



Ministry
of Justice

Impact Assessment – Annex B: Unused material

Findings from the CPS case file review,
solicitor survey and barrister survey

IA No: MOJ052/2020

Executive Summary

- This annex summaries findings from analyses, carried out in 2019, of the prevalence and nature of unused material that is contained in Crown Court criminal cases. It shows the results from a Crown Prosecution Service (CPS) case file review exercise, a solicitor unused material survey, and a barrister perceptions survey, which were all also undertaken in 2019. All figures in this paper relate to disclosed unused material.
- **Unused material is substantially more prevalent in cracks and trials than in guilty pleas** (over 70% of trials and cracks contained any unused material, compared to 27% of plea cases according to data from the CPS case file review). Much of the findings below therefore refer to analysis on cracks and trials only.
- **Most cases had some form of disclosed unused documentary material. This finding was consistent across all three evidence-collection exercises. However, the vast majority had a relatively low volume of pages**, with the median number of pages being around 40 and 20 based on the CPS case file review and solicitor unused material survey respectively. A small proportion of cases included a much larger number of pages (with cases with more than 1,000 pages of unused material making up 2% of cases in the CPS sample and 1% in the solicitor unused material survey). The barrister survey did not provide information on the volume of pages of unused documentary material.
- Evidence from the CPS casefile review and the solicitor unused material survey suggests **only a small proportion of cases include electronic unused material** (between 9% and 12% respectively). **The barrister survey reported a much larger proportion of barristers usually having to consider electronic unused evidence** (ranging from 75% to 100%). However, it is worth noting that, unlike the CPS casefile review and the solicitor unused material survey, the barrister survey did not provide information on unused material for specific cases - barristers do not generally retain this information as it not used for billing purposes. Therefore, the barrister survey on unused material was a more qualitative exercise and the responses were based on their general experience rather than specific cases.
- **The barrister survey suggested that sexual offences, murder/manslaughter, drug offences and dishonesty were the types of offences that typically involved the most amount of work on unused material.**
- **The number of pages of served evidence is not a good predictor of the number of pages of unused material.**
- Analysis on the relationship between the amount of unused documentary evidence and time spent reviewing it (as reported by solicitors) suggests that **each additional page of unused documentary material takes on average between an estimated 40 seconds and two minutes to review depending on the type of material and how we account for outliers in the analysis.** This is dependent on the type of material,

and the nature of the case and role of the defendant, but these findings are relatively consistent with the views of the Legal Aid Agency (LAA). In the case of electronic evidence, the sample size was too small to draw reliable conclusions.

- **Almost three quarters of respondents to the solicitor unused material survey indicated they had no problem receiving unused material.** Amongst the approximately one quarter who reported issues, the two most common problems were delays in receiving the material (50%) and not receiving it at all (20%).
- **The gathered data did not cover a period of time long enough to allow us to assess whether the prevalence of unused material (both documentary and electronic) has changed over time.**

