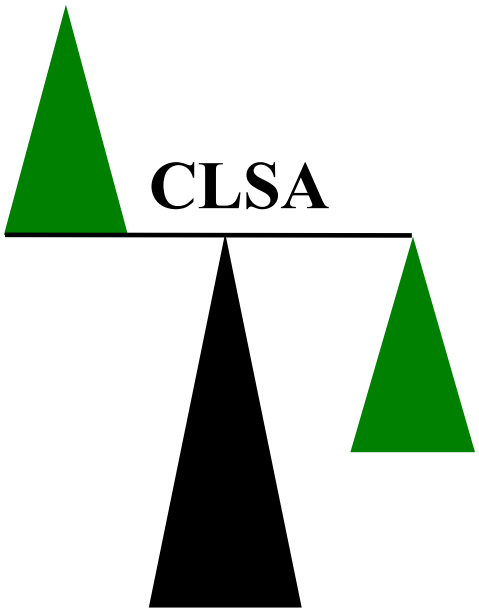

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Response of the Criminal Law Solicitors Association to the Consultation on revisions to the Attorney General's Guidelines on Disclosure and the CPIA Code of Practice

Introduction

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding to the consultation on behalf of its members.

The CLSA has been campaigning over disclosure failings for many years and gave evidence both orally and in writing to the Justice Select Committee during its 2018 investigation and report on Disclosure. We recognize that the concerns we expressed in that evidence have been reflected in the Attorney General's Review of 2018 and that the intent of the current consultation is to build on that review by making changes to the Guidelines and Code of practice.

The 2018 Attorney General's review and the 2017 HMCPSI and HMIC joint report *Making it Fair* recognized the following problems in practice which we set out in our evidence to the Justice Select Committee:

a. Investigators not pursuing reasonable lines of enquiry that might exculpate the accused.
b. Revelation of material from the investigators to the prosecutors being poor.
c. Poor quality schedules of unused material
d. Prosecutors failing to challenge poor quality schedules
e. Prosecutors and investigators not applying the disclosure test correctly.

The 2018 Attorney General Review and the Justice Select Committee Report followed a number of other reviews and reports including the 2017 HMCPSI

and HMIC joint report, and the *Mouncher Investigation Report* of 2017. Those reviews and reports contain recurring themes and issues regarding disclosure. Namely, that the legislation governing disclosure does not require fundamental change but the implementation of that legislation in practice is problematic, that a cultural shift is required to make disclosure a central part of the prosecution process, and that guidance regarding disclosure should be simple and not over complicated.

While understanding that this consultation forms only part of the work that is being done to address disclosure failings, our response is underpinned by our view that proposed changes to the Guidelines and Code are not alone sufficient to deal with the problems we have identified above.

We also note the request contained in the 2018 Justice Select Committee report that the Attorney General sign off on the guidelines at regular defined intervals[1]. We suggest that the Attorney General commit to review the necessity of further consultation on amendment and updating of the guidelines within a defined period.

Question 1

With reservations, a qualified yes.

The Law in relation to disclosure has been clear for over 20 years. The process of disclosure should be simple when done correctly. The fact that the Attorney General is now considering a "nudge" for disclosure officers and prosecutors to comply with what should already be a simple test, is an indictment of the criminal justice system.

We have highlighted above the need for there to be a cultural change to make disclosure central to the prosecution process[2]. Talk of "nudging" is a failure to understand the extent to which this behaviour has become a part of the prosecutor's culture.

[1] Justice Select Committee Report 2018 para81
[2] See 2017 HMPCPSI Report para1.2, Mouncher report para 14.6 and the 2018 AG Review p22

Further, the creation of subsets of material that are subject to a rebuttable presumption that they meet the test for disclosure may hamper the proper application of the test for disclosure. The list gives too much focus to the documents on the list and will encourage a failure to give proper attention to the material not on the list. The focus in the minds of investigators, prosecutors and defence lawyers will inevitably shift to whether a certain item is included in the presumption for disclosure rather than the proper question: is the material relevant and does it meet the test for disclosure?

We endorse the concerns expressed in the 2018 AG review that this runs counter to the thinking approach that is required. The proposed approach instead encourages box ticking – disclosing documents on the presumed list and ignoring any other document.

What is required is for *all* reasonable lines of enquiry to be pursued, *all* relevant material to be scheduled and *all* disclosable material that is scheduled to be disclosed. By providing a subset of relevant or potentially relevant material, the guidelines encourage a focus on that material to the exclusion of other potentially important and relevant material. We have a real concern that such material may be ignored with the result that disclosure failings occur.

