

**Resuming a Prosecution when a patient becomes fit to plead**

**Introduction**

1. This guidance explains the powers and responsibilities of the Secretary of State for Justice, the Crown Prosecution Service (CPS) and His Majesty’s Courts & Tribunals Service (HMCTS) when a restricted patient (a patient subject to a restriction order under section 41 of the Mental Health Act 1983) becomes fit to plead and sets out the procedure to be followed when a prosecution is resumed. The fitness to plead procedure merely suspends a prosecution until a defendant is able to enter a plea and stand trial. It is essential that criminal proceedings are resumed and determined swiftly when the Secretary of State remits a patient for trial.

**The law**

1. Section 5(1)(b) and (2) of the Criminal Procedure (Insanity) Act 1964 (“The Act”) states that where a person has a finding made that they are under a disability and that they did the act or omission charged, the court shall make:
	1. a hospital order (with or without a restriction order;
	2. a supervision order; or
	3. an order for his absolute discharge.
2. Section 5A(4) of the Act gives the Secretary of State for Justice the power to remit for trial a person who becomes fit for trial while detained in hospital under a hospital order with a restriction order made under section 5(2)(a) of the Act.
3. Section 5A(4) also provides that “on a person’s arrival at the court” the hospital and restriction order will “cease to have effect”. It is His Majesty’s Prison and Probation Service’s (HMPPS) view that, when read with the provisions of the Mental Health Act 1983, this cessation occurs when a judge makes another, discrete and subsequent, order for remand (whether on bail or in custody) or orders the proceedings to come to an end, for instance by ordering the charges to lie on file or that a not guilty verdict be entered, in the presence of the patient in the courtroom. The patient must therefore appear in person.[[1]](#footnote-2)
4. As the hospital order comes to an end once the above circumstances are satisfied, it is essential for public protection that a plan is already in place for the defendant’s continued treatment before attending court. To ensure a plan is in place there should be an initial directions hearing where the defendant’s attendance is excused. A further case management hearing should then be listed which the defendant will be required to attend. This is in the best interests of the defendant as it will help to ensure that there is no disruption to any treatment plan, and ensure they are present so they may understand the effect of the orders the Court will make, and the impact it will have on them.
5. Section 4A(2) Criminal Procedure (Insanity) Act 1964 provides that a finding of unfitness will have the effect that the trial “shall not proceed or proceed further”. Although the fitness to plead procedure can result in an acquittal, a finding that the offender did the act or made the omission charged is not a conviction and does not amount to the determination of a criminal charge. It does not preclude a full trial of the accused if s/he becomes fit to be tried: *R v H* [2003] UKHL 1. A finding that the accused did the act or omission alleged is neither a conviction nor an acquittal: *Chinegwundoh* [2015] EWCA Crim 109.
6. This guidance concerns the position where the Secretary of State remits a patient who has been subject to a hospital order with a restriction order. Where other disposals are ordered, remittal to court is not available: *S v The Queen* [2014] EWCA Crim 2648. Any other decision to commence a subsequent prosecution is outside this guidance. Those decisions would need to be made in accordance with the Code for Crown Prosecutors and the principles governing abuse of process.

**Role of The Mental Health Casework Section (MHCS)**

1. The Mental Health Casework Section (MHCS) will keep the issue of a patient’s fitness to plead under review and will obtain the opinion of the responsible clinician at least once a year. The Secretary of State for Justice will notify the CPS when the responsible clinician has determined that a restricted patient is now fit to plead. The MHCS will also provide the CPS with the responsible clinician’s report which will address, so far as possible, those factors relevant to the decision to resume proceedings set out below. MHCS is of the view that for the general administration of justice, including obligations towards the prosecution of offenders, the clinical report can lawfully be shared with the CPS to enable the administration of justice process take its course, pursuant to Article 6(1)(c) of the General Data Protection Regulations 2018 (GDPR) because the “processing is necessary for compliance with a legal obligation to which the controller is subject.”
2. MHCS will also ensure that where the CPS is not going to resume a prosecution, the responsible clinician has considered, and where appropriate put in place, suitable arrangements for the lawful ongoing detention and treatment of the patient under Part II of the Mental Health Act 1983 powers, once the case has been remitted to court and a final disposal made.

