed police officers to make further enquiries of the complainants' credibility, which the defendant had questioned. As a result of the lawyer's request, a thorough review of social services' records took place and one of the complainants was spoken to regarding potentially relevant text messages. Early action prevented problems later in the case.

It was also apparent to the CCRC that, in some investigations of lesser complexity, less attention to detail was given from an early stage. That is not to say that a specific disclosure failing necessarily occurred, but that the audit trail of what had been considered during the disclosure process was more difficult to evidence. Disclosure of material in these cases often seemed to be more fluid, occurring ad-hoc and without adequate recording. Often, it was necessary to 'piece together' what must have occurred through considering both the CPS and police files concurrently, and also by drawing conclusions from the trial transcripts.

The audit trail

There was substantial variation in the adequacy of recording of disclosure related work by the CPS seen in the cases reviewed. The ability to provide evidence to support that a robust and thorough disclosure regime has taken place is a key requirement for maintaining confidence in the fairness of the prosecution process.

The inadequate completion – or complete absence – of a Disclosure Record Sheet ("DRS") within the CPS file was frequently encountered during Phase 2. This is an issue also noted in other reports.[16] Although there were examples of well completed DRS forms within the files reviewed – notably, again, in the more complex cases – there were many cases in which the DRS contained only a single entry or was absent entirely from the CPS file.

The failure to monitor adequately and account for disclosure related actions during a prosecution is a matter that has been considered in detail in other reports and accepted by the CPS. One of the key changes implemented by NDIP in 2018 relates to the replacement of the DRS with use of the Disclosure Management Document ("DMD") already by then routinely in use in Complex Casework Units.[17]

The NDIP Progress Update of October 2018 indicated that DMDs are *"now being used by the CPS in all rape and serious sexual offences (RASSO) and Complex Crown Court cases".* The progress made regarding this issue is to be welcomed. A standardised and mandatory regime applied to the disclosure

[16] See, for example, Making it Fair, July 2017, at paragraph 8.2
[17] The benefits of the DMD were commented upon in the Attorney General's Office report of November 2018, at page 23

process across all criminal prosecutions can only assist compliance and the ability to justify the approach to it in a particular case.

In view of the attention that the need for detailed audit trails has received elsewhere, and the actions taken to address deficiencies, it is unnecessary for the CCRC to say more about the examples identified in its review. The CCRC was able to resolve any concerns that arose by examination of the relevant files.

The MG6 schedules

The CCRC concluded that, often, there were instances where the MG6 schedules were either wrongly or inadequately completed by police officers.[18] There were also instances identified of potentially inadequate consideration being given to the schedules by the CPS reviewing lawyer. These issues have been longstanding concerns for the CCRC.

To quote from paragraph 1.3 of the 2017 "Making it Fair" report:

"The inspection found that police scheduling (the process of recording details of both sensitive and non-sensitive material) is routinely poor, while revelation by the police to the prosecutor of material that may undermine the prosecution case or assist the defence case is rare. Prosecutors fail to challenge poor quality schedules and in turn provide little or no input to the police. Neither party is managing sensitive material effectively and prosecutors are failing to manage ongoing disclosure. To compound matters, the auditing process surrounding disclosure decision-making falls far below any acceptable standard of performance."

It would be wrong, the CCRC considers, to reference the above extract without acknowledging that the Making it Fair report resulted from a review of 146 Crown Court cases, 56 of which (38.4%) had already been identified as having been 'failed' prosecutions due to disclosure deficiencies. It is to be expected that the CCRC's findings are proportionately of lesser magnitude; all cases scrutinised by the CCRC have been prosecutions in which the Crown would say, *prima facie*, disclosure operated appropriately. In addition, the cases considered in this review were cases which the CCRC had previously reviewed and had decided not to refer to the appeal court.

Despite the numerous examples of failings identified within the disclosure schedules considered, the CCRC has not identified any persisting failure so serious as to bring into question the safety of any conviction concerned. The additional scrutiny that has already been given to cases coming to the attention of the CCRC through applications to it, is to be expected to have weeded out the vast majority of those flawed disclosure scenarios that have

[18] See the four relevant tables at pages 8 – 9 above

been identified as so damaging to the Crown's case that the prosecution should not proceed or conviction stand.