CPS casefile review

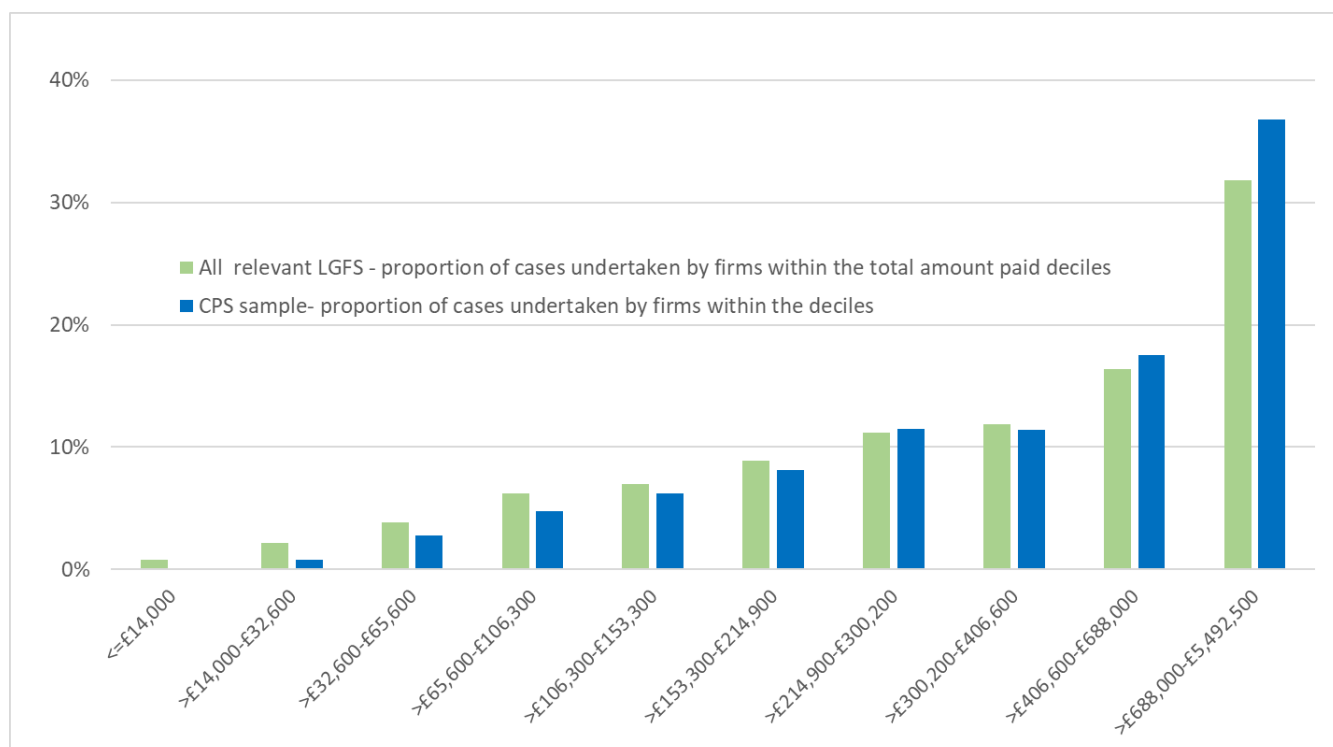
Introduction

1. The CPS undertook an in-depth case file review in 2019 of 3,000 Crown Court cases (paid out between April 2018 and March 2019) to identify the volume and type of case material, the amount of material being shared with the defence, and the level of activity being undertaken by the prosecution advocate at each stage of the case. This included a review of disclosed unused material.
2. The CPS completed checks to ensure the sample was representative of the general distribution of Crown Court criminal caseload that it completes. Analysts at the Ministry of Justice (MoJ) also checked the representativeness of this sample against criminal legal aid cases carried out by defence litigators and advocates by completing checks against Litigator's Graduated Fee Scheme (LGFS) data, and ran additional analysis. This annex focuses on this additional analysis and its findings.

Representativeness

3. The CPS completed checks to ensure their sample was representative of the general distribution of their Crown Court caseload, in terms of case outcome, offence type and advocate type. Given the CPS prosecuted the vast majority of Crown Court legal aid cases, this sample is also representative of the distribution of Crown Court legal aid caseload. Further information can be found in the link below:
<https://www.gov.uk/guidance/criminal-legal-aid-review#methodology>.
4. Analysts at the MoJ undertook some additional checks to assess the representativeness of the CPS sample by firm size. Firms were split into deciles based on their LGFS income in 2018-19. Figure 1 looks at the volumes of cases completed by firms within these deciles. It shows, as expected, that the firms in the lower deciles had fewer cases but the pattern was consistent between the total LGFS and CPS sample.

Figure 1 – Proportion of cases undertaken by firms within LGFS deciles, compared against the CPS sample



* The CPS data is based on 2,116 cases that could be matched in LGFS billing data.

* Relevant LGFS data – the same case outcomes as the CPS sample were included: trials, elected case not proceeded, guilty plea and trials.

Data Quality and limitations

5. There was missing information on electronic evidence in 250 of the 3,000 cases. For all analysis on electronic material, these cases have been excluded.
6. This data only includes cases over a 12 month period and, therefore, does not show to what extent the prevalence of disclosed unused material has changed over time.
7. While the CPS casefile included information on the number of pages of unused documentary material and the duration of the electronic unused material, it included limited information on the specific type of unused documentary and electronic material.

Key findings

8. Table 1 shows that guilty pleas are much less likely to have any disclosed unused evidence (72% had no disclosed unused material). Our subsequent analysis is, therefore, based on cracked trials (cracks) and trials. Table 1 also shows that electronic disclosed unused material is far less prevalent than documentary disclosed unused material.

