Attorney General's Office

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

February 2020

Attorney General's Office

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Foreword

Disclosure lies at the heart of securing fair trials for all. Disclosure is the process whereby relevant unused material, gathered during the course of an investigation, is provided to the defence. It is a key step in the process of an investigation, and it is a priority for this Government to encourage improvements in disclosure practice, to ensure an effective and robust criminal justice system.

In November 2018, the Attorney General's *Review of the efficiency and effectiveness of disclosure in the criminal justice system* ('the Review') was published. This reflected and built on the valuable work underway at the time, including the Justice Select Committee's 2018 report on disclosure and the National Disclosure Improvement Plan (NDIP), led jointly by the police, the Crown Prosecution Service (CPS), and the College of Policing.

The findings of the Review highlighted the need for leadership and culture change throughout the criminal justice system in order to improve the performance of disclosure obligations. The Review contained a wide range of practical recommendations, with an emphasis on performing disclosure obligations early and fully. This consultation seeks views on a number of proposed changes to the *Attorney General's Guidelines on Disclosure* and to the *Criminal Procedure and Investigations Act ('CPIA') Code of Practice*, made as a consequence of the recommendations in the Review.

It is essential that the duty of disclosure is seen from the twin perspective of fairness to the accused and complainant, while serving as a vital guarantor of a secure conviction. Therefore, it is important that these documents provide suitable guidance and instruction to those carrying out disclosure obligations.

It is also important to stress that, since the Review's publication, a great amount of work has taken place in order to improve disclosure practice. The police, the CPS and the College of Policing have been collaborating on the development and delivery of NDIP, which sets out a series of actions and aims to improve disclosure practice. Colleagues involved in NDIP also attended the Tech Summit, co-chaired by the Solicitor General's predecessor and the previous Minister for Policing, in 2019.

This successful event brought together representatives from the technology industry and operational partners to discuss the issues arising from the increased volume of digital data in criminal cases, the solutions technology might provide, and to share learning from 'tech pilots' currently being tested in police forces.

However, there is still more that can be done, and it is crucial for all those within the criminal justice system to keep working to improve the disclosure process. We are therefore now launching this consultation to seek views on the revised *Disclosure Guidelines* and *CPIA Code of Practice.*

This consultation is the result of continuing, collaborative work throughout the criminal justice system to identify and incorporate improvements to these sources of guidance on disclosure. We are truly grateful for the views and help received throughout this process from operational partners and others.

It is, of course, vital that the *Guidelines* and the *Code of Practice*, are not only suited to the ever-changing criminal justice landscape in which we find ourselves, but also appropriately support those who will be using them. We want to hear from those who use and have used these documents, from investigators, prosecutors, defence practitioners, as well as anyone with experiences, be they personal or otherwise, of disclosure and the criminal justice system more broadly. We want to ensure that our proposed amendments fulfil the recommendations they are seeking to implement, and to understand the range of impacts they could have.

The Rt. Hon. Suella Braverman QC MP
Attorney General

The Rt. Hon. Robert Buckland QC MP
Lord Chancellor

Approach

1. This consultation covers both the Attorney General's Guidelines on Disclosure ('the Guidelines'), and the CPIA Code of Practice ('the Code'). These documents are intended to be complementary and read alongside each other.

2. The Attorney General's Guidelines on Disclosure provide high-level principles and guidance for investigators, prosecutors, and defence practitioners carrying out disclosure duties. They are intended to clarify the processes that are required and the roles each relevant party must play, as well as setting out examples of best practice.

3. The Code of Practice sets out how police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation. It is issued under Part II of the Criminal Procedure and Investigations Act (CPIA) 1996, the legislation underpinning disclosure obligations.

4. There are also a number of other documents that investigators, prosecutors, and defence practitioners use. These include the Criminal Procedure Rules, the Disclosure Manual published by the CPS, and other relevant CPS guidance, such as the guidance on disclosure of communications evidence.

5. The Guidelines and the Code are also intended to be read alongside the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases. The judiciary are currently considering whether updates to the Judicial Protocol are needed in order to reflect changes proposed in this document. This consultation does not address these considerations.