Categorisation of sensitive material

The CCRC noted a recurrent failing in relation to the categorisation of material by the police disclosure officer as either sensitive or non-sensitive. In 16.9% of the cases considered during Phase 2, a mistake was identified in which either sensitive material appeared on the MG6C schedule[19], or non-sensitive material appeared on the MG6D schedule. In all of the cases noted, the error was identified and corrected by the CPS lawyer on reviewing the schedules. Failings of this kind most often related to sensitive third party material such as medical records or social services' paperwork. In four cases, such records were not recorded on either schedule. In each case, however, the records or their substance were disclosed to the defence via letter rather than schedule or, on review by the CCRC during Phase 2, were considered incapable of having been of assistance to the defence at trial. These latter examples, however, should be recognised as persisting disclosure failures.

Redaction

It is legitimate to redact personal information or procedural details from a document in order to protect witnesses or operational security. Once redacted, the material can be classified as non-sensitive. There were examples of failures to do so, leading to personal information being placed on the wrong schedule. Of the 10 examples identified of material having been placed on the wrong schedule, six related to material wrongly classified as sensitive and four wrongly classified as non-sensitive.

Inadequate identification

There were also examples noted in which relevant material could not be identified on any of the disclosure schedules provided to the CCRC. For example, in addition to the failures noted elsewhere relating to relevant previous convictions and social services' material, there were four occasions when telephone examination reports or downloads did not appear on the schedules on file. This, possibly, was due to a failure to keep adequate records of the disclosure process. As noted above, best practice would be to use a single document – the DRS, or the DMD going forward – to show what has been disclosed and when. In the majority of cases in which this issue rose,

[19] The schedule intended for non-sensitive material.

it was clear from CPS correspondence that the material had been disclosed to the defence[20].

Versions of the MG6

Allied to the benefits that the DMD will bring about, the CCRC considers it would be beneficial for all MG6 schedules to state a 'version number' to assist the audit trail. During the Phase 2 review it was noted on occasions that there were different versions of an MG6C schedule, for example, which did not logically follow each other. A second MG6C would sometimes be prepared in preference to an amended original MG6C, which resulted in less clarity of process. It would be preferable for the original schedule to be amended rather than an entirely new schedule created.

One case reviewed during Phase 2 revealed a novel police approach worthy of mention. In Case D, the officer who completed the MG6 schedules elected not to produce a schedule of sensitive material at all. Instead, the MG6C listed all material. Where the officer identified a particular document as sensitive it remained on the MG6C, but was listed twice, as versions A and B, the latter being the version following appropriate redaction. The accompanying MG6E discussed the material concerned. That approach was considered easy to follow.

The test of relevance and disclosure

The Code of Practice[21] to the Criminal Procedure and Investigations Act 1996 ("CPIA") provides guidance on material which comes into the possession of police officers during the course of a criminal investigation which might become disclosable. A test of relevance is provided to assist in considering what material should be retained and which, therefore, should be included in the disclosure schedules. The Code of Practice states, *"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."*

At paragraph 6.2 of the Code of Practice it states, *"Material which may be relevant to an investigation, which has been retained in accordance with this code, and which the disclosure officer believes will not form part of the prosecution case, must be listed on a schedule."*

[20] Where it was not clear, though, the material itself was considered for potential impact. In all of those cases it was clear that the failure to disclose (if it actually was not disclosed) did not result in significant unfairness.
[21] The current version has been in force since 19 March 2015; the previous version, since 2005.

During the Phase 2 review a number of examples were identified of practices which did not allow for easy compliance with the assessment of relevance and the consequent duty to disclose. There were seven instances of the inadequate description of material referred to in the MG6 schedules. Where inadequate information was given, CPS lawyers were obliged either to ask for clarification, request a copy of the material referred to or work with what had been provided. Because of the practice of weeding closed files, or inadequate completion of the DRS, it was not always possible to establish whether the CPS lawyer's decision regarding relevance and disclosure was based upon an adequate understanding of the material in question.

On a number of occasions the MG6 schedules, whilst completed in an apparently cursory manner by the police disclosure officer, were supplemented with copies of the documents themselves when submitted to the CPS.

