Attorney General's Office

Government Response to Consultation

Government response to the Attorney General's Guidelines on Disclosure and CPIA 1996 Code of Practice consultation: a summary of consultation responses

September 2020

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Introduction

In February 2020, the Attorney General's Office and the Ministry of Justice conducted a public consultation on the Attorney General's Guidelines on disclosure ('the Guidelines') and the Criminal Procedure and Investigations Act ('CPIA') 1996 Code of Practice. The consultation document set out the proposals to revise the current guidance, which is aimed at investigators, prosecutors and defence practitioners, on disclosing unused material in criminal cases.

The proposed revisions came about after findings from *the Review of the efficiency and effectiveness of disclosure in the criminal justice system* ('the Review'). The Review, published in 2018, highlighted the need for leadership and culture change throughout the criminal justice system in order to improve the performance of disclosure obligations. The consultation also proposed changes to the revised 'Streamlined Disclosure Certificate' (SDC) which is currently being revised under the auspices of the Criminal Procedure Rule Committee (Crim PRC).

The consultation had originally been planned to run for 8 weeks, from 12 February until 22 April 2020. However, due to the Covid-19 related pressures that the public had been facing, the Attorney General and the Lord Chancellor agreed to extend the consultation period for a further 13 weeks.

The consultation closed on 22 July 2020 and all responses have been carefully considered.

Overview

There were **45** written responses to the public consultation and not all respondents answered every question. All responses have been analysed and given full consideration in the preparation of this response.

Type of consultation respondent	
Lawyer	**13**
Police	**13**
Non-police investigators	**7**
Victims Groups	**6**
Academic	**1**
Other	**5**

Total number of responses: **45**

This document provides a summary of the consultation responses received. It does not attempt to capture every point made. It also sets out the proposed changes the Government is making to the Attorney General's Guidelines on disclosure and CPIA Code of Practice 1996. Where the Government has decided not to make further changes to the consultation proposals, the reasons are explained.

Question 1: do you agree that the list of material proposed for the rebuttable presumption is fit for purpose?

There were 42 responses to this question. Of the responses received, 24 agreed (57%) that the rebuttable presumption was fit for purpose. Of the respondents that agreed, 10 were in full agreement (24%). However, 14 had some reservations (33%). 18 respondents (43%) disagreed that the rebuttable presumption was fit for purpose.

The majority of respondents that wrote to us about the list of material in the rebuttable presumption felt that this list covered material that will almost always be generated throughout a criminal investigation and agreed that it was important to retain and record this material at an early stage before there is any attrition of material. This will provide reassurance to the defence that all material has been reviewed. However, there was some concern around the list of material appearing to be a 'tick box' exercise, which would move away from the 'thinking approach' that investigators have been encouraged and trained to use. Respondents felt that this risked being interpreted as the *only* list of material to disclose and that while useful, it could inhibit an investigative thinking approach to both the investigation and case preparation phase of a case. Investigators highlighted the additional work this could bring as the relevant redaction technology is not yet in place for some forces, and the different types of technology and pilots that forces have in place. Furthermore, this would require additional training packages and could affect the speed at which investigations take place. On the contrary, some responses expressed how the materials set out in this list were usually disclosed in any event and that this list of material should act as an automatic disclosure of those materials, rather than just act as a 'nudge.'

Government response: the Attorney General's 2018 *review of the efficiency and effectiveness on disclosure in the criminal justice system* found that the materials on this list almost always assist the defence and therefore should meet the test for disclosure. However, they are frequently not disclosed until there has been significant correspondence and challenge from the defence. Introducing this list acts as a 'nudge' for investigators to consider these materials where they exist.

We do not believe that this list should be 'automatically' disclosed to the defence without consideration as there is likely to be sensitive material that would not be in the public interest to automatically disclose, such as personal data of vulnerable witnesses. We are also trying to encourage investigators to apply the test in a "thinking manner" at all stages of the disclosure process, and such automatic disclosure would risk moving away from this way of thinking. Furthermore, the list could be seen as the only material to be disclosed. In order to ensure that this is understood by the reader, we have added an extra paragraph setting this out directly below the list of material for clarification. We appreciate the extra resource the introduction of the rebuttable presumption could entail. In order to support a smooth implementation throughout the criminal justice system, we propose that these changes will be put into effect from December 2020, or after Parliament approves the statutory instrument,

whichever is the later date. We are working closely with the police to ensure that the necessary technology and training will take place before the rebuttable presumption comes into effect.

Question 2: is it clear what is meant by a crime report?

