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**Response to Sentencing Council Consultation
Overarching Principles: Sentencing offenders with
mental health conditions or disorders**

July 2019

This response to the Sentencing Council Consultation on *Overarching Principles: Sentencing Offenders with Mental Health Conditions or Disorders* has been prepared by the Criminal Law Committee of The Birmingham Law Society. The Society is the largest provincial law society with some 5,000 members. The response represents the collective view of its members who are specialist lawyers practising in all aspects of the criminal law and from all branches of the legal profession.

Executive summary

The timely identification and assessment of offenders with mental health conditions and disorders improves access to justice, improves the management of risk in custody and in the community, and improves outcomes for the most vulnerable people within the CJS. Conversely, when courts act in ignorance of relevant mental health conditions, there is a self-evident risk of injustice in both access and outcome.

The Criminal Law Committee of Birmingham Law Society therefore commends the Council's aim in providing further guidance to sentencers in dealing with offenders with mental health conditions and disorders. We consider that the principal benefit to the guideline is in improving consistency of approach in this area.

Any attempt to improve the approach of sentencers to offenders with mental health conditions must be viewed against the backdrop of pressures outside of the control of the Council: the mental health crisis within the prison estate, and funding and resource difficulties faced by the courts, Probation Service and defence practitioners. Although the aim of this consultation is to be commended, any guideline will be worth little unless the agencies tasked with obtaining and presenting relevant information to the courts, and providing treatment and rehabilitation services to offenders with mental health conditions and disorders, are afforded the resources to do so.

Question 1: Do you agree with the proposal that the draft guideline only applies to offenders aged over 18? If not, please tell us why.

The consultation includes the proposition that the impact of mental health and related issues on children and young people is so different to that on adults, that it would be difficult adequately to accommodate the considerations for all ages within one guideline. It is difficult to comment upon that proposition without the evidence upon which it is founded. However, many of the factors identified in the draft guidelines would appear to be relevant to both adult and youth offenders: for example, the effect of mental health or similar conditions on culpability (para.10), and the interplay between the statutory purposes of sentencing and mental health conditions (para.11). The guideline instead refers sentencers of young offenders to the overarching guideline, in particular paras. 1.11 – 1.14: these are very general guidelines which barely touch upon the issues of mental health and other conditions set out in this draft guideline. We would prefer to see either the publication of a separate guideline dealing with sentencing young offenders with mental health and similar conditions, or the amendment of the overarching guideline, ‘Sentencing Children and Young People’, to include more detailed guidance on mental health and similar conditions.

Question 2: Do you agree with the proposed title of the guideline? If not, please tell us why and suggest any alternatives.

We are in broad agreement with the proposed title of the guideline, and certainly prefer it to the longer title considered and rejected by the Council. In practice, courts, advocates or other agencies will find their own “pathway of desire” to the shortest and most convenient title.

Question 3: Do you have any comments on the proposed contents of paragraphs one to six? Do you think the information will be helpful to courts? If not, please tell us why.

Some sentencers in the criminal courts, particularly lay sentencers, will have no practical experience of dealing with people suffering from mental health conditions. It is therefore essential for the guideline to contain general guidance for sentencers in this area. The general guidance in paras. 1

– 6 includes “mythbusting” of key misconceptions, the need for reports, the need for any medical evidence to be passed to the prison in the event of a custodial sentence, and the practicalities of explaining the effect of sentence to such an offender. These are all important areas on which sentencers may need guidance and we think therefore that the information provided would be helpful to the courts.

Question 4: Do you have any comments on paragraph seven? Do you think the information will be helpful to courts? If not, please tell us why. Is there any further information relating to private treatment that you think should be added?

Some explanation as to the basis for making a distinction between private and NHS providers would be useful, as it is not immediately clear from context. We wonder why these considerations should not equally apply to private and NHS treatment.

Question 5: Do you think the guidance within paragraphs eight and nine is helpful? Is there any of the guidance that you disagree with? If so, please tell us why you disagree with it.

Paragraph 9 may be read as encouraging sentencers to disregard or minimise medical evidence on culpability. While it is important that sentencers should not feel bound by medical opinion, and must exercise their own judgment, arguably the guideline goes too far. The approach of the courts to mental health conditions should be evidence-based, as far as possible, and sentencers should not feel encouraged to substitute their own lay assessment for that of a medical expert. We suggest that the guideline should state a presumption that the expert opinion of a suitably qualified psychiatric or psychological expert as to an offender’s culpability, based on a comprehensive analysis of the evidence, should not be set aside by a sentence unless there are compelling reasons for so doing.

