**CBA Response to the Justice Select Committee's**

**Inquiry into The Disclosure of Evidence in Criminal Cases**

**20th March 2018**

## Introduction

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

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

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

Q1: Are the current policies, rules and procedures satisfactory to enable appropriate disclosure of evidence and support the defendant's right to a fair trial?

- How effective are current policies, rules and procedures – particularly in the light of the growth in electronically stored material (such as text or social media messages)?
- To what extent (if at all) have any recent or ongoing changes to the wider policy landscape, including in relation to legal aid, had an impact on disclosure?

The current CPIA 1996 regime is sufficiently clear, well balanced and satisfactory in principle to ensure appropriate disclosure of evidence and support the right to a fair trial if the current policies, rules and procedures are implemented and followed correctly and faithfully.

The current regime however was introduced at a time when the Internet was in its infancy and mobile phones were an exception with no significant memory capacity. The technological capability of devices to send and receive large files including images and video and URL links has led to hand held devices being capable of storing enormous amounts of data. Instant messaging using a variety of media platforms e.g. FaceBook, WhatsApp, Messenger, Snapchat, Tinder, either to individuals or groups has become the primary way in which people communicate when then are not face to face.

There is no overestimating the scale of the investigator's task in identifying what is available, what is a reasonable line of enquiry, and the length of time it will take to undertake such enquiries. Severe delays frequently occur in obtaining "complete" downloads of electronic equipment, in particular of telephone handsets, and this has led in some cases to partial and/ or inadequate disclosure of parts of conversations, or selected messages taken out of their original context (e.g. screenshots of selected excerpts). Disclosure failures in these sorts of cases has led to refusals to charge serious offending unless and until completed downloads have been obtained and the entirety of their 64mb of data has been the subject of detailed and documented scrutiny. This knee jerk response however is a recent consumer-type problem resulting from the huge

demand for downloads of electronic devices and the inadequate downloading facilities available, rather than a specific flaw in the disclosure process.

There is no need to change the disclosure regime to deal with advances in technology. What there is, however, is a need for is investment. Investment, at the very least, in adequate downloading facilities to cope with the explosion in reliance upon electronic data - to that end a "Digital Hub" is set to open in the middle of 2018. But above all there is a desperate need for investment in full and proper training for those responsible for undertaking disclosure responsibilities. Transparent and uniform training needs to be readily accessible and personally deliverable across the criminal justice process. Not merely limited to tackling the approach to the seizure/recovery/interrogation and scheduling of data, but rather tackling the entire disclosure process from the identification of relevant material, reasonable lines of enquiry, awareness of third party material, the appropriate scheduling of materials across the MG6 series, to an awareness of the accountability for its inspection at every stage of the process.
The CPS can only review material whose existence has been disclosed to them or can reasonably be within their contemplation.

Problems arise in the initial Police investigative stage where there has been insufficient appropriate training as to what are the investigators' statutory obligations within the context of what their overarching role is perceived to be. Local practices as to scheduling and recording/retention of material have led to an inconsistent approach. There is frequently a disjunct between the Police and CPS as to what material should be provided to them, and often Police create a schedule of 'irrelevant' material which remains undisclosed to the CPS or defence.

These problems are then frequently exacerbated by too adversarial an approach taken to disclosure in the first place, or an inadequate review of the schedules and material provided; insufficient time seems to be allowed by those who manage the CPS for reviewing lawyers' to deal with disclosure.

Most disclosure failings are identified by trial counsel either at or just before the outset of a trial and would have been capable of earlier remedy, had time and resources been available for consideration as to whether the existing framework had been applied correctly. These types of

failing are avoidable. They are the not the result of a flaw in the process but are the direct result of the drastic underfunding of the entire criminal justice system. Budget cuts to all the major stakeholders in the CJS – the Police, the CPS, Solicitors and the underfunded Independent Bar have had a deleterious effect on the disclosure process. Ever increasing quantities of material are required to be considered and inspected for ever decreasing remuneration.

Q2: How do the current policies, rules and procedures on disclosure operate in practice and are there any practical barriers to them working effectively?

- What is the normal practice of Police and the CPS in reviewing and disclosing evidence and what, if any, are the barriers to this working effectively? Are reviews and disclosures carried out at the right level, is training and guidance appropriate, and is there sufficient oversight of decisions?
- What is the normal practice of the defence in making disclosure requests, and of the courts in dealing with applications for prosecution disclosure and setting timetables, and what (if any) are the barriers to these procedures working effectively?
- How has Transforming Summary Justice changed disclosure practices in the magistrates' courts and how effectively does this work in practice?
- How frequent are applications for disclosure of sensitive material, and how are they handled by the prosecution, the defence and the courts in practice?

The first of these questions is addressed within the answers to Q1 herein.

Listing and trial targets seem to have created an in built pressure in terms of how disclosure time tables are framed within the trial process.

Defence are not required to disclose the detail of their case until they have seen the strength of the prosecution case and had an opportunity to consider what may exist to undermine it as described on

the schedule. Even then, many Defence statements are not sufficiently detailed or clear to allow the prosecution to consider disclosure meaningfully.

The courts do not have the requisite statutory authority to act as supervisors or to enforce disclosure at this stage. The judge is not able to see the whole case including the schedule of unused material and any such material served by the prosecution on the Defence whether it is used or unused material.

Consideration should be given to creating a location on DCS for the uploading of the MG6C, disclosed materials and requests and responses to requests for disclosure.