With those reservations expressed, we do see merit in dealing summarily with more straightforward disclosable documents so as to free up a disclosure officer/lawyer to concentrate their minds on material that are perhaps not as straightforward and are specific to the issues that have arisen in a particular case. The list proposed should be documents that (subject to proper redactions) will always be served with the initial disclosure thus freeing up the officers/lawyers to focus on the balance of the material. On this basis, we are prepared to support this proposed amendment but only if the concerns we have highlighted above are acknowledged and addressed.

If the guidelines are amended in the way suggested they must explicitly emphasise that material that is not included in the list at paragraph 74 should still be fully considered and have the proper disclosure test applied to it.

In relation to pursuing a cultural change, we commend the comments in the *Mouncher* report, endorsed in the 2018 Attorney General Review, that: "the use of phrases such as "strict interpretation of the disclosure rules" must cease and any support for them actively withdrawn. The abiding principle must be "if in doubt, disclose" and nothing must be permitted to qualify or diminish it"[3]. We suggest that the guidelines should explicitly include these comments.

Question 2

No.

All contact with a complainant, witness or suspect should be noted and is likely to be disclosable, not just their previous accounts. We again endorse the recommendation of the *Mouncher* report that almost every contact with a witness should be disclosed, save for discussion of irrelevant personal details, etc[4]. The guidelines should explicitly set out the need to keep notes of such contact and that they are likely to be disclosable. If the list at paragraph 74 is to exist, then "notes of all contact with witnesses" should be included.

Relevant CCTV footage should be included. Where incidents take place in public places, there often should be CCTV footage of the location. It should be standard procedure to seize and retain such footage. Our members have vast experience of the police failing to seize and retain CCTV footage when it is known an incident has taken place within sight of CCTV cameras. It is no answer to say that where it exists, the CCTV footage is likely to be used as evidence. The purpose of including CCTV footage in the list is to prompt the police to retain it in the first place as a reasonable line of enquiry.

[3] Mouncher Report p284
[4] Mouncher Report p283

Question 3

Please see our answer to question 2 above.

Question 4

Please see our answer to question 1 above.

Question 5

No response

Question 6

No

The guidance should highlight the provisions of the Data Protection Act 2018, i.e. that in certain circumstances (and subject to safeguards to protect individual's data) the Police have the power to apply for, and obtain, material without a witness summons being necessary. The guidance should prompt investigators to make such applications.

In this regard the Attorney General may wish to consider the ICO report on mobile phone extraction by police forces in England and Wales published in June 2020[5]. In particular section 2.2 of that report deals with the applicable legislation and principles of data protection that apply. Although this report deals with mobile phone examination, we submit that the principles referred to apply to other third party material, for example medical records.

[5] https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1_1.pdf.

The ICO report also refers to the inherent conflict between the competing rights of suspects, complainants and witnesses[6]. We set out our views in relation to this matter at paragraphs 31-35 below.

Question 7

No.

We do not believe the use of the word "victim" is appropriate in the context of guidelines regarding disclosure in a trial process. Instead we suggest that the word "complainant" is appropriate. For our reasons, we can do no better than to refer to the report of Sir Richard Henriques into Operation Midland dated 31 October 2016[7], paragraphs 1.11 to 1.20.

In particular that report stated:

"Throughout the judicial process the word 'complainant' is deployed up to the moment of conviction where after a 'complainant' is properly referred to as a 'victim'. Since the entire juridical process up to that point, is engaged in determining whether or not a 'complainant' is indeed a 'victim', such an approach cannot be questioned. No Crown Court judge will permit a 'complainant' to be referred to as a 'victim' prior to conviction. Since the investigative process is similarly engaged in ascertaining facts which will, if proven, establish guilt, the use of the word 'victim' at the commencement of an investigation is simply inaccurate and should cease"[8]

The process of disclosure is central part of the trial process in place to determine whether or not the defendant is guilty. The use of the word 'victim' in the guidelines assumes the guilt of the defendant, which is contrary to the right to a fair trial which the guidelines and proper disclosure are in place to ensure.

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[6] ICO report p46
[7] https://commonslibrary.parliament.uk/research-briefings/cdp-2016-0244/
[8] Henriques Report para 1.12

Investigators and prosecutors are less likely to pursue lines of enquiry or disclose material that might assist a suspect, if they are implicitly being encouraged by the disclosure guidelines to work on the assumption that the suspect is guilty. As Sir Richard Henriques says "the accurate use of language should be fundamental in any criminal justice process"[9].

We note for example the use of language by the Attorney General in the foreword to the consultation "It is essential that the duty of disclosure is seen from the twin perspectives of fairness to the accused and *the complainant*, while serving as a vital guarantor of a secure conviction" (our emphasis). We submit that in the context of disclosure, the use by the Attorney General of the word 'complainant' in the foreword is the correct language.

