Rape and serious sexual offence prosecutions

Assessment of disclosure of unused material ahead of trial

June 2018

CPS

Introduction

Getting disclosure right is a fundamental part of a fair criminal justice system. It is a crucial safeguard, and in every case, any material that undermines the case for the prosecution or assists the case for the accused must be shared with the defence. There are important roles for investigators, prosecutors, the defence and the court in ensuring that disclosure is conducted properly.

When that doesn't happen, or happens too late, the consequences for individuals can be serious. In recent months, a number of criminal prosecutions have been stopped very late in the process after disclosure failures have come to light. For the individuals involved, this can have a huge impact. We deeply regret every case where mistakes have been made. Our priority, working closely with the police, is to put in place effective measures that bring about a sea-change in how disclosure is managed so that complainants and suspects alike can have confidence that every case is fair.

In January 2018, the Crown Prosecution Service announced that senior prosecutors were assessing all cases in England and Wales where someone had been charged with rape or serious sexual assault. This additional scrutiny of pre-trial prosecutions was carried out to ensure that prosecutors were satisfied that the police had pursued all reasonable lines of enquiry, and that there was a clear strategy to ensure disclosure was carried out effectively and in a timely manner.

Disclosure obligations apply to all offence types, but there are particular challenges in rape and serious sexual offence (RASSO) cases. They often involve large volumes of digital material, such as personal smartphones which may hold thousands of social media messages. Cases will often come down to the word of one person against another, so messages between the parties, or between them and others, may be significant, and could strengthen the case for either the prosecution or the defence. This material may influence the decision to prosecute.

When deciding whether to authorise charges, prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction, and that it is in the public interest to do so. Prosecutors must continue to review cases as they develop, and take account of any change in circumstances, including what becomes known of the defence case. This duty of continuous review means that decisions are taken to stop cases when they no longer meet the test for prosecution. Bringing such cases to a swift conclusion is an important part of the CPS' role.

The assessment of cases was prioritised and concluded by mid-February. Further analysis was then carried out on RASSO cases which were stopped during this period to identify whether issues with the disclosure of unused material played a part in the decision to bring the prosecution to an end. This allowed us to identify common factors and has informed the extensive work already underway by police and prosecutors to drive sustainable improvements in meeting disclosure obligations.

A number of themes came to light, which are set out below. Every case where issues with the disclosure of unused material contribute to a decision to stop a trial is clearly a cause for concern. We are committed to equipping police and prosecutors with the tools and skills they need, as well as bringing about a change in mind-set so that disclosure is properly recognised as a fundamental priority throughout every investigation and prosecution.

There is unprecedented focus within the CPS, the National Police Chiefs' Council and the College of Policing to tackle deep-rooted and long standing issues with disclosure. Working together with the rest of the criminal justice system, we are confident that the actions set out here, along with the joint National Disclosure Improvement Plan (NDIP), will deliver sustainable change.

What is disclosure?

Disclosure refers to providing the defence with copies of, or access to any prosecution material which might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused. It is a crucial part of a fair trial.

The police and the prosecutor each have clear duties to make sure that disclosure is conducted properly.

When the police request a charging decision from the CPS, they must supply to the prosecutor any material which has been identified by them which could reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused. If an officer is unsure, he/she must seek advice from the prosecutor.

After a defendant has been charged, the police must then record all relevant unused material on a schedule (the Disclosure Schedule). “Relevant” in this context is a broad concept and includes any material related to the case unless it is incapable of having any impact on the case. “Unused material” is material which is not going to be relied on as evidence for the prosecution. The material must be properly described, and the description must be accurate and contain enough detail for the prosecutor to decide what ought to be disclosed to the defence.

The police are also obliged to review and identify material listed on the Disclosure Schedule which could reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused.

Prosecutors must review Disclosure Schedules prepared by officers and must be alert to the possibility that relevant material may exist which has not been revealed to them. They should advise when necessary and probe the actions of police. If material appears to be missing or descriptions are not adequate then the prosecutor should take action to address that.

When initial disclosure takes place in a case, the Disclosure Schedule should be sent to the defence and the defence given a copy of, or access to any material which could reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused.

Once a Disclosure Schedule is received by the defence, in Crown Court cases they must respond by sending a Defence Statement to the CPS. This outlines their defence, and may request disclosure of material that they think will assist their case.

The CPS and the police have a duty to keep disclosure under review throughout the life of a case. The CPS and police are responsible for disclosure whether or not the defence make any requests for disclosure or for specific items or categories of material.

