

**SENTENCING OF PEOPLE WITH MENTAL WELFARE ISSUES: REPORT ON DISCUSSION  
EVENT WITH SCOTTISH SENTENCING COUNCIL**

**FRIDAY 14 JUNE 2019, EDINBURGH**

- Scottish Sentencing Council:** Lady Dorrian QC, the Lord Justice Clerk (chair)  
Lord Turnbull (senator member)  
Sheriff Principal Ian Abercrombie QC (judicial member)  
Sheriff Norman McFadyen (judicial member)  
David Harvie, Crown Agent (prosecutor member)  
Stephen O'Rourke QC (advocate member)  
Krista Johnston (solicitor member)  
Sue Moody (victims expert)
- Secretariat to the Council:** Graham Ackerman (Secretary)  
David Dickson (Principal Legal Officer)  
Andrew Bell (Principal Research Officer)  
David Ross (Senior Policy Officer)  
Stuart Ritchie (Communications Officer)  
Jessica Flynn (Business Manager)
- Attendees:** Dr Gary MacPherson (consultant forensic clinical  
psychologist)  
Suzanne Martin (Scottish Association for Mental Health)  
Lesley McDowall (Scottish Prison Service)  
Colin McKay (Chief Executive, Mental Welfare  
Commission for Scotland)  
Charlotte Sivelle (Royal College of Psychiatrists in  
Scotland)  
Sheriff Nikola Stewart (Sheriffdom of South Strathclyde,  
Dumfries and Galloway)  
Professor Lindsay Thomson (Medical Director of the State  
Hospital, Carstairs)  
Ian Waitt (Social Work Scotland)
- Apologies:** Summary Sheriff Jillian Martin-Brown (Council member)

Susan Fallone JP (Council member)

Chief Constable Iain Livingstone (Council member)

Neil Hutton (Council member)

## Overview and agenda

1. An overview of the discussion event, setting out its purpose and an agenda, was circulated to all attendees in advance. Attendees were informed that the Council had announced in its current [business plan](#) its intention to hold discussions with interested stakeholders to learn more about the issues which can arise when sentencing people with mental welfare difficulties, with a view to considering what, if any, activity the Council might undertake in this area.
2. For this reason the Council was keen to seek input on a range of matters to assist with consideration of this topic, including in relation to current difficulties or challenges in sentencing, any issues which should be considered if this were to be addressed in sentencing guidelines in future, and what further information the Council may wish to gather. The agenda set out three questions on these matters, which would form the basis of the discussion:
  - **Question 1: What issues can arise when offenders with mental welfare difficulties are sentenced?**
  - **Question 2: How should the courts approach the sentencing of such individuals? In particular:**
    - **What should (or should not) be the main purpose(s) of sentencing?**
    - **What factors might the court need to consider?**
    - **What information might the court need to obtain in order to impose an appropriate sentence? What might be the features of an appropriate and effective sentence?**
  - **Question 3: Is there a case for the Council to develop guidance on this topic? And if so, would that take the form of a standalone sentencing guideline, or could this be incorporated into other guidelines?**

3. It was noted that only sentencing after conviction in a criminal court is within the statutory remit of the Council; thus, for example, pre-conviction disposals such as treatment orders, or any disposal following on a finding that the accused is unfit for trial, are outwith the Council's remit.

## Discussion

4. Following a brief introduction from the Chair, open discussions took place on the three questions set out above. It should be noted that the views expressed here are not necessarily those of the Scottish Sentencing Council.

