



HMCPSI

HM Crown Prosecution
Service Inspectorate

Disclosure of unused material in the Crown Court

A follow-up of the January 2020 review of the Crown Prosecution Service's handling of the disclosure of unused material in the Crown Court

December 2020

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Who we are

HM Crown Prosecution Service Inspectorate inspects prosecution services, providing evidence to make the prosecution process better and more accountable.

We have a statutory duty to inspect the work of the Crown Prosecution Service and Serious Fraud Office. By special arrangement, we also share our expertise with other prosecution services in the UK and overseas.

We are independent of the organisations we inspect, and our methods of gathering evidence and reporting are open and transparent. We do not judge or enforce; we inform prosecution services' strategies and activities by presenting evidence of good practice and issues to address. Independent inspections like these help to maintain trust in the prosecution process.

Contents

1. Headlines	5
Recommendations	10
2. Context and methodology	11
Context	12
The disclosure regime	13
Methodology	15
File sample composition.....	16
The types of unused material.....	17
3. Working with partners	18
The service received by the CPS.....	19
Challenging others	26
4. The service the CPS provides	30
Service to the police	31
Service to the defence and the court	34
Service to victims, witnesses and the public.....	39
Direction of travel.....	41
Annexes	
The disclosure regime	45
Question set	49
File examination data	69

1. Headlines

1.1. We published a report on the Crown Prosecution Service's (CPS's) handling of the disclosure of unused material in the Crown Court in January 2020. That report examined the CPS's disclosure performance over an 18-month period and mainly included cases that were completed in 2018 and 2019. The report highlighted that, whilst there was evidence of some progress over time, there remained much room for improvement. Therefore, to assess whether more improvements have been made, we decided to conduct another inspection in which we could examine more recent cases.

We made a conscious decision not to include cases that were being dealt with during lockdown

1.2. The cases examined in this inspection were all charged on or after 1 August 2019 and listed for the Crown Court up to Friday 20 March 2020. We chose this cut-off date so that our file sample would only include cases up to the point when the UK's first coronavirus lockdown began. We made a conscious decision not to include cases that were being dealt with during

the lockdown, because cases in the Crown Court were not being progressed in line with the usual timescales and requirements during this period.

1.3. Whilst this means the cases we examined were not affected by delays or issues related to the pandemic, it does have something of an impact on the direct comparability of our findings in this report to those we published in January 2020.

1.4. In this inspection, we examined many more cases where the defendant was in custody. There is substantially less information available to the prosecutor at the point of charge in these cases than in cases where the police investigation is ongoing and the defendant is bailed or released under investigation.

1.5. We also decided not to include cases that included rape in this follow-up. We are currently conducting a joint inspection of rape cases and we were keen not to duplicate work. The absence of rape cases is likely to dampen the overall results of this inspection, since it was those cases that were generally handled more effectively in the January 2020 report.

1.6. Whilst there may be some issues with the direct comparability of the two inspections' findings, our methods in this follow-up are clearly focused on assessing the quality and value added by prosecutors in the handling of disclosure. As such, the findings of this inspection allow us to judge the general trend of improvement and performance.

1.7. There is evidence of improvement in some aspects of performance since the January 2020 report, but also of slight deterioration in some aspects. Some of the deterioration may be attributable to differences between the file samples, but, as in the January 2020 report, our view is that CPS prosecutors' compliance continues to improve in respect of carrying out the process, but still has some way to go to deliver casework that could be assessed as of the appropriate quality.

1.8. The Chief Inspector's foreword to the January 2020 report clearly stated that some of the problems are the result of resource challenges. The foreword stated, "Almost without exception, those faults [referring to casework quality issues] have been caused or exacerbated by the problem of too few legal staff being spread too thinly over a volume of work of ever-increasing complexity." Given that this inspection assessed cases from a period before the coronavirus lockdown, when some of the additional staff secured as a result of the Comprehensive Spending Review were in post, it is therefore somewhat disappointing that we did not see more of an improvement in casework quality.

1.9. The effective handling of disclosure is inextricably linked to the effectiveness of the prosecution team: that is, the performance of both the police and the CPS. The January 2020 report outlined improvements in case quality and compliance by both organisations, but noted that effective training was crucial if improvement was to be maintained. The report said, "If the early signs of improvement found in this inspection are to be sustained, the focus on the National Disclosure Improvement Plan must be maintained and extended to ensure that activity by the police and CPS results in a cultural change at the operational as well as at the strategic level."

The effective handling of disclosure is inextricably linked to the effectiveness of the prosecution team

1.10. In this inspection, there is evidence that this focus has started to drift. Across most measures, the police's compliance with requirements has declined. Again, some of this may be influenced by the make-up of the file sample, but given the rates of decline across most measures, it points to a more fundamental problem. The service the police provides to the

CPS – especially identifying what is and is not disclosable unused material, providing an adequate report on it to the prosecutor to make a decision at charge, and providing complete and accurate disclosure schedules post-charge – is key to allowing the prosecutor to undertake an effective review and deal properly with disclosure.

1.11. Some of this report's findings about the CPS's performance are likely to be affected by the service provided by the police. When the police do not identify

what is and is not disclosable or provide an adequate report, this has an impact on the prosecutor's ability to make effective review decisions about handling and managing disclosure. However, this inspection also shows that the rate of feedback from the CPS to the police has declined since the January 2020 report. This may be a sign of fatigue or prosecutors beginning to lose heart that no matter how much they feed back, there are few signs of improvement. This is something that those dealing with the National Disclosure Improvement Plan will want to consider, since there is a risk that strategic intent and actions will not make the difference at the operational level.

1.12. Whilst this inspection did not look at cases from the first coronavirus lockdown period, dealing with backlogs of cases and the attendant impact on resources is certain to bring further additional challenges at the operational level.

1.13. In chapters 3 and 4 and annex C, we compare performance against the same question set we used for the report published in January 2020. There are some aspects of performance that show some signs of improvement. These include:

- the completion of disclosure management documents by the police and CPS
- the police's response to defence statements
- the identification of material that needed to be disclosed at the first hearing
- the instructions given in the charging advice to court prosecutors and reviewing lawyers
- the timeliness of serving initial and continuing disclosure.

1.14. Many of these are processes that should be carried out and can be improved by system prompts when officers and prosecutors are considering cases. No matter whether or not these are improvements in compliance with process, they still indicate that improvements can be maintained.

1.15. However, we also found a number of measures where performance had declined in comparison to the findings set out in the January 2020 report. These included:

- the service provided by the police to the CPS
- the quality of the prosecutor's review at charging, in relation to the consideration of, and strategy around, disclosure issues
- the identification of reasonable lines of enquiry.

1.16. The CPS's compliance with the statutory disclosure regime at the initial and continuing disclosure stages also showed a slight decline from the performance levels in the January 2020 report.

1.17. In the January 2020 report, we made no recommendations; it was our view that the disclosure regime is clear, and what was needed was significantly better compliance with it by both the police and the CPS. However, given that many of the issues highlighted in this report repeat concerns we set out previously – and more recently in the *2020 charging inspection* report – we have decided to include a series of recommendations this time.

1.18. Our reports on casework quality highlight that the CPS needs to think about how to develop a clear focus on quality. Whilst it is true that it is making more effective charging decisions, there are some clear weaknesses in how prosecutors:

- consider and determine case strategy
- settle and record the rationale of review decisions
- make effective decisions about the core aspects of the handling and management of disclosure, as this inspection highlights once again.

1.19. It seems to our inspectors that prosecutors are dealing with and following the process more often than thinking about the case strategy.

1.20. This inspection has again highlighted the importance of effective partnership. The National Disclosure Improvement Plan and the work being conducted jointly between the police and CPS is crucial to the success of any tangible improvements. This inspection shows that on a number of measures, the prosecution team partnership is under strain. The police's compliance with the requirements is deteriorating, the CPS's feedback has decreased, and this culminates in weaker management and handling of disclosure material. The result is a less efficient system; given the impact of the coronavirus, the last thing the criminal justice system can afford is more delays and inefficiency caused by rework. The importance of the partnership is such that we are suggesting that a joint inspection with Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services should feature as a priority in the Criminal Justice Joint Inspection business plan. We make a recommendation to support this position.

Recommendations

Given the importance of the prosecution team's relationship and impact of their performance, a joint inspection of the handling of disclosure should be added as a priority to the Criminal Justice Joint Inspection business plan for 2021-22. (paragraph 1.20)

The Crown Prosecution Service should work with the police at an Area level to identify and address deficiencies in file quality (against the agreed file standards) and use this work to influence improvements within the prosecution team performance meeting and/or Local Criminal Justice Board structures. (paragraph 3.29)

The Crown Prosecution Service should develop a clear strategy to improve the quality and standard of pre-charge reviews and case file reviews, including the expectation for reviews to consider and address disclosure issues. This should form a core part of the casework quality agenda and feature as part of the established individual quality assessment assurance regime. Prosecutors should be held accountable to this regime and prosecutors' compliance with it should be assessed to address weaknesses or concerns. (paragraph 4.26)

The Crown Prosecution Service should improve the capability and capacity of legal managers to understand and set clear expectations for disclosure review records, and provide clarity of expectations at all stages of review. (paragraph 4.26)

2. Context and methodology

Context

2.1. In January 2020, we published our inspection report *Disclosure of unused material in the Crown Court*.¹ Then, the novel coronavirus coming out of China was just that: novel. Now, it is a feature of daily life, to which we have all had to adapt. Inspection activity has continued, but in a way that reduces the burden on the organisations we inspect and reflects the risks that we all face. This has required flexibility in our inspection methodology and programme.

2.2. We say this because in the usual course of events, we would not have followed up on the *Disclosure* report in the same year as we published it. We acknowledge that the passing of more time would have enabled a more robust assessment of the direction of travel. The methodology for this follow-up, however, lent itself to remote working, and required very little of the Crown Prosecution Service (CPS). In addition, enough time had passed that we were able to select cases dealt with after the ones we reported on last time. It therefore seemed, to us, to be a useful endeavour and one that will, we hope, assist the CPS in focusing resources at this testing time.

2.3. When undertaking an inspection during the pandemic, one of the questions was always going to be how to deal with cases that fell into the timeframe of the first national lockdown. To allow us to make some form of direct comparison to the results we published in the January 2020 report, we decided to examine cases listed for trial in Crown Court up to Friday 20 March 2020. In the January 2020 report, we examined cases which had been charged up to July 2019, so we also had to limit the cases examined in this inspection to those charged on or after 1 August 2019.

2.4. In the January 2020 report, we noted that the CPS and the police were undertaking a programme of work through two phases of their National Disclosure Improvement Plan (NDIP), led by a national joint board. The CPS had also delivered extensive training and carried out focused quality assurance to establish how well prosecutors were dealing with unused material.

2.5. The January 2020 file examination was carried out in six tranches, two of charging decisions and four of trial files, to assess progress across time. We found some indications of progress, albeit from a low baseline in some aspects of the work. In the report, we said: “Many aspects of performance showed continuous improvement as the file examination progressed through the six tranches, from earlier to more recent files. This indicates that the intensive training programme instigated by the CPS and the National Disclosure

¹ www.justiceinspectorates.gov.uk/hmcpsi/hmcpsi-disclosure-of-unused-material-in-the-crown-court/

Improvement Plan are starting to reap benefits. However, in some aspects the performance baseline from the initial file examination was very low, and although there was progress, there is still a long way to go before an acceptable standard is reached.” We also noted improvement in some aspects of police performance, and in the quality of defence statements.

2.6. We made no recommendations in the report since “any such recommendations would merely restate the need to comply with the requirements of the statutory regime”.

2.7. Since we published our January 2020 report, the CPS has continued with the programme of work set out in the second phase of the NDIP. This work includes meetings of disclosure champions supervised by the CPS working group, which includes the two national disclosure leads, a Chief Crown Prosecutor and Deputy Chief Crown Prosecutor.

The disclosure regime

2.8. In our previous report, we set out the disclosure regime in some detail. That part of the report has been included in annex A of this report. Whilst the report was published in January 2020, most of the work that led up to its publication was conducted in 2018-19. For that reason, we refer to it throughout as the 2018-19 inspection.

2.9. The essence of the regime is that material gathered by the police during an investigation which does not form part of the prosecution case (“unused material”) must be retained, and disclosed to the defence if it meets the test set out in the Criminal Procedure and Investigations Act 1996². The test is whether the unused material “might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused”. Irrelevant material need not be revealed to the prosecutor by the police or disclosed thereafter, and sensitive material which meets the test can be withheld if a Judge authorises its non-disclosure.

² legislation.gov.uk/ukpga/1996/25/contents

Key stages of disclosure

Retention by the police

During an investigation, the police must pursue reasonable lines of enquiry that point away from a suspect being responsible for the offence as well as those that point towards the suspect. The police must record and retain any relevant material gathered in that investigation.

Revelation by the police

The police must reveal a list of all relevant unused material to the CPS in the correct schedules, and supply items that may meet the disclosure test.