There is a potential conflict between the right to a fair trial of a defendant and the right to privacy of a complainant and witnesses. In some cases the credibility of the complainant is in issue if a person is saying something happened and the defendant is saying that is not true[10]. A criminal trial often by necessity deprives the defendant of their right to privacy as well. It is an inevitable consequence of proceedings which are designed to allow the arbiters of fact to assess the truthfulness of witnesses, including the defendant by assessing their credibility.

We welcome the acknowledgement that investigators and prosecutors may need to investigate private matters and that where the conflict is irreconcilable, the right to a fair trial will take precedence over the right to privacy. A proper application of the disclosure test ensures that any material that is not *relevant* will not be disclosed. Equally, s17 Criminal Procedure and Investigations Act limits further disclosure by the defence to third parties of material received from the prosecution, thereby safeguarding against any unnecessary impact on a witness or complainant's privacy.

[9] Henriques report para 1.20
[10] 2018 Justice Select Committee report para 126

The resolution of this conflict will be case specific. We take the view that the best way for resolution this conflict in specific cases will be transparency regarding the prosecution disclosure strategy and what reasonable lines of enquiry have been pursued. We suggest that this part of the guidelines should encourage the use of a Disclosure Management Document and early engagement with the Defendant to ventilate what approach to investigation the police propose to take and invite Defence input into it.

This should not however be seen as a way for investigators and prosecutors to avoid having to consider properly the disclosure test – irrespective of any engagement by the defence investigators should be considering all reasonable lines of enquiry and disclosing any relevant fruits of that labour. The purpose of early engagement is to ensure any additional lines of enquiry that had not been anticipated by investigators can be considered, and indeed in some cases, for some enquiries to be dispensed with if they are not likely to be relevant to an issue in the case.

Question 8

Please see our answer above

Question 9

Yes

As we have set out above, we do believe that pre-charge engagement can be beneficial, particularly when resolving the issue of what additional reasonable lines of enquiry are appropriate during an investigation.

However engagement by the defence will not happen until there is proper remuneration for defence representatives for participating in such engagement. There is currently no remuneration regime in place for legal aid to cover the costs of such engagement.

The Legal Aid Agency is currently conducting a review into Criminal Legal Aid remuneration, however that review is unlikely to report for some time. Remuneration for work undertaken in pre-charge engagement was at one stage considered fit for inclusion in an accelerated proposal for new funding but a recent consultation has indicated that any proposals for funding must await the publication of the amended disclosure guidelines[11].

Unless a suspect has the personal means to pay privately a defence solicitor would be unpaid for the work required to participate in this engagement. It is highly unrealistic to expect pre-charge engagement to be effective if defence representatives are working unpaid or are not being fairly remunerated. Proper legal aid remuneration will be crucial to ensuring that pre charge engagement will be effective and is not limited to only those who can afford to pay. No matter how useful pre-charge engagement could be the reality is that unless Legal Aid Agency will properly pay for it, it will not happen.

Question 10

A qualified yes

A suspect will require legal advice before properly considering a request for pre charge engagement. The process of engagement is voluntary and adverse inferences cannot be drawn from refusal, unlike silence in a police interview. Pre-charge engagement may include requests for personal information of the suspect, for example their medical records, and they are entitled to the same right to privacy as complainants and witnesses. Pre charge engagement may not be to the advantage of a suspect and their rights should be protected during the process.

Conversely, an unrepresented suspect may be unaware of the potential benefit to them of engaging with disclosure at an early stage. Investigators

[11] https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/

and prosecutors are likely to achieve much more productive engagement when a suspect is legally represented.

It is vital that the guidelines require investigators to recommend a suspect exercise their right to legal advice prior to pre-charge engagement being initiated. Where a suspect is represented the guidelines should require a request for engagement to be made to the legal representative rather than the suspect directly. Annex B should be amended to require investigators to invite a suspect to engage legal advice before commencing pre-charge engagement.

Further, it is essential that the investigator gives disclosure of unused material prior to a decision to engage. Such disclosure is not included in the CPIA and would therefore be common law disclosure.

Question 11

Yes

We agree with the principle that the earlier that schedules are prepared the better. However, we emphasise that it is the quality of schedules of unused material that is the most important thing, and that quality should not be sacrificed to the desire to produce and review a schedule quickly. It is often the case now that schedules are prepared that are plainly incomplete and are only properly prepared and added to much too late in proceedings. Whilst we recognise that new material may come to light and need to be added, it is equally important that the investigators and prosecutors get the schedule right first time, as it is often the case that material later added to a schedule was in the possession of the prosecution from an early stage and that the schedules drafted are incomplete as they omit that material

Question 12

A Qualified yes

We agree with the proposition that if the Disclosure Management Document and Unused Material are served sufficiently far ahead of the PTPH this will assist in the meaningful ventilation and resolution of disclosure issues at PTPH.

