

Justice Committee

Oral evidence: [Disclosure of evidence in criminal cases](#), HC 859

Tuesday 27 March 2018

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Members present: Robert Neill (Chair); Mrs Kemi Badenoch; Alex Chalk; Bambos Charalambous; David Hanson; Gavin Newlands; Victoria Prentis; Ellie Reeves; Ms Marie Rimmer.

Questions 1 - 76

Witnesses

I: Kevin McGinty, Chief Inspector, HM Crown Prosecution Inspectorate; and Wendy Williams, Inspector, HM Inspectorate of Constabulary and Fire & Rescue Services.

Examination of witnesses

Witnesses: Kevin McGinty and Wendy Williams.

Chair: Good morning, everyone. Welcome, Mr McGinty and Ms Williams. Thank you very much for coming to give evidence to us. This is an evidence session about disclosure. Before we start, we have to go through the formalities of declaring interests. I am a non-practising barrister and consultant to a law firm.

Victoria Prentis: I am a non-practising barrister who worked for many years at the Treasury Solicitor's Department conducting cases on behalf of the CPS, and in that capacity I worked occasionally with Mr McGinty.

Alex Chalk: I am a barrister.

Ellie Reeves: I am a non-practising barrister.

Bambos Charalambous: I am a non-practising solicitor.

Q1 **Chair:** Mr McGinty, Ms Williams, we have all met before, but if you would like to introduce yourselves and your organisation for the record, we will then go straight into the questions.

Wendy Williams: I am Wendy Williams. I am from Her Majesty's inspectorate of constabulary and fire and rescue services.

Kevin McGinty: I am Kevin McGinty. I am Her Majesty's chief inspector for the Crown Prosecution Service inspectorate.

Q2 **Chair:** Thank you very much. Ms Williams, I think your role in this is that the police end of disclosure is one of the issues you inspect.

Wendy Williams: That is correct.

Q3 **Chair:** Thank you very much for helping us. There has been a lot of publicity recently about issues around disclosure, with suggestions that they are an indication of a flaw in the system, lack of resourcing pressure, error or whatever. Because you have both looked at this from your differing perspectives—the CPS and the police—in your inspections, I would like to get a sense of how serious a problem it is. How frequently does it occur? Is it getting better or worse? You may have picked up that the Criminal Law Solicitors Association did a survey of its members and found that about 97% of them said that as criminal defence solicitors they had encountered disclosure errors in the last year. Does that seem about right? Does it surprise you?

Kevin McGinty: It does not surprise me, no. The real concern that we had appears almost in the first paragraph—paragraph 2.1—of our report.

Q4 **Chair:** This is the joint report, isn't it?

Kevin McGinty: Yes, it is from the joint report. The Criminal Cases Review Commission said: "In the past 12 months this Commission has continued to see a steady stream of miscarriages. The single most frequent cause continues to be failure to disclose to the defence information which could have assisted the accused." That is the most serious aspect of the disclosure problem. The disclosure problem itself is broader than that. Late disclosure causes all sorts of difficulties within the criminal justice system. It wastes time and resources. It means that cases are delayed and that victims do not see justice. It is a waste of everyone's time, but, as I said, the really serious issues are the miscarriages that may result.

HMCPSP carried out a review in 2007-08 and a re-review in 2008-09. Those reviews were slightly different because they were looking at magistrates court work and not just the Crown court, which this looked at. It does not seem to be getting any better; if anything, it seems to be getting slightly worse. Having said that, in the magistrates court things seem to be getting slightly better, but it is still a serious problem.

Q5 **Chair:** I will bring you in in a second, Ms Williams. I do not know if either of you have had a chance to look at this: the point made by the Criminal Law Solicitors Association was not only about the 97%, which you said did not surprise you, Mr McGinty, but that in the magistrates court the attitude of benches and legal advisers was described by some of the people who have spoken about this from the defence solicitors' side as being almost dismissive, and that they did not get support when they sought adjournment or redress for failures of disclosure. Did you find evidence one way or the other around that?

Kevin McGinty: We found that the two processes, Transforming Summary Justice in the magistrates court and Better Case Management in the Crown court, put pressure on courts and the prosecution and defence to try to reduce the number of hearings in court. That is a good process and, from the reviews that we have done, it is largely working, but it places pressures on both the prosecution and defence, and it discourages judges from giving adjournments when they think the matter can be dealt with sooner than was asked for by the defence. There is increasing pressure on the defence, but I am not sure that is necessarily a bad thing.

Q6 **Chair:** Ms Williams, the pair of you did the joint report and signed it off in July last year, so it is still fairly recent. What was your finding?

Wendy Williams: As far as policing is concerned, there was a real concern that there was lack of knowledge and understanding of the nature, importance and purpose of disclosure, and that manifested itself in various ways. Officers did not tend to consider the importance of disclosure as part of the investigation. Instead, disclosure was seen as more of an administrative exercise rather than integral to the investigation process, and that issue continued throughout the life of a case. It was a problem as regards investigations, and throughout the prosecution, and, indeed, with regard to case management.

Q7 **Chair:** I get a sense, and other colleagues have found this as well, that sometimes the disclosure officer is about the most junior person in the team, and they may not be trained or have much experience. Have you encountered that in your inspections?

Wendy Williams: It was a familiar scenario. In more serious cases, usually there is a separation, and the senior investigating officer is different from the disclosure officer, but in the volume cases that we looked at the disclosure officer was often the officer in the case, and the levels of knowledge as regards the disclosure regime were not the levels that we expected, or, indeed, the levels that needed to be in place. As I indicated, there was a fundamental lack of understanding of disclosure, and that was borne out in all sorts of issues, not least of which were failures to train and failures to supervise. As a consequence, as Mr McGinty pointed out, cases were being dropped late in the day, sometimes at the door of the court, sometimes during the course of a trial, and, as has been indicated, that leads to waste, and not only to financial cost but to the personal cost that occurs when victims, witnesses and defendants ready themselves for the trial process only to find either that the case has been postponed or that the case is dropped altogether.

Q8 **Chair:** Of course, they may have been waiting some months before the court hearing comes along, if not more.

