



**CPS Public consultation on Mental Health Conditions
and Disorders: Draft Legal Guidance**

JUSTICE consultation response

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. We are pleased to respond to this consultation. In 2017, JUSTICE published its *Mental Health and Fair Trial* report, chaired by Sir David Latham.¹ The report expressed concern about lack of appropriate guidance for prosecutors on when to prosecute. We recommended that the CPS guidance be urgently reviewed and updated, in particular to explain the nature of diversion and the local options available as an alternative to prosecution.
3. In submitting this response, JUSTICE reconvened members of the Working Party to consider the proposed guidance. JUSTICE has also benefitted from close consultation with the CPS.
4. We are aware that the Sentencing Council is currently developing Guidelines for sentencing offenders with mental health conditions or disorders. JUSTICE is impressed by the language used in the draft Guidelines in relation to mental health and mental capacity. We understand that the CPS is looking to align its language with the Sentencing Council and we would welcome this change.
5. Although the CPS draft Guidance provides a useful starting point, we regret that it does not address the recommendations that we proposed. We consider that certain amendments are needed. In particular, the practical considerations for prosecutors on how to conduct their role where a defendant has mental health difficulties are absent from the Guidance and consequently the role of the prosecutor at each stage is not apparent. For this reason, we will address Question 5 first.

¹ Available at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/11/JUSTICE-Mental-Health-and-Fair-Trial-Report-2.pdf>

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

General observations

6. We have some general observations about what we consider to be absent from the draft Guidance under the following headings:
- i. Advice and supervision
 - ii. Special prosecutor/point of contact
 - iii. 'Roadmap'/practical guidance
 - iv. Training
 - v. Structure of the Guidance
 - vi. Identifying a mental health issue

i. Advice and supervision

7. Anecdotal evidence suggests that prosecutors in magistrates' courts in particular already often experience difficulties contacting the reviewing lawyer. This is particularly so where the prosecutor is an agent or is an associate prosecutor (not a qualified lawyer) and therefore cannot make decisions such as whether to drop a case or proceed with a case without certain witnesses or evidence. These require a decision by the duty lawyer. In these circumstances, it is not clear where the prosecutor can go for further assistance where there is a mental health concern to a case, or whether they can ask questions out of region.
8. We are concerned that there is currently no structure through which prosecutors can access consistently available advice on how to approach a case involving a defendant with a mental health condition or learning disability. The Guidance lacks a clear contact point for staff – it is not clear who, if anyone, prosecutors can contact. This often leads to cases being adjourned rather than resolved at the earliest opportunity. JUSTICE proposes that the CPS needs to put in place a structure, or centre of knowledge, which prosecutors can follow to access advice. It would be helpful if the Guidance included more detail about where to source appropriate advice, support and information. This would enable the Guidance to be effective in practical terms for CPS staff.

ii. Special prosecutor/ point of contact

9. There needs to be consistency in the approach to the decision to prosecute. In our *Mental Health and Fair Trial* report we recommended that a specialist prosecutor be created for each CPS area, who has received mental health awareness training and is in a better position to make the charging decision in cases of vulnerability, assisted by up-to-date guidance and to have conduct of the case.² We maintain that this kind of role is essential to ensuring that appropriate charges are brought and the case is properly managed throughout. While such a role is absent from the Guidance, we understand that a single point of contact is being established in each area to provide advice, as opposed to conduct of cases. We understand that there are resourcing problems in the CPS that would make it very difficult for specialists to have conduct of all cases with mental health concerns, and welcome this advisory role as an alternative. The point of contact must be appropriately trained and communicate regularly with other points of contact about best practice, as other CPS specialist advisor roles do. It should also be referenced throughout the Guidance so that prosecutors know who they can contact for assistance.
10. Prosecutors also need information and evidence about vulnerability at the earliest opportunity in order to make a decision whether to prosecute. In our report, we recommended that the assessment by Liaison and Diversion (L&D) services (which records a vulnerable individual's needs and whether they should be referred on for treatment or further support) should be contained in a report that travels with the case file to the specialist prosecutor to assist with their charging decision.³ The report would set out the initial assessment and recommendations for necessary support services, as well as detailing the appropriateness and nature of possible diversion. The Guidance needs to include more information on a prosecutor's role with regards to the L&D assessment; for example, whether a prosecutor should proactively seek an assessment report; is obliged to take into account the information presented; and should request a further report or psychiatric assessment.
11. However, GAP (Guilty anticipated plea) cases usually proceed from police charge to first appearance without the possibility of a review by a prosecutor. As such the file is only reviewed on the day of or at the outset of the hearing. The Guidance should indicate how a prosecutor should deal with this kind of case. Where a file has an L&D report identifying

² Pages 7 and 59 of our report.