Table 1: Cases with disclosed unused material

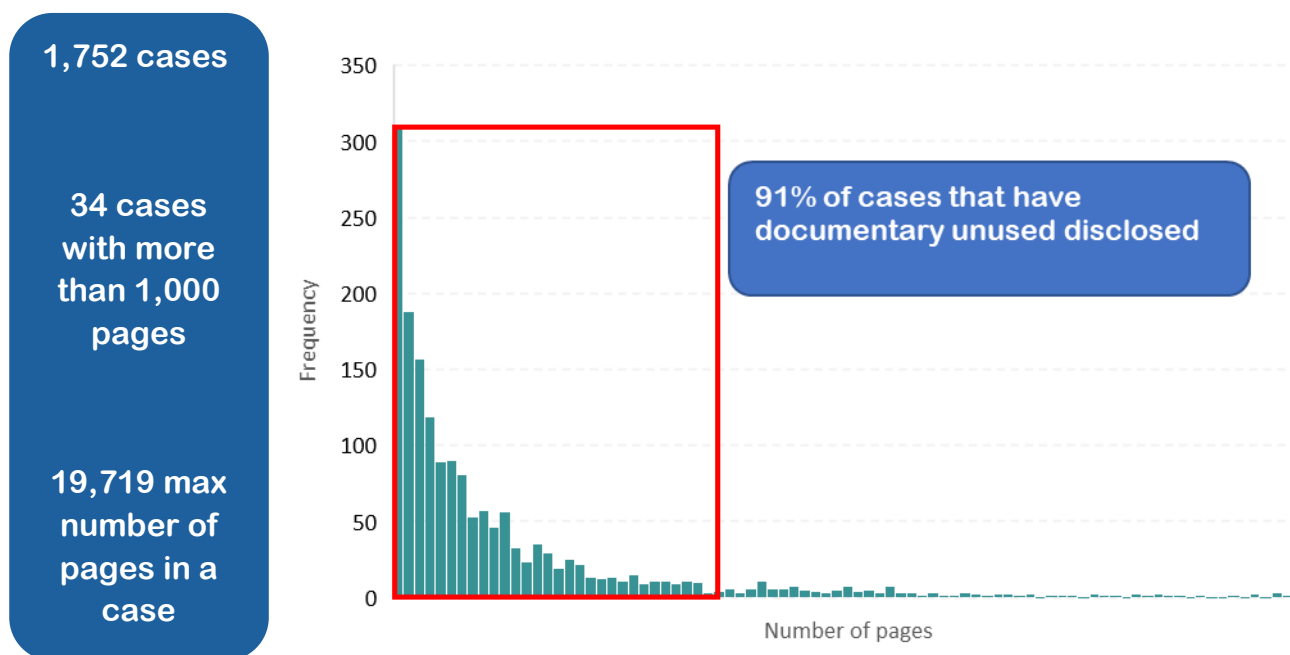
	Total cases in the CPS sample	Percentage that have any electronic disclosed unused	Percentage that have any documentary disclosed unused	Percentage with no disclosed unused
Cracks	1,392	8%	70%	28%
Trials	1,018	9%	76%	22%
Guilty pleas	590	2%	27%	72%
Total	3,000	7%	64%	35%
Cracks and trials	2,410	9%	73%	25%

Documentary material¹

9. Whilst almost three quarters of cracks and trials in the sample had documentary disclosed unused material (73% or 1,752 cases), in most of these cases (over 90%) the number of pages of disclosed unused material was below 250 (see Figure 2), with 50% of cases having 40 or fewer pages.
10. Whilst the median was 40 pages, the average was 880 pages. This indicates that there were a relatively small number of cases with a very large number of pages, which were pushing up the mean while the median was not affected by these extreme values. Therefore, the median provides a better indication of the number of pages of documentary disclosed unused material in a representative case.
11. There were 34 cases (or 2%) that had more than 1,000 pages, with one case having almost 20,000 pages.

¹ The distributional measures refer to in this section (such as average, median, upper quartile, etc.) exclude cases with zero pages. In other words, these measures refer to the distribution of disclosed unused pages for cases where documentary material exists. Had we instead assessed the distribution across all case types by including cases where documentary material does not exist, the page counts under the various distributional measures would have naturally been lower.

Figure 2: Distribution of disclosed unused pages in cracks and trials (only cases with documentary disclosed unused material)



