

CRIMINAL LAW UPDATE



FEBRUARY 2021

Disclosure

The new Disclosure Code of Practice and Attorney General's Guidelines

The new 2020 versions of the Disclosure Code of Practice issued under the Criminal Procedure and Investigations Act (CPIA) 1996 (the 'Code') and Attorney General's Guidelines on Disclosure (AGG) are probably not lockdown reading of choice for anybody. Nevertheless, they contain new procedures and a sea change in some respects and it will be essential for criminal practitioners to get to grips with the new requirements. There is a new emphasis on a thoughtful, rather than a prescriptive approach. Disclosure is to be integral to an investigation and not an adjunct.

'Disclosure should be completed in a thinking manner, in light of the issues in the case, and not simply as a schedule completing exercise.'

(AGG paragraph 4)

These are the new requirements:

Code Paragraph 6.3: Schedules

1. 'Consideration of disclosure issues is an integral part of an investigation and is not something that should be considered in isolation.' (AGG paragraph 14)
2. Schedules of unused material must be prepared when the accused is charged with:

- a. an indictable only matter; or
 - b. an either-way matter that is likely to be tried on indictment; or
 - c. an either-way offence where the accused is considered likely to plead not guilty or
 - d. a summary matter where the accused is likely to plead not guilty.
3. Where police seek a charging decision under the full code test, and a not guilty plea is anticipated, the schedules should be provided by the disclosure officer to the prosecutor at the same time as seeking this charging decision. (AGG 71.a)
 4. However, a schedule is not required where the accused is charged with a summary offence or either-way offence and the accused is likely to plead guilty. If a not guilty plea is subsequently entered or indicated, the schedules should be prepared as soon as possible thereafter. (AGG 71.c)

Code Paragraph 6.6: Rebuttable Presumption (RP)

5. This is a paragraph to focus minds. It lists seven categories of material, about which disclosure officers and prosecutors 'are to start with a presumption that it is likely to meet the disclosure test', but also stresses that the disclosure test in s.3 CPIA is unchanged. In lay terms, the approach to RP is 'disclose unless...' but still subject to, 'only disclose if'. It will be interesting to see whether these nuances create any difficulties – and whether the greater scrutiny leads to changes in prosecutorial decision making.
6. The seven categories of RP material include: records containing descriptions of an alleged offender; incident logs; contemporaneous records of the incident (e.g. crime reports and investigation logs; CCTV and others); custody records; previous accounts made by complainant or other witnesses; interview records; material casting doubt on the reliability of a witness.
7. RP material must be listed on the schedule by the Disclosure Officer (DO) in addition to all other material which may be relevant to the investigation.

8. Together with the disclosure schedules, the DO must give the prosecutor a copy of any RP material, indicating whether or not the DO considers it satisfies the test for disclosure and explaining the reasons for coming to that view. (Code 7.5)
9. The prosecutor must review the RP material and endorse the schedule to say whether the material does or does not meet the test for disclosure and must record the reason for the decision. In relation to reasons, the expectation is that the endorsement needs to be more than 'CND' or 'it does not meet the disclosure test.' It might say, for instance 'the first witness account is entirely consistent with their statement and so is not disclosable'.

Disclosure Management Document (DMD) AGG 92–99 and Annex C

10. DMDs will now be required in significantly more cases. The requirements are found in the AGG, not the Code, and a template is in Annex C. DMDs will be informed by a new document, an 'Investigation Management Document' (IMD), which is found in neither the Code nor the AGG. These, however, are now being used by the police in all cases where the investigation started after 31 December 2020, to inform the preparation of the DMD.
11. An IMD should be begun as early as possible in an investigation, recording the issues in the case, the lines of inquiry, decisions and the reasons for them. It should not be disclosable – unless of course it were completed in such a way as to undermine or assist. The IMD should be submitted to the prosecutor with the disclosure schedules.
12. The prosecutor then prepares the DMD. It is a living document, to be updated as the case proceeds. The sort of material that will be included in the DMD will be the reasonable lines of inquiry that have been identified (or discounted), address the approach taken to third party and digital material. In relation to digital material, bear in mind that there is no presumption that electronic material will be reviewed, see *R v Bater-James and Mohammed* 2020 EWCA Crim 790.

13. It should be served on the defence and court at an early stage, the expectation is it will be prior to PTPH, then updated via DCS; a copy should be sent to the disclosure officer each time it is updated.
14. A DMD is not to be used to disclose material; but it sets out the approach to disclosure. The DMD will outline the strategy and approach taken in relation to disclosure, it may include a brief summary of the prosecution case and the prosecutor's understanding of the defence case.
15. A DMD should now be prepared in all Crown Court cases. Prosecutors should 'consider whether or not a DMD would be beneficial' in cases in the Magistrates' Court or Youth Court.

Other changes

16. I have highlighted the changes that will apply to all cases. There is additionally new guidance in relation to digital material (AGG paragraphs 54–57 and Annex A) and pre-charge engagement (AGG Annex B). AGG paragraphs 11–13 contains a section on the relationship between Article 6, the right to a fair trial and Article 8, the right to respect for family life, private life, home and correspondence, and it sets out the approach that should be taken to reconciling the delicate questions that arise. These three issues may well overlap.

Practicalities

17. Initial disclosure should be served in advance of the first hearing of an NGAP case in the Magistrates' Court (charged on the full code test). Where a guilty plea was anticipated but a not guilty plea entered in the Magistrates' Court, then initial disclosure should be served 'as soon as possible' after the not guilty plea was entered (AGG paragraph 102), and as a matter of good practice, served before the PTPH in the Crown Court (AGG paragraph 104).

Transition

18. The new procedure came into force on 31 December 2020, but neither document contains information about transition. In practice, IMDs are now required for all cases where the investigation started after 31 December 2020. DMDs are required for all cases charged after 1 January 2021. Cases that were charged before then will be continuing under the old system.

With thanks to Wessex CPS for an excellent, detailed and thought-provoking Disclosure Seminar in January 2021, for highlighting the changes and information about procedure.

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