Although disclosure in Case B[22] was considered to have been well handled by the CPS, the MG6C schedule prepared by the police was computer generated, apparently by direct transfer of entries from a HOLMES[23] database. This practice resulted in a very extensive schedule of unused material, running to nearly 300 pages, a significant proportion of which did not satisfy the relevance test and placed an unnecessary burden on the CPS lawyer and runs the risk of relevant material being overlooked.

In Case E, a West Midlands region prosecution, the police file contained a pro-forma checklist, provided by the CPS, referring to all matters that it required to be considered before it would consider a case further. The checklist, completed in 2014 in the case in question, provided a useful measure by which to consider the applicability of all potential avenues of enquiry. Whilst the CCRC understands that this checklist is no longer used, amendments made recently to the MG3 form as a result of NDIP are likely to achieve the same purpose.

A similar approach was adopted in Case F, a case from the North-West. The police officer was required to complete a different checklist detailing potentially relevant enquiries before submitting the file to the CPS for a charging decision. Although not all of the matters contained in the checklist would be relevant to every case, prompting consideration of them must be a positive move to promote an open-minded investigation and a responsible disclosure regime.

The need for greater accountability, both in terms of the fairness of an investigation and prosecution and the requirement for the prosecution to be able to demonstrate that fairness, was key to recommendations made in NDIP. As a result of one recommendation therein, the National Standards for Disclosure were created, and published on 25 May 2018. The guidance

[22] Discussed at page 14, above
[23] HOLMES is the computer system used by police forces to organise and run a major investigation

contained therein aims to assist police officers with the correct completion of the various MG6 schedules. The CCRC looks forward to seeing the adoption of those standards in practice.

Third party material and disclosure

A theme identified during the Phase 2 review was the frequency of problems regarding the obtaining, treatment and disclosure of third party material which may bear on complainant or witness credibility. Primarily, in the cases considered during this review, this related to medical records, mental health records and social services' records.[24]

In six of the cases considered during Phase 2, police officers encountered significant difficulties in accessing, or establishing what potentially relevant material was held by a social services' department. In four of those cases it was necessary for the police to obtain a Court Order before clarification could be obtained. The need for such action merely reflects the operation of the existing system of access to sensitive personal records and the resolve with which social services' departments might be expected to protect vulnerable individuals' privacy.

When the cases under consideration were prosecuted, the practices of police forces and CPS regions differed. Assessing the potential relevance of third party material, particularly where it might have a bearing on the complainant's credibility at trial, was not a task easily performed or consistently approached. This has been a concern of long standing to the CCRC. Often, in the CCRC's experience, the impression can be given that the police officer tasked with making the enquiry does not fully understand the relevance of the search needed. Relevant, potentially disclosable, information that might be obtained from a social services' file, for instance, may be deeply embedded and potentially quite subtle in evidential relevance. There is potential for relevant material to be missed. The task needs to be performed by someone who is appropriately trained and appropriately informed about the case.

In Case G, the offence occurred many miles from the complainant's home. It was necessary for officers from the investigating police force to travel to a different part of the country to review potentially relevant social services' files relating to the complainant and her family. The report subsequently produced by the officers focused on the defendant's involvement with that family and information detrimental to him. Little consideration appears to have been given to the complainant and matters relevant to her credibility. When the CCRC reviewed the applicant's conviction, it identified that the complainant had, on an earlier occasion, given false information to social workers in an attempt to influence a child access matter. Such information should have been disclosed

[24] Other third party material, including telephone schedules and other digital evidence, will be considered separately below

to the defence. Although the CCRC concluded that the material could not, ultimately, raise a real possibility that the Court of Appeal would find the applicant's conviction to be unsafe, there remains no explanation why the material was not identified by the officers when conducting the original review of social services' records.

Following recommendations discussed in NDIP, a protocol[25] was agreed for a uniform approach to third party material which potentially bears on an investigation. The adoption of a standardised approach to the consideration of material – both from the police force and the responding third party – is intended to improve objectivity and effectiveness. The CCRC observes that specific training would be of benefit to investigators with a view to improving understanding of how material of seemingly tangential or marginal significance can be of importance in the ability to mount a defence and, hence, to the fairness of a trial.