CPS assessment of pre-trial rape and serious sexual assault cases

All 14 CPS Areas have a dedicated team, called a RASSO unit, with specialist lawyers trained in prosecuting rape and serious sexual assault cases. These specialist lawyers carried out peer reviews of all rape or serious sexual assault prosecutions being handled by the RASSO units,[1] and which were already set for trial, or in which a plea of not guilty was anticipated.

By February 13, a total of 3,637 cases had been assessed by RASSO lawyers. Some cases were at an early stage, while others were close to trial.

Review of cases is a continuing process and prosecutors must take account of any change in circumstances that occurs as the case develops, including what becomes known of the defence case. This is an obligation that exists all through the life of a case, and decisions can quite properly be made to stop proceedings at any stage.

In conducting this additional assessment, prosecutors reviewed key case documents, including:

- the MG3 document (a report from the police setting out a summary of the facts of the case and why they believe a charge should be authorised by the CPS);
- prosecutors' review decisions;
- disclosure schedules; and
- any other relevant case material.

Prosecutors paid particular attention to social media and digital communications. Each case was assessed to identify:

- whether all reasonable lines of enquiry had been pursued;
- whether the disclosure strategy was appropriate for the case, and was being conducted effectively; and
- if any material was outstanding, what it was, when it was expected and, on arrival, the impact of that material.

This allowed them to re-assess the strength of the case and whether it was progressing in accordance with the case strategy and relevant timetable. Prosecutors identified where additional work was required, either to strengthen the prosecution case or to be satisfied that the evidence continued to support the decision to prosecute. In many cases, the police were asked to conduct further investigations.

Analysis of cases stopped during the review period

Prosecutors have a duty to make sure that the right person is prosecuted for the right offence and must consider whether there is enough evidence to provide a realistic prospect of conviction, and whether it is in the public interest to do so.

This duty also means that prosecutors should identify, and where possible seek to rectify evidential weaknesses, but when a case does not meet the evidential test set out in the Code for Crown Prosecutors, it should be swiftly stopped. A decision to stop a case can be taken at any stage, taking account of changes in circumstances as the case develops.

[1] A small proportion of rape and serious sexual assault cases are managed by CPS Specialist Casework Divisions and Complex Casework Units. These units deal with the most complex cases. While no issues have been identified with disclosure in serious sexual cases handled by these units, all cases will be subject to ongoing review.

The principal reason for undertaking this assessment of RASSO cases was to confirm that they were being progressed properly, and to address any concerns. However, after that had been concluded, the CPS conducted a further exercise to identify the extent to which disclosure issues were a factor in the decision to stop RASSO cases during that period.

It is our belief that the cases stopped during this period would, in any event, have been stopped before trial when the normal review process would have led to the identification of any undermining issues. This additional scrutiny allowed decisions that may have been made closer to a trial date to be brought forward.

Every RASSO case that was stopped between 1 January and 13 February 2018[2] was examined to identify whether there were concerns over how disclosure had been managed, and whether it was a contributory factor in that decision. A deliberately broad approach was taken so that cases of concern would be captured, even where disclosure may not have been the main factor that led to the case being brought to an end.

Chief Crown Prosecutors identified 47 cases stopped during the period that had issues with the disclosure of unused material.

This is significantly higher than the number of cases recorded in CPS management data using the classification "disclosure issues with CPS or police." Whenever a case is stopped before the end of a trial, or before a trial has started, prosecutors must record a single reason for that decision. In reality, there are often several contributing factors, but prosecutors must select the main reason when recording the outcome. The classification "disclosure issues with CPS or police" is used when the prosecution team has failed to meet its disclosure obligations, and this directly led to prosecution being stopped.

Of the 47 cases of concern identified by Chief Crown Prosecutors, five were recorded on the CPS case management system under the classification "disclosure issues with CPS or police".

Why cases were stopped

A central CPS team looked at all the cases which were stopped during the six-week period to identify common themes. While each case is unique, the disclosure issues in these cases fall into the following broad categories:

- Threshold Test charging decisions
- Analysis of communications evidence
- Handling third party material
- Effective case progression

These themes, set out in more detail below, echo those identified in 'Making It Fair', the joint report by Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services published in 2017. In January, the CPS, National Police Chiefs' Council and College of Policing published a comprehensive joint improvement plan which sets out a range of actions to meet these challenges. Significant progress has been made to deliver the necessary improvements.

[2]All 14 CPS Areas had concluded their re-assessment of pre-trial RASSO cases by 13 February. Because the 3,637 cases assessed were at different stages, many are subject to further investigation and will continue to be reviewed regularly.

