Annex B

Sentencing Council

Overarching Principles: Mental Health[1]

[1] Working title- precise title to be decided in due course

Applicability of guidelines

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders aged xx and older, who are sentenced on or after xxxx, regardless of the date of the offence.

Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

"Every court -

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so."

Scope of the Guideline

1. This guideline identifies the principles relevant to the sentencing of offenders who have:

    - A mental disorder
    - A learning disability
    - A learning difficulty
    - Autism Spectrum Disorder
    - An acquired or traumatic brain injury
    - Dementia

    Further information on these can be found within **Annex C.**

2. The guideline seeks to assist courts in assessing culpability and personal mitigation and to assist with identifying an appropriate sentence. Courts should focus on what the available

evidence says about the **nature, extent and effect of the impairment** experienced by the offender at the relevant time. The presence of any of the conditions listed in paragraph one ***may*** be relevant to sentencing, but in some cases the condition will have **no relevance to sentence.**

This guideline applies only to the sentencing of convicted offenders; it does not address issues of fitness to plead or disposals for those found unfit to plead.

Sentencing principles

3. There are a wide range of mental health conditions and developmental disorders, and the level of impairment caused will vary between individuals, for this reason the approach to sentencing should be individualistic and focused on the particular issues relevant to each case. In particular:

- care should be taken to avoid making assumptions, as unlike some physical conditions, many mental health conditions or learning disabilities are not easily visible
- no inference should necessarily be drawn if an offender had not previously been formally diagnosed (albeit a formal diagnosis **will be required** for a condition to be considered at sentencing)
- or had not previously declared a condition (possibly due to a fear of stigmatisation or because they are unaware they have a condition)
- it is not uncommon for people to have a number of different conditions 'co-morbidity', and for drug and/or alcohol dependence to be a factor 'dual diagnosis'.
- difficulties of definition and classification in this field are common, there may be differences of expert opinion and diagnosis in relation to the offender, or it may be that no specific condition can be identified

4. If an offender has any of the conditions listed in paragraph 1, this may affect their level of responsibility for an offence, and it may also impact upon the suitability of sentencing options in the case. For this reason, when it appears to the court that a condition may be relevant to culpability or disposal, sentencers may seek further information. The relevance of any condition will depend on the nature, extent and effect of the condition on an individual and the circumstances of the particular offences(s). Before considering ordering a new report, courts should utilise all existing sources of information, such as from probation, defence representatives, court mental health teams or GP records. New reports should only be

necessary when a hospital order is being considered, or else in **exceptional** cases. Further information about request for reports[2] can be found at **Annex B** of this document.

5. In cases where custody is the only option for an offender as hospital disposals are not appropriate, then courts should forward psychiatric pre-sentence reports to the prison, to ensure that the prison has appropriate information about the offender's condition and can ensure their welfare.

6. Courts should always be alive to the impact of a condition for the defendant to understand and participate in proceedings. To avoid misunderstandings, which could lead to further offences, (or recall) it is important to ensure that offenders understand their sentence and what will happen if they reoffend and or breach the terms of their licence or supervision). Courts should therefore consider putting the key points in an accessible way. Further information can be found at Chapter Four, within the Equal Treatment Bench Book:

https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/

Assessing Culpability – offence mitigation

7. Courts should refer to offence specific guidelines to assess culpability, in conjunction with the following guidance. The presence of any of the conditions listed within paragraph 1 may impact on an offender's level of culpability, in some cases potentially very significantly, in others the condition will have no relevance to culpability. Assessments of culpability will vary between cases due to the differences in the nature and severity of conditions, and the nature and seriousness of the offence (taking into account the level of intent required for the offence), it is not possible to be prescriptive in this regard. However courts may find the following list helpful, of ways in which impaired mental functioning may reduce culpability:

Impaired mental functioning at the time of the offending may reduce the offender's culpability if it had the effect of:

- Impairing the offender's ability to exercise appropriate judgement
- Impairing the offender's ability to make calm and rational choices, or to think clearly
- Making the offender disinhibited
- Impairing the offender's ability to understand the consequences of their actions

[2] S.157 Criminal Justice Act 2003 may apply- see further details in Annex B

This is not an exhaustive list.

Acts or omissions by the offender

8. Any assessment of culpability must be made with reference to the medical diagnosis and all the relevant information available to the court. The degree to which the offender's acts or omissions contributed to the impact of their condition at the time of the offence may be a relevant consideration. For example, where an offender exacerbates their condition by voluntarily abusing drugs or alcohol or by voluntarily failing to seek or follow medical advice this may increase responsibility. In considering the extent to which the offender's behaviour was voluntary, the extent to which a condition has an impact on the offender's ability to have an insight into their condition, or exercise self-control or to engage with medical services will be relevant.