Wendy Williams: Indeed.

Kevin McGinty: Or longer.

Q9 **Chair:** Or longer, as you say, Mr McGinty, in some cases. We had the

Director of Public Prosecutions give evidence to us a while ago, and she said sometimes the fact that cases are dropped is evidence that the system is working. I get the impression that you would not agree with that, Ms Williams.

Wendy Williams: In the cases that we looked at, we did not see any miscarriages of justice, and it is correct that cases were dropped and did not proceed in circumstances where that was probably the best outcome. However, if it occurs very late in the day, which is what we found during our inspection, that is not serving the interests of justice and it is not adequately serving the administration of justice. To say that late disclosure means that the system is working fails, I think, to take account of the fundamental systemic issues that we identified.

Q10 **Chair:** Would you disagree with that, Mr McGinty?

Kevin McGinty: Not at all. It is the system working in the sense that people are not being tried when they should not be, but it is not working in the sense they have got as far they have. If they had a proper grip on disclosure from the very start, it would not have got that far. It may well be that a person has been in custody for weeks or months. That is what is damaging.

Chair: Absolutely.

Q11 **Alex Chalk:** So that we are crystal clear, surely it must be a miscarriage of justice if someone has spent six months on remand for a crime that it emerges, following a proper disclosure procedure, they have not committed. That is a miscarriage of justice, isn't it?

Wendy Williams: It is certainly the case that it should not be occurring. What we were saying was that disclosure should be considered at the charging stage, let alone at the trial stage. Indeed, the very first recommendation we made was that prosecutors and police officers must have due regard to information and evidence that points away from the defendant, as well as information that might point towards the defendant.

Kevin McGinty: However, there may be a difference, if, for instance, the relevant evidence only comes to light at a later stage.

Q12 **Alex Chalk:** That is a separate issue.

Kevin McGinty: It is a separate issue.

Q13 **Chair:** But when it was there and it has not been properly listed, that is unforgivable.

Kevin McGinty: One of the first recommendations we make is that you ought to get a grip on disclosure as part of the investigatory process prior to charge. If they have that grip, and there is evidence to suggest someone should not be charged, people are not going to end up in custody when they should not be.

Q14 **Chair:** If the threshold test or whatever applies, it ought to apply at that point.

Kevin McGinty: Yes.

- Q15 **Alex Chalk:** The responsibility of disclosure is the responsibility of the Crown overall, which is indivisible. I want to look at the first part of it, which is the policing aspect. It seems to me that there are at least three issues that a responsible police officer has to grapple with. In the standard volume case that you describe, say, a burglary, the police officer in the investigation gathers a whole bunch of stuff, including evidence they are relying on, such as served witness statements. They also gather all sorts of things ranging from receipts to CCTV that does not show anything, and all that kind of stuff.

The first decision they have to make is whether it should go on a schedule at all. The second issue is how they go about describing it. If they get five bits of CCTV, do they just put it in a basket that says "CCTV," or should they be separating it—from the chip shop, from the end of the road or from the borough CCTV and so on? They also have to make a decision about whether the stuff should go on a sensitive schedule. For example, if someone comes along and says, "Look, I'm telling you this in confidence. I'm a police source. I'm telling you what I saw," the police might take the decision that it doesn't amount to a row of beans and does not assist the prosecution. There are lots of difficult areas of discretion. What actual training, in your experience, do police officers have in grappling with those really quite difficult judgments? What training do they have, and is it adequate?

Wendy Williams: We looked at the issue of training both on the part of police officers and prosecutors. On police officer training, the College of Policing is responsible for providing comprehensive training that takes account of the legislation, the disclosure manual, the codes of practice and all the guidance. The most up-to-date training was very much out of date, so different forces were looking at different, and devising different, training programmes. That led not only to duplication but to inaccuracies in the quality of training that was being provided.

In answer to your question, we found a variable picture across the country, with different officers who had different levels of knowledge and understanding, but, across the board, the quality of training and the understanding and appreciation of the importance of disclosure were poor.

- Q16 **Alex Chalk:** One of the figures that emerged from this excellent report, which I am very grateful to you for preparing, is that in over a third of cases officers are not producing an MG6E, which is, effectively, a heads-up to the prosecutor: "Look, there's something on these schedules that you want to have a good hard look at because it may assist the defence case." In over a third of cases, those simply were not being provided to prosecutors. Is that right?

Wendy Williams: That is correct. Also, in 22% of cases, the quality of the schedules themselves was poor. In fact, in only 18.9% of cases was the MG6C schedule of the correct quality, which indicates that the level of

knowledge about which you have been speaking is not there as far as policing is concerned.

Q17 **Alex Chalk:** Just so that we are clear about the significance of poor quality, because poor quality might just sound like a counsel of perfection—who cares?—isn't the point that, if the descriptions are poor, when the defence receive them, they may not know what the police hold? If they are not properly on notice of what the police hold, they will not know whether to ask to see it. If they do not ask to see it, they may be excluded from information that may cast doubt on the prosecution case or assist theirs. Isn't that the point?

Wendy Williams: That is part of the point, certainly. The other part is that prosecutors will not know what the nature of the material is, and, given that the prosecutors have to make the decision as to what falls to be disclosed and what does not, the whole process is undermined from the outset.

Alex Chalk: I quite agree.

Q18 **Chair:** If you do not know, you cannot carry out your duty, can you, Mr McGinty?

Kevin McGinty: In a sense, it is probably worse than you pointed out, because the first thing that the police have to do is decide whether the material is relevant. It is only when they have actually decided that the material is relevant that they go on to test whether or not it has the capacity to undermine the prosecution case or assist the defence case. What we found was that they were not even passing the first test in many cases. If you want an example of a really bad MG6, there is one on page 12 of the report.

Chair: Yes, we have had a look at that.

Kevin McGinty: As Wendy pointed out, the only point of having a description is to assist the prosecution to assess what the police actually have. Having said that, the CPS is at fault, because faced with an MG6 like that, which is rubbish, they should be saying—

Chair: Not good enough.