There were 36 responses to this question. Of the responses received, 20 agreed (55%) that it was clear what is meant by a crime report. Of those that agreed, 13 fully agreed (36%) and 7 agreed but had some reservations (19%). 15 disagreed (42%) and 1 was neutral (3%).

There were mixed opinions on the definition of a crime report: some felt as though it was sufficiently clear what a crime report was, whereas others felt there needed to be further clarity on whether this includes notepads or pocket note books, which are deemed a separate entity from an electronic crime report. Others found the definition of a crime report was excessive and too detailed. It became clear through the responses received that police forces use different IT systems and software, which record information differently. This meant that the definition of a crime report was not consistent nationally and risked a varied interpretation of the necessary materials to be considered. Non-police investigators also informed us that they do not use crime reports, investigation logs or incident logs. It was suggested that we specify that some of these items will not exist in all cases to avoid confusion or misplaced assertions to the effect that alternative items should be substituted.

Government response: written feedback from respondents provided us with greater insight into the different IT systems that police forces use and the different definitions of crime reports. We can see that a crime report is not a 'one size fits all' approach, and different definitions apply across different forces. Furthermore, non-police investigators do not use crime reports in the same way that police forces do and therefore asking non-police investigators to disclose crime reports would have been confusing and risked the disclosure of alternative documents. We have therefore restructured the list of materials and added 'contemporaneous record of the incident' in place of 'crime report.' Crime reports will be used as an example of what would constitute a contemporaneous record of the incident. This would allow for a better, more flexible and inclusive approach for all investigators to be able to apply. We did not, however, feel as though it was for the Guidelines to define what a crime report is.

Question 3: are there any items in the list of materials that are missing or should be removed?

There were 35 responses to this question. Of the responses received, 23 agreed (65%) and 12 (35%) found that there were no items missing or should be removed from the list of materials.

The following materials were popular suggestions to be added on the list of materials:

- A voluntary attendance record;
- Adding the word 'relevant' before 'previous convictions and cautions';
- Body worn camera footage;
- Evidence from witnesses' camera phones;
- Adding 'CCTV footage, or other imagery, of the crime in action'.

Government response: we welcome these suggestions to the list of materials and we have therefore added to the list of materials: a voluntary attendance record; we have changed 'previous convictions and cautions' to 'relevant previous convictions and relevant cautions'; and added CCTV footage, or other imagery, of the incident in action (which would include body worn camera footage). We have also rearranged the list of materials so that they are in chronological order in which the events occur. We did not add 'evidence from witnesses' camera phones' to the list of materials as evidence should be considered as separate material to that contained in this list. We did consider whether 'recordings from witness' camera phones' would be relevant; however, we felt this material would be difficult to obtain in all instances and could raise concerns around privacy rights and data protection requirements.

Question 4: does the proposed wording in the Guidelines make it clear that this is not intended to cause "automatic disclosure?"

There were 40 responses to this question. Of the responses received, 22 agreed (55%). Of those that agreed, 16 fully agreed (40%) and 6 had some reservations (15%). 18 disagreed (45%) that it is clear this is not intended to cause automatic disclosure.

Generally, most investigators found it clear that the rebuttable presumption is not intended to cause automatic disclosure; however, there was scope to make it clearer by drafting specifically in the Guidelines that this is not intended to cause automatic disclosure. As mentioned above in response to Question 1; respondents felt that this list risked being interpreted as the only list of material to disclose and that while useful, it could inhibit an investigative thinking approach to both the investigation and case preparation phase of a case.

Government response: As referenced in our response to Question 1 above, this list of material intends to act as a 'nudge' for investigators to consider these materials where they exist and is not intended to create a culture of automatic disclosure, or for this to be the only list of material for consideration. In order to ensure that this is understood by the reader, we have added extra lines setting this out directly below the list of material for clarification. We hope this will make clear that in every instance the disclosure test should be applied in a "thinking manner". The list of material, along with all other material which may be relevant to an investigation, must be scheduled by the investigator. Items on this list however, should not be automatically disclosed: investigators and prosecutors should always apply the disclosure test and consider each item of material carefully in the context of the case in question.

Question 5: is it clear what the references to carrying out disclosure in a "thinking manner" mean?

This question was aimed at disclosure officers and prosecutors only. There were 27 responses to this question. Of the responses received, 24 agreed (89%). 16 fully agreed (59%) and 8 had reservations (30%). 3 respondents disagreed (11%) that it was clear what "thinking manner" meant.

