

*NB, there are a number of further comments which could be made here, but which are relevant to cases where, for example, consent or visual identification are the issues. The FLA has focussed on the issues of more general application.*

The responses on behalf of the FLA reflect a wide range of experience from both branches of the legal profession including public prosecutors (past and present); defence lawyers and advocates who both prosecute and defend.

## **Overall comments**

There are two overarching issues which require careful handling:

1. There is an inextricable link between the disclosure process and the prosecution process, because consideration of material which might meet the test for disclosure:
  - a. ought to be part of investigative decision-making, and
  - b. ought to be part of the Code test review process.
2. Nonetheless, in various respects, it is important to distinguish between the legal position as it applies to evidence (or potential evidence) and unused material.

We think the current draft would miss the opportunity to emphasise the first point and may contribute to confusion on the second issue.

## **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.**

No. We suggest that that the rebuttable presumption discourages a proper application of the disclosure test. When the CPIA was first enacted the prosecution and investigation authorities undertook a major programme of joint training. Since then practice has strayed further and further from what was envisaged. There have been previous attempts – some local – to apply a presumptive list but these have not resulted in improved disclosure. Instead this approach, in our experience provides a shortcut for purported disclosure. There are two major dangers to this (i) it tends to reduce the value of the revelation process to the prosecution review process and (ii) it may make proper decision-making less likely in respect of material which is not identified as falling within the presumption.

NB. The last sentence of para 20 could be confusing because it is an incomplete (and therefore potentially misleading) statement of obligations: "*Material which is presumed to meet the test for disclosure, as set out in paragraph 74 of these guidelines, must always be retained and recorded*".

**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.**

Yes. We believe this will be sufficiently clear to those responsible for retention and scheduling. It may not be comprehensive enough for the scope to be understood by, for example, unrepresented defendants.

**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.**

Yes (f) should be reworded so that it is clear that a potential suspect's interview is unused material only if that suspect is not charged.

**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.**

Yes but, from experience, we think it likely that this may nonetheless be the result.

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

No.

- The status of other governmental departments is not sufficiently clear.
- There is a statement that "*Investigators and prosecutors cannot be regarded to be in constructive possession of Material*" but the concept of Crown Indivisibility means that this is ultimately an issue for the court, not for the Law Officers to pronounce upon.
- If it is right to treat other government departments as third parties then greater thought needs to be given to how much of this part should be common to the different sub-sections and how much needs to be distinct. At present there is no clear rationale.
- Para 33 refers, in footnotes, to the relevant tests for a witness summons but perpetuates the blurred distinction between access to unused material (the topic under discussion) and access to admissible evidence (the issue addressed by the statutory provisions). This issues needs to be addressed.
- Some of the references are unhelpfully worded. For example in para 37: "*... there is no absolute duty on the prosecutor to disclose relevant material held overseas by entities*". While this statement is not wrong it diverts attention from first principles in terms of what material the prosecutor's duty of disclosure applies to.
- The section on international enquiries does not address the investigator's general duty to make notes.

### **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.**

No, see Q8

**Q8: Are there any aspects requiring further clarification? Please give a yes/no answer, and provide reasoning**

Yes. There is a general lack of understanding about the relationship between these issues and the issue of consent. The general reference to acting "*in accordance with the law*" (para 12) does not provide any

guidance on what this means, in a spectrum which could range from simply acting lawfully to exercising coercive statutory powers. (See above re the witness summons procedure). Para 15's reference to the absolute right to a fair trial does not address the possible solutions and may lead investigators to assume that rights to privacy should be overridden, when an alternative would be not to proceed with the case. That alternative itself needs to be carefully understood. Historically there have been instances where an ultimatum of that sort has been given to a complainant in cases where no such need arose. This whole topic needs greater guidance.

#### **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.**

Yes, for the reasons given in the consultation.

**Q10: Do you agree that the proposed guidance in Annex B is helpful? Please give a yes/no answer, and provide reasoning.**

No. This allows too much discretion to an investigator and is based on the premise that a suspect must respond to the prosecution in order to be listened to. A suspect may legitimately exercise the right to silence in interview but have bona fide information which would assist the investigation. The guidance encourages investigators to ignore such information.

**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.**

Yes but it should also explicitly say that material identified as meeting the test for disclosure must be provided with the schedule.

**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.**

No – this should not be described as best practice: it should be required in full Code test cases where there is an anticipated not guilty plea.

NB. While there are more practical difficulties in threshold cases the prosecution's duties should be treated as enhanced where a defendant is remanded in custody. Care needs to be taken to avoid suggesting that there is a lesser standard of responsibility in threshold test cases.

#### **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.**

No, some of the changes are a step back from the previous guidance, in particular around LPP

**Q14: Are there any areas where additional guidance or information could be beneficial? Please give a yes/no answer, and provide reasoning.**

See Q13

### **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.**

Yes and no. The structure is helpful but some areas are not an improvement (see above)

**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.**

No: our overall view is that the new guidelines might create further inconsistency.

**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**

No: using the phrase "best practice" is not prescriptive enough. Resources are likely to be the key driver of actual performance.

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

There is a risk of confusion and that discretionary choices will be made according to resourcing pressures rather than on a "thinking" basis. The guidance needs to be backed up with training and ongoing resources.

**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.**

Yes, but the changes would be more effective if the guidance was more prescriptive

**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**

Yes: these are helpful