

Prison Reform Trust response to CPS legal guidance: mental health conditions and disorders consultation – June 2019

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

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Introduction

This response was informed by a round table seminar held at the Prison Reform Trust on Wednesday, 22 May 2019. The following people attended, and we are grateful for their contributions:

- Jo Easton, Magistrates Association
- Mignon French, CSTR programme lead, NHS England
- Patrick Harris, Law Society
- Professor Geoff Shepherd, clinical psychologist (special thanks to Professor Shepherd for consulting more widely and for producing a briefing paper for our seminar)
- Zoe Burton, Marc Conway and Jenny Talbot, Prison Reform Trust

We were also joined by Jonathan Bambro and Alison Plant, Crown Prosecution Service and thank them for their attendance.

The following consultation response was informed by our round table seminar. It does not necessarily represent a single view from those present.

We welcome the draft legal guidance. It gives greater clarity in a difficult area of criminal justice decision making.

1. Do you agree or disagree with the proposed factors to be taken into account by prosecutors at the public interest stage? Do consultees propose any further factors to be taken into account at this stage?

With some exceptions, we agree with the proposed factors to be taken into consideration at the public interest stage.

We welcome the approach of considering each person as an individual and each case on its own merits. Except in extreme cases of acute illness, diagnoses on their own are an unreliable guide as to whether the person understood what they were doing at the time of the offence and the likely consequences of their actions. These judgements require a subtle grasp of the individual's psychology and are not predictable from broad categories like diagnoses, or simple historical data. It is therefore important that the crown prosecutor has access to the necessary information and advice on which to base their decision. This may come from a range of sources, including the police, liaison and diversion services and the person's defence lawyer.

For example, individuals who have or are suspected of having mental health conditions and/or disorders may have received support from an Appropriate Adult (AA) while in police custody and have been assessed by liaison and diversion services. As part of their assessment, liaison and diversion services may include information about a person's history of engagement with mental health and/or learning disability services, whether the person is currently receiving treatment or support, and whether referrals have been made to relevant health, social care and/or support services. Liaison and diversion services should have a women's lead and, increasingly, all women suspects should be assessed. Information concerning whether an AA was called and reports by liaison and diversion services should be made available to the crown prosecutor to inform their decision making.

It should be noted that the absence of such information *cannot* be taken as proof that the individual does not have mental health conditions and/or disorders. Evidence shows that a minority of individuals entitled to an AA receive support and while liaison and diversion services currently operate in most police custody suites there are reasons why individuals who may need their attention slip through the net. Therefore, in the absence of information concerning a person's mental health/mental disorder, we strongly suggest that a mechanism be introduced that indicates to the crown prosecutor:

- that the person does not have mental health conditions and/or disorders,
or
- the custody sergeant considered that an AA was not necessary.
and
- the person was not referred to or assessed by liaison and diversion services.

The presence of multiple interacting mental health conditions and disorders, fluctuating conditions, substance misuse, and multiple social disadvantage will affect a person's capacity to make sensible and informed judgements. This may vary over time and across different kinds of decisions. In other words, a person may have capacity sometimes and in some circumstances.

The question of capacity is not dealt with in great detail in this guidance, which we considered an omission. In their extensive consideration of unfitness to plead, the

Law Commission discussion was largely based on questions of capacity. The current Sentencing Council consultation on sentencing offenders with mental health conditions or disorders also considers capacity, including a useful list of questions around capacity and culpability. We suggest that the question of capacity is included in this guidance as a consideration in the public interest stage.

The second factor guiding a decision to prosecute is consideration of ‘the likelihood of repetition’. The guidance notes that decision making in this regard should be informed by history of similar behaviour and response to treatment, including ‘potential impact on offending behaviour’. The importance of history in determining the likelihood of repetition is non-contentious; however, the extent to which mental health conditions are ‘treatable’ is contentious. Even if conditions are ‘treatable’ symptomatically, whether this has any effect on future behaviour in the context of a specific offence is hard to predict. For example, alongside treatment, there are many other factors that may impact a person’s condition—positively or negatively, over which they may have little control.

