

Howard League for Penal Reform's response to the Sentencing Council's consultation on sentencing offenders with mental health conditions or disorders

9 July 2019

Summary

1. The Howard League for Penal Reform welcomes the opportunity to comment on the draft sentencing guideline for people with mental conditions or disorders.
2. As presently drafted the guideline raises a number of concerns and presents a missed opportunity to ensure that people who have mental health conditions or disorders receive appropriate outcomes in the courts that meet their needs and do not exacerbate them.
3. The guidance says at the outset that the presence of a mental condition will not necessarily have an impact on sentence and underscores that sentencers are not bound by medical opinion. In the absence of further qualification and the requirement for reasons to be given, this undermines much of the important information in the guidance.
4. The guidance gives insufficient weight to the difficulties posed by custody and presents hospital orders as “non-penal” when in fact they contain the central feature of our penal system – the deprivation of liberty.
5. The guideline is not applicable to children but at present there is no comprehensive guidance that deals with children who suffer from mental health conditions, leaving a disparity between the protections for adults and children.
6. The guideline makes no express reference to the particular needs of young adults with mental health difficulties. This group requires special attention in respect of mental health.

1. About the Howard League for Penal Reform and summary of response

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has over 12,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.
- 1.3 Our legal team works directly with children and young adults in prison.
- 1.4 We have drawn on our legal and policy work in responding to this consultation. While we welcome the opportunity to comment on the draft sentencing guideline for people with mental conditions or disorders, we are concerned that, as presently drafted, the guideline raises a number of concerns and presents a missed opportunity to ensure that people who have mental health conditions or disorders receive appropriate outcomes in the courts that meet their needs and do not exacerbate them.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. The impact of mental health conditions on sentence should not be undermined at the outset and reasons should be given for departing from medical opinion

- 2.1 It is a concern that the first substantive paragraph of the proposed guidance states that "the mere fact that an offender has such a condition or disorder does not necessarily mean that it will have an impact on sentencing." This sends out the wrong message and undermines the significance of the guidance from the outset. The presence of a mental health problem is clearly relevant information that ought to be considered as part of the sentencing exercise. It would be most concerning, if not discriminatory, if the presence of mental disorder were to have no impact on sentence at all and it is therefore concerning that the guidance opens with this caveat without any further explanation or qualification. Similarly, at a later stage, the guidance states (paragraph 9):

"Expert evidence, where offered and relevant, should be taken into account, but sentencers must make their own decisions and should not feel bound to follow expert opinion. Examples of when it may not be appropriate to follow expert opinion include, but are not limited to, where conclusions are based on incomplete analysis or a misreading of the evidence, or where experts suggest a diagnosis without a clear indication of how it affects culpability."

- 2.2 While sentencers are not bound by medical opinion, the guidance should make it clear that sentencers should explain why they are not following expert opinion.

3. Insufficient weight given to the impact of custody on mental health and well-being and the presentation of mental health disposals as “non-penal”

3.1 There is a wealth of evidence to show that custody can exacerbate poor mental health and increase the risk of self-harm and suicide. The Howard League and Centre for Mental health conducting an inquiry on preventing prison suicides and found that prisons were unhealthy and unsafe places that were having a detrimental effect on prisoners’ physical and mental wellbeing (Howard League, 2016). Prisoners experiencing mental distress often exhibit challenging behaviour and are subject to punishments that exacerbate their distress, such as being placed on basic regime or in solitary confinement. Prisons are not safe places for people with mental health conditions or disorders and in some cases, may precipitate them.

3.2 The latest annual report published by the Chief Inspector of Prisons (Her Majesty’s Inspectorate of Prisons, 2019) found,

“In over half the adult male prisons inspected, we found a lack of assessment and treatment for prisoners with mental health, learning disabilities or emotional needs. Many prisoners were held in conditions that were in no way therapeutic, and which often clearly exacerbated their condition. We remained concerned about the continuing plight of prisoners experiencing severe delays in transfer to secure mental health beds. In the vast majority of prisons, the 14-day target for transfer was not met; one prisoner at Swinfen Hall had waited seven months before he was finally admitted”.

3.3 It is also a concern that the guidance appears to characterise prison sentences as penal and hospital orders as the opposite. Notwithstanding the dreadful conditions of prisons today, is the deprivation of liberty that is the central feature of punishment in England and Wales and this is a common feature to mental health and prison disposals. In fact, a hospital order can result in a longer deprivation of liberty than a fixed prison term and is often perceived as a punishment by the person subjected to it. Similarly, in respect of hybrid orders, it is essential that sentencers are reminded to “stand back” and consider whether treatment in prison may ever be appropriate before imposing such an order: if the answer is no, such an order should not be imposed. While the hybrid order is available for those convicted at the age of 21 or over, there would be significant concerns about imposing an order on a young adult who committed the offence under the age of 21 (see the section below on young adults) and the Council may wish to urge sentencers to apply a similar approach to the crossing a significant age threshold set out in the children’s guidance.

4. Children

4.1 The guideline is not applicable to children. This is in keeping with the need to take a different approach when it comes to sentencing children. However, the Council should be mindful that the current guideline for children does not explicitly address mental health disposals for children other than to note on several occasions that “any mental health problems or learning difficulties/disabilities” as part of the welfare principle. If the Council considers that guidance is necessary for adults, the children’s guidance should be updated too.

5. Young adults

5.1 The guideline makes no express reference to the particular needs of young adults with mental health difficulties. This group requires special attention in respect of mental health.

5.2 It is well established that this group is still maturing and inherently vulnerable. There is a firmly established evidence base that young adults between 18 and 25 years old continue to mature and in particular the frontal lobes of the brain, which help regulate decision-making and impulse control, develop until around 25 years old (Blakemore et al 2006; T2A and University of Birmingham, 2011). In R v Clarke [2018] EWCA Crim 185 the Lord Chief Justice observed:

“Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear... Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday.”

5.3 Mental health difficulties are more prevalent in this age group. There is a significant body of evidence that demonstrates that mental health problems are disproportionately prevalent among young adults in the criminal justice system (Royal College of Psychiatrists, 2015). Mental health conditions may still be present but undiagnosed either due to lack of system contact or the practice of not diagnosing some disorders until people are in their mid-twenties

5.5 Prison can have a particularly detrimental effect on the well-being of this group and may exacerbate or even precipitate mental health conditions. The latest annual report by Her Majesty’s Inspector of Prisons for 2018-19 states:

“As of 31 December 2018, 13,474 young adult men aged 18 to 24 were held in adult male prisons (17% of all male prisoners). In our survey, they generally reported a less positive experience of prison life than their older peers. They were often overrepresented on the lowest level of the incentives scheme and in disciplinary proceedings, and prisons were not investigating the underlying reasons for this sufficiently.”

6. Concluding observations

6.1 The notion of a specialist guideline to ensure that people with mental health conditions get the most appropriate outcome is welcome but we consider that this guideline requires significant revision to achieve that. We would be happy to discuss this with you further.

The Howard League for Penal Reform
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