³ Page 100 of our report.

mental health concerns, we suggest that it should be flagged and reviewed by a prosecutor prior to charge, who should at a minimum have access to a CPS trained mental health reviewer for advice, as set out above. The prosecutor should then make the charging decision. We believe that the Guidance additionally ought to address how a prosecutor at court should proceed with a case where there is no L&D report, but where the prosecutor for whatever reason – for example, in light of the facts of the offence or the defence representations – believes that there is a potential mental health element.

iii. 'Roadmap'/practical guidance

12. There is a great deal for prosecutors to be aware of in terms of a suspect's mental capacity to commit an offence and the defences available to them; alternatives to prosecution; and, should the case proceed, adaptations at trial. Prosecutors additionally need to be cognisant of the reality of the number of litigants in person who may also be defendants with mental health concerns and the limits on legal aid solicitors being able to conduct investigative work. This will make it more difficult for prosecutors, however they should be provided with guidance and training on how to identify and deal with this, which may include raising the issue with the court to ensure fairness to the defendant.
13. JUSTICE considers that more clarity is needed around the public duty on a prosecutor deciding whether or not to prosecute, with respect to both inequality and fair trial. The Guidance should reference the duties on the prosecutor as a public authority under the Human Rights Act 1998 and the Equality Act 2010, as well as the underpinning provisions in the European Convention on Human Rights and the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"). It should also outline how proactive prosecutors are expected to be in fulfilling these public duties. The CPS Guidance also needs to be reflected and consistent with the guidance on prosecuting in cases where there may be a nominal penalty or where a defendant is found unfit to plead. Such guidance is heavily weighted in favour of the victims' wishes, which is important, but we stress that prosecutors also have a duty to consider the fairness of proceedings.
14. The Guidance does not currently address how prosecutors should deal with the practical aspects of taking a case through charge to trial. For example, there is no consideration of:
 - (a) How decisions should be made;
 - (b) What expertise is available and should be consulted in order to consider the impact of mental health on a defendant's capacity; and

(c) What each prosecutor must be satisfied of in terms of the defendant's mental capacity to commit the offence prior to making a charging decision or decision to prosecute

15. We consider that the Guidance would greatly benefit from a roadmap or flow chart, showing what procedures a prosecutor must follow in order to make their decisions and when. A visual aid setting out the process and options available at each stage would be helpful and should go some way to improving the familiarity of prosecutors with the appropriate responses to capacity, defences, alternative disposals, reasonable adjustments at trial and sentencing options. A roadmap would equally assist agents who, although unable to make a final decision, would be better equipped for a meaningful dialogue with the reviewing lawyer and/or point of contact on how to proceed.⁴

16. We further propose it would be useful to provide worked examples throughout the document to assist prosecutors in applying the Guidance.

iv. Training

17. We are concerned that prosecutors do not have sufficient knowledge to deal with vulnerable suspects and defendants and we note that the Guidance does not require any specialism or referral to a specialist. The Guidance should indicate an expectation that mental health awareness training should have been undertaken by prosecutors conducting such cases.

18. Beyond the Guidance, it will be critical to ensure that there is appropriate training for every element of the system.⁵ It is an ordinary part of the advocate's duties to question vulnerable witnesses, and to ensure the defendant can participate in every aspect of the trial, including giving evidence and acting in person.⁶ We believe that it would be misconduct for a prosecutor to take on a case that they are not sufficiently trained to do, in the same way as it would be for an advocate.⁷ It is not sufficient to say that staff are capable of

⁴ At present, the time that is available for explaining any issues and receiving advice is extremely limited.

⁵ As recommended in our report, at page 51: "Training should be made available to a prosecutor in each CPS area across the country, and must introduce them to the impact of vulnerability upon capacity to commit crime; the public interest test in this scenario; the need for medical assessment and suitable experts; the impact of Mental Health Act procedures upon the trial; the options available for diversion; and necessary adaptations to ensure that a trial is fair. This should be run with input from the Royal College of Psychiatrists, L&D, intermediaries and other relevant professionals."

