SENTENCING ACADEMY

Fellowship Scheme 2020/21

Mental illness: the real ‘life sentence’?

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INTRODUCTION

In 2020, 71% of women and 47% of men in prison were reported to have mental health problems (HM Inspectorate of Prisons 2020, p. 155). Individuals with mental ill health may find themselves in prison because the courts favour protection of the public over the protection of the rights of offenders with mental ill health. In 2019, 1,016 prisoners were transferred from prison to a secure hospital – the second highest number on record (Prison Reform Trust 2021, p. 46). This raises the possibility that inappropriate sentencing decisions are being made, that prison is damaging for mental health, or both. Either way, individuals with mental ill health are finding themselves in prison when they should not be there. In October 2020, the first sentencing guideline for offenders with mental ill health came into force. This paper argues that, although a welcome step forward, the Guideline ignores the main problem which is a lack of understanding of mental illness within the criminal justice system. Without a better understanding of mental illness, and the effects that different sentences can have on individuals who suffer from mental illness, the problem remains.

THE LAW

Part 3 of the Mental Health Act 1983 provides alternative sentencing options to a custodial or community sentence for offenders with mental illness. This includes hospital and guardianship orders, a restriction order, and a hospital and limitation direction. Section 37 of the Mental Health Act 1983 states that a hospital order can be imposed where the offender is suffering from a mental disorder and appropriate medical treatment is available for the offender's illness. Section 37 also covers guardianship orders which can apply where the local social services, or a proposed private guardian, is willing to receive the offender into guardianship. This would require them to ensure the defendant resides at a certain location, attends appointments, and that access to the offender is always allowed for treatment purposes. A restriction order imposes the additional requirement of approval from the Ministry of Justice before the patient's release from a hospital order – the hospital cannot decide to release the patient without this approval, under section 41 of the Mental Health Act 1983. Finally, section 45A of the Mental Health Act 1983 governs hospital and limitation directions, also referred to as a hybrid-order, which can be imposed if the conditions for a hospital order are satisfied but, when the patient's mental health is considered to have improved, they are sent from hospital to prison to serve the remainder of their sentence.

In 2017 a JUSTICE report 'Mental Health and Fair Trial' explored mental health within the criminal justice system and made 52 recommendations within five different areas where those with mental ill health should be better recognised and supported: the investigative stage, decisions to prosecute, pre-trial, legal capacity tests and sentencing. Echoing many other reports which have tried to communicate the same message (Reed 1992; Wessely 2018), recommendations for pre-sentencing stages include a specific prosecutor to decide on the charging decision in cases of vulnerability, dedicated mental health judges and a statutory legal capacity test for fitness to plead and fitness to stand trial (JUSTICE 2017).

With regards to sentencing, JUSTICE recommended better co-operation between the criminal courts and mental health tribunals, a wider range of sentencing disposals, mental health training for judges and a specific sentencing guideline for this group of offenders. It proposed that the sentencing guideline should include the necessary evidence needed to sentence offenders with mental ill health, guidance for how this evidence should be considered and which requirements must be met for the specific sentencing options available (JUSTICE 2017, para 6.22). Following the publication of JUSTICE's report, the Sentencing Council released the first sentencing guideline for 'Sentencing offenders with mental disorders, developmental disorders, or neurological impairments' which came into force on 1 October 2020. The mental health guideline is the second group-specific guideline, after children and young people, and was recognition of the previous guidance for sentencing mentally ill offenders being unclear. The new Guideline aims to address the confusion caused by case law and ensure that guidance is in one accessible place. At the time of its publication, HHJ Rosa Dean, a member of the Sentencing Council, stated that the Guideline would 'make sure that courts have the relevant information when sentencing offenders with mental disorders to make sure their rights and needs are balanced with protecting the public, and the right of victims and families to feel safe' (Sentencing Council 2020a).

THE 2020 GUIDELINE

The new sentencing guideline applies to adults who at the time of committing an offence, and/or at the time of sentencing, are suffering from a mental disorder, developmental disorder, or neurological impairment, and aims to ensure that the courts have the relevant guidance to make fair and balanced sentencing decisions. It is argued here that whilst a good source of guidance for courts, the Guideline alone does not go far enough to address the balance

between the rights of offenders with mental illness and the protection of the public by merely codifying the guidance which was already available.

Identifying Mental Illness

The Guideline is split into three sections. Section one provides information on mental disorders and refers to Annex A which includes descriptions for some of the most common mental illnesses. There will rarely be a straightforward answer to determining whether an individual does suffer from a mental illness, or to identifying what mental illness that individual may suffer from. As explained at paragraph four of the guideline, many disorders are not easily recognisable because of co-morbidity – this is where an individual has more than one disorder meaning that they may display a number of different symptoms. Furthermore, mental disorders can often be invisible and additionally, as it is highlighted in the Guideline at paragraph five, courts should also be aware of 'relevant cultural, ethnicity and gender considerations of offenders within a mental health context'.