It is noteworthy that in describing arrangements for the Mental Health Treatment Requirement, the Mental Health Act is silent on the potential impact of treatment on offending behaviour, requiring only that *‘the mental condition of the offender...is such as requires and may be susceptible to treatment’*.

Concerning the suspect’s history of engagement with and response to treatment: it is important that previous engagement with treatment that has not been successful does not exclude a person from being offered the opportunity again. There are many reasons that may affect a person’s engagement and response to mental health treatment, including stigma, the quality of the service provided, the age and maturity of the person, and other factors that may impact a person’s condition (see above). For example, a recent report by the Prison Reform Trust found that the distance a person had to travel to access services, the number of buses involved, cost of public transport, and whether childcare was available directly affected their ability to engage with services.¹

The guidance should ensure that the ‘likelihood of repetition’ for suspects with mental health conditions and/or disorders, as currently framed, does not impose a more stringent ‘test’ than for suspects without such conditions, as described in the overarching Code for Crown Prosecutors (2018): *‘whether the offending was or is likely to be continued, repeated or escalated.’*

We note that the question of ‘maturity’ is not cited at the public interest stage in this guidance and suggest that a reference is made to the relevant section of the overarching Code for Crown Prosecutors (2018): The Public Interest Stage: 4.14 (d).

People with mental health conditions and/or disorders may be especially susceptible to suggestibility and coercion. The guidance should, therefore, refer to s45 Modern Slavery Act 2015 (Defence for slavery or trafficking victims who commit an offence).

¹ Hammond, T., Talbot, J. et al (2019) Out of the Shadows: Women with learning disabilities in contact with or on the edges of the criminal justice system, London: Prison Reform Trust

2. Do you agree or disagree that the new section on diversion from prosecution sets out the right factors for prosecutors to consider? Is there anything else that should be taken into account?

The guidance states that, *‘Once a decision is taken that there is enough evidence to justify a prosecution, prosecutors should consider whether there is a suitable out of court disposal, as an alternative to prosecution, which is appropriate to the seriousness and consequences of the offending, and meets the aims of rehabilitation, reparation or punishment’.*

The guidance should note the damage and disproportionate impact that a custodial sentence has on many individuals with mental health conditions and/or disorders. We therefore agree that for some people this may be an appropriate disposal—with the necessary reasonable adjustments to ensure the person understands the implications of such disposals. It should be noted, however, that crown prosecutors can only consider a ‘suitable out of court disposal’ where they exist, and out of court disposals have been in marked decline since 2008.²

Although the following point is beyond the scope of this consultation, for diversion from prosecution to work effectively, adequate disposal options and local services must be made available. Innovative out of court disposals do exist and should be encouraged, especially for this cohort. For people with learning disabilities and/or autism, it is worth noting that while Transforming Care ended in March 2019, there is an ongoing commitment in The NHS Long Term Plan for *‘increased investment in... forensic community support’* for this group.³

Decisions concerning a caution or conditional caution should take into consideration a person’s capacity to understand the implications and requirements of a caution or conditional caution, and to give informed consent. Reasonable adjustments to ensure understanding should be employed, as necessary.

While the decision to take ‘no further action’ may be appropriate in some circumstances, it is important also to ensure the person understands the gravity of their alleged offending behaviour to help prevent an escalation of the behaviour that brought them into contact with the criminal justice system.

Referring to liaison and diversion services, the following assertion on page 17 needs clarifying: *‘...or enable them to be diverted away from the criminal justice system into a more appropriate setting, if required.’* Diversion to where and under what powers?