⁶ See *R v Yahya Rashid* [2017] EWCA Crim.

⁷ See *R v Grant Murray et al* [2017] EWCA Crim 1228 at [226].

assessing mental health issues without any specific additional training. We understand, from speaking to the Director of Public Prosecutions, that all CPS advocates have undertaken the Advocacy and the Vulnerable witness handling training, which is welcome. However, this does not address the identification of and response to defendants with mental health difficulties. Nor does it cover all prosecutors who are making charging decisions.

19. Training for prosecutors could take inspiration from City, University of London's recent autism awareness events. As part of the University's 'Access to justice for children with autism' project, 460 Metropolitan Police Service police officers were trained over three days on the characteristics of autism and the role of registered intermediaries for vulnerable witnesses. The police officers reported a significant improvement in their knowledge and awareness of the relevant issues.⁸

20. Training could involve familiarisation with the Guidance and would ultimately support the delivery of the Guidance contents.

v. Structure of the Guidance

21. As a more general comment, we think that the order of the Guidance is rather disjointed, and consequently the document lacks coherence in certain areas.

22. We provide a few examples of this below :

- i. **The 'Decision to Prosecute' section:**⁹ This section needs to start with the relevant information on capacity – at present, this appears too far down in the document. As explained in paragraphs 43–46 of this response, in order for a prosecutor to assess the evidence, they must first have an understanding of the defendant's capacity.
- ii. **The reference to 'Mental health disposal':**¹⁰ Such a disposal has not yet been introduced as a possibility in the Guidance, and therefore including it under the '*Actus reus*' heading seems out of place. Reference to a 'mental health disposal' should be made in the introduction of the 'Decision to Prosecute' section instead.

⁸ See <https://www.city.ac.uk/news/2019/may/raising-awareness-autism-met-police-service>

⁹ Page 6 of the draft Guidance.

¹⁰ Page 6 of the draft Guidance.

- iii. **‘Defences’**:¹¹ The defences based on mental health difficulties need to be dealt with first and would be better located before these standard defences, given that the Guidance concerns suspects and defendants with mental health difficulties. If a person lacks capacity, they will not be able to raise any of these standard defences.
- iv. **‘Remand for defendants with a mental disorder’**:¹² This is a jump from the decision to prosecute. We consider that it would be helpful to include a conclusion on whether to prosecute or not before moving into the court stage.

23. We consider that the structure of the Guidance needs to better reflect the process of a case and what a prosecutor must consider at each stage. We are concerned that prosecutors might miss certain important considerations as a consequence of the current layout of the Guidance.

vi. Identifying a mental health issue

24. A potential way of facilitating early assessment and identification of mental health issues would be for police officers to flag case files where there is vulnerability prior to sending on to the CPS. We suggest that a tick box should be added to the MG3 form, instructing officers to “record here whether there is any mental health concern”. Prosecutors would then have a clear indication of the issue when reviewing the file. It is crucial to ensure that vulnerability is flagged so that appropriate information is known when deciding whether to prosecute and for when the case arrives at court.

25. Having this ‘tick-box’ might prompt the police to reflect more about a suspect’s potential vulnerabilities, in addition to the question about mental health concerns contained in the custody record. It might additionally result in any L&D reports being transferred to the CPS more quickly, and would assist a prosecutor to understand what mental health concerns exist.

26. We have experience as defence representatives of being denied access by the CPS to a client’s L&D report in the Crown Court. We further suggest that both L&D services and prosecutors should be made aware that L&D reports can be disclosed to the defence representatives. This should be clarified in the Guidance.

¹¹ Page 9 of the draft Guidance.

¹² Page 19 of the draft Guidance.

Specific observations

27. Aside from the general observations we make above, and answers to the consultation questions below about what we consider the Guidance should seek to achieve, we note that there are some specific areas covered in the Guidance that need further attention.
28. In revising the Guidance, we consider that further attention should be given to the following sections:
- i. 'Guidance' section
 - ii. "Remand for defendants with a mental disorder" section
 - iii. 'Trial Procedure' section
 - iv. 'Sentencing' section

'Guidance' section

29. The only external documents referred to in the Guidance are considerably out of date. It is also unclear whether the *Home Office Circular No 66/90 – Provision for Mentally Disordered Offenders* still has any authority. The guidance on *Diverting offenders with mental health problems and/or learning disabilities within the National Conditional Cautioning Framework* contains example local schemes that are no longer operating, and the conditional cautions approach needs to be reviewed.
30. Whilst JUSTICE welcomes the attempt to signpost CPS lawyers to practical guidance, we regret that these documents are far from suitable.