Initial disclosure

The prosecution must send the defence any material which meets the test for disclosure and has not already been disclosed. They can apply to a Judge to withhold disclosable sensitive material.

Defence statement

In Crown Court cases, the defence must serve a statement setting out their case. They will often use this statement to list any unused material they think ought to be disclosed.

Continuing disclosure

The prosecutor sends the defence statement to the police for enquiries, if needed, and for revelation of further unused material to the prosecutor. The prosecutor must send the defence any additional unused material if, in the light of the defence statement, it now meets the test for disclosure.

Section 8 application

The defence can ask the court to order the prosecutor to disclose items which it thinks meet the test and which the prosecutor has refused to disclose.

Methodology

2.10. The aim of this inspection was to follow up the results of our previous inspection in relation to trials. There were no recommendations against which to measure progress, but we have assessed the direction of travel from the previous file examination data, using the data from the final live trial tranche as the comparator.

2.11. We were and are conscious of the impact of the coronavirus pandemic on the CPS, especially its casework. For this reason, we chose cases that had been listed for Crown Court trial for the first time up to Friday 20 March 2020; the full national lockdown began on the following Monday, 23 March 2020. We also selected cases that had been charged on or after 1 August 2019; this was to ensure that the charging decisions post-dated those in the final tranche of cases we examined in our previous inspection. The last tranche of trials, against which we measure the direction of travel in this report, were listed between April and May 2019.

2.12. There are a number of differences between the make-up of the two file samples. This is likely to have an adverse impact on some of the findings. Whilst we adopted the same methodology and question set as the 2018-19 inspection, there were more cases in this inspection where the suspect was in custody; and this inspection did not include cases that involved rape, while 16% of cases in the 2018-19 inspection did involve rape. This means that some of the findings in this inspection may be slightly less positive because of the make-up of the file sample.

2.13. We examined each file up to a point two weeks before the first trial listing, by which time the prosecution and defence ought to be trial-ready in most cases, and used the same question set as the 2018-19 inspection. We examined 20 cases per CPS Area, making a total of 280 files. This is just over half the number of trial cases (555) we examined in the 2018-19 inspection.

File sample composition

2.14. At the time we started this inspection, we were also planning a joint inspection of rape cases with Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS). We therefore decided not to include rape cases in this inspection, although we did include other serious sexual offences (SSO). In total, there are 25 SSO or child abuse cases in the sample of 280 cases (8.9%). The numbers are low, and each case represents 4% of the subset of cases, so a small number of cases would have a disproportionate impact on percentages. For that reason, we have decided not to present data relating to SSO or child abuse cases separately. They are included in the sensitive case percentages, which reflect the findings for the 85 sensitive cases in the sample (30.4%).

2.15. The sample contains 11 cases involving youths, and 26 where the main or only defendant was female.

2.16. The relatively short period between our chosen charge and trial dates (a maximum of about eight months) meant that this inspection reviewed a much higher proportion of cases in custody that had been charged by CPS Direct. As we have established, this difference between the file samples had an impact on the type of case, but our inspectors’ assessment of quality is made at whatever stage of the case. As such, our findings about quality still reflect what we found. Table 1 sets out the proportions for this and the 2018-19 inspection.

Table 1: File sample composition then and now

Question	This inspection	Previous inspection
The defendant was held in custody at any point during the life of the case	79.3%	38.7%
The decision to charge was made by CPS Direct	76.8%	50.8%

2.17. When reporting our findings, some of the percentages may not add up to exactly 100% because of rounding to one decimal point.

The types of unused material

2.18. Unused material is categorised as either sensitive or non-sensitive. In the 280 cases we examined, 206 (73.6%) featured only non-sensitive unused material, three cases (1.1%) featured only sensitive material, and the remaining 71 (25.4%) featured both.

2.19. About 44% of the sensitive material related to police investigative techniques, information leading to a search warrant, or other information the disclosure of which could hinder crime prevention or detection. Another 23% related to the private life of a victim or witness: for example, medical or social services records. We did not include rape cases in our sample (see paragraph 2.14), but other sexual offences cases were included. In these, the sensitive material was much more likely to relate to the private life of the victim or a witness.

2.20. In the cases we looked at, the unused material that was likely to have the most impact on the case was that relating to the credibility of a victim. Crime scene examination or forensic evidence was the next most impactful. Material related to credibility was most often previous convictions (53.0%), followed by previous inconsistent statements (20.0%).

2.21. As was the case in the 2018-19 inspection, unused material from communications (via social media, phones or other modes of contact) did not feature as a primary cause for concern in our findings. Contact between the defendant, victim, and witnesses was the most significant unused material in only 4.2% of the cases in our sample, and in only 6.4% of sensitive cases.

2.22. There was third party material in just under a third of the sample (64.6%). Amongst these cases, the most common third party was forensic science providers and the second most common was the NHS.

3. Working with partners

The service received by the CPS

Across the life of a case

3.1. As stated in chapter 1, the effective handling of disclosure is inextricably linked to the effectiveness of the prosecution team: that is, the performance of the police and the Crown Prosecution Service (CPS). If cases are to be handled effectively, both partners must undertake their obligations properly and provide each other with a level of service that allows for cases to be progressed and managed.

3.2. There were very few cases in our sample (21 out of sample of 280) where unused material identified by the police – after either the charging decision or the post-charge review by the prosecutor – could have materially affected the advice or review. There was also very little evidence that the police had failed to retain unused material (this was so in 12 cases) or to make a proper record of unused material that was not originally in a recorded format, such as something told to an officer (this was so in six cases).

Police performance at the charging stage

3.3. At charge, it was apparent that there was likely to be unused material over and above that generated routinely in an investigation (such as a crime report, incident log or custody record) in 270 of the 280 cases we examined (96.4%). We found that the police were generally good at providing those routine items which they have to hand. Not all of the other material will be available from the point of charge. For example, obtaining records from the NHS or social services, or the results of forensic examination of crime scenes or phone downloads, takes time. In addition, where the police propose to take a defendant to court in custody, they will have had limited time to pursue the lines of enquiry that will generate relevant unused material.

3.4. All the expected unused material was available at charge in 46.2% of the cases we examined, and some was available in 43.2%, with none available in the remaining 10.5%. Where unused material was not available, it was the view of inspectors that it would have been in 74 out of the 180 applicable cases (41.1%) if the police had carried out reasonable lines of enquiry. This means that in four out of ten cases, the prosecutor did not have material to consider that inspectors would have expected to have been available at that point if the officer in the case had undertaken reasonable enquiries.

3.5. The police provided either the unused material or an adequate report on it nearly two thirds of the time (65.9%). In sensitive cases, the police provided either the material or an adequate report 74.1% of the time.

3.6. Not all the unused material available at charge will meet the test for disclosure but, in the cases we examined, 55.3% of it did. Some of this is material that will be revealed to the defence when initial disclosure is undertaken after a not guilty plea. In some instances, however, the prosecutor is required to make early disclosure in accordance with the common law, as set out in *DPP v Lee*.³ This is the case when a piece of unused material could assist the defence in making a bail application or in the early preparation of their case. Examples would include where the complainant has a previous conviction for dishonesty in a case where their credibility is challenged by the defence, or where supplying details for a witness who supports the defence's account would enable the defence to take a statement from them before their memory fades.

3.7. Despite the importance of recognising what unused material is disclosable to the defence, in our file sample, the police identified less than half of it (41.0%) as meeting the statutory disclosure test or that in *DPP v Lee*. Again, this is something that is likely to hinder the prosecutor when they consider the case and review the material before considering the case strategy.

3.8. At charge, the police submit a summary of evidence and other required documents (such as the Manual of Guidance Form 6 or MG6, which is a confidential information form). These should explain the prosecution evidence, set out likely defences and tell the prosecutor what work is outstanding, if any. Done well, this enables the prosecutor to make an accurate assessment of the impact of the unused material on the prosecution case strategy. In the cases we examined, what the police submitted enabled the prosecutor to do so nearly four fifths of the time (79.1%), and in 85.7% of sensitive cases.

3.9. We looked specifically at the handling of communications and third party material at charge. In the sample, there was likely to be relevant communications material in 117 cases (41.8%). In 63 of these 117 cases (54.3%), the police supplied the material or an adequate report on it. Where they did not, in about a third of cases (37.7%, or 20 cases), the police could have undertaken reasonable lines of enquiry to obtain the material.

3.10. For third party items (such as hospital records), there were 188 cases (67.1% of the sample) where such material was likely, and the items or an adequate report were supplied in 64.0% of the 188 cases. Of the instances

³ *EWHC Admin 242*; British and Irish Legal Information Institute; March 1999
www.bailii.org/ew/cases/EWHC/Admin/1999/242.html

where there was no report and the items were not supplied (67 cases), the police could have obtained them by conducting reasonable enquiries in 35.8% (24 cases).

3.11. The police were better at carrying out reasonable lines of enquiry, providing the material or an adequate report, and identifying which items of unused material were disclosable in sensitive cases compared to those that were not sensitive.

Case study

A customer in a bar alleged that, after he had been ejected from the premises, he had been assaulted by the suspect, who was one of the bar's security staff. The police told the charging lawyer about all the unused material and identified the items that undermined the case against the suspect, who was claiming he acted in self-defence. These included CCTV footage and accounts given by the suspect and his colleagues to the management of the bar. The police set out their reasoning for why the material was unused, and how it related to the case; this provided enough information for the lawyer to be able to determine that the prosecution would be unable to disprove self-defence. Unfortunately, the lawyer advised charge and the case concluded with the prosecution offering no evidence on the day of trial.

Police performance after charge

3.12. When sending the charging decision to the police, the prosecutor will frequently set actions for the police to carry out. Some of these may relate to unused material directly, or to reasonable lines of enquiry which may, once explored, generate additional unused material. The police responded appropriately to the actions set in 62% of cases, but in a timely manner in under half (47.9%). Responses were better and more timely in sensitive cases than non-sensitive ones.

3.13. We noted that delays were often related to providing forensic or phone analyses, which is a problem many police services are facing, particularly given the vast quantities of data that can be stored on mobile devices. In our inspection of the quality of CPS charging advice⁴, we noted that there was scope to improve the parameters set by prosecutors, so as to narrow the analysis required, or to set proportionate timescales for actions.

⁴ 2020 charging inspection; HMCPST; September 2020
www.justiceinspectorates.gov.uk/hmcpst/inspections/charging-inspection-2020/

Case study

A mobile phone was seized from a defendant who was alleged to have been involved in the production of cannabis. There was a significant delay in the analysis of the contents of the phone, some of which were not in English and so needed translating. At charge, the prosecutor did not give any guidance as to the level of download required or set any parameters, which may have contributed to the delay. The result came in less than 14 days before trial. The contents proved not to be unused material after all, but damning evidence of the defendant's involvement.

3.14. The police case summary and confidential information forms each contain declarations about the handling of unused material that meets the disclosure test or is disclosable under DPP v Lee. We found that police declarations regarding the applicability of the statutory test were accurate 42.1% of the time, and 55.3% of the time for the common law test.

3.15. After charge, in a case going to the Crown Court, the police are required to supply schedules which list and fully describe the unused material. Non-sensitive material must be listed and described on an MG6C schedule and sensitive material on an MG6D schedule. The police must also provide copies of any undermining or assisting material and must identify, on an MG6E, which of the items listed on the MG6C and MG6D meet the test for disclosure.

3.16. The police sent the schedules by the required target date in two thirds of cases (66.7%), and more often (72.9%) in sensitive cases. Where they did not, the most common failing was not sending any forms at all. Almost always (88.7%), the forms supplied by the police were the right ones. The right forms were sent more often in non-sensitive cases but were of slightly worse quality.

The police also submitted the unused material itself in 61.5% of relevant cases.

After charge, in a case going to the Crown Court, the police are required to supply schedules which list and fully describe the unused material

3.17. Over three quarters of the schedules (79.7% or 216 cases) were not complete or accurate. In over half of these 216 cases, items were missed off a schedule, and in another 46 cases, the descriptions of items were inadequate. In another 16 cases, evidence was wrongly identified as unused material.

3.18. We found too often that the schedules first submitted did not list all the unused material the police were in possession of at the time, so supplemental or revised schedules had to be sent later, frequently without the required MG6E. The CPS rarely tackled the police about this in the cases we examined, and schedules were accepted without

comment even where they omitted items of unused material that were on the CP Ss electronic file. The consequences of regularly updating MG6Cs or MG6Ds include confusion for the CPS and the defence, a blurring between initial and continuing disclosure, and the risk that additional items will be missed or served late.

3.19. In our sample, the police submitted an MG6E in 19.3% of cases and indicated by other means (for example, on an MG6) that they considered there to be disclosable material in another 17.0%, leaving 63.7% of cases where they did not identify any disclosable material. The accuracy of police MG6Es was weak, with just over a third (36.2%) giving a complete and correct list of disclosable items. In 45.0% of cases, the police did not identify any of the disclosable material, and in another 16.2% they identified only some. In seven cases, the police said items were disclosable when they were not. In some cases, the police MG6E omitted items of unused material that the police themselves had identified elsewhere as being disclosable. Performance was slightly better in sensitive cases.

