Consultation on
The Code for Crown Prosecutors

Summary of Responses

October 2018

CPS

Introduction

This is a summary of responses to the public consultation undertaken by the Crown Prosecution Service (CPS) on the revised Code for Crown Prosecutors (the Code).

The proposed revisions were published on 23 July 2018 and consulted on for a period of eight weeks, ending 17 September 2018.

The consultation

The purpose of the consultation was to provide an opportunity for people to comment on the draft Code, so that the final version was informed by as wide a range of views as possible.

The Code is used on a daily basis by prosecutors and the police when deciding whether or a not a suspect should be charged with a criminal offence.

The Code is periodically revised so that it reflects legal and social developments, as well as changes in prosecution policy and practice.

The current edition of the Code was published in January 2013. The proposed revisions retained the style of the 2013 Code, which introduced a shorter, streamlined version, with an overarching statement of principles. Beneath the Code sits a body of legal guidance and policies, which provide further detailed assistance to prosecutors on specific offences and topics.

The main proposed revisions to the Code in the consultation document were:

- Disclosure

  This was included for the first time as part of evidential stage of the Full Code Test (FCT): when assessing whether there is sufficient evidence to charge, prosecutors must consider the potential impact of any other material.

- Proceeds of Crime

  Prosecutors are instructed to consider proceeds of crime at various stages of a case: when considering the public interest in charging a suspect; when selecting charges; when making submissions on court venue; and when considering a defendant's offer of a plea.

- The Threshold Test

  This was clarified and simplified, to ensure it is only applied when necessary. Review of the Threshold Test is to be carried out earlier, by the time the prosecution case is served. We also proposed to extend the use of the Threshold Test to cases where it is not appropriate to apply the Evidential Stage of the Full Code Test, due to outstanding reasonable lines of enquiry.

Other proposed revisions to the Code included:

- The FCT is to be applied in most cases after reasonable lines of inquiry have been pursued, unless the prosecutor is satisfied that any further evidence is unlikely to materially affect the application of the FCT. This strikes a balance between ensuring we do not charge cases prematurely and preventing unnecessary delays in charging.

- The FCT decision may be postponed, or not made at all, if there is a failure by the police or other investigators to follow advice to pursue a line of inquiry or comply with a request for information.
- Additions to the Public Interest section included:
  - A lower culpability level if the suspect has been compelled, coerced or exploited, particularly if the suspect is a victim of a linked crime.
  - The hate crime factors were expanded to include a suspect targeting or exploiting a victim, based on any of the stated characteristics.
  - Maturity: prosecutors are reminded that young adults will continue to mature into their mid-twenties.
- There was a new paragraph on the independence of the prosecutor. Independence was key to the formation of the CPS and is still central to the way in which we work.
- Guidance on the consideration to be given to any relevant prosecution or enforcement policy of other prosecutors or Government departments.
- The approach to be taken where the law differs in England and Wales.
- Some of the language was updated, such as "court venue" instead of "mode of trial", and "children and young people" instead of "youths".

Consultation Questions

The consultation asked 4 questions:

1. Do you agree that when deciding whether there is sufficient evidence to prosecute, prosecutors should consider whether there is any other material that may affect the sufficiency of evidence?
2. Do you have any views on the revised Threshold Test?
3. Prosecutors are required to consider a suspect's / defendant's proceeds of crime when deciding whether to charge [4.14.b], when selecting charges [6.1.c], when making submissions on court venue [8.3]and when a defendant offers a plea [9.2]. Do you have any observations on these requirements?
4. Do you have any further comments on the proposed revisions to the Code?

Method of Analysis

We received 46 responses in total.

All responses have been analysed, including any received after the consultation closed. A breakdown of the source of the responses is at Annex A.

Each response to each question was analysed separately and the main points were identified and carefully considered. Not every respondent gave specific answers to each individual question but their views were considered. This summary addresses the main points made by respondents.

Outside scope

We received a number of responses that addressed issues outside the scope of the consultation or the Code, most of which we have not included in this Summary. For example:

- General observations on the disclosure process, such as the disclosure obligations of the police, the nature and extent of reasonable lines of inquiry, and the difficulties caused by social media

and large quantities of digital material. Although these matters have been considered in the formulation of the principles that we set out in the Code, the Code does not address them in detail. The CPS approach to disclosure is contained in the CPS Disclosure Manual and the joint CPS-Police National Disclosure Standards, May 2018.

- Changes to the law on disclosure, which are not the responsibility of the CPS.
- Matters relating to the Director's Guidance on Charging, such as an escalation process to review the decision or action of the police or a prosecutor.
- Matters relating to resources and operating models, such as whether the CPS or police are sufficiently resourced to carry out charging decisions in accordance with the Code revisions.
- Comments on court processes, such as whether there is an effective court process for the prosecution of persons with learning and other disabilities.
- Suggestions for changes to police or prosecution processes, such as the how tape-recorded interviews should be communicated to the prosecutor.
- Making the Code mandatory for all non-CPS prosecutors.
- References to a particular case or personal experience.