Q19 **Alex Chalk:** Routinely, as I think your report said, a prosecutor will happily look through that and mark it "CND"—clearly not disclosable—whereas he or she is not in a proper position to make a fair assessment as to whether it is disclosable or not.

Kevin McGinty: We talk in the report about a culture of defeat, in a sense, of acceptance: "This is the way it has always been and, if we challenged every bad MG6 that came in from the police, the system would grind to a halt." It probably would.

Q20 **Chair:** At the moment, the question is can you trust the MG6s? Frequently, not.

Kevin McGinty: Very frequently not, yes.

Chair: Very frequently not, as your report makes very clear, Mr McGinty. Can I bring you in on the training point, Mr Hanson, and then Ms Prentis?

Q21 **David Hanson:** Could I follow up on Mr Chalk's comments on training? Paragraph 10.2 of your very damning report says, "In relation to providing adequate training on disclosure, it is our view that it is not fulfilling this responsibility." That is the College of Policing. Your report was July 2017 and it is now almost April 2018. Has the College of Policing responded, reviewed, commented, fed back on that comment, which is, in my view, quite strong?

Wendy Williams: It is certainly a strong finding. In March this year, we were invited to a meeting that the College of Policing had convened. It has set up a working group, the object of which is to collate and devise a comprehensive training package that can be rolled out, and will be rolled out, across all 43 police forces in England and Wales. It is then going to undertake a series of regional workshops, starting in May. The work on the training package continues, but, as you rightly pointed out, we inspected and reported in July last year that the position is quite pressing, so it is important for that training to be devised as quickly as possible.

Q22 **David Hanson:** If you undertook an inspection on 28 March this year, would anything have substantively changed between your initial findings and comments and now?

Wendy Williams: The recommendations that we made fell into three categories: immediate, within six months and within 12 months. I mention that because we identified the aspects that needed immediate attention, the recommendations that related to process and those that related more to the infrastructure. We consider that the cultural shift that Kevin was speaking about will take time to take effect, but for it to occur the infrastructure has to be in place. That requires not only the College of Policing but the police service at a senior level to understand the importance of disclosure, and to ensure that that message is made clear to all officers at all different levels, so that there can be that change.

Q23 **David Hanson:** The College of Policing is not that old. When did it last review its training on this matter prior to July 2017?

Wendy Williams: The report makes it clear that the training package is very old. I cannot remember the specific year, but it is years old, and it was accepted by the College of Policing that there was a need to upgrade and update the training.

Q24 **David Hanson:** In paragraph 4.6 you say, in relation to disclosure and police forces: "Many appear to have been influenced by the College of Policing basic training on disclosure." That sort of says to me that some are not. How universal is the adoption by the 43 forces of access to the current training programme? Would the improvements that you are seeking be adopted as a matter of course by the 43 forces? In a sense, how influential is the College of Policing in determining the activities of police officers on the ground on this matter?

Wendy Williams: My understanding is that the College of Policing is considered to be influential as far as policing is concerned. We recommended that all 43 forces identify a disclosure champion in each force. That champion should be a senior police officer who is able to ensure that our recommendations are fully implemented, and can provide assistance and supervision to those lower down in the organisation.

Q25 **David Hanson:** Are there any forces you could indicate to the Committee that you would regard as gold standard on disclosure in relation to their current performance?

Wendy Williams: Sadly, at the time of our inspection we did not identify a force that was achieving the gold standard. We saw some pockets of good practice.

Q26 **David Hanson:** Silver standard.

Kevin McGinty: We did not look at all the forces.

Wendy Williams: No, we did not look at all 43 forces. What we found, and it is set out in chapter 4, is that different forces were implementing their own training packages. That cannot be consistent, and self-evidently is not consistent, and therefore leaves open the possibility that there will be duplication and error.

Q27 **David Hanson:** When the College of Policing has looked at your recommendations, had its working groups, produced its documents, done whatever it has done, at what stage in the world cycle is it going to end? Who is going to check that it is of a sufficient standard to satisfy yourselves prior to publication?

Wendy Williams: Police forces are accountable. Chief constables are accountable to police and crime commissioners. It is the police and crime commissioner who holds the chief constable to account. Police and crime commissioners are required to respond to the inspection reports that we carry out, so it is for police and crime commissioners to hold police chiefs to account.

Q28 **David Hanson:** In a sense, I was looking for a timescale for the College of Policing producing the report, but you have raised another issue. If police and crime commissioners are to hold police chief constables to account, how much training do they have on disclosure issues, if any?

Wendy Williams: I would not expect police and crime commissioners to have received training on disclosure. Our recommendations are clear. Disclosure is not understood or appreciated, and it is integral to the administration of justice and a fair trial for the defendant and all others. On that basis, knowing that, it is for police and crime commissioners, as part of their performance management processes, to ensure that in their forces performance is properly managed.

Q29 **David Hanson:** But, in your view, the College of Policing should have the role of setting a standard by which police and crime commissioners can judge their chief constables' performance.

Wendy Williams: It is the responsibility of the College of Policing to set the professional standard for the police service, so it is its role to identify what the standard should be.

- Q30 **David Hanson:** I appreciate all that, but I go back to your comment in 10.2 that, "it is our view that it is not fulfilling this responsibility." Have you examined the accountability of the Home Office in following this through with the College of Policing?

Wendy Williams: It is for the College of Policing to put in place our recommendations. It is now doing that; I mentioned the meeting we were involved in. There is activity afoot, and I am sure that it takes very seriously the recommendations that we made.

Kevin McGinty: We need to recognise the challenge that is faced by the police in this training programme. Criminal justice is only a small part of what the police do and, no matter how good the training the individual officer gets, unless that officer experiences cases in which they have to deal with disclosure, the training will go for naught because it will be forgotten by the time they get round to doing it again. That is a real challenge. and we do not know what the answer is.

In terms of accountability, Sir Thomas Winsor, Wendy and I have agreed that we will revisit it once there is a chance for the improvements to settle in—probably in the year 2019-20—to see what has been followed up and whether there has been any improvement. That may seem a while away, but, as far as HMCPSI is concerned, any inspection we do usually involves looking at cases. One of the things we will be doing in case reviews is to see how disclosure is being dealt with and whether there are any improvements. If there are no improvements, we will report on it.