Other factors that should be taken into account should the person be found guilty of an offence are the paucity of adapted community orders for offenders with mental disorders and the Mental Health Treatment Requirement (MHTR) for offenders with mental health conditions. MHTRs may become more readily available following the development and trialling of a Community Sentence Treatment Requirement protocol under the auspices of the Department of Health and Social Care and the Ministry of Justice. The guidance should be updated as information about a national roll-out becomes available; an announcement is expected summer 2019.

Community sentencing options provided for in law that are not available locally, in a timely manner, should not result in a more punitive custodial sentence.

² Table Q5.1b and Q5.4, Ministry of Justice (2019) Criminal justice statistics quarterly December 2018, London: Ministry of Justice

³ NHS England (2019) The NHS Long Term Plan, London: NHS England, paragraph 3.35

3. Do you agree or disagree that the guidance clearly and accurately sets out the procedures for fitness to plead?

Where reports to determine fitness to plead are deemed necessary, consideration should be given to them being undertaken in the community. If this is not possible, we welcome reference to s35 Mental Health Act 1983, which is underused. However, crown prosecutors should be aware of the difficulties in securing a timely hospital bed. This varies from area to area but remains a national problem.

Guidance should make clear that in waiting for admission to hospital, a police cell can never be considered a 'place of safety' and that prisons are both overcrowded and unsafe. The guidance should further note the recommendation made by the independent review of the Mental Health Act that '*Prison should never be used as 'a place of safety' for individuals who meet the criteria for detention under the Mental Health Act*'.⁴

We welcome the discretion implied concerning judgments of intent and capacity, set out in the following guidance: '*A judge must determine if the defendant is fit to plead and to stand trial. This is a determination on the balance of probabilities if the defendant raises the issue, or if he contests it the it is for the prosecution to satisfy the court beyond a reasonable doubt.*'

Rather than starting this section with fitness to plead, we suggest starting with a consideration of necessary adjustments to enable effective participation in court proceedings. This would reflect the approach taken by the Law Commission in their report on unfitness to plead (shown below), and Article 13, United Nations Conventions on the Rights of Persons with Disabilities.

'Full trial wherever fair and practicable

1.14 At the heart of our recommendations lies our belief that the normal criminal trial is the optimum process where a defendant faces an allegation in our criminal justice system. We consider that full trial is best not just for the defendant, but also for those affected by an offence and society more generally. This is because the full criminal process engages fair trial guarantees for all those involved, under article 6 of the European Convention on Human Rights ("ECHR") and allows robust and transparent analysis of all the elements of the offence and any defence advanced. It also offers the broadest range of outcomes in terms of sentence and other ancillary orders.

1.15 Removing any defendant from that full trial process should, we consider, only be undertaken as a last resort. The decision to adopt alternative procedures should be made with great caution and only where it is in the best interests of the defendant, because he or she lacks the capacity to participate effectively in his or her trial. We consider that every effort should be made to afford a defendant whose capacity may be in doubt such adjustments to the proceedings as he or she reasonably requires to be able to participate in the full criminal process, and to maintain that capacity for the whole of the process. However, we do acknowledge that a very small number of defendants will never have the capacity to participate effectively in a trial.'

(Law Commission 2016:4; Summary).

⁴ Recommendation 130 in Wessely, S. (2018) Modernising the Mental Health Act: Increasing choice, reducing compulsion—Final report of the Independent Review of the Mental Health Act 1983, London: Department for Health and Social Care

The guidance is clear in how it sets out procedures for fitness to plead, although it is unfortunate that different procedures apply for the Crown Court and the Magistrates' court and Youth court. There are disadvantages in fitness to plead arrangements in the lower courts, and guidance is required on how to mitigate these disadvantages. In their report on Unfitness to Plead, the Law Commission recommended introducing into the Magistrates' and Youth courts procedures to address capacity—a recommendation we support, and more detailed guidance might increase consistency of practice.⁵

4. Do you agree or disagree that the information in Annex A covers the main features of conditions which prosecutors should be aware of when dealing with these cases? Is there anything else that should be taken into account?