Where appropriate, we have passed on suggestions and responses to relevant CPS policy leads, so that they may consider them in the context of those portfolios.

General Observations and Key Themes

This section sets out some of the broad themes and issues that recurred in the responses we received, and provides the CPS response to each of these.

The revisions were generally well-received. For example:

- On confidence in CPS charging decisions being undermined by cases being stopped or verdicts overturned: *The proposed changes in the Code go some way in responding to those concerns and we welcome the amendments.*
- *The Code should clearly platform the full code test as a default position for prosecutors and the threshold test as an option in exceptional circumstances. We therefore welcome changes to paragraphs 4.1 and 5.1 of the proposed code, which go some way towards doing this.*
- *The additional text about the independence of prosecutors is an important and welcome statement.*
- *The public interest section is easier to read and understand.*
- *The modernisation of the Code by the plain English drafting and updating of some sections … is welcome.*

However, some respondents expressed concerns about the revisions or suggested further amendments. These are outlined below under the specific questions.

In addition, a number of respondents commented on two issues closely related to question 1, the timing of the charging decision (paragraph 4.3) and failure to follow lines of inquiry or comply with a request for information (paragraph3.3):

Timing of the charging decision

Although a number of respondents welcomed the new paragraph at 4.3, other respondents expressed reservations that the timing of the charging decision is being delayed until outstanding reasonable lines of inquiry have been pursued. We have a number of observations on this point:

- The current Code states that "in most cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed" [4.2]. The proposed revision did not, therefore, encourage prosecutors to charge at a later date than at present.
- Paragraph 4.3 is simply intended to emphasise the importance of considering material that may be obtained via further investigation, before making the charging decision.
  And it additionally clarifies when prosecutors may use their discretion to make a charging decision at an earlier stage, prior to the investigation being completed: this will apply if the prosecutor is satisfied that any further evidence or material is unlikely to affect the application of the FCT.
- However, given the responses we have received, we have decided to revise the wording of paragraph 4.3 as follows, so that it does not indicate that "in most cases" a charge would be made after all inquiries have been pursued:

  The Full Code Test should be applied:
  a) when all outstanding reasonable lines of inquiry have been pursued; or
  b) prior to the investigation being completed, if the prosecutor is satisfied that any further evidence or material is unlikely to affect the application of the Full Code Test, whether in favour of or against a prosecution.

- As we stated when we launched the consultation, our aim is to strike a balance between ensuring we do not charge cases prematurely and preventing unnecessary delays in charging. We think that the revision to 4.3 achieves a better balance, by providing more discretion to the prosecutor.
- We intend to revise the Director's Guidance on Charging, to provide more guidance on the timing of charging decisions.

Failure to follow lines of inquiry or provide information

A number of respondents raised concerns over new paragraph 3.3, which states that *prosecutors must have regard to the impact of any failure to pursue an advised reasonable line of inquiry or to comply with a request for information, when deciding whether the application of the Full Code Test should be deferred or whether the test can be met at all:*

- Some prosecutors and police respondents indicated that this has potential to cause disagreement between them.
- Some respondents identified a risk of prosecutors being too cautious and rejecting cases or delaying charge where there are outstanding inquiries or material to be reviewed, however unlikely it would impact on the charging decision.
- One respondent felt there is a risk that the CPS start directing investigations, by asking for further inquiries before providing charging advice.

Paragraph 3.3 supports the principles set out in the new paragraphs 4.3 and 4.8, final question, and is simply intended to ensure that cases are not charged prematurely. Addressing the points above:

- The clarification should help to prevent any disagreement between the police and prosecutors, as it emphasises the importance of considering what material may be obtained from further inquiries before making a charging decision.
- Paragraph 4.3 makes clear that if any further evidence or material is unlikely to affect the application of the Full Code Test, the prosecutor may make the charging decision. Prosecutors are therefore being encouraged to adopt a thinking approach and to strike a balance between premature charging and unnecessary delay, which should not result in prosecutors being overly cautious.

- Paragraph 3.3, which states that *prosecutors cannot direct the police or other investigators*, reflects current best practice, as set out in the Director's Guidance on Charging. This allows the prosecutor to provide pre-charge action plans to the police and to be proactive in identifying and, where possible, rectifying evidential deficiencies.

Revisions

In light of the responses received, we have made a number of revisions to the final version of the Code. The main revisions are explained below under each question.

Summary of Responses to Specific Questions

This section provides a summary of the key points and themes raised in response to each of the questions, and the changes made as a result of the feedback.

