CBA Response to The Consultation Upon Amendments to Annex A of the Attorney-General's Guidelines (Digital Material)

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 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.

Introduction

4. As part of the Annual Review of Disclosure undertaken by the Attorney General (AG) in May 2022, the AG's office is considering amendments to the Attorney General's Guidelines on Disclosure in response to Action 6A:

   "We recommend the guidance on Block Listing and Digital Sifting is enhanced, in consultation with LEAs, to offer user friendly and comprehensive guidance in these growth areas of disclosure."

5. Further to a roundtable meeting chaired by the Solicitor General, on 19th July 2023, attended by then Chair and Vice-Chairs of the CBA, Kirsty Brimelow KC and Tana Adkin KC and Secretary Mark Watson, the CBA sets out its observations in writing on the proposed new Annex A which comprises additional §53-61 (new Annex A) replacing and expanding up the original §52.

6. As raised at the roundtable, the CBA also has encountered issues with the treatment of legally professionally privilege (LPP) material. The Solicitor General extended an invitation to the CBA for additional observations to made upon LPP (§26-32).

The Problem and the Solution

7. We are concerned that the new Annex A continues to describe the challenges which are inherent within the application of the law of disclosure to large volumes of digital material, but nevertheless does not reflect the technological advances which make the task more manageable and reliable. There is no reference to the advances in database and AI software within the Annex.

8. The guidance is largely framed from the perspective that the only way to deal with large volumes of data is to divide material into blocks and then perform some sort of random dip testing. This is a process which has no empirical basis to demonstrate that it is a sound approach. Furthermore, the rationale behind it

seems to be borne from a sense of expediency or the defeatist belief that a more thorough scrutiny of the material is not attainable.

9. A serious fallacy with the block approach to the disclosure scrutiny process is the erroneous notion it will be readily apparent to the disclosure officer how files can be rationally divided into thematic blocks. It is often the case that files and folders are not already ordered into a rational and recursive hierarchy from a root folder/directory down to subject folders, more specific sub-folders, and then individual files which have been named to give an indication of their contents or their subject matter. It is very often the case that file names may be numerical or alphanumerical because they are computer rather than human generated, with no obvious link to their theme or content. Additionally, a computer may well have no well-ordered folder and file structure at all. The degree to which the ordering is methodical depends upon the habits of the user of the computer prior to its seizure, or upon how automated file naming was implemented.

10. In many instances, any block groupings by a disclosure officer will be entirely capricious. The block groupings could only ever be rational if there is already a rational folder and file structure. If such a rational structure exists, then there is no need for block grouping; it would be much worse than the existing structure. On a well-ordered computer, the grouping should replicate the well-ordered recursive folder structure. There is no need to fix what is not broken.

11. In many instances, the only safe way to divide data into blocks will be by reviewing the contents of the files. The record of this review could then be scheduled. Once this has occurred there would then be a rational basis for dividing into blocks. However, because the files at that stage have been reviewed and scheduled, the division into blocks would be utterly purposeless and have become otiose. It would simply be dogmatic grouping rather than to assist with reliable disclosure. It would merely obfuscate disclosure.

12. Additionally, many of the files do not lend themselves to any form of OCR (Optical Character Recognition) searching. PDFs are one of the most common formats of

relevant data for both service as evidence or disclosure. The reading of OCR data and its processing into a database, can only take place on native PDFs (e.g. a Word file saved as a PDF) or a scanned file that has had OCR software run on it before it was saved. However, it is not possible to know which PDFs on a seized device have already been OCRd without opening them first, either manually or by an automated AI process.

13. This is a very real problem. It is often the case that defence teams are asked to provide search terms and then these are used to search a database built from the product of the contents of many files. However, the disclosure officer will not know how many files have been missed out of the database because they did not already have any OCR data within them.

14. The difficulty is even more severe with JPEGs and some specialised file formats. The difficulties can only be ameliorated with a complete list of the files and folders on a device. This can be produced very easily; it is a trivial automated task.