Paragraph six of the Guideline rightly states that if there is any suggestion that a defendant may be suffering from a mental illness then a medical report should be requested, and must be requested before passing a custodial sentence, unless it is unnecessary to do so. However, the condition 'unless it is unnecessary to do so' is problematic because it should always be necessary to obtain a report. As Peay (2016) argues, a disregard for medical reports is likely to lead to inconsistent sentencing decisions because psychiatrists understand mental disorders and can assess the potential effects of certain sentencing options upon such a disorder. In comparison, a judge's knowledge in this area is limited due to a lack of mental health training within the criminal justice system.

The Guideline states that it may be unnecessary to obtain a medical report if up to date information is available. In a webinar hosted by Garden Court Chambers in April 2021, HHJ Rosa Dean suggested, as examples, that this could include recent doctor or school reports.[1] However, JUSTICE's report from 2017 argued that any report should be undertaken by medical professionals only. Due to the complexities surrounding mental illness, only a report completed by a medical professional will allow for a correct diagnosis and an appropriate evaluation of the potential effect that each sentencing option may have upon the defendant's mental health. Therefore, it is argued that the Guideline has not gone far enough to protect the rights of this group of offenders by failing to make medical reports a requirement for all sentencing decisions where the defendant has a mental illness.

[1] Available here: https://www.youtube.com/watch?v=_Lsg8qFqKts.

Assessing Culpability

Section two explains how culpability should be assessed. This can also be referred to as the extent to which an individual is to blame for an offence. The guidance has been taken from the case law in *Vowles*[2] and *Edwards*.[3] The Court of Appeal in *Vowles* advised that prison, or a section 45A-hybrid order, is the usual sentence for a mentally disordered offender who is found to be responsible for the offence. If the offending is found to be wholly or in significant part attributable to the offender's mental disorder, then a section 45A order should be considered first. The effect of the decision in *Vowles* was that those who may have been eligible for a hospital order were likely to be sentenced to a section 45A hybrid-order instead, increasing the number of individuals with mental disorders in prisons. The guidance in *Vowles* was updated by the Court of Appeal in *Edwards*, which suggested that a sentencing judge should consider whether a hospital order is appropriate first, then consider all other powers including hybrid-orders and prison.

Since the decision in *Edwards*, the Court of Appeal has taken two different approaches to sentencing offenders with mental ill health: treatment versus punishment. Yet, there appears to be a continued preference towards the punitive approach taken in *Vowles*. This can be seen in the recent case of *Steele*[4] where it was held that imprisonment was the correct sentence, rather than a hybrid-order, even though psychiatric evidence stated that the offender's personality disorder played a role in leading him to commit the offence. This is not surprising when the Guideline simply codifies the guidance from the cases of *Vowles* and *Edwards* and so the sentencing of offenders with mental ill health remains based on a legal decision assessing firstly, the seriousness of the offence and secondly, to what extent the individual is to blame. Where an offender with mental ill health is found to be partially or significantly to blame, a hybrid order is often favoured because any degree of culpability must be balanced against the potential risk of future offending. However, Peay (2016) argues that if an individual's offending is found to be attributable to their mental disorder, then they cannot be completely to blame and the offender should not be excluded from consideration for a hospital order.

Determining the Sentence

The final step of the Guideline at section three is to determine the sentence. The different sentencing options available, and the requirements for each, can be found at Annex C of the Guideline. It is encouraging to see that the Guideline has given greater importance to the

[2] [2015] EWCA Crim 45.
[3] [2018] EWCA Crim 595.
[4] [2020] EWCA Crim 1694.

alternatives to prison by placing community orders and hospital orders before hybrid-orders in the list of mental health disposals.

Mental Health Treatment Requirement

Firstly, a Mental Health Treatment Requirement (MHTR) can be attached to a community order, or suspended sentence order, if the Court is satisfied that treatment is required to an extent which does not merit the making of a hospital order. The offender must be willing to comply, and the order may also be imposed alongside a Drug Rehabilitation Requirement and/or Alcohol Treatment Requirement. However, if an offender reoffends or does not comply with the requirements of a treatment order, they can be re-sentenced to a custodial sentence, or the suspended sentence can be activated, without consideration for the effect that this might have on their mental health. It is for this reason that, before either a community order or suspended sentence order with a MHTR is imposed, the availability of mental health services in the area should be assessed. This information can be obtained through the Liaison and Diversion services and one reform suggestion would be for the Guideline to include a requirement for judges to consider a report containing such information, as provided by legal representatives, before imposing a community sentence with MHTR.