Question 1

Do you agree that when deciding whether there is sufficient evidence to prosecute, prosecutors should consider whether there is any other material that may affect the sufficiency of evidence?

There were 37 responses to this question.

A number of respondents welcomed the introduction of this requirement, pointing out that:

- *It will reduce the number of cases that are subsequently abandoned and also assist in enhancing the quality of cases that the Police present to the CPS.*
- *It is in the interest of our investigations and of justice.*
- *Referrals made to the appellate courts … involve the non-disclosure of material which would have been caught by the proposed new test, implemented properly and complied with.*
- *This approach could save costs and time for the parties and the courts.*
- *It is a good idea in principle, and prosecutors ought to be doing this anyway.*

However, other respondents expressed reservations, some of which are addressed below.

<u>Main changes as a result of feedback:</u>

1. At the request of a number of respondents, we have amended "further inquiries" to "further reasonable lines of inquiry", to be consistent with paragraph 4.3.

2. Some respondents suggested that we define or limit the scope of the "other" material that the prosecutor is required to consider when making a charging decision.

The "other" material clearly does not lend itself to an exhaustive definition, as this will depend on the facts of the particular case. However, at the request of one respondent, we have clarified that the "other material" includes examined material in the possession of the police.

<u>Suggested changes that we have not made included</u>:

1. Some respondents suggested that the paragraph should be re-worded to align it with the statutory test for disclosure under the Criminal Procedure and Investigations Act 1996 (CPIA), using the language and referencing the obligations of the prosecutor under the CPIA.

We decided not to reference the CPIA, nor to use its language, not simply because the CPIA disclosure regime applies post-charge, but also because the focus of this paragraph is wider than a prosecutor's obligations under the CPIA regime. This paragraph is aimed at the investigation more broadly, and encompasses both potential evidence and disclosure material that:

- May undermine the prosecution case or assist the defence case.
- May strengthen the prosecution case or weaken the defence case.
- Is in the possession of police and has been examined (for example, the material could be on draft disclosure schedules).
- Is in the possession of police and has not yet been examined (for example, it has been seized).
- Is not in the possession of the police but may be obtained via further investigation.
- Has been revealed to the prosecutor (for example, when seeking advice or a charging decision) as material that may undermine the prosecution case or assist the defence case: as per The Director's Guidance on Charging 2013, paragraph 3.
- Has not been revealed to the prosecutor (who, applying this paragraph of the Code, may make enquiries of the police as to whether there is any other evidence / material that may affect the assessment of the sufficiency of evidence).

2. One respondent suggested that a negative consequence of this requirement is that investigators may undertake unnecessary work, particularly in cases that do not eventually lead to a charge.

   We acknowledge that such an outcome can be frustrating. However, the revision is intended to encourage prosecutors and investigators to consider the scope of the investigation and potential further material at an early stage, so that fewer cases are charged and subsequently discontinued, following further inquiries.

3. Some respondents expressed concern that, although it is good practice to submit disclosure schedules prior to a charging decision, the Code's emphasis on pre-charge consideration of disclosure material may lead to a proposal that schedules are required in all cases prior to a charging decision, effectively bringing forward the entire disclosure review pre-charge.

   The revisions are not intended to alter the current best practice on disclosure work. This is contained in the joint CPS-Police National Disclosure Standards, May 2018, and envisages the prosecutor being fully aware of any material that may have an impact on the charging decision before the decision is made: paragraph 2.1.5 requires any material which may affect the decision to charge to be brought to the attention of the prosecutor; and paragraph 2.1.6 stipulates that the pre charge report must highlight to the prosecutor any material that may undermine the prosecution case or assist the defence. As one respondent acknowledged, best practice is to encourage the provision of disclosure schedules pre-charge. We also note that although disclosure should be considered pre-charge, it is a continuing duty throughout the life of the case.

4. One respondent suggested that we set out in more detail the scope of the prosecutor's disclosure obligations pre-charge, during charge and post-charge, and use the CPIA language throughout.

   We disagree, as we have separate detailed guidance on disclosure in the CPS Disclosure Manual. As stated above, the CPIA does not apply pre-charge and we have therefore not confined the Code to its ambit or its language.

5. One respondent objected to the prosecutor having to consider all material in the possession of investigators at the charging stage, as it would not be reasonable or practicable. Another respondent asked how will prosecutors be able to assess the significance of the material before it has been examined?

   Paragraph 4.3 does not oblige the prosecutor to examine all material at this stage, some of which may not yet be in the possession of the investigator. However, it cautions against a case being charged too early, without an understanding of the likelihood of further evidence or material affecting the decision. In practice, a prosecutor would need to receive an assurance from the investigator / disclosure officer that there is unlikely to be any further material, whether in their possession or not, that could impact on the decision.