### **Question 1: What issues can arise when offenders with mental welfare difficulties are sentenced?**

5. There was discussion of whether courts have sufficient information when sentencing offenders with mental welfare difficulties. Attendees considered a range of issues related to the three main sources of information for the court: the Crown Office and Procurator Fiscal Service ("COPFS"), the defence, and reports (primarily criminal justice social work reports, or "CJSWRs").
6. In relation to COPFS, it was agreed that the main issue is a pre-sentencing one and therefore outwith the Council's remit. Improved information about an individual's mental health would allow for better informed prosecutorial decision making. Given such individuals are often reported from custody, decisions have to be made within tight time constraints. COPFS may therefore only learn about an individual's mental health issues after a decision to prosecute has been taken, or indeed at sentencing.
7. The need to improve information sharing between relevant bodies and organisations was discussed. As an example of the difficulties to be overcome, inconsistencies in the information available to emergency services attending the same incident were noted: ambulance staff may get notice of mental health issues while the police may not. As a consequence, the police would be unable to report any such issues to COPFS. The sharing of information held by local authorities was also recognised as a challenge, given that there are 32 local authorities operating 32 different systems. Post-sentencing, it was suggested that the full range of available reports may not always be provided to prisons. Offenders may come with a personal escort record<sup>1</sup> but not a full psychiatric report if one has been

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<sup>1</sup> The Personal Escort Record (PER) form is used by anyone with responsibility for escorting an individual in custody. Every person entering prison should be accompanied with a PER form. The PER form is designed to ensure

prepared. This might affect, at least in the initial stages of a custodial sentence, the identification of suitable programmes for the offender.

8. Attendees recognised that the question of sharing information about an individual's mental health with different bodies within the criminal justice system (where necessary and appropriate) was a significant issue, but one which is outwith the Council's remit. To address this, discussion would be required between the relevant bodies, particularly to address data security concerns.
9. In relation to the information provided by the defence, one attendee noted that a defence solicitor is often the first person who has to consider whether there is a mental health issue that should be brought to the attention of the court, but that they might not be best placed to do so. There may also be an impact on sentencing if the defence is unable to obtain medical evidence of an offender's mental welfare difficulties.
10. There was general discussion of the effect on sentencing of issues with court reports; specifically, the effect of a lack of information about available disposals in CJSWRs, and some participants expressed concerns about delays in obtaining psychiatric and psychological reports. It was suggested that CJSWRs often do not provide sufficient information about the types of programmes that are available in the community and in prisons, what exactly is involved in such programmes, how long they will take, and if there are any waiting times. This makes it difficult for sentencing judges to be confident that they can determine an appropriate sentence, or that it will be effectively implemented. It was noted that the availability of viable sentencing options for community disposals is one of the most important factors in whether or not a sentence will be successful. Unless there is robust management of the resources available this may continue to be an issue for the courts.
11. While there was some experience of delays in obtaining CJSWRs, this was felt to be more of an issue with psychiatric and, in particular, psychological reports. One attendee suggested that in less acute cases in the sheriff court, psychiatric and psychological reports are not requested as often as they used to be. This was felt to be due to the costs involved and the likelihood of delays. It was noted that the Forensic Mental Health Services

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relevant information about the individual is passed on to the receiving authorities and importantly to those officers who take over responsibility for the individual from others.

Independent Review<sup>2</sup> would be considering the provision of psychiatric and psychological reports to the courts including the impact of any delays on sentencing<sup>3</sup>.

12. It was observed that courts may also require reports from mental health officers (“MHOs”)<sup>4</sup>, not just from medical professionals. Although courts have processes for liaising with medical professionals, similar processes are lacking in relation to MHOs. This may be due in part to the fact that MHOs might not necessarily work for the local authority which is within the court’s jurisdiction. The availability of MHOs across Scotland was also suggested as an issue, along with the fact that there might not be much interaction between MHOs and those who prepare CJSWRs. While not a matter within the Council’s remit, it was felt that it would be helpful for courts and local authorities to consider how they engage with MHOs with a view to establishing agreed procedures and points of contact.
13. The number of mental health disposals at sentencing was noted as being very low, with one attendee suggesting that there are perhaps less than 200 a year. The rarity of guardianship orders in criminal – as distinct from civil – cases was noted<sup>5</sup>, along with the rarity of community payback orders with a mental health treatment requirement<sup>6</sup>. In respect of the latter it was noted that a CJSWR would have to recommend the suitability of such a requirement, and that it might not be something that is consistently available across Scotland.
14. Consideration was given to whether courts should take a different approach to the sentencing of those who have an intellectual or cognitive disability compared to the approach in relation to those who have a severe personality disorder. It was suggested, for example, that guardianship might be a more appropriate disposal to consider for the former.
15. Reference was made to research suggesting that a high proportion of prisoners have some form of personality disorder. It was suggested that sentencing judges may find it relatively

