

Publication of Home Office's Preliminary Findings and Direction of Travel in relation to the disclosure process

15 August 2024

In April 2024 the Home Office published **Preliminary Findings and Direction of Travel** in its Independent Review of Disclosure and Fraud Offences, part of the Fraud Strategy which began in May 2023.

Part 1, which relates specifically to the improvement of the operation of the disclosure process, draws upon the views of key stakeholders in the justice system including investigators, prosecutors, defence lawyers, the judiciary, and academics. The final report to the Home Secretary is due to be released in the next couple of months.

The findings make an early reference to the gravest symptom of disclosure failings – miscarriages of justice. The recently overturned conviction of Andrew Malkinson, and the ongoing public inquiry into the fundamentally misconceived prosecutions of over 100 sub-post masters are cited as examples. This is a sobering reminder of what can and has happened when disclosure does not function effectively.

Is it the legislation?

Whilst the findings indicate that the “architecture of CPIA is sound” it is, at points, said to be “too restrictive or ambiguous”. Stakeholders have suggested that this resulted in a lack of parity between the legislative framework and its implementation. It is suggested that the CPIA should be updated to ensure that it keeps pace with technology, and to support “greater consistency of application”.

In a similar vein, stakeholders have flagged the tendency for prosecutors to make subjective and excessively restrictive decisions as to relevance, which is at odds with its broad definition under CPIA. Findings indicate that degree of confusion exists about what ‘relevant material’ means in practice, and a review of the definition will be undertaken before the final report.

Will technology help?

The report acknowledges that there is a need for the regime to keep up with the “proliferation” of digital material generated in all criminal cases, coupled with the “progressively complex nature of offending”, which slows down case progression. There is no acknowledgment, however, of the looming shadow of the existing backlog across the criminal courts. Whilst complex cases may perpetuate the backlog to a limited extent, they are part of a wider picture of congestion and delay.

The findings indicate that thought will be given to whether prosecuting agencies “self-procure” technological solutions to support them with their obligations. However, there is a risk that this could perpetuate the inconsistencies in approach between agencies, and result in prosecuting agencies losing control of the process. The report considers whether central government procurement of AI or technical tools could also be used.

What about the keys to the warehouse?

Although many defence professionals continue to advocate for the “keys to the warehouse”, the report highlights that the material is likely to have emanated from the defendant “in the first place”, or may create data protection risks. The findings suggest that the approach should be considered to ensure that current safeguards are sufficient to ensure that any material disclosed is only used in connection with the proceedings.

It is important to note, however, that most of the identified risks are already present during the disclosure process, and data protection and the source of the material are rarely used as justifications for not providing material to the defence. Failure to disclose material on the grounds of data protection risks seems inconsistent with a defendant's right to a fair trial.

Engagement

The findings consider the possibility of making greater use of Plea and Trial Preparation Hearings ("PTPH") in the Crown Court, along with more substantive disclosure hearings, possibly before the service of defence statements. This is likely to be positively received by the defence, with the "significant advantage of judicial oversight or direction of the process from that early point", as well as the opportunity to make observations on the prosecution's proposed approach to disclosure. Vitally, the findings suggest that "new sanctions" will be considered where prosecutors do not adhere to the disclosure timetable. This could be an important step in adding weight to court deadlines, which can often pass without explanation from the prosecution as to why the material is late, or in some cases, has not been gathered at all. The findings also flag a potential amendment to the Criminal Procedure Rules to require that certain steps by both parties be "carried out as soon as is reasonably practicable".

What next

The suggested direction of travel is, of course, only an indication, and may be subject to change once the full evaluation has been carried out. Once the full report arrives, the new Labour government may consider these issues secondary to other priorities highlighted in its manifesto, including the recruitment of Associate Prosecutors to tackle the court backlog.

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