Social media evidence and technology

The explosion in the scope and extent of digital information in recent years has led to the need to adapt to the changing nature of evidence. All stakeholders in the criminal justice system, including the CCRC, are undergoing a necessarily rapid learning process in terms of how digital evidence – and social media communication in particular – can potentially be relevant and should be approached during an investigation. That learning process continues. In view of the intense scrutiny this issue continues to receive both from stakeholders and the media, it would be otiose for the CCRC to speculate on where digital evidence will lead our investigative, prosecutorial and trial processes.[26]

The CPS has, in 2018, refreshed and consolidated its guidance[27] to investigators and prosecutors regarding what might be a reasonable inquiry regarding communication evidence, and how it should be conducted. Such decisions are recognised as case specific.

The investigations considered by the CCRC during the Phase 2 review spanned an 11 year time period.[28] There was a wide variation in the amount and nature of social media evidence during that time. All cases considered pre-dated the scrutiny given to disclosure in recent times and the revised guidance produced as a result.

[25] Protocol between the Police Service and the Crown Prosecution Service on dealing with third party material, published May 2018
[26] The challenge is explained with striking impact in the Attorney General's Office review, at part 6, "Harnessing technology"
[27] Disclosure – Guidelines on Communications Evidence, published 26 January 2018 and A guide to 'reasonable lines of enquiry' and Communications Evidence, published July 2018
[28] The earliest arrest date was in 2004 and the most recent in 2015

In Case H, a 2012, investigation, there was open discussion between the police force and the CPS regarding the cost involved with serving full, unedited downloads of the complainant's and defendant's mobile telephones and e-mail correspondence from a laptop. Edited downloads were served, which in themselves were substantial documents. The full, unedited, schedules were placed on the MG6D rather than the MG6C.

Cost issues were also a relevant factor in Case I, a London North prosecution, in which the defendant's solicitors were advised by the CPS that they would have to attend the CPS office to obtain copies of the complainant's video interviews because restrictions on financial budgets prevented their being provided in the normal way. Although not strictly a disclosure issue in the context of this report, the CCRC raises the matter in the belief that it can never be right for the onus to be on the defence in such circumstances.

In three further cases the CCRC identified failures to place mobile telephone downloads on the MG6C schedule. In those examples, however, appropriate disclosure had occurred by way of letter rather than schedule.

There appeared to be confusion in a number of cases regarding when it was appropriate to subject a complainant's mobile telephone to detailed analysis. In Case J, for example, the defendant said in police interview that the complainant had left his company because of a text message that she had received. Although the complainant's mobile telephone had been seized by police, the relevance of the defendant's statement was not appreciated immediately. There were also potentially relevant communications between the complainant and third parties which did not become a focus until the investigation was quite advanced. It was also known from an early stage that the complainant had been in possession of two mobile telephones at the relevant time, yet was prepared to hand only one to the police. The matter had not been resolved satisfactorily by the time of trial, although the jury was aware.

Context is everything with such social media evidence. The CCRC will continue to consider digital evidence on a case-by-case basis. Its role in such matters is largely retrospective, in the sense that most often only evidence already existing at that time is likely to be capable of scrutiny. In the CCRC's experience it is very difficult to obtain previously unavailable social media evidence when considering an application to it. Retention periods, the difficulties with accessing personal devices and the international legal framework all impact on the likelihood of being able to obtain relevant communications potentially years after the events in question. The CCRC will, however, continue to use its statutory powers as it deems appropriate.

The CCRC review process and disclosure

Disclosure is a subject frequently raised by applicants to the CCRC. This was borne out by the finding from Phase 2 that 37.3% of cases considered included a submission relating to disclosure.

The issue of how to approach such submissions is the subject of casework policy and guidance. In addition to the Casework Policy documents published on the CCRC website[29] there is relevant, practical, guidance on a number of subjects including Exceptional Circumstances (in the absence of a previous appeal) and Disclosure by Prosecution and Defence.

A significant focus of the disclosure review was to consider whether current casework policy operated effectively. Specifically, three aspects of CCRC policy were considered:

- Whether there was any evidence to indicate that the CCRC should revisit its current policy of only scrutinising the pre-trial disclosure process where there are specific and tangible reasons for doing so;

- Whether there was any evidence to suggest that the "necessary and reasonable" test applicable to the CCRC's investigation of witness credibility required revisiting; and

- Whether there was any evidence to suggest that disclosure related submissions, when raised by an applicant who had not previously sought leave to appeal, should be treated as raising potential exceptional circumstances.[30]

The review team did not identify any evidence to indicate that the current casework policy or guidance required revision. In 27.1% of the cases considered during Phase 2, the CCRC had given detailed consideration to the disclosure process.