- Q31 **Chair:** The concern is that while that is happening someone might be wrongly convicted because of an error of disclosure. You can only do it after the event, Mr McGinty, I appreciate that. Do you get a sense of urgency from Crown prosecutors and senior police officers? Do they have a sense of the need to tackle this urgently?

Kevin McGinty: I hope so, but history shows that they have not in the past, I am afraid.

Chair: No.

Kevin McGinty: I think the response to this report has been quite different from the response to the reports in 2008 and 2009. Since then, we have had the Attorney General's guidelines, two reviews by Lord Justice Gross, and a number of Court of Appeal cases that have gone horribly wrong, where the prosecutor and the police have been severely criticised by the Court of Appeal, yet we still have this situation.

- Q32 **Alex Chalk:** Can I raise an issue? It is a point that Lord Justice Gross made as well. Any practitioner, or indeed police officer, who has been trained has a sheaf of stuff they need to look at. There are the Attorney

General's guidelines on disclosure and all this highfalutin stuff: "This is the golden thread that runs through our criminal justice system." It is all absolutely true. The disclosure test is that "You must disclose material that might reasonably be considered capable of undermining the case of the prosecution."

All that stuff is really quite simple in a way, and I wonder whether it has been overcomplicated. A police officer needs to get everything, unless it is truly irrelevant—for example, the police officer's petrol receipt on the way to the investigation—and put it on the schedule. They should have a look at it and if there is anything where they think, "If I were a defendant, I might fancy having a look at that," they should tell the prosecutor. The prosecutor will ask, "What's their defence in this case?" "It wasn't me." "Oh well, we have some footage of somebody walking away from the scene who doesn't look like that person, and that might help the defence."

Isn't it quite straightforward? Is there a danger that we have overcomplicated all of this, and some quite straightforward instructions to the police initially and straightforward instructions to the CPS later would help? Is there a failing in that aspect of the training?

Wendy Williams: We made that very point in the report. Disclosure appears to have been overcomplicated, and there is a need to demystify the process. There is also the need no longer to regard disclosure as an administrative exercise that sits somewhere beyond the investigation and prosecution process. Accepting that, and having regard to some straightforward instructions, guidance and training, should improve the quality of performance quite considerably. As Kevin pointed out, yes, this is a practical exercise, and therefore the training will require a degree of practice and practical exercises for officers to get into the habit of completing the schedules, and doing so properly, but once that is accepted and it has been inculcated, there should not be the sorts of issues that there have been. It is a combination of a cultural approach that does not accept the integral nature of disclosure and a belief that it is far more complicated than in fact it is.

Kevin McGinty: To be fair, I should say that we found that the CPS training was good. It is also fair to point out that in many areas the CPS has improved immeasurably in terms of how they deal with disclosure, post the Mouncher case, in some of the most complicated and difficult cases. It was quite interesting, as we went to various Crown courts around the country, to ask judges what their experience was of disclosure. In virtually every Crown court, save one, there were deep concerns about the way in which disclosure had been dealt with. The one court where there weren't was the central criminal court. That is largely because the heavy diet of murders at the central criminal court is dealt with by a specialist unit in London.

Q33 **Chair:** It is the expertise.

Kevin McGinty: Yes.

Q34 **Alex Chalk:** It is always dangerous to rely on your own experience, but, in my experience, it often comes down to the workload, calibre and application of the individual. I had experience of some absolutely first-rate CPS prosecutors who were so attentive to their disclosure duties that it was not just a competent prosecutorial system; it was world class, absolutely excellent. The problem is that you go down the road to, naming no names—Inner London Crown court or whatever it is—on a volume case and people do not have the bandwidth. They do not have the time, and they simply accept a shoddy MG6C and say, “Do you know what? This is just too difficult to get through. Let’s try to muddle through a broadly fair trial if we can.” That is the problem, isn’t it?

Kevin McGinty: That is part of the danger. Generally, it does get sorted out. Because it is muddle through, and advocates at court, whether barristers or CPS advocates, sort things out at the end, the judge gets involved as well, and largely you get a fair trial, the risk is not so great that it demands that something is done at a much earlier stage.

Q35 **Chair:** It is almost dependent on the good will and application of those people, isn’t it—the judges and the advocates going the extra mile sometimes?

Kevin McGinty: The criminal justice system is dependent on the good will of the people who are operating within it.

Q36 **Chair:** Absolutely. But if there were a more systematic approach, it would obviate or reduce risk.

Wendy Williams: The same considerations apply, in terms of the more serious cases, on the part of policing. We found that the quality was much better in more serious cases, and that is because officers who deal with those sorts of cases are used to dealing with disclosure.

Kevin McGinty: Counter-terrorism is a very good example of that. We have a world-class system.

Chair: Generally, it is immaculately done.

Q37 **Victoria Prentis:** That shows that the system can work. It is just that it does not automatically work at the lower end, and, indeed, in the vast majority of cases. You helpfully drew our attention to the sample form on page 12. Are you confident that the average CPS lawyer would send that back, and that it would be well received by the police officer to whom they sent it?

Kevin McGinty: I hope the average CPS lawyer would send it back. I do not think they do. I hope it would be well received by the police officer, but I am not entirely sure; I don’t know. If at that stage the police were given more guidance by the CPS as to what they needed to do, there might be an improvement. I draw that from what happens after the defence case statement is served. We found that the CPS was sending it straight to the police without considering it themselves. If in fact they had looked at it and given some advice to the police, there might have been an improvement. Having said that, you might have got to that stage

without either the police or the prosecution really knowing what they had in the first place.

- Q38 **Victoria Prentis:** You mentioned earlier the large volume of material that may have been declared irrelevant by a junior police officer right at the beginning and that nobody ever sees. We have no idea how much of that there is.

Kevin McGinty: One of the things we pointed out in the report, as far as the prosecutor is concerned, not the police, is that the audit trail is very weak. The key document, the disclosure record sheet, is not being completed in the way it should be. Quite often, there is no record of what is being disclosed.

