Cardiff Law School Innocence Project

CENTRE for CRIMINAL APPEALS

Disclosure

Written evidence to the Justice Select Committee inquiry

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Centre for Criminal Appeals

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Introduction

The **Centre for Criminal Appeals** is a legal action charity that fights miscarriages of justice and demands reform. Through our work challenging wrongful convictions, we have been routinely hampered in our efforts identifying and correcting miscarriages of justice by difficulties accessing post-conviction disclosure from police and the Crown Prosecution Service. At the same time, we have become acutely aware of the tragic human consequences trial disclosure failings can have.

The **Cardiff Law School Innocence Project** was established in 2006 and engages law students under academic and, when available, legal guidance, in investigating claims of innocence in criminal cases. In most instances the work and effectiveness of the project is severely restricted by missing documents, the cost or destruction of trial transcripts and the inability to obtain post-trial disclosure. There is a relentless demand from convicted persons for assistance from the project, however the powers of the project are severely restricted by the current systemic resistance to post-trial disclosure and further exacerbated by not having the status of a law firm.

Executive Summary

- The current disclosure regime is not fit for purpose. Under it, crucial evidence is routinely withheld from defendants and there is an unacceptably high risk of miscarriages of justice occurring.

- Disclosure failings are not a new problem. Promises of improved training have been made time and time again, yet the problem persists.

- Bold change is needed to re-establish the right to a fair trial. In particular, the police should be relieved of their role deciding what evidence is – and more importantly what evidence is not – disclosed to defendants.

- Instead, an Independent Disclosure Agency should be established to review all material gathered in a case, strip out any genuinely sensitive material, and provide an identical level of disclosure to both prosecution and defence.

- This proposal would be consistent with the important principle of equality of arms. Such a body would require adequate resourcing but would free up significant amounts of police resources and court time.

- Structural change must be accompanied by increased resources, particularly for defence work. Currently, there is no legal aid for reviewing unused material – there was no pay incentive for the work that ultimately prevented Liam Allan's wrongful imprisonment.

- Although trial-level disclosure failings are widespread, the current post-conviction disclosure regime makes it unnecessarily difficult for any resulting

miscarriages of justice to be addressed. Had Liam Allan been convicted, he likely would never have been able to access the evidence that exonerated him.

- Improved access to police and CPS files should be provided to appeals lawyers and university innocence projects, per the Open Justice Charter.[1] Disclosure refusals should be made easily challengeable through recourse to an independent body or tribunal.

- It is not enough to say that the Criminal Cases Review Commission (CCRC) can access such material; their reviews are no longer sufficient to reliably identify miscarriages of justice resulting from disclosure failings. It is the defendant or would-be appellant to whom the right of access to post-conviction disclosure should apply. This right should not be denied because of the existence of an arm's length body subject to the vagaries of government funding levels. In addition, defendants who have not been able to find grounds for appeal without further disclosure are almost never eligible for the CCRC's assistance.

[1] http://thejusticegap.com/2016/12/ojc/.

The current disclosure framework

Are the current policies, rules and procedures satisfactory to enable appropriate disclosure of evidence and support the defendant's right to a fair trial?

Pre-trial and trial disclosure

1. No, the current disclosure framework has inherent faults which cause an unacceptably high risk of defendants receiving unfair trials and miscarriages of justice resulting. The Criminal Procedure and Investigations Act 1996 (as amended by the Criminal Justice Act 2003) and its accompanying Code of Practice are structurally flawed in three key respects, which are interlinked:

- They require the police and prosecution to act in an impartial and inquisitorial manner, when in practice they act as adversaries to the defence;
- They require police officers to make critical legal decisions regarding the sensitivity of material, when they are not legally-qualified;
- They require police officers and prosecutors to make decisions regarding the relevance and value of material, when in fact it is the defence who will almost always likely know better what will help establish their client's innocence or lesser culpability.

2. Evidence that police officers and prosecutors are inherently the wrong people to be tasked with ensuring the defence receives fair disclosure is provided by CPS focus group notes and survey answers obtained by the Centre for Criminal Appeals from HMCPSI under the Freedom of Information Act (FOIA). In these, prosecutors state that:

- "officers… put undermining material on the [MG6]D [the sensitive unused material schedule] to hide [it from the defence]";

- "officers are reluctant to investigate a defence or take statements that might assist the defence or undermine our case";
- some "lawyers simply refuse to disclose undermining material".

These comments illustrate why in an adversarial system it is too risky to assign one side (the police and CPS) responsibility for providing fair and full disclosure to the other (the defence).