<sup>2</sup> <https://www.gov.scot/groups/forensic-mental-health-services-independent-review/>

<sup>3</sup> The review will look at, among other things, “the provision of professional and expert witness psychiatric and psychological reports to Scottish Courts and the impact any delays may have on people awaiting sentencing”. See <https://www.gov.scot/publications/forensic-mental-health-services-independent-review-terms-of-reference/>

<sup>4</sup> A mental health officer is a social worker who has special training and experience in working with people who have a mental illness, learning disability, dementia or related condition. See <https://www.mwcscot.org.uk/law-and-rights/mental-health-act>

<sup>5</sup> The power to impose a guardianship order in a criminal case is provided for at section 58 of the Criminal Procedure (Scotland) Act 1995 <http://www.legislation.gov.uk/ukpga/1995/46/section/58>

<sup>6</sup> <https://www.scottishsentencingcouncil.org.uk/about-sentencing/community-payback-orders/>

straightforward to assess the level of culpability for less serious mental welfare difficulties but are likely to find it difficult to assess how the level of culpability is affected by the wide spectrum of personality disorders. It was agreed that some personality disorders increase risk, and that any sentencing guidelines should focus on this. It was felt that that where a personality disorder may be a factor to be considered in sentencing, it can only be fully identified or assessed through a full psychiatric report. A clinical diagnosis could be made without doing the tests involved in a psychiatric assessment, but such a diagnosis in lieu of tests might be open to challenge in court. This again raised the question of whether there were sufficient resources to ensure psychiatric reports could be made available to courts in all cases where they might be considered necessary.

16. It was felt that the level of resources and support available to offenders through drug treatment and testing orders, together with the multi-disciplinary approach of such orders, is not generally available to offenders with mental welfare difficulties. It was suggested that if such an approach was available, it might be more effective than a community payback order with a mental health treatment requirement.
17. It was also noted that there is an impact on prisons when receiving those with mental health issues who have been remanded pending trial or given a custodial sentence: a significant number of people who come into prison are transferred soon after to a mental health facility, and while they are in prison may need to be held separately from the mainstream population. A person with mental health issues can transfer several times between a prison and a mental health facility. All of this has an impact on the running of the prison. Sometimes, but not always, the issue is identified in advance.
18. It was noted that it is also worth bearing in mind that an individual's condition can change during their journey through the criminal justice system.

**Question 2: How should the courts approach the sentencing of such individuals? In particular:**

- **What should (or should not) be the main purpose(s) of sentencing?**
- **What factors might the court need to consider?**
- **What information might the court need to obtain in order to impose an appropriate sentence? What might be the features of an appropriate and effective sentence?**

19. There was discussion of what should be the main purpose or purposes of sentencing offenders with mental welfare difficulties. Attendees had regard to the Council's ['Principles and purposes of sentencing'](#) guideline, which applies to all sentencing decisions. It states that the purposes of sentencing may include (in no particular order):
- protection of the public
  - punishment
  - rehabilitation of offenders
  - giving the offender the opportunity to make amends
  - expressing disapproval of offending behaviour
20. It was agreed that protection of the public, rehabilitation, and giving the offender the opportunity to make amends would be appropriate purposes in the sentencing of offenders with mental welfare difficulties. However, concerns were raised about punishment. Some attendees suggested that once a person is in the mental health system it is unethical to think about punishment. Sentencing judges may therefore need to consider whether it is appropriate to consider punishment at all in cases where a mental health disposal is likely. It was recognised, however, that there may be more of a penal requirement around certain personality disorders rather than for learning disabilities.
21. There was agreement that the nature of any mental disorder, whether it is lifelong or temporary, and its effect on the level of culpability are key factors courts should consider. Additionally, the level of risk should be considered, both in relation to the risk of reoffending and the risk of harm being caused to others (or to the offender him or herself).
22. With regard to the range of issues encompassed within the statutory definition of mental disorder<sup>7</sup>, there were differing opinions as to whether a guideline should list specific types of mental disorder. Reference was made to the consultation by the Sentencing Council for England and Wales on a draft guideline on sentencing offenders with mental health conditions or disorders<sup>8</sup>. Attendees discussed whether it would be helpful, if the Council was to develop its own guideline on this topic, to include a list of common mental health conditions and disorders similar to the one in Annex A of the England and Wales consultation document. Some attendees noted that the inclusion of "substance misuse