6. It has previously been suggested that these different documents should be consolidated into one place. While this is not possible, due to the fact they are aimed at different audiences and created by different authorities, we have sought to cross-reference across the documents and include links in the Guidelines to make the relationship between these sources clearer.

7. The questions in this consultation document are in boxes, as per **Box A** below which contains guidance on how to respond.

Box A

Guidance on how to respond to this consultation

Please note the following:

- We are seeking views from those with experience of disclosure practice (for example, investigators, prosecutors, disclosure practitioners, victims' representatives) in particular.

- You do not need to submit answers to every question.

- If you have evidence to support your answer (including anecdotal), please provide it.
- At the start of each answer (where relevant) please indicate yes/no. You can then provide reasoning and evidence afterwards.
- Please try to keep your answers below 250 words per question.
- All responses to this consultation should be submitted no later than **22 July 2020** to disclosure@attorneygeneral.gov.uk or to:

  Attorney General's Office, 102 Petty France, London, SW1H 9EA.

Culture Change

The Rebuttable Presumption

8. The Attorney General's *Review of the efficiency and effectiveness of disclosure in the criminal justice system*[1] (the Review) identified a number of improvements that could be made in order to improve disclosure practice. The Review also acknowledged that, as highlighted in previous reviews of disclosure practice, the culture of disclosure must change.

9. The Review found that at times, this culture meant that disclosure obligations were insufficiently prioritised, and that the relevant paperwork was not completed on time or to the necessary standard. This could affect the ability of a case to continue through to a final judgment. Issues identified in the Review included prosecutors failing to challenge gaps in the investigation, and signing off on inadequate unused schedules.

10. There has already been significant progress in this space, spearheaded by the work and leadership of the National Disclosure Improvement Plan ('NDIP'). Through embedding performance indicators and increased training, this programme of work is strengthening accountability and responsibility for disclosure. The proposed changes to the Guidelines and to the Code seek to reinforce and embed this positive change.

11. In order to ensure a fair investigation, it is essential that reasonable lines of inquiry are pursued, and that the disclosure test is applied correctly. To encourage and assist with this, the Review proposed introducing a **rebuttable presumption** in favour of disclosure, for certain items of unused material. This would essentially be a list of material which, where exists, is highly likely to meet the test for disclosure.

Turn to **paragraph 74** of the Guidelines and **paragraph 6.6** of the Code to see the proposed drafting.

[1] https://www.gov.uk/government/publications/review-of-the-efficiency-and-effectiveness-of-disclosure-in-the-criminal-justice-system

12. This presumption is intended to provide assistance to investigators and prosecutors, by 'nudging' them to consider this list of material. It is important to note, however, that this proposal is not intended to encourage 'automatic' disclosure: investigators and prosecutors should always apply the disclosure test, and consider each item of material carefully in the context of the case in question.

13. In summary, materials that feature on this list:

    a. Must be retained by investigators (in accordance with paragraph 5 of the Code);

    b. Must be scheduled (in accordance with paragraph 6 of the Code);

    c. Should be disclosed (unless they do not meet the disclosure test as set out in CPIA 1996); and

    d. Where they are or are not disclosed, an explanation of the reasons why must be provided on the unused schedule.

14. It is also important to note that the materials subject to the rebuttable presumption are not the *only* categories of material that should be scheduled. Investigators and prosecutors should continue to consider all material that may be relevant, including where it does not feature on the list.

15. A rebuttable presumption, such as the one proposed, should not mean that considerations relating to sensitive material and redaction are bypassed. They remain as important as ever, and the importance of redacting unused material, where necessary, is highlighted in the Guidelines and in the Code.

16. Any material subject to the proposed presumption should be reviewed by a prosecutor. Where material subject to the rebuttable presumption is or is not disclosed, the specific reasons why the material does or does not satisfy the test for disclosure should be recorded on the unused schedule. By providing reasons for why material has not been disclosed, this will ensure that prosecutors give due consideration to the decision to not disclose this material and further ensure that this decision is transparent to the defence, and that this decision can be reviewed if necessary.

17. The Review listed a number of categories of material that could be subject to the rebuttable presumption[2]. This list has since been tested with legal practitioners, and revised to take into account their feedback; hence, the proposed list below differs from that in the Review. For example, *CCTV footage of the crime in action* no longer features on the list, as it is highly likely that, where this exists, it will be used as evidence.