The majority of investigators and prosecutors felt that it would be clear what a 'thinking manner' meant to those already involved in the disclosure process, given their experience. However, it may be less clear for those new to CPIA and investigations, or even officers less closely involved in disclosure. Some responses found that there should be some more guidance over what this means as it can be a subjective phrase.

Government Response: We felt that if we define a "thinking manner", we risk setting parameters to the interpretation of the phrase, which would be counterproductive for the thinking approach that we are trying to encourage. We believe that the case of *R v Olu and others* [2010] is helpful as it explains that a "thinking manner" is "not undertaking the process in a mechanical manner…keeping the issues in mind…being alive to the countervailing points of view…considering the impact of disclosure decisions…keeping disclosure decisions under review." This has been added as a footnote to the Guidelines.

Question 6: is the guidance on obtaining material by third parties helpful and sufficiently detailed?

We received 44 responses to this question. 25 agreed (57%) that the guidance on third party material was helpful and sufficiently detailed. Out of the 25 that agreed, 15 fully agreed (34%) while 10 had some caveats (23%). 19 respondents disagreed (43%) that the guidance on obtaining third party material was helpful or sufficiently detailed.

Respondents would have liked to see further clarification as to what constitutes a third party. The guidance refers to a "person other than the investigator or prosecutor", but respondents found it is not clear what bodies are to be considered to be 'government departments'. For example, there are some departmental investigators for whom the indivisibility of the Crown applies who are uncertain as to whether they are deemed to possess all the material held throughout the Government on a particular subject. Furthermore, it is unclear whether third parties should include private individuals e.g. shop owners and homeowners.

Some respondents felt that a time parameter should be set on government agencies to provide

the investigator with material, so as to avoid delaying investigations and that the Guidelines could benefit from referring to the Joint Protocol on Third Party Material and the CPS Disclosure Manual. There was also confusion over whether it is the responsibility of the investigator or the prosecutor to identify what third party material is required and some respondents found that they could not know if material was relevant if they hadn't seen it yet, which could lead to speculative searches.

Government Response: a third party is anyone, other than the investigator or prosecutor, who is not directly involved in the case but may hold information relevant to the case in question. This includes private individuals and private bodies as well as public ones. We have provided further guidance to this effect at paragraph 26 of the Guidelines. This excludes victims and witnesses as they have a direct involvement in the case. We have combined the third party material guidance that was originally placed in Annex A on digital material, so that it is all contained in one place and easier to find. We have also clarified in the guidance that it is for investigators to pursue all reasonable lines of inquiry in consultation or discussion with prosecutors where appropriate, and for each enquiry, whether it is international or domestic, the defence should be informed of the steps that have been taken to obtain material and the result of the enquiry.

References and links to the Joint Protocol on Third Party Material and the CPS Disclosure Manual have also been added to the Guidelines, as we agree with the feedback received that cross-referring to further information available in different areas would help the reader in performing their disclosure obligations. We have also expanded on the duty Crown Servants have to support the administration of justice but explain that investigators and prosecutors cannot be regarded to be in constructive possession of material held by Government departments or Crown bodies simply by virtue of their status as Government departments or Crown bodies.

Question 7: do you believe the revised drafting provides sufficient clarity around the competing rights in this space?

We received 42 responses to this question. 28 agreed (67%) that the revised drafting provided sufficient clarity around competing rights. Of the 28 respondents who agreed, 16 fully agreed (38%) and 12 had some reservations (29%). 14 respondents did not agree (33%) that the revised drafting provided sufficient clarity.

Some respondents queried whether there is in fact a 'balance' between the right to a fair trial (Article 6) and the right to respect for one's private and family life (Article 8). Respondents also noted that "necessary" and "reasonable" were laudable principles but did not provide for practical guidance, noting that it may or may not be the place of the Guidelines themselves to provide such guidance.

Government Response: Since the consultation was launched, the Court of Appeal gave its judgment in *Bater-James and Mohammed* [2020] EWCA Crim 790, and the Information Commissioner's Office (ICO) released its Investigation Report into mobile phone extraction by police forces. The Guidelines are not intended to replicate or paraphrase this statement of the law or the report's findings, nor to pre-empt the response to them, nor can the Guidelines (as some respondents invited) set out a definitive account of all applicable law in this area. Instead, the Guidelines set out key principles and how they should inform the approach of investigators, prosecutors and others – in accordance with the law in this field and the issues identified by the ICO. We considered that this section sufficiently addressed the issue with reference to witnesses (which includes victims, or complainants) – the key emphasis being the ability of the person to provide witness to the incident in question.

