



Document number	19/25
Date	04 June 2019
Response to	Consultation on draft legal guidance for mental health conditions and disorders
Issued by	Crown Prosecution Service
Link to consultation	https://www.cps.gov.uk/consultation/public-consultation-mental-health-conditions-and-disorders-draft-legal-guidance
Notes	For additional information please contact Jo Easton at jo.easton@magistrates-association.org.uk

Question 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?

The MA agrees with the proposed factors to be taken into consideration at the public interest stage. However we do think it is important to include a reference to the immaturity of the defendant, especially if they are under the age of 18. Although there is a section in the overarching [Code for Crown Prosecutors](#) under 4.14(d) looking at the age of the defendant, there are specific factors relating to children and young people with mental health conditions that should be reflected in decision-making at this stage.

The MA would suggest that in setting out defences that may be relevant to this cohort, the statutory defence under the Modern Slavery Act should be referenced. Vulnerable people may be most at risk of coming into contact with the criminal justice system due to being subject to undue influence, and therefore the section 45 defence should be considered. It would also be helpful to remind prosecutors that if they identify concerns that an individual may be a victim of modern slavery, they should make a referral to the National Referral Mechanism.

We welcome the reference across to the Code for Crown Prosecutors in relation to the factors to take into account in relation to seriousness. We note, however, that in relation to tests of seriousness there are already established criteria within the criminal justice system, for example when looking at whether the offence is so serious that the custody threshold has been passed. We suggest it may be helpful for these definitions to be included in the guidance.

We note that the second factor guiding a decision to prosecute is a consideration of the likelihood of repetition, e.g. a history of similar behaviour and engagement and response to treatment. It is important that the specific circumstances of the individual are taken into account when considering this factor, with expert advice being sought as appropriate.

We would also note that it is very useful for information on all the factors referenced in the public interest stage to be provided to court as they can guide and influence sentencing options.

The MA concurs with the view that justice for victims may be achieved by a formal finding of a court, but suggests that the guidance should place greater emphasis on the harm suffered by the victim(s) and that any Victim Personal Statements should be carefully reviewed at the public interest stage.

Question 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?

We are satisfied that diversion is the right course of action where the alleged offending is admitted and understood by the suspect and the offending is of a relatively minor nature. We would not condone suspects who are alleged to have committed more serious matters being put through this process as a convenient way of dealing with the mental health issue and the possible difficulties of securing a conviction. The court has more powers to impose a suitable mental health orientated disposal if the matter is relatively serious. However, the relative scarcity of provision of Community Treatment Requirements, in particular Mental Health Treatment Requirements, does cause serious problems for benches in terms of sentencing options that will support individuals with mental health conditions.

It is important that the interests of the victims are considered as part of any decision to divert from prosecution.

The MA is concerned that there is a lack of resource in relation to assessments and hospital beds. In making a decision to divert from prosecution, it is important that the diversion is to something – so that the individual is given support in relation to any vulnerabilities they may have that are linked to offending behaviour, therefore reducing reoffending.

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

In relation to the process for remanding individuals for mental health assessments, we welcome the reference to Section 35 powers, which are often underused in magistrates' court. However, magistrates do need to be assured that timely mental health assessment from the relevant health professionals and beds are available, so that defendants with mental health problems are conveyed to an appropriate hospital bed in a timely way and not held in police custody longer than necessary. We would emphasise that a police cell can never be considered a 'place of safety' under the legislation.

As the guidance notes, the Criminal Procedure (Insanity) Act 1964 does not apply in the magistrates' court and therefore the 'fitness to plead' process as set out in Crown Court is not one that magistrates can follow. However, there is a process which can be followed in magistrates' court, which the guidance does outline. The guidance sets out the steps that can be taken by the court to switch to a 'fact finding' hearing, and lays out the features of such a hearing. Although we acknowledge the law is not clear on the process to be followed in magistrates' court, and it is unfortunate the process that is followed in Crown Court cannot be followed in magistrates court, we do feel that more detailed guidance on this issue here might increase consistency of practice.

Otherwise the MA is satisfied that the guidance is clear and accurate.

Question 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?

The MA agrees that the information contained in Annex A seems comprehensive and is likely to be of great benefits to prosecutors.

We consider that this information should be set out (or at least referred to) earlier in the guidance.

We also note that the Sentencing Council are currently consulting on an overarching guideline for sentencing those with vulnerabilities, and have also included an Annex describing relevant conditions. It would be useful if there was as much consistency as possible between the two Annexes.

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

We do query what policy will be in place in relation to when prosecutors should refer to this guidance document. Is it to be used for all decisions or only those where the defendant has been assessed as having one of the conditions listed? If the latter, what assessment will be used?

At the start, certain diagnoses are referenced, but it is important that this guidance is not only used where a clear diagnosis is indicated on the court files. We would suggest that prosecutors should be reminded to refer to any assessments carried out by Liaison and Diversion services (or the comparable service in Wales) and if there is no assessment, ask for one to be carried out (either in the police station or court).

The reference to diagnoses may be considered to be a simplification of the process by which mental health professionals identify vulnerabilities. It is rare to have a single, clear diagnosis, and many of those seen in magistrates' court have no diagnosis at all. We are also concerned that there is not clear reference to link between lack of diagnosis of certain vulnerabilities and people self-medicating with drugs or alcohol to help manage their condition.

We also consider it may be helpful for the guidance to reference the speed with which cases are dealt with in magistrates' court – as this poses particular challenges in relation to prosecutors getting the necessary information needed to follow this guidance. Although speedy justice is important, more time must be taken when cases are more complex, for example when a defendant is vulnerable.

Another concern is how this guidance will work in line with the new online processes (including online pleas and the proposed automated conviction process). Identification of vulnerabilities, and how they may affect prosecution decisions, is vitally important as early as possible, and any online processes must allow for this identification.

The MA notes that the Advocate's Gateway has produced useful guidance and training videos on the effective participation of all defendants (not just young defendants) with mental health issues and information about reasonable adjustments which can and should be made.

We also endorse the importance of the prosecutor's role in the section on sentencer principles, including any guidelines, any victim personal statements and the absolute duty of the prosecutor to identify any evidence of the mental impairment of the defendant.

In relation to the section on sentencing, we appreciate the clarity of the guidance on this but feel there could be more detail of the lower level orders available for this cohort. As well as Mental Health Treatment Requirements, Alcohol Treatment Requirements and Drug Rehabilitation Requirements would also be relevant for those with substance abuse issues connected to a mental health

condition. In addition, mental health support may be offered through a Rehabilitation Activity Requirement.

There has been a lot of positive work in relation to different government agencies agreeing a national protocol and piloting Community Sentence Treatment Requirements (CSTRs). It would be helpful if the guidance included reference to CSTRs

The guidance does not include reference to the sentencing options available to the Youth Court, which is unfortunate.

It is even more important than ever, with greater restrictions on access to legal aid, that prosecutors ensure that they identify and inform the court about defendants with mental health issues, especially where defendants are unrepresented.

In conclusion we welcome the Draft Prosecution Guidance and consider it gives greater clarity in a difficult area of decision-making in the criminal justice system. With some tightening and modest redrafting, we consider this will be helpful in helping prosecutors make decisions in cases where the mental health of the defendant is an issue.

DRAFT