Annex A

Review of relevant CACD cases

1. R. v Fox [2011] EWCA Crim 3299

The imposition of a hybrid sentence comprising imprisonment for public protection and hospital and limitation directions under s.45A for offences of kidnapping and causing grievous bodily harm with intent was neither wrong in principle nor manifestly excessive where, although the offender had been suffering from an undiagnosed serious mental illness (paranoid schizophrenia), **criminal culpability was not wholly absent,** and the degree of harm caused together with the significant risk to the public of future serious harm was also taken into account.

2. R. v Welsh [2011] EWCA Crim 73

A Judge had been right to sentence an offender suffering from schizophrenia, who had committed manslaughter on the grounds of diminished responsibility, to life imprisonment rather than make a hospital order under s.37 together with a restriction order under s.41 as, on the evidence, public confidence in the resolution of the case would not be met by a hospital order. The Judge concluded that W had a **bad record of violence before the onset of his illness,** and his **culpability for the unprovoked attack** with the need to protect public safety necessitated a life sentence.

3. R. v Khelifi [2006] EWCA 770

Although medical evidence supported a hospital order, it was held that the Judge had correctly exercised his discretion instead to impose a prison sentence; there is no presumption that a hospital order will be made in these circumstances. The psychotic illness K suffered from had not been so severe at the time of the offences as **to disable him from his culpability for participation in a serious crime** (fraud). The five-year sentence was reduced to three and a half years, partly as the Appeal court had the benefit of evidence to show that a prison term **would be more onerous on K than it would on a person without his condition.**

4. R. v Jenkin [2012] EWCA Crim 2557

Having pleaded guilty to GBH with intent, the appellant was sentenced to life imprisonment with a six-year minimum term, combined with a hospital direction and limitation direction under s.45A. He appealed unsuccessfully against sentence, arguing for a restricted hospital order or alternatively an IPP sentence. A life sentence should be reserved for those cases where the culpability of the offender is particularly high or the offence itself particularly grave, both were met in this case. The s45A hybrid order was appropriate as the criteria were met and the disorder was treatable, but when treatment was no longer necessary the risk to the public required that he be released from hospital to prison and for the Parole Board to make the release decision. It was found that J had **significant responsibility for the offence, before it he was drinking to excess, failing to take prescribed medication, he did not believe he was driven to commit the offence or was under threat, and sought to minimise/excuse his actions. He also had committed violent offences long before becoming delusional.**

5. **R. v Graciano [2015] EWCA Crim 980**

A sentence of life imprisonment with a minimum term of 7.5 years, was appropriate for an offender who had pleaded guilty to manslaughter. Although psychiatrists recommended a hospital order with restrictions, and his mental illness was a significant contributory factor in causing him to act as he did, the offender retained some **significant elements of rationality,** such that the abnormality of mental functioning did not overwhelm him and he retained a **significant degree of culpability** for the killing. The Judge stated that he had taken account of the requirement for public confidence in his sentencing decision, and the appreciation of the different release regimes which applied to indeterminate sentences.

6. **R. v Quirk [2014] EWCA Crim 1052**

A Judge had been entitled to impose a sentence of life imprisonment, coupled with hospital and limitation directions under s.45A, on an offender aged 63 who had pleaded guilty to damaging property being reckless as to whether life was endangered, despite medical evidence indicating that his criminal actions were attributable to his autistic spectrum disorder. It was held that the Judge had been right to assess Q's **culpability as high**, despite his condition, there had been a clear element of **planning in his conduct**, and when apprehended Q had sought **to minimise or conceal his wrong doing**. Although such awareness was possibly not entirely to be equated with responsibility, those matters could not simply be disassociated from the assessment of culpability.

7. **R. v Watson [2007] EWCA Crim 864**

A sentence of five-and-a-half years' imprisonment imposed on a defendant following a conviction for causing death by dangerous driving was not manifestly excessive in the light of the aggravating features. Further, a medical report diagnosing attention deficit hyperactivity disorder **had not provided sufficient reason to reduce the culpability of the offender**. W had exacerbated the situation by **failing to stop and attempting to hide his responsibility** for the accident.

8. **R. v Whitnall [2006] EWCA Crim 2292**

A defendant **could not seek to reduce culpability** for an offence of causing death by dangerous driving where he admitted the offence and had **insight into the mental illness** (mania/psychosis) that he suffered from at the time of the commission of the offence.