Remand for defendants with a mental disorder

31. As indicated above, the section appears at an odd stage in the Guidance.
32. We consider that there needs to be a much broader 'Court appearance' section here, outlining what the prosecutor's role is on the first and subsequent appearances at court. Specifically, this could clarify whether the prosecutor is responsible for checking that any necessary reasonable adjustments have been made and, if the defendant is represented, for liaising with the defence about the defendant's requirements. Additionally, we consider that it would be helpful to include a section on bail and whether any treatment conditions might be appropriate. Further, in terms of the representations that might be made about a

request for a reasonable adjustment, there needs to be consideration of whether a prosecutor should counter this request or not.

33. In respect of the 'Remand for reports' section,¹³ we believe that this section needs to include guidance on what the prosecutor's role is at this stage.

'Trial Procedure' section

34. The Guidance is very Crown Court-focused, and does not appear to deal with magistrates' or youth courts – at least in the terminology used.¹⁴ Very often cases at magistrates' courts will involve defendants with mental health issues who have been charged by the police and are appearing at GAP hearings. At present, cases with a mental health dimension are being regularly inexpertly handled by prosecutors (including agents and associate prosecutors), legal advisers and defence representatives alike. It needs to be made clearer that this is a guide for all prosecutions. Guidance is invariably used by those at the junior stages of practice and the youth and magistrates' systems are quite distinct from that in the Crown Court.

35. We are concerned that there may be an informal policy in some CPS areas that where an either way or indictable only offence is being sent to the Crown Court, this will not be discontinued in the magistrates' court if mental health issues arise that clearly militate against the public interest test being met. We have experienced cases where, instead, they are sent up to the Crown Court for another prosecutor to consider in the meantime. One of our number was asked to leave the room whilst the magistrates' court prosecutor spoke to the mental health team about reviewing a charging decision. We are also aware of requests from defence solicitors to review the charging decision in light of mental health issues being routinely ignored at the magistrates' court stage. There is no compelling justification for this occurrence. Where it is clearly not in the public interest to prosecute, it is wholly inappropriate to continue the case – for the defendant, the complainant and warned witnesses, and the public expense of taking a case to the Crown Court. The Guidance should underline that each prosecutor must keep the public interest under review in the context of a case involving a defendant with mental disability.

¹³ Page 19 of the draft Guidance.

¹⁴ For example, there are constant references to the jury.

36. The 'Reasonable adjustments' section¹⁵ would be sensibly placed at the start of the 'Court appearance' section that we suggest should be included in paragraph 32 above. Within that section, the Guidance should detail the reasonable adjustments that might be needed to enable a defendant to participate effectively – such as whether breaks and shorter days are needed, whether public presence should be restricted, and if adaptations to lighting or sound are required¹ - and set out the Ground Rules Hearing process, and the requirement to adapt questions appropriately for defendants who have communication difficulties. This would do much to address the current inconsistent approach to making accommodations for vulnerable defendants.
37. JUSTICE welcomes the 'Live links' section,¹⁶ which provides helpful guidance on how this facility is used. However, we consider that there should also be guidance on how a prosecutor should respond to an application for such a reasonable adjustment, and to other kinds of requests.
38. The 'Intermediaries' section¹⁷ needs to explain what an intermediary is.
39. It is disappointing that the only reference to intermediaries is in the context of the trial.¹⁸ The need for assistance from an intermediary should be carefully considered at an earlier stage, such as first appearance, bail hearings and fitness to plead hearings, along with any other particular requirements of the defendant. Prosecutors should also look out for whether an intermediary provided assistance during police interview, as an indication of a mental health concern, and the Guidance should include this possibility in the section we suggest at paragraph 24 on identifying suspects with mental health concerns. Further information as to whether and when an intermediary should be present to assist a defendant and what the prosecutor must consider in this circumstance is also lacking in the Guidance.
40. The Guidance makes clear that the Advocate's Gateway (TAG) has produced a toolkit on the effective participation of young defendants.¹⁹ However, there are also TAG toolkits on

¹⁵ Page 23 of the draft Guidance.