Threshold Test charging decisions

The Code for Crown Prosecutors has two tests that prosecutors can apply when deciding whether a suspect should be charged; a Threshold Test and a Full Code Test. In the majority of cases, prosecutors will apply the Full Code Test, which states that "prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge."

In serious cases, where an immediate charging decision is justified, the Threshold Test may be used. The prosecutor must be satisfied that there is at least a reasonable suspicion that the suspect has committed the offence, and they present a substantial bail risk. A Threshold Test decision will be made on the basis of limited material, usually consisting of statements from key witnesses. There must also be grounds for believing that further evidence will become available within a reasonable period.

18 of the 47 stopped cases identified as having disclosure issues were charged using the Threshold Test.

The initial evidence and circumstances of these cases provided substantial grounds for believing that the defendant would fail to surrender, commit further offences, interfere with witnesses or otherwise obstruct the course of justice.

The police investigation is not complete at the time the Threshold Test is applied. Evidence which is a common feature of rape and serious sexual offending, particularly where the parties are known to each other, such as communications evidence and social services records, is rarely available at the point a Threshold Test decision is made. Inevitably, further evidence will become available after charge which may be so undermining to the prosecution case that there is no longer a realistic prospect of conviction and the case will be stopped.

Prosecutors and police officers should take steps to discover and review this material as quickly as possible and it was clear from the analysis of discontinued cases that this process is frequently taking longer than necessary.

Action to address this: *The CPS has introduced changes to how Threshold Test cases are handled. Managers will now review all cases charged on the Threshold Test together with the allocated lawyer within 7 days to ensure a clear action plan is provided to the police and outstanding material is reviewed promptly when it is received.*

Communications evidence

When conducting an investigation, the investigator should pursue all reasonable lines of enquiry, whether these point towards or away from the suspect. This will often include communication data, such as text messages, emails or social media contact on devices belonging to the suspect, the complainant, and, on occasion, third parties. Examination of a complainant's mobile will not be necessary in every case, but when the suspect and complainant know each other, it may be appropriate to ask whether there is communications material which may have a bearing on the case.

Prosecutors should advise the investigator if, in their view, there are additional reasonable and relevant lines of further enquiry that should be pursued. They should also ensure that any account

given by the suspect has been investigated and challenge any explanation given for lines of enquiry that were not followed up.

This analysis has found examples of communications evidence that ought to have been reviewed by the investigator and prosecutor not being examined until after the case had been charged. In some of the cases that were stopped this evidence was so undermining that there was no longer a realistic prospect of conviction.

Action to address this: *It is essential that disclosure issues are addressed pre-charge wherever possible and we have now introduced an additional section on the MG3 form (used by police when they submit a request for a charging decision) in RASSO and complex cases for officers to identify both what they have considered to be reasonable lines of enquiry in the circumstances of the case, and to identify all of the electronic material that has been seized and the approach to it.*

Handling third party material

Duties of disclosure under the Criminal Procedure and Investigations Act 1996 (CPIA) and its Code of Practice are imposed upon two categories of persons only: the investigator and the prosecutor. All other categories of persons are to be treated as third parties, rather than as belonging to the prosecution team. The existence of third party material such as medical records or material held by social services and local authorities is particularly common in cases of rape and serious sexual assault, including in non-recent cases. Third party material will very frequently be relevant and it must be obtained, reviewed and, where appropriate, disclosed.

The failure to identify relevant third parties and to obtain material from them in a timely way was a feature in some of the cases that were stopped during the review period.

Action to address this: *As part of the National Disclosure Improvement Plan we have agreed a joint protocol for handling third party material, which is being considered by the National Police Chiefs' Council for final approval before being rolled out nationally. This includes a new standard process for the police to inspect and review third party material and record their decisions as to whether any or all of the material is undermining to the prosecution case and to pass this to the prosecutor. There must be agreement between the police and the prosecutor on identifying and seeking access to relevant third party material at the earliest opportunity in the case.*

Effective case progression

Disclosure is a vital part of the preparation for trial, both in the magistrates' courts and in the Crown Court. Disclosure officers must review and fully describe each item on the schedule of unused material so that an assessment can be made about whether an item is capable of undermining the prosecution case or assisting the defence. The duty to review is a continuing one and disclosure cannot be dealt with in a vacuum; this exercise has reinforced how important it is for prosecutors to challenge investigators and not simply accept inadequate schedules of unused material. They must question explanations for material being unavailable and proactively manage disclosure from the outset of the case.