We welcome the inclusion of information about mental health conditions and disorders; however, some information requires improvement, especially in relation to personality disorders and learning disabilities. We note that the Sentencing Council is currently consulting on mental health conditions and disorders and have also included an Annex describing relevant conditions. It would be extremely useful if the two Annexes were consistent. To have two different Annexes may lead to unnecessary confusion.

Information about specific conditions and disorders contained at Annex A should further include:

- the possibility of multiple interacting mental health conditions and/or disorders;
- coexistence of mental health conditions and/or disorders and substance misuse, including self-medication and why a person might self-medicate;
- fluctuating conditions;
- the impact of multiple social disadvantages on a person's mental health conditions and/or disorders – each of which can affect a person's ability to access and retain contact with local health and social care services; and
- that many people with mental health conditions and/or disorders may not have a diagnosis.

5. Do you have any further comments on the revised mental health conditions and disorders legal guidance?

Clarity is needed on when these guidelines apply. For example, is it to be used only when a report has been received from liaison and diversion services indicating the presence/possibility of mental health conditions and/or disorders or when a diagnosis is confirmed?

Consideration should be given to incorporating the guidance into the overarching Code for Crown Prosecutors (2018) to avoid it being viewed as an adjunct and, therefore, lacking any real weight.

⁵ Law Commission (2016) Unfitness to Plead—Volume 2: Draft Legislation, London: HM Stationery Office, page 23.

Sentencing disposals, pages 29–35: the information contained in the guidance is clear and helpful. However, we suggest that the disposals are reversed, starting with lower level orders, and added to. For example, as well as the Mental Health Treatment Requirement, the Alcohol Treatment Requirement and Drug Rehabilitation Requirement may also be relevant for offenders with substance misuse problems. In addition, support for poor mental health and offenders with mental disorders may be offered through a Rehabilitative Activity Requirement. It would be informative and helpful if the sentencing disposals included reference to the new national protocol for Community Sentence Treatment Requirements.

Ensuring the trial process is effective and fair for defendants with mental health conditions and/or disorders is likely to require a more considered approach to ensure the full participation of defendants. It would be helpful, therefore, to include guidance highlighting that the consideration of reports and the need to facilitate reasonable adjustments is likely to slow down proceedings, which, in the pursuit of fairness, is right and proper.

How this guidance should inform and support new online processes (including online pleas and the proposed automated conviction process) requires careful consideration. Mechanisms should be put in place to ensure people with mental health conditions and/or disorders using online processes have the necessary safeguards.

Where crown prosecutors are aware that a defendant has/or may have mental health conditions and/or disorders the guidance should make clear what they should do with that information if it appears the court is not aware. This is especially important where a defendant is unrepresented.

Reasonable adjustments for defendants with mental health conditions and/or disorders should be a matter of routine. It would be helpful if, in the guidance, the crown prosecutor was encouraged to draw attention to the court of the need for reasonable adjustments, where necessary. A defendant's entitlement to reasonable adjustments, including an intermediary, needs clarifying alongside responsibility for ensuring the necessary adjustments are made.

The title of the guidance doesn't give sufficient clarity that learning disabilities and autism are within scope. There is much disagreement over terminology but, to avoid all doubt, we suggest that learning disabilities and autism are included in the title. The term mental health conditions and disorders should be used throughout the guidance, where appropriate.

Shared IT systems between police, crown prosecutors, court staff and members of the judiciary, national probation service and health care should be prioritised to ensure an efficient and effective flow of information across the criminal justice pathway. Further, defence lawyers may have relevant information about their client's mental health condition and/or disorder and consideration should be given to how meaningful interaction can be enabled along the pathway—from the police station through to disposal from the court.

One final specific point: on page 3 of the guidance, three points at the bottom of the page—delete the word 'and' between point 2 and 3 and insert, 'or'.