**Role of the Crown Prosecution Service (CPS)**

1. The decision whether to continue the prosecution lies solely with the CPS who will take the decision, having re-reviewed the case, in accordance with the principles set out in the Code for Crown Prosecutors and other relevant legal guidance. Prosecutors will have particular regard to the following factors:

(a) The current availability of evidence, including exhibits, and unused material;

(b) The current admissibility of evidence, including evidence which may not have been admissible at the time of the original finding;

(c) The views of any victims and witnesses;

* 1. The seriousness of the offence;
	2. The risk of reoffending and the risk of harm;
	3. The impact of a prosecution on the health of the victim, witnesses and defendant;
	4. The length of any delay between the offence, resumption of fitness to plead and the likely trial date;
	5. The fact that the offender was suffering from significant mental ill health at the time of the offence;
	6. The effect of the hospital treatment on the offender's mental health and behaviour;
	7. The likely sentence or order of the court on conviction;
	8. The duration of the hospital order/restriction order, and whether it is commensurate with the seriousness of the offending;
	9. Whether the public interest can now be satisfied by an out of court disposal, which the offender accepts and with which he can comply.
1. The responsible clinician should provide so far as possible:

(a) an opinion on the likely mental state of the patient at the date of the offence;

(b) the patient’s response to treatment provided;

(c) any further proposed treatment, the aim of that treatment and its potential impact on offending behaviour;

(d) whether the patient is likely to continue to be detained in hospital under the Mental Health Act 1983;

(e) the likely impact of a prosecution on future offending. A prosecution may have the effect of confronting the offender with their behaviour and taking responsibility for his or her actions. A prosecution may not be necessary where the risk of reoffending is low;

(f) the risk that the patient is likely to pose in terms of reoffending and causing serious harm;

(g) probable impact of a prosecution on the offender's health;

(h) any previous response to treatment provided when the offender had been diverted from prosecution for another offence.

1. The fact that a hospital order combined with a restriction order was deemed necessary in the circumstances of the case may be a relevant to the assessment of seriousness, but is not a determinative factor. The fact that the patient has now received treatment as a result of which they are fit to plead may be relevant to the likelihood of re-offending but is not determinative.

**Remission**

1. The MHCS shall inform the CPS that it intends to remit the patient’s case for trial and shall at the same time provide a copy of the responsible clinician’s report, addressing points 8(a) to (h) above.

**Listing**

1. A balance has to be struck between permitting the CPS sufficient time to re-review the case and a hearing in relation to the resumed case. This is why the CPS have been afforded a maximum 60-day period to review the case before it is listed. If the CPS does not respond to MHCS within 60 days it will approach the court for a listing to ensure the remittal process proceeds without further delay. The court will list the case “For Directions – Case remitted for trial Defendant not required” in XHIBIT or “Further case management hearing – fitness to participate in trial process – Defendant not required” in Common Platform no less than 21 days thereafter, either following a decision by the CPS or after 60 days, whichever is soonest. The MHCS will inform the patient and the patient’s solicitor (or last known solicitor) and the CPS of this date.
2. The defendant must not attend the First Hearing to maintain the extant hospital and restriction orders; however, there are no powers to prevent the defendant from attending and it is a matter for defence representatives to advise. Removing the need for the defendant to attend the First Hearing ensures that order pursuant to the Mental Health Act 1987 remain in force until the Second Hearing, at which stage a decision on case proceedings will be finalised.
3. The CPS will endeavour to communicate its decision before the hearing to all parties but otherwise shall propose the next steps and timescale for the case and future decision-making.
4. **If the prosecution is not to continue**, a date by which the proceedings will end and the method of ending them will be confirmed at the directions hearing. A hospital order can only be discharged when the defendant is before the court. Therefore, arrangements must be made for the patient to attend the subsequent hearing so that the proceedings can be finalised. This also ensures that the defendant is aware that proceedings are at an end, and the court is addressed about the consequences of the proceedings ending which include;
* the fact that the hospital order with restriction will cease once the judge makes final orders in relation to offences to lie on file or not guilty verdicts;
* that the defendant will fall to be acquitted, and any ancillary orders which fall to be made or applied for can be considered;
1. It is best practice for the responsible clinician to make their views clear about any ongoing treatment of the patient i.e. whether the patient will continue to be detained under civil powers. This second hearing should be listed “For mention (Defendant to attend) in XHIBT or “Prosecution to offer no evidence (defendant to attend)” in Common Platform.
2. **If the prosecution is to continue**, case management issues will be considered, including:

(a) clarification that the section 37/41 order will cease once an order for remand on bail or in custody has been made;

(b) whether further information, including medical reports, will be needed for the next date of hearing: the CPS will take the decision to proceed or not on the evidence it has but will keep the decision under review and further time may be needed to seek medical opinion or other relevant material;

(c) whether there are security or other reasons for the case to be heard in a different court or particular court room;

(d) whether additional measures will be needed to enable the defendant to participate in his or her trial.

1. The Court, having set the next date for a “plea and trial preparation hearing” (PTPH) will inform the relevant hospital and the patient of the date. The Court will consider whether to remand the defendant on bail, with conditions or without, or in custody. It is best practice to take into account the responsible clinician’s proposals for any ongoing detention when making this decision.
2. The hospital is responsible for securing the attendance of the patient at court and should liaise with the court to ensure that appropriate arrangements are made. This will enable the court to ensure there is a safe and secure environment.
3. If the patient choses to attend these initial directions hearing, then the MHCS and the hospital should notify the CPS and the Court in advance of the hearing. This is because the hospital order will fall to be discharged at this hearing and so the issue of bail will need to be considered prior to the hearing.

**First appearance at the plea and trial preparation hearing or hearing to cease the proceedings (the second hearing)**

1. MHCS interpret the section 37/41 order as ceasing to have effect once the court makes an order ending proceedings or to remand the defendant on bail or in custody (section 5A(4) Criminal Procedure (Insanity) Act 1964) in the presence of the patient. The patient’s responsible clinician should be aware of this so that procedures for detention under the civil provisions of the Mental Health Act 1983 can be considered and commenced if the patient still requires compulsory treatment in hospital.

1. If the prosecution formally offers no evidence or the court orders the charge to lie on the file at the hearing, the court has no power to make any order under the Mental Health Act 1983, although it may consider other ancillary orders which are appropriate following acquittal.
2. If the prosecution is resumed, at the plea and trial preparation hearing the court will have to consider the issue of bail. Its powers include remand to hospital for further reports (section 35 of the Mental Health Act 1983) or for treatment (section 36 of the Mental Health Act 1983), remand in custody or on bail. A new PTPH form should also be prepared.
3. Custody Time Limits do not apply to any period of remand in custody after the offender is remitted from hospital. The Custody Time Limit expired when the issue of fitness to plead was determined. The Prosecution of Offences (Custody Time Limits) Regulations 1987 provides an exhaustive list of “preliminary stages of proceedings” during which a CTL will apply. The period between remittal to court under section 5A(4) Criminal Procedure (Insanity) Act 1964 and the trial is not included in this exhaustive list. The situation is analogous to retrials in that Custody Time Limits do not apply to the period between the termination of the original trial and the start of the retrial: *R v Crown Court at Leeds, ex parte Whitehead* TLR 5 July 1999. However, the court should be vigilant to protect the interests of an accused in custody by taking steps to fix a speedy retrial.

**Annex 1 - Amendments made by the Police, Crime, Sentencing and Courts Bill**

Section 5A (4) provides that “on a person’s arrival at the court” the hospital and restriction order will “cease to have effect”. Provisions were introduced in Police Crime Sentencing and Courts Act 2022 via section 200, which inserted a new section 51(3)(e) into the Criminal Justice Act 2003. This will be the provision under which a court may make directions for a person to appear via live link in CPIA 1964 proceedings

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1. Please refer to addendum at **Annex 1 for alternate arrangements for court appearances since the introduction of the Police, Crime and Sentencing Act.** [↑](#footnote-ref-2)