The challenges stretch across the criminal justice system and disclosure requires a timely dialogue between the prosecution, defence and the court to enable the prosecution properly to identify all of the material that may undermine the prosecution case or assist the case for the accused. The Criminal Procedure Rules give the defence a significant role in engaging with the prosecution to

identify the issues in the case and ensuring that defence statements are served in accordance with the statutory time limits. Although we recognise that prosecutors need to be more proactive in their review of defence statements and to provide guidance to the disclosure officer on any additional lines of enquiry, in some cases issues raised were not apparent before the defence statement was received, very close to trial.

Action to address this: *As part of the NDIP we have extended the use of Disclosure Management Documents (DMD), which are used effectively in our most serious and complex cases, to all rape and serious sexual offences dealt with in the Crown Court. The DMD sets out the prosecution's approach to disclosure (for example, which search terms have been used on digital material and why) and identifies what reasonable lines of enquiry have been pursued. This invites the defence to identify any additional lines of enquiry that they consider to be reasonable and which have not yet been undertaken by the time of the first hearing in the Crown Court. This will enable the Judge to robustly manage the case from the outset.*

Emergence of new evidence

In some cases reviewed, material that did not exist at the point of charge led to the prosecution being brought to an end. The nature of criminal cases means that on some occasions the conduct of parties post-charge can be such that it undermines the case to the extent that there is no longer a realistic prospect of conviction. This is beyond the control of the investigator and the prosecutor, but illustrates why the duty to continually review a case is so important. In some cases there were examples of messages from the complainant to the suspect or third parties that conflicted with the nature of the allegation.

Action being taken to improve performance on disclosure

This review has reinforced the findings of the joint Inspectorate report published last July. We have set out some specific measures being taken to address the themes identified as a result of the detailed analysis undertaken. When combined with the corrective actions outlined in the National Disclosure Improvement Plan and a long-term cross-system focus on the issue, this will lead to improved performance and greater assurance for the public that this key part of the delivery of justice is being managed more effectively than before.

We are making sure prosecutors and police receive the training they need on disclosure. Recent casework failures have made it clear that we need to reinforce fundamental principles, such as the need for prosecutors to adopt the "thinking approach" to disclosure described in the Attorney General's Guidelines, and to ensure that disclosure is an integral part of the investigative and prosecution process.

Every prosecutor in the 14 CPS Areas will undergo a new disclosure training programme by September 2018, led by our Chief Crown Prosecutors. We are committed at the highest level to improve our performance in this critical area of our work. We have invited representatives of defence solicitors and independent barristers to review the materials we are developing to make sure we are getting this right.

While ensuring all action that can be taken immediately is underway, we are also looking at longer term solutions, such as how technology can be exploited to meet the challenges of ever increasing volumes of communications data. We have formed a joint digital technology group to explore these

opportunities and work has already begun across Government and with technology partners to develop more effective analysis tools for police and CPS in the future.

Specific action already underway includes:

- Introducing a process whereby the disclosure officer and the prosecutor agree, at the pre-charge stage where possible or immediately post-charge, the reasonable lines of enquiry proportionate to each investigation in all RASSO and complex cases. This is being done through the MG3 form used by police when they submit a request for a charging decision, with a prompt included for officers to include this information.

- Developing best practice from the current CPS serious casework regime and extending this to other Crown Court cases. With effect from 26 March 2018, Disclosure Management Documents, which are routinely used in terrorism, serious fraud and organised crime cases to identify issues for the judiciary and the defence, are being used in all rape and serious sexual offences and complex Crown Court cases. This is for an initial trial period of three months. We are seeking feedback from the judiciary and the defence on how these are working in practice before we consider rolling it out to other types of Crown Court work.

- Establishing CPS national and Area disclosure champions in all of our Crown Court and magistrates' courts teams. These champions are specialists in disclosure in their units. The police also have disclosure champions identified in each force and they will be linking up with their CPS counterparts.

- The CPS has begun to conduct disclosure themed individual quality assurance (IQA) reviews, to regularly assess disclosure decision making in individual cases.

- In addition to the national plan, each CPS Area has agreed a joint local disclosure improvement plan with each of the forces they work with.

Annex A

The CPS operates across England and Wales, with 14 regional teams prosecuting cases locally. The following table shows a breakdown of the 47 cases, by Area.

	Number of Cases
Wales	2
East Midlands	4
Eastern	0
London North	13
London South	10
Mersey Cheshire	4
North East	2
North West	4
South East	0
South West	3
Thames and Chiltern	0
Wessex	0
West Midlands	2
Yorkshire & Humberside	3
Total	**47**