6. The same respondent suggested that it may be helpful to set out the types of cases in which certain categories of material often turn out to have an impact on the sufficiency of evidence, and for prosecutors to be particularly proactive in these cases. Another respondent suggested the Code may include examples of when a charging decision would not be made because of the existence of un-reviewed material.

   We do not provide this level of detail in the Code, which is intended to set out the general principles to be applied in making decisions. More detailed guidance will be provided in the Director's Guidance on Charging but each case will depend on its own facts.

Question 2

Do you have any views on the revised Threshold Test?

There were 33 responses to this question.

<u>Main changes as a result of feedback:</u>

The second scenario

This proposal attracted a lot of comment and divided opinion. A number of respondents welcomed its introduction. For example:

- *The revised Threshold Test is excellent.*
- *Often investigating officers and custody officers apply the Full Code Test prematurely because they believe they have reached a realistic prospect of conviction, without addressing the outstanding reasonable lines of inquiry which could impact on the decision.*
- *The revised Threshold Test appears more comprehensive than the former version … [and] much more user friendly.*

However, others expressed a number of concerns with the second scenario. The most significant objections were:

- It is inappropriate to use the Threshold Test in cases where the further material sought may exculpate the suspect, and so weaken the prosecution case. Previously, the Threshold Test has only been used where the further material sought is inculpatory, and will strengthen the prosecution case.
- The second scenario sits unhelpfully with paragraph 4.3 and risks confusion as to whether outstanding lines of inquiry are or are not a good reason to postpone the Full Code Test or charge under the Threshold Test.

- It will result in an increase in the use of the Threshold Test.
- It is unclear in what circumstances it applies, and what is subsequently required in order to apply the Full Code Test.
- It appears to be similar to the first scenario.

We have given careful consideration to all of these concerns, as well as the opinions of those who supported its introduction, and we have concluded that it would not be appropriate to introduce the second scenario into the Threshold Test. We have therefore deleted it altogether from the final version.

However, we have revised the first scenario (see below), so that prosecutors consider material which may point away from as well as towards a particular suspect, when considering what evidence / material further investigations may provide, in order to decide whether to apply the Threshold Test. This revision reflects a number of responses, including from both defence and prosecution practitioners, which indicate that this approach is more principled and practical, and more accurately describes what actually happens in a Threshold Test case.

The First Scenario

1. As stated above, a number of respondents supported consideration of potential exculpatory material when applying the Threshold Test. As one respondent pointed out, because the proposed amendment focusses solely on evidence that might support guilt (since such evidence is required to meet the Full Code Test), it creates a real risk that lines of inquiry that point away from the suspect's guilt will be overlooked.

   We agree and we have amended paragraph 5.5, to remind prosecutors that when considering whether it is appropriate to apply the Threshold Test, thought must be given to whether there is material which points away from, as well as towards, a particular suspect.

2. One respondent stated that in a significant proportion of cases the Threshold Test is applied in expectation of evidence (eg from forensic or crime scene examination) that the police hope will strengthen the prosecution case, but the resulting evidence does not do so. They suggest that where the results of such examination cannot reasonably be predicted, prosecutors should be encouraged not to apply the Threshold Test.

   We agree that the Threshold Test should not be used in these circumstances. We regard paragraph 5.5 as amended (see above), to be sufficient to ensure that prosecutors do not conclude in these circumstances that there are reasonable grounds to believe that the continuing investigation will provide evidence to meet the Full Code Test. We shall also cover this point in revised e-learning on the Code for Crown Prosecutors.

3. A number of respondents requested that we re-insert in paragraph 5.7 the requirement that the prosecutor consider "the charges that all the evidence will support" when reaching a decision to apply the Threshold Test.

   We have given this further consideration and we agree to re-insert it. In particular, it will assist the prosecutor to identify the correct charges under the Threshold Test, and the further evidence that is required in order to apply the Full Code Test.

4. On reflection, we have added a further consideration (iv) under the second condition, at paragraph 5.7, which requires prosecutors to consider whether the further evidence could be obtained within any available pre-charge detention period.

Review

The revisions to the sub-section on *Reviewing the Threshold Test*, which encourages prosecutors to be proactive in securing the further evidence and which brings forward the date by which the Full Code Test is applied, were generally well-received.

One respondent welcomed the bringing forward of the review from the expiry of custody time limits to the service of the prosecution case. However, they thought the Full Code Test should be applied even earlier, as soon as the anticipated evidence is received.

We agree and we have amended the text accordingly.

Suggested changes that we have not made included:

First Scenario

One respondent queried whether the revised Threshold test restricts its use to particular offences only.

It doesn't – we have not changed the ambit of the use of the Threshold Test.

Three conditions

1. One respondent requested that we insert criteria to be used to assess the seriousness of the case.

   We have clarified that seriousness and the circumstances of the case should be assessed in relation to the alleged offending and the level of risk created by granting bail. We think that to insert criteria would be overly prescriptive and cumbersome, since this assessment is to be made on a case by case basis.