Undiagnosed/untreated conditions

9. The degree to which the condition was undiagnosed and/or untreated may be a relevant consideration. For example, where an offender has sought help but not received appropriate treatment this may reduce culpability.

Purposes of sentencing

10. Courts should consider all the purposes of sentencing during the sentencing exercise, the punishment of offenders, reduction of crime, rehabilitation of offenders, protection of the public, and reparation. The sentence should go some way to fulfilling all of those considerations, however particularly important is the punishment *and* the rehabilitation of an offender. Just because an offender has a mental health condition, it does not mean they should not be punished, particularly in serious offences where protection of the public is paramount. Equally, for offenders whose condition has contributed to their offending the effective treatment of their condition should in turn reduce further offending and protect the public.

11. Decisions will need to be made on a case by case basis. For example, in a case where an offender's culpability was high, the sentence may be more weighted to punishment. In a case where an offender's culpability was low, the sentence may be more weighted to rehabilitation.

Deciding on the appropriate sentence - offender mitigation

12. The court will need to consider as potentially significant mitigation that an offender's condition at the point of sentence could have a bearing on the type of sentence that is imposed, as set out below:

- The existence of a condition at the date of sentencing (or its foreseeable recurrence) could mean that a given sentence could weigh more heavily on the offender than it would on an offender without that particular condition.
- Being in prison can exacerbate poor mental health and in some cases increase the risk of self- harm, and for some prisoners their condition may mean a custodial sentence may have a greater punitive effect than it would for a prisoner without the condition.
- Some levels of community orders may be impractical, consideration should be given to tailoring the requirements of orders, as necessary in individual cases. An offender should not receive a more severe sentence, such as custody, because they would be unable to do unpaid work as part of a community order, for example.

13. If there was a serious risk of imprisonment having a gravely adverse effect on the offender's mental health, courts will need to consider this risk very carefully, in exceptional cases potentially looking at alternatives to custody, and potentially stepping outside of the guideline for sentence. Where the offence is very serious and culpability high, custody may be inevitable but the condition may still properly impact on sentence length. Courts should refer to any medical evidence or expert reports on this point to assist them.

14. Courts should consider whether a community order with a mental health treatment requirement (MHTR) might be appropriate (where available).

- Use of MHTRs attached to court orders for those offenders with identified mental health issues may result in reductions in reoffending, compared to the use of short term custodial sentences.
- Courts may also wish to consider a drug rehabilitation requirement and/or an alcohol treatment requirement in appropriate cases.
- A community order may be appropriate where the defendant's culpability is substantially mitigated by their mental state at the time of the commission of the offence, and where the public interest is served by ensuring they continue to receive treatment.
- It is not usually suitable for an offender who is unlikely to comply with the treatment or who has a chaotic lifestyle.

Sentencing disposals

15. Relevant mental health disposals/orders are listed below (further details on each are at **Annex A).**

Magistrates Courts

- Community Order with a Mental Health Treatment Requirement (MHTR)
- Section 37 Hospital order
- Section 37 Guardianship order
- Section 43 Committal to the Crown Court (with a view to a restriction order)

Crown Courts

- Community Order with a Mental Health Treatment Requirement (MHTR)
- Section 37 Hospital order
- Section 37 Guardianship order
- Section 41 Restriction order
- Section 45A Hospital and limitation order

The following guidance applies in the Crown Court only:

Where:

(i) the evidence of medical practitioners suggests that the offender is currently suffering from a mental disorder,

(ii) treatment is available, and

(iii) the court considers that a hospital order (with or without a restriction) may be an appropriate way of dealing with the case,

the court should consider **all sentencing options** including a section 45A direction and consider the importance of a penal element in the sentence taking into account the level of responsibility assessed at step one.

Section 45A hospital and limitation direction

a. Before a hospital order is made under s.37 MHA (with or without a restriction order under s.41), consider whether the mental disorder can appropriately be dealt with by custody with a hospital and limitation direction under s.45A MHA. In deciding whether a s.45A direction is appropriate the court should bear in mind that the limitation direction will cease to have effect at the automatic release date of a determinate sentence.

b. If a penal element is appropriate and the mental disorder can appropriately be dealt with by a direction under s.45A MHA, then the judge should make such a direction. (Not available for a person under the age of 21 at the time of conviction).