9. **R. v Cooper [2010] EWCA Crim 2335**

An unsuccessful appeal against a s.45A order. C had been found guilty of manslaughter by reason of diminished responsibility and attempted murder. It was held that **C's responsibility for the crimes was diminished by his mental disorder (psychosis), but not wholly extinguished. A significant degree of responsibility remained**. It was noted that the **psychosis may have been stimulated by his misuse of illegal drugs, (amphetamines).**

10. **R. v Nafei [2004] EWCA Crim 3228**

Appeal against 12-year prison sentence for importation of drugs, in circumstances where the medical evidence supported a hospital order, was refused: the Judge had properly exercised his discretion, particularly since there was no causal connection between the mental illness (schizophrenia) and the offending; the 12-year term was not excessive.

11. R. v Costin [2018] EWCA Crim 1381

The offender had pleaded guilty to seven counts of doing an act tending and intended to pervert the course of justice, and had been sentenced to a community order for 3 years. The offender had autism, a personality disorder, PTSD, ADHD and pathological avoidance demand syndrome. At the time of sentencing the Judge was concerned about the risk of self-harm or suicide if C was given a custodial term, and decided the better option was to treat and divert her away from offending.

It was then referred by the Solicitor General under the unduly lenient scheme. The appeal court acknowledged the extent of the offender's difficulties but stated that the level of seriousness of these offences was such that it was not possible to impose upon her a community penalty, stating that the sentencing judge had placed too much emphasis on the offender's problems and difficulties and insufficient emphasis on the impact of her offences on the victims and for the criminal justice system as a whole. The sentence was increased to 4 years custody.

12. R. v Khan [2017] EWCA Crim 174

A sentence of five years' imprisonment imposed on K for offences involving fraud would be replaced by a s.37 hospital order given medical evidence as to his mental state (K had bipolar affective disorder) and the serious risk that he would attempt to commit suicide in prison. The Court had **rejected an argument for reduced culpability**, as there was no evidence that of the time of the offence K was affected by the disorder. However, the CACD stated that '***we make it plain that this decision is heavily fact specific and is most unlikely to be of wider application. In the ordinary case the existence of culpability will call for a custodial sentence, but in the circumstance of this case this is not a practical option'.***

13. R. v Smith [2015] EWCA Crim 1685

An offender's imprisonment for public protection (for unlawful wounding was replaced with a hospital order under s.37. The offender had suffered mental illness (psychosis) that had **partially contributed to the commission** of the offence and, on the evidence, the court was satisfied that the medical route was better for protecting the public and achieving his return to the community. It was held that S's mental illness had played a significant part in the offence, along with drugs, alcohol and anger, **there was culpability, but not full culpability.** Punishment was required, but in his case it had been imposed and served, as he had spent 3 years in prison, during which time he was suffering very badly due to his mental illness.

14. R. v S [2012] EWCA Crim 92

An order under s.45A was the most appropriate sentence for an 18-year-old offender with Asperger syndrome who had been convicted of the rape of a teenage boy. The sentence of 10 years' detention would be served in hospital where the offender could receive medical treatment that would be difficult to provide under prison conditions. The Judge held that a s.37 hospital order would **neither properly reflect culpability** nor adequately protect the public, given that it was S's second serious specified offence.

15. R. v Atkinson [2014] EWCA Crim 2010

An indeterminate sentence of imprisonment for public protection with a minimum term of seven years was appropriate for an offence of wounding with intent involving a sudden attack on a 64-year-old man, where eight severe stab wounds had been inflicted. It had been open to the judge to conclude that the offender posed a risk of serious harm upon release. **Experts disagreed over the diagnosis, and whether the offence had been as a result of his illness, or had a criminal motive.**

16. R. v Jefferson [2016] EWCA Crim 2023

A sentence of life imprisonment with a minimum term of 10 years was appropriate following a conviction for attempted murder where the offender was suffering from a mental disorder requiring hospital treatment. The judge had not erred in finding that the mental disorder could be appropriately dealt with by imposing a sentence of imprisonment with a hospital and limitation direction under s.45A. However, the mental disorder (psychosis) was a significant factor which **lowered the offender's culpability.** Two psychiatrists stated that the **commission of the offence was directly linked to the illness**, and one stated that he believed the offence would not have taken place if J had not been ill.