3.20. In cases where identification is in dispute and the complainant or a witness has given the police an early description of the suspect, the document containing that account (such as body worn video, a pocket notebook or occurrence report) may well assist the defence and therefore be disclosable. We noted inconsistency in how these descriptions were dealt with. Some disclosure officers were very thorough in identifying items that contained early descriptions on the MG6E and cross referencing with the MG6C; others were less aware of these items' importance.

Sensitive cases were generally handled better by the police after receipt of the defence statement than non-sensitive cases

3.21. After the prosecutor has served initial disclosure on the defence, the latter must serve a defence statement setting out their case and, if they seek additional items of unused material, explaining why it ought to be disclosed. The prosecutor sends the defence statement to the police so that any additional material can be identified and any reasonable enquiries carried out. The police should then reply with a further MG6E and an updated or

supplementary MG6C and/or MG6D if appropriate.

3.22. The police supplied an accurate and complete MG6E in response to the defence statement in 68.6% of applicable cases in our sample. In 20.1% of cases, the police failed to identify additional disclosable items, and in 9.8%, they identified only some of them. In the remaining 1.5% of cases, the police identified items as disclosable when they were not. The police supplied properly

updated MG6Cs or MG6Ds in under half the applicable cases (43.4%). In 37.1% of the cases, the police either did not identify additional items or did identify them but did not provide updated schedules. Sensitive cases were generally handled better by the police after receipt of the defence statement than non-sensitive cases.

Police direction of travel

3.23. Most aspects of the police's service discussed so far are worse now than in the 2018-19 inspection. The more important of these are set out in Table 2, along with all the aspects where performance has improved.

3.24. The fact that police performance has deteriorated means that, when the case is received by the prosecutor, some of the fundamentals needed to make a well thoughtout review and disclosure strategy are not always available. This points to why the prosecution team relationship is so crucial to overall quality and efficiency. As we stated in the 2018-19 report: "If the early signs of improvement found in this inspection are to be sustained, the focus ... must be maintained and extended to ensure that activity by the police and CPS results in a cultural change at the operational as well as at the strategic level." The results of this inspection highlight evidence that this focus has started to drift, affecting performance.

Table 2: Improvement and deterioration in police performance

	Question	This inspection	2018-19 inspection ⁵
Police pre-charge	All the expected unused material was available at charge	46.2%	50.8%
	The unused material or an adequate report of it was supplied	65.9%	78.0%
	The police accurately identified disclosable unused material	41.0%	54.1%
	The police supplied the information needed for a disclosure management document pre-charge	26.3%	17.6%
Police post-charge	The MG6C and MG6D were complete and accurate	20.3%	23.0%
	The MG6E was complete and accurate	36.2%	45.7%
	The police submitted the schedules on time	66.7%	79.3%
Police response to the defence statement	The police MG6E in response to the defence statement was complete and accurate	68.6%	68.1%
	There was an additional, properly completed MG6C and/or MG6D where required	43.4%	53.5%
Police across the life of the case	There was evidence that the police had failed to retain unused material (lower is better)	4.3%	6.8%
	There was evidence that the police had failed to record unused material (lower is better)	2.2%	4.6%

⁵ The data shown for the 2018-19 inspection is for the final of the four tranches of live trial files.

The role of the defence

3.25. In Crown Court cases, after a not guilty plea, and after the prosecution have carried out initial disclosure, the defence are required to submit a defence statement. It must include information about the nature of the defence, which of the facts asserted by the prosecution the defence are challenging, and any alibi details. Although not mandatory, the defence statement is commonly used to list the further unused material to which the defence consider themselves entitled.

3.26. A defence statement was served in 242 of the 270 applicable cases in our sample (89.6%). Of those, 51.0% were served on time and 87.2% were of an adequate standard. Timeliness and quality were both better in sensitive cases.

3.27. The number of defence statements served has increased from 72.1% in the final tranche of the trial files in our previous disclosure inspection. Timeliness has also improved since then (from 37.6%) but the quality of defence statements has worsened (from 90.3%). We discuss the CPS's response to late or inadequate defence statements from paragraph 3.40.

Challenging others

The police

3.28. It is apparent that the police's understanding of their disclosure duties has room to improve. We have found this, and the lack of quality in police files more generally, to be the case in previous inspections. Given this, it is important that the CPS does what is proportionate and reasonable to provide the police with feedback and guidance in individual cases. There are a number of opportunities to do this during the course of a case.

3.29. Over the past few inspections, we have noted that the level of feedback from prosecutors to the police is decreasing. This may reflect fatigue or frustration that the feedback seems to have little noticeable effect on driving improvement. There is a debate about whether the time the CPS invests in feeding back to the police is filling a level of missed quality assurance within police forces, and whether it results from a lack of effective supervision. Our view is that there needs to be an effective prosecution team ethos that allows for each side of the partnership to engage locally to tackle issues that affect the service provided. Providing feedback on non-compliance, and requesting what is needed to build a case to the best evidence and to work effectively in partnership, is in the best interests of all. The CPS must do this, but more must be done locally to engage the police at a meaningful strategic level to address longstanding issues.

Recommendation

The Crown Prosecution Service should work with the police at an Area level to identify and address deficiencies in file quality (against the agreed file standards) and use this work to influence improvements within the prosecution team performance meeting and/or the Local Criminal Justice Board structures.

3.30. At charge, 123 of the 280 cases in our sample displayed one or more failings in the police's service. The CPS identified and fed back on the issues to the police in 31 of those cases (25.2%) and identified the problem(s) but did not feed back in nine (7.3%). This leaves 83 cases (67.5%) in which the CPS neither identified nor fed back on issues with the police's service.

3.31. In our January 2020 report, we explained that the CPS had recently introduced a new section on the MG3 to mandate the recording of two aspects of the police submission regarding disclosure, and anticipated that this would improve feedback levels. In fact, we found that feedback to the police has declined slightly since the last tranche of trial files examined in the 2018-19 inspection, when 28.3% of police flaws were identified and fed back. Areas were slightly better at feeding back to the police at charge than CPS Direct (26.9% of cases fully met the expected standard, compared to 24.7%).

3.32. Post-charge, the initial file submission by the police fell below the required standard in one or more aspects in 251 of the 280 cases. Of those 251 cases, the prosecutor fully utilised the opportunity to feed back in 31 instances (12.4%), partly did so in 68 (27.1%) and did not give any feedback at all in 152 (60.6%). This is also a decline since the January 2020 report, where we recorded rates of 23.9%, 28.2% and 47.9% respectively.

We found that feedback to the police has declined slightly since the last tranche of trial files examined in the 2018-19 inspection

3.33. We did see examples where the prosecutor fed back – rejecting inadequate schedules of unused material, for example – but too often the prosecutor accepted schedules that were incomplete or lacked proper descriptions. This may, in part, be because prosecutors do not wish to delay initial disclosure by the rejection; we noted slowness when the police resubmitted schedules that had

been challenged, including a wait of six weeks in one custody case. However, fear of delay is not a good reason for not proactively feeding back to the police about non-compliance with the disclosure regime.

3.34. Pre- and post-charge, there was less feedback to the police in sensitive cases than there was in non-sensitive cases.

3.35. When carrying out initial disclosure, the prosecutor may disagree with the police's assessment of whether the unused material meets the test for disclosure. This represents a good opportunity to explain the disclosure test in context to the police. In our sample, there were only 14 cases where the prosecutor thought unused material was not disclosable and the police thought it was. The prosecutor explained their reasoning in two of those cases (14.3%).

3.36. Cases where the police identified unused material as not disclosable, but the prosecutor considered it was, were more common; there were 123 such cases. In these cases, we would expect the prosecutor to record their reasons for deciding an item of non-sensitive material was disclosable on the MG6C schedule itself, which is sent back to the police; this would give the necessary feedback. However, we found feedback on the MG6C in just over a fifth of cases (25, or 20.3%) but not in the rest (79.7%). Again, the CPS's feedback rate has declined (from 23.8%).

3.37. At continuing disclosure, there were 14 cases where the police identified material as disclosable that the prosecutor considered not to be disclosable. The prosecutor fed back to the police in three of these cases. The prosecutor marked as disclosable material that the police thought did not meet the test in 44 cases, and the prosecutor fed back to the police in eight of those (18.2%). The latter figure has improved since our last report, when we recorded a feedback rate of 15.8%.

3.38. The CPS has improved the rate at which it feeds back to the police in the relatively few instances where the police have revealed significant unused material to the prosecutor late, or failed to record or retain unused material (see paragraph 3.2).

Table 3: Feedback from the CPS to the police

Question	Answers	This inspection	2018-19 inspection
The police did not reveal after charge or initial review unused material that would have materially affected the charge or review (23 cases)	The prosecutor identified and fed back	39.1%	12.5%
	The prosecutor identified but did not feed back	17.4%	37.5%
	The prosecutor did not identify or feed back	43.5%	50.0%
The police failed to retain unused material or record unused material that was not originally in a recorded format (16 cases)	The prosecutor identified and fed back	43.8%	41.7%
	The prosecutor identified but did not feed back	12.5%	25.0%
	The prosecutor did not identify or feed back	43.8%	33.3%

The defence

3.39. When a defendant enters a not guilty plea, the Crown Court sets a trial date and a timetable for service of initial disclosure, the defence statement and continuing disclosure. The process requires timely action on the part of the prosecution and defence so as not to jeopardise the trial date. In our file sample, the prosecutor chased a late defence statement in over half the applicable cases (56.9%). This was slightly more often than in the 2018-19 inspection (55.6%).

3.40. We have explained what the defence statement should contain and the standard we found in our file sample (see paragraph 3.25). The prosecutor challenged five of the 30 inadequate defence statements (16.7%), a slight decline from our last report (20.0%).

3.41. Prosecutors chased a late defence statement more often in sensitive cases, but challenged its adequacy less often.

4. The service the CPS provides

Service to the police

At charge

4.1. At the charging stage, the prosecutor has to decide whether there is a realistic prospect of conviction and whether a prosecution is in the public interest. These are the two limbs of the Code for Crown Prosecutors.

4.2. If they are not able to say there is sufficient evidence but can see the possibility of the case being built to the point where there is, the prosecutor can ask (but not compel) the police to carry out more work, usually called 'reasonable lines of enquiry'. At charge, the prosecutor can also ask to see items of unused material that may meet the test for disclosure, or advise the police on the degree to which evidence should be analysed – for example, the type of mobile phone download that is necessary in that case.

At charge, the prosecutor can ask to see items of unused material that may meet the test for disclosure

4.3. Prosecutors set out these requests in the part of the charging advice called the action plan. They should set proportionate dates by which each action needs to be completed. The advice itself is contained in a Manual of Guidance form 3 (MG3), of which the action plan forms a part. Prosecutors are provided with ample guidance on how to complete the MG3,

including templates with the required sections set out clearly. The document is an important one for setting the prosecution case theory and trial strategy, and for communicating to the police, and other CPS staff who deal with the case later, how it is to be managed and progressed. We have already commented on the importance of proportionality and timescales in ensuring that complex evidence or unused material is available when it is needed (see paragraph 3.13).

4.4. In our file sample, the CPS properly advised the police on reasonable lines of enquiry 60.3% of the time, and 61.8% of the time in sensitive cases. The most common topics or opportunities for further enquiries were forensics and crime scenes (32.1%), potential witnesses (18.6%) and communications (13.5%).

4.5. The handling of unused material in the MG3 fully met the expected standard in 44.3% of cases, partially met the standard in 31.1% and did not meet it at all in 24.6%. MG3s in sensitive cases fully met expectations in 40.0%

of cases. The primary failing was not addressing the impact of unused material on the case or how disclosable unused items undermined the prosecution or assisted the defence (55.8% of the cases that did not fully meet the standard). A further 20.5% did not set appropriate actions relating to unused material.

4.6. One of the common failings, which we also identified in the 2018-19 inspection, was identifying issues related to disclosable unused material in the evidential analysis section of the MG3 but then using a standard template declaration in the disclosure section. This standard declaration reads “I have not been advised of any material which is likely to undermine the Crown’s case or assist the defence”. This illustrates the need to apply care and attention when using standard paragraphs or templates. We also noted cases where there was the potential for disclosable material, such as intelligence-led policing activity, but the prosecutor failed to ask the necessary questions to reveal possibly undermining information.

Case study

The Area charging lawyer was under some pressure to deal with an allegation of child abuse, as there was a link to other proceedings which were due for trial about two months later. This allegation was of non-recent indecent assault by the defendant against a child under the age of 16. The charging advice was thorough and well expressed. The prosecutor clearly identified reasonable lines of enquiry and dealt effectively with all the issues relating to unused material. After charge, the police supplied a good set of unused material schedules, which also supported efficient case progression. This charge was joined with the others, the original trial date was kept, and the defendant was convicted on all counts.