Section 37 hospital order and s41 restriction order

If a s.45A direction is not appropriate the court must then consider whether, (assuming the conditions in s.37(2) (a) are satisfied), the matters referred to in s. 37(2)(b) would make a hospital order (with or without a restriction order under s.41) the most suitable disposal. The court should explain why a penal element is not appropriate.

Annex A

Mental Health Treatment Requirement (section 207 CJA 2003)	
May be made by:	A magistrates' court or Crown Court
Where an offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order, a community order with a mental health treatment requirement under section 207 of the Criminal Justice Act 2003 may be appropriate. The offender should express a willingness to comply with the requirement.	

Hospital order (section 37)		
May be made by:	A magistrates' court or Crown Court	
In respect of a defendant who is:	*Where made by a magistrates' court:*	*Where made by the Crown Court:*
	Convicted by that court of an offence punishable on summary conviction with imprisonment, or Charged before that court with such an offence but who has not been convicted or whose case has not proceeded to trial, if the court is satisfied that the person did the act or made the omission charged	Convicted before that court for an offence punishable with imprisonment (other than murder)
If the court is satisfied	On the written or oral evidence of two doctors, at least one of whom must be approved under section 12, that • the offender is suffering from mental disorder of a nature or degree which makes it appropriate for the offender to be detained in a hospital for medical treatment, and • appropriate medical treatment is available.	
And the court is of the opinion	Having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with the offender, that a hospital order is the most suitable method of dealing with the case	
And it is also satisfied	On the written or oral evidence of the approved clinician who would have overall responsibility for the offender's case, or of some other person representing the managers of the relevant hospital, that arrangements have been made for the offender to be admitted to that hospital within the period of 28 days starting with the day of the order.	

A hospital order is, essentially, an alternative to punishment. The court may not, at the same time as making a hospital order in respect of an offender, pass a sentence of imprisonment, impose a fine or make a community order, a youth rehabilitation order, or a referral order. Nor can the court make an order for a young offender's parent or guardian to enter into a recognizance to take proper care of and exercise proper control over the offender. The court may make any other order which it has the power to make, eg a compensation order.

Effect of unrestricted hospital orders on patients once detained [section 40(4)]

The hospital order lasts for six months initially, but can be renewed. The initial six month maximum period of detention runs from the day that the hospital order is made by the court, Patients admitted under a hospital order may not apply to the Tribunal until six months after the date of the making of the order (assuming the order is then renewed).

Restriction Order (section 41)	
A restriction order (section 41) may be imposed by the Crown Court if a hospital order has been made and:	
If	At least one of the doctors whose evidence is taken into account by the Court before deciding to give the hospital order has given evidence orally
And, having regard to	• the nature of the offence • the antecedents of the offender, and • the risk of the offender committing further offences if set at large
The Court thinks	It necessary for the protection of the public from serious harm for the person to be subject to the special restrictions which flow from a restriction order

A restriction order lasts until it is lifted by the Secretary of State under section 42, or the patient is absolutely discharged from detention by the responsible clinician or hospital managers with the Secretary of State's consent under section 23 or by the Tribunal under section 73.

While the restriction order remains in force, the hospital order also remains in force and does not have to be renewed.

Hospital and limitation direction (section 45A)

A hospital direction is a direction for a person's detention in hospital. A limitation direction is a direction that they be subject to the special restrictions in section 41 of the Act which also apply to people given restriction orders. A hospital direction may not be given without an accompanying limitation direction (although, as described below, a hospital direction may remain in force after the limitation direction has expired).

Hospital and limitation directions (section 45A)	
May be given by:	Crown Court
In respect of a person who is	Aged 21 or over and convicted before that court of an offence punishable with imprisonment (other than murder)
If the court is satisfied	On the written or oral evidence of two doctors, at least one of whom must be approved under section 12, and at least one of whom must have given evidence orally, that: • the offender is suffering from mental disorder of a nature or degree which makes it appropriate for the offender to be detained in a hospital for medical treatment, and • appropriate medical treatment is available
And the Court	Has first considered making a hospital order under section 37, but has decided instead to impose a sentence of imprisonment
And it is also satisfied	On the written or oral evidence of the approved clinician who would have overall responsibility for the offender's case or of some other person representing the managers of the relevant hospital, that arrangements have been made for the offender to be admitted to that hospital within the 28 days starting with the day of the order.

