

## Group Briefing

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# Failings in the disclosure process: key learnings

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

## What can we learn from failings in the disclosure process in the UK?

Failings in the disclosure process in the UK have attracted much media attention recently, following the collapse of a number of high-profile prosecutions. A [recent review](#) undertaken by the UK Attorney General's Office on the efficiency and effectiveness of disclosure in the criminal justice system is one of a number of measures taken there in an effort to address these failings.

The review calls for an emphasis on compliance with the duty of disclosure much earlier in the process than is currently the practice, supported by better training and methods, an appropriate use of technology, improved data collection and management information on the performance of the duty, and greater oversight.

While the Attorney General's review is specific to disclosure in the UK criminal justice system, given the similarity of our legal systems, it is reasonable to suppose that many of the failings identified are shared here. Prosecutors, investigators and regulators here can learn from the practical actions and solutions proposed.

### WHAT IS DISCLOSURE?

Disclosure is the duty of the prosecution

or investigative body to disclose all relevant evidence in its possession even if it does not intend to rely on that evidence at hearing. 'Relevant evidence' includes evidence that might undermine some aspect of the prosecution case or in some other way be of assistance to the defence.

Where this duty is not fully complied with, it can jeopardise a successful prosecution or investigation or result in a wrongful conviction. (Read more [here](#))

### DISCLOSURE FAILINGS & PRACTICAL SOLUTIONS

The UK Attorney General's review contains a very insightful and clear discussion of disclosure failings and proposes some practical solutions, including the following:

#### 1. Not giving disclosure obligations sufficient attention at the outset of an investigation

The review identified an ingrained cultural problem that sees disclosure as an administrative or bureaucratic issue that only arises at the mid-point of a prosecution or investigation. A fair investigation requires that consideration

be given to disclosure from the outset. The review recommends that working practices be adjusted to drive the cultural change that is required. In particular, it calls for more emphasis on the requirement to have an auditable record of what the investigator or prosecutor has actually done to discharge their obligations or the reasons why they did not do something.

## 2. Not always following reasonable lines of enquiry that might exculpate the accused

Prosecutors and investigators have a duty to conduct a thorough investigation, manage all material appropriately and follow all reasonable lines of inquiry, whether they point towards or away from a suspect. The review found that this does not happen routinely in all cases. At the least this causes costly delays in the justice system and at worst it means that cases are pursued based on insufficient evidence. The review recommends better training and guidance for investigators. It also recommends exploring ways to make disclosure schedules more informative, perhaps by the standardisation of terminology.

## 3. Failing to disclose material that might assist the defence

Certain items of material that almost always assist the defence are often not disclosed until there has been significant correspondence and challenges from the defence. This wastes time and resources.

The review calls for a rebuttable presumption in favour of disclosing certain categories of key documents/material that usually assist the defence (e.g. draft witness statements, CCTV footage, records of emergency calls to the police). It suggests that this would lead to a change in approach by investigators and prosecutors.

## 4. Lack of meaningful engagement between prosecution and defence

Early and meaningful engagement between the prosecution team and the defence is crucial to improving the disclosure process. The review identified that, in some cases at least, a lack of pre-charge discussion between investigators or prosecutors and the defence can hamper the early resolution of evidential issues, particularly where there is a large quantity of digital material. It calls for more guidance on pre-charge engagement.

## 5. Slow uptake on adoption of technology

Many of the failings endemic in the disclosure process are caused by the sheer scale of digital material involved in prosecutions and investigations, particularly in complex cases such as serious fraud. The review calls for a greater exploration and adoption of the potential benefits of technology, including AI and predictive coding, while acknowledging that there is no 'digital silver bullet'.

## WHAT DOES THIS MEAN FOR IRELAND?

Failings in the disclosure system impact on both the defence and the prosecution. From a defence perspective, failings can potentially result in a wrongful conviction. From a prosecution perspective, they can lead to the collapse of a trial

While there are no statistics on the number of criminal trials that have collapsed here due to disclosure failings, we do know that the disclosure system is not working as effectively as it should and that this has been raised as an issue of real concern for some years now. Complex cases such as serious fraud and financial and corporate crime are particularly high risk given the huge volumes of documentation that must be reviewed.

Our legal system and disclosure system is similar in many respects to that in the UK and we can learn from what is happening there – both from the failings identified and the solutions proposed.



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