2. Another respondent asked us to define a "dangerous" suspect, under the second condition regarding bail.

   Again, we do not think that this would be beneficial, as each case will be assessed on its own facts.

3. One respondent suggested that the UN 1989 Convention on the Rights of the Child, in particular Article 37(b) on using custody as a last resort, should inform prosecutors when considering the three conditions of the Threshold Test.

   The public interest section on the suspect's age and maturity already references this UN Convention, so we have not referenced it again in the section on the Threshold Test.

Question 3

Prosecutors are required to consider a suspect's / defendant's proceeds of crime when deciding whether to charge [4.14.b], when selecting charges [6.1.c], when making submissions on court venue [8.3]and when a defendant offers a plea [9.2]. Do you have any observations on these requirements?

There were 29 responses to this question.

The additional considerations relating to the proceeds of crime were welcomed by many respondents, and this question did not attract as much debate as the other questions.

Examples of the positive feedback we received:

- *As a matter of public policy, proceeds of crime is a relevant factor to weigh in the balance at various stages of a case.*
- *This highlights a much underused tool at present … any further focus or re-emphasis at the decision making stage is welcomed.*
- *Hopefully this new guidance will encourage greater awareness of the importance of financial evidence as a key indicator of an individual's involvement in criminal activity.*
- *The public should know that we consider these issues, as any good prosecutor would already.*

Main changes as a result of feedback:

One responded agreed that the recovery of benefit is a relevant factor in considering whether to accept an offer of a guilty plea but thought that the wording we had used at 9.2 had not allowed for sufficient prosecutorial discretion.

We agree and we have amended the wording, which now more closely reflects the wording at 6.1.c, on the selection of charges.

Suggested changes that we have not made included:

1. A number of respondents suggested that references to confiscation in the Code serve little purpose, given the breadth of the criminal lifestyle provisions and the power to commit a case to the Crown Court for a confiscation order to be considered.

   We disagree, as it is incorrect to say either that confiscation will always be possible or that the lifestyle provisions will always apply. Charging decisions may affect both. However, the main value of the Code changes is to remind prosecutors of the importance of the proceeds of crime and to prompt them to give it consideration at the earliest stages of a case. The revisions also reflect the public policy imperative of stripping offenders of their proceeds of crime, which a number of respondents acknowledged.

2. One respondent queried whether the proposed amendment is intended to encourage prosecutors to choose between offences based on the potential size of a confiscation order; another expressed concern that the perception may be that prosecutors are overcharging to get criminal lifestyles into cases.

   That is not our intention: the revisions are not intended to encourage prosecutors to select lifestyle charges to maximise asset recovery, especially as this may produce disproportionate confiscation orders.

3. One respondent suggested that charging decisions should not just be about the likely success of proceeds of crime outcomes and it could be made clearer that this will not dislodge existing principles concerning the need to make fair, just and proportionate decisions.

We agree that the proceeds of crime is but one factor to consider when making a charging decision. But we think that this is clear from the large range of other factors that we set out under the seven questions to consider in the public interest section, which include proportionality. We also indicate that the questions identified are not exhaustive. Moreover, the general principles in section 2 make clear that prosecutors must act independently and in the interests of justice, and when making decisions must be fair and objective.

4. One respondent queried whether pre-charge considerations of the proceeds of crime would place strain on the economic crime units of the police. Another suggested that we should confine these considerations to cases involving organised crime groups, to limit the impact on financial investigators.

   We disagree, as it is good practice to consider proceeds of crime implications as early as possible, and we do not think this would place an excessive or disproportionate burden on economic crime investigators. As one respondent observed, since financial investigators currently investigate to the best case scenario, the changes should not place undue strain on their work.

Question 4

Do you have any further comments on the proposed revisions to the Code?

There were 39 responses to this question.

<u>Main changes as a result of feedback:</u>

Section 1

1. Some respondents requested that we use the word "complainant" instead of "victim" where appropriate, and that we define both terms.

   In live cases, the CPS uses the term "complainant" during the investigation and trial, and the term "victim" post-conviction. However, in line with the terminology used by other Government departments and agencies in the criminal justice system, we use "victim" as a global term for victims and complainants in documents such as the Code. We have therefore retained the word "victim" in the Code. However, as requested, we have inserted a definition in paragraph 1.4, to explain that in the Code the term "victim" is used to describe a person against whom an offence has been committed, or the complainant in a case being considered or prosecuted by the CPS.

Section 2

1. One respondent pointed out that the line that prosecutors are "independent from the police and other investigators" does not reflect the position at some other agencies, where prosecutors and investigators work together.

   We agree and we have revised the line accordingly.

