The Consultation on revisions to the Attorney General's Guidelines on Disclosure and the CPIA Code of Practice

Introduction

1. 25 Bedford Row is one of the leading sets of Chambers of criminal barristers in the country. We are one of only five sets ranked in Tier 1 as a Leading Set in the 2020 Legal 500 Directory.

2. Our Chambers has developed a reputation as one of the most forward-thinking and efficiently run Chambers at the Criminal Bar. We have achieved this through a combination of high standards of advocacy and professionalism and dynamic management and leadership.

3. As part of our commitment to maintaining the highest standards of professionalism at the Criminal Bar we consider it part of our duty to the administration of justice to seek to respond to consultations which touch upon areas of work with which we are closely connected.

4. Given that this Consultation arises from the Attorney-General's Review of the efficiency and effectiveness of disclosure in the criminal justice system, published in November 2018 which in turn considered a number of other reviews and reports[1] which reflected

[1] Notably the Inspectorate of Constabulary and Fire & Rescue Services and the Crown Prosecution Service Inspectorate (HMCPSI) joint inspection of the police and prosecution management of disclosure of unused material by the police service and the Crown Prosecution Service (CPS) during 2017,

a widespread concern that the disclosure regime based upon the Criminal Procedure and Investigations Act 1996 (the CPIA) simply was not working, our responses to the Consultation draw upon our knowledge of that background and note that the Review baldly stated that the current disclosure system was not working.[2]

5. The Review itself sought to identify the specific problems with current disclosure practice and proposed the solutions upon which views are sought. We applaud the commitment to improve upon the current system and the amount of thought and research that underpins the proposed revisions, although remain somewhat sceptical that they will achieve the desired outcome. Nonetheless, any improvement is to be welcomed.

Independent Police Complaints Commission review and HMCPSI review of the conviction of the 'Cardiff Five', the 'Mouncher Investigation Report' into that case which was published in July 2017 and the disclosure inquiry by the House of Commons Justice Select Committee published in July 2018

[2] "no one who has regular professional involvement with the criminal courts can have avoided the conclusion, often from painful experience, that for too long the system of disclosure has not operated effectively enough." Foreword by the Rt. Hon. Geoffrey Cox QC MP Attorney General

Questions about culture change

Q1: Do you agree that the list of material proposed for the rebuttable presumption (paragraph 74 of the Guidelines and paragraph 6.6 of the Code) is fit for purpose?

No

It is of some concern that the law on disclosure is still so poorly understood that the Custody Record is on a list of material which it is merely presumed should be disclosed – but may not be. The Code of Practice C drafted as secondary legislation under the Police and Criminal Evidence Act 1984, paragraph 2.4A states: -

"*When a detainee leaves police detention or is taken before a court they, their legal representative or appropriate adult shall be given, on request, a copy of the custody record as soon as practicable. This entitlement lasts for 12 months after release."*

It is remarkable that the CPIA Code of Practice and the A-G's Guidelines are drafted so as to suggest that this unfettered right is subject to the prosecutor's decision whether to provide a copy or not, albeit with a rebuttable presumption that it should be.

Q2: Is it clear what is meant by a crime report (in the context of paragraph 74a of the Guidelines and paragraph 6.6 of the Code), do you have any views on this description and do you or your organisation use these?

Yes, from our perspective it is clear

Q3: Are there any items in this list of materials that are missing or should be removed?

Yes

The Review proposed that the list should include "*CCTV footage, or other imagery, of the crime in action*". The proposed list of items does not include this on the ground that where it exists it is "highly likely" it will be used in evidence. This overlooks the

fact that if the investigator takes the view that it is of such poor quality that it does not sufficiently identify the defendant it would possibly not be used as evidence. However, there are many cases where the quality is such that although it is insufficient to provide evidence of a positive identification it may still be of adequate quality to exclude the defendant, cast serious doubt upon the identification or upon certain aspects of the allegation. The fact that in most cases it may be deployed as evidence should not exclude it from the list of material that it is presumed should be disclosed. We suspect the removal of this item from the list has more to do with resource implications involving the service of video material – which is more difficult to copy and serve than documentary material. This should not be a reason for distinguishing this material from the other routine items which are on the list.