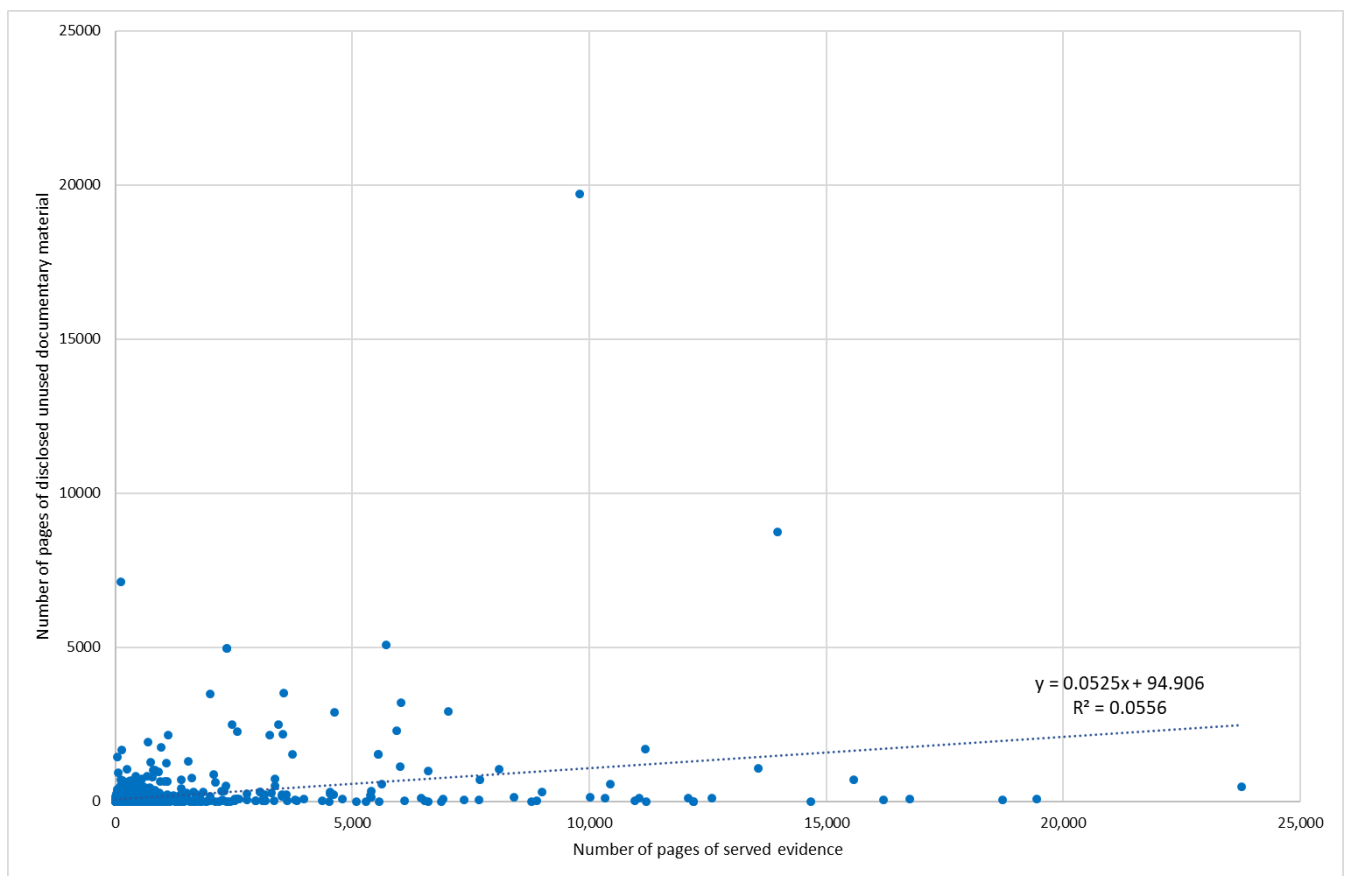
Electronic material

12. As shown in Table 1, only 9% of cracks and trials in the sample had any disclosed unused electronic material. Of these, CPS could only obtain detailed information about the electronic material for 153. These 153 cases contained a mixture of different types of electronic material: 98 of them had information on the duration (mins) of the material (i.e. CCTV, Body Worn Video, or Achieving Best Evidence material), 64 had any information on the size (MB) of the material, and 15 had any information on the number of pages.
13. Analysis was only carried out on the time duration (mins) of the video material in this paper. Analysis was not completed on the size (MB) of the electronic material. The reasons for this was that the size of unused material in megabytes may, or may not, reflect substantial volumes of underlying material.
14. This analysis showed that 90% of cracks and trial cases with information on the duration of the disclosed unused electronic material had less than three hours of evidence, 72% less than an hour and 50% less than 21 minutes.

Relationship between served evidence and disclosed unused material

15. MoJ looked into the relationship between served evidence and disclosed unused documentary material for cracks and trials. In Figure 3 we have plotted the 1,752 CPS sampled cases for which there were both served evidence and disclosed unused documentary material. Our analysis showed no strong relationship between served evidence and documentary disclosed unused material. This conclusion stands when cases with more extreme values (over 1,000 pages of either served evidence or unused material) are removed.

Figure 3 - Relationship between served evidence and disclosed unused documentary material for cracks and trials



Solicitor Unused Material Survey

Introduction

16. This survey, carried out in 2019, aimed to collect further data on those cases in the CPS casefile review that we could match with LAA data. For each case we asked the defence solicitor questions about the amount of unused material and the amount of work involved in reviewing that unused material. We also asked for more detailed information about the different types of documentary material and electronic evidence than in the CPS casefile review.