2. On reflection, we have decided to address misconceptions about the role of the CPS and incorrect inferences that are sometimes drawn from our decisions. At paragraph 2.2 we clarify that it is not a function of the CPS to decide if a person is guilty, and an assessment of a case is not a finding or implication of guilt or criminal conduct. At paragraph 2.3 we clarify that a

decision not to bring criminal charges does not necessarily mean that an individual has not been a victim of crime, as is not the role of the CPS to make such determinations. And at paragraph 2.8 we explain that our role is to be even-handed in our approach to cases, in respect of suspects / defendants and victims.

3. Paragraph 2.12 has been revised to clarify that it is CPS prosecutors who may, where they think it appropriate, have regard to a prosecution policy or Code of another prosecutor; and we have also made reference to enforcement policies, at the request of one respondent.

Section 3

1. We have added the word "reasonable" before the words "line of inquiry", in paragraph 3.3, at the request of one respondent.

2. One respondent suggested that at paragraph 3.4 we should add that the prosecutor could, in appropriate cases, invite the suspect or their representative to submit evidence or information to the prosecutor, before making a charging decision. This would comply with the principles of Transforming Summary Justice and Better Case Management, to identify issues as early as possible.

   We agree and we have revised the text accordingly.

3. A number of respondents made suggestions for revisions to paragraph 3.6, which we have accepted. These include:

   - A reference to consideration of further reasonable lines of inquiry that should be pursued, when reviewing cases post-charge.
   - The possibility that charges may be altered or discontinued following receipt of unused material that undermines the prosecution case or assists the defence case.
   - A reminder that the way in which a case is stopped can impact on a victim's position under the Victims' Right to Review Scheme.

   One respondent additionally highlighted the large amount of decisions prosecutors make on cases post-charge, and suggested that we set out the general principles to be applied when deciding whether to continue a case post-charge, with links to relevant guidance.

   We think that the revised paragraph 3.6 outlines these general principles adequately, especially with regard to disclosure and receipt of new material or information. For further detail, which would not be appropriate in the Code, prosecutors refer to the CPS Disclosure Manual. We do not provide links to this or various other legal guidance and policy documents in the Code, as these would be numerous and would detract from the simplicity and clarity of the Code principles. However, paragraph 2.7 reminds prosecutors that they must comply with any guidelines issued by the Attorney General and with the policies and guidance of the CPS.

Section 4 – The public interest stage

1. A number of respondents thought it would be more appropriate to assess seriousness [4.14.a] by culpability and harm, in line with the definition in section 143 of the Criminal Justice Act 2003, than by reference to the likely sentence, which would be difficult for a prosecutor to determine at the outset of proceedings. One respondent pointed out that the likely sentence is not the determining factor in some serious cases involving the prosecution of companies in liquidation, as a non-commensurate sentence is expected.

We agree with the suggestion and we have revised the text accordingly.

2. One respondent helpfully pointed out that although the new text on the maturity of the suspect applies to young adults, who continue to mature into their mid-twenties, the title of the section in which this is contained refers to suspects under the age of 18. The guidance may therefore be missed by prosecutors considering charges against suspects 18 and over.
3. We have rectified this by changing the title of the section to: "What was the suspect's age and maturity at the time of the offence?"

4. One respondent suggested that the public interest factors should include prosecutors' consideration of whether a person has learning disabilities, Aspergers and other mental health conditions.

5. Paragraph 4.14.b, fourth bullet point (suspect's level of culpability) , already stated that if a suspect is, or was at the time of the offence, "suffering from any significant mental or physical ill health", in some circumstances this may mean that it is less likely that a prosecution is required. In light of the response, we have revised the wording to "affected by any significant mental or physical ill health or disability".

Section 9

1. At the suggestion of one respondent, we have merged paragraphs 9.2 and 9.6, on the acceptance of pleas, to make it clearer which factors are to be considered when offered a guilty plea. This paragraph is now also more closely aligned with paragraph 6.1, on the selection of charges.

<u>Suggested changes that we have not made included</u>:

Section 1

1. One respondent asked us to define words and concepts in the Code, such as "vulnerability", "abuse of trust" and "authority".

   We have not done this, as we do not think that this would assist prosecutors, given that these concepts will need to be assessed on a case by case basis or by reference to case law.

Section 2

1. A number of respondents welcomed the introduction of paragraph 2.1 on the independence of the prosecutor. Some, though, asked for the reference to the prosecutor being "independent" when making decisions to be re-instated in paragraph 2.7.

   We have not done this, as paragraph 2.1 refers to the independence of the prosecutor when carrying out their professional duties, which includes decision making. It would therefore be repetitive to refer to independence again at paragraph 2.7.

2. One respondent requested that we make reference to the public sector equality duty in the Code.

   We have not done this, as paragraph 2.9 already makes reference to equality legislation, which includes the public sector equality duty.

