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17. Criminal Procedure and Investigations Act 1996

The Criminal Procedure and Investigations Act 1996 (CPIA) came into force on 1 April 1997 and applies to all criminal investigations which began on or after that date. The key provisions are set out in Part I and II. (Note that Part I and II do not apply to Scotland). Amongst other things, the Act obliges the prosecutor to disclose to the defence any prosecution material which might undermine the Crown's case or assist the case for the accused. In certain cases, there is also an obligation on the defence to produce a statement to the court and the prosecutor setting out the nature of the defence and various other matters.

Parts I (Disclosure) and II (Criminal Investigations) of the CPIA are of direct relevance to the IS as they have operational and practical implications for staff assisting police officers with criminal investigations or when they are conducting such investigations themselves. Section 23 of the CPIA obliges the Secretary of State to prepare a code of practice designed to secure several things, including (i) that where a criminal investigation is conducted all reasonable steps are taken

for the purpose of the investigation and all reasonable lines of inquiry are pursued; and (ii) that relevant information which is obtained in the course of a criminal investigation is recorded, retained and disclosed to the prosecutor. Section 26(1) states that a person other than a police officer who is charged with the duty of conducting a criminal investigation shall, in discharging that duty, have regard to any relevant provisions of the code of practice which would apply if the investigation were conducted by a police officer. **Failure to comply with the code of practice may jeopardise any case for the prosecution.** Regard should also be had to the Attorney-General's guidelines on the disclosure of information in criminal proceedings which amplify the CPIA.

Part I of the CPIA (Disclosure) has been substantially amended by the Criminal Justice Act 2003 (CJA) for all cases where the criminal investigation began on or after 4 April 2005. Although Part II (Criminal Investigations) remains unchanged, a new code of practice under section 23 is in force for all cases where the criminal investigation began on or after 4 April 2005. This means that at present there are two disclosure regimes operating. Which system applies to any particular case depends on **when** the investigation began: before **or** on/after 4 April 2005. Where appropriate, the following guidance flags up the distinctions between the two regimes. Reference to the "old" regime means the system is pre-CJA. Reference to the "new" regime means the system is post CJA amendments.

The CPIA places a requirement on the police and/or investigating body to:

♦ Retain: Record: Reveal

unused material obtained in a criminal investigation which may be relevant to the investigation and related matters.

For the purposes of Part II of the CPIA, a **criminal investigation** is an investigation conducted by police officers with a view to ascertaining; (a) whether a person should be charged with an offence; or (b) whether a person charged with an offence is guilty of it. This will include:

- ♦ investigations into crimes that have been committed;
- ♦ investigations whose purpose is to ascertain whether a crime has been committed, with a view to the possible institution of criminal proceedings;

- ◆ Investigations which begin in the belief that a crime may be committed, e.g. when premises or individuals are to be kept under observation, with a view to the possible institution of criminal proceedings.

Charging a person with an offence includes prosecution by way of summons.

All **material** of any kind, including information and objects, which is obtained or generated in the course of a criminal investigation and which may be **relevant to the investigation** must be retained, i.e. anything which has some bearing on any offence under investigation or any person being investigated, or to the surrounding circumstances of the case, unless it is incapable of having any impact on the case. Where there is any doubt about the relevance of the material, the investigator should retain it.

The **prosecutor** is the authority responsible for the conduct, on behalf of the Crown, of criminal proceedings resulting from a specific criminal investigation. Advice from the prosecutor can be sought about whether a particular item may be relevant to the investigation.

17.1. The role of the Assistant Director

The Assistant Director in charge of each enforcement office is responsible for ensuring compliance with the CPIA and the code of practice made under section 23 (ISBN 0-11-341163, obtainable on demand from the IS Finance and Planning Group) and for putting in place arrangements to ensure that, in every investigation, there is:

- ◆ an **officer in charge of the investigation** (i.e. the person responsible for directing the criminal investigation from the IS perspective - see chapter 17.2);
- ◆ an **investigator** (i.e. the person conducting, or assisting a police officer in the conduct of, the criminal investigation - see chapter 17.3); and
- ◆ a **disclosure officer** (i.e. the person if appropriate - see chapter 17.3 - or police officer responsible for examining material retained during the investigation, revealing material to the prosecutor and certifying that this has been done, and disclosing material to the accused at the request of the prosecutor).