- Q39 **Victoria Prentis:** Your excellent report made some quite firm recommendations with very firm time limits attached. Obviously, you wanted an immediate culture change, but could you look at recommendation 4, for example, which is that "Within six months"—a couple of months ago—"the police should improve their supervision of case files," and the process "should be supported by the requirement for supervisors to sign the Disclosure Officer's Report"? Is that happening?

Wendy Williams: As Kevin indicated, we have not re-inspected yet, and it will be for us to agree an appropriate time to go back and re-inspect, so we are not in a position to advise the Committee.

- Q40 **Victoria Prentis:** Even though you have given some quite short deadlines for many of the recommendations, you are going to let them lie for another year or so.

Kevin McGinty: It is very difficult. We are inspectors rather than regulators. We go in, we inspect and we provide the Attorney General, chief constables and this Committee with the sort of material you need to hold the CPS and the police to account. We do not have the resources, to be perfectly honest, to go back and do disclosure so soon. What I have said we can do, and what HMCPSI will do, and I am sure HMICFRS will do with the PEEL programme, is that when we are looking at cases, as we do on a regular basis, we will specifically look at whether disclosure has been dealt with in a more effective way than it has been in the past, and we will report on that.

- Q41 **Victoria Prentis:** Otherwise, it is a matter for us, is it, to haul in the heads of the relevant organisations and ask them, if you cannot go back for the next year or so?

Kevin McGinty: I fear so, yes.

- Q42 **Victoria Prentis:** You said that in very serious cases you are fairly confident that things are proceeding as they should. Does that indicate to you that the rules are broadly right in terms of sensitive material?

Kevin McGinty: The police and the prosecution face a significant problem because of the amount of material that can be considered unused material, particularly social media material or material taken off

phones. That is not a unique position for the CPS, because the Serious Fraud Office also has to deal with vast amounts of material and is in the process of thinking of different ways of trying to deal with it, including whether it should be by electronic checking. One of the things that perhaps the CPS could do is word searches of certain material.

Q43 Victoria Prentis: We have been doing them in fraud for 15 years.

Kevin McGinty: You can agree with the defence as to what sorts of words you should be looking at. It is a challenge, but not a challenge that cannot be addressed.

Chair: You would simply agree the search terms, wouldn't you?

Victoria Prentis: Yes.

Q44 Alex Chalk: I would have thought it was fairly obvious. At one of the earlier hearings, we heard about the PTPH or the PCMH, whatever it is called—it keeps changing its name. At that stage, they should be saying, "Right, the prosecution has set out the proposed words that we are going to run through the 50,000 pages of social media. Do you, defence, have any other suggestions?" No doubt, there would be the name of the complainant, the name of the defendant, plus, say it is a sex case, any language around that. I would have thought it was tolerably obvious that one should be doing that. What is the roadblock at the moment? Why is it not happening? It is not that difficult.

Kevin McGinty: I fear that is something you will need to ask the director when she gives evidence to you. It is happening in some cases, but not all.

Q45 Victoria Prentis: It has been happening for years in the civil arena, in which I worked. For example, the cases that came back from Iraq and Afghanistan were not criminal cases, but they could have been. They were "He said, she said," or, "He said, he said," sort of cases. There was a great deal of unused material. It was very difficult to determine what was sensitive and what was not. We used search terms. We did that routinely seven or eight years ago. Even the administrative court managed it. Why is it that in our most serious cases, where we are depriving people of their liberty, or asking witnesses to relive very difficult moments in court, we cannot have a sense of urgency about this?

Kevin McGinty: For the reason we set out in the report: there is a culture of accepted defeat, a feeling that it is all too much to deal with. That is the only explanation we can give.

Q46 Chair: That culture has to come from the top in the end. Change in that culture is the responsibility of the leaders of the organisations, isn't it?

Kevin McGinty: In the report, we say, yes, in part; but it will change only when every police officer involved in a case and every prosecutor involved in preparing a case for prosecution bears in mind that disclosure is an integral part of the prosecution process, and that is not happening.

Chair: It is not happening at the moment.

Q47 **Alex Chalk:** We may get into the broad sunlit uplands of a great digital strategy, blah, blah, blah. But what happens now? Supposing, today—Tuesday—someone is arrested and charged in respect of a rape, and there are 50,000 pages of social media between the two. I am perfectly prepared to accept that at the moment it is going to be very difficult for a junior DC to go through every single page. That is difficult at the moment. What is he or she supposed to do? Stick it on a schedule and say “50,000 pages of social media”? Is the Crown supposed to throw up its hands and say, “We are giving you the keys to the kingdom and we are just going to show you the whole lot”? In your assessment, until such time as we get dip sampling and all that stuff, what is the Crown expected to do with 50,000 pages of material? Hand it over, do nothing, what?

Wendy Williams: The responsibility starts with the officer in the case. The officer in the case should accept the fundamental importance of the disclosure process. In so doing, if the officer does not know what should be scheduled and what should not, what falls to be disclosed and what does not, or what is sensitive and what is not, it is for them to have that conversation with their supervising officers.

Q48 **Alex Chalk:** With respect, I do not think that answers the question. It is not unusual that an officer will have 50,000 pages. I do not think you are saying that that officer should be expected to read every page. It is simply not possible. Has he discharged his obligation if he simply sticks it on the schedule and says, “50,000 pages of Facebook contact between the two”? Is that enough?

Kevin McGinty: Surely common sense would suggest that, if a police officer is faced with that sort of difficulty, he seeks advice, either from his superiors or the CPS. That is what the CPS is there for. That is where they add value. That is why you use lawyers to bring prosecutions, and, therefore, one would hope that the CPS would be able to advise the police as to how best to deal with those 50,000 pages.

Q49 **Chair:** Are you confident that would happen?

Kevin McGinty: No.

Q50 **Chair:** That is what it comes to; you do not have that confidence.

Kevin McGinty: I am not confident that the police will ask in the first place. I am fairly confident that, if the CPS is asked that specific question, it will do it. When the CPS is faced with a question, it will do it.

Q51 **Chair:** But it may not get asked.

Kevin McGinty: We have a culture where that does not happen and it is not challenged.