18. The list of material proposed in this consultation are as follows:

[2] The Review suggested that the following categories might be included: crime reports; Computer Aided Despatch records of emergency calls to the police; existing investigators' notes; any record of the complaint made by the complainant; any previous account of a witness, including draft witness statements; CCTV footage, or other imagery, of the crime in action; previous convictions or cautions of witnesses; basis of pleas of co-accused; defence statements of the co-accused.

a) Crime reports, including: crime report forms or any contemporaneous recording of an incident; an investigation log; any record or note made by an investigator, on which they later make a statement or which relates to contact with the suspects, victim or witnesses; an account of an incident or information relevant to an incident or record of actions carried out by officers (such as house-to-house, CCTV or forensic enquiries) noted by a police officer in manuscript or electronically;
b) The defendant's custody record;
c) Any incident logs relating to the allegation;
d) Records which are derived from tapes/recordings of telephone messages (for example, 999 calls) containing descriptions of an alleged offence or offender;
e) Any previous accounts made by a complainant or by any other witnesses;
f) Interview records (written records, or audio or video tapes, of interviews with actual or potential witnesses or suspects);
g) Any material casting doubt on the reliability of a witness e. g. previous convictions and cautions of any prosecution witnesses and any co-accused.

19. Overall, this proposal should ensure that the material which is most likely to meet the test for disclosure is properly considered. The rebuttable presumption would apply to all cases, and be limited to material which the police possess.

Third party material

20. The Guidelines also include guidance on seeking material held by third parties, such as government departments and/or other crown bodies.

Turn to **paragraphs 28 - 41 of** the Guidelines to see the proposed drafting on third party material.

21. This section of the Guidelines notes that, where a request for relevant information has been made, investigators and/or prosecutors should assist the government department or other crown body in understanding what may be relevant in the context of the case in question. This should assist the process of identifying and obtaining material.

22. It is also possible that there may be material relevant to a case which is held overseas. The Guidelines state that reasonable steps must be taken to obtain this information, and cites the relevant legal basis for obtaining it formally. However, noting the difficulties that can materialise when seeking material held abroad, there is no absolute duty on the prosecutor to disclose relevant material held overseas by entities not subject to the jurisdiction of the courts in England and Wales.

Box B

Questions about culture change

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

Balancing the right to a fair trial with the right to privacy

23. It is important that victims are not deterred from reporting criminal offences, or from participating in the criminal process. However, the right to a fair trial can mean that, in the course of pursuing lines of inquiry, personal information pertaining to a victim and/or witness may be obtained and disclosed. The balance between protecting the private rights of an individual and securing a fair trial is a complex one, and the Review recognised that clearer guidance was needed to assist with competing statutory duties (including but not limited to the CPIA 1996 and Article 6 and 8 of the European Convention of Human Rights).

24. We recognise that the process of a criminal investigation can be extremely difficult for victims and witnesses. The proposed amendments set out clearly that investigators and prosecutors should not pursue enquiries that concern personal information as a matter of course. Investigators and prosecutors must have already satisfied themselves before collecting or processing any personal information from a victim or witness that they are pursuing a specific and identifiable line of inquiry that is reasonable in the context of the case.

Turn to **paragraphs 11 - 15 of** the Guidelines to see the proposed drafting.

25. The proposed changes to the Guidelines additionally make clear that the right to a fair trial is an absolute right, and therefore, in certain cases, it may supersede the right to privacy. This means that investigators and prosecutors may, depending on the facts of the case in question, need to investigate personal matters. This may include examining the contents of a mobile phone.
26. Intrusions into privacy should only be carried out, however, where:
    a. It is necessary to do so to secure a fair trial; and
    b. The lines of inquiry being pursued are reasonable.
27. Additionally, investigators and prosecutors should carefully consider how to best ensure that any collection of personal information is approached in a targeted manner, to avoid any potentially excessive intrusion where possible.

Box C

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

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

Please give a yes/no answer, and provide reasoning.

Q8: Are there any aspects requiring further clarification?

Please give a yes/no answer, and provide reasoning.