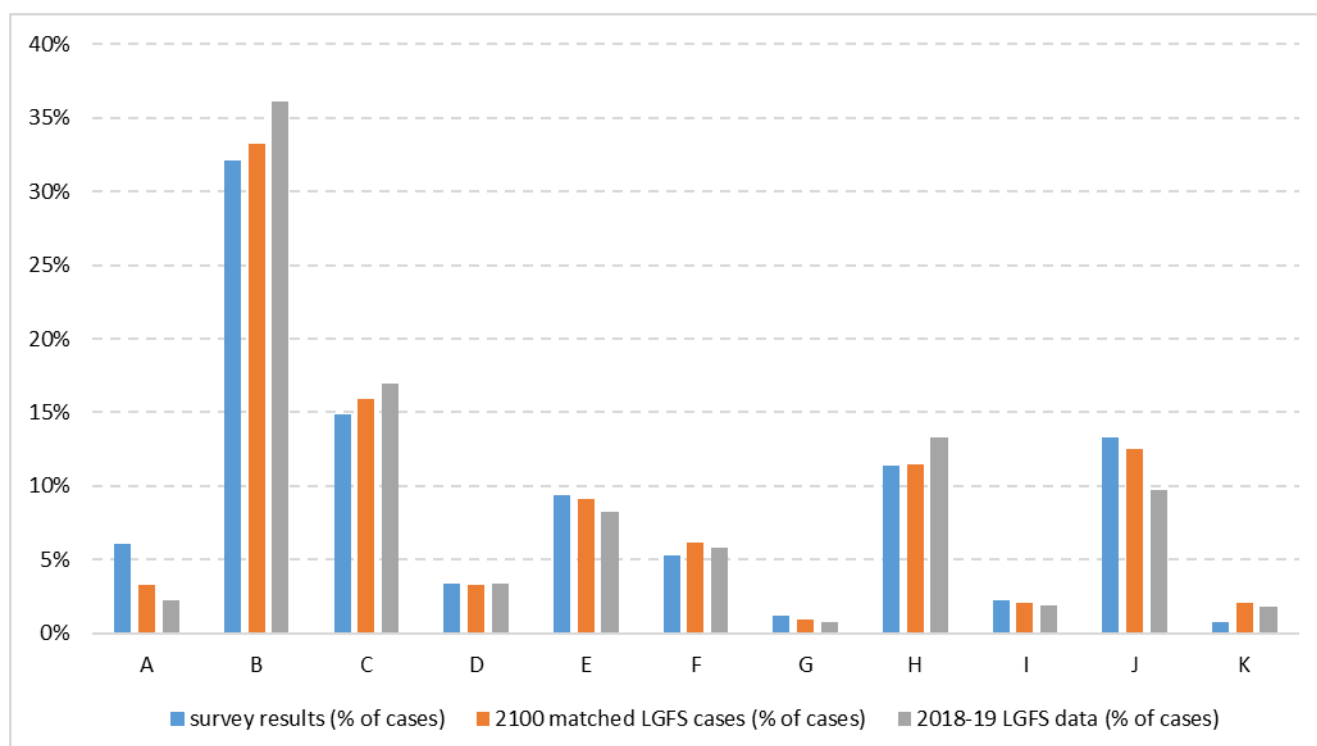
Response rate

17. We matched 2,116 cases from the CPS casefile review to LAA LGFS data. We contacted solicitors and received 660 responses.

Representativeness

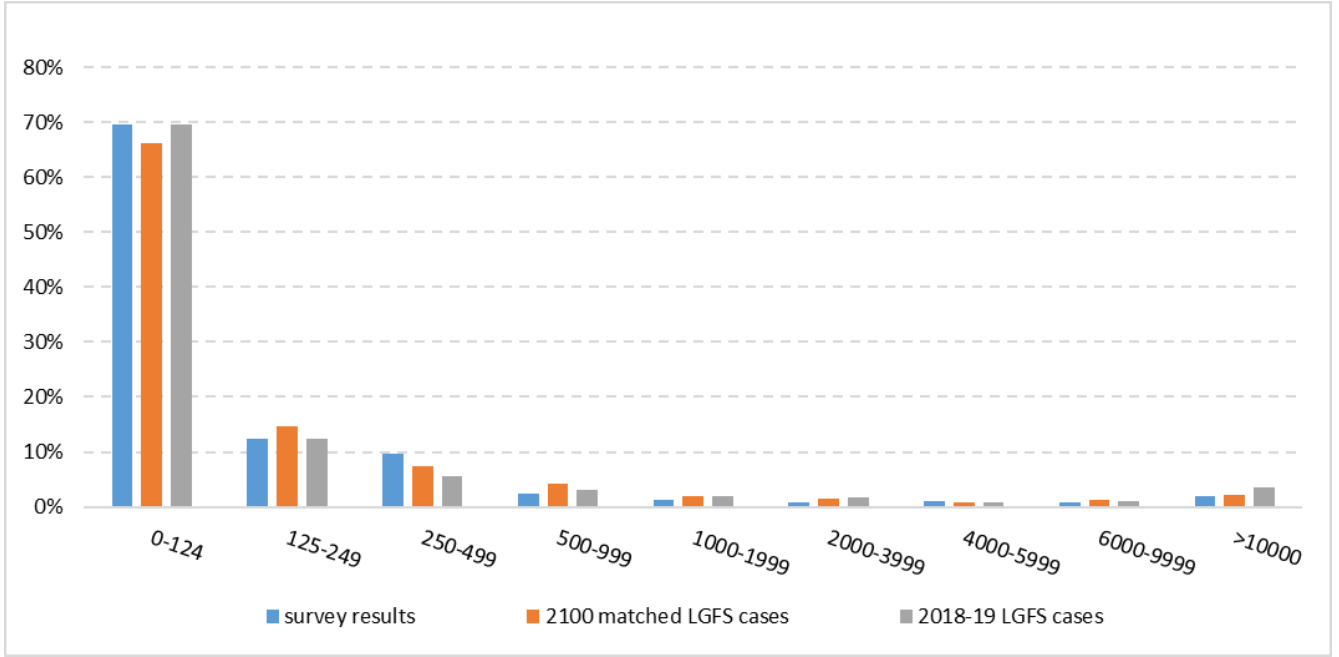
18. Overall, the responses appear to be broadly representative of all the CPS matched cases and 2018-19 LGFS cases, both by offence type and pages of prosecution evidence (PPE) (see Figures 4 and 5 below).