Of the remaining 72.9%, where an initial consideration of the case made it clear that disclosure was very unlikely to be relevant to the safety of the conviction, no further consideration had been given during the original case review. This was the case even where disclosure was specifically raised by the applicant.

Despite the very detailed scrutiny given to the process during this review, no failing of sufficient magnitude was identified in the disclosure process to suggest that a real possibility might arise that the Court of Appeal would consider a particular conviction unsafe.

[29] Casework Policies on Exceptional Circumstances and Enquiries as to Witness Credibility
[30] The operation of these policies is considered in more detail above, at pages 6-7

There was no evidence that current casework policy had resulted in a failure to identify a potentially important disclosure failing or that a potential miscarriage had been missed.

There was one case[31], however, where we decided that we needed obtain material from additional sources in order to satisfy ourselves that errors had not been made at various stages in the conduct of the case, including at the CCRC review stage.

This is a time-consuming piece of work which, though necessary, we decided ought not further delay the completion and publication of the wider review.

The results of these further investigations will in due course be added to the review report as an addendum. If those results are such that they change or modify the conclusions and recommendations of this report as it stands, we will ensure that the report, its conclusions and recommendations are modified and circulated or re-circulated as appropriate.

Having regard to the increased scrutiny to which disclosure continues to be subjected, and the revised, standardised, guidelines of the CPS, police and third parties, the CCRC does not currently intend to revise its approach to disclosure. It will continue to consider disclosure on a case-by-case basis, in the context of all the evidence available. No compelling case could be made to apply resources specifically to the task of reviewing the disclosure process in every application to the CCRC. Investing additional resources in this area would necessarily involve removing resources from other areas of investigation.

Of the 59 cases reviewed during Phase 2, 54.2% were ‘no appeal’ cases. Current casework policy is to approach such applications from the standpoint that applicants have not exhausted their ability to trigger the appeal process of their own volition. For the CCRC to expend resources on such an application requires it to identify potential exceptional circumstances that would justify referring a conviction to the Court of Appeal in the absence of a previous appeal. Absent such exceptional circumstances, applicants are reminded of their ability to apply for leave to appeal and are provided with a range of information to assist in that process.

At the conclusion of Phase 1 the CCRC noted that the 37 ‘no appeal’ cases that had been identified as raising issues relating to the disclosure process had been considered consistently in accordance with existing policy. Disclosure related issues do not, without a specific reason, raise potential exceptional circumstances because in most cases applicants are able to raise their concerns directly with the appeal court and the court has adequate powers to resolve such issues.

[31] This is the case discussed on page 6.

Of the 32 'no appeal' cases considered during Phase 2, nine applicants raised disclosure related submissions. Although every application is considered on its merits, none of these cases included an issue that required the CCRC's assistance. Potential exceptional circumstances might be found if a submission required the use of the CCRC's statutory powers or was otherwise incapable of investigation by an applicant or their legal representative. Whether there is a realistic prospect of identifying anything of potential significance is also considered. Matters based on pure speculation are unlikely to raise potential exceptional circumstances. No evidence was identified to indicate that any applicant had been disadvantaged by the existing policy.

The Phase 2 review concluded that the CCRC's current policy on exceptional circumstances was being applied consistently, within a reasonable range. Each no appeal case will be considered on its own merits.

The Phase 2 review concluded also that the CCRC's enquiries relating to witness credibility had been conducted appropriately and in accordance with existing Casework Policy. There was no reason to consider that the policy required revision or worked to the demonstrable detriment of an applicant.

Additional points arising from the Phase 2 review

The CPS and the CCRC have a mutual interest in ensuring that unsafe convictions are discovered. There have been instances in which the CPS has approached the CCRC regarding a conviction when it recognises that there may have been a disclosure failing or where sensitive new evidence comes to light post-conviction which potentially bears on safety.

It is important that the CCRC is always able to rely on the material provided to it by the CPS. During Phase 2, several reviews were delayed because the CPS did not provide adequate case papers. Those examples related principally to recent prosecutions pursued via the CPS' digital Case Management System ("CMS"). The CMS material did not routinely include the disclosure folder and unused, the correspondence folder, hearing record sheets or internal notes and communications – all of which are essential for a CCRC conviction review. Specific requests had to be raised to access the missing material in six cases.