The Defence can and usually do make applications when appropriate under s8 of the CPIA which is determined by the court.

Applications for Disclosure of sensitive material are increasingly infrequent under the current regime which when operated properly exists to provide a defendant with the fairest possible trial. It is unusual for the Crown to seek to withhold the substance of material that genuinely satisfies the test for disclosure. More often than not it is the form or source of material over which sensitivity is claimed. In practice suitably moderated documentation or admitted paragraphs achieve the balance between protecting sensitivity and making appropriate disclosure.

Transforming Summary Justice has not delivered the results that may have been anticipated. The approach to disclosure is cursory at best.

In most cases, the disclosure schedule is a single page with items which are not described accurately or fully enough to allow proper advice or consideration to those representing the accused. There is normally also a paucity of detail within the schedule.

The IDPC frequently does not contain all the evidence and the disclosure schedule is normally inadequate. There are occasions on which an entirely empty schedule is provided. Seemingly these schedules are signed off by a reviewing lawyer which may appear at odds with their duties.

Those documents are then often only made available on the day of the hearing which does not allow the defence a proper opportunity to consider, let alone draft, any defence document or indicate the nature of the defence save in the very broadest terms.

Even when the Defence proactively correspond with their local CPS Magistrates' Court unit or serve a defence statement upon them, the CPS routinely do not respond or respond late without even acknowledging receipt of said correspondence. Disclosure supplied in response to a defence statement is almost invariably served at court on the day of trial when the pressure and momentum of the imminent trial does not make for fairness on the Defendant. Some Magistrates' Courts refuse Defence requests to list cases for pre-trial hearings to deal with non-disclosure.

There is a growing suspicion within the defence community that this is all deliberate and possible policy by the CPS.

Q3: What improvements (if any) are needed to improve disclosure and ensure that fair trial rights are protected?

- What would be the resource implications of any changes to policies, rules, procedures, or any changes to operational practices?
- Do the Police and CPS have credible plans to ensure they are able to respond to the changing nature and volume of evidence, including electronic evidence?

A clear strategy has been developed by NPCC the result of guidance by the DPP to transparently document the due regard had by police to their obligations under the CPIA both on the CRIS, and more recently in a Disclosure Management Document (already relied upon in cases of homicide), due to be deployed in RASSO and across Serious Crime from 26th March 2018. This will assist investigating officers to demonstrate that a clear rationale has been applied when accounting for decisions with regard to the direction of the investigation and approach to the disclosure process.

With particular emphasis on the issues that have arisen from the use of electronic devices, the following operational guidance has been put in place:

Suspect's devices should always be considered for download

Once a decision has been made that a download of a suspect's phone is a reasonable line of enquiry, officers should exercise their powers of search and seizure under PACE either through a Section 8 Warrant of through Section 32 or 18 post-arrest powers. It is not appropriate to expect suspects to voluntarily provide their phones and/or digital devices.

Whilst there is a suggestion that one immediate area for reform may be the consideration of making defence statements obligatory as opposed to their current voluntary status under the CPIA, the efficacy of neither the investigating nor the disclosure process can be reliant upon the forced participation of a suspect in it. Nevertheless, for the protection of the integrity of the process and as a demonstration of its reasoned balance, opportunities for participation by suspects should be offered and results documented in the soon to be introduced Disclosure Management Document.

A Pre-interview form of words is prescribed: *I intend to ask **name** questions in order to establish if there are any relevant digital communications evidence in existence on his/her, complainant's or other person's mobile phone or other digital device. This will be your client's opportunity to direct the investigation team to any material that he/she knows is in existence and may assist their defence.*

*I also intend to ask your client for passcodes to digital devices that have or will be seized in order to investigate this matter. Whilst there is no obligation for your client to provide these details, such disclosure will prevent unnecessary delays in their case being fully investigated.*

The following areas must be covered during the suspect's PACE compliant interview:

- What devices do they own?
- What devices have they used to communicate with complainant and third parties in relation to the incident?
- What form of communications used? i.e SMS, instant messaging, other social media?

- Are there any images, videos or messages stored on a cloud server that are relevant to the case?
- Have any communications in relation to the case been deleted from the device?
- What are the access codes to the devices?

Officers must always consider obtaining a download of a complainant's/relevant witness's digital communications. A Form of words to be used is prescribed:

*The police have a duty to pursue all reasonable lines of enquiry. Current guidance is that all digital devices that you use are identified, downloaded and reviewed in order to assess if any data exists that is relevant to the issues in your cases. I therefore need to establish the following:*

- *What devices do you own?*
- *What devices have you used to communicate with the defendant and third parties in relation to the incident?*
- *What form of communications have been used? i.e SMS, instant messaging, other social media?*
- *Are there any images, videos or messages stored on a cloud server that are relevant to the case?*
- *Have any communications in relation to the case been deleted from the device?*

*What Social Media accounts do you have?*

As with digital devices, a review of a complainant's social media accounts such as Facebook, Instagram and Snap Chat could be a reasonable line of enquiry depending on the issues in the case and must be pursued in order to satisfy our duties under the CPIA.

Since it is resources that are needed to alleviate the overburdened, underfunded Criminal Justice process as a whole, there is an obvious cost implication for providing training, facilities and appropriate remuneration where voluminous work needs to be undertaken in order to permit the clear, well balanced and satisfactory existing CPIA regime to operate in the way it was designed to enable appropriate disclosure of evidence and support the defendant's right to a fair trial.