Post-conviction disclosure

3. No, the current post-conviction disclosure framework is not satisfactory for enabling appropriate disclosure of evidence. This is because under it, it is incredibly difficult for the wrongly convicted to discover and access police and CPS documents and exhibits that could help exonerate them.

4. Post-conviction disclosure is governed by:

- Section 72 of the *Attorney General's Guidelines on Disclosure (2013)*, which states: "Where, after the conclusion of the proceedings, material comes to light, that might cast doubt on the safety of the conviction, the prosecutor must consider disclosure of such material."
- The case of *R (Nunn) v Chief Constable of Suffolk Constabulary [2014] UKSC 37*, which endorsed this guideline "with the addition that if there exists a real prospect that further enquiry may reveal something affecting the safety of the conviction, that enquiry ought to be made".

5. This legal framework is inherently flawed for three reasons:

- It places those seeking disclosure in a Catch-22. To make a successful request, they will need to know of the likely existence of specific exculpatory material within police and CPS files in advance. Yet the only possible way of

discovering the existence of such material will almost always be through having access to the files and reviewing them;

- It leaves decision-making regarding access to material to police forces and the CPS, who naturally have little incentive to open their past actions to scrutiny;
- It relies on the CCRC as a "safety net" (*Nunn*, paragraph 39) that can be trusted to obtain and review sufficient post-conviction disclosure from the police and CPS. This disregards that facts that (a) in cases where a first appeal has not been possible (perhaps due to the need for post-conviction disclosure) defendants are ineligible for a case review by the CCRC, and (b) in practice the CCRC uses its investigatory powers very conservatively, as evidenced by its 0.77% referral rate and the tragic case of Victor Nealon, who spent an extra 16 years wrongly imprisoned because the CCRC refused to conduct the DNA testing that would eventually exonerate him.

6. This current legal framework has arisen from a desire to make impossible what are disparagingly called "fishing exhibitions". However, the simple reality is that in most cases the only way in which exculpatory material will be uncovered is by a comprehensive review of police and prosecution material on a case.

7. This point can be illustrated through comparison with a jurisdiction that enables such "fishing expeditions", namely Louisiana in the United States. There, the State's public records law allows those investigating potential miscarriages of justice to access the full files held by police and prosecutors on a case once a conviction is final. According to Innocence Project New Orleans: "Of the 48 people in Louisiana who have been exonerated since 1990, at least 43 exonerations were based on public records".[2] In Louisiana, then, access (whether public or professional) to full police and prosecution files is essential in order for most wrongly convicted people to access

[2] http://www.theadvocate.com/new_orleans/news/courts/article_bfe68a28-2f7a-11e7-81ad-d77da0151947.html.

justice. Is it so unreasonable to suggest that might be true in England and Wales as well?

Disclosure in practice

How do the current policies, rules and procedures on disclosure operate in practice and are there any practical barriers to them working effectively?

Pre-trial and trial disclosure

8. The way in which the current policies, rules and procedures on pre-trial and trial disclosure operate in practice can only be described as a comprehensive failure. The evidence for this assessment is overwhelming and includes:

- The wrongful convictions of individuals such as Danny Kay;[3]
- Cases such as that of Liam Allan, where wrongful imprisonment was only narrowly avoided;[4]
- The damning statistics on disclosure failings presented in the HMCPSI and HMIC's joint report, *Making it Fair*;[5]
- The increasing number of collapsed prosecutions due to disclosure failings;[6]
- More than a third of 1,282 defence lawyers surveyed reporting disclosure failings leading to possible wrongful convictions or miscarriages of justice.[7]

9. These disclosure failings are not new. Nor are they limited to particular groups of cases such as sex cases or those involving large amounts of digital material. While cuts to resources have no doubt worsened the situation, they alone are not to blame. Widespread disclosure failings have persisted despite numerous reviews and recommendations of better training, including in just the last ten years: HMCPSI's review in 2008,[8] HMCPSI's follow-up review in 2009,[9] Lord Justice Gross' review in 2011[10] and the Magistrates' Court Disclosure Review in 2014.[11]

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[3] http://www.bbc.co.uk/news/uk-england-derbyshire-42576716.
[4] http://www.dailymail.co.uk/news/article-5207249/Female-barrister-cleared-student-rape-slams-police.html.
[5] https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2017/07/CJJI_DSC_thm_July17_rpt.pdf.
[6] http://www.bbc.co.uk/news/uk-42795058.
[7] http://www.bbc.co.uk/news/uk-43174235.
[8] https://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/DCL_thm_report.pdf.

Post-conviction disclosure

1o. The way the current post-conviction disclosure framework operates in practice is a failure because it inhibits miscarriage of justice enquiries and leaves wrongly convicted people unable to prove their innocence.

