

CODE for CROWN PROSECUTORS – Consultation Document

1. Is the role of the Crown Prosecution Service explained clearly enough in sections 1,2 and 3?

Yes

2. Is the evidential stage of the Full test code explained clearly enough?

Yes

3. Are the public interest factors that tend in favour of prosecution explained clearly enough?

No

Although the public interest factors in favour of prosecution as listed in para. 4.12 have been expanded, in our view they do not go far enough.

Factor (b) states “a conviction is likely to result in a confiscation or any other order.” We would suggest that some reference is made here to compensation as this would better reflect offences against individual victims rather than simply confiscation which is more likely to reflect offences against the State or organisations.

Furthermore, factor (d) states that prosecution is likely where the ‘offence was committed against a person serving the public (for example, a police or prison officer, or a nurse)’. We would recommend that factor (d) be amended or expanded to reflect the nature of the service provided rather than a particular occupation. We would suggest that instead of reference to only ‘a nurse’ that this should be amended to ‘either NHS staff or Health and Social Care Staff’. The Home Office uses the phrase ‘Health and Social Welfare Associate Professionals in the British Crime Survey on violence at work. This category includes the following occupations –

- Nurses
- Midwives
- Paramedics
- Medical radiographers
- Chiropodists
- Dispensing opticians
- Pharmaceutical dispensers
- Medical and dental technicians
- Physiotherapists
- Occupational therapists
- Speech and language therapists
- Therapists n.e.c
- Youth and community workers
- Housing and welfare officers

We have noted the CPS guidance in relation to offences against police and prison officers and the existence of a specific offence of assault against these persons. We feel that this will mean that prosecutors will in most cases automatically consider this an aggravating factor.

We also note that the 'Health and Social welfare' category are according to the Home Office the occupational group most at risk of violence at work followed the group that contains police and prison officers. We would therefore suggest that the ordering of the groups in this factor be changed to acknowledge and reflect this and the 'Health and Social Welfare' group placed first.

We note and appreciate the CPS guidance on Offences Against the Person already in existence which states in the section on 'Assaults on Emergency Workers and Public Servants' that there is a "strong public interest in prosecuting such cases." We feel that this should be reflected in the Code.

Factor (g) refers to offences committed in the presence of or in close proximity to a child. We would suggest that this is expanded to include other persons who may be considered particularly vulnerable. In the context of the NHS this is most likely to include those with mental health conditions or with learning disabilities.

Factor (l) would relate to offences in which such persons were the victims but would not adequately cover situations where they were witnesses to offences. This would be relevant in residential homes or hospital ward settings where although they may not be the victim, they could be put in considerable fear or have their recovery adversely affected by witnessing offences and by effectively being forced to remain in an environment where offending takes place.

We feel that the reference to a 'vulnerable situation' in factor (h) could be clarified and/or expanded to refer to situations where the victim's employment means that they often have to place themselves in vulnerable situations. Examples include where a community health worker is the victim of an offence which takes place in a patient's home, or where a paramedic has to attend the scene of a violent incident to attend to the injured and is assaulted.

We would welcome some of the clarification as to the meaning or interpretation of 'area' and 'community' in factors (m), (n) and (o). Our concern here is to ensure that high levels of offences affecting a particular location or NHS service are considered in one of these factors. For example, would a hospital and its staff and patients be considered as a 'community'? And could serious financial loss to an individual, corporate body or society be expanded to cover the loss of an essential service, e.g. an ambulance out of action? (refer to factor (r) "the offence has resulted in serious financial loss, or the loss of an essential or emergency service, to an individual."

4. Are the public interest factors that tend against prosecution explained clearly enough?

No

At para. 4.13(b), it states that a prosecution is less likely to be needed if the defendant 'has already been given an appropriate out-of-court disposal for the offence which remains in place or which has been satisfactorily discharged.' It should

be noted that this would have to be qualified in cases where the offence is more serious than originally thought.

We refer to the recent case of R v Gore [2009] EWCA Crim. 1424. In this case, the court considered the effect of a fixed penalty notice upon a later prosecution for a more serious offence arising from the same incident. The court held that, in normal circumstances, the Crown would not be abusing its position by proceeding in such a way. As there was nothing in the statute to suggest that payment of a penalty notice in respect of an offence prevents liability for possible further proceedings where or if it transpires that a more serious and particularly a non-penalty offence has actually been committed.

The final bullet point of this sub paragraph requires further clarification, as it is not clear where a victim's right to pursue civil redress for an assault falls within this.

In our view factor (l) requires greater clarity. In such cases, will there be a requirement for such "promise" or being "informed" that proceedings will not be brought or continued to be in writing, or is it being suggested that a verbal declaration will suffice?

For obvious reasons in terms of the work undertaken by the NHS Counter Fraud and Security Management Service, we would like such assurances when given to be properly documented. Has any consideration been given to how in practice this will impact on an individual's right to pursue a private prosecution in light of case law on this particular issue?

Factor (o) covers defendants who are elderly, or was at the time of the offence, suffering from significant mental or physical ill health. In our view, it should be clarified that mental ill health is not in all cases a continuous process which absolves a person of all responsibility; it is frequently episodic in its effects.

We feel that for mental health to be considered, any such condition must have had some bearing on the offending behaviour rather than the mere existence of such a condition being a factor against prosecution. It has been our experience that in some areas both the police and the CPS have interpreted 'suffering from' as synonymous with 'diagnosed with' and have determined that the mere presence of a diagnosis means that prosecution is not an option available to them. This has led to some mental health in-patients to form the view that they are immune from prosecution and has resulted in further offences which in turn have not been dealt with. Similar difficulties have arisen where it is considered that a person being held under section under the Mental Health Act 1983 cannot be prosecuted.