Q4: Does the proposed wording in the Guidelines make it clear that this is not intended to cause 'automatic' disclosure?

Yes

However, there remains a significant risk that non-disclosure will still result. The CPIA Code of Practice has always said that in the Schedules of Unused Material which the investigator must compile and submit to the prosecutor "*The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed*." Yet this has done nothing over the years to prevent prosecutors from writing 'CND' ['*Clearly not disclosable*'] against items the description of which are obviously insufficient for that judgement to have been made by the prosecutor. The revised Guidelines and the Code of Practice state that "*a prosecutor must record on the unused material schedule whether each item of this material does or does not meet the test for disclosure and they must record the reason for that decision*". There is no reason to believe that this will do anything to prevent prosecutors from resorting to the same automatic response and writing "*CND because it does not satisfy the test for disclosure as it is not capable of undermining the prosecution case against them and/or assisting their defence*" which would satisfy the revised

Code in that it does state that the material does not meet the test for disclosure and does '*record the reason for that decision*'. It is equally impracticable to re-draft the wording as how would one describe a negative [it does not assist the defence] in a more positive or descriptive fashion? The whole point of this proposal is to prevent the hard-pressed prosecutor from falling back into automatic refusal to disclose and avoiding protracted correspondence as the defence seek enlightenment as to the reasons for non-disclosure so that it may be challenged.

Given that the Review acknowledges that these items "*almost always assist the defence and therefore meet the test for disclosure*"[3] there is no good reason not to make them automatically disclosable, subject to redaction of sensitive material. Making a short list of specific items that should be served automatically in no way undermines the "thinking approach" to every other piece of unused material and would remove any risk of injustice caused by the non-disclosure of these things that "almost always assist the defence".

Q5: For disclosure officers and prosecutors only. Is it clear what the references to carrying out disclosure 'in a thinking manner' mean? For example, at paragraph 4 and footnote 2 of the Guidelines.

No comment

Q6: Is the guidance on obtaining material held by third parties helpful and sufficiently detailed?

No

At present the Guidelines simply say at Paragraph 31, "*The defence should be informed of what steps have been taken to obtain material and what the results of the inquiry have been*" but without any indication of when this should take place, although the draft Disclosure Management Document contains references to third party material. There is a risk of delay being caused in cases where the defence are not notified of this until very

[3] At page 18

late in the day. Consideration should be given to amending Paragraph 31 to say "*The defence should be informed* ***as soon as reasonably practicable*** *of what steps have been taken to obtain material and what the results of the inquiry have been."* Further observations on this section are contained in the answer to Q20.

Questions about balancing the right to a fair trial with the right to privacy

Q7: Do you believe the revised drafting provides sufficient clarity around the competing rights in this space?

Yes

Q8: Are there any aspects requiring further clarification?

No

Questions about performing disclosure obligations early

Q9: Do you agree that it would be helpful for investigators and prosecutors to engage in pre-charge engagement?

Yes

The reasoning supporting this proposal in both the review and the Consultation document cannot be faulted or improved upon. The challenge in actually achieving this outcome in all but a small minority of cases is recognised in the Consultation which points out that "*The resource implications of these suggestions are recognised, and we are aware that in certain cases it may not be possible to serve initial disclosure to this timeframe, or provide schedules prior to or at the point of charge*."

It is notable that in the more complex cases meaningful disclosure often takes place months after charge and often only shortly before trial and in many cases disclosure schedules have not even been drafted or reviewed until after the trial has begun. This is never regarded as a good reason to delay the trial and the defence are required to 'make the best of it'. Paragraphs 91 to 92 of the Guidelines acknowledge that it is the Court's

duty to ensure this does not happen, but experience shows the Courts are generally not that concerned to enforce the CPR in this respect.

Q10: Do you agree that the proposed guidance in Annex B is helpful?

Yes

Q11: Do you agree that in all Full Code Test not guilty plea cases, it would be beneficial for investigators to provide unused material schedules to the prosecutor at the point of, or prior to, charge?

Yes

Again, the reasoning supporting this proposal cannot be faulted.