Section 3

1. One respondent requested that at paragraph 3.5 we use a lower test of "more likely than not" for deciding not to start or continue a case on the basis of a potential abuse of process.

   We disagree, as the test that we use, it is "highly likely" that a court will rule that a prosecution is an abuse of process, is consistent with the case law – *Guest v DPP* [2009] EWHC 594 (Admin) [58] – which suggests that the test is "a high degree of certainty".

2. One respondent suggested that we emphasise the independence of the prosecutor in relation to post-charge reviews and decisions.

   Paragraph 2.1, which highlights the independence of the prosecutor, applies to all of the work of the prosecutor, both pre and post-charge. It would therefore be repetitive to repeat this in relation to post-charge work, in paragraph 3.6.

3. One respondent requested that we should consult with complainants prior to altering charges or stopping a case.

   The CPS does not consult with complainants in this way. However, we do inform complainants and give reasons for decisions to discontinue or substantially alter a charge, or to stop a case. This is in accordance with CPS' duties under the Victims' Code, the CPS Victims' Right to Review Scheme and the Victim Communication and Liaison Scheme. We have not referenced this in the Code, as it relates to process rather than principles that guide charging decisions.

Section 4 – The evidential stage

1. The footnote at paragraph 4.6 states that for the purposes of the Code a "conviction" includes a finding that "the person did the act or made the omission" in circumstances where the person is likely to be found not guilty on the grounds of insanity. One respondent suggested that "conviction" should also include such a finding where a defendant is unfit to plead.

2. We disagree, as fitness to plead cases differ from insanity cases:

   - Unfitness to plead is concerned with the question of an accused's mental state at the time of his or her trial and not at the time of the offence.
   - The fitness to plead procedure merely suspends a prosecution until the accused is able to enter a plea and stand trial; so there is an expectation that there will be a realistic prospect of conviction at some point. In insanity cases, there is no such prospect, once the accused is found to have been insane at the time of the offence.

3. Another respondent suggested that a deferred prosecution should be an alternative to prosecution for children in cases where there is no admission, particularly if the suspect is from a BAME background or is a looked after child, and referenced the Lammy Review, Recommendation 10 on deferred prosecutions.

   We note the point and we are currently working with the Ministry of Justice on implementation of this recommendation.

4. One respondent suggested that neuro-diverse persons and those with learning disabilities, Aspergers and other mental health conditions may appear to be behaving criminally, such as committing a public order offence, when in fact they may lack the *mens rea* (mental element)

for the offence due to their condition. Therefore, in appropriate circumstances, their condition should be taken into consideration when assessing the evidential stage of the Full Code Test.

The section on the evidential stage covers only the broad principles governing the application of this stage, and does not address particular issues, such as how to assess whether a suspect formed the requisite mental element for an offence. However, we acknowledge that learning disabilities, Aspergers and mental health conditions may, in some circumstances, be relevant to an assessment of the mental element of an offence. We shall therefore take this response into consideration when revising the Mental Health legal guidance, which is currently being updated.

Section 4 – The public interest stage

1. One respondent agreed with the introduction of paragraph 4.14.b, 3rd bullet point, which states that a suspect will have a much lower level of culpability if they have been coerced, compelled or exploited; but thought it unnecessary to add the words "*particularly if they are the victim of a crime that is linked to their offending*".

   We disagree as the additional words reflect the growing recognition and concern that some persons who commit a crime do so in the context of being the victim of a crime, which is often more serious. For example, a victim of trafficking or slavery who pickpockets or cultivates cannabis; or a young person exploited by a "county lines" gang, to act as a drug runner.

2. Another respondent suggested that in considering culpability it would be helpful to refer to the Liaison and Diversion Scheme, which could be used for information about a suspect's mental health or learning disabilities.

   Although this level of detail would not be included in the Code, we have passed on the suggestion to the policy lead responsible for updating the Mental Health Legal Guidance, and we understand that the scheme will be covered in the guidance.

3. One respondent requested we mention registered intermediaries in the context of special measures. We have not done so, as these come under a range of available special measures, which will be set out in more detail in the Mental Health legal guidance.
4. One respondent did not like "demonstration" of hostility being "relegated" to the end of the paragraph on hate crime characteristics, reinforcing the feeling some people have that motivation has to be present for an offence to be a real "hate crime.

   This is not our intention – we have simply re-worded the paragraph so that it is easier to read.

5. One respondent expressed concern about the introduction of the line on maturity, suggesting that people continue to mature beyond their mid-twenties, as it is an on-going process.

   Whilst we acknowledge the point, the reason for the revision is to alert prosecutors to the growing evidence that young persons are not necessarily fully mature by the age of 18. The Government response to the 2016 Justice Committee Report on Young Adults (18-25 year olds) stated: *It is widely accepted as a principle by those working in the criminal justice system that young adults (and especially men) will continue to mature into their mid-twenties, in line with the considerable scientific evidence gathered and presented by the Committee* [12].

