CBA Response to the Consultation on Revisions to the Attorney General's Guidelines on Disclosure and the CPOA Code of Practice

April 2020

Introduction

1. The CBA represents the views and interests of practicing members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

4. This response will take a section by section approach to the Consultation paper published in February 2020 and will provide detailed submissions in support of those responses.

Foreword and Approach (Paragraphs 1-7)

5. The Consultation appears to recognize the importance of disclosure in ensuring the overriding of objective of the Criminal Courts – namely, that criminal cases are dealt with justly, including, but not limited to, acquitting the innocent and convicting the guilty, dealing with the prosecution and the defence fairly, and recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights. For too long the issue of disclosure has been the poor relation of Criminal practice, frequently misunderstood or ignored with the various disclosure regimes having been either mis-applied or disregarded in ways which are incompatible with the overriding objective.

6. The CBA has been encouraged by the invitation of practitioners from both the Bar and Solicitors groups to initiatives such as NDIP. However it is vital that the momentum and commitment to driving up standards in the delivery of this fundamental part of the criminal justice system continues. Although there was a renewed training programme in relation to disclosure delivered via NDIP in 2018 to both the CPS and Police, it has been disappointing to note that it has not been either understood or engaged with at a frontline level by some.

7. Members of the CBA are frequently asked to deliver training sessions on disclosure to the Police and it is apparent from those sessions that there are fundamental tensions between the Police, the Crown Prosecution Service (CPS) and defence practitioners relating to disclosure. Those tensions arise partly from the different functions each play within the Criminal Justice System but partly from a lack of regard to the overriding objective and a lack of importance being placed on in house training within the Police and CPS. The members of the CBA who have provided training have done so on a pro bono basis with the intention of improving levels of knowledge and understanding. Although there was a renewed training program in relation to disclosure delivered via NDIP in 2018 to both the CPS and Police, it has been disappointing to note that it has not been either understood

or engaged with at a frontline level by some. There needs to be greater transparency and consistency on how training is delivered and by whom with perhaps local groups based on the same principles as NDIP considering local issues. The lack of national funding budgets for proper in house training reflects the general underfunding of the disclosure aspect of every criminal case. Since the introduction of the CPIA there had been no provision for remuneration for the time spent considering disclosure until February of this year on the prosecution side and there is still no provision for the defence. Unused material can be equal in volume to the amount of served evidence, in the most simple of cases, and in cases of greater gravity will routinely vastly exceed the amount of served evidence. All of that material must be read, digested, and processed in parallel to the served evidence so that the overriding objective can be achieved.

8. It is disappointing that many police officers, with senior investigative roles are unaware of the existence of the CPIA Code of Practice and a first step in any review of the disclosure regime must be to ensure a consolidated approach across the Police forces in England and Wales and an enhanced emphasis placed on the training of senior officers who will then be in a position to roll that out to their subordinates. Whilst the work of the NDIP went some way towards this, we understand that much of its training was then modified at force level.

9. Whilst a single document containing clear and definitive guidelines and "best practices" would be desirable, the CBA recognises and accepts that each part of the CJS with a role to play in disclosure requires a bespoke document, aimed at providing guidance for their own particular needs. There are also two different aspects to disclosure, especially in the digital age: the conceptual and the practical. Whilst these new guidelines concentrate on setting out the purpose of disclosure and its statutory background, overall we are of the view that guidance on the

mechanics of achieving it are still lacking. This may because this aspect is better dealt with in training, but for example detailed suggestions by a forensic digital specialist as to how to run effective search terms, remove duplicates, deal with email chains etc would be very welcome.

Culture Change

The rebuttable presumption

Box B

Q1 – Do you agree that the list of material proposed for the rebuttable presumption is fit for purpose?

A – In part. The list represents the most basic of items which would routinely fall to be disclosed in any event. The change proposed would simplify the task of disclosure officers and reviewing lawyers in identifying the basic material but would give no guidance for future reviews. Provided the list is viewed as the start of the process and not the bare minimum that needs to be done, then the list is fit for purpose. The list makes no mention of Body Worn video footage (BWF) which is increasingly available in cases across the spectrum of gravity. It should be considered in the same way as CCTV.

Q2 – Is it clear what is meant by a crime report….