This has the potential to become a common failing in the future, as the number of CMS based prosecutions reviewed by the CCRC increases. The CCRC invites the CPS to improve its response to CCRC requests for files and ensure that complete files are always provided. Where there is a separate paper file, it should be provided also. It is not always clear what the CMS file contains or where particular material should be located. The CCRC needs to be confident that it has been provided with the entire file.

Allied to that, the CCRC needs to improve its understanding of and familiarity with the CMS, and also the CPS use of Egress for the sharing of digital evidence. Specific training will be sought to ensure an appropriate degree of familiarity is achieved. A similar issue exists with the new Digital Case System ("DCS") in use by Crown Courts and accessed by the CPS and the defence, through which prosecutions are pursued to trial.

Findings and Recommendations

Finding:
The disclosure regime operated with varying levels of consistency and with various methods of recording information nationwide. The DRS was often found to be inadequately completed. The CCRC found greater clarity and more efficiency in the disclosure process conducted in complex and / or sizeable cases.

> Recommendation One:
> The use of DMDs should be extended to all Crown Court cases. The additional transparency brought about by that regime and the early involvement of the defence in the investigative process emphasises fairness in the investigation and promotes the importance of the disclosure regime.

Finding:
MG6 schedules were frequently wrongly or inadequately completed by the police. These errors were generally resolved by the CPS pre-trial.

> Recommendation Two:
> Further training for those officers completing disclosure schedules. In particular, the test of relevance should be clarified and the nature of sensitive material and appropriate redaction.
>
> Recommendation Three:
> Early focus on steps to promote an open-minded investigation and the relevance to disclosure. The use of a checklist of potentially relevant enquiries and sources of information may be helpful at a pre-charge stage.
>
> Recommendation Four:
> There should be version control of form MG6. MG6 schedules should include a version number and logically flow from the original when updating is required.

Recommendation Five:
CPS lawyers should adopt and implement a consistent policy of challenging inadequately completed MG6 schedules.

Finding:
There was an inadequate understanding amongst investigators of what potentially relevant material might be included in third party records.

Recommendation Six:
Investigators should receive training in order to emphasise the potential relevance of evidence within third party records of superficially little apparent value. The duty to carry out an impartial investigation entails the need to identify material potentially of use to the defence. Such searches are especially important when considering the credibility of a complainant or witness.

Finding:
The retention and provision of case related material by the CPS to the CCRC was often inadequate, especially in those cases prosecuted following implementation of the CMS or in the cross-over period between paper and electronic files.

Recommendation Seven:
There should be nationally agreed guidelines for the retention of relevant documents in concluded prosecutions, to include evidence of the disclosure regime as it operated.

Finding:
In two reviews the CCRC found evidence that funding restrictions had impacted on the disclosure regime.

Recommendation Eight:
The disclosure process should be applied consistently to ensure fairness in the trial process. Adherence to policy should be applied consistently nationwide to prevent regional variation and unfairness.

Finding:
The CCRC lacks adequate understanding of digital systems recently introduced by the CPS and the Crown Courts (HMCTS). This must improve to be able effectively to deal with future applications.

Recommendation Nine:
The CCRC should liaise with the CPS and HMCTS to facilitate relevant training for staff and access to systems.

Finding:
A large number of applications reviewed by the CCRC have not been the subject of a previous appeal or application for leave to appeal. This is not limited to those cases considered during the disclosure review.

Recommendation Ten:
The CCRC must continue its work within the criminal justice system to educate potential applicants regarding the ability to apply for leave to appeal without the CCRC's assistance and its limited ability to intervene in the absence of such steps.

Finding:
Applicants who made submissions regarding disclosure were nearly twice as likely to have disclosure considered on a broad basis by the CCRC if their application was supported by legal representatives (75% cf. 38.9%).

Recommendation Eleven:
The CCRC should guard against any suggestion of inappropriate disparity between the treatment of represented and unrepresented applicants. It should look for ways of monitoring and comparing the extent of casework investigation between these groups and address any inappropriate discrepancies accordingly.

Conclusion

The CCRC's Disclosure Review was established as a response to concerns both in the media and from the collapse of some high profile prosecutions of serious sexual offences due to non-disclosure.