Whilst it remains difficult to provide case examples to go beyond the application of these principles in individual cases, the Guidelines now place an emphasis on articulation and the role of an investigator: a key check and balance is the ability of an investigator – who has responsibility for reasonable lines of inquiry – to articulate the approach taken. It is through this that there can be meaningful discussion with prosecutors, meaningful engagement with the defence, and meaningful provision of information to witnesses. We have sought to address the balance by reflecting the nature of the rights themselves: Article 6 is an unqualified right; Article 8 is a qualified right.

The Guidelines now invite consideration, when assessing reasonableness, of (i) the prospect of obtaining material (not, as respondents pointed out 'likelihood' – but some consideration of whether objectively relevant material might be found) and (ii) whether it is relevant. We have not sought to define 'relevant' as respondents rightly pointed out that the CPIA Code of Practice provides this definition.

Question 8: are there any aspects requiring further clarification?

We received 40 responses to this question. 28 agreed (70%) that the revised drafting provided sufficient clarity around competing rights. 12 disagreed (30%).

Government Response: see the response to Question 7 above.

Question 9: do you agree that it would be helpful for investigators and prosecutors to engage in pre-charge engagement?

There were 38 responses to this question. Of the responses received, 35 agreed (92%) that pre- charge engagement would be helpful. Of those that agreed, 19 fully agreed (53%) and 14 had reservations (39%). 3 disagreed (8%) that pre-charge engagement would be helpful for investigators and prosecutors.

Generally, pre-charge engagement is viewed in principle as a positive step that will enable key issues to be focused upon at an earlier stage in the process, thus avoiding potential disclosure problems or delays later. Some respondents noted that this is already taking place in some complex, document heavy cases where defence practitioners are in place at an early stage.

However, there were concerns raised around the resource implications this might cause. There were several responses that referenced inadequate defence funding, potentially creating a two-tier system for those who could afford to engage advocates for this part of the process by paying for advice privately. Respondents from the defence community highlighted the potential risks of a subtle shift in the burden of proof moving to the defence – respondents sought assurance that failing to engage pre-charge could not result in adverse inferences being drawn by a court later in the process.

Conversely, those representing the interests of victims raised concerns that without proper safeguards and a more formal process in place, pre-charge engagement could become a fishing expedition into victims' data. Those that did not think pre-charge engagement would be helpful had concerns that it could potentially complicate the disclosure process, particularly for less experienced staff.

Government Response: We note the reservations made in relation to the lack of defence remuneration for this part of the process. The Ministry of Justice will shortly launch a public consultation on a fee scheme that will consider how best to remunerate this work.
We have added a line earlier on in Annex B to formally recognise that, should a defendant choose not to engage in pre-charge engagement, that decision will not subsequently be used against them. This principle is already fully explained in paragraph 7 but referencing it at paragraph 3 as well should reinforce the point to those investigating cases and should provide reassurance to defence practitioners.

We have also included a link to Annex A to highlight the importance of investigators being fully aware of the guidance in relation to the pursuit of reasonable lines of inquiry in the context of the case. The guidance at Annex A in relation to digital material should reinforce the message that pre-charge engagement is not there to be used by the defence as a fishing expedition into the personal life and devices of the complainant. We recognise the need for greater training on this issue and encourage the police and CPS to provide the necessary training to their staff to ensure that this process is used to its full benefit in appropriate cases.

Question 10: do you agree that the proposed guidance in Annex B is helpful?

There were 38 responses to this question. Of the responses received, 32 agreed (84%) that the proposed guidance in Annex B is helpful. Of those that agreed, 18 were in full agreement (47%) and 14 had caveats (37%). 6 disagreed (16%) that Annex B was helpful.

Most respondents felt that the proposed guidance in Annex B is comprehensive and helpful: particularly, the explanation of what pre-charge engagement is and the potential benefits. However, some of the responses suggested that it might be helpful to give examples or establish conditions where it would be appropriate to initiate pre-charge engagement. Several responses requested inclusion of a reference to ensure a suspect has had ample opportunity to seek legal advice and engage legal representation before any pre-charge engagement is sought.

Representations were made that paragraph 9 (suitability of pre-charge engagement following a no comment interview) may undermine the defendants' right to silence, or in some respects is not relevant to whether the pre-charge engagement can continue. Concerns were raised that the guidance encompasses too many options with regards to the manner or circumstances in which pre-charge engagement could be conducted and it was suggested that it should either be a formal process or not. Concerns were also raised that it will place an extra burden on investigators to complete the requisite forms by requiring them to complete a formal record of the process, and that this risks complicating the process and may not be properly adhered to.