¹⁶ Page 23 of the draft Guidance.

¹⁷ Page 25 of the draft Guidance.

¹⁸ Page 25 of the draft Guidance.

¹⁹ Page 26 of the draft Guidance.

how to identify and respond to vulnerability, adult defendants, and using an intermediary. We consider that these toolkits should be referenced and hyperlinked in the Guidance.

41. JUSTICE also believes that the role of the 'Mental Health Casework Section'²⁰ needs to be properly explained.

'Sentencing' section

42. We note that the 'Sentencing' section is in fact superseded by the draft Mental Health Conditions or Disorders Sentencing Guideline, and we propose that the CPS legal Guidance refers to that Guideline rather than set out different information.

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?

43. In our view this section should be extended to cover a duty on the prosecutor to consider whether the suspect has a mental health issue before going on to consider the Full Code Test. As a starting point, the section requires a practical approach, with more information on how a mental health issue should be identified and addressed by a prosecutor.
44. Significantly, there must be an obligation on the prosecutor, first, to observe any indicators of mental health or disability concerns in the police file, and second, to actively take steps to consider whether, as a consequence, there should be a prosecution or diversion. This should be set out as the first step in this section – prior to outlining the evidential or public interests tests. This is permissible and outlined in the Code for Crown Prosecutors under sections 3.1 and 4.4.
45. In particular, the Guidance needs to address the following considerations:
- i. Where and what information the prosecutor requires to make a decision;
 - ii. Whether the suspect is legally represented, and if so, when their representative should be contacted about any disability;
 - iii. Who else known to the suspect should be contacted about any disability;

²⁰ Page 27 of the draft Guidance.

- iv. Whether L&D services can provide an initial assessment, if not already carried out;
 - v. Whether an expert report should be commissioned.
46. There then needs to be an obligation to consider whether the person has capacity to commit the offence, and (a) whether they are fit to plead and to stand trial and (b) whether reasonable adjustments might make this possible. In our view most of these issues should be considered ahead of making a decision to prosecute. If it is clear at the outset that the person is going to be unfit, we would expect that to have a significant bearing on the decision whether or not to prosecute.
47. We note that ‘maturity’ is included within the Code for Crown Prosecutors,²¹ and we suggest that the Code could be expanded to make prosecutors aware of the issue of mental capacity. The Code also allows for public interest to be considered earlier on. Whilst we appreciate that such instances are rare, we consider that there is a case for doing that where the mental health issue suggests a lack of capacity. This possibility is not referred to at all in the Guidance.
48. We are pleased that there is some appreciation of mental capacity in the Guidance – to the extent that it refers to ‘learning disability’, and describes ‘personality disorders’ in specific and sympathetic terms.²² Additionally, the Guidance states that “insanity does not mean an absence of *mens rea*”,²³ recognising that mental health diagnoses on their own mean little without a lack of capacity to commit a crime.
49. However, the Guidance lacks explicit reference to mental capacity. We appreciate that it may be helpful to be able to define a formal, easily recognisable condition, but the Guidance needs to stress that the critical issue here – underlying the mental health diagnoses – is incapacity. While ‘capacity’ is hardly referred to in the document, we note that the term is used more frequently in the Sentencing Council’s Draft Sentencing Guideline.²⁴

²¹ Under ‘The Public Interest Stage’ heading in the Code, available at <https://www.cps.gov.uk/publication/code-crown-prosecutors>

²² Pages 4, 39, 40, 42 and 43 of the draft Guidance.

²³ Page 14 of the draft Guidance.

²⁴ See the ‘Sentencing Offenders with Mental Health Conditions or Disorders – for consultation only’, available at <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/sentencing-offenders-with-mental-health-conditions-or-disorders-for-consultation-only/>