Figure 4: Distribution of cases by offence type²



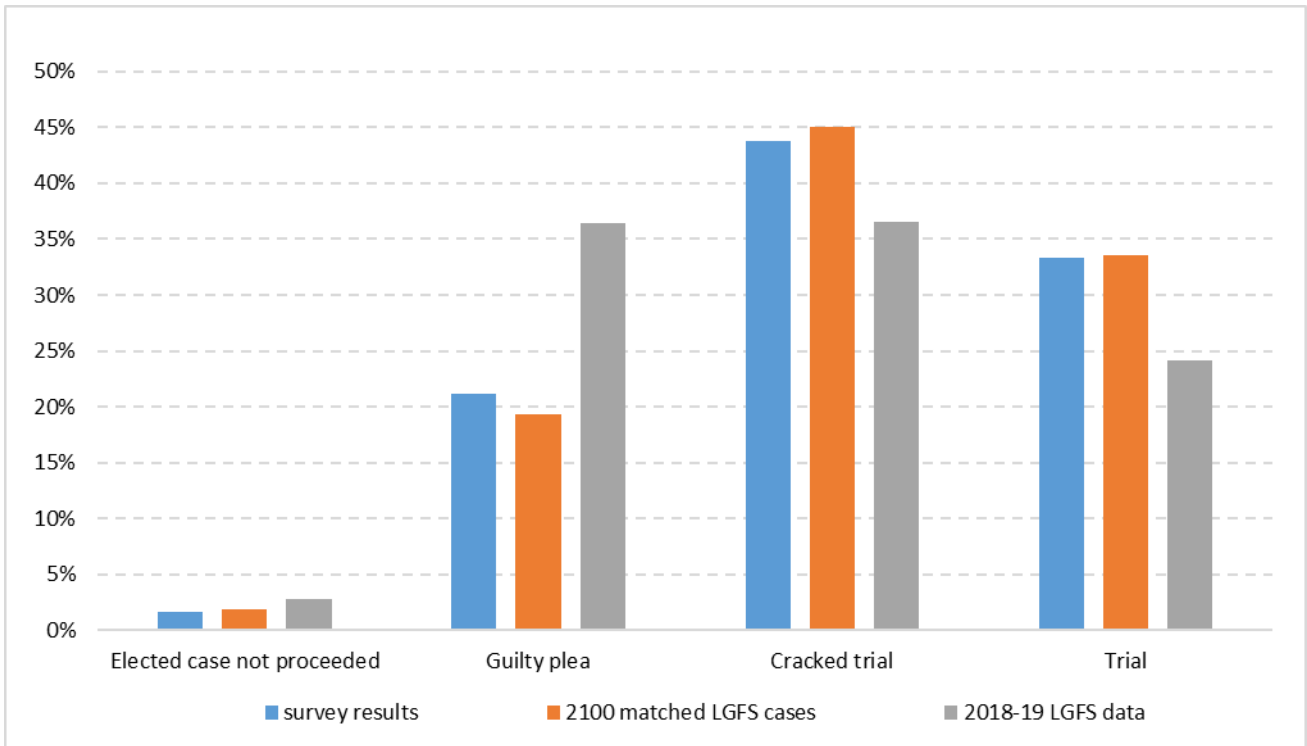
² A = Homicide and related grave offences, B = Serious violence or damage and serious drug offences, C = Lesser violence or damage and lesser drug offences, D = Serious sexual offences and offences against children, E = Burglary etc., F = Other offences of dishonesty, G = Other offences of dishonesty, H = Miscellaneous other offences, I = Offences against public justice, J = Serious sexual offences, K = High value dishonesty.

Figure 5: Distribution of cases by PPE



19. However, as shown in Figure 6, when responses are considered by case outcome, they are less closely aligned to 2018-19 LGFS cases. In particular, cracks and trials are over-represented, whilst guilty pleas are under-represented when compared to 2018-19 LGFS cases. It is worth bearing in mind that, as Table 1 showed, cracks and trials are much more likely to have unused material than guilty pleas.

Figure 6: Distribution of cases by case outcome



Data Quality

20. Not all of the 660 responses contained complete information about the unused material involved in each case. For example, some solicitors specified that certain types of unused material existed but they could not account for the volumes of it (either in pages for documentary material, or pages, duration (mins), or size (MB) for electronic material). Around 89% of the 660 responses (590) contained complete information about the unused material involved in the case.

Key findings

21. The survey included a question asking for feedback about the survey. In answer to this question, a number of solicitors mentioned that the CPS had not disclosed any unused material on them before an “early” guilty plea was entered. This seems to suggest that solicitors may not complete any work on unused material in some guilty pleas cases. This is backed up by the CPS casefile review, which suggests guilty pleas are less likely to have disclosed unused evidence. For this reason, similarly to the CPS casefile review analysis, we have focused our analysis on cracks and trials.