Government Response: we recognise the importance of the suspect being able to seek proper and timely legal advice, should they choose to do so, before they embark on the pre-charge engagement process. A new paragraph 11 has been included to reflect the importance of this. Paragraph 9 has been updated so that even when a suspect has exercised their right to remain silent, pre-charge engagement may still proceed, which will allow a defence representative to engage and suggest further lines of inquiry in appropriate cases. Paragraphs 25-30 as drafted give sufficient advice on recording the process, although we recognise that this may need to be complemented with further training for investigators and prosecutors and we will work with the police and CPS to ensure that this is delivered. We have removed the restriction that suggested it would only take place in very few cases; it should be adopted in those cases where the defendant and representative are content to proceed and the investigator is satisfied that it is the appropriate course of action.

Question 11: 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?

There were 36 responses to this question. Of the responses received, 24 agreed (67%). Of those that agreed, 13 agreed completely (36%) and 11 had some reservations (31%). 12 disagreed (33%).

Respondents recognised the benefits in the early provision of the schedules, as a mechanism

for assisting the prosecutor in preparation for the case and to enable them to fully review the material at an earlier stage. This could result in fewer cases being discontinued post-charge because of the late revelation of relevant material. There would be a benefit in providing prosecutors with a more comprehensive understanding of the case at an earlier stage, thereby assisting them in reviewing and making the charging decision.

Defence practitioners were supportive in principle, as it would enable them to better advise their client and understand the case against them, however the provision of schedules more quickly should not be to the detriment of the quality of the information contained therein. The most prevalent issue recorded was the impact that this would have on police resources, particularly in complex and document heavy cases. Respondents voiced concerns that this was a disproportionate cost for the police to bear in terms of time and resources, particularly in those cases where the CPS did not then proceed to charge, taking into consideration the need for redaction of sensitive information, which is time consuming. It was suggested that IT restructuring to navigate this could be a feasible option.

Concerns were raised that this could result in there being a longer delay before charge, which could be to the detriment of victims and witnesses, particularly in those cases where court bail conditions are utilised to provide necessary protection. Several respondents highlighted that there are a number of pilots ongoing that would seek to embed the "thinking approach" to disclosure and the change in culture that is required, including the use of the Disclosure Management Documents and the Investigation Management Document which is populated throughout the course of the investigation. It is felt that these pilots should be fully tested and that these initiatives have a better chance of embedding the requisite change in developing the "thinking approach", rather than insisting that the police serve the schedules at an earlier point in proceedings.

Government Response: We recognise that the timing of service of unused schedules is an issue that cuts to the heart of the tensions in the disclosure process. Ensuring that the police undertake a sufficiently detailed assessment of the information and evidence before it and compile a sufficiently complete schedule for the appropriate charging decision to made, whilst also enabling defence practitioners to have better, earlier access to relevant information about the case is an important objective that the guidelines are striving to achieve. We accept the importance of ensuring the quality of the information contained within the schedules and we will work with criminal justice partners to ensure that this becomes embedded best practice and encourage joint training with investigators and police to take place to ensure that these guidelines are adhered to as far as possible.

We note the ongoing development of technology, specifically to deal with redaction, and encourage police forces to adopt its use (when it is available and working to the requisite standards) to help speed up this process.

Question 12: do you agree that in not guilty plea cases, it should be best practice for initial disclosure to be served prior to the PTPH?

There were 35 responses to this question. Of the responses received, 27 agreed (77%). Of those that agreed, 16 agreed in full (46%) and 11 had reservations (31%). 6 disagreed (17%) and the rest were neutral (6%).

A significant proportion of responses agree that it should be best practice for initial disclosure to be served prior to the Plea and Trial Preparation Hearing. This would have a positive impact on engagement from the defence or could assist in the tendering of more early guilty pleas at the first hearing and more effective case progression which will in turn reduce delays and save public expenses.

Some highlighted concerns in relation to complex and document heavy cases, advocating for a phased disclosure approach, as currently adopted by the Serious Fraud Office, with oversight by the court. Some also suggested that this would not be feasible in large, fast-paced cases – for example homicide cases, whereby new lines of inquiry are often highlighted post-charge. Whilst accepting that this approach is positive in principle, concerns were raised in relation the overlap with Better Case Management, which advocates for a national approach and for serving disclosure on a proportionate basis. Respondents felt that the approach proposed in the Guidelines could undermine these fundamental principles. It was further articulated that robust judicial case management would need to be embedded to ensure the Guidelines had the necessary impact, and it was advocated that the necessary culture change required buy in from across the system, not just the prosecutors.