In routine investigations, it may be appropriate for all three roles to be discharged by one person. In more complex cases, it may be necessary to separate the roles and assign more senior ranks

as circumstances dictate. In such cases, close consultation will be essential between the above three roles.

The Assistant Director may also appoint **deputy disclosure officers** if necessary to assist the disclosure officer. Deputy disclosure officers may perform any function of the disclosure officer.

In all investigations, the Assistant Director must ensure that the names of the officer in charge of the investigation, the investigator, the disclosure officer and any deputy disclosure officers are recorded.

If the officer in charge of the investigation or the disclosure officer no longer has responsibility for the functions falling to him, the Assistant Director must assign someone else to assume the responsibility and record that person's identity.

The Assistant Director shall ensure that disclosure officers and deputy disclosure officers have sufficient skills and authority commensurate with the complexity of the investigation to discharge their functions effectively. An individual must not be appointed as a disclosure officer, or continue in that role, if that is likely to result in a conflict of interest, for instance, if the disclosure officer is the victim of the alleged crime which is the subject of the investigation. If there is any doubt as to whether there is a conflict of interest, the advice of the prosecutor should be sought.

The Assistant Director for each enforcement area must decide on the length of time for which material is retained if a criminal investigation has not resulted in charges or after the conclusion of any criminal proceedings if the investigation has resulted in charges. In doing so he should take into account:

- ◆ the policy of the local police force;
- ◆ the practice of the department in relation to the retention of material;
- ◆ the advice of police and the prosecutor in any given case;
- ◆ the statutory requirements for the retention of material imposed other than under the code of practice;
- ◆ The possibility that a complaint or civil action might follow (particularly if no charges were brought).

17.2. The role of the officer in charge of the investigation

The officer in charge of the investigation is responsible for ensuring that proper procedures are in place for **recording** information and **retaining** records of information and other material in the investigation and making this available to the disclosure officer.

If the officer in charge of the investigation believes that other persons may be in possession of **material which may be relevant to the investigation**, he should ask the disclosure officer to inform them of the existence of the investigation and invite them to retain the material in case they receive a request for disclosure. The officer in charge should also ask the disclosure officer to inform the prosecutor that they have such material. However, the officer in charge of the investigation should not make speculative enquiries of other persons: there must be some reason to believe that they may have relevant material. That reason may come from information provided to the police by the accused or from other enquiries made or from some other source.

Material must be **retained** in a secure place (e.g. a safe). It must be clearly labelled with relevant dates, the source of the material and relevance to the investigation. All movements of items involved in the investigation must be **recorded**. Items should only be removed from the store with the authority of the officer in charge of the investigation.

The officer in charge of an investigation may delegate tasks to another investigator or to other persons participating in the investigation but remains responsible for ensuring that these have been carried out and for accounting for any general policies followed in the investigation. It is an essential part of the officer's duties to ensure all material which may be relevant to the investigation is retained and made available to the disclosure officer or (in exceptional circumstances) revealed directly to the prosecutor.

17.3. The role of the investigator

Where a criminal investigation is conducted, the investigator must take all reasonable steps for the purposes of the investigation and pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. He must:

- ◆ ensure that any information obtained in the course of the criminal investigation which may be relevant to the investigation is **recorded** (see chapter 17.5);

- ◆ ensure that any record of such information is **retained** (see chapter 17.6);
- ◆ Ensure that any other material that is obtained in the course of the criminal investigation and may be relevant to the investigation is also **retained** (see chapter 17.6).

