So What's Going On and Wrong with Disclosure in Criminal Cases? Implement rather than review!

By Charlie Sherrard QC, @charliebrief, of Furnival Chambers

Like many people at the Bar, I am far happier to let my words do the talking rather than committing thoughts into print, but the recent concerns raised by the collapse of the two recent rape trials [*I feel a sense of anxiety in continually using the names of innocent people for fear of perpetuating their distress!*] have prompted this note.

Since 1996 and the introduction of the CPIA, solicitors and barristers have seen the concept of disclosure continually eroded to the point where we have become understandably and consequently cynical. This is an unhealthy state of affairs given that we are rarely in a position to assure our lay clients that the very criminal justice system that we are a major part of is in a fit and proper state to protect their rights. Yet appropriate and effective disclosure is the most fundamental factor in the preservation of a just and fair trial process.

Earlier today I was interviewed on LBC by Andre Morgan and, as with any interview, I conducted such research as I thought necessary. I saw that Commander Richard Smith of the Met Police, had announced that the Met Police would review every rape and sexual abuse case in which someone was charged. My immediate reaction was two-fold – first, why does it only involve a review of sexual allegations? And second, when was the last such review held?

The first question remains unanswered by any police officer in any media source that I have researched. Whether one is involved in a diet of murders at the Central Criminal Court, complex fraud cases at Southwark or drugs cases around London, [I am not London-centric, but the so-called review appears only to be contemplated by the Met Police] disclosure of basic unused material is a continual battle that any practitioner will know routinely results in either the late or no disclosure at all, of crucial material in circumstances where an

impartial open-minded investigator would have led to a different result. Many will resonate with the position where a defendant's computer or mobile phone has been seized. Applications are made for an imaged copy or a download respectively – not of a 3rd party or complainant's material but the actual defendant! Understandably, defendants, whether in custody or not, instruct that the answer and context to prosecution allegations may well be found on their own devices but they aren't able to recall the date, file or entry by way of specifics. How often is a blanket response given that it doesn't satisfy the disclosure test? Yet how often is it actually considered properly or fairly or at all? The material cannot be considered sensitive yet it is continually like getting blood out of a stone. And of course, this doesn't only apply to sex cases.

My second question provided an enlightening answer that I would urge practitioners to consider carefully. The most recent review into the problems arising out of disclosure of unused material was a mere 6 months ago! On the 18th July 2017, the HMIC, Her Majesty's Inspectorate of Constabulary, published a report arising out of a three-month review into the Police and CPS compliance with the disclosure of unused material provisions. The remit focused primarily on "volume" Crown Court cases but the findings, conclusions and recommendations are relevant to every case, it is suggested, whether a 'volume' one, sexual one or any other type of criminal case that gives rise to very real and serious consequences for a defendant.

As for the Report, the underlying case that prompted the review was the case of 'R-v-Mouncher and others in 2011' arising out of the actions of eight police officers indicted with perverting the course of justice stemming from their actions in prosecuting five men for the murder in 1988 of Lynette White.

During the course of the report, Richard Horwell QC stated that "*disclosure is a specialism: not an exercise in reading material and drawing up lists. Appropriate recognition of that fact is necessary and minimum standards and accreditation are necessary to ensure a raising of standards nationally!'.*

An analysis of the report can be summarised as follows:

PRINCIPLES: Of note in the HMIC report is that, contrary to the commonly held view that disclosure follows the Defence Statement, there is an acknowledgment that disclosure of unused material should be considered at: (i) the point where a criminal investigation starts (ii) continues at the point of charge AND (iii) be at the forefront as the case progresses. *Every* unused item in the possession of the Crown/Police, and considered relevant to an investigation should be reviewed to establish whether its existence is capable of undermining the prosecution or assisting the defence.

FINDING: The HMIC, upon an extensive review, found that Police and Prosecutors were causing delays and undermining justice in criminal trials by failing to follow basic rules about disclosing evidence to the defence.

"Inspectors found extensive issues in the way unused non-sensitive disclosure material is recorded by the police, with 22% of schedules found to be wholly inadequate. Often officers were just compiling lists, rather than explaining their contents to assist the prosecutor. Prosecutors, in turn, were not requesting a description of the items, preventing them from making any meaningful review. The lack of proper case supervision by the police was a significant cause for concern and 78% of the files examined were marked either poor or fair."

HM Inspector of Constabulary, Wendy Williams said: *"We found in this inspection that the police recording of both sensitive and non-sensitive material was lacking, which creates uncertainty and confusion for prosecutors. In turn, this poor practice was not being challenged by the CPS. This has resulted in a lack of confidence in the disclosure process on the part of the judiciary. We urge the police service to address these shortcomings in accordance with guidance and the code of practice. We have made recommendations to the police service and governing bodies to help improve these areas."*

CONCLUSIONS & RECOMMENDATIONS: The HMIC and 'Mouncher' reports made a number of recommendations designed to ensure, [although seemingly not *yet* at present] that the process is substantially improved, including:

- The Police or CPS must correctly identify all disclosure issues relating to unused material at the charging stage [*once again, I stress, not post Defence Statement!*]
- The CPS should comply with the Attorney General's Guidelines on Disclosure to ensure that every defence statement is reviewed by the 'allocated' prosecutor before it is forwarded to the Police AND that prompt guidance is given to the Police on what further actions are necessary
- The College of Policing should produce guidance on training that is of *sufficient* [my emphasis] depth to enable police forces to provide *effective* training on disclosure to all staff involved in the investigation process.
- Police forces should establish the role of dedicated disclosure champion and ensure that the role is performed by someone of sufficient seniority to ensure they are able to work closely with the CPS.
- The Police and the CPS should review their respective digital case management systems to ensure all digital unused material provided by the police to the CPS.
- The introduction of a minimum standard and national accreditation process for disclosure officers
- A national training programme for disclosure
- A national standard and guidance regarding quality reviews of a disclosure officer's work
- A review of the manner in which quality assurance exercises are conducted by the CPS

The HMIC report concluded with these powerful words*: 'Non-compliance with the disclosure process is not new and has been common knowledge amongst those engaged within the criminal justice system for many years and it is difficult to justify why progress has not previously been made... Until the police and CPS take*

their responsibilities in dealing with disclosure…more seriously, no improvement will result and the likelihood of a fair trial can be jeopardised.'

Six months on and Commander Richard Smith speaks of a review. Why? We have had a wholesale review; we have read of the associated damning findings; and, most significantly, we have read about a series of very sensible and pragmatic recommendations. What needs to be answered urgently is WHY HAVE THEY NOT BEEN IMPLEMENTED? WHY IS HAS NO PROGRESS BEEN MADE? WHAT IS THE POINT IN HAVING A REVIEW IF NOTHING IS IMPLEMENTED? How can two unconnected trials, save for the investigating officer, arrive at the doors of the Court, purportedly ready for trial, without any or any effective compliance with the disclosure process having been conducted?

It was said this week that the criminal justice system 'nearly' failed. I happen to disagree. It DID fail! Failings resulted in young men having their lives ruined in the short term and potentially ruined for life. Yet this was after the concluding words of the HMIC report had been published. No improvement following the report has been made. That surely has to start immediately before complete faith is lost in the system by all who participate in the process even including jurors.