Government Response: the majority of respondents answered Questions 11 and 12 in a similar vein and raised inter-linked points. We accept the apprehension that this will have an impact on policing resources, but we remain of the view that this approach will bring real benefits to the quality of charging decisions by ensuring the prosecutor can review all the appropriate information at the time of making the decision. It will further embed the thinking approach to disclosure which is one of the fundamental principles upon which the Guidelines are built and we are keen that this is adopted by operational partners. These changes should be embedded with further training to ensure that the quality of the information contained in the schedules is sufficient for the charging decision to be made.

We recognise the need to exempt the Serious Fraud Office from this principle because of the specific investigative and prosecutorial role they have under the Roskill Model. Due to the nature and complexity of their cases, phased disclosure is the accepted method, with oversight by the court ensuring the necessary robust judicial case management during Further Case Management Hearings. We also recognise that there may be other cases, for example large complex fraud investigation by the CPS Serious Fraud Division, that would benefit from a phased disclosure approach, managed by robust judicial case management through Further

Case Management Hearings. We understand that the Lord Chief Justice's Criminal Practice Directions will be amended in due course to reflect this change. We have not defined the cases that would benefit from a phased disclosure approach, because that should be decided on a case by case basis. We would encourage the use of an initial Disclosure Management Document to be analysed at Plea and Trial Preparation Hearing, which may then detail the reasonable lines of inquiry pursued in the case and outline what material has been obtained and how it has been reviewed to ensure compliance with disclosure obligations.

We have made clear that nothing in the Guidelines is intended to or should subvert the principles established in the Better Case Management framework, either in relation to a divergence in national practice or "proportionate disclosure".

Question 13: does the Annex on Digital Material in the Guidelines contain sufficient information and guidance?

There were 38 responses to this question. Of the responses received, 22 agreed (58%). 17 were in full agreement (45%). However, 5 had some reservations (13%). 13 respondents disagreed (34%). The rest of responses were neutral (8%).

There were general concerns that the Annex focused on digital material relating to suspects and that there should be more information regarding the approach to be taken with victims/complainants and witnesses. It was also felt that more guidance around privacy and data protection aspects of processing digital material obtained from digital devices should be included. The suggestion and clarification that the use of algorithms and other methods to search large quantities of digital material was permissible, and that the corresponding scheduling of large quantities of material could be done in 'blocks' or 'sub-groups' was welcomed. Respondents generally commended the references to the need for transparency in the prosecution's approach to disclosure and the need to devise clear strategies from the outset of an investigation, but it was felt this could be emphasised more strongly, including the important role the defence play in identifying relevant material.

Some respondents felt that the guidance on how to handle Legally Professionally Privileged (LPP) material could be more detailed, particularly when LPP material is discovered that had not been anticipated.

Government Response: whilst appreciating the need to emphasise the rights of witnesses and complainants in investigations, it should be recognised that this document aims to set out the key principles in relation to obtaining and reviewing material from all types of digital devices, from both suspects and witnesses/complainants, not just private or personal material that may be sought from an individual's mobile phone, for example. To reflect the importance of this issue, further information has been provided regarding the approach to be taken when seeking to obtain and process digital material from victims/complainants and referring

practitioners to the guidance in the main Guidelines regarding Article 6 and Article 8 rights. We are grateful to those respondents who highlighted some inaccuracies in the statement of some legal provisions, and we hope that these have been sufficiently rectified. Some additional guidance on handling LPP material that has been discovered but was not anticipated has also been included.

Question 14: are there any areas where additional guidance or information could be beneficial?

There were 37 responses to this question. Of the responses received, 22 (59%) felt some additional guidance would be beneficial. Of those that agreed, 18 were in full agreement (49%). However, 4 had some reservations (11%). 10 respondents disagreed (27%). 5 respondents were neutral (14%).

As with Question 13, several respondents were of the view that more guidance was needed on the handling and retention of sensitive personal data obtained from digital devices belonging to witnesses/complainants, both in relation to the witness/complainant as well as any personal data belonging to third parties that is obtained from digital devices. There was reference to the fact that technology is continually advancing and providing new challenges for the criminal justice system, and that more guidance should be given on the ability to obtain material stored in the 'cloud' or on systems that are based outside of the UK, such as social media companies. There was a general feeling that parties in the criminal justice system need further training to fully understand their disclosure obligations and that it would be helpful if the Annex could provide some additional practical or illustrative examples to assist with this.