17. R. v Ledgard [2010] EWCA 1605

A suspended 12-month term of imprisonment imposed on a bipolar disorder sufferer in respect of various driving offences was replaced by a community order. L had submitted that when he was in the manic phase of his disorder he had little if any control over what he was doing, so that **significantly reduced his culpability** and meant that the sentence would not work as a disincentive to further offending. It was held that in L's case a custodial sentence was not justified, **although the court stated it would not be right to say that a custodial sentence could never be justified in such a case.**

18. AG's ref no 22 of 2011 (R. v Lloyd [2011] EWCA Crim 1473)

A three-year community order imposed upon an offender suffering from mental ill-health who had attacked a man in a bar with a hammer was unduly lenient. Although the offender's mental health (depression, paranoia) **significantly reduced his culpability**, it did not eliminate it and his actions deserved retributive punishment. A sentence of five years' imprisonment was appropriate.

19. R. v McFly [2013] EWCA Crim 729

In setting a minimum term on a mandatory life sentence for murder, a Judge had erred in leaving the offender's anti-social personality disorder entirely out of account. The personality disorder was capable of being and was a relevant mitigating factor within Schedule 21 of the 2003 CJA Act. M submitted that the Judge had **overstated his culpability**, that it had been wrong to leave the disorder entirely out of account, and he should have had regard to it as a relevant mitigating factor, even if it had not **substantially diminished his responsibility**. The 24 year term was replaced with a minimum term of 21 years.

20. R. v Semanshia [2015[EWCA Crim 2479

A sentence of imprisonment rather than a hospital order had been appropriate for an offender notwithstanding psychiatric reports made after sentencing that indicated that he had paranoid schizophrenia. Even if evidence were to establish that the offender had been mentally unwell at offence and sentence, it would not follow that a hospital order should inevitably have been made. S had pleaded guilty to false imprisonment and GBH with intent. **Experts disagreed as to the extent to which culpability was reduced by his mental illness.**

21. R. v Shaw [2015] EWCA Crim 1489

A total sentence of 14 months' imprisonment for assault occasioning ABH, affray, and having an article with a blade or point was reduced to 10 months because the Judge had attributed insufficient weight to the offender's psychiatric condition before and at the time of the offending. S had a longstanding diagnosis of paranoid schizophrenia (of a mild severity) and generalised anxiety disorder. It was held that S's mental health problems, particularly his **lack of insight** at the time of the offences **served to lower his culpability** for what were otherwise violent offences which would merit a substantial custodial sentence.

22. R. v Staines [2006] EWCA Crim 15

There was no reason to quash a discretionary life sentence with a hospital and limitation direction under s.45A, and to substitute for it a hospital order under s.37 and s.41 of the Act where the offender, who had pleaded guilty to manslaughter by reason of diminished responsibility and had been diagnosed with a pathological borderline personality disorder, had later been diagnosed with a mental illness as well. A s.45A order did not, by its terms, preclude its application in cases where the offender suffered from both, and gave a better measure of control without impeding the offender's treatment.

23. R. v Teasdale [2012] EWCA Crim 2071

Two sentences of discretionary life imprisonment imposed following convictions in 1998 and 2000 for violent offences were replaced on appeal with hospital and restriction orders under s.37 and s.41 as those orders would have been the correct disposal at sentence had the offender's paranoid schizophrenia been identified at the time. The appeal court heard expert evidence that T had significant symptoms of psychosis from as early as the 1990s and that it **was highly likely that his subsequent criminal behaviour had been influenced by that illness.** There was good reason why the expert evidence was not available at the time, namely T's complete refusal to engage with any psychological assessment.

24. R. v Przybylski [2016] EWCA Crim 506

A sentence of imprisonment together with a direction under s.45A would not adequately protect the public from an offender with serious mental health problems who was at high risk of relapsing into a psychotic state, and who had stabbed a woman after he had been drinking in an unprovoked attack. A s.37 hospital order together with a s.41 restriction order would better protect the public. The appeal court found that that P's **culpability was reduced**. It was **the mental illness which drove him to drink on the morning of his offence and because of his disordered state it could not properly be said that P had premeditated** his attack upon the victim. **P probably would not have realised the disinhibiting effect of alcohol.**

25. R. v Edwards [2018] EWCA Crim 595

The court summarised the general principles to be considered by those representing and those sentencing offenders with mental health problems that might justify a s.37 hospital order, s.41 order, a finding of dangerousness and/or as.45A order. The court reviewed the statutory framework and case law, and summarised the general principles set out below to be considered by those representing and sentencing offenders with mental health problems that might justify a hospital order, a finding of dangerousness and/or a s.45A order.

