Crown Prosecution Service Consultation on the Code for Crown Prosecutors

Thank you for inviting the Committee to comment on the proposed Code for crown prosecutors. Although we do not intend to submit a formal response to the consultation, we are nonetheless writing to welcome additions to the Code and make some broader comments. As you are aware, we published our report on the failings in disclosure shortly before summer recess (Disclosure of evidence in criminal cases, HC859), which considers some of the issues which you have reflected in proposed amendments to the code.

Terminology

Paragraph 1.4 gives clear definitions of when the terms "suspect", "defendant", and "offender" are used. The proposed Code does not, however, give clarity on use of the terms "complainant" or "victim". Currently the proposed Code uses the word victim throughout and does not use the word complainant. While we do not think the word victim should never be used, we think that it is usually more appropriate to refer to the "complainant" – given that the guilt or innocence of the accused can only be established through the trial process; in some situations, a trial is also required to establish whether an offence has been committed at all. We recommend that the Code include clear definitions of victim and complainant that should then be applied to the use of those words, throughout.

The decision to charge

The decision to charge an individual with a crime, however serious, can have wide ranging implications for that individual, and for many other parties - including the complainant and, if that individual might present a danger to the public, society at large.

While we did not comment on charging decisions in our report on disclosure it is apparent that confidence in CPS charging decisions might have been undermined by cases being stopped, and/or verdicts over-turned. The proposed changes to the Code go some way in
responding to those concerns, and we welcome the amendments. Paragraph 2.2 of the proposed Code affirms the serious impact that a decision to prosecute or recommend an out of court disposal has, for victims, suspects, witnesses and the public at large. We welcome this and we welcome the assertion that decisions should be taken with "the utmost care".

The use of the threshold test

Use of the threshold test should be limited to where it is absolutely necessary to ensure the public is adequately protected (as outlined in the three conditions in paragraph 5.11 - 5.13). The code should clearly platform the full code test as a default position for prosecutors and the threshold test as an option in exceptional circumstances. We, therefore, welcome changes to paragraph 4.1 and 5.1 of the proposed Code which go some way towards doing this, and additional detail provided in part 5 which outlines the circumstances under which the threshold test might be applied. Particularly, we welcome the inclusion of the three conditions which must be met in order for the threshold test to be applied. We do, however, think the wording of 4.1 and/or 5.1 could be strengthened further so that it is clear that the threshold test must only be applied when the circumstances make it absolutely necessary. We would propose the following amendment to paragraph 5.1:

"Where an immediate charging decision is necessary, according to the conditions outlined in paragraphs 5.10-5.13, and where it is not possible to apply the Full Code Test within the time constraints, prosecutors may apply the threshold test to charge a suspect. The seriousness or circumstances of the case must justify the making of an immediate charging decision, and there must be substantial grounds to object to bail. A charging decision under the Threshold Test must be kept under continuous review and the Full Code Test must be applied as soon as practicably possible, as outlined in paragraph 5.14."

Reasonable lines of inquiry

We welcome the inclusion of instructions for prosecutors to assure themselves that all reasonable lines of inquiry have been followed before a charging decision. Paragraphs 97 - 102 of our report on disclosure discuss the perception that there is a "culture within policing that encourages the pursuit of a conviction against a suspect and does not give enough weight to the investigation of alternatives." We concluded, in paragraph 107 that "most police forces and their officers recognise their duty as a search for the truth but that this has not been, and is still not, universal". Clearly, the Code for crown prosecutors applies to prosecutors rather than police, but prosecutors make charging decisions based on information provided to them by the police and, as became clear during our inquiry, prosecutors must assure themselves that decisions they make are appropriate based on the weight of the material provided to them.

The proposed Code addresses this at paragraph 3.3, stating that while "[p]rosecutors cannot direct the police or other investigators ...[p]rosecutors must have regard to the impact of any failure to pursue an advised line of inquiry or to comply with a request for information". We welcome this and we welcome the added clarity provided in paragraph 4.3 where the proposed Code states that it would not be appropriate to make a charging decision (under
the Full Code Test) until outstanding reasonable lines of inquiry had been pursued. We also welcome the instruction at the end of paragraph 4.8 that prosecutors must consider whether there is material that might affect the assessment of sufficiency of the evidence, including unexamined material in the possession of the police.

We discuss the Threshold Test and the circumstances of its application above. While we feel that it should only be applied in certain, absolutely necessary, circumstances we also agree that a suspect should not be charged under the Full Code Test if there are reasonable lines of inquiry that have not been explored. Under most circumstances, this would mean conducting a thorough investigation prior to charging, but when (and only when) a case meets all three conditions (in para 5.10 – 5.13) that make an immediate charging decision imperative the Threshold Test can be applied and continuously reviewed until the Full Code Test can be applied later. We therefore welcome clarification that a Threshold Test can be applied where there are outstanding lines of inquiry to be considered.

Post charge decisions

The introduction to the Code states that it "gives guidance to prosecutors on the general principles to be applied when making decisions about prosecutions". Our inquiry brought into stark relief the breadth and extent of day to day decisions made by prosecutors after the suspect has been charged, which impact not only on the suspect, but on complainants, the public and the rule of law. For example, a prosecutor has a continuing duty to disclose, for which they must be satisfied that the relevant material collected by police is revealed to support the accused's right to a fair trial. Prosecutors might, therefore, decide to return an inadequate schedule to the police, or they might be sufficiently satisfied to reveal it to the defence, allowing a case to proceed on the basis of that material. In other circumstances, evidence comes to light after a charge which undermines the prosecution case. In these circumstances, a prosecutor might decide whether there is still a realistic prospect of conviction and if not (as happened in the case of R v Allan) apply to court for the case to be stopped. While these decisions are covered in detail elsewhere, we think it would be valuable for the Code to state the general principles that must be applied when deciding how a case might continue after charging with cross-reference to the more detailed guidance. Similarly, to charging decisions, this should emphasise, independence from political or external interference, and the prosecutor's obligation to assure themselves that all reasonable lines of inquiry have been examined.

Maturity

We reported on young adults in the criminal justice system in October 2016 (HC196) and again in June 2018 (HC419). The CPS first introduced maturity as a consideration in the Code 2012, as cited in the government response to our 2016 report. In a letter to us dated 23 of May 2018 you noted that maturity might be further considered in the current review of the Code for Crown Prosecutors and our June 2018 report (HC 419) recommended that:

"...the Crown Prosecution Service keeps us informed on its decision regarding possible amendments to the Code related to consideration of age and maturity. The CPS should consider piloting the use of youth prosecutors who are specifically trained in
understanding maturity for decisions involving young adults up to the age of 25.”

We therefore welcome the clarification and restatement of this in paragraph 4, including specifically noting that young people continue to mature into their mid-20s. This respond to part (but not all) the of our recommendation.

Bob Neill
Chair, Justice Committee