4.7. CPS Direct MG3s reached a higher standard overall than those generated by Areas.

Table 4: Comparison of CPS Direct and Area MG3s

Question	Answers	CPS Direct	Areas
The MG3 dealt properly with unused material	Fully met	45.6%	40.0%
	Partially met	34.0%	21.5%
	Not met	20.5%	38.5%
Where the MG3 fell below fully met, the main or most significant failing was:	Did not address unused material at all	5.1%	30.8%
	Did not address how disclosable unused material undermined the prosecution case or assisted the defence	36.8%	33.3%
	Did not discuss the impact of unused material (revealed by the police or not) on the evidence and public interest	19.7%	20.5%
	Did not set appropriate actions in the action plan in relation to unused material	24.8%	7.7%
The CPS advised the police on reasonable lines of enquiry	Yes	62.1%	53.2%
	No	37.9%	46.8%

After charge

4.8. Once the prosecution has served initial disclosure, the defence are required to set out their case in a defence statement. The prosecutor should send this to the police with guidance on any additional enquiries or unused material that may be indicated. In our sample, that opportunity was taken in 36.5% of relevant cases and in 41.7% of sensitive cases. This is a marked decline from the 60.0% of cases in the 2018-19 inspection where guidance was provided.

4.9. In nearly three quarters of the cases that did not meet the expected standard (74.7%), the defence statement was sent in an email or under cover of a standard letter without any case-specific advice, which shows the CPS adding no value. In another 20.5%, the advice given did not sufficiently relate the defence statement to the prosecution case strategy. A lack of a clear trial

strategy and proper understanding of their own case at charge, which we identified in our recent inspection of charging, may be contributing to prosecutors' failure to relate the defence case to their own and give the police proper guidance.

Service to the defence and the court

4.10. The charging lawyer gave sufficient instructions to the court prosecutor and reviewing lawyer in 55.9% of relevant cases. In 51.3% of relevant cases, the charging lawyer identified unused material that needed to be disclosed to the defence at the first hearing under DPP v Lee (see paragraph 3.6).

4.11. CPS Direct lawyers were much better at identifying DPP v Lee material, doing so in 57.1% of cases, compared to 17.6% for Area lawyers. CPS Direct also gave good instructions to the court prosecutor and reviewing lawyer more often than Areas (59.8% compared to 43.1%). In many of the cases where the prosecutor had identified that there was DPP v Lee material to disclose at the first hearing, we could not tell whether that disclosure had in fact been made, as there was no note to that effect on the hearing record sheet.

4.12. Fewer sensitive cases had good quality instructions to the court prosecutor and reviewing lawyer. There was very little difference in the rate of identification of DPP v Lee material.

Initial disclosure

4.13. In most of the cases in our sample (79.6%), initial disclosure was served after the plea and trial preparation hearing (PTPH). However, there were some cases (16.5%) where initial disclosure was made proactively, before the formal timetable was set, either at the first hearing in the magistrates' courts or between that hearing and the PTPH. Initial disclosure was served early more often in sensitive cases (17.6%) – although we note that there were more errors in sensitive cases, so this may be indicative of haste rather than proactivity. Initial disclosure was timely in the majority of cases (85.7%) and more so in sensitive cases (88.2%). Prosecutors often sought extensions ahead of the deadline when it was apparent that more time would be necessary.

4.14. We reviewed the provision of initial disclosure separately, depending on whether the unused material was disclosable or not. Table 5 sets out our findings for the two types of material and compares it to our findings for just sensitive material.

Table 5: Initial disclosure

Question	Answers	All cases	Sensitive cases
The prosecutor complied with their duties of initial disclosure in relation to non-disclosable unused material	Yes	42.6%	39.0%
	No	57.4%	61.0%
The prosecutor complied with their duties of initial disclosure in relation to disclosable unused material	Yes	45.3%	39.4%
	No	54.7%	60.6%

4.15. The most common failing in relation to non-disclosable unused material was using the wrong endorsements but with the right decisions (35 of 156 applicable cases, or 22.4%). The endorsement for items that the prosecutor considers not to be disclosable is different depending on whether the prosecutor has reviewed the material or not. We commonly saw that items had been supplied, but prosecutors endorsed the schedule to show that the item was not disclosable on the basis of the description rather than from their check of the item itself. This and another failing, that of not endorsing a blank schedule of sensitive material (21 cases or 13.5%), may fall into the category of errors of process rather than of decision-making. However, it is important that the prosecutor demonstrates they have properly considered the schedules and material and have communicated their decisions to the police and defence accurately.

4.16. A more substantive error, which featured in 18.6% of applicable cases, was deciding to disclose unused material that did not meet the disclosure test. This is an error which is very unlikely to cause risk to the interests of justice or of participants in the process, because favouring disclosure generally does not hamper the defence, and most of the material that was disclosed did not include personal information relating to a victim or witness. There was only one case where the prosecution did not carry out initial disclosure at all; it was not a sensitive case.

Case study

The suspect believed that the complainant had stolen about £8,500 from him while he was unconscious. The complainant alleged the suspect forced her into a car and took her to a cellar where he tied her up and threatened her in an effort to find out where the money was. The police rescued the complainant before any of the threats were carried out.

The material submitted by the police at charge referred to information that might be sensitive. The charging lawyer from CPS Direct asked the police for more details, suspecting that there may be undermining unused material to consider. Despite this, the police did not supply the relevant information, and the Area did not properly pursue or escalate the request, so it was four months after charge when the police responded. Once the position was clarified, it became apparent that the case could not proceed, and the prosecution offered no evidence. Earlier attention to the unused material would have saved resources for all involved and led to an earlier acquittal for the suspect.

4.17. Performance in relation to disclosable unused material was slightly better, but the most common failing was marking disclosable material as not disclosable (41.7%). This was also the most common reason for marking down initial disclosure in sensitive cases. This is the failing that carries the most risk to justice. In our file sample, there were 53 cases where this failing was apparent at initial disclosure. This is not the same as failing to disclose material that meets the test across the life of the case, as items may well have been disclosed at another stage after initial disclosure.

4.18. The proportion of endorsement errors was similar in sensitive cases and across all cases in the sample, but in sensitive cases, there were more instances of the prosecutor marking non-disclosable material as meeting the test and disclosing it.

Continuing disclosure

4.19. We have already discussed the frequent lack of specific guidance to the police on the defence statement (see paragraph 4.8). After the police respond, the prosecutor should consider what additional unused material ought to be disclosed. In our sample, continuing disclosure was timely in 69.9% of all cases, and in 78.1% of sensitive cases. In a few cases, we noted that continuing disclosure was premature rather than late, with the prosecutor not waiting for the police to respond to the defence statement.

Table 6: Prosecutors' compliance with statutory duties at continuing disclosure

Question	Answers	All cases	Sensitive cases
The prosecutor complied with their duties of continuing disclosure in relation to non-disclosable unused material	Yes	71.6%	73.3%
	No	28.4%	26.7%
The prosecutor complied with their duties of continuing disclosure in relation to disclosable unused material	Yes	67.1%	70.6%
	No	32.9%	29.4%

4.20. Unlike at the initial stage, sensitive cases demonstrated better compliance than non-sensitive cases at continuing disclosure. As we found in the 2018-19 inspection, continuing disclosure was dealt with much better than initial disclosure. There were six cases where continuing disclosure was not carried out at all; none of these were sensitive cases.

4.21. For non-disclosable material, the most frequent error (found in 42.6% of relevant cases) was marking it as disclosable. We noted that prosecutors were more likely to disclose items of non-disclosable material at this stage, even items they had marked as not disclosable at initial disclosure, and without explaining their reasoning. Not endorsing decisions correctly or at all accounted for another 18.5% of applicable cases. In the case of disclosable material, 34.6% of the cases failed because the prosecutor wrongly identified it as not disclosable.

4.22. There were 13 cases in which disclosable material was endorsed as not disclosable at both stages of the statutory regime. This does not mean that the material was not disclosed at all; we did not examine cases past our cut-off date of a fortnight before trial, and we had no access to the Crown Court digital case system to check whether informal disclosure had been made. Of those 13 cases, five were allegations of domestic abuse, but the rest were not sensitive. Eight ended in conviction and five in discontinuance or acquittal, including one Judge-directed acquittal.

4.23. Our sample contained only six cases where the defence applied to the court for additional disclosure under section 8 of the Criminal Procedure and Investigations Act 1996. In five of these cases, the prosecution dealt with the application appropriately and in a timely manner. Three out of the four sensitive cases with section 8 applications were handled well. In the fourth sensitive case, the prosecutor did not grip the issues in the case when making continuing disclosure and when responding to the section 8 application. In another case, it was the defence's section 8 application that prompted the CPS to review the

unused material properly; the handling of disclosure in the case had been inadequate up to that point.

4.24. In some complex cases, a disclosure management document (DMD) is used to record the approach taken by the police and prosecutor to reasonable lines of enquiry and unused material. This could include, for example, where there is a significant quantity of data downloaded from mobile phones or tablets, which it would be impossible to go through line by line, and which they assess by searching for particular words or phrases. The search terms chosen would be set out in the DMD, which would then be served on the defence, who are invited to identify any additional lines of enquiry or, for example, different search terms for data-heavy electronic devices. The DMD is also served on the court and is a useful aid for the Judge in robust case management. In our sample, there were 29 cases which we considered would have benefited from a DMD at some stage of the case; the document was properly completed in six cases pre-charge and 14 post-charge.

Case study

In a child sexual abuse case, the police gathered and assessed a considerable quantity of third party material. There was a thorough disclosure management document, and early service of initial disclosure (before the plea and trial preparation hearing) to aid effective disclosure management. A later section 8 application by the defence for additional items was dealt with robustly: disclosure was given where items met the test, but resisted where they did not. At the hearing of the section 8 application, the defence indicated they were satisfied the prosecution had complied with its duties.

4.25. Another important document is the disclosure record sheet (DRS), which ought to list all the relevant decisions (with reasons) and events in relation to disclosure during the life of the case. Since the 2018-19 inspection, changes to the CPS case management system have automated some of this process by logging key events, such as the receipt of the police schedules and sending of standard disclosure letters. This does not remove the need for prosecutors to endorse other events, such as their review of unused material and reasons for key actions and decisions, but it has meant that we saw no cases with more than one DRS, unlike in the 2018-19 inspection.

4.26. Over half the cases (50.9%), and 46.4% of sensitive cases, had a single, properly completed DRS. Where we found that the DRS was below the standard expected (136 cases), almost all (126) had one or more action or decision missing.

Recommendations

The Crown Prosecution Service should develop a clear strategy to improve the quality and standard of pre-charge reviews and case file reviews, including the expectation for reviews to consider and address disclosure issues. This should form a core part of the casework quality agenda and feature as part of the established individual quality assessment assurance regime. Prosecutors should be held accountable to this regime and prosecutors' compliance with it should be assessed to address weaknesses or concerns.

The Crown Prosecution Service should improve the capability and capacity of legal managers to understand and set clear expectations for disclosure review records, and provide clarity of expectations at all stages of review.

Service to victims, witnesses and the public

Compliance with the Code for Crown Prosecutors

4.27. As we do in almost all casework inspections, we considered whether the CPS's decision to charge and to proceed to trial was in accordance with the Code for Crown Prosecutors. To comply with the Code, there must be a realistic prospect of a conviction and a prosecution must be in the public interest.

4.28. In our sample of 280 cases, there were five cases where the decision made was wholly unreasonable, giving an overall Code compliance rate of 98.2%. Four defendants were wrongly charged, and all four cases were set down for trial when they should not have been. Three were dropped on the day of the trial, and one resulted in a Judge-directed acquittal.

Case study

The suspect (S) was believed to have been involved in two burglaries. The victim of the first burglary disturbed the burglar, who left a glove behind, which was found to have S's DNA on it. At the second burglary, crime scene investigators recovered marks made on a mirror by a glove, and those traces contained S's DNA. There was no evidence other than the DNA to link S to the two crimes.

The first victim gave a description of the burglar which clearly did not match S, being very different in respect of age and hair colour. S was therefore not the perpetrator of the first burglary. The unused material in relation to the first offence significantly undermined the prosecution case for the second, because somehow S's DNA had come to be on a glove used by someone else to commit a burglary, and the only link between S and the second offence was DNA deposited by a glove. Despite this, S was charged with the second burglary.

After charge, the full forensics statement was received, which confirmed the DNA match to S from the marks on the mirror, but also said: "However, in my opinion, the findings are approximately equally likely if [S] touched this area whilst wearing gloves or if another individual touched this area whilst wearing [S]'s gloves. Therefore, in my opinion, these findings are unable to assist in addressing if [S] was the person wearing the gloves at the time that the glove marks were made". Despite this undermining the prosecution case further, the case proceeded to trial. At the close of the prosecution case, the defence submitted that the DNA evidence was unreliable, and the Judge agreed, ordering the jury to acquit S.