17.4. The role of the disclosure officer

The disclosure officer is responsible for:

- ◆ examining material retained during an investigation but which does not form part of the prosecution case;
- ◆ creating schedules of such material that describe each item properly and passing it to the prosecutor (see chapter 17.8);
- ◆ revealing material to the prosecutor during the investigation and any proceedings resulting from it;
- ◆ drawing the prosecutor's attention to material which might undermine the case for the prosecution or assist the accused's case, throughout the criminal investigation and proceedings and providing amended schedules as necessary;
- ◆ providing the prosecutor with a copy of material, in particular, which is the accused's explanation for the offence charged or material casting doubt on the reliability of a confession or a prosecution witness;
- ◆ looking again at the schedules when a defence statement is received and identifying material not previously disclosed that may undermine the prosecution case or assist the accused's defence and sending it to the prosecutor;
- ◆ allowing the prosecutor to inspect material or to have copies of material if the prosecutor asks for it, save where the material is too sensitive to be copied and can only be inspected;
- ◆ disclosing material to the accused at the request of the prosecutor;

- ◆ Certifying that all relevant material which has been retained and made available to the disclosure officer has been revealed to the prosecutor in accordance with the code. It is necessary to certify not only when the schedule and accompanying material is submitted to the prosecutor, and when relevant material is reconsidered after the accused has given a defence statement, but also whenever a schedule is otherwise given or material is otherwise revealed to the prosecutor.

The disclosure officer must give the schedules to the prosecutor wherever practicable at the same time as he gives him the file containing the material for the prosecution case (or as soon as is reasonably practicable after the decision on mode of trial or the plea).

The CPIA imposes a continuing duty on the prosecutor, from the time he makes first disclosure to the accused (or makes a statement declaring that there is nothing to disclose) for the duration of the criminal proceedings against the accused, to disclose material which satisfies the prosecution test for disclosure. To enable the prosecutor to comply with these statutory obligations, any new material coming to light should be treated in the same way as the earlier material.

17.5. Recording of information

If material which may be relevant to the investigation consists of information which is not recorded, in any form, the officer in charge of the investigation must ensure that it is recorded in a durable or retrievable form (whether in writing, on video or audio tape, or on computer disk).

If it is not practicable to retain the initial record of information because it forms part of a larger record which is to be destroyed, its contents should be transferred accurately to a durable and easily-stored form before that happens.

In some cases, negative information may be relevant and should be recorded, e.g. if a number of people present state they saw nothing unusual.

Where information, which may be relevant, is obtained, it must be recorded at the time it is obtained or as soon as practicable after that time.

17.6. Retention of material

The investigator must retain material obtained in a criminal investigation which may be relevant. This includes material coming into his possession, such as documents seized whilst searching

premises, and material generated by him, such as interview records. A copy or a photograph, rather than the original material, may be retained if the original is to be returned to its owner or if the original is perishable. Under the new disclosure rules (for all cases where the investigation began on or after 4 April 2005) a copy rather than the original may now be retained where it is reasonable to do so in all the circumstances.

If the officer in charge of an investigation becomes aware that material previously examined, but not retained (because it was not thought to be relevant at that time) may now be relevant, he should, wherever practicable, take steps to obtain it or ensure that it is retained for further inspection or for production in court if required.

Without prejudice to the general duty to retain material which may be relevant to the investigation, material falling into the following categories should be retained:

- ◆ relevant parts of officers' notebooks;
- ◆ IOs reports relevant to the matter under investigation;
- ◆ records of telephone messages which contain descriptions of an alleged offence or offender;
- ◆ final versions of witness statements (and draft versions where their content differs in any way from the final version), including any exhibits mentioned (unless these have been returned to their owner on the understanding that they will be produced in court if required);
- ◆ interview records (written records, or audio or videotapes, of interviews with actual or potential witnesses or suspects);
- ◆ communications between the IS and experts such as forensic scientists, reports of work carried out by experts and schedules of scientific material prepared by the expert for the investigator, for the purpose of criminal proceedings;
- ◆ records of the first description of a suspect by each potential witness who purports to identify or describe the suspect, whether or not the description differs from that of the subsequent descriptions by that or other witnesses;
- ◆ any material casting doubt on the reliability of a confession;

- ◆ any material casting doubt on the reliability of a witness;
- ◆ information provided by an accused person which indicates an explanation for the offence with which he has been charged;
- ◆ any other material which may fall within the duty of prosecution disclosure in the CPIA (i.e. anything which might undermine the prosecution case or assist the case for the accused);
- ◆ Home Office and port files.