11. In our experience working on potential miscarriage of justice cases, even highly specific requests for material from the police and CPS are normally turned down. This includes, for example, requests for unreviewed CCTV footage from around the crime scene, requests for police identity parade documentation when procedures can already be shown to have been violated, and requests for details of other, unfounded, allegations made by a complainant in a case.

12. Often, staff at police forces are ignorant of the current post-conviction disclosure framework and will incorrectly treat requests for disclosure as Subject Access or Freedom of Information requests (and then use FOIA exemptions to refuse disclosure). However, for the reasons given above, we maintain that the problem is more fundamental than a lack of knowledge on behalf of the police. The problem is that appeals lawyers and others investigating miscarriage of justice cannot access anywhere near enough police and prosecution material.

13. The existence of the Criminal Cases Review Commission (CCRC), the public miscarriage of justice watchdog with the power to access any police and CPS documentation it wants, does not compensate for this state of affairs. This is because it does not use its powers to access material to carry out the comprehensive investigations needed to reliably identify non-disclosure. This is evidenced by:

- The CCRC referring a mere 0.77% of cases to the Court of Appeal in 2016/17, despite having been told by the Justice Select Committee in 2015 that it

[9] https://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/DCLFU_thm_Dec09_ExecSum.pdf.
[10] https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/disclosure-review-september-2011.pdf.
[11] https://www.judiciary.gov.uk/wp-content/uploads/2014/05/Magistrates%E2%80%99-Court-Disclosure-Review.pdf.

needed to be “less cautious” in referring cases at a time when its referral rate stood at 2.2%;[12]

- One of its own Commissioner’s recently expressing doubts about the CCRC’s current ability to identify cases where non-disclosure had led to a miscarriage of justice. As revealed by a FOIA request by the Centre for Criminal Appeals, Commissioner Alexandra Marks “said she had recently been involved in two referral cases where material non-disclosure was the reason for referral, but **she doubted whether the enquiries that led to the discovery of that non-disclosure would be made if the applications had been made to-day.**”[13]

14. Even when the CCRC is presented with clear evidence of non-disclosure, its subsequent investigation is woefully inadequate, as illustrated by the case of Roger Khan.

15. Mr Khan, a vulnerable man with dyslexia, was convicted of attempted murder in 2011 after representing himself at trial. Since taking on Mr Khan's case, the Centre for Criminal Appeals uncovered that an investigating officer in the case had an undisclosed personal relationship with an alternative suspect - a man whose alibi the jury specifically asked for and whose DNA cannot be eliminated from items linked to the crime scene. The officer was in charge of coordinating phone enquiries in the case and, troublingly, the alternative suspect's phone records appear to have escaped scrutiny.

16. In such a case, the CCRC should have reviewed the full police file in the case to examine how this undisclosed relationship may have contaminated the police investigation. Instead, it seems to have approached the police force in question for its views and left satisfied that “appropriate safeguards” were put in place. Both the CCRC and the police have so far refused to provide Mr Khan's representatives with any documentation about the undisclosed relationship, or even what these "appropriate safeguards" supposedly were.

[12] https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/850.pdf, p. 3.
[13] CCRC Board Meeting Minutes, 27 September 2017, p. 6.

17. Under a functioning post-conviction disclosure system, it should be possible for Mr. Khan's representatives to access the necessary police documentation to get to the bottom of this instance of non-disclosure.

Improving disclosure and protecting fair trial rights

What improvements (if any) are needed to improve disclosure and ensure that fair trial rights are protected?

Pre-trial and trial disclosure

18. Since the pervasiveness of disclosure failings is not merely a matter of inadequate resources or poor training, but also the result of in-built flaws with the current legal framework, we believe radical change is needed to ensure fair trial rights are protected.

19. We propose that the function of deciding what material is disclosed to the defence be taken away from police disclosure officers and prosecutors. Instead, a new independent body should be created to fulfil this role. For the sake of this submission, we'll refer to this as the 'Independent Disclosure Agency' or 'IDA'.

20. The IDA should consist of legally-qualified staff who are given full access to all police material in a case via access to the HOLMES 2 computer database. IDA staff should review all such material, identify and remove any genuinely sensitive information, and disclose all remaining material to both prosecution and defence.

21. Under this proposal both parties would be given equal levels of disclosure, which has the benefit of reinforcing the principle of equality of arms so central to protecting fair trial rights. Moreover, such a system embraces in its design the "if in doubt, disclose" principle proposed by Richard Horwell QC in the *Mouncher Investigation Report*.[14]

22. Such a system would make it significantly less likely that important evidence is wrongly withheld from the defence:

14 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/629725/mouncher_report_web_accessible_july_2017.pdf.

