

T2A response to the consultation on Mental Health Conditions and Disorders: Draft Legal Guidance

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Question 1

Do consultees 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?

Young adulthood is a distinctive period of development. T2A has amassed an irrefutable body of evidence about advances in behavioural neuro-science that the typical adult male brain is not fully formed until at least the mid-20s, meaning that young adult males typically have more psychosocial similarities to children than to older adults. Those parts of the brain influencing maturity that are the last to develop are responsible for controlling how individuals weigh long-term gains and costs against short-term rewards. As the system to regulate 'reward seeking' is still evolving this affects how young adults judge situations and decide to act, including consequential thinking, future-oriented decisions, empathy, remorse, and planning. This transition and the underlying development of maturity is a process, rather than an event.

In typical brain maturation, temperance—the ability to evaluate the consequences of actions and to limit impulsiveness and risk-taking—is a significant factor in moderating behaviour and the fact that its development continues into a person's 20s can influence antisocial decision-making among young adults. Criminal behaviour typically decelerates rapidly in the early 20s, importantly including those who had hitherto been persistent offenders.

Those who persist in criminal behaviour into adulthood are more likely to have neuro-psychological deficits, including cognitive difficulties with thinking, acting, and solving problems, emotional literacy and regulation, learning difficulties and language problems associated with Attention Deficit Hyperactivity Disorder (ADHD), autism, learning and language disorders and head injuries. These deficits, particularly ADHD and traumatic brain injury (TBI, an impairment to the brain from an external mechanical force), are associated with more violent offending.

Neuro-disabilities are distinct from mental disorders or psychiatric illnesses or diseases which appear primarily as abnormalities of thought, feeling or behaviour, producing either distress or impairment of function, although they may co-exist. The prevalence of these disorders is also thought to be high in young adults and there is some overlap in how they manifest themselves behaviourally.

At the public interest stage the guidance states that, before considering the three factors specified, the prosecutor should consider “any evidence concerning the nature and degree of the mental ill health or disability and the relationship between the mental ill health or disability and the conduct of the suspect and reach a preliminary view on the suspect’s culpability.” The stage of neurological development of a young adult is an important factor in culpability. This is acknowledged to some extent in the Code for Crown Prosecutors (the Code), which states that prosecutors should consider the level of maturity of a young person, as well as their chronological age, in recognition that young adults will continue to mature up to their mid-twenties.

The guidance you are currently consulting on seeks to set out for prosecutors *how* mental health conditions and disorders might affect criminal behaviour. In a similar manner, the Extended Explanations guidance proposed by the Sentencing Council, in a recently closed consultation, explicitly defines young adults as aged up to 25 and sets out in some detail *how* the development of maturity may affect culpability. In the Code, there is more detailed guidance about when a prosecution is in the public interest when considering a suspect’s age or maturity, which focuses on the seriousness of the offence, the past record, and the absence of admission. Each of these factors might themselves be affected by maturity. There is a tendency to ratchet up the criminal justice response as a result of repetition of similar behaviour. In the case of young adults, this could be attributed to their poor decision-making, by virtue of their age, and stage of neurological development.

In addition, learning disabilities and other developmental disorders can impact detrimentally maturity. This guidance provides an opportunity to make a clearer distinction between typical and atypical maturity in young adults and to consider how each should affect charging decisions. Clarifying this distinction was recommended by the Justice Select Committee in its report *The treatment of young adults in the criminal justice system*. They observed:

Neither CPS investigating prosecutors nor sentencers have a sufficiently sophisticated understanding of maturity to weigh up how it may affect young adults’ culpability. In addition they do not routinely have the necessary information on which to make robust assessments about an individual’s maturity and hence take account of this in their reasoned prosecution and sentencing decisions. It is likely therefore that maturity is only considered primarily in cases where there is extreme immaturity.

Advocates, sentencers and prosecutors are not sufficiently cognisant of brain development and neuro-disabilities for several reasons. Our evidence suggests that they tend to pick up those who are manifestly immature compared to their peers, and therefore perhaps the most serious cases, but they do not appear to be considering these matters for young adults as a matter of course. Practices therefore do not reflect adequately the evidence on typical brain development.

We would encourage the Director of Public Prosecutions to evaluate the impact of the inclusion of age and maturity in the Code for Crown Prosecutors to satisfy herself that its use reflects properly the maturity of young adult suspects, which may be

hidden.

T2A would be keen to work with the CPS to develop more detailed practice guidance for prosecutors in how to identify and consider maturity of an alleged offender when considering factors relating to culpability in prosecution decisions. We met recently with Baljit Ubhey, who encouraged us to submit a response to this consultation as a mechanism for raising the prospect of further work in this area.

See also our publications [Pathways from Crime: Ten steps to a more effective approach to young adults in the criminal justice process](#) and [Prosecuting young adults: The potential for taking account of maturity at the charge and prosecution stage of the criminal justice system](#).

Question 2

Do consultees 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 damaging effects of engagement with the criminal justice system, which are well recognised in the CPS's approach to dealing with children, extend to young adults who are still developing their identities. We propose in our Pathways from Crime report that the use of Conditional Cautions for young adults should be strengthened and maximised.

Question 3

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

N/A

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?

The guidance notes that there are a very wide range of mental health conditions and developmental disorders, and each will impact on individuals in different ways. Annex A currently includes a range of links to external website to assist prosecutors in understanding these different conditions. Where definitions are directly provided these do not uniformly include reference to the different ways in which that condition might relate to offending behaviour.

There is a need for the CPS to devise or commission consolidated guidance to avoid the need for prosecutors to consult individual websites and interpret for themselves the potential impact on criminality or other aspects of the tests applied, with the risk that these are not well-understood. The Justice Select Committee also proposed that prosecutors receive training on the impact of typical and atypical brain development on criminality and that their understanding of maturity and its application to the Code were the subject of research to ensure that guidance is interpreted as intended.

It is also important to note in the guidance that there is a strong likelihood that there is significant scale of undiagnosed mental disorders and conditions amongst those suspected of committing crime. The CPS should work together with the police and other agencies to agree how collectively the system should best ensure that such needs are properly assessed.

Question 5

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

The guidance states that the role of the prosecutor at sentence is to assist the court to reach its decision as to the appropriate sentence. This will include drawing the court's attention to the relevant sentencing guidelines or guideline cases and the aggravating and mitigating features of the offence under consideration.

The Sentencing Council is adapting its guidelines to take account of the evidence on the development of maturity in young adults, both in relation to the application of the

mitigating factor of age/lack of maturity and for some aggravating factors for which they consider the defendant's maturity should be taken into account. As we noted above, expanded guidance for prosecutors on understanding how maturity impacts on culpability and decision-making would bring practice into line with the approach of the Sentencing Council.

Prosecutors should also have a role in ensuring that where an assessment of maturity has been undertaken, for example, by a youth offending service or HMPPS (prisons and probation), that this assessment is made available to the court to enable appropriate consideration to be given to these matters. All young adults for whom a Pre-Sentence Report is completed should include an assessment of maturity.

How did you hear about this consultation (delete as applicable)?

- National press
- **Television or Radio**
- Specialist press (e.g. Law Society Gazette)
- CPS Website
- Other website
- CPS Twitter feed
- Other Twitter feed (or social networking site)
- Other (please specify)