It was not within the Commission's gift to conduct a comprehensive review of how disclosure is or was working in the wider justice system. The aim of this

review was to analyse a relevant sample of the Commission's own case reviews to ascertain whether there is reason to think we may have been missing opportunities to refer for appeal convictions, and in particular, rape convictions, due to problems with the disclosure process or any issues with the way in which our casework processes deal with disclosure matters.

The CCRC is pleased to report that no major concerns as to the safety of the convictions reviewed were uncovered during its Disclosure Review[32]. However, it is clear that there is further work for the police, CPS, Courts Service and the CCRC to do to improve the disclosure process in the future. It is also important to reflect on the fact that the sample size was statistically small. The outcome of the disclosure review persuades us that[33] it would not be a proportionate or necessary use of our resources to extend the review process to a further sample of cases that have been completed by the Commission.

We continue to be mindful of the central role that proper disclosure plays in the criminal process and in the achievement of appropriate and safe convictions. Since the disclosure review began the CCRC has commissioned a number of training sessions for its staff, including specialist training on digital disclosure, aimed at maintaining and building on our awareness of disclosure issues.

The conduct of this disclosure review has contributed to our understanding of how disclosure is operating and helped us to better understand how we need to develop in certain areas in order to ensure that we remain in a position to understand how disclosure failings arise and to spot them when they do. We hope it may also be of some use to others.

[32] Notwithstanding the further investigations into the case discussed on page 27 of this report.
[33] Subject to the outcome of the re-opened case.

Appendix

A description of the disclosure process extracted from the introduction to the Attorney General's Office "Review of the efficiency and effectiveness of disclosure in the criminal justice system– published November 2018[34].

Disclosure is the process in a criminal case by which someone charged with a crime is provided with copies of, or access to, material from the investigation that is capable of undermining the prosecution case against them and/or assisting their defence. Without this process taking place a trial would not be fair. Investigators, prosecutors, defence teams and the courts all have important roles to play in ensuring the disclosure process is done properly, and promptly. The stages of the current disclosure process during an investigation and a prosecution include:

• When an allegation is made against someone, the investigator will begin an investigation. From the outset the investigator has a duty to record, retain and review material collected during the course of the investigation. The investigator reveals this material to the prosecutor to allow for effective disclosure to the defence.

• Disclosure obligations begin at the start of an investigation, and investigators have a duty to conduct a thorough investigation, manage all material appropriately and follow all reasonable lines of inquiry, whether they point towards or away from any suspect.

• If the investigator believes there is strong evidence to suggest someone committed a crime they will present the evidence to the prosecutor, who decides if the person should be charged.

• If a person is charged with an offence the investigator will review all material gathered during the investigation. This could include CCTV footage, statements from witnesses, mobile phone messages, social media conversations or photographs.

• Some evidence will be used in the prosecution and will be part of the case. Some material will be irrelevant and have no bearing on the case at all.

• The remainder is referred to as the 'unused material'. This material is relevant to the case but is not being used as part of the prosecution evidence presented

[34] The AG's review can be seen in full here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756436/Attorney_General_s_Disclosure_Review.pdf

to the Court. The investigators[35] create a schedule of the unused material to aid the disclosure process.

• The unused material is reviewed by the investigator and if any of it is capable of undermining the prosecution case or assisting the defence it will be brought to the attention of the prosecutor.

• Prosecutors must provide the defence with a schedule of all of the non-sensitive unused material and provide them with any material that undermines the case for the prosecution or assists the case for the accused.

• The accused must serve a defence statement on the prosecution in Crown Court cases and may do so in magistrates' court cases, which sets out their defence to the allegations and can point the investigator to other lines of inquiry. The investigator will review all their material again and decide whether, in the light of the defence statement, additional material is now relevant or meets the test for disclosure because it supports the case for the accused.

• The investigator produces a further report to the prosecutor who makes the final decision on whether further material should be disclosed. The accused has a right to challenge that decision by making an application to the court.

• The investigator and prosecutor have a continuing duty to keep disclosure under review throughout the life of a case.

[35] Investigator is used here as short hand for a police officer or investigating officer. The scheduling and review of unused material is carried out by an officer appointed as 'disclosure officer' for the case, a role sometimes performed by the same person carrying out the investigation.