6. One respondent suggested that all cases with a suspect under the age of 18 should be reviewed by a Youth Offender Specialist.

The CPS position is that a Youth Offender Specialist will undertake the major reviews of files involving youth offenders and take all major decisions in relation to those files.

7. The same respondent suggested that a distinct approach for 18-25 year olds should be set out in the Code.

   We do not think this age group requires a distinct approach but as referenced elsewhere, we have revised the sub-section on suspect's under 18 years of age: we include additional text on the maturity of persons up to their mid-twenties; and we have changed the title of the sub-section to reflect the inclusion of this age group.

Section 7

1. One respondent suggested that there should be a presumption that children are dealt with by out of court disposals, except in serious cases, as this is suggested by the ACPO Youth Offender Case Disposal Gravity Factor System and the Ministry of Justice Out of Court Disposal guidance.

   The public interest sub-section on age and maturity already addresses the broader point, indicating that the best interests and welfare of the child or young person must be considered, and the younger the suspect, the less likely it is that a prosecution is required. The section on out-of-court disposals indicates that prosecutors must follow any relevant guidance.

Section 9

1. One respondent suggested that consideration should also be given to the ability of the defendant to pay compensation, where appropriate, and to the potential for recovery of costs, when considering the offer of a plea. Another respondent made this point in relation to both sections 6 and 9.

   Sections 6 and 9 already reference "post-conviction orders" and "ancillary orders" respectively, and we do not think it necessary to specifically mention costs or compensation.

Next Steps

The previous Code has now been replaced by the eighth edition of the Code, which comes into effect on 26 October 2018, and is published with this Summary.

We shall also publish an Easy-Read version of the Code on the CPS website, which will make the Code more accessible to young people and those with learning difficulties.

Conclusion

We are very grateful to everyone who responded to the consultation. We are content that the responses have led us to make changes that have resulted in a clearer, improved Code.

Annex A Source of the Responses

SECTOR	NAME	ORGANISATION
ACADEMIC	Prof Peter Hungerford-Welch	City Law School, University of London
CPS	Christian Wheeliker	District Crown Prosecutor
	Laura Tams	Senior Strategic Policy Advisor
	Tom Guest	Director's Legal Advisor's Team
	Claire Nicholls	District Crown Prosecutor
	Inder Kaur-Singh	Inclusion and Community Engagement Manager
	Natalie Carman	CPS Direct
	David Orman and David Chimes	Co-Chairs, Disabled Staff Network
	Olive Essien	Chair, National Black Crown Prosecutors Association
	Mick Conboy	Hate Crime Stakeholder Manager
LEGAL	Nick Vamos	Peters & Peters Solicitors LLP
	Alex Arnell	Andrew Jackson Solicitors LLP
	Janet Arkinstall	The Law Society
	Aaron Dolan	Criminal Bar Association
	John Battle	Chair, Media Lawyers' Association
	Jo Easton	Magistrates Association
	Roy Morgan	Cardiff and District Law Society
	Rhoda Nikolay	Independent Consultant and Trainer to the police and other criminal justice agencies.
POLICE	Graham Marshall	West Midlands Police, advisor to NPCC
	Tracy Lewis	Derbyshire Police
	Andy Pritchard	Kent Police
	Alan Dewberry	North Wales Police
	Julie Mackay	Gloucestershire Police
	Steve May	Dorset Police
	Steve Ward	Staffordshire Police
	Margaret Tough	Dyfed Powys Police
	Jeremy Carter	Wiltshire Police
PARLIAMENT	Bob Neill MP	Chair of the Justice Committee
PUBLIC SECTOR	Kevin McGinty CBE	HM Chief Inspector, HMCPSI
	Frazer Stuart	Criminal Cases Review Commission
	Richard Stoddart	Office for Nuclear Regulation

	Lynne Owens CBE	Director General for the National Crime Agency
	Ian Cole	Central and North West London NHS Foundation Trust
	Ceri Hopewell	Serious Fraud Office
	Anastasia Elkina	British Transport Police
	Tracey Anderson	Health & Safety Executive
	Simon York	HM Revenue & Customs
	Charles Shuttleworth	Insolvency Service
ORGANISATIONS	Nick Antjoule	Head of Hate Crime Services, Galop
	Stephen Brookes	Disability Rights UK
	Laura Cooper	Youth Justice Legal Centre and Just for Kids Law
	Omar Khan	Runneymede Trust
MEMBERS OF THE PUBLIC	Margery Barisic	
	Nicholas Hatton	
	Mr Thomas Brunton and Mrs Jennifer M Brunton	
	Achilleas Constantinou	