The case ran from September 2019 to February 2020, and involved the attendance of a self-employed barrister at five Crown Court hearings including the trial. Their fees and much of the police and CPS resources would have been saved if the charging review had properly addressed the undermining unused material.

4.29. Post-charge, there was an additional case where the Area reviewing lawyer added a count of affray against one of two defendants, even though the CCTV clearly showed him trying to stop his colleague fighting with another man, stepping in between them, and attempting to drag him away. The defendant was convicted of an unconnected robbery, carried out with the same co-defendant, but acquitted of the affray.

Previous convictions of victims and witnesses

4.30. Previous convictions were the most likely item of unused material to have an impact on victims' or witnesses' credibility (see paragraph 2.20). Such records should not be disclosed automatically, and it is important that the prosecutor relates their impact to the specific issues in the case. An old conviction for a motoring offence, for example, is unlikely to undermine the credibility of the victim of an assault where the suspect's defence is mistaken identity.

4.31. In most of the cases we examined, at charge, the police sent details of any previous convictions recorded against victims and witnesses or told the prosecutor there were none recorded. However, the police were less efficient at listing previous convictions on the unused material schedule when first submitting them, and whilst we saw cases where the prosecutor challenged this error, this was not universal. There was one case where, at initial disclosure, the previous convictions were disclosed to the defence where they did not undermine or assist.

4.32. There were cases in our file examination where the prosecutor decided the previous convictions of a victim or witness were not disclosable. The guidance on the CPS internal website says that in these circumstances, a senior lawyer's approval should be obtained. That did not happen all the time in our file sample, though it may be that the consultation was recorded somewhere other than on the CPS case management system – for example, in an exchange of emails.

Direction of travel

4.33. There are some aspects of the CPS's performance that have improved since the 2018-19 inspection and some that have declined (measured against the fourth and final tranche of live trial files we examined). However, as we recognise elsewhere in this report, some of the findings may be affected by the different make-up of the file sample and the exclusion of rape cases in this inspection.

4.34. Although findings are not entirely uniform, the general picture appears to be one of improvements related to the recording and timeliness of the management of issues relating to disclosure, and a decline in the more substantive aspects of quality of review and developing an effective disclosure strategy. Of course, the fact that the quality of what has been received has also declined will, no doubt, have had an impact on how proactive and effective

Disclosure of unused material in the Crown Court: a follow-up

prosecutors could be when considering and handling the case at the review stage. This impact would be less significant once cases have been charged and are progressing through the system.

Table 7: Changes in performance at charge

Question	Answers	This inspection	2018-19 inspection
The CPS charging advice dealt properly with unused material	Fully met	44.3%	49.2%
	Partially met	31.1%	18.3%
	Not met	24.6%	32.5%
The prosecutor advised the police on reasonable lines of enquiry	Yes	60.3%	73.7%
	No	39.7%	26.3%
The MG3 gave sufficient instructions to the court prosecutor and reviewing lawyer about unused material	Yes	55.9%	52.8%
	No	44.1%	47.2%
The prosecutor identified any material that needed to be disclosed at the first hearing under DPP v Lee	Yes	51.3%	48.4%
	No	48.7%	51.6%

Table 8: Changes in performance at initial disclosure

Question	Answers	This inspection	2018-19 inspection
Initial disclosure was timely	Yes	85.7%	83.6%
	No	14.3%	16.4%
The prosecutor complied with the duty of initial disclosure in relation to non-disclosable unused material	Yes	42.6%	63.4%
	No	57.4%	36.6%
The prosecutor complied with the duty of initial disclosure in relation to disclosable unused material	Yes	45.3%	72.3%
	No	54.7%	27.7%

Table 9: Changes in performance at continuing disclosure

Question	Answers	This inspection	2018-19 inspection
The prosecutor chased a late defence statement	Yes	56.9%	55.6%
	No	43.1%	44.4%
The prosecutor challenged an inadequate defence statement	Yes	16.7%	20.0%
	No	83.3%	80.0%
Continuing disclosure was timely	Yes	69.9%	64.5%
	No	30.1%	35.5%
The prosecutor complied with the duty of continuing disclosure in relation to non-disclosable unused material	Yes	71.6%	83.8%
	No	28.4%	16.2%
The prosecutor complied with the duty of continuing disclosure in relation to disclosable unused material	Yes	67.1%	82.8%
	No	32.9%	17.2%

Table 10: Changes in performance across the life of the case

Question	Answers	This inspection	2018-19 inspection
There a disclosure management document where required	Yes	75.9%	73.9%
	No	24.1%	26.1%
There was a properly completed disclosure record sheet (DRS)	Yes, one DRS fully completed throughout the life of the case	50.9%	48.5%
	No, more than one DRS but no other issues	0.0%	14.2%
	No, some decisions and/or actions are missing from the DRS	45.5%	29.9%
	No, DRS only completed for initial disclosure	0.7%	3.7%
	No, there is no DRS and no explanation why not	2.9%	3.0%
	Other	0.0%	0.7%

Annex A

The disclosure regime

Every criminal investigation will generate two types of material. The first type is evidential and may include, for example, statements from witnesses who see the crime, CCTV, forensic analysis or admissions by the suspect. The second is material gathered in the course of the investigation that the Crown Prosecution Service (CPS) does not intend to use as evidence against the suspect. This “unused material” may include, for example, the crime log, investigators’ pocket notebooks, and search records.

Some investigations may generate a third type of material: that which is categorised as irrelevant.

Unused material may be sensitive or non-sensitive. Sensitive material can include, for example, information from an informant or that which would reveal the police’s investigative techniques. The category material falls into determines which schedule it is listed on by the police. The schedule for non-sensitive material is called an MG6C, while the schedule for sensitive material is an MG6D.

The unused material may not be disclosable to the defence. Material which is disclosable is that which undermines the prosecution (“undermining material”) or which may assist the defence case (“assisting material”). Material which falls into these categories includes, for example, an alibi witness, identification parade forms for witnesses who fail to pick out the defendant, matters which speak to the credibility of the victim or witness, and negative forensic analyses.

The Criminal Procedure and Investigations Act 1996⁶, supplemented by a statutory Code of Practice⁷ and a range of other guidance, sets out the obligations on the CPS, defence and police with regard to the disclosure of unused material. Once these statutory provisions are triggered, the prosecution must disclose undermining or assisting material (initial disclosure).⁸

The rare exception is if material that meets these criteria is sensitive. In those circumstances, the prosecution must apply to a Judge to withhold the material. This is known as a public interest immunity hearing, which can have two outcomes: the Judge can agree that the material can be withheld, or they can order it to be disclosed. If the latter, the prosecution must decide whether to disclose the material or discontinue the case.

Unused material can be generated by the police (crime logs, for example) or by a third party (NHS records, for example). In some instances, the victim will have

⁶ legislation.gov.uk/ukpga/1996/25/contents

⁷ *Criminal Procedure and Investigations Act Code of Practice*; Ministry of Justice; February 2015 [gov.uk/government/publications/criminal-procedure-and-investigations-act-code-of-practice](https://www.gov.uk/government/publications/criminal-procedure-and-investigations-act-code-of-practice)

⁸ In certain limited circumstances, there is an obligation on the prosecution to disclose material before the Act kicks in (see paragraph 3.6).

to consent for the material to be disclosed. For social services material specifically, there are agreed protocols on how it is handled and processes for determining what should be disclosed.

It is the duty of the investigator to reveal all relevant unused material to the prosecutor and to provide copies of any which undermine the prosecution or assist the defence. Every item should be listed on the correct schedule with a description sufficiently full for the prosecutor to be able to assess whether it is undermining or assisting material. Any schedule that does not meet the required standard should be returned to the police. Where the investigator has identified undermining or assisting material, it should be listed on a form known as an MG6E and cross-referenced to its number on the MG6C or MG6D. An MG6E should still be sent even if there is no material that requires disclosing.

It is the duty of the police to follow all reasonable lines of enquiry which may lead away from the suspect being responsible for the crime. Sometimes these will be raised by the defendant in interview. For example, the defendant may say that their mobile phone will not show any texts relating to drug dealing. If the police have the defendant's phone, then they would need to download messages to confirm (or not) what the defendant was saying. The case of *R v E*⁹ provides useful judicial guidance on what amounts to a reasonable line of enquiry, which in some cases may include the need to examine the victim's phone.

Once the prosecution has made initial disclosure, the defence must serve a defence statement within a set timescale.¹⁰ This should set out the defence case, the details of any alibi, any further reasonable lines of enquiry the defence believe should be carried out, and any further material they consider should be disclosed. The defence's reasoning for further reasonable lines of enquiry or disclosure must be explained in the context of the defence case. The prosecutor should reject any defence statement which does not meet the required standard.

The prosecutor should send the defence statement to the police, giving them guidance on what, if anything, needs to be done in the light of its content. The police must then review the unused material and carry out any further reasonable lines of enquiry. They must then submit another MG6E (and MG6C and MG6D if necessary) either identifying further material for potential disclosure or saying there is none. This is all part of the process of continuing disclosure, which makes it the responsibility of the investigator and the prosecutor to keep unused material under review at whatever stage in the process it is generated.

⁹ *EWCA Crim 2426*; British and Irish Legal Information Institute; November 2018 www.bailii.org/ew/cases/EWCA/Crim/2018/2426.html

¹⁰ Although it is always expressed as mandatory, the defence cannot be forced to serve a defence statement, but adverse inferences can be drawn from their failure to do so.

Disclosure of unused material in the Crown Court: a follow-up

If the prosecution and defence cannot agree on what should be disclosed, the defence may make an application to the court for it to determine whether the material meets the disclosure test. This is known as a Section 8 application.

Annex B

Question set

Throughout this annex, the abbreviation “UM” refers specifically to *relevant* unused material.

All cases at charge

Question	Answers
1 Was it apparent at charge that there was likely to be unused material (UM) in this case, over and above the usual items?	Yes
	No
	Not applicable

Police at charge

Question	Answers
2 Was all the expected UM available at charge?	Yes
	No, only some available
	No, none available
	Not applicable
	Yes
3 Was there UM that would have been available if the police had carried out reasonable lines of enquiry?	Yes
	No
	Not applicable
4 Did the police provide the UM or an adequate report on it to the Crown Prosecution Service (CPS) for pre-charge decision (PCD)?	Yes, the material was provided
	Yes, an adequate report was provided
	No, not provided and report was inadequate
	No, not provided and no report
	Not applicable
5 Did the UM (revealed by the police or otherwise apparent from the papers) include material that undermined the prosecution case or assisted the defence?	Yes
	No
	Not known
	Not applicable
6 Was there any material that fell to be disclosed immediately under DPP v Lee?	Yes
	No
	Not known
	Not applicable

Question	Answers
7 Did the police identify to the CPS that the UM included material that could undermine the prosecution case or assist the defence, or was disclosable under DPP v Lee?	Yes
	No
	Not applicable
8 Did the police submission accurately set out the prosecution case, any likely defences and any other relevant information, so as to enable the CPS to assess the impact of any UM?	Yes
	No
	Not applicable

CPS at charge

Question	Answers
9 Did the CPS identify and feed back to the police any failings with the police's dealings with unused material at charge?	Yes, identified and fed back
	No, identified but not fed back
	No, not identified and not fed back
	Not applicable
10 Did the CPS charging advice deal properly with disclosable and non-disclosable UM?	Fully met
	Partially met
	Not met
	Not applicable
11 If Q10 is partially met or not met, what was the main or most significant failing with UM?	Did not address UM at all
	Did not address how disclosable UM undermined the prosecution case or assisted the defence
	Did not discuss the impact of UM (revealed by the police or not) on the evidence and public interest
	Did not discuss any sensitivity of UM
	Did not set appropriate actions in the action plan in relation to UM
	Other
12	Not applicable
	Did not address UM at all

Disclosure of unused material in the Crown Court: a follow-up

Question	Answers
<p>If Q10 is partially met or not met, what was the next most significant failing with UM?</p>	<p>Did not address how disclosable UM undermined the prosecution case or assisted the defence</p> <hr/> <p>Did not discuss the impact of UM (revealed by the police or not) on the evidence and PI</p> <hr/> <p>Did not discuss any sensitivity of UM</p> <hr/> <p>Did not set appropriate actions in the action plan in relation to UM</p> <hr/> <p>Other</p> <hr/> <p>Not applicable</p>
<p>13 Did the CPS advise the police in the Manual of Guidance form 3 (MG3) on reasonable lines of enquiry?</p>	<p>Yes</p> <hr/> <p>No</p> <hr/> <p>Not applicable</p>
<p>14 What was the primary nature of the reasonable lines of enquiry on which the CPS did or should have advised?</p>	<p>Cell site analysis</p> <hr/> <p>Comms</p> <hr/> <p>Forensic and crime scene</p> <hr/> <p>Other third party</p> <hr/> <p>Expert</p> <hr/> <p>999 calls</p> <hr/> <p>Potential witnesses</p> <hr/> <p>Other</p> <hr/> <p>Not applicable</p>
<p>15 Did the CPS charging advice give sufficient instructions to the court prosecutor and reviewing lawyer about UM?</p>	<p>Yes</p> <hr/> <p>No</p> <hr/> <p>Not applicable</p>
<p>16 Did the charging lawyer identify any material that needed to be disclosed at the first hearing under DPP v Lee?</p>	<p>Yes</p> <hr/> <p>No</p> <hr/> <p>Not applicable</p>
<p>17 If there was a breach of the Code for Crown Prosecutors at charge, did it relate to UM?</p>	<p>Yes</p> <hr/> <p>No</p> <hr/> <p>Not applicable</p>