A limitation direction ends automatically on the patient's 'release date'. The patient's release date is the day that the patient would have been entitled to be released from custody had the patient not be detained in hospital. Discretionary early release such as home detention curfew is not taken into account. For these purposes, any prison sentence which the patient was already serving when the hospital direction was given is taken into account as well as the sentence(s) passed at the same time as the direction was given. If the patient is serving a life sentence, or an indeterminate sentence, the release date is the date (if any) on which the person's release is ordered by the parole board.

Although the limitation direction ends on the release date, the hospital direction does not. So if patients are still detained in hospital on the basis of the hospital direction on their release date, they remain liable to be detained in hospital from then on like unrestricted hospital order patients. This includes patients who are on leave of absence from hospital on their release date, but not those who have been conditionally discharged and who have not been recalled to hospital.

Unlike hospital order patients, hospital and limitation direction patients are detained primarily on the basis of a prison sentence. While the limitation direction remains in effect, the Secretary of State may direct that they be removed to prison (or equivalent) to serve the remainder of their sentence, or else release them on licence. This is only possible where the Secretary of State is notified by the offender's responsible clinician, any other approved clinician, or by the Tribunal, that:

- the offender no longer requires treatment in hospital for mental disorder, or

- no effective treatment for the disorder can be given in the hospital in which the offender is detained.

When notified in this way by the responsible clinician, or any other approved clinician, the Secretary of State may:

- direct the offender's removal to a prison (or another penal institution) where the offender could have been detained if not in hospital, or
- discharge the offender from the hospital on the same terms on which the offender could be released from prison.

If the Tribunal thinks that a patient subject to a restriction order would be entitled to be discharged, but the Secretary of State does not consent, the patient will be removed to prison. That is because the Tribunal has decided that the patient should not be detained in hospital, but the prison sentence remains in force until the patient's release date.

Committal to the Crown court (section 43)	
A magistrates' court may commit a person to the Crown Court with a view to a restriction order if (s43(1))	
The person	Is aged 14 or over, and
	Has been convicted by the court of an offence punishable on summary conviction by imprisonment
And	The court could make a hospital order under section 37
But having regard to	The nature of the offence The antecedents of the offender, and The risk of the offender committing further offences if set at large
The court thinks	That if a hospital order is made, a restriction order should also be made.

Guardianship order (section 37)		
May be made by	a magistrates' court or the Crown Court	
In respect of a person who is aged 16 or over and who is	where made by a magistrates' court	where made by the Crown Court
	convicted by that court of an offence punishable (in the case of an adult) on summary conviction with custody or	convicted before that court for an offence punishable with imprisonment (other than murder)

	charged before (but not convicted by) that court with such an offence, if the court is satisfied that the person did the act or made the omission charged	
if the court is satisfied	on the written or oral evidence of two doctors, at least one of whom must be approved under section 12, that the offender is 16 or over, and is suffering from mental disorder of a nature or degree which warrants the offender's reception into guardianship under the Act	
and the court is of the opinion	having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with the offender, that a guardianship order is the most suitable method of dealing with the case	
and it is also satisfied	that the local authority or proposed private guardian is willing to receive the offender into guardianship	

Guardianship enables patients to receive care outside hospital where it cannot be provided without the use of compulsory powers. The Act allows for people ('patients') to be placed under the guardianship of a guardian. The guardian may be a local authority, or an individual ('a private guardian'), such as a relative of the patient, who is approved by a local authority. Guardians have three specific powers: residence, attendance and access. The *residence power* allows guardians to require patients to live at a specified place. The *attendance power* lets guardians require the patient to attend specified places at specified times for medical treatment, occupation, education or training. This might include a day centre, or a hospital, surgery or clinic. The *access power* means guardians may require access to the patient to be given at the place where the patient is living, to any doctor, approved mental health professional, or other specified person. This power could be used, for example, to ensure that patients do not neglect themselves.

Annex B

Requests for psychiatric reports should only be necessary in a **limited amount of cases**. If asking for a report courts should make the request sufficiently specific so that the report writer is clear as to **what** is required, and **when** the report is required by. Examples of information that might be requested are:

- background/history of the condition
- diagnosis, symptoms, treatment of the condition
- the level of impairment due to the condition
- how the condition relates to the offences committed
- dangerousness
- risk to self and others
- if there has been a failure of compliance (e.g not attending appointments, failing to take prescribed medication) what is thought to be driving that behaviour
- the suitability of the available disposals in a case
- the impact of any such disposals on the offender
- any communication difficulties and/or requirement for an intermediary
- and any other information the court considers relevant.