Performing disclosure obligations early

28. The Review highlighted that disclosure should, where possible, be carried out at the earliest stage possible. This should bring about a number of benefits, including the reduction of disputes surrounding disclosure at a late stage in proceedings.

29. As a matter of best practice, it is therefore proposed that, where it is expected that a not guilty plea will be entered in the Crown Court, **initial disclosure should be served prior to the Plea and Trial Preparation Hearing** (PTPH).

Turn to **paragraph 89 - 90 of** the Guidelines to see the proposed drafting.

30. This change would help ensure that conversations and decisions made at PTPHs are as meaningful as possible, and provide the opportunity to identify and resolve any issues with disclosure at an early stage.

31. In order to enable prosecutors to serve initial disclosure prior to the PTPH, the Guidelines and Code encourage investigators to provide unused material schedules prior to charge in cases where the police have sought a charging decision from the prosecutor, or at the point of charge in police charged cases.

Turn to **paragraph 58 - 61** of the Guidelines and **paragraph 7.1** of the Code to see the proposed drafting.

32. The resource implications of these suggestions are recognised, and we are aware that in certain cases it may not be possible to serve initial disclosure to this timeframe, or provide schedules prior to or at the point of charge. However, there would be significant benefits to this approach and so the Guidelines and Code seek to encourage it.

33. Early engagement between prosecution and defence can also help 'frontload' disclosure obligations, and avoid problems only being identified at a later stage. The Review found that, in certain cases, if the defence knew more about the prosecution case at the pre-charge stage, then they may volunteer more information which may identify further reasonable lines of inquiry.

34. In order to help identify where this sort of **pre-charge engagement** may be appropriate, and how it could be carried out, an annex has been included in the revised Guidelines.

Turn to **Annex B** within the Guidelines to see the proposed drafting.

35. In summary, this sets out the following key features of pre-charge engagement:

    a. It is a voluntary process of engagement between the parties to an investigation;
    b. It would take place any time after the first Police and Criminal Evidence Act 1984 ('PACE') interview and before any suspect has been formally charged;
    c. It could be initiated by an investigator, a prosecutor, the suspect's representative or an unrepresented suspect;

d. Information on pre-charge engagement should be provided to the suspect or their representative either before or after interview;
e. It may take place face to face or via correspondence, and does not need to be a formal process;
f. A full written, signed record of the pre-charge engagement discussions should be made.

36. It is envisaged that pre-charge engagement will only take place in a minority of cases. It could in particular be helpful in identifying any further reasonable lines of inquiry, agreeing key word searches of digital material, and discussing potential witnesses.

37. Whilst the statutory disclosure rules do not apply during pre-charge engagement, given its timing, it is important for the parties involved to bear in mind their obligations as regards the disclosure of unused material. Before, during and after pre-charge engagement, the investigator and/or prosecutor should consider whether any further material falls to be disclosed to the suspect. This is to ensure that discussions are fair and that the suspect is not misled.

38. Pre-charge engagement should not be considered a substitute for a further interview with a suspect, and it is unlikely to be appropriate for cases where a 'no comment' interview is given.

39. The Review also suggested that the Criminal Procedure Rule Committee (CrimPRC) consider amending the rules around PTPH extensions, to allow for extensions over the current 7-day maximum in exceptional circumstances. This is because the prosecution and defence are sometimes unable to have meaningful engagement prior to the PTPH as not all the relevant information is available within the 28-day timescale. Therefore, if longer extensions were granted, this could make the PTPH more effective.

40. The CrimPRC have duly considered this proposal, but due to the risks in creating further delays to the progress of the case, have instead suggested that Further Case Management Hearings (FCMH) could be appropriate in cases involving a substantial amount of unused material, or a complex disclosure exercise, to encourage effective engagement between the parties. This would also assist in meeting the timetable directed at the PTPH. The direction for such a hearing could be considered at the time of the PTPH, or after if the court so directs.

Box D

Questions about performing disclosure obligations early

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

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?

Please give a yes/no answer, and provide reasoning.

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? Please give a yes/no answer, and provide reasoning.