No explanation has been given as to why reference in this factor to prosecute where necessary applying the Home Office (or more recently Ministry of Justice) guidance on dealing with mentally disordered offenders has been removed from the proposed draft. The key theme throughout the consultation document is consistency in 'approach' and 'decision making'. However, a vital component in ensuring that mentally disordered offenders are dealt with appropriately and consistently has been removed.

We feel that the phrase "the need to safeguard the general public" requires amendment or expansion. It is our view that those most at risk from offences committed by those with mental health conditions are most likely to be those who provide services to those persons. As we have stated above the lack of an

appropriate response in relation to offending behaviour can place these staff at risk. We would suggest that after “the general public” the phrase “or those providing service to these groups” is added.

5. Is the public interest stage of the full code test explained clearly enough?

No

It is stated at para.4.10 that public interest factors which can affect the decision to prosecute usually depends on the seriousness of the offence or the circumstances of the suspect. We feel that wider picture should be taken into account and not just the particular circumstances of the incident. The circumstances of the victim as well as those impacted by the offence should be of equal importance.

In our view, the term ‘seriousness’ requires further clarification. How is it defined? Also who would the ‘loss or harm’ be directed to? For example, a minor assault on a paramedic which results in the removal of the crew and ambulance from service for the evening may not impact significantly on the victim but could be life threatening for those who are in need of an emergency ambulance. Similarly the withdrawal of staff from an Accident and Emergency unit may have serious consequences.

While we accept that the objectives of the Sentencing Guidelines Council guidance on ‘seriousness’ are different from the objectives of the Code, there are many matters which are common to both. In the ‘seriousness’ guidance it states that not only any actual harm should be taken into account, but that any risk of harm caused by the offending behaviour should be considered. We feel that the examples provided above indicate that the public interest should also take into account the risk of harm both to the victim and to the wider community caused by the offending behaviour.

6. Is the section on out of court disposals set out in an understandable way, and does it explain clearly what disposals and alternatives to prosecution are available?

The guidance stipulates that simple cautions should be used for those who commit less serious offences.

It has come to our attention where individuals who have seriously assaulted NHS staff serving members of the public, have been given a simple caution despite the existence of previous cautions and/or convictions for the same or substantially similar offences, where there has not been significant lapse of time sufficient to conclude that it had been an effective deterrent.

Furthermore when individuals are issued with a simple caution, there is little attempt to obtain the victims view as part of the process and where this is done the victims are often advised that the method of disposal is the only available option.

Equal reference should be made within the draft Code of the importance of establishing the victim’s views to the disposal where possible and appropriate prior to any final decision being made. Please refer to the Home Office guidance (16/2008 - *Simple Cautioning of Adult Offenders*).

When a victim’s views are to be sought in relation to an out of court disposal, the victim should be made aware of any consequences that agreeing to such a disposal

would entail. For example, agreeing to a caution would mean that the victim could not pursue a private prosecution. Where a victim expresses a view that they wish to pursue a private prosecution, even if this means that a non-court disposal will not be given this should also be taken into account.

If and where possible, reinforce within the Code the police's obligation to adhere to the requirement to ensure that all records are checked prior to the issue of a caution to safeguard against inappropriate use of the disposal in order to give effect to the aims of the simple cautioning process.

7. Is there any section of the code that you think should be expanded?

In addition to those sections, we have suggested amendment to or expansion of the above, we would include here 'nominal penalty' and 'significant sentence'.

At para. 4.12(a) states that a prosecution is likely to be needed if 'a conviction is likely to result in a significant sentence'. Para. 4.13(a) states that one of the factors against prosecution is where 'the court is likely to impose a nominal penalty'.

We feel that consideration of the significance of any sentence should not be judged in relation to the range of sentences imposed by the courts on a global scale, but rather on the significance of any sentence in relation to the individual offender.

In many cases, it would appear that these phrases are often interpreted as meaning custodial sentences, particularly in relation to offenders who are being detained under a mental health section, and we feel it should be made clear that this is not what is intended. For example, we have had several reports that in cases involving assaults on staff by psychiatric in-patients, a fairly low level fine (or compensation award) has a strong deterrent effect. The impact of this on such individuals is far greater than for those who are not detained in hospital. Therefore, whilst a low-level financial penalty may be no more than an inconvenience for some people for a psychiatric in-patient, it is a significant sentence.

Views of the victims or their families (paras 4.14 – 4.15)

In our view, the Code should also take into account the views of a community or organisation affected by a particular type of offending, or who due to the nature of their activities are subjected to offending behaviour at a higher level than many others. Offending behaviour may in many instances have no easily identifiable individual victim, or may be perpetrated against an organisation e.g. public order offences, anti-social behaviour in hospitals, and fraud against NHS etc. The Code of Practice for Victims of Crime recognises this at paragraph 3.7 and in our view this should be reflected in the Code.

Re-starting a prosecution (paras. 9.1 - 9.3)

Para 9.1 states that occasionally there may be special reasons why a prosecution service will overturn a decision not to prosecute where a case is serious or to impose an out-of-court disposal.

It would be helpful to ensure that prosecutors fully explain the implications of the chosen termination process to the victim as well as the defendant in order to maintain parity. It may also be useful to advise victims of the right to bring a private prosecution under section 6(1) of the Prosecution of Offenders Act 1985 or

alternatively of the right to commence civil proceedings (as recommended in our responses to the Consultation in April 2009).

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