The duty to retain material falling into these categories does not extend to items that are purely ancillary to such materials and possess no independent significance, e.g. duplicate copies of records or reports.

17.7. Length of time for which material is to be retained

All material that may be relevant to the investigation must be retained until a decision is taken whether to institute proceedings against a person for an offence.

If a criminal investigation results in proceedings being instituted, all material which may be relevant must be retained at least until the prosecutor decides not to proceed with the case, or the accused is acquitted or convicted.

Where the accused is convicted, all material which may be relevant must be retained at least until:

- ◆ the convicted person is released from custody, or discharged from hospital, in cases where the court imposes a custodial sentence or a hospital order;
- ◆ Six months from the date of conviction, in all other cases.

If the court imposes a custodial sentence or hospital order and the convicted person is released from custody or discharged from hospital earlier than six months from the date of conviction, all material that may be relevant must be retained at least until six months from the date of conviction.

If an appeal against conviction is in progress when the release or discharge occurs, or after the six-month period referred to above expires, all material that may be relevant must be retained until the appeal is determined. Similarly, if the Criminal Cases Review Commission is considering an application at that point in time, all material which may be relevant must be retained until the Commission decides not to refer the case to the Court of Appeal or until the Court determines the appeal resulting from the reference by the Commission.

17.8. Scheduling of material

It is the responsibility of the disclosure officer to prepare schedules listing material which has been retained and which the disclosure officer believes will not form part of the prosecution case. (Paragraphs 6.6 to 6.8 of both the old and the new code set out the circumstances in which a schedule is to be prepared for those cases where a criminal investigation began before or on/after 4 April 2005 respectively).

The disclosure officer should set out each item of material separately and number them consecutively. There should be *separate* schedules for sensitive and non-sensitive material. The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed. (Paragraphs 6.3 and 6.4 of both the old and the new code set out the details of *separate* schedules for sensitive and non-sensitive material. Paragraphs 6.10 and 6.11 of both the old and the new code deal with block entries in the schedule).

In relation to sensitive material the disclosure officer must set out on a sensitive schedule any material which he believes it is not in the public interest to disclose, and the reason for that belief. The schedule must include a statement that the disclosure officer believes the material is sensitive. Under the new code (for cases where the criminal investigation began on or after 4 April 2005) if there is no sensitive material the disclosure officer must record this fact on a schedule of sensitive material.

17.9. Sensitive material

IOs working in the general enforcement field are unlikely to be involved in preparing material for the prosecutor and, if they are, it is likely to be with the guidance of a Criminal Investigation Team

(CIT). However, where material falls into one of the following categories, the investigator should request that the disclosure officer list it as sensitive:

- ◆ material relating to national security;
- ◆ material received from the intelligence and security agencies;
- ◆ material relating to intelligence from foreign sources which reveals sensitive intelligence gathering methods;
- ◆ material given in confidence;
- ◆ material which relates to the use of a telephone system which is supplied to an investigator for intelligence purposes only;
- ◆ material relating to the identity or activities of informants or under-cover police officers or other persons supplying information to the police or the IS who may be in danger if their identities are revealed;
- ◆ material revealing the location of any premises or other place used for surveillance, or the identity of any person allowing an officer to use them for surveillance;
- ◆ material revealing, either directly or indirectly, techniques and methods relied upon by officers in the course of a criminal investigation, e.g. covert surveillance techniques, or other methods of detecting crime;
- ◆ material whose disclosure might facilitate the commission of other offences or hinder the prevention or detection of crime;
- ◆ Material containing details of persons taking part in identification parades.

Note: the list above is not exhaustive and reference should be made to the CPIA Codes of Practice if there are concerns over the sensitivity of material. Other items, where the issue of sensitivity may impact on the IS, are:

- ◆ Home Office papers or files bearing a security classification;

- ◆ Material referring to safeguards in passports and techniques relating to methods of forgery detection. In all prosecution cases where sensitive material of this nature is involved which should not be disclosed in open court, advice should immediately be sought from a CIO at the ISNDFU, Status Park;
- ◆ internal IS communications such as management minutes;
- ◆ communications between the IS and police or the CPS;
- ◆ Material upon the strength of which search warrants were obtained.