Communications material

Question	Answers
18 At charge, was it apparent that there was likely to be relevant comms material?	Yes
	No
19 Did the police provide the relevant comms material or an adequate report on it to the CPS at charge?	Yes, the material was provided
	Yes, an adequate report was provided
	No, not provided and the report was inadequate
	No, not provided and no report
20 If no, were there obvious further lines of enquiry that could have been undertaken before charge to enable the police to obtain and reveal the comms material?	Not applicable
	Yes
	No
	Not applicable

Third party material

Question	Answers
21 At charge, was it apparent that there was likely to be relevant third party (TP) material?	Yes
	No
22 Did the police provide the relevant TP material or an adequate report on it to the CPS at charge?	Yes, the material was provided
	Yes, an adequate report was provided
	No, not provided and the report was inadequate
	No, not provided and no report
23 If no, were there obvious further lines of enquiry that could have been undertaken before charge to enable the police to obtain and reveal the TP material?	Not applicable
	Yes
	No
	Not applicable

Initial submission of UM documents

Question	Answers
24 Did the police accurately identify disclosable UM at initial file submission on an MG6E or by other means?	Yes, on MG6E
	Yes, other means
	No
	Not applicable
25 Did the police respond appropriately to any actions relating to UM which were set by the CPS in the MG3 at PCD?	Yes
	No
	Not applicable
26 Did the police respond in a timely manner to actions set in the MG3 relating to UM?	Yes
	No
	Not applicable
27 For the first hearing, did the police accurately complete the section of the MG5 relating to any UM which may impact on bail or other prep of the D case (DPP v Lee)?	Yes in case with no disclosable material
	Yes in case with disclosable material
	No in case with no disclosable material
	No in case with disclosable material
	Not applicable
28 For the first hearing, did the police accurately complete the section of the MG6 relating to any UM which may undermine the prosecution case or assist the defence (Criminal Procedure and Investigations Act 1996)?	Yes in case with no disclosable material
	Yes in case with disclosable material
	No in case with no disclosable material
	No in case with disclosable material
	Not applicable
29 Did the police include the right UM form(s) for the type of case?	Yes
	No
	Not applicable
30	No form(s) sent

Question	Answers
If no, what was the main or most significant failing?	Streamlined Disclosure Certificate (SDC) sent instead of schedules or v.v. No MG6B No MG6C or SDC No MG6D No MG6E Other Not applicable
31 Was the information on the form(s) (SDC or schedules) complete and accurate?	Yes No Not applicable
32 If Q31 is no, what was the main or most significant failing?	Item(s) missed off an SDC or MG6C Item(s) missed off an MG6D Item(s) listed on MG6C in error Item(s) listed on MG6D in error Item(s) description inadequate Failed to explain why UM was sensitive Irrelevant material was included Evidential material was included Other Not applicable
33 If Q31 is no, what was the next most significant failing?	Item(s) missed off an SDC or MG6C Item(s) missed off an MG6D Item(s) listed on MG6C in error Item(s) listed on MG6D in error Item(s) description inadequate Failed to explain why UM was sensitive Irrelevant material was included

Question	Answers
	Evidential material was included
	Other
	Not applicable
34 Was the police MG6E accurate and complete?	Yes
	No, identified only some of the disclosable UM
	No, identified none of the disclosable UM
	No, identified UM as disclosable when it was not
	Not applicable
35 Was the police submission of the UM form(s) timely?	Yes
	No
	Not applicable
36 Did the police supply copies of any items they ought to have sent?	Yes
	No
	Not applicable

Initial disclosure – all cases

Question	Answers
37 Did the prosecutor challenge identify and feed back to the police any police failings identified in Q24-36?	Fully met
	Partially met
	Not met
	Not applicable
38 At what stage was initial disclosure (ID) served?	Before first hearing
	At first hearing
	After first hearing before PTPH
	At PTPH
	After PTPH
	Not served
	Not applicable
39 Was ID timely?	Yes
	No

Question	Answers
	Not applicable

Initial disclosure – non-disclosable UM

Question	Answers
40 Did the prosecutor comply with the duty of ID (not timeliness) in relation to non-disclosable UM (NDUM)?	Yes
	No
	Not applicable
41 If Q40 is no, what is the main or most significant failing?	Did not carry out ID at all
	Did not endorse any decisions on the MG6C
	Failed to endorse/sign a blank MG6D
	Did not endorse any decisions on a non-blank MG6D
	Said non-sensitive NDUM was disclosable
	Said sensitive NDUM was disclosable
	Did not specify the right test for disclosure
	Used the wrong endorsements
	Did not identify reasonable lines of enquiry
	Other
Not applicable	
42 If Q40 is no, what was the next most significant failing?	Did not endorse any decisions on the MG6C
	Failed to endorse/sign a blank MG6D
	Did not endorse any decisions on a non-blank MG6D
	Said non-sensitive NDUM was disclosable
	Said sensitive NDUM was disclosable

Question	Answers
	Did not specify the right test for disclosure
	Used the wrong endorsements
	Did not identify reasonable lines of enquiry
	Other
	Not applicable
43 If the prosecutor at ID identified as not disclosable UM that the police had considered was disclosable, did the prosecutor inform the police why it was not disclosable?	Yes
	No
	Not applicable

Initial disclosure – disclosable UM

Question	Answers
44 Did the prosecutor comply with the duty of ID (not timeliness) in relation to disclosable UM (DUM)?	Yes
	No
	Not applicable
45 If Q44 is no, what is the main or most significant failing?	Did not carry out ID at all
	Did not endorse any decisions on the MG6C
	Failed to endorse/sign a blank MG6D
	Did not endorse any decisions on a non-blank MG6D
	Said non-sensitive DUM was not disclosable
	Said sensitive DUM was not disclosable
	Did not specify the right test for disclosure
	Used the wrong endorsements
	Did not identify reasonable lines of enquiry
	Other
	Not applicable

Question	Answers
46 If Q44 is no, what was the next most significant failing?	Did not endorse any decisions on the MG6C
	Failed to endorse/sign a blank MG6D
	Did not endorse any decisions on a non-blank MG6D
	Said non-sensitive DUM was not disclosable
	Said sensitive DUM was not disclosable
	Did not specify the right test for disclosure
	Used the wrong endorsements
	Did not identify reasonable lines of enquiry
	Other
Not applicable	
47 If the prosecutor at ID identified as disclosable UM that the police had considered was not disclosable, did the prosecutor inform the police why it was disclosable?	Yes
	No
	Not applicable

Continuing disclosure – all cases

Question	Answers
48 Was a defence statement (DS) served?	Yes
	No
	Not applicable
49 Was it served on time?	Yes
	No
	Not applicable
50 Did the prosecutor chase a late DS?	Yes
	No
	Not applicable
51 Was the DS adequate?	Yes
	No

Disclosure of unused material in the Crown Court: a follow-up

Question	Answers
	Not applicable
52 Did the prosecutor challenge an inadequate DS?	Yes
	No
	Not applicable
53 Was the DS sent to the police disclosure officer in a timely manner?	Yes
	No
	Not applicable
54 Did the prosecutor review the DS and provide comments and advice to the police?	Yes
	No
	Not applicable
55 If no, what was the main or most significant failing?	Did not provide any comments on the DS
	Did not adequately relate the DS to the prosecution case and trial strategy
	Other
	Not applicable
56 Did the comments or advice from the prosecutor when sending the DS to the police include identification of reasonable lines of enquiry?	Yes
	No
	Not applicable
57 Was it apparent upon receipt of the DS that there was likely to be further UM to be revealed to the prosecution at this stage?	Yes
	No
	Not applicable
58 Should that further UM have been identified earlier?	Yes, by police
	Yes, by prosecution
	Yes, by both
	No
	Not applicable
59 Was the police MG6E submitted in response to the DS accurate and complete?	Yes
	No, identified only some of the DUM
	No, identified none of the DUM
	No, identified UM as disclosable when it was not

Question	Answers
	Not applicable
60 In response to the DS, did the police supply an additional, properly completed MG6C and/or MG6D?	Yes
	No, further items not identified at all
	No, further items identified but not scheduled
	No, not all items listed on the new MG6C
	No, new MG6C has incorrect numbering
	No, other problem with MG6C
	No, not all items listed on the new MG6D
	No, other issue
	Not applicable
61 Was continuing disclosure (CD) timely?	Yes
	No
	Not applicable

Continuing disclosure – non-disclosable UM

Question	Answers
62 Did the prosecutor comply with the duty of CD (not timeliness) in relation to non-disclosable UM (NDUM)?	Yes
	No
	Not applicable
63 If Q62 is no, what is the main or most significant failing?	Did not carry out CD at all
	Did not endorse decisions about non-sensitive NDUM
	Did not endorse decisions about sensitive NDUM
	Said non-sensitive NDUM was disclosable
	Said sensitive NDUM was disclosable

Question	Answers
	<p>Did not specify the right test for disclosure</p> <p>Did not identify reasonable lines of enquiry (RLE)/ask the police to deal with obvious questions arising from the DS</p> <p>Other (please note)</p> <p>Not applicable</p>
64 If Q62 is no, what was the next most significant failing?	<p>Did not endorse decisions about non-sensitive NDUM</p> <p>Did not endorse decisions about sensitive NDUM</p> <p>Said non-sensitive NDUM was disclosable</p> <p>Said sensitive NDUM was disclosable</p> <p>Did not specify the right test for disclosure</p> <p>Did not identify RLE/ask the police to deal with obvious questions arising from the DS</p> <p>Other (please note)</p> <p>Not applicable</p>
65 If the prosecutor at CD identified as not disclosable UM that the police had considered was disclosable, did the prosecutor inform the police why it was not disclosable?	<p>Yes</p> <p>No</p> <p>Not applicable</p>

Continuing disclosure – disclosable UM

Question	Answers
66 Did the prosecutor comply with the duty of CD (not timeliness) in relation to disclosable UM (DUM)?	<p>Yes</p> <p>No</p> <p>Not applicable</p>
67 If Q66 is no, what is the main or most significant failing?	<p>Did not carry out CD at all</p> <p>Did not endorse decisions about non-sensitive DUM</p>

Question	Answers
	<p>Did not endorse decisions about sensitive DUM</p> <hr/> <p>Said non-sensitive DUM was not disclosable</p> <hr/> <p>Said sensitive DUM was not disclosable</p>
	<p>Did not specify the right test for disclosure</p> <hr/> <p>Did not identify RLE/ask the police to deal with obvious questions arising from the DS</p> <hr/> <p>Other (please note)</p> <hr/> <p>Not applicable</p>
<p>68 If Q66 is no, what was the next most significant failing?</p>	<p>Did not endorse decisions about non-sensitive DUM</p> <hr/> <p>Did not endorse decisions about sensitive DUM</p> <hr/> <p>Said non-sensitive DUM was not disclosable</p> <hr/> <p>Said sensitive DUM was not disclosable</p> <hr/> <p>Did not specify the right test for disclosure</p> <hr/> <p>Did not identify RLE/ask the police to deal with obvious questions arising from the DS</p> <hr/> <p>Other (please note)</p> <hr/> <p>Not applicable</p>
<p>69 If the prosecutor at CD identified as disclosable UM that the police had considered not disclosable, did the prosecutor inform the police why it was disclosable?</p>	<p>Yes</p> <hr/> <p>No</p> <hr/> <p>Not applicable</p>

Defence section 8 application

Question	Answers
<p>70</p>	<p>Yes</p> <hr/> <p>No, late response</p>

Question	Answers
If the defence made a section 8 application, did the prosecutor respond appropriately and in a timely manner?	No, inadequate response
	No, both
	Not applicable

All cases, throughout the life of the case

Question	Answers
71 Was there UM in this case, over and above the usual items?	Yes
	No
	Not applicable
72 If there was a breach of the Code for Crown Prosecutors post charge, did it relate to UM?	Yes
	No
	Not applicable
73 Did the UM relate primarily to evidence or public interest?	Evidence
	Public interest
	Not applicable
74 Was the UM non-sensitive or sensitive?	Non-sensitive
	Sensitive
	Both
	Not applicable
75 What was the primary reason for any UM being sensitive?	National security
	Covert human intelligence source (CHIS) or undercover officer (UCO)
	Police techniques
	Where disclosure could hinder prevention or detection of crime
	Search warrant information
	Information given in confidence
	Material relating to private life of a witness
	Other
	Not applicable
76 What type was the most significant UM?	Victim credibility
	Witness credibility