Q12: Do you agree that in not guilty plea cases, it should be best practice for initial disclosure to be served prior to the PTPH?

Yes

Experience leads us to conclude that this laudable aim will not be achieved in any but the most simple cases.

Questions on harnessing technology

Q13: Does the Annex on digital material in the Guidelines contain sufficient information and guidance?

Yes.

Q14: Are there any areas where additional guidance or information could be beneficial?

No.

Q15: Do you think the revised Guidelines are clearer, and easier to understand?

Yes

The revised Guidelines are a huge improvement on the old ones. The expanded format, the clear statements of principle together with the references are welcome as are the references to the CPIA Code of Practice and the fundamental duties [NB Paragraphs 8, 20, 22, 24, 46, 48, 51 and 70]. The change to a 'chronological' approach is welcome as emphasises the need to consider disclosure from the outset and as a continuing duty.

Q16: Do you agree that the proposed changes to the Guidelines and the Code are likely to improve the performance of disclosure obligations?

Yes

This is a highly qualified 'yes' to a very loaded question but given the number and quality of the proposed changes which follow on from a review that found that the current disclosure system was not working it would be very surprising if the changes made things worse or no different. There are two notable and relatively intractable problems with disclosure. As the Review noted in the Foreword "*no one who has regular professional involvement with the criminal courts can have avoided the conclusion, often from painful experience, that for too long the system of disclosure has not operated effectively enough*". This is for two reasons. The first, again noted by the Review, was that "*there is an irreconcilable conflict at the heart of CPIA 1996 disclosure procedures in England and Wales….it is unrealistic to expect investigators and prosecutors, who are working to secure convictions, to exercise due care in searching for and identifying material that might assist an acquittal*." In practice the performance of investigators and prosecutors is extremely variable with some exercising exemplary care and others behaving in a way that raises doubts about their *bona fid*es. The real problem is a lack of accountability when things are not done properly; the consultation does nothing to address that issue[4]. The second problem is a

[4] The issue of accountability was expressly addressed in the Review at page 30 where it says "*Within any system accountability is necessary to ensure standards are met.*"

lack of resources to enable either investigators or prosecutors to carry out their duties correctly; that issue is outside the scope of the Review or Consultation. The one substantive change that is likely to have a beneficial effect is Paragraph 81 of the Guidelines: "DMDs should be prepared in all Crown Court cases".

Q17: Do you agree that the proposed changes to the Guidelines and the Code will encourage disclosure obligations to be carried out earlier than they are currently?

Yes

For the reasons given in answer to Q16, the good intentions of the Review are unlikely to result in any significant change in practice but the requirement to draft a DMD should result in a far better and structured approach to disclosure. The real test will be whether the Courts are prepared to enforce disclosure duties by a proper application of the CPR.

Q18: What operational impacts do you envisage the proposed changes to the Guidelines and the Code having, if any?

The impacts would appear to fall most heavily on investigators and prosecutors and only time will tell if they are provided with adequate resources to effect the proposed changes in a meaningful way.

Q19: Do you consider that the proposed changes to the Guidelines and the Code could affect the relationship and/or levels of engagement between any of the parties involved in criminal cases? For example, investigator/prosecutor, or investigator/complainant.

It is difficult to see how the proposed changes will affect relationships between investigators and complainants. As far as relationships between investigators and prosecutors are concerned one can foresee great potential for conflict. If prosecutors correctly apply the CoP and Guidelines they will impose significant burdens upon investigators at a time when we understand investigators' resources are limited and

stretched. If the investigators correctly apply the Guidelines it will impose burdens on prosecutors to properly review the unused material at a time when we understand the CPS in particular is under-resourced and cannot comply with their current disclosure obligations. It is therefore difficult to foresee the proposed changes actually having a benign effect upon the CJS as a whole, however well-intentioned they are.

Q20: Are the links and references to other forms of guidance in the revised Guidelines helpful and clear?

Yes

The Revised Guidelines are an improvement in this respect on the older versions. We would have liked to see a link to the model protocol on Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings in the Third Party section as it is an invaluable guide to best practice in cases involving the difficult topic of securing relevant material from third parties in those cases where it is likely to be most significant.

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April 2020