CBA Response to Sentencing Guidelines Council Consultation entitled Sentencing Offenders with Mental Health Conditions or Disorders

July 2019

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Q1. Do you agree with the proposal that the draft guideline only applies to offenders aged over 18? If not, please tell us why.

There are many conditions that may become ameliorated with age and others that either only emerge in later life or cannot be diagnosed until adulthood is reached. The CBA understands the proposal that those sentencing youths should have regard to the Overarching Principles that apply to sentencing those under the age of 18. It is no doubt helpful to sentencers dealing with young offenders that they should have a compendious document to refer to. It is also right that sentencers should be particularly reminded of the need for an individual approach when it comes to sentencing youths. Particular care should also be paid as to how offenders who are over 18 but under 21 who are approached given the differences in regimes which still acknowledges their youth. Turning 18 should not necessarily be a cliff edge but may inform which services and treatments are available.

It is important that if a more evolved and specific guideline is promulgated for adult offenders that the guideline which applies to youths should not be seen as being less sophisticated or generalised.

Ultimately it is acknowledged that including young offenders within this draft guideline could have the effect of unduly complicating the sentencing of youths. There should be specific reference to the youth sentencing guideline and the paragraphs that are applicable within it until a further similar guideline is created for youths. Equally there should be a reference to this guideline within the Youth Sentencing guidelines for assistance as to approach.

Q2. Do you agree with the proposed title of the guideline? If not, please tell us why and suggest any alternatives.

The CBA appreciates that there may be an issue in balancing the clinical descriptors and the sensitivities of those who are affected by such conditions. The title settled upon is sufficiently comprehensive whilst at the same time being simple enough within the context of sentencing. The Council is invited though to consider including neuro divergent conditions as many with

conditions listed in annex A may would not necessarily be considered mental health conditions or disorders.

Q3. 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.

Paragraph 3 is vital and should be specifically highlighted in its own right.

It is pleasing to see that sentencers will be reminded that many conditions are invisible or not readily discernible upon immediate presentation. It is very important that assumptions are not made about the absence of any previous diagnosis. This is especially important given that progress in identifying and diagnosing as well as awareness of conditions can be evolutionary – that which is seen now may not have been apparent in the past or its significance not appreciated at the time e.g. disruptive behaviour at school or exclusions.

Frequently contact with the Criminal Justice system is a reflection of how their condition directly or even indirectly has affected them to the point that they have come before the courts. There are many defendants who do not receive any proper assessment or diagnosis until they come into contact with the Police or Courts.

It is often the case that conditions are only diagnosed after some time and that those with mental health problems feel stigmatised by society and so maybe reluctant to seek help.

It is vitally important that sentencers have clear signposting to the types of medical reports that can assist in ensuring a just sentence is imposed that both properly acknowledges an offender's mental health problem while, insofar as is possible, ensuring that any sentence imposed helps mitigate that problem and does not exacerbate it. It goes without saying that reports should accompany offenders into custody and that should be included in the introduction to the guidelines.

An emphasis on participation in and understanding of proceedings by all offenders is warmly encouraged so that the intention and purpose of the sentencer is communicated to the offender in a way that can best be understood.

Cultural and ethnic considerations should always be considered and it is apt that sentencers should be particularly reminded of their obligations to ensure equal treatment.

Q4. 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?

It is important that offenders treated within the NHS and privately are not subject to differing levels of security and staffing ability/knowledge. Sentencers should be able to satisfy themselves that private medical establishments understand their obligations, duties and responsibilities both towards the offender but also importantly to the court.

One important matter that should be brought to the attention of sentencers is who is funding private treatment.

Q5. The guidance in paragraphs 8 and 9 is helpful but the emphasis should perhaps go towards a presumption that expert opinion should be taken into consideration unless it would be inappropriate to do so or for exceptional reasons. If a sentencer rejects such expert evidence as is placed before them, they should provide reasons as to why they have done so. To do otherwise may allow for inappropriate consideration or even outright rejection of information that should properly form part of the basis of the sentencing exercise governed by this guideline. Moreover, it creates a potential tension between the obligations set out in para. 3 (the necessity of reports) and what weight if any it should ultimately be given.

It should also be emphasised that many people with mental health disorders have lifelong difficulties. The offender with mental health difficulties may have relapsed due to changes in medication, a failure to continue to take prescribed medication or simply because there has

been a relapse. It is important for sentencers to not equate a relapse with higher culpability since relapses are part of the difficulties that those with mental health difficulties have to manage and it would be unfair for them to have a higher culpability simply because they have relapsed due to a failure to take medication for example.

Q6.

Paragraph 10 is not sufficiently nuanced. The issue of culpability requires context. As set out in the draft guidelines, it appears that there may be higher culpability in certain circumstances but it does not clarify that the starting point for culpability for those with mental health conditions is or should be lower than for other defendants if appropriate. Any increase in culpability should therefore be considered within the context of the condition and offence then adjusted accordingly. It would be unjust that they should be penalised with an increased culpability if the starting point is the same as that for a defendant without a mental health condition.

