



Mental Health Conditions and Disorders: Draft Legal Guidance

Response of the Criminal Bar Association

June 2019

Introduction

The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

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 draft legal guidance correctly states that the evaluation of the public interest stage in a case involving a mental health condition or disorder is likely to be a nuanced exercise that has to balance the needs and culpability of the suspect as against the risk posed to the public by the repetition of unlawful conduct.

The Code helpfully requires consideration of i. seriousness of the offence; ii. likelihood of re-offending; and iii. the need to safeguard the public. Plainly where there is any realistic prospect of the public being put at risk by a suspect that will always militate heavily in favour of the public interest test being met.

The draft legal guidance identifies four matters that should be considered to bear positively in a determination on whether the public interest is engaged: i. deterrent effect; ii. justice for victims by a finding of the court; iii. public confidence in having allegations tested in public and statutory tools making provision for mentally disordered offenders being utilised; and iv. wider public interest in judicial determination and public ventilation of complainants' evidence.

The CBA agrees with proposed factors identified. It considers that careful consideration is required when considering the public interest test in cases involving mentally disordered suspects. The criminal law makes careful provision for situations in which suspects who were either disordered at the time of the commission of an offence or are so disordered at the time of their trial that they are unable to take an effective part in proceedings. The different range of disposals available to sentencers in these circumstances are a reflection of the fact that society needs and expects protection from mentally disordered offenders but that they are not deserving of punishment in the same way as those who commit offences and are not found to be disordered in any way.

Plainly there is potential for the public to be protected by operation of the civil sections of the Mental Health Act but significantly greater safeguarding is afforded by the disposals available to criminal judges.

The CBA considers it important that prosecutors reminded to weigh into account any evidence of an adverse impact on the suspect's health or disability of a prosecution. It does not serve public confidence in the administration of justice to pursue proceedings where the circumstances of an accused, in particular evidence of a likely substantial impact on their health, would make such proceedings unseemly or oppressive. Such matters require careful analysis and consideration.

Protection of the public should always be the pre-eminent consideration in determining whether a prosecution 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?

The CPS should be commended for incorporating the section of diversion and it is to be hoped that it should be carefully applied in practice to ensure that only where absolutely necessary are suspects brought before the criminal courts.

Rightly diversion should be considered only once the evidential test is met. It is noted that a caution or conditional caution will not be appropriate where there is any doubt about the reliability of admissions made. It should perhaps be emphasised that where potentially unreliable admissions form the mainstay of the evidence considered in the case then the prosecutor should reflect on whether the evidential test has truly been met.

The requirement that prosecutors should be aware of what local Liaison and Diversion (L&D) services are in place is a beneficial expectation but this, of course, will only be of use in practice where such services are properly funded and known about. Certainly, it is not the belief of the CBA that these services are currently well known to barristers.

It may be that some complainants may be especially understanding that diversion is being considered in circumstances where a suspect is shown to be disordered and it would be worth emphasising in this section that the views of complainants are always an important factor in reaching determinations about the public interest.

Q3 Do consultees agree or disagree that the guidance clearly and accurately sets out the procedures for fitness to plead?

In respect of the Crown Court, the position is covered by Statute.

The position in the magistrates and Youth Court should be the same as the procedure in the Crown Court. It would be of assistance for the Prosecutors to make plain that the CPS considers that a similar procedure to Crown Court procedures should be followed in Youth Court and Magistrates Court proceedings including the requirement for expert evidence.

There is a dilemma in the Youth Court ("YC") on how vulnerable child defendants are dealt with. As identified in the legal guidance, there is not any explicit statutory framework which sets out the process of how to deal with young people and children who are found unfit to plead/stand trial. It appears to be a creature of common law drawn from very limited statutory sources. It may be that that is because it was never envisaged that the YC would have to deal with any child that was found to be so impaired that they would not be able to engage with the process in any meaningful way.

Moreover, it is a fact that diagnosis and indeed understanding of certain disorders e.g. Autism have moved on significantly since these matters were last considered by Parliament and indeed the courts. DPP –vs P is now an authority which is nearly ten years old in which time by way of illustration there has been an explosion of mobile phones, tablets and the internet. Not only has technology moved on but there is now a greater awareness and understanding of conditions which may affect young persons and children.

We still rely upon a Victorian legal test for fitness to plead and trial in the courts which may now be viewed as a blunt instrument which no longer reflects the now more nuanced approach to neurology, psychiatry and the law. Similarly the Mental Health act as applied within the criminal courts with its requirement for a treatable illness (even as amended by various Mental Health acts such as the 2007 version) perhaps no longer reflects the true position that all courts now regularly face.

In parallel to all of this is not only a greater understanding of the impact of sexual offences but also a greater willingness to report allegations. Equally the case law has made it clear that the Youth Court should retain jurisdiction for all but the most grave crimes.

These class of cases are rare but place the prosecuting authorities in an almost impossible position of having to consider the Public Interest, impact upon complainants whilst balancing the needs of incredibly vulnerable accused whose very vulnerabilities potentially make them a risk to themselves and the Public. There are very limited diversions available and appear to vary Police force to Police force.