- Firstly, IDA staff, being both independent and legally qualified, would be less likely to mistakenly class material as being "sensitive" when it is in fact not – an error currently frequently made by police who either "do not understand what constitutes sensitive material" [15] or, as evidenced by paragraph 2 above, deliberately misclassify material as "sensitive" to hide it from the defence;
- Second, by ensuring that the defence can access all non-sensitive material gathered in a case, the risk of exculpatory evidence going undetected will be lessened.

23. It must be stressed, however, that any such structural overhaul must be accompanied by increased resources. In particular, the defence must be given adequate resources for the work of reviewing unused material and identifying any exculpatory material present within it.

24. In addition, structural change should be accompanied by improvements in the use of technology to make it easier for the defence to review large amounts of material and identify the most important content therein. This could involve granting the defence access to a copy of the HOLMES 2 database for the case securely via a cloud service, with the sensitive material identified by the IDA removed. This would allow the defence to review configurable indexes of the material, conduct word searches and draw links between individuals and documents.

25. The above proposals would of course come with resource implications. Funding would be needed to establish and run the IDA, and provide defence practitioners with sufficient resources to thoroughly review the material disclosed to them.

26. However, such a system would arguably be far more efficient than the status quo by reducing duplication. The present system requires police and then prosecutors to make assessments of the sensitivity and relevance of material – assessments which the defence attempts to review and possibly challenge. Where a dispute cannot be resolved, the trial judge is then forced to make an assessment of their own. Under the proposed system, in contrast, the IDA has one task to carry out: namely, determining

[15] https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2017/07/CJJI_DSC_thm_July17_rpt.pdf, p. 13.

what material is genuinely sensitive (a task its legally-trained staff will no doubt carry out more accurately than police officers). It is then the defence who, having full access to the material that remains, decides what undermines the prosecution's case or assists their case.

27. Another benefit under these changes is that police officers would no longer expend large amounts of time trying (often unsuccessfully) to carry out disclosure functions they are ill-suited to fulfil. This can only be a good thing for the police's ability to carry out its primary purposes of protecting the public and preventing and detecting crime. In addition, the proposed system is likely to result in far less court time being wasted through delays, adjournments and collapsed trials.

28. Ultimately, though, justice cannot be delivered on the cheap. In particular, we would ask the Justice Select Committee to factor in the dreadful human cost that disclosure failings can have in the form of lives lost to wrongful imprisonment. If additional resources are needed to end the disclosure crisis, re-establish the right to a fair trial and prevent miscarriages of justice, that must be a price worth paying.

Post-conviction disclosure

29. Notwithstanding any future pre-trial improvement in the disclosure system, there will remain an urgent need to provide drastically improved post-trial access to information, transcripts and exhibits.

30. To ensure that victims of miscarriage of justice do not remain in prison because of an inability to access the material to support their claim of innocence, real change is needed. Specifically, the hugely restrictive Catch-22 post-conviction disclosure test endorsed by the Supreme Court in *Nunn* must be replaced with an alternative that elevates concerns for justice over concerns for finality.

31. This new approach must enable appeal lawyers and other representatives of those claiming innocence to carry out the comprehensive investigation needed to uncover any exculpatory evidence that might exist. This can be only done through secure access to the *full* police and prosecution files on cases, save any genuinely

highly-sensitive material, as illustrated by the importance of such access in achieving exonerations in Louisiana described in paragraph 7 above.

32. In our Open Justice Charter, published in late 2016, we outlined proposals for how a fairer, more effective post-conviction disclosure system could work in practice. In brief, we submit that the Justice Select Committee should consider recommending the following three reforms:

(a) Representatives of those seeking to challenge their conviction should be provided with electronic access to all police and prosecution material held on a case, unless the police or CPS can demonstrate a specific valid justification for why a particular document or extract should not be disclosed. A disclosure refusal should be readily challengeable through recourse to an independent arbitrator, such as the IDA proposed above or the First-tier Tribunal (General Regulatory Chamber), which deals with other information cases.

(b) Representatives of those seeking to challenge their conviction should be granted controlled access to physical evidence for forensic examination and testing by qualified experts, with those experts taking direct custody of items from police and returning them to police, unless the police can demonstrate a specific valid justification why not (for instance, if the testing would consume the remainder of the physical evidence). Such a refusal should be readily challengeable through recourse to an independent arbitrator, such as the IDA proposed above.

(c) Audio recordings of Crown Court trials should be retained at least until the end of the sentenced imposed on the defendant (as opposed to the current 7 year retention period), and representatives of those seeking to challenge an individual's conviction should be provided with free access to these trial recordings.

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