Hospital Orders

Hospital orders are viewed as inappropriate unless there is found to be little or no culpability on behalf of the offender (Peay 2015). This was highlighted in *Rooney*[5] where the judge held that time spent on a hospital order could not be credited towards the offender's final sentence because there was no punishment within a hospital and restriction order – its sole purpose was treatment. It is argued here that an individual's liberty is still restricted through a hospital order as it would be in prison, serving to both punish the offender and treat their illness. Another issue for judges is the fact that an offender's release from a hospital order is determined by a Mental Health Review Tribunal rather than the Parole Board. An offender can be released based on their mental illness becoming manageable, rather than an assessment of any reduced risk to the public and this may explain why courts are reluctant to use hospital orders.

Nevertheless, judges have the power to impose a hospital order with restrictions if it is necessary for the protection of the public. Any risk of further offending can be monitored by the Secretary of State before the offender is released from a hospital, as governed by section 41 of the Mental Health Act 1983. Furthermore, reconviction rates for mentally disordered

[5] [2020] EWCA Crim 1132.

offenders discharged from hospital appear to be much lower than for those released from custody.[6] A potential explanation for this is that offenders receive ongoing support for their mental illness upon release from a hospital order, which they do not receive once released from prison. Under section 117 of Mental Health Act 1983, there is a legal obligation to provide patients with aftercare following their release from hospital. The management of the illness beyond a hospital order may better reduce the risk of reoffending and hospital orders serve to both punish the offender and protect the public.

A section 45A hybrid-order provides the option to impose both punishment and treatment. Peay (2015) argues that the ability to impose a hybrid-order provides a safety-net for any anxiety surrounding the possibility of early release from hospital of offenders who may still pose a threat to the public. However, this may ignore the fact that offenders with mental illness are more often a danger to themselves and, as the then Secretary of State for Justice, Robert Buckland (in January 2021) noted, prison is not a place for those whose greatest danger is their own mental health. However, a hybrid-order requires that once an offender's mental illness is deemed to have been treated, they are then sent to prison to serve the rest of their sentence. The courts should begin to give more consideration to the possibility of an individual's mental illness deteriorating once removed from a safe support system within hospital and placed into an environment filled with high levels of violence, drug misuse and self-harm to serve the remainder of their sentence in a prison (HM Inspectorate of Prisons 2020). This paper will now consider the potentially damaging effects of prison on offenders with mental illness.

Prison

O'Loughlin (2021) argues that by failing to consider the likely effect of a custodial sentence on the offender, the courts ignore their obligations to protect mentally disordered offenders from harm. This is supported by the European Court of Human Rights decision in *Renolde v France*,[7] which held that a State has an obligation to take preventative measures to protect an individual whose life is at risk, and this extends to prisoners who suffer from mental ill health and are at a risk of suicide. This places an onus on the courts and the government to ensure that the rights of offenders with mental ill health are upheld. Both are failing to do this. Between 2012 and 2014, of the 199 self-inflicted deaths in custody investigated by the Prisons and Probation Ombudsman, 70% of the people had been identified as having mental health needs (Prisons and Probation Ombudsman 2016).

[6] See the evidence cited in *Nelson* [2020] EWCA Crim 1615 at para. 39.
[7] [2009] 48 E.H.R.R. 42.

These figures come several years after the decision in *Renolde v France* and further in 2018, the House of Commons' Health and Social Care Committee found that the government were not doing enough to uphold the basic needs, safety, and human rights of prisoners. Prisons were deemed to be unsafe environments characterised by violence, self-harm and drug misuse which would only lead to deterioration for an individual who already suffers from mental illness. Given current prison conditions, as demonstrated by the Health and Social Care Committee's report, prison does have a negative impact on an offender's mental condition.

The HM Inspectorate of Prisons Annual Report for 2019-20 found inadequate access to mental health assessments and treatments in half of the prisons inspected, as well as 'long and unacceptable delays' experienced by those who needed a transfer to hospital (2020, p. 44). This situation has been exacerbated by the Covid-19 pandemic. There is also a lack of provision for aftercare for mental health upon release from prison compared with those who receive a hospital order. Consequently, O'Loughlin (2021) argues that the courts should be taking more action to identify offenders with mental ill health and divert them away from prison – including considering medical reports and the potential risk that imprisonment poses on an offender with mental ill health.