Q52 **Victoria Prentis:** We hope that the police and the CPS have done their jobs properly, but we are worried about both. Can we move on to defence counsel? How frequently does lack of compliance and engagement by defence counsel undermine the process?

Wendy Williams: We looked at a sample of files to see whether the defence case statement had been provided in a timely way, or indeed at all. As the report makes clear, in 73% of cases the defence statement had been provided. We found that the defence were discharging their obligations, but what they would probably say is that, because disclosure is not dealt with either in a timely way or correctly throughout the process, that could be the reason for the late defence statements that occurred.

Kevin McGinty: There is a table on page 44 that sets out what we found in the defence statements we looked at. In terms of T1 and T2, which are referred to there, we looked at two different sets of files. We looked at 90 files that we picked at random throughout the country, and we looked at 56 that the CPS had drawn to our attention as cases where they had specifically identified a disclosure problem. In those 90 files, we found that 66 had provided an adequate defence statement, three had not, 16 did not provide one at all and in five cases it was not applicable. I am not quite sure why it was not applicable, but it was not.

Q53 **Victoria Prentis:** We know that the criminal Bar is quite demoralised and concerned at the moment. Have you noticed changes in the quality of defence teams since changes to legal aid?

Kevin McGinty: I do not think I am qualified to say that. We only have the material that we have here, and anecdotal evidence, and I am not sure that my view is any better than anybody else's.

Q54 **Bambos Charalambous:** It seems to me that the problem is at the start of the matter. At 3.3, your report says there were "obvious disclosure issues prior to charge in 81 of the 146 cases," which is 55.5%. You go on to say that in only 24.7% of cases were the issues fully dealt with by the prosecution. My question is about the problems. Is it a question of staffing? Is the issue about getting the documents from the prosecution to the defence at the start of a case? Is that where the root of the problem is?

Wendy Williams: No, the major problem relates to officers not appreciating the importance of disclosure. As part of their investigation, in addition to taking statements—for example, in a robbery allegation—from witnesses who say the perpetrator was six feet tall and had blue eyes, if they interview witnesses who say the perpetrator was five feet tall and had green eyes, they should place that information before the prosecutor at the charging stage so that the prosecutor can have regard to information that may undermine the prosecution case or may assist the defence. We found that at the charging stage officers were not bringing to prosecutors' attention unused material that might fall to be disclosed, and that is why our first recommendation was that both officers and prosecutors should have regard to disclosure at the charging stage.

Q55 **Bambos Charalambous:** The other issue that seems to have come out is that it is not followed routinely in the same manner by different forces.

It is dealt with in a very different manner by different forces, or not at all in some cases. Should there be strict adherence to a routine?

Kevin McGinty: That is true not just of disclosure but of the quality of police files generally. We have just completed an area assurance report of all the CPS areas, except for London, over the last two years. As part of that inspection, we looked at the quality of police files that come in. They vary enormously from force to force. For instance, one area may have three police forces, and within that particular area those three police forces will be providing files of a very different standard. I have some figures I can give you if you are interested in that. It is not just about disclosure. It is about file standard generally.

Q56 **Bambos Charalambous:** After charge, once you embark on a process, there is a huge amount of cost involved if the matter goes all the way up to trial and is then dropped.

Kevin McGinty: Absolutely.

Wendy Williams: Yes, and the waste that is caused in the criminal justice system is significant. As we make clear in the report, these sorts of disclosure errors occur regularly in Crown courts up and down the country, day in, day out. If a case is discontinued, adjourned or postponed, the huge cost in both financial and human terms cannot be underestimated.

On the point about a consistent approach to file quality, this is where your Committee members' questions come to the fore. It is the College of Policing that is supposed to set the standard in terms of there being a consistent approach on the part of forces, and that is why we made the recommendation for the college to put together within 12 months a training package that is consistently used.

Kevin McGinty: For instance, we are looking at police file submission and how many comply with the national file standard for the particular type of case. In CPS West Midlands we found that 52.5% were fully met, and in the CPS North West area it was 45.1%; but in CPS South East only 30.2% fully met the standard. We had "Partially met" or "Not met" as well. That makes the point. Drawing on what Wendy has been saying, the problem starts at the beginning, but it continues and is built on all the way through. There are opportunities to try to stop the rot at various places along that process that are not being taken.

Q57 **Bambos Charalambous:** Do we know the financial cost? Is there a figure for the cost?

Kevin McGinty: The National Audit Office would perhaps be able to help you more with that, but it is undoubtedly significant.

Chair: That is very helpful, thank you.

Q58 **Ms Marie Rimmer:** This is an excellent report. I have been glancing through it. It is a great pity that the recommendations do not seem to be coming through.

I want to look at the problems created by pressure to meet tight timescales and the squeeze on resources. It matches what you have seen during the inspection, particularly paragraphs 7.1 and 7.2, where you mention that prosecutors spoke to you about the "late submission of defence statements and the subsequent delay caused in receiving responses from the police." Judges you spoke to "confirmed that there were occasions when the defence supplied the DS late, but stated that often the items being requested by the defence should have been flagged up at the initial disclosure stage." Judges spoke about a "lack of confidence in the prosecution's ability to manage the disclosure process." Has Better Case Management worked in practice? Are the timescales imposed on the police and CPS realistic? You talk about pressures all through the report. It is quite damning, isn't it, on a lot of those in-practice things?

Wendy Williams: That is correct, but the sorts of issues that we have identified are systemic. They go right back to the beginning of the process. If disclosure is treated with the significance that it requires, and due deference is given to it, the timescales that might be challenging, and that Better Case Management and Transforming Summary Justice support, should not get in the way; they should not stand in the way of disclosure being carried out correctly. That is why we call for a systemic change. It is only by completely shifting the way that disclosure is treated and dealt with that cases will be properly administered through the courts.

Q59 **Ms Marie Rimmer:** It cannot work like this.

Kevin McGinty: We should not underestimate the importance of Better Case Management and Transforming Summary Justice.

Ms Marie Rimmer: Absolutely.

