

RESPONSE TO CONSULTATION ON THE CODE FOR CROWN PROSECUTORS

1: Do you agree that when deciding whether there is sufficient evidence to prosecute, prosecutors should consider whether there is any other material that may affect the sufficiency of evidence?

It must be an inherent expectation in any competent assessment of the sufficiency of evidence that there should be consideration of any other material already in existence and in the possession of the investigator before or at the same time as consideration is given to what other reasonable lines of enquiry ought to be pursued that may be expected to generate such material, whether those lines of enquiry be identified by the prosecutor, the investigator, a third party or the suspect himself.

Articulation of that expectation in the revised Code is consistent with the framework and terminology of the Disclosure Management Document.

2: Do you have any views on the revised Threshold Test?

The reformulation of the test in the proposed revision makes no substantial difference to its application but is confusing, repetitive and cumbersome. We would propose the following formulation and submit that it achieves the same end (using some of the improved terminology from the proposed revision)

The Threshold Test

When the Threshold Test can be applied

5.1. In limited circumstances, where the Full Code Test is not met, the Threshold Test may be applied to charge a suspect. Prosecutors must be satisfied that all of the following three conditions are met:

- I. The seriousness or circumstances of the case must justify the making of an immediate charging decision,
- II. there must be substantial grounds to object to bail based on a proper justified and supported risk assessment;
- III. it is in the public interest to charge the subject.

5.2. There must be a rigorous examination of the conditions of the Threshold Test to ensure that it is only applied when necessary and that cases are not charged prematurely.

5.3 Where any of the conditions are not met, the Threshold Test cannot be applied and the suspect cannot be charged.

There are two parts to the evidential consideration of the Threshold Test

‘reasonable grounds to suspect’

5.4 Prosecutors must be satisfied, on an objective assessment of the evidence, that there are reasonable grounds to suspect that the person to be charged has committed the offence. The assessment must consider the impact of any defence or information that the suspect has put forward or on which they might rely.

5.5 In determining whether there are reasonable grounds to suspect, prosecutors must consider all of the material or information available, whether in evidential format or otherwise. Prosecutors must be satisfied that the material to be relied on at this stage is:

- I. capable of being put into an admissible format for presentation in court;
- II. reliable;
- III. credible.

Can further evidence be gathered to provide a realistic prospect of conviction

5.6 Prosecutors must be satisfied that there are reasonable grounds to believe that the continuing investigation will provide further evidence, within a reasonable period of time, so that all the evidence together is capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.

5.7. The likely further evidence must not be merely speculative. It must be identifiable and likely to point towards the guilt of the suspect. In reaching this decision prosecutors must consider:

- I. the nature, extent and admissibility of any likely further evidence and the impact it will have on the case;
- II. the reasons why the evidence is not already available;
- III. the time required to obtain the further evidence and whether any consequential delay is reasonable in all the circumstances.

Reviewing the Threshold Test

A decision to charge under the Threshold Test must be kept under review. The prosecutor should be proactive to secure from the police the identified outstanding evidence or other material in accordance with an agreed timetable. The evidence must be regularly assessed to ensure that the charge is still appropriate and that continued objection to bail is justified. The Full Code Test must be applied as soon as is reasonably practicable and, in Crown Court cases, usually before the formal service of the prosecution case.

Paragraph 4.14 (c)

Circumstances of and the harm caused to the *victim*

The wording of this element needs review and the word ‘victim’ should be replaced with complainant as this allows for more objectivity in giving pre-charge advice. There should also be clarification as to a definition of vulnerability having regard particularly to the inherent issue surround subjective ‘perception’ of vulnerability by a complainant or the bias that may exist dependent upon the type of allegation considered. Similarly, clarification is required of the terms

abuse of trust and authority given the judgment in R v Forbes 2016 as it has a specific legal meaning and application which may differ from public understanding of it.

Para 4.14(d) U18s

The SGC guideline on Children and Young People has been in force since June 2017 and should be incorporated. The SGC makes the specific point that youth offending can and may amount to a phase. Maturity is a difficult concept for a prosecutor has no direct experience of the young person and who may make assumptions based upon the biological age of the YP.

It also does not address that the YP may have learning or other disabilities which could affect charge or account for an absence of an admission. Moreover there is as yet no real effective court process to deal with these prosecutions in the Youth Court.

Para 5.11

Bail

There are going to be occasions when the objection to bail must be tempered by the likely time of investigation. This must be applied by the Prosecutor objectively and rigorously, based upon such information that should be disclosable to the Suspect/Defence lawyers. All too often these decisions appear to be made upon Police assertions which are unchecked, unsupported and largely inferential on the gravity of the offence alleged.

The TT should be reserved for only the most grave or urgent of cases. It has become perhaps overused as a means by the Police to bypass the usual agreed checklists of evidence required before charge is normally considered. It is particularly important that it should not become a short circuit to bypass release under investigation.

3: Prosecutors are required to consider a suspect's / defendant's proceeds of crime when deciding whether to charge [4.14.b], when selecting charges [6.1.c], when making submissions on court venue [8.3] and when a defendant offers a plea [9.2]. Do you have any observations on these requirements?

Whilst a defendant's proceeds of crime may be a relevant, material and timely consideration when deciding upon what to charge [6.1.c]; venue[8.3] and acceptable pleas [9.2], they should not be the deciding factor in the question of *whether* to charge. It should be remembered that the state has extensive powers of civil recovery.

4: Do you have any further comments on the proposed revisions to the Code?

There are some welcome revisions with regard to clarifying the staged approach to decision making, but some of the revisions achieve little more than different wording. If there is to be imminent revision of the Criminal Procedure Rules in light of the introduction of DMD then perhaps the timing of this proposed revision is premature.

How did you hear about this consultation (delete as applicable)?

- National press
- Television or Radio
- Specialist press (e.g. Law Society Gazette)
- CPS Website

- Other website
- CPS Twitter feed
- Other Twitter feed (or social networking site)
- Other (please specify)