A – Not entirely. Paragraph 74a is a long and detailed paragraph and includes many different types of material. "Crime report" needs to be distinguished from the other types of material by being given its own sub paragraph, to read: "*Crime reports, including: any crime report forms or any other written or other contemporaneous recording of an incident, however described; investigation logs - any record or note made by any person involved in the investigation of an offence on which they later make a statement or which relates to contact with the suspect, complainant, or witnesses; any account of an incident, or information potentially relevant to an incident, or other record of actions undertaken by any*

person involved in an investigation, such as house to house enquiries, meetings with witnesses, CCTV viewing logs forensic examinations and submissions"

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

A – Nothing to be removed but BWF should be included. The list ought to include digital material owned by a defendant, on computers or mobile phones, much of which will never be evidence in the case but which may well assist a D in providing information to his legal team to support a defence – this may be particularly so in allegations of fraud or sexual misconduct. If any digital devices seized by the police are promptly returned to the D this problem is resolved.

Q4 – Does the proposed wording of the Guidelines make it clear that this is not intended to cause "automatic" disclosure?

A – Yes, but there is insufficient guidance as to when it might not be appropriate to disclose.

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

A - Not really. "A thinking manner" is open to too much interpretation and needs to be defined more clearly. It is too subjective and might have been better termed as: "*Engaging in a considered, thorough, and analytical approach tailored to each case. Those involved in disclosure should not apply the processes mechanistically but rather consider the material in the context of the case*".

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

A – The Guidance is detailed but not particularly helpful in achieving the overriding objective as it provides too many loopholes to justify non-disclosure of material which may assist the defence. If any potentially disclosable material is held by any Crown body or Government department then it should be available for review by both the disclosure officer and the reviewing lawyer. Consideration can then be given to PII applications, if necessary. If the Govt

department or Crown body refuses to disclose the material then the CPS will have to consider whether or not they are in a position to discharge their disclosure obligations. Para 37 is seems to confuse the duty to obtain and the duty to review/disclose. Reasonable requests should be made overseas, if material which undermines/assist is provided then it should be disclosed unless subject to a successful PII application (e.g. because it has only been provided as intelligence).

We are of the view that the Local Authorities should be mentioned specifically, with reference to existing (and ideally going forward standardised) protocols as to how disclosure will be dealt with.

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

A – Yes, but the word "Victim" must be substituted by the word "Complainant" Furthermore, we are of the view that it should go further and explain that any such material will be proportionate to the investigation and detection of an alleged criminal offence particularly in indictable only offences.

Q8 – Are there any other aspects which require clarification?

A – Only that it is important that the potential sources of personal information of complainants, witnesses and Defendants are secured at the outset of the investigation to ensure that no person has the opportunity to delete or otherwise destroy information which may otherwise have been of relevance. It really is of fundamental importance that the obligations of recording and retention are understood and observed scrupulously .

Any person from whom personal information is obtained must be given full, preferably written details of how that information is to be stored, used, and distributed, in compliance with GDPR legislation.

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

A – There are two aspects to pre charge engagement – firstly, the engagement between the police and the CPS, which should already happen. Secondly, the engagement between the defence teams and the Police/CPS. Engagement between the parties already begins at a very early stage post charge, as required by the various Better Case Management Protocols, locally and nationally. Engagement pre-charge is an area which requires specific consideration, not as part of an overall review of disclosure. However we are of the view that engagement pre-charge is an area which requires specific consideration, not as part of an overall review of disclosure. For example, it raises issues of funding and legal representation as there is no/limited Legal Aid post interview but pre-charge. It could create a two tier system whereby those with funds to pay privately will be represented to deal with this and those that do not will have no method to constructively engage. Recording of discussions are not sufficient, there should be defined LOEs with time constraints unless impracticable. On a more fundamental level, it is critical that the burden of proof should not be subtly shifted to the defence but rather the starting point must remain the obligation to follow LOEs that lead AWAY as well as to the accused. This important obligation on investigators has been lost in recent times and it should remain the starting point for any investigator not to be watered down or displaced by defence engagement. There will be occasions when the investigator has access to material that the defence will not have access to such as intelligence or sensitive

Therefore, at the very least, safeguards need to be built in to any Guidelines to ensure that it is truly voluntary, and any engagement, or lack thereof, is not to be subject of adverse inferences or other comment in front of a jury but as already stated this is really pre-trial engagement is matter which would be better considered aside from this consultation

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

A - Yes, but subject to the qualifications contained in the answer to Q9.

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?

A – Yes, and it should already happen, however it should not be restrictive in approach. We have already seen the inbuilt delays that RUI creates and this may become an additional delaying factor. Care should be used with this approach particularly for example where the D or C is very young or vulnerable.

It should be noted that a schedule is only as good as the descriptions contained thereon which is dependent upon the understanding of the disclosure rules by the disclosure officer. This issue is compounded by finite resources, particularly in relation to digital material – if material has been secured but not downloaded, then no accurate description of the material can be provided. If CCTV, or BWF has been obtained, but not viewed because of resource limitations, then no accurate description can be provided.