22. Evidence from the solicitor unused material survey is also generally consistent with evidence from the CPS sample:

- Solicitors reported that a large proportion of cases included documentary material (82% of cracks and trials received pages of schedules, and 52% of cases received documentary evidence).
- When documentary evidence was present (including both pages of schedules or documentary material) the median number of pages was low: 20 pages³. A small proportion of cases had substantially more pages than the median (1% had over 1,000 pages).
- Again, in line with the CPS casefile review results, electronic unused material appears to be rare across the responses (in around 12% of cracks and trials).

23. Almost three quarters of respondents indicated they had no problem receiving unused material. Amongst the approximately one quarter that reported issues, by far the two most common reported problems were that they did not receive the evidence (20%) or that there was a delay in receiving it (50%).

³ The figure refers to cases that include both pages of schedule and disclosed unused documentary material, and cases that include only pages of schedule. When cases that include only pages of schedules are removed, the median number of pages is 58.

Relationship between quantity of evidence and time spent reviewing, for cracks and trials

24. We looked into the relationship between the quantity of material and the time spent reviewing it, for cracks and trials, when solicitors reported that there was some unused material and they had spent some time reviewing it.⁴ There were 359 cases where solicitors reported that there was unused documentary material (including pages of schedules) and they reported they had spent time reviewing it.
25. We tried various approaches, varying the type of unused documentary material we included in our analysis and the way we identified outliers. For unused documentary material, our analysis showed each additional page of material takes on average an estimated 40 seconds to two minutes to review. Details of the analysis used for the lower and upper bound scenarios are as follows:
- Lower bound: analysis excludes pages of schedules and two data points were considered to be outliers⁵. This analysis estimates that each additional page of unused documentary material takes around 40 seconds to review.
 - Upper bound: analysis focuses on the time to review pages of schedules exclusively (that is, any other unused documentary material is not included) and excludes one data point considered to be an outlier.⁶ This analysis estimates that each additional page takes just over two minutes to review.
26. This finding is relatively consistent with the views of the LAA, depending on the type of material, and the nature of the case and role of the defendant.
27. We also looked into the equivalent relationship for electronic unused material; in this case the relationship between the duration (in minutes) of the evidence and the time spent reviewing it. As above, we considered only those cases where both the quantity of unused material and the time spent reviewing it were reported. There were only 25 such cases and, therefore, we considered this sample to be too small to draw any robust conclusions from.
28. Finally, the data from the CPS casefile review did not include information on time spent reviewing either documentary or electronic material as the CPS reviewers could not gather this evidence. Therefore, it has not been possible to draw comparisons.

⁴ We also carried out this same exercise with data that included, in addition to cracked and trials, guilty pleas and elected cases not proceeded. The findings for this analysis were consistent with the findings that we set out in this section in relation to cracked and trials only.

⁵ This analysis includes 155 cases, two of which were considered outliers and removed.

⁶ This analysis includes 343 cases, one of which was considered an outlier and removed.

Barrister Unused Material Survey

Introduction

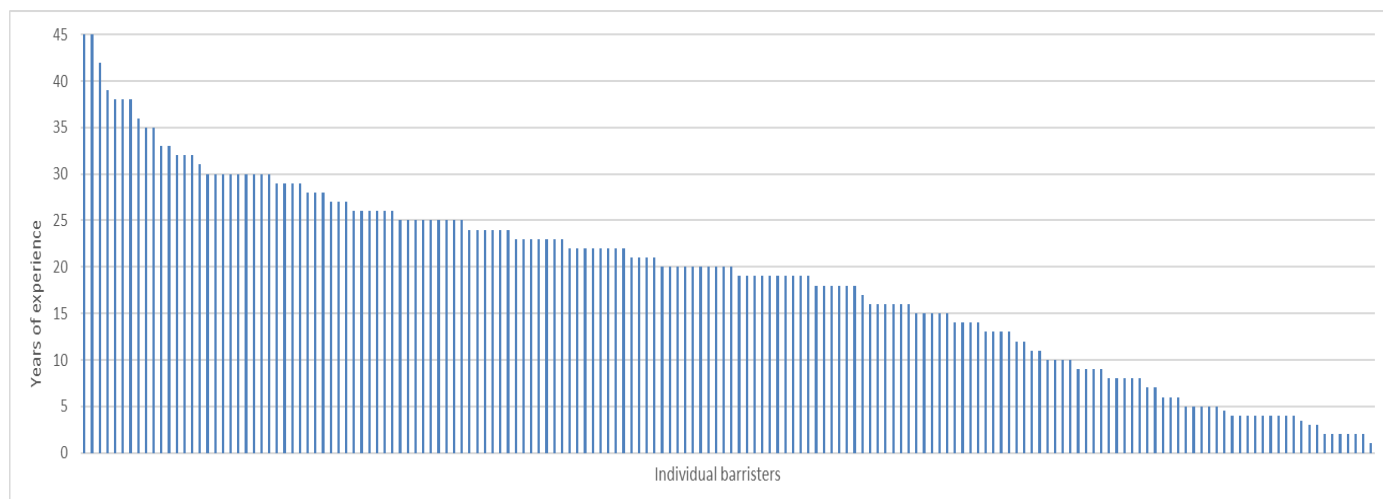
29. We proposed to undertake a similar data collection exercise on unused material with barristers in 2019. However, the Bar informed us that barristers do not routinely retain case specific information on unused material as it is not used for billing purposes. Instead we agreed to conduct a more qualitative exercise in 2019 asking barristers more generally about the different case types that typically involve unused material (e.g. plea, and trials) and how often they need to spend time considering unused material for different offence types.
30. Based on 2018-19 Advocates' Graduated Fee Scheme (AGFS) billing data, we included barristers in the sample if they were actively involved in criminal defence work, defined as having completed at least 10 cases, or any work as a Queen's Council (QC) or lead junior. QCs and lead juniors were oversampled in this way to ensure experience on the more complex and infrequent case types.