Moreover, there is no funding available to criminal solicitors to address these issues for formal presentation to the CPS for consideration prior to charge. In any event until charge, there can be logically no issue of fitness to plead as there is nothing to plead to.

The Police are thus faced with disclosures being made which they must investigate appropriately and sensitively as they will usually create child protection issues as the complainant is usually younger than the biological age of the accused. They are then faced with interviewing someone who under PACE is almost certainly unfit for interview and if properly advised will be 'no comment'. Again, there can be no alternative diversions unless there is some admission of guilt.

So, the matter is sent to the CPS for pre-charging advice (please see above though) who have to consider the Full Code test and invariably given the gravity and nature of allegations together with the absence of any formal medical input, charging results. The intractable issue now for the CPS is that there is seemingly no adequate process or disposal before the Youth Court though that is only one of the criteria for charging. Yet the child complainants need resolution and protection too and in particular where there has been coercion and/or violence.

This is of course not a full consideration of the position as for example it has not considered the Human Rights Act or Family Law position which of course would form part of any review.

The simple position is that there is no proper procedure in the YC and until one is either devised or the superior courts rule upon the issue this will remain a vicious circle with no adequate resolution which prosecutors will need to consider. The criminalisation of children and young people is of particular concern and this is doubly so where the child or young person has additional needs. The long-term consequences may prove disproportionate given their age and vulnerabilities.

Question 4

Do consultees 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

It largely covers the main types of commonly encountered issues and should be applauded for signposting to the specialist websites for providing further information. However, there is concern that this provides only very basic explanation and that prosecutors should be aware of those limitations. Prosecutors should be warned about use of terminology which may have a specific meaning within a psychiatric/medical context e.g. 'mild' learning difficulties does not mean limited/negligible but means that the way it may affect the person is mild within a given range from severe to average. Similarly there is inherent risk in using without qualification assertions over mental age and/or intellectual function e.g. high intellectual function does not necessarily mean that the person is gifted, intelligent or academically equipped but rather that within the range of how they might function they are at the higher end of function rather than ability.

The definition of Autism and Aspergers syndrome has been replicated from the NAS site in part thereby losing some of the nuance of the definition. Where such material is reproduced then it should clearly be attributed. Aspergers should not be separated – it

is Autism and to make it separate implies that is in some way not Autism. There is no mention of the lack social skills, sensory conditions or what is termed as the 'triad of impairments' . Autism makes for atypical ways of thinking, moving, interaction as well as significant differences in sensory and cognitive processing. Autistic people may have episodes where their bodies/minds become overloaded resulting in a shutdown which may manifest itself as extremely agitated or volatile behaviors known colloquial as 'melt downs'. Once one of these begins, the person is not fully in control of their conduct/

Particular care is required with conditions such as Autism which may affect criminal liability in offences where the mental element is crucial such as conspiracy or joint enterprise or offences that require a specific intent.

There is a need to deal more specifically with ADHD which is probably one of the most significant neurodiverse conditions that regularly features in the CJS and prosecutors should be sign posted to aaduk.org in the general list.

Similarly, depressive illnesses up to and including post-natal depression warrants its own special section.

Post-traumatic stress disorder (PTSD) also warrants its own section. This is applicable to veterans and the NHS is running awareness campaigns to raise awareness on this topic for criminal justice practitioners.

Furthermore, the Advocates Gateway and the Youth Justice Legal Centre websites have useful information mental health diagnosis or diagnosis for children or young persons with an autism diagnosis

<https://www.theadvocatesgateway.org>

<https://yjlc.uk/legal-materials/autism/>

The need to understand the main features of conditions requires Prosecutors to have received specialist mental health training in order to apply the information in Annex A.

Question 5

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

It is heartening to see the approach that the CPS is hoping to take both generally and in respect of diversion. Diversion rather than criminalisation serves the public better in the long term by providing effective interventions and treatments which should work towards addressing the core issues that may under lie the causes of offending

It should be noted that very often, it is precisely due to the accused's mental health/disorder that they have come into contact with the CJS. A conviction may only serve to create a revolving door whereby the CJS increasingly displaces proper interventions.

Prosecutors should also have in mind the principle aims of the Youth Court when dealing with children and young persons who are also mentally disordered (SGC Youth guidelines bear repetition).

There is frequent reference to punishment in the legal guidance but it is hard to reconcile that with a defendant who is being punished for the mental health/disorder that causes them to come into contact with the CJS unless it is something wholly within their control.

Equally the argument of deterrence requires some reconsideration as it begs the questions of deterring whom and how as well as its efficacy.

The guidance deals with intermediaries and the current law and criminal procedure rules. The CBA considers the need to ensure effective participation in the trial process is fundamental to the safety of any conviction. If a registered intermediary can assist a defendant, then prosecutors should be ready to support a defence application for such assistance.

Finally, prosecutors should guard against making assumptions and/or acting on reliance of information provided by the Police without reference to other sources. The Police are not specifically trained to identify or assess how mental health or /mental disorders may effect a person or case which are matters that should be considered with psychiatric evidence who are better placed to provide the information. Reliance on school records (which may not reflect the whole position) and/or employment histories are to be discouraged.