Consultation on the revisions to the Attorney General's Revised Disclosure Guidelines and the Criminal Procedure and Investigations Act Code of Practice

17/04/2020

Corporate Crime analysis: Gemma Tombs, practice development lawyer, Criminal Litigation, Kingsley Napley LLP, analyses the disclosure guidelines revised by the Attorney General and the Criminal Procedure and Investigations Act (CPIA) Code of Practice, and the way these will affect both parties to criminal proceedings and the current disclosure process.

What is the background of this consultation?

The disclosure regime has been the subject of scrutiny for many years. In the six years since the Attorney General's Guidelines (the Guidelines) were last revised, parties to criminal proceedings have had to grapple with ever increasing quantities of electronic material and there have been a series of high profile prosecutions abandoned following disclosure failures which have emphasised the need for a review of the current disclosure process.

In November 2018 the Attorney General published his Review of the efficiency and effectiveness of disclosure in the criminal justice system (the Review) which built on the findings of work that had gone before, including joint reports by the policing and prosecution inspectorates and the continuing collaborative efforts of the National Disclosure Improvement Plan (NDIP).

In his review the Attorney General recognised the 'the systemic problems of disclosure within the criminal justice system from the inception of an investigation to the conclusion of proceedings' and recommended ways to change the culture of disclosure. These recommendations form the basis of proposed changes to the Guidelines and the CPIA Code of Practice and this consultation seeks views on these changes from all parties involved in disclosure.

What are the main changes being proposed? What practical changes will practitioners notice?

The main thrust of the proposed changes is the need for compliance and engagement with the disclosure process by both sides at a much earlier stage in proceedings than current practice.

The concept of pre-charge engagement is promulgated and detailed at Annex B of the Guidelines. It is a voluntary process which can be initiated by either side but only after the first Police and Criminal Evidence (PACE) interview and before a suspect is charged. The term itself is misleading as it is predicated on the basis that a suspect will be charged when a proclaimed potential benefit is that it might avoid proceedings being brought in the first place. Although this novel concept is a potentially significant development, as it could mean earlier disposal of cases and the associated savings, the Guidelines envisage it will only take place in a minority of cases. It will also require sufficient resourcing in place to ensure a suspect's solicitor is able to engage in a meaningful way. The defence must have a sufficient understanding of the investigators' lines of enquiry before they will be in a position to advise their client whether to engage and there will be many cases where there is little to be gained by engaging (for example where the case is weak) or to do so could be detrimental (for example where the defence inadvertently identify a line of enquiry which is adverse to their client). It may also lead to delays between arrest and charge while the pre-charge engagement is considered.

The revised Guidelines also introduce a rebuttable presumption in favour of disclosure for certain items of unused material which the police have in their possession. Paragraph 74 of the Guidelines sets out a list of material which is highly likely to meet the test for disclosure and includes crime reports, incident logs and records of interviews with potential witnesses or suspects. It is intended that the material within this category will be properly considered at the outset of an investigation and should mean it is less likely to fall through the cracks. The presumption will only be effective however if proper resources and training is available to the investigators and prosecutors applying it.

There is also revised guidance on obtaining material held by third parties and balancing the right to a fair trial with the right to privacy. In respect of the latter, it is proposed that before collecting personal information from an alleged victim or a witness, the prosecution must be satisfied that the information sought is 'relevant' based on what is known at that stage of the case. It goes on to underline that digital devices should not be obtained as a matter of course and that the decision to examine a device will be fact and case specific. This approach is likely to cause difficulties in respect of mobile phones as they will often contain both relevant and irrelevant material but are nonetheless still a reasonable line of enquiry in the first stage of an investigation.

Finally there is the addition of an annex dealing solely with digital material. Emphasis is placed on defence participation in defining the issues in the case and the scope of reasonable searches of digital material. This engagement however can only fairly happen where the defence are in an informed position.

Are the proposals achievable? What will the challenges to success be?

In order to be achievable these proposals will require significant resourcing and funding for the police, the Crown Prosecution Service (CPS) and the defence. For example how advisors will be paid for pre-charge engagement at the police station under the criminal legal aid scheme is yet to be consulted upon. In February the Solicitor-General told the House of Commons that part of the £85m investment in the CPS announced last year will enable the CPS to better meet their disclosure obligations but there will be many demands on this sum including the expected increase in caseload

resulting from the recruitment of 20,000 new police officers and the necessity of police training on the complexities of electronic and phone data. The inevitable backlog of cases caused by coronavirus (COVID-19) will also bring more pressure to bear on the resources of the police and CPS.

Are there any missed opportunities?

In July 2018 the Justice Select Committee (the Committee) published its report Disclosure of Evidence in Criminal Cases and the Review later that year drew on some of the Committee's recommendations but not all. For example the revised Guidelines fail to include a commitment by the Attorney General to sign off at stated intervals (as requested by the Committee to prevent a culture of 'it didn't start on my watch'). The Attorney General and Ministers at the Home Office and the Ministry of Justice also agreed to write to the Committee by 1 April 2019 on the topic of the investment needed to ensure disclosure obligations are met but it seems these details have not yet been provided.

What is the likely timescale for any ultimate changes?

It is telling that the timescales contained in the Review have already passed (the majority called for implementation by Autumn/ Winter 2019). The consultation on the revised Guidelines closes on 22 July 2020 and Government guidance dictates the Attorney General's Office should respond within 12 weeks or provide an explanation as to why this is not possible. The current climate and effective lockdown will inevitably delay the completion of this task. The timescale for any ultimate changes in the disclosure process is likely to be many months if not longer given the lack of resources and funding available.

Interviewed by Dorotea De Santis.