However, the Defence will only be able to properly engage with disclosure at a PTPH if unused is served in a timely fashion prior the hearing. Properly dealing with disclosure requires instructions to be taken from the Defendant. Where the Defendant is in custody in particular, that is impossible if a schedule and DMD are served only shortly before a hearing. We note that the expectation is that the schedule is prepared at the point the Crown are considering charge and if that is done then service of a schedule and DMD long before the PTPH should be possible. We suggest that the guidelines should require that the DMD is served no less than 14 days prior to the PTPH. This applies equally to service of evidence before the PTPH – it is often the case that material is only uploaded on the eve of a hearing which means a defendant will not have had an opportunity to review it, especially if in custody.

Question 13

No

We are aware of attempts by police forces to use Artificial Intelligence and algorithms to review unused material. Our understanding is that at present the technology is currently not ready.

We appreciate that technology may evolve. In our view, but that is no excuse for the guidelines being clear in its guidance and the guidelines should be regularly updated as the technology in use develops.

We have referred above to our view that the Attorney General should commit to review of the guidelines within a specified timeframe. One of the reasons for this is the need to review what technology is being used to analyse unused material. Where technology has been used to analyse unused material, guidelines should insist upon transparency in what technology has been used, how it has been used, and why.

As regards the search of digital material regarding search terms, we refer to our responses to questions regarding early engagement and balancing the right to privacy – they key is transparency with the approach that has been adopted. For transparency reasons “reference to block listing, algorithms and predictive coding, which can assist in sifting, examining, and listing large amounts of digital data” must require full disclosure to the defence community including all material demonstrating the development of the tools and ensuring that any concerns raised are fully shared and investigated.

At present the regime rightly requires important decisions to be taken by a human being. As AI becomes more prevalent it may prove a useful tool but should not take the place of an investigator and prosecutor applying their minds to the disclosure test.

Question 14

Yes

The guidelines should require transparency as to what technology has been used to analyse unused material, how this technology was chosen, how it was used and what the result has been. A full audit trail should be made available. This should be recorded in a disclosure management document.

2. The guidelines should be regularly updated dependent upon what computer programs are developed and used for analysis of unused material.

Question 15

No

The proposed amendments introduce a subset of material that is presumed to be disclosable. This inevitably introduces a layer of complexity to what should be a simple and straightforward test for disclosure. We see some merit in this approach but the implications of have to be acknowledged and addressed.

Question 16

No.

The guidelines are limited to CPIA disclosure with a brief nod to the common law pre charge. There are no guidelines to deal with the common law disclosure that should be made at that stage and no mention whatsoever in relation to the common law post-conviction when dealing with, for example, ancillary orders such as confiscation proceedings under the Proceeds of Crime Act. The continuing refusal by the AG to address the important common law implications for disclosure cheapens the attempt at Guidelines. The failure to mention the common law period when listing the stages at paragraph 53 may demonstrate a failure to fully understand the process of disclosure in the Crown Court.

Question 17

Yes. We agree that the code encourages disclosure obligations to be carried out earlier.

Question 18

We are not in a position to comment on this question.

Question 19

We refer to the responses we have given above regarding the language of parts of the guidelines referring to the 'victim'. In our submission properly referring to the 'complainant' should not affect the level of engagement between the investigator and the complainant. The correct use of language does not prohibit complainants being dealt with in a compassionate manner and their complaints being investigated thoroughly and impartially[12].

Nor should it be controversial for the guidance to state that the right to fair trial may require some intrusion into the privacy rights of the participants including complainants and witnesses. Such guidance is no more than a correct statement of the law. Complainants can also be reassured that disclosure of material to the police for the purposes of their investigation does not necessarily mean that it will be disclosed to a defendant in criminal proceedings, and that even if they are there are limits placed on how the defendant may use that material without permission from the Court.

We also welcome the guidelines being amended to encourage engagement between prosecution and defence. We particularly encourage the use of disclosure management documents as a means of transparently setting out the prosecution disclosure strategy to that it can be commented on by the defence and the court.

However, the Attorney General must be realistic that pre-charge engagement will only happen if there is proper remuneration for that engagement for defence solicitors. Amendment of the guidelines is only part of the picture.

Question 20

We have no comments regarding the links contained in the guidelines.

[12] Henriques report para 1.16-1.17