Any concerns over sensitivity of material should be referred to the OIC or a CIO.

Under the new code (for cases where the investigation began on or after 4 April 2005) material relating to the private life of a witness may fall in the category of sensitive material.

In exceptional circumstances, where an investigator considers that material is so sensitive that its revelation to the prosecutor by means of an entry on the sensitive schedule is inappropriate, the existence of the material must be revealed to the prosecutor separately e.g. a Home Office classified file. This will only apply where compromising material would be likely to lead to the loss of life, or directly threaten national security.

Any officer who encounters such material during the course of an investigation should immediately seek the advice of the officer in charge of the investigation before taking any further action.

In such circumstances, the responsibility for informing the prosecutor lies with the investigator who knows the details of the sensitive material. The investigator should act as soon as is reasonably practicable after the file containing the prosecution case is sent to the prosecutor. The investigator must ensure that the prosecutor is able to inspect the material so that he can assess whether it needs to be brought before a court for a ruling on disclosure. It is ultimately a matter for the court to decide whether sensitive material can or cannot be withheld.

If the court decides that sensitive material must be disclosed, officers should seek the advice of ISHQ on how to proceed.

17.10. The disclosure regime - Background and the Criminal Justice Act 2003

The disclosure regime is set out in Part I of the CPIA. It has been amended substantially by the Criminal Justice Act 2003 (CJA) for all cases where the criminal investigation began on or after 4 April 2005, as discussed above at the start of this chapter.

17.10.1 Primary or initial disclosure under the CPIA (as amended)

The prosecutor (defined in Part I of the CPIA as any person acting as prosecutor, whether an individual or body) is responsible for this. Under the old regime, primary disclosure means the disclosure of prosecution material which has not previously been disclosed to the accused and "which in the prosecutor's opinion might undermine the case for the prosecution against the accused" (old CPIA section 3(1)). If there is no such material, the prosecutor must give the accused a written statement to that effect.

Under the new regime, primary disclosure is replaced by "initial disclosure". Initial disclosure means the prosecutor must disclose material which "might reasonably be capable of undermining the case for the prosecution against the accused or of assisting the case for the accused" (new CPIA section 3(1)). If there is no such material, the prosecutor must still give the accused a written statement to that effect under the new regime. The effect of the new law is to combine the old prosecution obligations of primary and secondary disclosure into one continuing duty of disclosure which exists for the duration of the proceedings following initial disclosure.

17.10.2 Second stage disclosure under the CPIA (as amended)

The second stage (in either the old or the new disclosure regime) is for the accused to furnish a defence statement to the court and the prosecutor. This stage is compulsory in all trials on indictment but is voluntary in cases that proceed to summary trial.

The defence statement must set out the nature of the accused's defence and indicate matters on which he takes issue with the prosecution with reasons. Under the new regime, the defence statement must also indicate any point of law which the defence wish to make, including case-law authorities which the defence intend to rely on. The defence statement must also give particulars of any alibi. The defence statement is intended to eliminate the "ambush" defence, i.e. where the argument for the defence was unknown to the prosecutor until the trial.

Under the new regime, the defence will also have to provide details of defence witnesses which are to be relied upon and the names of defence experts. There will also be an obligation on the accused to provide updated disclosure if there is any change to the defence after the defence statement is made, or to confirm that there has not been any change in writing. **These CJA changes are not yet in force. An instruction will be issued when these changes are commenced.**

Under the old regime, if no defence statement is served, the prosecutor will be under no duty of secondary disclosure. However, the position has changed for cases falling within the new regime where the prosecutor is under a continuing obligation to disclose material after initial disclosure has been made whether or not a defence statement has been served, see chapter 17.10.3.

17.10.3 Secondary disclosure under the CPIA

Secondary disclosure is a stage under the old regime which no longer exists under the new regime.