Question	Answers
	<p>Witness account</p> <hr/> <p>Crime scene investigation (CSI) or forensic evidence (including negative result)</p> <hr/> <p>Medical evidence (including psychiatric)</p> <hr/> <p>Other expert evidence</p> <hr/> <p>Comms: contact between defendant and victim, witness or others; contact from victim or witness to others</p> <hr/> <p>Third party material</p> <hr/> <p>Other</p> <hr/> <p>Not applicable</p>
<p>77 What type was the next most significant UM?</p>	<p>Victim credibility</p> <hr/> <p>Witness credibility</p> <hr/> <p>Witness credibility</p> <hr/> <p>CSI or forensic evidence (including negative result)</p> <hr/> <p>Medical evidence (including psychiatric)</p> <hr/> <p>Other expert evidence</p> <hr/> <p>Comms: contact between defendant and victim, witness or others; contact from victim or witness to others</p> <hr/> <p>Third party material</p> <hr/> <p>Other</p> <hr/> <p>Not applicable</p>
<p>78 What was the main type of the material impacting on victim or witness credibility?</p>	<p>Victim or witness previous convictions</p> <hr/> <p>Victim or witness has made previous inconsistent statements</p> <hr/> <p>Other victim or witness credibility</p> <hr/> <p>Not applicable</p>

Question	Answers
79 What was the main type of the UM relating to comms/contact from/between parties?	Direct contact between defendant and victim (text, letter, phone call or in person) Social media contact between defendant and victim Direct contact between defendant and a witness Social media contact between defendant and a witness Contact between defendant and another Contact between victim and another Other Not applicable
80 What was the main type of third party UM?	Forensic service provider Social services NHS Education Family proceedings Other Not applicable
81 Was there a disclosure management document (DMD) where required?	Yes No Not applicable
82 Was it completed fully and accurately at the pre-charge stage?	Yes, by police and CPS Yes, police supplied info Yes, CPS completed DMD No by neither Not applicable
83 Was it completed accurately and fully post-charge?	Yes No Not applicable
84 Did the prosecutor keep UM under continuous review	Yes No

Question	Answers
	Not applicable
85 Did the prosecutor properly complete a disclosure record sheet (DRS)?	Yes, one DRS fully completed throughout the life of the case No, more than one DRS but no other issues No, some decisions and/or actions are missing from the DRS No, DRS only completed for ID No, there is no DRS and no explanation why not Other (please note) Not applicable
86 Did the police correctly identify what was evidence and what was UM?	Yes No, identified some of the evidence as UM No, identified some of the UM as evidence No, did not distinguish between evidence and UM when submitting material Not applicable
87 Did the police supply copies of UM where appropriate?	Yes No Not applicable
88 Did the prosecutor ask to see items of UM where appropriate?	Yes for ID and CD Yes for ID, and CD not reached yet Yes, no need to ask as already supplied for both stages No, asked for ID but not for CD No, asked for CD but not for ID No, did not ask for ID, and CD not reached yet Other Not applicable

Disclosure of unused material in the Crown Court: a follow-up

Question	Answers
89 Was a public interest immunity (PII) application made where it was appropriate to do so?	Yes No Not applicable
90 Could any UM disclosed by the police at any stage after charge have materially affected the pre-charge advice provided?	Yes No Not applicable
91 Could any UM disclosed by the police at any stage after the initial review have materially affected the initial review by the prosecutor?	Yes No Not applicable
92 If Q90 and/or Q91 are yes, did the CPS identify the failings and feed back to the police?	Yes identified and fed back No, identified but not fed back No, not identified and not fed back Not applicable
93 Was there evidence that at any stage the police had failed to retain UM?	Yes No Not applicable
94 Was there evidence that at any stage the police had failed to record UM that was not originally in a recorded format?	Yes No Not applicable
95 If Q93 and/or Q94 are yes, did the CPS identify the failings and feed back to the police?	Yes identified and fed back No, identified but not fed back No, not identified and not fed back Not applicable

Annex C

File examination data

Disclosure of unused material in the Crown Court: a follow-up

Figure 1: Was there unused material that would have been available if the police had carried out reasonable lines of enquiry?

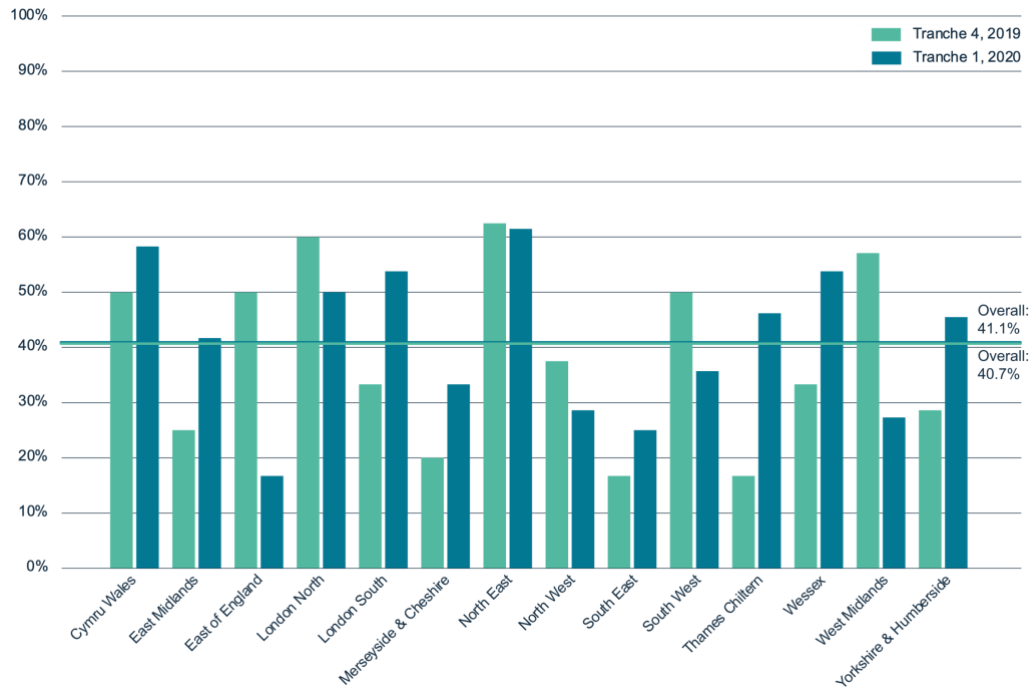
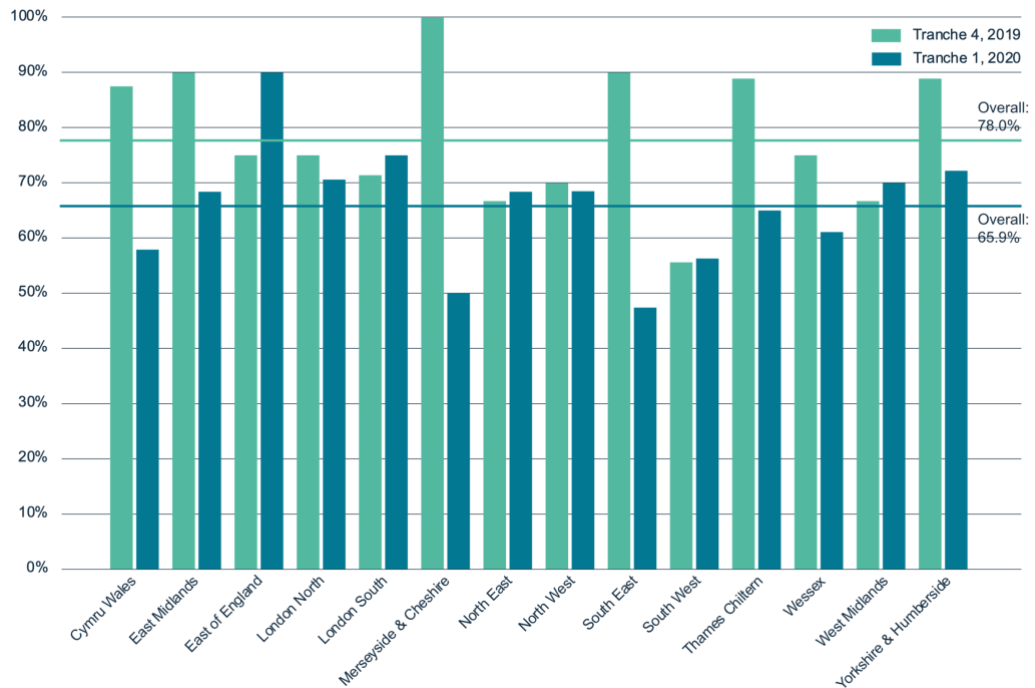


Figure 2: Did the police provide the unused material or an adequate report on it to the CPS for pre-charge decision?



Disclosure of unused material in the Crown Court: a follow-up

Figure 4: Did the police identify to the CPS that the unused material included material that could undermine the prosecution case or assist the defence, or was

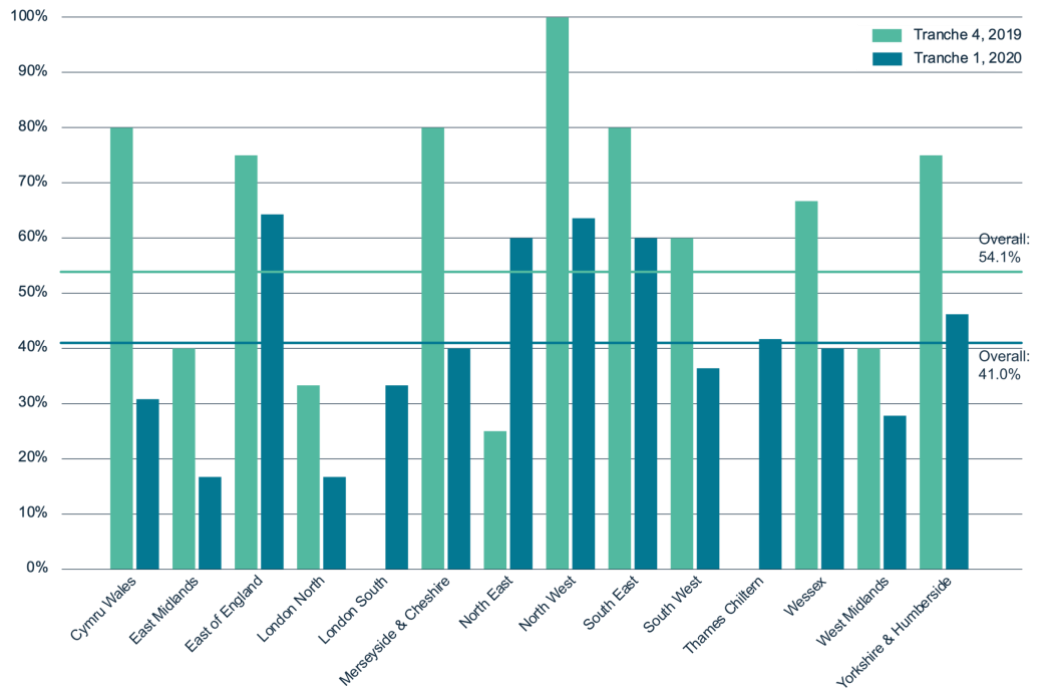
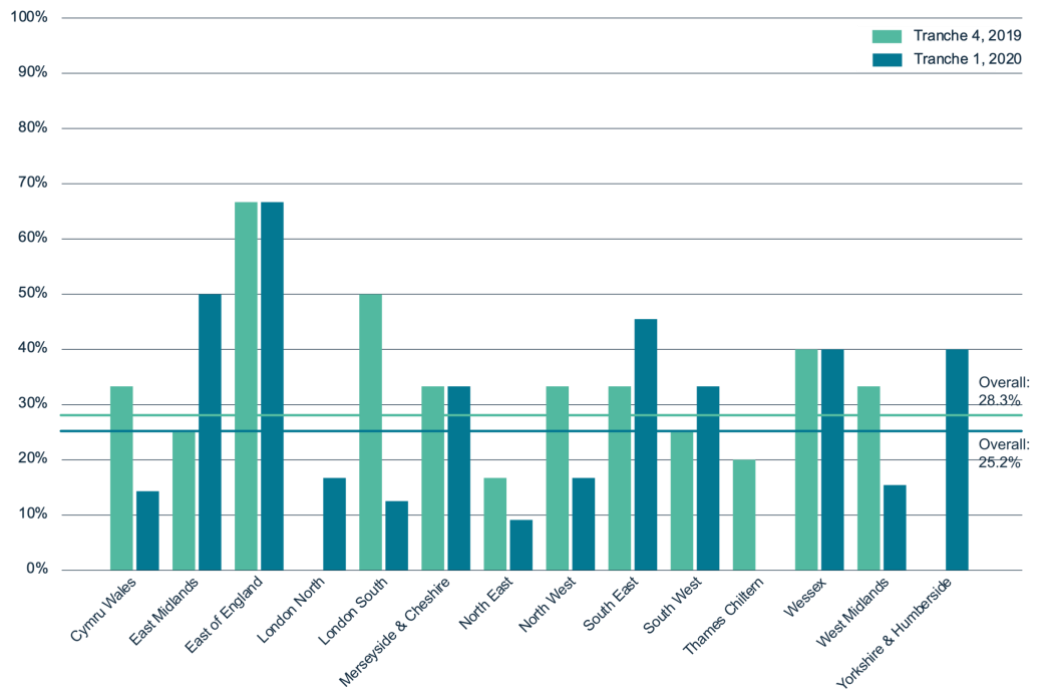


Figure 3: Did the CPS identify and feed back to the police any failings with the police dealings with unused material at charge?