<sup>7</sup> "Mental disorder" is defined in section 328(1) of the Mental Health (Care and Treatment)(Scotland) Act 2003 as any mental illness, personality disorder, or learning disability. See <http://www.legislation.gov.uk/asp/2003/13/section/328>.

<sup>8</sup> <https://www.sentencingcouncil.org.uk/wp-content/uploads/Mental-Health-consultation-paper-Web.pdf>

disorder (drugs, alcohol)” would risk bringing a very large number of offenders within the scope of any such guideline, and that it may be preferable not to include this.

23. One attendee felt that a guideline would not need to include a list of mental disorders, as these would be identified in a CJSWR, so sentencing judges would not ignore them. Although some concerns were raised about the extent to which courts recognise learning disabilities in offenders, most attendees felt that these would also be highlighted in a CJSWR.
24. Set against that was a recognition that a list may be helpful for inexperienced sentencing judges by identifying issues that are not readily apparent, especially in remote areas where such cases may not arise often. Additionally, it may also be helpful to those who write reports for the court, and it would help to increase public understanding and awareness.
25. Attendees also discussed the need for courts to consider whether the offender is currently subject to any civil mental health orders at the point of sentencing and what effect, if any, this might have on a criminal disposal.
26. It was suggested that the court should consider whether the offender has suffered a brain injury or trauma. There was discussion of the possibility that there may be a large number of undiagnosed mental health or welfare issues in the prison population, particularly as a result of brain injury or trauma, and that these issues may only become apparent when offenders engage in prison programmes. Reference was made to research carried out by the University of Glasgow in collaboration with the Scottish Prison Service<sup>9</sup> which suggests that a quarter of all Scottish prisoners have been hospitalised with a traumatic brain injury at some point in their lives; 10% of prisoners have suffered a severe head injury in their lives, or multiple head injuries that are likely to lead to a persistent disability; and that there is an association between brain injury and offending behavior.
27. In relation to the information that the court may need to obtain, it was agreed that the main source of information would continue to be a CJSWR, which attendees felt had three main purposes in cases involving mental health or welfare issues:

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<sup>9</sup> McMillan TM, Graham L, Pell JP, McConnachie A, Mackay DF (2019) The lifetime prevalence of hospitalised head injury in Scottish prisons: A population study. PLoS ONE 14(1): e0210427. <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0210427>

- to address the extent to which mental health issues may be treated as a mitigating factor in the sentencing process (based on the level of agency that the offender had when they committed the offence, and therefore their level of culpability);
- to assess the risk of further offending, and the risk of harm being caused to others or to offenders themselves; and
- to address the offender's mental health needs.

28. In addition, attendees agreed that a CJSWR should suggest an appropriate disposal and outline the available resources for the implementation of that disposal (to address concerns about the lack of such information being available). Although the information provided in a CJSWR is outwith the Council's remit, it was felt that a guideline highlighting the need for such information might help to ensure CJSWRs provide it.