NEXT STEPS

Improvements to the Guideline

Despite the Guideline, courts may still be showing insufficient regard for all relevant medical evidence. In *R v Reynolds*,[8] fresh evidence from a psychiatrist on appeal suggested that the correct sentence was a hospital rather than hybrid order. The Court of Appeal rejected this medical evidence as it could not agree the extent to which the offender's mental disorder contributed to his offending. Despite this, it was agreed that there was a significant risk that the offender's mental health would deteriorate if sent to prison. However, because the Court argued that the offence concerning child sex offences was serious and there was a real need for punishment, a section 45A hybrid-order was imposed instead of a hospital order. O'Loughlin (2021) argues that consideration should always be given to the negative effect a custodial environment will have on an offender's mental illness and to whether there is potential for a custodial sentence to breach an offender's right to life, or right to not be subject to inhuman or degrading treatment. O'Loughlin (2021) therefore criticises the Guideline for

[8] [2021] EWCA Crim 10.

failing to emphasise that where a sentence poses a real risk of breaching an offender's human rights, particularly their right to life, then the Court must consider alternative options regardless of any degree of culpability. The Guideline could, for example, make it a requirement to obtain and consider medical reports and place more emphasis onto considering the offender's human rights. Finally, it should also include information portraying the positive effects of hospital orders compared to the damaging impact that prison can have on individuals with mental ill health.

Additional Next Steps

In addition to improvements to the Guideline, mandatory training should be provided which further educates legal professionals on the effects that different sentencing options can have on an individual's mental health. Training should encourage judges to visit local communities and prisons to determine the adequacy of the mental health services they provide. Nevertheless, even if judges were made aware of the potentially life-threatening impact that a custodial sentence could have on an individual with mental ill health, a range of rehabilitative sentencing options, or appropriate community options need to be made more widely available. Following the enactment of the Human Rights Act 1998 there were calls for reform of the Mental Health Act 1983 to create a better balance between the rights of the public and the rights of individuals with mental ill health. Almost 30 years ago, John Reed also argued that the aim, when sentencing mentally ill offenders, should be to maximise rehabilitation and increase opportunities for independent living, which could be achieved through supported housing (Reed 1992, p. 19). In 2007, the Act was reformed and patients no longer had to prove to the Tribunal that the conditions for their detention were no longer satisfied, as the burden was reversed back onto the hospital to prove the lawfulness of the individual's detention.[9] This was a positive change for the rights of those sentenced to a hospital order but there was little else within the 2007 reforms to shift the balance from the protection of the public to the protection of the rights of offenders with mental ill health – the balance remained in favour of public protection. The current alternative sentencing options are found within legislation which is almost 40 years old, and they remain limited. Ultimately, reform of Part 3 of the Mental Health Act 1983 is urgently needed.

The Mental Health Act 1983 is to be reformed again but once more, Part 3 of the Act which governs the treatment of offenders with mental ill health has been forgotten. The questionable justification for this is that the government is satisfied that Part 3 helps professionals to make the right decisions when diverting individuals away from the criminal justice system

[9] *R (ex p H) v Mental Health Review Tribunal, NELR and the SoS for Health* [2001] 3 WLR 512

(Department of Health and Social Care 2021). One welcome reform suggestion includes increased community treatment which involves discharging a patient from hospital under supervision, where there is no longer a therapeutic benefit to hospital detention. This would be a positive reform because a judge would be reassured by the potential for increased supervision and treatment upon release from a hospital order than that which already occurs under section 117 of the Mental Health Act 1983. Although, as with the 2007 reforms, this reform will only apply to those offenders who are deemed suitable for a hospital order. It does not go far enough to improve or widen the sentencing of mentally ill offenders overall. Consequently, an out-dated and unfairly balanced guidance remains to govern the sentencing of offenders with mental ill health.

CONCLUSION

Overall, the Guideline alone does not go as far as it could to help the criminal courts make fair and balanced sentencing decisions. It should always be necessary to request a medical report where there is the suggestion that an offender may be suffering from a mental illness. Consideration for the offender's human rights should also be given greater weight throughout the Guideline to move away from a favouring towards protection of the public. Finally, this would be aided by including stronger requirements to consider the potential effects of a sentencing option on an offender's mental health. However, the Sentencing Council alone cannot address the problems highlighted above and so the justice system and the government need to do more to ensure that custodial sentences are avoided where there is a real risk of breaching an offender's human rights. Offenders with mental ill health should be treated rather than punished. Yet despite many reports, this message is still being ignored. It is argued here that the government should reform Part 3 of the Mental Health Act 1983 to include a wider range of diversion options for sentencing offenders with mental illness and also to fund the mental health services within communities and prisons much more generously. Until the government acts upon either of these suggestions, the courts should always consider alternative options to prison for this group of offenders and mandatory training is needed to address the lack of understanding of mental illness within the criminal justice system.

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