(a) consideration as to whether a hospital order was appropriate under s.37(2);

b) if yes, the judge should then consider all available sentencing options, including a s.45A order. This had to be considered before making a hospital order because a disposal under s.45A included a penal element and the court had to have "sound reasons" for departing from the usual course of imposing a sentence with a penal element;

(c) in deciding on the most suitable disposal, the judge had to bear in mind the importance of the penal element of a sentence;

(d) in deciding whether a penal element was necessary, the judge should assess the offender's culpability and the harm caused by the offence. The fact that an offender would not have committed the offence but for their mental illness **did not necessarily relieve them of all responsibility for their actions;**

(e) a failure to take prescribed medication was not necessarily a culpable omission. It might be attributable in whole or in part to the offender's mental illness;

(f) a judge deciding to impose a hospital order under s.37 or s.41 had to explain why a penal element was inappropriate;

(g) the regimes for release of an offender on licence from a s.45A order and for an offender subject to s.37/s.41 orders were different, but the latter did not necessarily offer a greater protection to the public, as might have been assumed in *Ahmed* and/or by the parties in the instant cases. Each case turned on its own facts;

(h) if an offender wanted to call fresh psychiatric evidence in their appeal against sentence to support a challenge to a hospital order, a finding of dangerousness or a s.45A order, they should lodge a s.23 application. If the evidence was the same as before the sentencing judge, he was unlikely to admit it;

(i) grounds of appeal should identify with care each of the grounds the offender wanted to advance. An applicant/appellant wishing to add grounds not considered by the single judge should make an application to vary.

The court also commented that a level of misunderstanding of the guidance offered in *Vowles* appeared to have arisen as to the order in which a judge should approach the making of a s.37 or s.45A order and the precedence allegedly given in *Vowles* to a s.45A order. While s.45A could have been better drafted, the position was clear: s.45A and *Vowles* does not provide a "default" setting of imprisonment, as some had assumed.

26. R v Vowles [2015] EWCA Crim 45

The court gave guidance on the approach to be taken in sentencing offenders suffering from mental disorder who had received indeterminate sentences of imprisonment specifying a minimum term so as to strike an appropriate balance between ensuring treatment in a

hospital and protecting the public. A judge should not feel circumscribed by psychiatric opinion, and the fact that two psychiatrists supported a s.37/41 order was never, alone, a reason to make one (paras 51-53).

A hospital and restriction order under s.37/41 is more likely to be appropriate in a case where the mental disorder is a severe mental illness (particularly a psychotic illness or an organic brain disorder) rather than a personality disorder. That is because it is more likely that such an illness may have a direct bearing on the offender's culpability and because the illness is likely to be more responsive to treatment in a hospital. In contradistinction it is more difficult to attribute a reduction in culpability to a personality disorder and at present individuals with severe personality disorders are less likely to benefit from hospitalisation (para 50 iii).

27. R v Birch [1990] 90 Cr. App. R.78

Case that notes that an offender detained under s37 order passes out of the penal system into the hospital regime. Where sentencer considers that notwithstanding the mental disorder there was an element of culpability which merits punishment a prison sentence can be justified.

28. R. v Beaver [2015[EWCA Crim 653

Although a sentence of three years' imprisonment imposed on an 82-year-old man for the manslaughter of his wife was neither wrong in principle nor manifestly excessive, mercy required that a 24-month term of imprisonment suspended for 24 months with a 12-month residential and mental health requirement be imposed instead. The offender had been the sole carer of his wife, who had dementia; he was in the early stages of dementia himself; and the strain of caring for his wife and serving part of his sentence had led to a decline in his physical and mental health.

29. R. v Bernard

B, aged 63, appealed against sentence of five years' imprisonment for being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a Class B drug, 27.7 kilograms of cannabis. B argued that the six year starting point used by the judge was too high and that the judge had not given sufficient consideration to mitigating factors, particularly B's medical condition. B suffered from a narrowing of the oesophagus, causing difficulty in swallowing, diabetes and hyper-tension. The appeal was allowed, and the sentence reduced to three and a half years' imprisonment, that (1) considering the quantity of cannabis involved, the starting point was too high and (2) B's medical condition was taken into account as an act of mercy by the court.

The following principles for considering the medical condition of offenders were set out by the judge:
(a) the Secretary of State could release a prisoner by means of the royal prerogative of mercy if his medical condition affected his life expectancy or the prison's
ability to provide satisfactory treatment. However, the threat of such occurrences at a future date did not provide a reason for interference with an appropriate sentence by the Court of Appeal;
(b) HIV positive offenders and others with a reduced life expectancy

could not expect a reduced sentence;
(c) a reduced sentence was not automatically available to those with a serious medical condition even when the illness was difficult to deal with in prison, and
(d) a court could impose a reduced sentence on an offender with a serious medical condition but it would be as an act of mercy rather than as a result of a principle of law,