29. Whether a guideline should include a requirement to obtain psychiatric reports was also discussed. It was recognised that there would need to be consideration of how this would be funded. Attendees agreed that it would not be practical to require the court in every case where the offender is or appears to be mentally disordered to obtain and consider a medical report before passing a sentence: any solution needs to be practical and sensible, and the court needs to be sufficiently well informed, but there may be a point at which seeking further information isn't necessary and might result in undue delay, for example when an appropriate sentence might be admonishment or a fine. However, a guideline could in theory say that for condition X the court should always obtain a report, but for condition Y a report is discretionary.

30. It was also noted that many offenders may have a cluster of issues – for example a personality disorder, substance misuse issues, and adverse childhood experiences – and that additional resources might be required to investigate and obtain information in relation to each.

31. Discussion focussed on what the features of an appropriate sentence might be. It was proposed that this should not be seen as a simple dichotomy between prison and hospital. One attendee suggested that interventions were generally more effective in the community. However, a community payback order with an unpaid work requirement may not be appropriate, given that offenders with mental welfare difficulties may not be ready or able to undertake such work. There were suggestions that sentences providing some form of lifestyle support might be suitable in some cases. As an example, reference was made to

green prescriptions used by the NHS. These include an aspect of outdoor physical activity, which health professionals can refer patients onto. It was recognised, however, that the Council does not have any direct influence over the provision of programmes provided by local authorities or the third sector in relation to sentencing.

32. It was agreed that a guideline could encourage greater use of mental health disposals, such as guardianship orders, or community payback order with a mental health treatment requirement.
33. A package of measures similar to those available under drug treatment and testing orders<sup>10</sup> was favoured, adopting the same multi-disciplinary approach, and providing the same type of care and support. The Structured Deferred Sentence<sup>11</sup> court was suggested as a model of the type of monitoring and support that the court – with the appropriate level of support from the local authority and social work – could seek to provide in appropriate cases. Again, the provision of the necessary resources for such an approach was recognised as being outwith the Council’s remit.

**Question 3: Is there a case for the Council to develop guidance on this topic? And if so, would that take the form of a standalone sentencing guideline, or could this be incorporated into other guidelines?**

34. Attendees agreed that the Council should consider developing a guideline on this topic. It was felt that a guideline would help to increase public awareness and understanding of the challenges involved in sentencing such cases. It might also be of assistance to the judiciary in helping to identify the factors to be considered and the options available to the court.
35. It was agreed that rather than address mental welfare difficulties in offence-specific guidelines, it would be better to take a principle-based approach, similar to the approach that the Council is taking with its guideline on the sentencing of young people<sup>12</sup>. This would set out the purposes of sentencing an offender with mental health or welfare issues, and where these purposes might differ from the purposes set out in the ‘Principles and purposes of sentencing’ guideline; for example, by placing a greater emphasis on protection of the public, rehabilitation and giving the offender the opportunity to make amends; and by

<sup>10</sup> <https://www2.gov.scot/resource/doc/353029/0118820.pdf>

<sup>11</sup> Information about the Structured Deferred Sentence approach can be found here: <https://www.cycj.org.uk/wp-content/uploads/2019/05/6-Case-Study-South-Lanarkshire.pdf>

<sup>12</sup> <https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development/sentencing-of-young-people-guideline/>

explaining that punishment should not be a purpose of sentencing in cases where treatment in the mental health system is required. Or by specifically mentioning that treatment might be a purpose in certain cases.

36. A principle-based guideline could also set out why the assessment of culpability is different in cases involving mental health or welfare issues, because the nature of any mental illness, disorder or condition can mean that an offender's level of culpability is lower.
37. It could also set out the features of an appropriate sentence. This might involve encouraging the use of community payback orders with a mental health treatment requirement, or guardianship orders in appropriate cases.
38. It was felt that there is merit generally in considering at what level of severity a mental welfare issue might warrant particular attention in sentencing terms. Those with the most severe difficulties will likely exit the criminal justice system altogether while those with lesser difficulties may be unlikely to present significant sentencing challenges. However, people with difficulties falling between those limits could be particularly adversely affected, and the most challenging in terms of identifying the appropriate sentence.

