Our response to the consultation on prosecuting defendants with mental health conditions

Consultation details

Title of consultation: Mental health conditions and disorders: draft legal guidance

Source of consultation: Crown Prosecution Service

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For more information please contact

Lorel Clafton
Equality and Human Rights Commission, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX
0207 832 7800
lorel.clafton@equalityhumanrights.com
Background and summary

About the Commission

The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited by the UN as an ‘A status' National Human Rights Institution in recognition of its independence, powers and performance.

Our inquiry into access to justice for disabled defendants

We are currently carrying out an inquiry into the experiences of disabled defendants. Our main focus is people with cognitive impairments, mental health conditions and neuro-diverse conditions, including autism and Attention Deficit Hyperactivity Disorder (ADHD). We are looking at whether the needs of these individuals are properly identified in the criminal justice system, and whether adjustments are put in place so that they can participate fully in court processes. Our inquiry focuses on the pre-trial stage, which is the period after a person has been charged but before a trial begins. This covers aspects of the criminal justice process in which prosecutors are involved - including the decision to maintain a prosecution once a mental health condition has been identified - and where the Crown Prosecution Service has a role in, for example, setting policy or providing guidance. More information about the inquiry, including the terms of reference, is available on our website.
Summary of our response

The current evidence base indicates a high prevalence of mental health conditions, cognitive impairments and neuro-diverse conditions among defendants. Research suggests the needs of these individuals in the criminal justice system are not consistently understood or met.

In this context, we welcome the proposed new legal guidance on prosecuting defendants with mental health conditions. We support the guidance for prosecutors to consider mental health and relevant impairments at the public interest stage, including the potential detrimental impact of a prosecution on the individual. We also welcome the inclusion of a new section on liaison and diversion. We have identified areas for further consideration, including the extent to which prosecutors can make a suitable assessment of a person’s mental health or impairments. We recommend that the guidance include more information on effective participation in practice, and that it make clear that consideration of adjustments should always be relevant in assessing fitness to plead, with the ‘unfit to plead’ procedure used only as a last resort where no procedural adjustments or other forms of assistance would enable a defendant to participate effectively. While we have answered each of the consultation questions, we have not commented on areas of policy that are outside of the Commission’s specific remit and expertise, or that are under active consideration in our inquiry.

Through our inquiry we are working to understand better how the needs of defendants with mental health conditions, cognitive impairments and neuro-diverse conditions should be identified and met. We would welcome further engagement with the Crown Prosecution Service after the inquiry concludes in December 2019. At that stage we will be able to comment more fully on the evidence and issues relevant to the prosecution of defendants with mental health conditions and other impairments, based on our findings.
The legal framework

Duties to consider and make adjustments for disabled defendants arise under both human rights and equality law.

Human rights law

Article 6 of the European Convention on Human Rights (ECHR) protects the right to a fair trial and provides for certain minimum rights for those charged with a criminal offence. Article 14 ECHR prohibits discrimination in the enjoyment of convention rights.

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) requires states to ensure that disabled people have effective access to justice on an equal basis with others (article 13). Adjustments should be made as far as necessary to put disabled people on an equal footing with other parties in the proceedings, and equal to the position of a defendant without their impairment.

Equality law

Public bodies are required under the Equality Act 2010 to make reasonable adjustments for those meeting the definition of disability as set out in the Act. Reasonable adjustments must be made to policies, procedure and practice to ensure that disabled people are not put at a substantial disadvantage, and as far as possible that their ability to participate effectively in their trial is as close as possible to that of non-disabled defendants. The duty is anticipatory, which means that public bodies are required to think in advance about the needs of disabled defendants and identify adjustments to meet them.

A duty to consider reasonable adjustments also arises under the Public Sector Equality Duty (PSED). This requires public authorities, including the

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1 Other relevant articles of UNCRPD include Articles 1, 2, 4 and 5.
Crown Prosecution Service, to identify disadvantages that disabled defendants may experience, and consider what steps could remove or minimise them, or what adjustments could be made. The PSED is anticipatory and ongoing, which means that equality considerations must be reflected in the way policies are designed and how services or functions are delivered, and kept under review.

As a result of the ‘judicial exemption’ provision in the Equality Act 2010, the duty to make reasonable adjustments under the Act does not cover a decision not to commence or continue criminal proceedings, or anything done in relation to that decision.²

**Our consultation response**

**The decision to prosecute**

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?

We welcome the guidance to prosecutors to take a suspect’s mental health and impairments into account when deciding whether a prosecution is in the public interest. In particular we support the guidance to consider the effect of impairments on the suspect’s culpability, and the potential effect of a decision to prosecute on their mental health or impairment. Certain impairments may also affect a suspect’s ability to understand and participate in the criminal justice process, which could lead to unfairness if adjustments are not made. We further welcome the inclusion of guidance to consider mental health or disability in relation to ‘confession evidence’ and whether

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appropriate safeguards have been observed, for example in police questioning.