Furthermore, if this list of questions is to be adequately dealt with it will need to form the basis for a court report. The guidance should indicate that a sentencer dealing with a serious offence should seek expert opinion on such questions by way of a court report.

In any event, these questions should be posed subjectively rather than objectively.

Q7.

There no issue with the guidance in this section. It should be emphasised that those with mental health difficulties should not be treated more harshly than those without such difficulties; in fact, it may be sensible to remind sentencers that those with mental health problems sentenced to a hospital order are being sentenced to such an order because they have a mental disorder and because they pose a risk to others or themselves.

Q8.

Yes, this is helpful. Yes, this is helpful. A yes/no flowchart might be helpful to assist sentencers to determine which order is the most appropriate in the particular case but care

would need to be taken to ensure that the overall approach remained defendant/case specific rather than restricted to satisfying a flow chart.

Q9.

We agree this is helpful. It largely covers the main types of commonly encountered issues but it is highly recommended that links to other sources of information would be useful. The approach that the CPS took in their recent consultation on the charging of the defendants in these circumstances may be of assistance.

We are concerned to see that specific medical descriptors have been left without explanation. For example, 'mild' and 'moderate' are usually within the context of the clinical assessment and diagnosis of the condition and are not the same at all as their everyday usage. A person with mild learning disabilities refers to where on the range of learning disabilities they lie – they are still learning disabled and it is not a reflection of how well they may or not function within society. Caution and care must be taken by sentencers as to what is actually meant by the expert within their report or within medical records.

However, there is an anxiety that this section provides only a very basic explanation and that sentencers should be made aware of those limitations rather than receiving the information as definitive. Similarly, there is inherent risk in using without qualification assertions over mental age and/or intellectual function e.g. high intellectual function does not necessarily mean that the person is gifted, intelligent or academically equipped but rather that within the range of how they might function they are at the higher end of function rather than ability.

The definition of Autism is particularly troubling as it is overly simplified and again uses terms that have a specific medical meaning. It may be more of use to consider that offered by the NAS site. Where such material is reproduced then is should clearly be attributed. Asperger's should not be separated from Autism – it is Autism and to make it separate implies that is in some way not Autism. There is no mention of the lack social skills, sensory conditions or what is termed as the 'triad of impairments'. Autism makes for atypical ways of thinking, moving, and interactions as well as significant differences in sensory and cognitive processing. Autistic people may have episodes where their bodies/minds become overloaded

resulting in a shut down which may manifest itself as extremely agitated or volatile behaviours known colloquially as 'melt downs'. Once one of these begins, the person is not fully in control of their conduct which may affect culpability,

Particular care is required with conditions such as Autism which may affect criminal liability in offences where the mental element is crucial such as conspiracy or joint enterprise.

There is a need to deal more specifically with ADHD which is probably one of the most significant neurodiverse conditions that regularly features in the CJS and sentencers should be sign posted to www.aadduk.org

Similarly, depressive illnesses up to and including post-natal depression warrants its own special section. There is no information about other disorders such as post-partum psychosis : https://www.nhs.uk/conditions/post-partum-psychosis/

Attention should be drawn to the mental effects of Coercive control. Whilst it is accepted that these are less common it would be helpful to guide sentencers to links for reliable information on other disorders.

This guidance will need to be regularly reviewed – it cannot remain static for prolonged periods as this may result in application of outmoded ideas of the conditions defined in Annexe A and more generally.

It will need to be updated to reflect any developments in understanding or treatments. There are areas such a Personality Disorders which are still relatively 'new' but which are increasing featuring in criminal cases.

Q10.

It is noted that there is no reference to the questions raised regarding culpability in this section set out in the draft guidance at paragraph 10. These questions should be asked of the author of any report to assist the sentencer.

Q11.

Yes, this is helpful.

Q12.

No other issues to address

Q13.

Yes, the length of the guideline is fine.

Q14.

The CBA would strongly encourage the Council to produce a similar guideline for Youths.

The Council is invited to make clear from the outset that this guideline allows sentencers an opportunity to consider cases holistically rather than restrictively.

It is the view of the CBA that the starting point for culpability should be lower than other defendants and then reviewed within the context of the offence and defendant. There are many times when a defendant's condition although not directly related to the offence before the court may inform as to the real level of culpability and it is envisaged that this will routinely require expert input even if it is brief.

Q15

It is hoped that it would impact sentencing to allow for a more positive and constructive approach to dealing with defendants with a greater emphasis on treatment and rehabilitation thereby affording the public greater protection by addressing the cause/background to the offending. It is hoped that it will allow sentencers to feel less constrained by other guidelines on specific offences and rather more empowered to meet the justice of an individual case.

Q16. If such information is collated and published it should be transparent as to where this information comes from. Previous information collated suggests the average length of such

orders but it was not clear as to where the information was collated from and how extensive it was.