Government Response: it remains difficult to provide specific examples for practitioners to use, both as these Guidelines aim to elucidate key principles in complying with disclosure obligations and because each approach should be tailored to the specific circumstances of the case being dealt with. We have therefore not included any practical examples in the Annex but hope that operational guidance created by individual agencies in the criminal justice system will supplement and expand on these principles.

As highlighted in the response to Question 13, the Annex now includes some principles to be followed when dealing with devices of witnesses/complainants, as well as suspects. It was felt that practitioners should be reminded of their obligations under data protection legislation but that the Annex was not the appropriate place in which to provide guidance on data protection – comprehensive and practical guidance is already available (provided by the Information Commissioner) and these Guidelines and that guidance should be read together to ensure a full understanding of data protection obligations when fulfilling disclosure obligations.

Question 15: do you think the revised Guidelines are clearer and easier to understand?

We received 36 responses to this question. Of those who responded, 28 agreed (78%). 20 agreed with the statement in full (56%), and a further 8 had some reservations (22%). 7 respondents (19%) did not feel the revised Guidelines were clearer and easier to understand and the rest were neutral (3%).

The majority of respondents found that the Guidelines now reflect the transition to early disclosure and provides more formal advice and guidance that has been developing since 2018. The change to a chronological approach was welcomed as it emphasises the need to consider disclosure from the outset and as a continuing duty. There were concerns that the Guidelines do not go far enough to clarify the balance between a complainant's right to privacy and the suspect's right to a fair trial. There is speculation that complainants, particularly regarding sexual offences, are likely to see data trawls into their personal lives exacerbated by the Guidelines. There were also requests to confirm the position surrounding confiscation proceedings and to make clear that the CPIA Code of Practice does not apply post-conviction and therefore the duty of disclosure does not apply to confiscation proceedings.

Government Response: we are grateful that responses were in favour of the new structure of the Guidelines: we believe that by restructuring the Guidelines, so that they follow the chronological order of a criminal case from the investigation through to the conclusion of a trial, this encourages the user to familiarise themselves with the guidance as a whole. We have provided further guidance at paragraphs 11-13 on privacy rights which highlights a set of principles for investigators to apply before obtaining and reviewing personal data, which is reiterated in Annex A on digital material. We hope that this enhanced guidance will lead to a move away from intrusive or disproportionate methods of obtaining personal data. We agree that there should be some clarification as to whether disclosure obligations apply to confiscation proceedings. We have added an extra section at paragraphs 139-140 setting out that the CPIA ceases to have effect post-conviction and that the reader should refer to the Proceeds of Crime Act 2002 instead for the correct legislative scheme. However, the prosecutor may nonetheless decide to disclose material which might reasonably be considered capable of ensuring fairness in the course of that process.

Question 16: do you agree that the proposed Guidelines and Code are likely to improve the performance of disclosure obligations?

We received 33 responses to this question. Of those that responded, 22 agreed (67%). Of those that agreed, 9 agreed with the statement in full (27%), with an additional 13 agreeing but with reservations (39%). 10 disagreed (30%) and one response was neutral (3%).

Respondents felt that the Guidelines could improve communication between investigators, prosecution and the defence, which is vital for improving the disclosure process. As has been raised throughout responses, there is a concern that providing too much detail in the Guidelines could result in disclosure becoming more formulaic and limit the 'thinking approach'. There were also concerns that without the accompanying requisite training and technology, the Guidelines alone will not improve the process. There is a common concern that, while useful and well intentioned, a consequence of the Guidelines will be an increased workload for investigators and prosecutors.

Government Response: it is encouraging to see that the majority of responses agreed that the proposed changes are likely to improve the performance of disclosure obligations and that communication between all parties will be enhanced as a result. We recognise that the changes to the Guidelines are only one part of a wider systemic change that we hope to see within the criminal justice system, and that the changes need to be put into practice for any benefit to shine through. We are fully supportive of the work that has already been done by the police and the National Disclosure Improvement Board as they continue to research redaction technology and put training plans in place to prepare investigators for the culture change that we are embedding. We hope that by working closely together to find the relevant tools that we can ensure a smooth implementation towards the end of the year.

Question 17: do you agree that the proposed changes to the Guidelines and Code will encourage disclosure obligations to be carried out earlier than they are currently?

We received 33 responses to this question. There were 19 in agreement (58%). Of the 19 in agreement, 10 agreed in full (30%) and 9 had some reservations (27%). 10 respondents disagreed with the statement (30%). The rest provided a neutral response (12%).