50. Further, the defences are rather mental health-oriented. There will be suspects or defendants with less obvious cognitive deficits, but the Guidance offers very little by way of describing them. Consequently, these subtle cognitive deficits cannot be fully understood by lawyers without recourse to an accompanying explanation. This explanation needs to be included in the Guidance. The 'Defences' section²⁵ needs to be amended to clarify that the presence of a cognitive deficit might affect the relevant test.
51. We are concerned that the 'Public interest' section as currently drafted pushes towards prosecution. This is particularly the case where the Guidance refers to 'nominal penalties'²⁶ which in itself pushes prosecutors towards charge and prosecution. The 'Principles' Section articulates that "the Code for Crown Prosecutors makes clear that there is a balance to be struck between the public interest in diverting a defendant with significant mental illness from the criminal justice system and other public interest factors in favour of prosecution, including the need to safeguard the public."²⁷ JUSTICE is concerned as to whether it is possible to strike this balance in cases where the person does not have mental capacity. Specifically, if someone has a significant mental illness such that diversion is the appropriate outcome, we wonder whether prosecutors should still be encouraged to weigh this up against other public interest factors in prosecuting.
52. Diversion is a credible and appropriate outcome for some vulnerable individuals and there are opportunities for diversion at every stage of the criminal justice process. However, the draft Guidance does not go far enough to set out the options for diversion at the public interest stage. Diversion ought to be considered once the evidential threshold has been passed – at the charging as well as the sentencing stage. Where the Guidance lists the factors for prosecutors to take into account, it should explicitly flag here that if the Full Code Test has been satisfied, a diversion from prosecution may be appropriate, and that these services are outlined in the next section.
53. The Guidance ought to explain that concern about how the complainant, or public generally, might react to an alternative to prosecution should never outweigh the need to make an appropriate disposal that reflects the capacity of the suspect and which minimises future risk to the public. However, the reasons for deciding not to prosecute must be

²⁵ Page 9 of the draft Guidance.

²⁶ Pages 15 and 16 of the draft Guidance.

²⁷ Page 3 of the draft Guidance.

carefully explained to the complainant, in line with the Victims Code. This again underlines why mental health training and advice from a specialist is necessary.

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?

54. We would stress from the outset that the reference to “offenders”²⁸ should be replaced with “suspects”. Although the individual might subsequently become a defendant, they are still a suspect at this stage. Moreover, “offender” is an inappropriate term to apply to a person who a prosecutor is contemplating diverting from prosecution because of mental health concerns. It would be more appropriate to use a neutral term such as “individual.”

55. In our *Mental Health and Fair Trial* report, we raised concern that where a caution is inappropriate, diversion could only be achieved by taking “no further action”. As we explained in the report, in such circumstances: “there is a lack of incentive for the suspect to address their mental health and the behaviour it may be causing. Moreover, there is currently no requirement on mental health services to provide the necessary support to prevent reoffending. It is for precisely these reasons that prosecutors will be reluctant to discontinue the proceedings as they will want to know what support there will be in place for the suspect/defendant once the proceedings have been stopped.”²⁹

56. Unfortunately, the draft Guidance builds on the previous – and inadequate – provision. A “no further action” response is unacceptable if it means that the individual will not receive any ongoing support. The Guidance should indicate the requirement for prosecutors to consult with L&D services in such circumstances to arrange support and treatment.

57. We urge the CPS to consider whether, given the development of L&D services, a management plan could be made available in the community. We further suggest that whether treatment is being received or not could form part of the public interest consideration. As an alternative to NFA, an “NFA receiving treatment” disposal could be useful, where the CPS is satisfied that treatment is available.

²⁸ Page 17 of the draft Guidance.

²⁹ Page 54 of our report.

58. Although the Working Party did not reach a firm recommendation for an alternative disposal, due to the complex considerations involved as to admissions and breach, we raise suggestions in our report.³⁰ We think that further, detailed consideration should be given to NFA disposal.
59. The draft Guidance states that “Prosecutors should be aware of what local L&D services are in place so they may advise the court appropriately”.³¹ However, it is unclear what the prosecutor is expected to advise the court about here. It is our understanding that the Guidance is to help the prosecutor determine whether to prosecute. Additionally, this seems to overlook the present reality – that it is the defence representative who is expected to liaise with L&D services and the mental health team at court.³² Where an individual is self-represented, they might be invited to speak to L&D services themselves. This paragraph of the Guidance would benefit from clarification.
60. It is disappointing that there is no reference to communication under the ‘Liaison and Diversion’ heading.³³ The draft Guidance does not allude to the possibility that either the police or L&D services should identify whether the suspect has communication difficulties and might therefore require the assistance of an intermediary. If the Guidance were to draw attention to this possibility, prosecutors could enquire as to what steps have been taken to assess the defendant’s capacity at this stage, which would further inform their decision.
61. In addition to recording information about an individual’s health needs, L&D services should also consider the person’s ability to understand and use language sufficiently to engage properly with the criminal process.³⁴ This will go some way to enabling effective participation. Prosecutors should be aware of this and the Guidance should indicate how a report might be useful or lacking in order to assist with their decision.