Harnessing technology

41. Since the Guidelines were last issued (in 2013), there have been numerous changes and advances in technology; both in terms of physical capabilities, as well as in its use in day-to-day life. The Review recommended that the Guidelines be updated to provide simpler, clearer, and more practical assistance on digital material, which keeps pace with these changes. This was reinforced by feedback received from prosecutors: on the whole, the supplementary annex on digitally stored material remains a very useful resource for prosecutors dealing with digital material, but more guidance could be provided on how prosecutors can approach sifting and examining large quantities of digital data could be provided.

42. Whilst technology has in part caused the increase in material that may be subject to disclosure obligations, it can also assist in performing these obligations. There are already a number of pilots ongoing in local police forces to test specific technological capabilities in this space, and we await the outcome of these pilots to see whether there are solutions that can assist more broadly.

43. The human-led nature of disclosure obligations, however, remains crucial. Technology can assist, but cannot replace.

44. It is also clear that the ways in which technology can assist investigators and prosecutors will depend on the case in question. The context of different cases will vary tremendously: cases of serious organised crime, for example, are likely to yield more and different types of unused material than a volume crime case.

45. This is not to say that volume crime cases will not produce significant amounts of data; a high proportion of volume crime cases will have large volumes of digital data. However, the method by which technology could help collect, distil and curate data will vary according to the case in question.

46. Therefore, the amendments proposed in this space are not too prescriptive about the ways in which technology should be harnessed. This is to avoid creating guidance that is too specific, and cannot be applied to all cases. Noting the fast-paced movement and evolution of technology, the Guidelines and Code also seek to avoid including content that may soon become out of date.

Turn to **Annex A** within the Guidelines to see the proposed drafting.

47. Of course, there are overarching principles and practices that can be relevant for different cases. For example, the revised Guidelines seek to reinforce the message that it is acceptable to search mobile phones and other communications devices by sampling and key word searches. They also include reference to block listing, algorithms and predictive coding, which can assist in sifting, examining, and listing large amounts of digital data.

48. One specific change has been to refer to 'large', rather than 'enormous' quantities of digitally stored material in the Guidelines. This change is intended to clarify the fact that certain techniques, such as searching by sample and/or key word, may be helpful when data contained on everyday devices, such as mobile phones, is being searched.

49. In the Code, a change of wording is also proposed in order to clarify that the obligation to list material consecutively on schedules, does not prevent materials of the same type being listed together. This aims to make it easier to navigate schedules (in particular, those where large volumes of material are listed). Similarly, language has also been changed to reflect the fact that block listing may be a useful technique to adopt in all cases involving substantial volumes of material, rather than just those containing many items of a similar or repetitive nature.

50. To reflect on the complex nature of digital disclosure, the Guidelines also encourage prosecutors to consider the instruction of a digital forensic expert to advise on the digital disclosure strategy in the most complex cases.

51. Overall, investigators and prosecutors should not hesitate to use technology to assist in the disclosure process, but should always carefully consider the best ways to do so and consult experts where necessary.

Box E

Questions on harnessing technology

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

Structure and readability

52. As the Guidelines are an often-used and well-regarded resource, we have sought to not make wholesale changes to the content of the document, but to instead update it so it better reflects the realities and challenges of the current context.

53. To ensure that the Guidelines are as easy-to-use and as practical as possible, the document has been restructured so that it follows the chronological order of a criminal case. The structure therefore is as follows:

    a. Investigation
    b. Revelation of material
    c. Charge
    d. Common law disclosure
    e. Initial disclosure
    f. Case management
    g. Defence statements
    h. Ongoing disclosure

54. Overall, the proposed changes to the Guidelines seek to make the document a more user-friendly guide for prosecutors, investigators and defence practitioners. The Guidelines set out the key principles that should be adhered to when carrying out disclosure obligations, including legal requirements and best practice.

55. It should be noted that, due to this change of structure, there are no longer separate sections for different users. Therefore, any user of the Guidelines will need to familiarise themselves with the document as a whole.

56. In many cases, the changes proposed in the revised Guidelines seek to embed examples of best practice that are already in place. We would also be grateful to receive further examples of best practice to consider.

Box F

General questions

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

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

Please provide reasoning.

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

Please give a yes/no answer, and provide reasoning.

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

Please give a yes/no answer, and provide reasoning.