Question 6: Please tell us your views on the contents of paragraph ten- do you think this will be helpful to courts? If not, please tell us why and suggest any alternative approaches to assessing culpability that you think may be more appropriate.

This is the heart of the draft guideline. The proposed questions are an attempt to set out a codified approach for sentencers as to the question of culpability for offenders with mental health conditions and disorders. One of the difficulties faced by defence practitioners in these cases is that there is currently very little guidance to sentencers and different tribunals take very different approaches to the effect of mental health conditions on culpability. We think these questions will be helpful to courts and that they provide a more principled approach to sentencing such offenders and will hopefully improve consistency of sentencing in this area.

Question 7: Please tell us your views on the contents of section three - do you agree with the guidance in this section? If not, please tell us why.

The guidance in section three is helpful and we agree with it. We particularly commend the explicit guidance in paragraph 12 that mental health treatment can not only rehabilitate an offender, but can also protect the public by reducing the risk of reoffending – something that can be overlooked by sentencers.

We also commend the guidance in paragraph 13, to particularly consider the effect of the proposed sentence on an offender's mental health.

Question 8: Do you think the list of different disposals and Crown Court guidance is helpful? If not, please tell us why.

We consider that this is useful information to include within the guideline.

Question 9: What are your views on the information on common mental disorders? Do you think it is helpful? Is there information missing that you would like to see included?

We consider that some guidance on common mental disorders would be helpful to both sentencers and practitioners. We are not qualified to comment on the substance of the guidance and note that it was written by a forensic psychiatrist. It appears to cover the common mental disorders encountered in practice: perhaps there should be more guidance about ‘simple’ depression and anxiety, which is the most common diagnosis encountered in practice and in respect of which there is often an inconsistent approach by the courts.

Question 10: What are your views on the information on reports within Annex B? Is it helpful? Is there information missing that you would like to see included?

We consider that this is helpful information to include within the guideline and have no suggestions of further material to include.

Question 11: What are your views on the information on disposals within Annex C? Is it helpful? Is there information missing that you would like to see included?

We consider that this is helpful information to include within the guideline and have no suggestions of further material to include.

Question 12: Are there any other equality and diversity issues that you think should be addressed?

No. We agree with the Council that the guideline is likely to reduce instances of discrimination against those who are disabled as a result of mental health disorders.

Question 13: Do you think the length of the guideline is about right or not? Is there information missing that you would like to see included?

We consider that the draft guideline is as long as it needs to be, and have no suggestions for further material to include.

Question 14: Do you have any further comments on the draft guideline not covered elsewhere?

The guideline is silent on offenders with multiple needs, where mental disorders may interact with other social needs such as homelessness, unemployment, relationship breakdown, or debt – all of which may exacerbate the effect of mental disorder. The effect of these other social needs is frequently not addressed in a medical report, where the focus is on diagnosis and treatment. As a result, it becomes even more important for the Probation Service to consider and assess the available medical evidence in an holistic way with other areas of need, to suggest suitable sentencing options.

Question 15: What, if any, do you think the impact of the guideline might be on sentencing practice?

We hope that the guideline will improve consistency of approach by sentencers in this area, which is currently in our experience wildly inconsistent. It appears to us likely that defence advocates will feel more confident in drawing relevant information about defendants' mental health conditions to the court and will be more confident that the court will properly take those conditions into account at the point of sentence.

We would hope and expect that the guideline would result in an increase in the imposition of community orders with mental health treatment requirements, and other non-custodial disposals, as sentencers are required to take into account relevant mental disorders in assessing culpability.

In Birmingham, we are already experiencing the improved outcomes offered by Liaison & Diversion teams, and hopefully the guideline will mean that such interventions are used more frequently.

Question 16: We are interested in obtaining information about the length of time that offenders spend in hospital on section 37 and section 37/41 orders - do you have any information on the average length of stay for these patients?

We are unable to provide any information on this topic.

9 July 2019

A handwritten signature in black ink that reads "L. Thomas". The signature is written in a cursive style with a large initial "L".

Linden Thomas
President
Birmingham Law Society