Under the old regime this stage is compulsory where the prosecutor receives a defence statement. The prosecutor must disclose any prosecution material which has not previously been disclosed to the accused and "which might be reasonably expected to assist the accused's defence as disclosed by the defence statement" (old CPIA section 7(2)) or give the accused a statement that there is no such material (old CPIA section 7(1)).

Note also that under the old regime, the old section 9 of the CPIA imposes a continuing duty on the prosecutor from the time of primary disclosure to review prosecution material.

Under the new regime, the old CPIA section 7 (obligation of secondary disclosure) and old CPIA section 9 (continuing duty of prosecution to disclose) are repealed and replaced by the prosecution continuing duty to disclose in new CPIA section 7A. Following initial disclosure under new CPIA section 3 the prosecutor must keep under review whether there is any undisclosed material which "might reasonably be capable of undermining the case for the prosecution against the accused or of assisting the case for the accused". This continuing duty exists at any time but requires particular consideration when a defence statement has been served. If the prosecutor considers he has no obligation to make further disclosure after the defence statement is served, he must give the accused written notice to that effect.

17.11 Section 35 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004

The following process has been designed to improve compliance to the documentation process. It applies to all Documentation Units in England and Wales, Criminal Casework Directorate (CCD) and Criminal Investigations Teams (CIT). It may also be applied to teams responsible for documentation interviews in Local Enforcement Offices (LEO) where a CIT is operative. This document also contains guidance on reasonable excuse and case priorities.

Section 35 provides that a person may be required to take a specified action if the Secretary of State thinks that the action may enable a travel document to be obtained and that the document will facilitate the person's removal.

A person commits an offence if he fails without reasonable excuse to comply with the documentation process, and, if guilty, may be sentenced to a maximum of 2 years imprisonment and/or fine.

Non-compliance can be:

- ◆ Non attendance at LEO interview
- ◆ Attendance at LEO interview but refusal to answer questions or complete any part of the documentation process, i.e.
- ◆ Not bringing family members when required to do so
- ◆ Not bringing supporting documentation when required to do so.
- ◆ Refusal to co-operate
- ◆ Providing incomplete information
- ◆ Absconding
- ◆ Non-attendance or refusal to answer questions at Embassy or High Commission interview (either face to face or telephone).
- ◆ Providing false information which results in Embassy or High Commission rejecting application.

Section 35 action may not be appropriate if:

- ◆ An individual has previously complied and through no fault of their own we have not taken action on this and then they subsequently refuse to comply. This is unlikely to be a suitable case for section 35 action, due to the previous compliance.
- ◆ There is bio-data and/or documentary evidence of nationality on the Home Office or Port files, which may be used to obtain a document in the absence of compliance from the individual. In these instances, if we can get the travel document with this information then section 35 action is not appropriate. Check all Home Office files for bio-data and other evidence of nationality.
- ◆ Country policy or instructions prevent the removal of an individual even if a travel document could be obtained (see paragraph 17.11.2 below).

Section 35 should be used as the last resort when the non-compliance of the individual prevents us from obtaining a travel document.

17.11.1.1 Timing of section 35 action

Section 35 should be used when individuals have no outstanding appeals and are removable but for the documentation barrier. However, this does not prevent documentation units from asking individuals to comply with documentation requests after the first adverse decision, and where the time for making an appeal against that decision has passed. In instances where section 35 action has been initiated and the individual subsequently puts in further representations an application or an appeal, section 35 action should be suspended until these have been considered. If the individual submits an out of time appeal, section 35 action should be suspended. Compliance must be sought again once the individual is appeals rights exhausted (paragraph 17.11.5 provides clarification on fear of persecution as a reasonable excuse)

17.11.1.2 Issue of IS35 and first interview (Documentation Units)

Issuing the IS35

1. The IS35 letter should be used when an individual is requested to take an action that will enable a travel document to be obtained.
2. Such requests can not be made unless the first adverse decision has already been made.
3. Documentation Units do not need to send out the IS35 with the first invitation to interview letter but all actions the individual is required to take must be given in writing.

4. The consequences of non-compliance with the documentation process must be explained to the individual and a copy of the IS35 handed to them at the start of the documentation interview.
5. A photocopy of the invitation to interview and a photocopy of the IS35 as issued should be retained (unsigned CID/word processor generated copies are not acceptable as evidence).