It may be necessary for the Crown Prosecution Service (CPS) to consider further the extent to which prosecutors are able to evaluate a suspect’s mental health or other impairments, and to assess the potential impact of a prosecution. The issue of identifying need is a central focus of our inquiry. We are engaging with and seeking input from the CPS as part of the evidence gathering to inform our work, and we will share our findings and recommendations when they are available so that we can support improved practice.

In considering the relevance of mental health and disability in a decision to prosecute, we would emphasise both the range and prevalence of mental health conditions, cognitive impairments and neuro-diverse conditions among those who are in contact with the criminal justice system. We set out more detail on this point in response to question 4.

**Diversion from prosecution**

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 pleased to see the inclusion of a new section on diversion from prosecution, and we support consideration by prosecutors of whether an alternative to prosecution is appropriate. We welcome the guidance around the use of cautions or conditional cautions, recognising that they are not appropriate where a person’s mental health or other impairments would prevent them from understanding the significance and implications of accepting a caution and providing informed consent.
As we raised in question 1, it may be necessary for the CPS to consider further the extent to which prosecutors can make an assessment of the suitability of a prosecution or out-of-court disposal for a defendant, taking into account their mental health or impairment. We expect to be able to further inform practice in this area through our inquiry.

We would emphasise the balance for prosecutors between diverting people away from prosecution where it is appropriate and necessary, and ensuring that the criminal justice system is adapted to meet the needs of disabled people and that adjustments are provided to enable full participation in the process. It is important to ensure that diversion does not lead to a denial of fair trial or other human rights.

Fitness to plead

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

We are pleased to see a reference in this section to the relevance of modifications to the trial process and special measures to the assessment of whether a defendant is fit to plead and stand trial. However, we consider this statement should be expanded and strengthened to make it clear that consideration of such measures is a necessary element of this assessment. The ‘unfit to plead’ procedure denies a defendant their right to a full trial and should only be used as a last resort where no procedural adjustments or other forms of assistance will enable a defendant to participate effectively.3

We also consider that the section on ‘Effective Participation’ should be expanded to explain what this means in practice, to help prosecutors identify when adjustments for defendants are necessary.4

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4 See eg SC v United Kingdom (2005) 40 EHRR 10, paras. 28-29.
Through our inquiry we are exploring which factors promote participation and which adjustments are effective. As part of this we are considering a number of areas referenced in the guidance, including the role of intermediaries and the use of video links. When we conclude our inquiry we expect to be able to provide evidence on the types of adjustments that can support participation.

**Information for prosecutors about mental health conditions**

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?

Given the nature of the Commission’s role and expertise we cannot comment on whether the information in Annex A is comprehensive. However, we note that the Annex covers the main conditions we outlined in the terms of reference for our inquiry, following engagement with experts (although this list was not intended to be exhaustive). There is one exception to this, which is foetal alcohol syndrome, and we recommend this is added. We also recommend that further information to support prosecutors is added for those conditions that are listed in Annex A but where no definition is provided – including bipolar disorder, anxiety and post-traumatic stress disorder.

We recommend that the guidance highlight to prosecutors the high prevalence of mental health conditions, cognitive impairments and neuro-diverse conditions among people who are in contact with the criminal justice system. Existing research indicates, for example, that an estimated 39 per cent of people detained in police custody have a mental health issue.\(^5\) Between 11 and 22 per cent of suspects detained by the police may be at

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\(^5\) See NICE (2017), *Mental health of adults in contact with the criminal justice system*. 
risk of vulnerability and require the assistance of an appropriate adult.\textsuperscript{6} 76 per cent of women and 40 per cent of men in prison on remand have a common mental health disorder,\textsuperscript{7} and almost half of the male prison population may suffer from some degree of traumatic brain injury.\textsuperscript{8} Prosecutors should also be aware of the possible co-occurrence of more than one mental health condition, cognitive impairment or neuro-diverse condition.

Through our inquiry we are exploring the barriers and enabling factors that support criminal justice professionals, including prosecutors, to identify and meet disabled defendants’ needs, including any that are arising as a result of the court reform programme and the use of video links. When we conclude our inquiry we expect to be able to provide further evidence and recommendations on the role of prosecutors in this respect.

**Further comments**

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

We recognise that the guidance may require specific legal terminology. However, we recommend that as far as possible the guidance use language that reflects the social model of disability. The social model holds that people have impairments, and frames disability as the environmental, social attitudes or other barriers that exclude or discriminate against them.

\textsuperscript{6} See National Appropriate Adult Network (2015), ‘There to help: ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police’.

\textsuperscript{7} See NICE (2017), Mental health of adults in contact with the criminal justice system.

\textsuperscript{8} The Disabilities Trust Foundation (2015), ‘The association between neuropsychological performance and self-reported traumatic brain injury in a sample of adult male prisoners in the UK’. See also ‘Making the link: female offending and brain injury’.