15. If there is to be any transparency and reliability to the process, then we propose the following:

    (a) There are many types of software (including freeware) that will produce a complete list of all the files on a computer, together with the folder structure or hierarchy that they are contained within.

    (b) There is no reason why this cannot be provided to each defence team unless the file name itself revealed privileged or confidential information (this would be a very rare occurrence.)

    (c) The type and version of the software that was used to produce the folder and file list should be disclosed to the defence.

    (d) Database software that keeps up with developments in AI should scan the files and read the contents into its database.

(e) The nature of the database software used to scan the files should be disclosed to the defence.

(f) The database software that was used should include a list of all the files whose contents it was able to read and those files that it was not able to read. This too should be provided to the defence.

(g) This process will mean that the circumstances in which it is necessary to use the inherently capricious process of block grouping and dip testing will be a very rare occurrence.

(h) Whether block grouping is the only expedient or pragmatic approach will depend upon the number of files that cannot be scanned by advanced database and AI software.

(i) Many of these files, such as PDFs without OCR data, could be converted into OCR versions by a fast automated process.

(j) This would reduce further still any files that cannot be incorporated into the database.

(k) In many instances, there will be a rump of awkward files which may well be sufficiently few that they can each be manually reviewed on specialist software without the need for any block grouping and dip testing.

16. In the light of the above, we are of the view that the block grouping approach should be regarded as the last resort in the new Annex A, as opposed to the first port of call. It is inherently unreliable. In large volumes of data with a small number of relevant files, dip testing is very likely to reveal nothing of relevance because the relevant files are a very small percentage of the total files that have been capriciously blocked together. Such a clumsy and unreliable approach to disclosure should have no place in 2023 unless it is truly all that is attainable. If it is all that is attainable then its adequacy or inadequacy can be considered by the judge and the jury.

17. The present proposal to block group items to the schedule prevents any rational section 8 application from being made. If the material has been reviewed, it has only been reviewed properly if a record is made as it is done. This record could be supplied as the schedule. The inability to schedule suggests that the material has not been reviewed. A block grouping is tantamount to admission of a failure to review. Such an admission of failure should be vanishingly rare if technology is embraced to its full potential.

18. The advantage of the modern approach outlined in paragraph 12 above is that it is completely transparent and can be refined by all the parties on a fact and case specific basis. There should be no consideration given to block grouping and dip testing until the number of files not amenable to database and AI scanning is known. The defence could assist by suggesting software to read uncommon file types.

19. Moreover, the approach we suggest means that the Prosecutor will not have to resort to dip testing the block grouping either. The Prosecutor should have full access to the database and the generated copy of all the files that could not be scanned by the software. The prosecutor could then focus on these latter files and approve a strategy to review them.

LPP material (§25-33)

20. Further, any review by independent counsel will be unreliable without such a database. The approach we propose would enable independent counsel to identify the files subject to LPP, remove them and remove them from the database. Additionally, the party in whom the LPP vests would be able to consider the original database and list of files not in the database, and thus provide independent counsel with more reliable information to remove the LPP material. This approach would prevent the investigating officers from stumbling across LPP material in their dip testing or more methodical searches and reviews.

21. As raised at the roundtable meeting, the current Guidelines at Annex A are insufficiently robust and we are aware of one large trial that was substantially delayed, mid trial, due to poor handling of LPP material.

22. We suggest that there should be no resort to grouping and dip testing until the defence has had an opportunity to engage in the process. This should almost always be post-charge, although we invite further consideration of the Guidelines relating to LPP material.

23. At post-charge stage the AI scanning and database should be complete. Informed representations could be made at this point. The present draft Annex A proposes grouping and dip-testing for expediency before it is known whether there is any better strategy. It is irrational to take the last resort with all its frailties before it is known whether that is truly necessary.

24. The approach that we suggest will need investment in software, hardware and training. However, it will drastically reduce the need for manual searching and so we believe it will reduce the cost overall. Importantly, it will produce an outcome which more reliably fulfils the duty to comply with section 3 CPIA. It also has the advantage of freeing up the disclosure officer so that the focus can be on the files that cannot be AI scanned into the database. Dip testing thus becomes rarely necessary.