³⁰ See pages 26 and 99 of our report.

³¹ Page 17 of the draft Guidance.

³² This is particularly so, given that a suspect will need bespoke services based on an understanding of their individual needs and existing engagement. The defence representative can, for example, liaise with L&D services and request that they or the mental health team speak to their client and help them to engage with the court or to attend appointments.

³³ Page 17 of the draft Guidance.

³⁴ Page 18 of the draft Guidance.

62. We would like to emphasise that L&D services are not yet available in every area. Further, we are aware that in certain areas where services are unavailable, there is no information on the website or contact details addressing how to easily access an alternative service or what to do when there is no service in place.³⁵ CPS support for L&D services might encourage Government to continue the roll out of this important asset to the proper treatment of defendants with mental health concerns in the criminal justice system.

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

63. As indicated above, the 'Trial procedure' section³⁶ lacks practical guidance on how the prosecutor should approach the fitness to plead process. This section needs to include information around the following questions:

- i. What evidence does the prosecutor need?
- ii. Should he/she instruct their own experts?
- iii. Should the prosecutor contest the process?
- iv. Following a determination that the defendant is unfit, what representations should the prosecutor make about disposal?

64. As currently drafted, the unfit to plead criteria and reference to the case of *R v John M*³⁷ is misleading. In fact, if only one of these criteria are not met, the defendant is unfit to plead. We consider that this section should be reviewed in order to accurately summarise the test.

65. The second point in the list of 'features in common with the procedure in the Crown Court'³⁸ (under the 'Fitness to plead in the magistrates' court and youth court' heading) is incorrect; it is not a feature of unfit to plead in the Crown Court that the defendant requires medical evidence from two doctors that the defendant has a mental disorder requiring treatment. Rather, in the Crown Court, two doctors have to aver that the *Pritchard* criteria are met,³⁹ which is not the same thing.

³⁵ This is the case in Woolwich, for example.

³⁶ Page 20 of the draft Guidance.

³⁷ [2003] EWCA Crim 3452, at page 21 of the draft Guidance.

³⁸ Page 22 of the draft Guidance.

³⁹ *R v Pritchard* (1836) 7 C&P 303.

66. This section seems to omit the situation where a defendant is not sectionable under the Mental Health Act but is still ‘unfit’ or unable to participate in the summary proceedings. In our report, we acknowledged that the powers on disposal where an individual is ‘unfit’ are very limited.⁴⁰ We believe that it would help to include more detail on these particular circumstances.

67. JUSTICE believes that there is insufficient attention in the Guidance to the fact that most cases are in fact heard in magistrates’ courts and the procedure there is different. For example, the Guidance states that “a prosecutor who is satisfied that there is a realistic prospect of conviction shall remain so satisfied notwithstanding a likelihood that the suspect will obtain a special verdict.”⁴¹ There are differences in procedure and outcome regarding the availability of the insanity defence in magistrates’ courts that need to be highlighted in the Guidance. Insanity is not a special verdict in the magistrate’s court as the Guidance suggests,⁴² rather it is a defence and results in a simple ‘not guilty’ outcome. The Guidance should reference that, following *DPP v H* [1997], the insanity defence is only available in relation to crimes requiring *mens rea* or where *mens rea* is in issue, and *R (Singh) v Stratford Magistrates’ Court* [2007] EWHC 1582 (Admin); [2007] 1 WLR 3119, which sets out the process for pleading the defence of insanity in magistrates’ courts.

68. Although the ‘insanity’ and ‘fitness to plead’ sections⁴³ set out the law, the Guidance is lacking step-by-step guidance of when these processes and defences might arise and what options a prosecutor has when faced with one. This would be immensely helpful for prosecutors faced with complex decisions.

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?

69. Although the Guidance describes a range of vulnerabilities, we note that there is no consideration of whether the suspect or defendant might or might not understand the process or the language used when going through the criminal justice system. Individuals

⁴⁰ Pages 75 and 89 of our report.

⁴¹ Page 12 of the draft Guidance.

⁴² Page 14 of the draft Guidance.