When requested by Clinicians wanting to undertake an inpatient assessment, courts may wish to consider using interim hospital orders (s.38 MHA). Further information on requests for reports can be found within the Criminal Procedure Rules, which can be found here:

https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015#Anchor8.

Power to order reports- Magistrates courts

There are limited additional powers to order reports in the Magistrates courts. S.11 Powers of Criminal Courts (Sentencing) Act 2000[3] provides for ordering a report, but it is only post conviction or finding of fact. Section 19 of the Prosecution of Offences Act 1985[4] plus Regulation 25(1) The Costs in Criminal Cases (General) Regulations 1986[5] allows for payment out of central funds to a duly qualified medical practitioner who provides a report.

[3] https://www.legislation.gov.uk/ukpga/2000/6/section/11
[4] https://www.legislation.gov.uk/ukpga/1985/23/section/19
[5] https://www.legislation.gov.uk/uksi/1986/1335/regulation/25/made

Additional requirements in case of mentally disordered offender (s.157 Criminal Justice Act 2003)

(1) Subject to subsection (2), in any case where the offender is or appears to be mentally disordered, the court must obtain and consider a medical report before passing a custodial sentence other than one fixed by law.

(2) Subsection (1) does not apply if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a medical report.

(3) Before passing a custodial sentence other than one fixed by law on an offender who is or appears to be mentally disordered, a court must consider—

(a) any information before it which relates to his mental condition (whether given in a medical report, a pre-sentence report or otherwise), and

(b) the likely effect of such a sentence on that condition and on any treatment which may be available for it.

(4) No custodial sentence which is passed in a case to which subsection (1) applies is invalidated by the failure of a court to comply with that subsection, but any court on an appeal against such a sentence—

(a) must obtain a medical report if none was obtained by the court below, and

(b) must consider any such report obtained by it or by that court.

(5) In this section "mentally disordered", in relation to any person, means suffering from a mental disorder within the meaning of the Mental Health Act 1983 (c. 20).

(6) In this section "medical report" means a report as to an offender's mental condition made or submitted orally or in writing by a registered medical practitioner who is approved for the purposes of section 12 of the Mental Health Act 1983 by the Secretary of State [or by another person by virtue of section 12ZA or 12ZB of that Act] [1] as having special experience in the diagnosis or treatment of mental disorder.

(7) Nothing in this section is to be taken to limit the generality of section 156.

Annex C

- **A mental disorder –** such as (but not limited to) schizophrenia, bipolar disorder, depression, anxiety, post-traumatic stress disorder (PTSD), or personality disorders. These conditions can affect thought, feelings and behaviour. Conditions can be short or long term, some conditions can fluctuate, and a range of symptoms can be experienced.

- **A learning disability** – a life long condition which includes significant impairment of intelligence (an IQ of less than 70) and social functioning (a reduced ability to cope independently and adapt to the daily demands of a normal social environment). A learning disability can range from mild, moderate to severe. It may mean someone has limited language ability, comprehension and communication skills, be acquiescent and suggestible and have difficulty understanding social norms.

- **A learning difficulty –** such as dyslexia, Attention Deficit Hyperactivity Disorder (ADHD), or Attention Deficit Disorder (ADD). A learning difficulty is different to a learning disability as it is unrelated to intelligence. Symptoms can include impulsiveness, inability to relate to others in socially acceptable ways, inability to express feelings and emotions in an appropriate way or to be able to think clearly.

- **Autism Spectrum Disorder –** (including Asperger's syndrome) a lifelong developmental disability that affects how people communicate and relate to others, and make sense of the world. Aspects of the condition can be social naivety, difficulty with change or unexpected events, misunderstanding of social cues, adherence to rules and lack of insight into behaviour. It may be characterised by a lack of empathy or a limited ability to express emotion.

- **An acquired or traumatic brain injury –** an injury caused to the brain since birth, (from falls, or road accidents or illness, such as a tumour or stroke). Injuries can range from mild to severe, severe brain injury can cause complex long-term problems such as impaired reasoning, impaired insight into behaviour, loss of control over behaviour and inappropriate behaviour.

- **Dementia –** a syndrome associated with an ongoing decline of brain functioning, such as Alzheimer's disease or vascular dementia. Symptoms can be difficulty in

controlling emotions, loss of empathy with others, difficulty with social interaction, problems with memory and in some cases, experiencing hallucinations.

Further information about any of these conditions can be found here:

https://www.nhs.uk/conditions/.

Blank page