Response rate

31. We received responses from 171 barristers. Based on 2018-19 AGFS billing data, this represented less than 10% of barristers that met the sample conditions.

Representativeness

32. There is a slightly higher proportion of QCs or lead juniors in the responses than those in the sample. Of the 171, 38% completed any work as a QC or lead junior versus 27% in the sample. As described on the methodology webpage, we oversampled senior advocates to ensure experience on the more complex and infrequent case types.
33. The respondent's self-reported years of experience supports this too. 75% of them have at least 10 years of experience as a barrister, and only 15% of them (around 25 barristers) have less than 5 years' experience. The minimum is 1 year and the maximum is 45 years.

Figure 7: Years of experience of the barristers that responded

Data Quality

34. Although the total number of responses was low, most barristers reported that they had sufficient experience to comment on the unused material involved (see Table 2 below).

Key findings

35. The time barristers spent on unused material increased as the case headed closer towards trial. This is consistent with evidence from the CPS casefile review and the solicitor unused material survey. Looking at Table 2:

- If a guilty plea came at the Plea and Trial Preparation Hearing (PTPH) then unused material was considered 'Rarely' or 'Never' by 32% of respondents, with only 19% saying they would "always" spend time considering unused material in these cases.
- If a guilty plea came any later (or the case went to trial) unused material was considered 'Sometimes' – or more regularly – by over 96% of respondents.
- In cases that went to trial unused material was considered 'Always' 93% of the time.
- The only unusual result is unused material being considered 'Always' more often when the guilty plea comes in the first or second third (64%), compared to the final third (37%).

Table 2: How often barristers need to spend time considering unused material, by case types

	Guilty plea at PTPH (%)	Guilty plea in first or second third (%)	Guilty plea in final third (%)	Trial (%)
Total number of response	167	166	166	168
Never	4%	0%	1%	0%
Rarely	28%	2%	2%	0%
Sometimes	39%	7%	23%	1%
Most of the time	10%	27%	36%	5%
Always	19%	64%	37%	93%

36. At least three quarters of barristers reported usually having to consider at least one form of electronic unused material. Furthermore, barristers reported that electronic evidence was as common (if not more so) than documentary material. This is not consistent with the CPS sample and the solicitor survey, where the prevalence of electronic evidence was very low in both exercises (around one in ten cases) and much lower than the number of cases where documentary unused material was present. It is worth noting that the barrister survey was a more qualitative exercise, based on barristers' general experience rather than information about specific cases. As mentioned before, barristers do not generally retain information on unused material as it not used for billing purposes.
37. For documentary unused material, barristers' responses on prevalence were more in line with evidence from the CPS sample, as they reported that many cases included documentary unused material (ranging from 81% to 100% of cases depending on the type of offence). The CPS sample showed that 63% of cases included documentary unused material (or 74% when only cracks and trials were considered).
38. Barristers were also asked to tick (up to 5) offence types that typically involve the most amount of work for them on unused material. For this question, many barristers included offences for which they had not self-reported sufficient experience in at the beginning of the questionnaire. In Table 3 below, we have only counted the instances of the top 5 offences where the barristers have also reported sufficient experience in those offence types. It shows that sexual offences (children), murder/manslaughter, sexual offences (adult), drug offences and dishonesty have often been included in barristers' top 5.

Table 3: Frequency table, barrister's self-reported top 5 offences that involved the most amount of work on unused material

Offence description	Total barristers with experience on these offence types	Offence included in "up to 5" offence types AND barrister experienced	% of total
Sexual offences (children)	111	105	95%
Murder/Manslaughter	75	69	92%
Sexual offences (adult)	117	102	87%
Drugs offences	146	125	86%
Dishonesty (under £30k to over £10m)	148	93	63%
Exploitation/human trafficking	58	28	48%
Serious Violence	137	64	47%
Firearms offences	114	24	21%
Regulatory offences	65	12	18%
Other offences against the person	93	10	11%
Burglary and robbery	104	11	11%
Public order offences	88	6	7%
Standard cases	65	3	5%
Offences against public interest	64	2	3%
Property damage	67	1	1%
Driving offences	68	0	0%
Terrorism	Sample size too small		

39. Data on offences where the number of barristers reporting having experience was under 50 is not reported as the small sample size was deemed too small to draw robust conclusions from.