25. Additionally, the cost and size of storage mediums has fallen drastically. There are many circumstances in which it would now be a trivial task to copy the seized data to a hard drive, together with the database, and supply this to the defence. This would truly permit defence engagement in the process.

26. It is not rational to argue that the strictures of the CPIA can be watered down pragmatically or for expedience on the one hand, in order to justify block grouping of data that has not been reviewed; but on the other hand to argue that the CPIA cannot be pragmatically interpreted, in order to permit full disclosure of the

material and the database to ameliorate the flaws and dangers in what otherwise be a simulacrum of section 3. Pragmatism must cut both ways.

Pre-charge Engagement

27. The present proposals for pre-charge engagement are unworkable in the vast majority of cases. There is no public funding for defence solicitors to be engaged in such a process. Even wealthy suspects will often be subject to a Restraint Order which prevents the release of funds to instruct solicitors to engage at this stage. Pre-charge engagement will only be possible for the wealthy who are not subject to restraint or who have wealthy friends or "backers."

28. There are obvious risks with pre-charge engagement with unrepresented suspects. This is largely deprecated in the guidelines. We agree. We accept that it could not be forbidden; suspects are always free to conduct themselves with the authorities how they see fit.

29. If there are to be any meaningful advances in pre-charge engagement, then it will be necessary for funding arrangements to be brought in. The present lack of funding means that any proposal that lack of engagement constitutes implicit consent would be wholly wrong. It would amount to exploitation of the lack of funding to justify what might be a wholly flawed inadequate approach to disclosure. We object specifically to §53:

    Where it is deemed appropriate and in accordance with Annex B which addresses pre-charge engagement, the defence should be invited to an early stage to make representations about the planned approach to block listing. A lack of defence engagement can reasonably be taken as approval of the approach. Records of communication should be retained.

30. Even with funding, there are serious flaws in the pre-charge engagement proposal. Suspects can only make constructive proposals about data that has been copied

from devices they used, or they are familiar with. A suspect will have no knowledge about devices used by others or systems used by a co-suspect. A suspect is in no position to make reliable proposals about devices they are not familiar with before they even know the shape of the case. Any keywords will inevitably be deficient.

31. Such a partially informed pre-charge process is likely to lead to tendentious and partisan suggestions which may deflect the disclosure process away from a suspect towards a co-suspect. It is likely to lead to a process that takes wrong turns in its infancy which may be difficult to correct later. It would infect the disclosure process with cut-throat strategies at the outset. Control and strategy would be diverted from what is meant to be an objective neutral approach under the CPIA Code.

32. If the proposals that we suggest are implemented, the perceived theoretical benefits of pre-charge engagement are likely to be wholly unnecessary. If there is to be any such engagement, then it could take place in relation to the small percentage of files that are not suitable for analysis by AI and inclusion on the database. This might produce a real gain rather than an illusory one or distorted partisan one.

33. We propose that the line in §53, "*A lack of defence…..to the approach*" be deleted.

34. If the quantity of the files not within the database is small, the engagement could take place post-charge by defendants and their lawyers and be judicially managed. This is because there would be sufficient time before trial for this part of the unused material to be reviewed for disclosure. It would provide a much more transparent, manageable, and reliable system than that which is presently proposed.

<u>Conclusion</u>

35. If there is to be any meaningful update to Annex A, which eradicates much of the present serious imperfections and frailties, it is essential for there to be a root and

branch embrace of new technology to manage large amounts of data. This will permit the true application of Parliament's intent when it enacted section 3 CPIA, rather than making do with a Heath Robinson simulacrum of it. It will also permit a transparent and case managed implementation of disclosure, in line with the Better Case Management Revival Handbook, in which the defence have the resources and information to play a proper role.

Kirsty Brimelow KC

Chair of the CBA - 01.09.22 – 31.08.23

Simon Csoka KC

Former Representative of the CBA on the Northern Circuit