Pre-charge engagement; a more extensive use of DMDs; early provision of disclosure schedules; and initial disclosure prior to PTPH in not guilty plea cases, were all highlighted as positive inclusions likely to encourage disclosure obligations to be carried out earlier. However, there is again concern surrounding the collection of digital data and other complex cases. Due

to the extensive amount of digital data that can be involved in a case, reviewing it all in a timely manner will be a challenge. The same applies for high volume and complex cases, in which key information may become apparent post-charge.

It was also highlighted that reminders of continuing obligations on further schedule submissions if/when more unused material is uncovered would be desirable. Some respondents report that further schedules are often not submitted early enough, and officers wait until there are more items included on the schedules prior to forwarding to CPS. Another common response is that without the associated training and resources the Guidelines will not make the desired improvements.

Government Response: see Questions 9-12 on pre-charge engagement for our response on pre-charge engagement.

Question 18: what operational impacts do you envisage the proposed changes to the Guidelines and the Code having, if any?

We received 35 responses to this question. Of the 35 that responded 34 envisaged operational impacts to the proposed changes to the Guidelines and Code (97%) and 1 did not think there would be any operational impact (3%).

Respondents found that pre-charge engagement would have the most operational impact. It was anticipated that more time would be spent on pre-charge meetings between investigators and prosecutors, that enhanced pre-charge discussions with defence would take place and some respondents also anticipated that there could be an increase in guilty pleas due to the issues in the case being clarified at an earlier stage in proceedings. Respondents anticipated that the greatest impact would be on the operational capacity of investigators as there would be an increase in work done by investigators in preparing schedules and in obtaining charging decisions. The increase in pre-charge work may result in delays in the referral of cases from the police to the CPS. Training and redaction technology were highlighted as significant operational concerns that could put pressure on limited resources. However, most respondents found that whilst there would be a resource burden incurred by the proposed changes, this would result in the prevention of wrongful convictions and the collapse of trials.

Government Response: We recognise that the initial change in policy may be difficult to adapt to at first, however we strongly believe that higher levels of engagement between investigators, prosecutors and defence practitioners is crucial to improving the disclosure process. Both sides have a responsibility to identify the issues in a case as early as possible: this could help identify reasonable lines of inquiry pointing to or away from the suspect sooner, allow for a case to conclude earlier and prevent the collapse of proceedings at a later stage.

As highlighted throughout this document, we recognise that there will be initial operational pressure for investigators as a result of these proposals, however we do believe that, once the relevant technology and training is in place, the criminal justice system will begin to see the benefits of a culture change towards disclosure.

Question 19: do you consider that the proposed changes to the Guidelines and Code could affect the relationship and/or levels of engagement between any of the parties involved in a criminal case?

We received 30 responses to this question. 18 agreed (60%) that relationships and engagement between parties could be affected. 4 disagreed (13%) and the rest were neutral (27%).

Many respondents found that the proposed changes would improve the level of engagement between investigators and prosecutors, as well as improved performance of disclosure obligations. It was felt that an encouragement of teamwork would assist in strengthening relationships between investigators and prosecutors, encouraging a more proactive and unified approach. However, some respondents anticipated conflict between parties and there may be tension between parties when first applying the revised guidance. Some felt as though there will be better engagement from the defence at pre-charge stage once the new fee schemes kick in.

Government Response: it is reassuring to see that the Guidelines could bring better teamwork-building skills between investigators and prosecutors, and better relationship-building between the prosecution and defence. We understand the importance of remunerating defence practitioners for the extra work done pre-charge. In order to reinforce these proposals, the Ministry of Justice will launch a separate consultation on additional remuneration for defence practitioners.

Question 20: are the links and references to other forms of guidance in the revised Guidelines helpful and clear?

We received 26 responses to this question. 24 agreed (92%) that referring to other forms of guidance was helpful and clear. 2 disagreed (8%) that this was helpful or clear.

Generally, people found it clear and to be an improvement from the current Guidelines. However, the majority of respondents would have liked to see reference to CPS guidance on disclosure, the Joint Protocol on Third Party Material and the Criminal Procedure Rules.

Government Response: as set out in our response to Question 6 on third party material, we agree with the benefit of cross referring to different available areas of guidance on disclosure and we have now made reference to the Joint Protocol on Third Party Material, the CPS Disclosure Manual and the Criminal Procedure Rules. It should be noted that the Criminal Procedure Rules 2015 are due to be replaced by the Criminal Procedure Rules 2020 from 5 October 2020.