17.11.2 The Documentation Interview

It is very important that the interviewing officer should not question the individual about the offence of failing to comply with the documentation process other than to confirm that the individual will not comply and establish the excuse for non compliance.

Completing the Annex B form (Documentation Interview)

1. The interviewing officer must ensure that the IS35 letter is completed fully and **all** actions the individual is required to take must be ticked on the form (i.e. to attend an interview, bring in supporting documents).
2. The officer must complete the details at the top of the Annex B. (N.B The Annex B will become an exhibit if the individual fails to comply)
3. The officer must confirm that the individual understands the interpreter.
4. At the beginning of all interviews the interviewing officer must read the IS35 letter to the individual. If the individual has any questions, these and the answers must be noted in Q & A format verbatim.
 - ◆ The officer must confirm that the individual understands the requirements of S35.
 - ◆ A copy of the issued IS35 must be retained on file.
3. The documentation interview should be conducted and all answers recorded on the bio-data and application forms. It is important that you record exactly what is said by the individual as they have said it (in the first person). Do not paraphrase, abbreviate or add your own words. This interview will also become an exhibit if the individual fails to comply.
4. If the individual refuses to answer any or all questions this must be recorded on the forms.

5. If the individual does not comply, i.e. by refusing to answer questions or complete any part of the documentation package, the interviewing officer should ask the further 3 questions (questions 3-5) on Annex B, and the answers given should be recorded on this form,

The 3 questions are:

- a) I have interviewed you to request your compliance with the documentation process. Are you willing to comply with the documentation process?
 - b) Why will you not comply?
 - c) Have you understood the requirements of IS35?
6. The statement “I confirm that this is a true and accurate record of the interview” should be read aloud to the individual.
 7. The individual should be asked to sign, print their name, and date the Annex B in the space provided at the bottom of the form. The interviewing officer and the interpreter should also sign, print their name and date in the spaces provided.
 8. If the individual refuses to sign then write ‘refuses to sign’ in the space for their signature.
 9. The interviewing officer should refer the case to the duty HEO for advice on whether any excuse for non compliance given at the time of interview is considered to be a reasonable excuse. Guidance on reasonable excuse is given at paragraph 17.11.5 below. If it is decided that the individual has not offered a reasonable excuse then the next stage of this process should be followed at paragraph 17.11.4 below. If the excuse is accepted as reasonable then the individual should be given a further opportunity to comply. There is no limit to the number of opportunities which can be given but the HEO should consider balancing being reasonable towards the individual with whether, despite reasonable excuses, the repeated failure to comply is in itself non-compliance.

17.11.3 Failure to Attend Documentation Interview

If the person does not attend the first interview and regardless of whether a reasonable excuse has been offered, the person should be re-invited in for interview as soon as possible. The IS35 form must accompany the invitation letter and all actions the individual is required to take should be ticked on the form and copies of these documents as issued placed on file.

If the individual does not attend this second interview and has not offered a reasonable excuse then the next stage of this process should be followed at paragraph 17.11.4 below.

Documentation Units and/or CIT should also consider whether enforcement absconder action is appropriate.

17.11.4 Non-compliance action (Documentation Units & Criminal Investigators)

17.11.4.1 Witness Statements

In order to take forward a section 35 case the CIT will need a completed witness statement (form MG11) from the interviewing officer (C1) and the interpreter (C2), if one was used. The CIT will also need a witness statement exhibiting the records from the individual's Home Office file (C3). Template witness statements are attached for your use (Annex C). They should be completed by officers as soon as possible after the non-compliant interview to ensure accurate and full recollection of what happened.

In the statement the interviewing officer must give details of the interview and produce a copy of the IS 35 letter, the documentation interview and the Annex B as exhibits. The exhibit number comprises of the officer's initials and exhibits should be consecutively numbered e.g. if Joe Smith is the officer concerned then his exhibits will be labelled JS/1, JS/2 etc. Ensure that the sections on page 2 of the MG11 are completed. Annex D, the exhibit label, should be completed and attached by paperclip to each document which is exhibited in the statement.