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?

A – Yes and this should already be being done. However both the old guidelines and to a certain extent these, don't really deal adequately with the lacuna between charge and the point CPIA kicks in. They get a passing mention at a para 64-65 but this is an area often overlooked as there is no specific time or manner for disclosure under *ex parte Lee* to be carried out. Therefore in our view greater emphasis should be given and ideally a structure put in place to ensure it is done. We propose that the PTPH form be amended to have a box for CPS to confirm that they have specifically considered their obligations under *ex parte Lee.*

In particular you cannot technically make a s.8 until a DCS is served etc (see para 113) but you may be seeking disclosure to assist with arguing abuse of process etc. By including this on the form, a timetable can set to for an issues regarding the adequacy of such disclosure to be raised.

Q 13 – Does the Annex on digital material in the Guidelines contain sufficient information and guidance?

As referred in our preamble, there are two aspects to reviewing digital material: understanding the concepts of what it is you are hoping to achieve, and the practicalities of getting there in an efficient and forensically robust way. In our view, both these aspects need addressing, in the guidelines but also in better training and resources. At present the guidelines provide little assistance on how best to effect disclosure of digital material. Practical examples, from specialists would be a welcome addition (see for example the specimen summing up contained in the Crown Court Compendium).

Q14 – Are there any areas where additional guidance or information could be beneficial?
A – As stated above in Q.13, we are of the view that additional guidance, possibly by way of practical examples, would be welcome. However, as always it is dependent on having the resources and appropriately trained individuals to do these exercises. The guidelines refer to a "digital forensic specialist" at para 3, but as we all know they are few and far between and to get access inevitably leads to delay. Often the work is done by officers, doing their best, but not necessarily that computer literate, let alone trained to tag correctly, run Boolean searches, remove true duplicates using hash values, how to avoid false positives etc. There needs to be better training of everyone (CPS and officers) as to how to conduct digital searches and more experts. Presently it is often done extremely inefficiently (for example reviewing everything for evidence and then later reviewing everything again for scheduling/disclosure when if done once, with proper descriptions etc at the start then any later reviews (e.g. post PtPh, post DCS) could be done much quicker. It should also be noted that technology advances very quickly, (the impact on data gathering from the switch to 5G be a prime example) and therefore it is imperative that the Guidelines, or at least this Annex, is updated regularly so that it considers, and provides practical assistance, on the current position.

We note that there is no reference to the fraud/inequity exception in the LPP section and are of the view it should be referred to.

We are also not sure of the relevance of the third party material section at end of this annex; it appears to be tagged on and not very thought through (para 56 seems to just peter off). Such material is already covered in main guidelines. We suggest therefore that perhaps just a few lines is added to state that the same principles apply as elsewhere in the annex to the reviewing material held by third parties and that the process of filtering can take place either by/at the third party on proper direction or the wider material can be obtained by investigator/prosecutor who can then do it themselves. Either way, the process should be documented and any third party should be reminded of their duty to retain material (e.g. the wider server) to enable future searches to be conducted if required.

Q15 – Do you think the revised Guidelines are clearer and easier to understand?
A – Not really. The existing Guidelines and Code were clear, if read with care.

Q16 – Do you agree that the proposed changes to the Guidelines and the Code are likely to improve the performance of disclosure obligations?
A – They should, but only if two things happen: Firstly, the cultural change which the consultation paper identifies, and secondly, an increase in the importance placed on disclosure, both in terms of resources and thinking processes. Resources improvements must be made, across the board, from the training of police disclosure officers, the availability of specialist analysis of material, where required, and the availability of sufficient reviewing lawyers to give the time necessary to work through schedules of unused material in a thorough way.

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 currently are?
A – Not unless resources are made available, as outlined in the answer to Q16. The current system, which has evolved over the years since the CPIA was introduced, has required and encouraged an attitude of "we will do it when we can, if we can". That attitude must change before there can be any improvement in disclosure.

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

A – Unless proper training and resource increases are provided before the implementation of any changes, there is the potential for increased delay between arrest and charge. Delay is already an issue in the Criminal Justice System, most notably as a result of the increasing practice of the police RUI practices, and the over-use of the reporting on summons rather than formal charge. A holistic approach to the reduction of delay needs to be adopted and it would be unfair and inappropriate to resist any changes to the disclosure regime simply because of the potential for increased delay, when other areas of the CJS could be improved to minimise it.

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?

A – Only a potential for increased tension between the parties as everyone gets to grips with the new Guidelines and Code. Unless and until CPS are in a position to approach cases on an ownership basis, rather than by rota, then the existing problems with disclosure are likely to persist.

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

A – Yes.