Disclosure of unused material in the Crown Court: a follow-up

Figure 6: Did the CPS charging advice deal properly with disclosable and non-disclosable unused material?

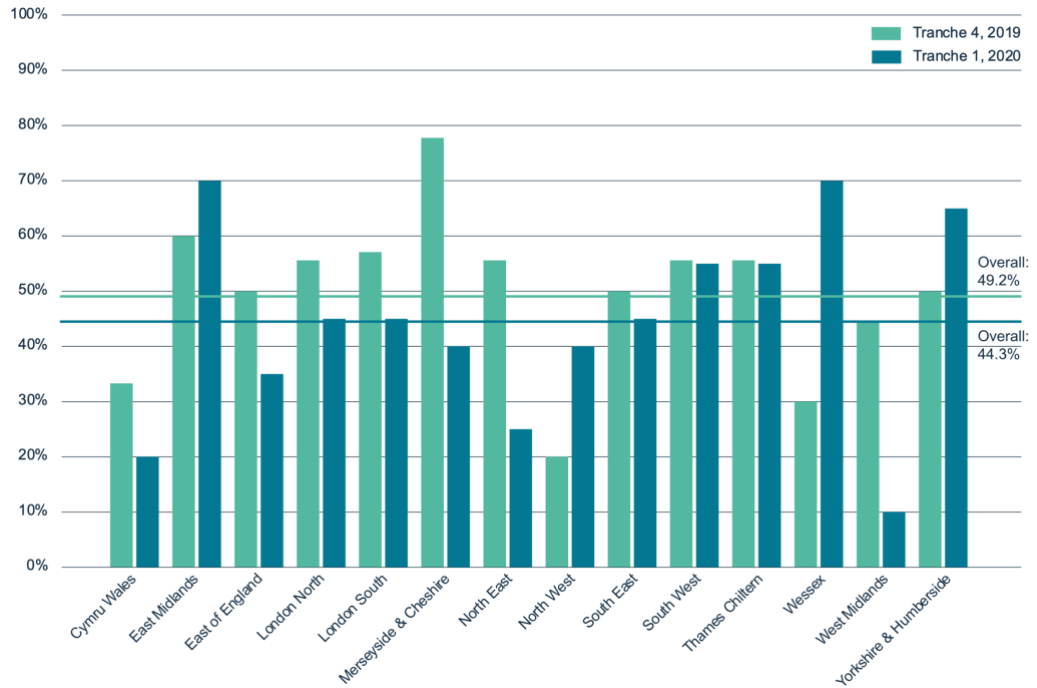
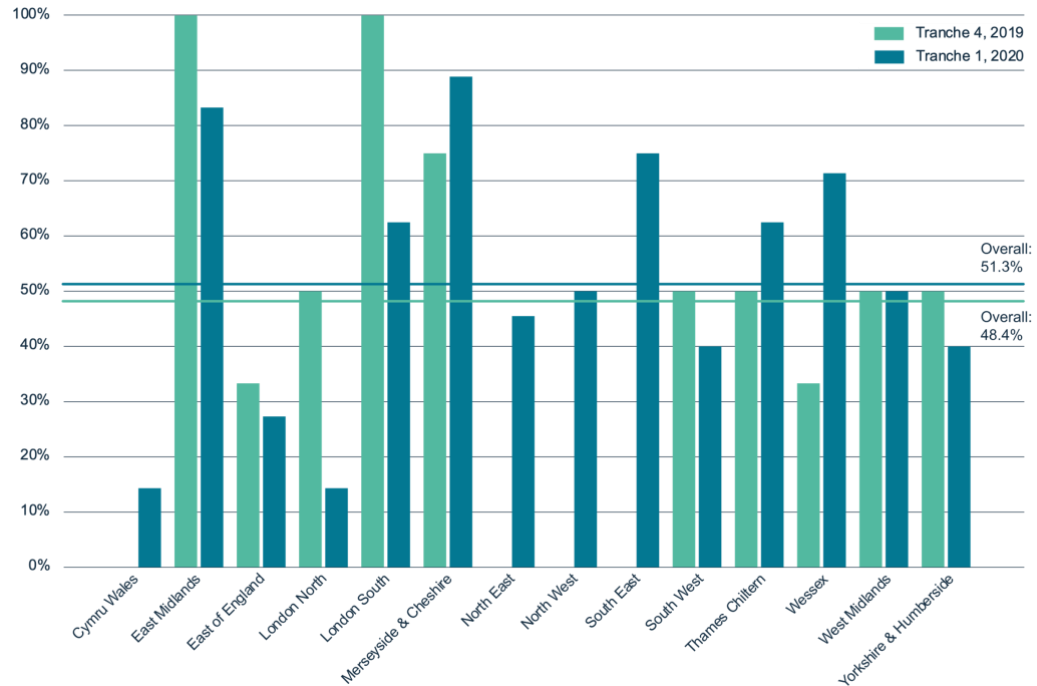


Figure 5: Did the charging lawyer identify any material that needed to be disclosed at the first hearing under DPP v Lee?



Disclosure of unused material in the Crown Court: a follow-up

Figure 7: Did the prosecutor challenge identify and feed back to the police any police failings identified in Q24-36 (which relate to the standard of the police file

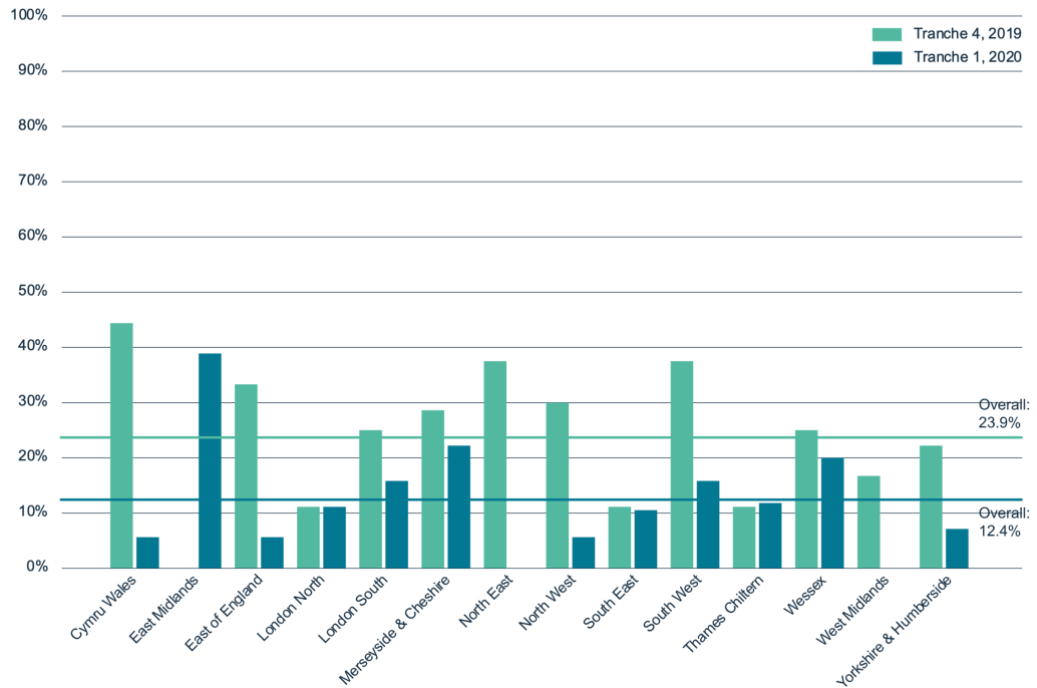


Figure 8: Did the prosecutor review the defence statement and provide comments and advice to the police?

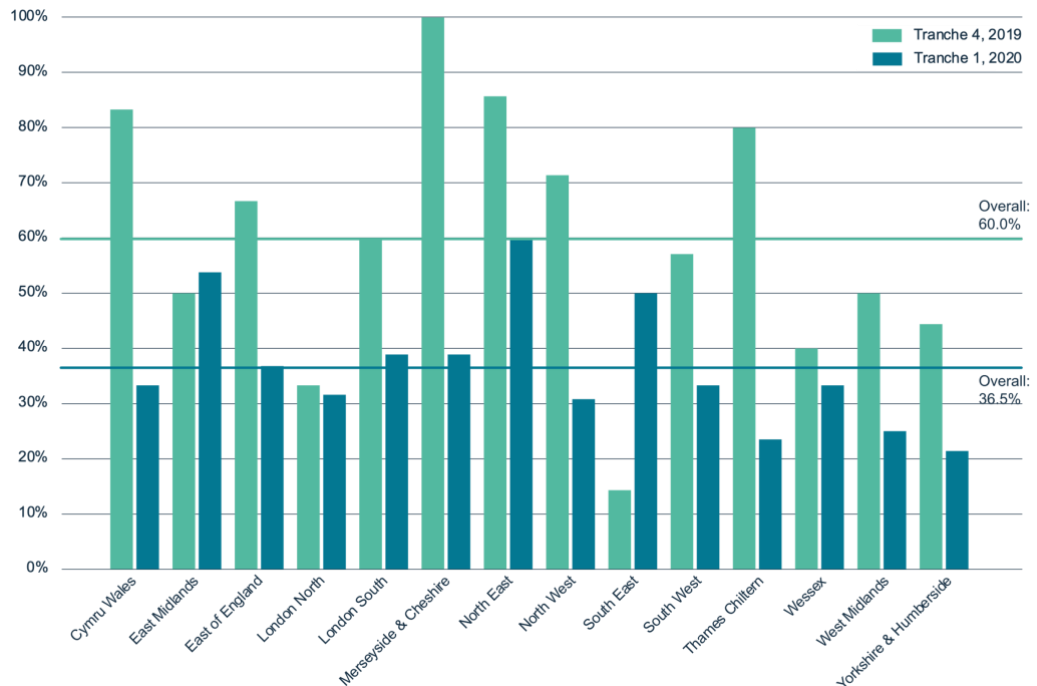
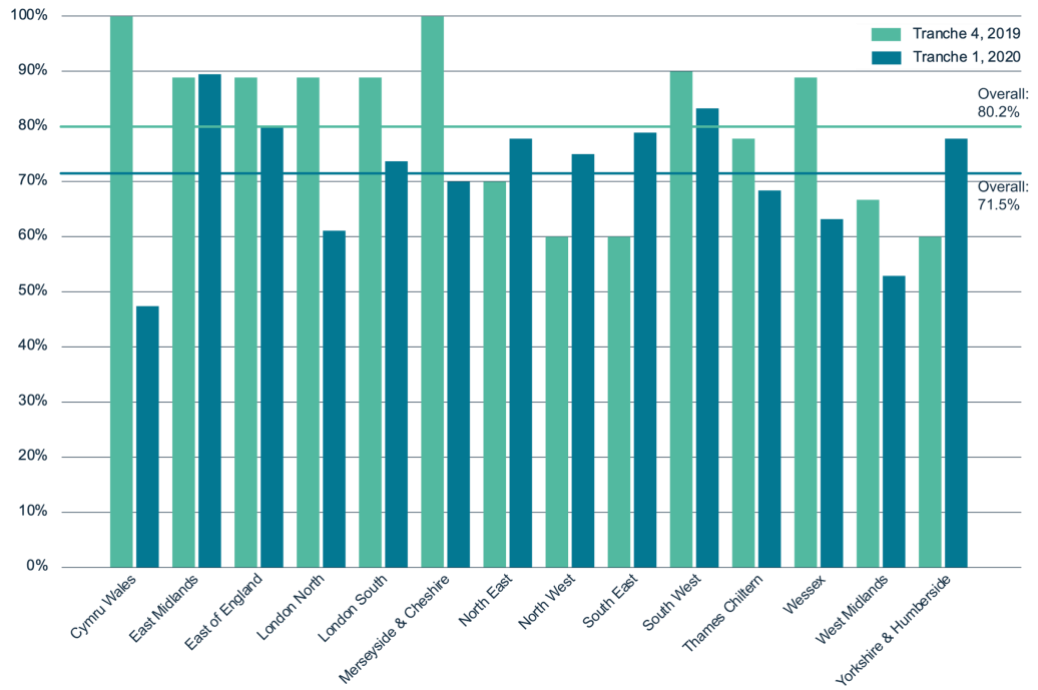


Figure 9: Did the prosecutor keep unused material under continuous review?



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