The interviewing officer must ask the interpreter to complete a witness statement and sign it. The interviewing officer should sign this statement as a witness (bottom right). Ensure that the sections on page 2 of the MG11 are completed.

The Home Office records witness statement may include documents or mention processes which are unfamiliar to the criminal courts. Officers completing these statements may wish to consider including a short explanation of the purpose of a document or process.

Prior to signing statements the interviewing officer may wish to engage with the CIT to ensure that statements contain all the required information.

17.11.4.2 Second tier Interview and referral to the CIT

If an individual does not comply at interview (either by not attending and not having a reasonable excuse for non compliance, or by refusing to answer questions or to complete any part of the documentation package without having a reasonable excuse) and has had the IS35 letter served and its implications explained, the next interview must be conducted with the presence of a trained investigator. The purpose of this interview is to confirm with the individual whether they will comply with the documentation process and to pursue prosecution action if necessary. This is essentially a second tier interview.

Before referring these cases to the Criminal Investigations Team, the checklist (Annex E) must be completed by the Documentation Unit and necessary witness statements completed. All documents and information should be passed to the CIT when the case is referred. At this point, the local CIT will discuss any necessary evidential requirements.

The offence will essentially be complete at this stage. The CIT officer will, however, ask the individual again whether they will comply with the documentation process and record these questions and answers in their notebook/IRB. If the individual is non compliant, the CIT will take appropriate action. Should the individual decide to comply at this stage the documentation unit officer should continue the interview, complete the bio data form and continue the documentation process.

17.11.4.3 Points of Contact

Points of contact should be established within all Documentation Units and Criminal Investigations Teams. The teams with whom you should liaise are detailed in Annex F.

17.11.4.4 CIT taped interview post-arrest

When establishing the background for failure to comply, the interviewing CIT officer must read the IS35 letter to the suspect and confirm that the suspect understands the contents.

17.11.5 Guidance on reasonable excuse

When considering whether an individual has offered a reasonable excuse, the following guidance should be consulted:

EPU 09/04 states *"If the person claims therefore that he does have an excuse for not complying then that excuse will need to be examined carefully. If a prosecution proceeds the prosecution will have to prove, in the face of any excuse raised by the defendant that he did not have that excuse, or if he did, it was not a reasonable one."*

CPS guidance is that the legislation is silent on what constitutes 'reasonable excuse'. In the case of ***R v Masoud Tabnak [2007]*** the Court of Appeal (Criminal Division) found that a failure to co-operate based on a fear of persecution or serious harm under the Refugee Convention and Article 3 of the Human Rights Convention, **could not amount to** a 'reasonable excuse' for not complying with the requirement imposed under section 35(1) of the Act. The Court confirmed the decision of the trial judge that "To allow fear of persecution to amount to a reasonable excuse would frustrate the intended aims and objectives of Parliament." The provision is concerned solely with an inability to comply with the practical requirements defined in section 35(2).

The fear of persecution or serious harm is a defence which has already been considered by the Asylum and Immigration Tribunal, a specialist Tribunal which is best placed to consider whether the defendant's claim for asylum is genuine or not. Such a ruling is conclusive that a person is not a refugee and precludes a defendant from adducing evidence to raise the question of refugee status in criminal proceedings. If a defendant were allowed to raise fear of persecution as a defence at the Crown Court, it would, in effect, be placing the judge and jury in an appellate function over experienced professionals.

Examples of what might constitute reasonable excuse include the failure to attend an interview because of a medical appointment or difficulties with transport, or needing time for further information. Any claim which is raised as a 'reasonable excuse' must be substantiated. It is then for the prosecution to prove that the person did not take the appropriate steps and does not have a 'reasonable excuse' for failing to do so.

This department has assured Parliament that the Secretary of State will only request an individual to take such steps as are required to document him/her if the department intends/is able to remove or deport the individual. If policy, instructions or a significant legal judgement prevent removal then such cases will not qualify for Section 35 action (for instance if there is a court judgement or if country policy prevents removals to a certain country). Therefore only cases where there is a reasonable expectation of removal should be put forward for Section 35 action.