⁴³ Pages 13-16 of the draft Guidance.

can in fact present various communication difficulties, for example a vulnerable suspect might not understand the significance of the caution, or the language used during the questioning and charge that follows. This is an important aspect for prosecutors to understand in making a decision and should be included in the Guidance.

70. Although personality disorders (“PDs”) feature in the annex,⁴⁴ they are notably missing from the list of mental health conditions in the draft Guidance.⁴⁵ This particular disorder is undoubtedly one of the most difficult areas for sentencers, however it is scarcely addressed overall in the document. This is particularly odd given the preponderance of defendants with personality disorders in the criminal justice system. We consider that this list should be amended to explicitly include PDs.

71. With regards to Asperger’s Syndrome, and in particular high functioning autism (“HFA”), we emphasise that children and adults who have HFA can have difficulty with processing language. A key feature of that difficulty is that individuals do not always know what is implied in what other people are saying, with the consequence that they misunderstand and therefore interpret what is said wrongly. Intermediaries – many of whom are, for example, speech and language therapists – and others can provide numerous examples of discussions and conversations going wrong. When describing the difficulties children and adults experience when they have autism, it may assist to provide examples of this occurring in the Annex.

72. In terms of co-morbidity, although the Guidance acknowledges that there may be “crossovers”⁴⁶ and states that individuals “may suffer a number of related conditions”,⁴⁷ we consider that this needs to be made much clearer.⁴⁸ In its current form, the Guidance seems to suggest that there is a search for a singular diagnosis. JUSTICE believes that the list of conditions should be preceded by an acknowledgment that “individuals may have one or more of these conditions”, and that these need to be dealt with together. The Draft

⁴⁴ Pages 41-42 of the draft Guidance.

⁴⁵ Page 2 of the draft Guidance.

⁴⁶ Page 2 of the draft Guidance.

⁴⁷ Page 2 of the draft Guidance.

⁴⁸ We understand that examining co-morbidity is the norm in the Family Drug and Alcohol Courts (FDAC), where there is a focus on addressing all the layers of problems so that a treatment or intervention plan can be laid out.

Sentencing Offenders with Mental Health Conditions or Disorders Guidelines should be referenced here and a similar approach taken.⁴⁹

73. We believe that learning difficulties and disabilities, and mental difficulties in the sense of psychiatric issues, are at times conflated in the Guidance. The Guidance seems to be focussed towards psychiatric issues, without making this distinction clear.

74. JUSTICE also thinks that the 'Principles' section needs to reference the fact that mental health is often not constant and can impact in some circumstances but not others.⁵⁰ Therefore although the suspect or defendant may have lacked capacity at the time of the offence, they could have regained it by the time a prosecution is brought.

75. We welcome that the Guidance observes that "many mental health conditions or learning disabilities and difficulties are not always easily recognisable and prosecutors should ensure they are alert to material or evidence that suggests the suspect or defendant may have a mental health issue, requesting clarification from the police where appropriate."⁵¹ However, we consider that the Guidance should emphasise that prosecutors need to be proactive in identifying what, if any, mental health concerns a suspect or defendant may have. Additionally, the Guidance should suggest that prosecutors request assistance from other professionals, such as L&D services, as well as from the police.⁵²

Conclusion

76. We are impressed by the efforts being made to update the CPS Guidance and the attention that the CPS is giving to mental health. We reiterate that mental health is an important issue that needs careful thought and a practical approach. Done properly, the Guidance has the potential to radically improve the treatment of vulnerable people in the criminal justice system. We believe that the recommendations we make above are the most

⁴⁹ See the 'Sentencing Offenders with Mental Health Conditions or Disorders – for consultation only', available at <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/sentencing-offenders-with-mental-health-conditions-or-disorders-for-consultation-only/>. In particular see the third point in paragraph 2, which states that: "it is not uncommon for people to have a number of different conditions, 'co-morbidity' and for drug and/or alcohol dependence to be a factor".

⁵⁰ See the Mental Capacity Act 2005: Code of Practice 2007, (TSO, 2007), para 4.26 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf.

⁵¹ Page 3 of the draft Guidance.

⁵² Page 3 of the draft Guidance.

effective and practical way of achieving an appropriate response to vulnerability. JUSTICE would welcome ongoing dialogue with the CPS as the draft guidelines develop following the consultation phase.

JUSTICE
4 June 2019