Kevin McGinty: There have been so many attempts over the years to try to bring in a process that reduces the number of court hearings. There is the prospect that Transforming Summary Justice and Better Case Management are actually working. The pressure needs to be kept on everybody to ensure that they continue to work, because that impacts on the number of times witnesses and victims have to come to court, and it speeds up justice. Everyone in the criminal justice system is determined to try to make that work, but it creates pressures. It creates time pressures. As Wendy said, if you start properly and know what you have in your possession, and you have scheduled it properly and the CPS has looked at it properly, they can deal with it.

Q60 **Ms Marie Rimmer:** How can the system, which seems to be questionable, work without proper resources and training? We read on page 25 about police training: "In relation to providing adequate training on disclosure, it is our view that it is not fulfilling this responsibility...to enable police officers to understand fully the requirements of disclosure in any criminal investigation." What comes out in your report is that there is not adequate supervision. Unless there is proper training and adequate supervision, how can we expect the system to work?

Wendy Williams: I go back to the submissions I made earlier about the efforts that are now taking place in policing in the form of the College of Policing running the five regional workshops, and the work that is being done in conjunction with the CPS to improve disclosure practices. If that work is carried out, and if those sessions take place, and if, as Kevin said earlier, officers refer to their senior officers, to their supervisors and to prosecutors if they are in doubt, it will increase levels of confidence in the ability of both the police service and the CPS to respond adequately to their disclosure responsibilities.

Q61 **Ms Marie Rimmer:** You bring out in your report that the CPS and the police provide training and are even coming up with their own packages. Is there not a danger of inconsistency?

Wendy Williams: Absolutely. That is why it is for the College of Policing, the professional arm of the police service, to set the standard and devise the training package to which all police officers should subscribe. By the way, it should not just be an online training course; it should be interactive. You can have webinars if you want, but it should certainly be interactive and practically based, so that officers understand what their responsibilities are and can carry out their roles effectively. Once that is done, the standard will improve.

Kevin McGinty: That is not the case with the CPS, because it is a national organisation and therefore can have consistent training across the country.

Q62 **Ms Marie Rimmer:** What impact has it had for disclosure? Does the process and timescale imposed by Transforming Summary Justice impact on justice outcomes or not?

Kevin McGinty: I am certain that it does, simply because it introduces delay and uncertainty, and it means that neither the prosecution nor the defence know what the entirety of the relevant evidence is. Therefore, it does cause problems, yes.

Q63 **Ellie Reeves:** You talk very helpfully about some of the challenges, including the fact that lots of electronic material is being seized—mobile phones, laptops, tablets, and so on—which leads to there being lots of documentation. In terms of resources to deal with that, police numbers have been cut and further cuts are anticipated. Do you envisage the problem getting worse in relation to being able to deal with that substantial level of documentation?

Wendy Williams: I go back to the submissions we made earlier. The problems that we identified in relation to disclosure well predate both austerity and the influx of digital material, which clearly is in use much more now than it was in former years. The fact that there has not been any appreciable improvement in disclosure, irrespective of the development of the digital framework and platform, as well as austerity, leads me to suggest that the fundamental systemic issues should be addressed. While, yes, of course there are issues with regard to funding, it is the fundamental need to completely overhaul the way that disclosure

is dealt with that will finally address the problem and lead to improvements.

Kevin McGinty: Can I say something about resources? I took the view when I took up this appointment that it was not really for me to say whether the CPS was under-resourced, because, unless I know how they spend every penny they are given, I do not know whether they are generally under-resourced or simply wasting money somewhere where they should not be wasting money. When I carry out an inspection, if I find that one particular part of an organisation—say a RASSO unit—is under-resourced, I say so in the report.

The CPS has had very significant budget reductions over the last few years. Sometimes a budget reduction will lead to an improvement in efficiency because it makes you think again about how you deal with things, but one has to accept that reductions can only go so far, and there comes a stage when you simply do not have the resources to do what you are required to do. I cannot tell you whether that is the position with the CPS yet. What I can tell you is that I know the CPS is stretched. You would need to ask the Director of Public Prosecutions whether it is under-resourced generally.

Q64 **Ellie Reeves:** You talked earlier about the CPS often not challenging the police on disclosure issues. Might that be a question of resource, or is that not something you can answer? Do you think resourcing and funding contribute to that?

Kevin McGinty: I think resourcing contributes to that, but I do not think that the CPS is therefore under-resourced generally. It may well be that they just need to reassess how they deal with particular cases. Resourcing is an issue, but, again, I go back to the idea that there is a cultural issue that needs to be addressed as well.

Wendy Williams: As you rightly pointed out, policing has been subject to significant cuts over the period. As we indicated in our report, we interviewed prosecutors and police officers who said that they were stretched and that they had significant case loads, and we have reported on that. It is undoubtedly the case that, if there were further funding, there might presumably be additional prosecutors or additional police officers, but unless and until the fundamental issue is addressed waste in the criminal justice system will be perpetuated.

Q65 **Alex Chalk:** I want to return to one of the key points you made in your report. When looking at the police part of the process, you said, "The lack of supervision is a significant cause for concern." You are saying on the one hand that training is not great in how to go about making a decision and, secondly, that supervision is lacking. That is why you say we should have dedicated disclosure champions and that sort of thing.

Given how fragmented our policing system is, with over 40 police forces, are we realistically ever going to be able to get the level of expertise within a police force to provide that level of supervision, so that a junior police officer doing his second case—the last one was a year and a half

ago and he cannot remember how the schedule works and how he should exercise his discretion—can pick up the phone to someone in his own police force? Isn't part of the problem that it is so fragmented that you are unlikely to have that level of expertise?

Wendy Williams: That is why our recommendations fall into recommendations about process and infrastructure. One of the infrastructure elements is to ensure that every force has its own disclosure champion who is sufficiently well versed in disclosure to be able to provide supervision and assistance to more junior officers, but is sufficiently senior to be able to ensure that officers are properly trained, that the training is refreshed and that practices are adhered to.

Q66 **Alex Chalk:** I understand that is what you want to do. My question is a different one. Is it realistic, given the fragmentation? Of course it is realistic in the Metropolitan Police Service because it is a huge police force and you would expect there to be a champion. But is it realistic in, I don't know, Gloucestershire police, where the total number of officers is under 1,000? In among the rapid response teams, the armed police and beat police, are they going to be able to have a dedicated disclosure champion with that level of expertise? That is my concern.