## **Conclusion**

39. The Council agreed to take account of the issues raised in the course of discussion in considering whether or not to develop a guideline on this topic, and in taking forward the development of any future guideline in due course. In particular, taking into account the specific points noted above, further consideration may be warranted in relation to the following areas:

- the challenges involved in ensuring that courts have sufficient information about any mental health or welfare issues at the point of sentencing;
- the degree to which the level of culpability may vary across the spectrum of mental disorders; and
- how to address questions around the availability of suitable disposals for offenders with mental welfare difficulties.

## **ATTENDEE BIOGRAPHIES**

### **Dr Gary MacPherson, Consultant Forensic Clinical Psychologist**

Gary is a consultant forensic clinical psychologist. He has over 25 years' experience as an expert witness for the courts. He has held head of service and board level responsibilities in the NHS and independent sector. He was awarded a fellowship of the British Psychological Society and he is a professor at Maastricht University, the Netherlands.

### **Suzanne Martin, Senior Public Affairs Officer, Scottish Association for Mental Health (SAMH)**

Suzanne has worked in public affairs for over four years, having previously worked for a public affairs agency across a myriad of sectors. She started at SAMH in May 2018, where her role is focussed on engaging political and sector stakeholders to achieve SAMH's policy aims and improve Scotland's mental health.

### **Lesley McDowall, Health Strategy and Suicide Prevention Manager, Scottish Prison Service**

Lesley joined the Scottish Prison Service in 1997 as a Practitioner Nurse. From 2006 she was the Head of Care at HMP & YOI Cornton Vale until 2011 when responsibility for the delivery of healthcare in prisons transferred to NHS Health Boards. She was retained by the Scottish Prison Service as the Clinical Advisor and now holds the position of Head of Health Strategy. She is responsible for all health related strategies including Mental Health, Drug & Alcohol, Health Protection and Suicide Prevention.

### **Colin McKay, Chief Executive, Mental Welfare Commission for Scotland**

Colin has been Chief Executive of the Mental Welfare Commission since 2014. Previously Colin worked in the Scottish Government for 14 years, including 4 years working on mental health law reform, first as secretary to the Millan Committee, and then as Bill manager for the Mental Health (Care and Treatment) (Scotland) Act 2003. He also worked in Government on justice, strategy and public service reform. Before that he was a solicitor, and spent 10 years with ENABLE Scotland, and served as a Mental Welfare Commissioner for 2 years. He has a particular interest in the interface of law, care and ethics.

### **Charlotte Sivelle**

Charlotte is a Specialty Doctor in Forensic Psychiatry currently based at Rohallion Clinic in Perth, which is one of the three medium secure units in Scotland. She is also the Specialty

Doctor representative on the Royal College of Psychiatrists in Scotland Forensic Executive Committee.

**Sheriff Nikola Stewart**

Sheriff Stewart is the resident sheriff at Lanark and an appeal sheriff in the Sheriff Appeal Court. She has been on the Mental Health Tribunal for Scotland shrieval panel since its inception, dealing with restricted patient cases. Prior to that, as resident sheriff at Lanark since 2000, she was primarily responsible for dealing with State Hospital restricted patient appeals as well as civil detention appeals and applications within the jurisdiction.

**Professor Lindsay Thomson, Medical Director of the State Hospital, Carstairs**

Lindsay has been Medical Director of the State Hospitals Board for Scotland and of the Forensic Mental Health Services Managed Care Network, and Director of the School of Forensic Mental Health since 2007. She has been an Honorary Consultant Forensic Psychiatrist at The State Hospital from February 1998. She is Professor of Forensic Psychiatry at the University of Edinburgh.

**Ian Waitt, Social Work Scotland**

Ian is currently employed as Mental Health Officer Service Manager with City of Edinburgh Council, having had a variety of social worker, Senior Social Worker and Team Manager posts. He has been an active member of the Social Work Scotland Mental Health Sub-Group and its ADSW predecessor since 2008 and is also currently chair of the Forensic Network Social Work Group, a post he has held since 2018.