Wendy Williams: Policing is complex, and the responsibilities are multifarious. However, we would suggest that it is absolutely realistic to have one disclosure champion in every force. You are right. Different forces are of different sizes, and different forces might have more than one disclosure champion, but, given its integral importance to the investigation process and to the trial and case management process, it is an investment.

Alex Chalk: I agree but I know what will happen. That one will go off sick, he will be off for six months and they'll ask, "Who's the disclosure champion?" "Do you know what? We haven't got anyone in this force." That is what worries me. Anyway, that is all I wanted to say.

Q67 **Chair:** Does it require greater investment, greater priority, by chief constables?

Kevin McGinty: We have said before that disclosure in itself is not rocket science. It does not require much, even if it is only a couple of officers in each station who have had some experience of dealing with disclosure problems in cases and know how you go about putting a file together.

Q68 **Chair:** It is getting the basics right.

Kevin McGinty: It is the same in chambers. You may not know how to do some particular thing, but there is usually somebody in chambers you can ask.

Chair: And a culture where you go and ask. I understand that.

Q69 **Mrs Badenoch:** Going back to technology, in section 10 of your report, you mentioned problems in the use of digital systems, and that both agencies use a mixture of digital and paper systems as work-arounds and

there are examples of sensitive material being lost. However, last November, when Alison Saunders spoke to this Committee, she said the CPS had made huge strides around digital processes. What is your view on that?

Kevin McGinty: They probably have made huge strides but they are not there yet. It is a very challenging system. Whitehall is littered with failed IT projects. The CPS has been trying to work on a common platform, which was a serious attempt to try to get everyone working together on a similar system. It is facing challenges in the same way as every other all-encompassing IT system has done. In the meantime, they are using a case management system called CMS, which is far from perfect and which they have had to muddle along with for some time. There are challenges. The director was probably right in saying that they had made significant progress, but they are not there yet.

Of course, the link between the police force and the CPS is often the most challenging, because the police have many different systems, so, within a CPS area that has more than one police force, it is almost inevitable that the police forces will have different systems, some of which will be able to communicate with the CPS directly and some of which will not. There are other issues. One of the things we point out in the report is the capacity of some systems to deal with a large file.

Q70 **Mrs Badenoch:** Are you talking about video, for example?

Kevin McGinty: Video and perhaps documentary, because sometimes it will be images of documents as opposed to Word documents. They take up a lot of space, which means that they cannot be transmitted electronically so they have to be posted. Once you have two different systems—one electronic and one postal—you run all sorts of risks, such as not getting the two to join up together or losing them. There are still significant challenges.

Q71 **Mrs Badenoch:** What do you think can be done? What can the CPS and the police do to ensure that they are not losing data and evidence, and are sharing it properly?

Kevin McGinty: I guess it starts with completing a proper schedule. If the police had a proper schedule of the material they had, there would at least be an initial record of what they hold. That is the first thing. As far as the CPS are concerned, they need to ensure that, however material comes to them, whether electronically or by post, they can manage to join it up and keep a record of what they have kept. One issue we raise in the report is the failure to keep a proper audit track and to keep a disclosure record sheet. There is a lot more that could be done to improve the position, and it needs to be done.

Wendy Williams: There is. There are also practical solutions that can be identified. As we said in the report, there are certain systems that do not number items sequentially beyond a certain number. Those are the sorts of aspects that can and should be easily solved. By fixing some of the more fundamental issues, the more difficult issues to which Kevin has

alluded that relate to electronic transmission between different police systems and the CPS system, can be put in train, but the more immediate matters can be dealt with straightaway.

- Q72 **Mrs Badenoch:** Looking at joining up the two agencies, and joining up the justice system more widely, there is very little joint governance between the police and the CPS at the moment, but they have responded jointly in several instances. They have responded jointly to news reports. They have published a joint review on the Liam Allan case and a national plan for disclosure. Do you consider that best practice? Would you expect to see more, perhaps formalising some sort of guidance for future working practices?

Wendy Williams: It is positive that both the police and the CPS have responded jointly and that, as you indicated, there is the joint national disclosure improvement plan to which both are signatories. That is really what we are calling for in the inspection report. We are calling for a joint partnership approach between officers and prosecutors throughout the life of a case, from the outset, from the time when officers refer to prosecutors for a charging decision, right through to the conclusion of the case. It is only by working together far more effectively than has been the case until now that better outcomes will be supported and achieved.

- Q73 **Mrs Badenoch:** Do you think there should be a formal way of working, something with some sort of joint governance, or just a "see as you go" approach?

Wendy Williams: Both organisations are independent, but the true test is in the commitment that each organisation gives, both individually and jointly, to improve the situation. The fact that there is a joint improvement plan, and there has been a joint response, potentially bodes well, but I repeat that, unless and until there is a cultural shift on the part of senior officers and senior prosecutors, we will not see the significant changes that we need for the system to operate efficiently and effectively.

Kevin McGinty: The really good thing about the joint response is that they are not blaming each other. They are actually trying to work together to solve a problem they acknowledge is a joint one.

Chair: That is a positive, but in terms of delivery the jury is still out.

- Q74 **Mrs Badenoch:** They may not blame each other but, ultimately, where do you think the responsibility lies for the recent failures, and who should lead the response?

Kevin McGinty: Both.

Wendy Williams: Both, yes; it is shared.

Kevin McGinty: It is genuinely shared.

- Q75 **Chair:** And you think there is greater recognition of that.

Wendy Williams: Yes.

Kevin McGinty: Yes.

Q76 **Chair:** Are there any other questions from members? In summary, you have given us very clear evidence and I am grateful to you. I think you said this was sortable if it is given the significance that it deserves. How confident are you that it will be given the significance it deserves?

Kevin McGinty: Your own investigation and the other work that is being done by the defence community—by the Bar and by the Law Society—is different from what has happened before, and one hopes that it will result differently from the last occasions.

Chair: Thank you both very much for coming and helping us with your evidence. We are very grateful to you. The session is concluded.