Scottish Sentencing Council

Judicial perspectives of mental health and sentencing

Issues paper

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Introduction

Background

1. The Scottish Sentencing Council[1] is an independent advisory body with three statutory objectives: to promote consistency in sentencing practice; to assist the development of policy in relation to sentencing; and to promote greater awareness and understanding of sentencing policy and practice. Its main function is to prepare sentencing guidelines for the Scottish courts.

2. This issues paper relates to a commitment in the Council's business plan for 2021–24[2] to carry out research and engagement in relation to mental health and sentencing in order to raise-awareness of the issues involved and to assist its consideration of whether to develop a guideline in this area.

3. Sentencing is rarely straightforward but it can be significantly more complex and challenging when the person being sentenced has mental health issues. The Council considers that by exploring the disposal options available and current sentencing practice in such cases, and learning more about the nature and degree of the various issues – mental illnesses, neurodevelopmental and neurological conditions, and learning disabilities – that frequently come before the courts, there are opportunities not only to increase understanding and awareness of the challenges involved but also to bring about more effective sentencing outcomes. This will contribute to improvements for individuals with mental health issues who commit offences, those affected by their actions, as well as for the criminal justice system and society more generally.

4. Prior work by the Council in this area includes a roundtable discussion in June 2019 involving attendees from across the criminal justice system with expertise in relation to mental health issues. A report of the discussion[3] highlighted a number of areas for further consideration, including challenges around the provision of information about mental health issues at sentencing and the availability of suitable disposals for those with mental health issues.

5. Following this, in May 2022 the Council published a literature review[4] exploring the sentencing landscape around mental health in Scotland and other jurisdictions. Among other things, this found that mental health issues are common among those appearing for sentencing, and higher than among members of the general population, but are just one factor amongst many that contribute to offending. The interaction between mental health issues and other factors such as social deprivation, unemployment, homelessness, and

[1] https://www.scottishsentencingcouncil.org.uk/about-us/aims-and-accountability
[2] https://www.scottishsentencingcouncil.org.uk/media/libfrssc/scottish-sentencing-council-business-plan-2021-24.pdf
[3] https://www.scottishsentencingcouncil.org.uk/media/s35f4mln/report-of-scottish-sentencing-council-roundtable-discussion-sentencing_.pdf
[4] Mental Health and Sentencing – Literature Review (May 2022), prepared for the Scottish Sentencing Council by Ailbhe O'Loughlin (University of York), Jay Gormley (University of Strathclyde), Lucy Willmott (University of Cambridge) and Jonathan Bild, Julian Roberts and Anna Draper (Sentencing Academy)

substance misuse is complex. This makes it difficult to establish a direct causal connection between mental health issues and offending.

6. In addition to these publications, two of the Council's guidelines address mental health. The sentencing process guideline,[5] which applies in all cases, lists mental illness or disability, especially where linked to the commission of the offence, and demonstrating a willingness to address mental health issues, as examples of possible mitigating factors (things which might reduce the seriousness of an offence).

7. The sentencing young people guideline,[6] which applies to those aged 24 or under at the time they are found or plead guilty, lists mental health among a range of issues the court should consider when assessing a young person's maturity and level of blame. Other issues that can affect mental health are also listed, such as trauma, adverse childhood experiences, and speech, language, and communication needs.

8. To build on this work, and to address the commitment in the 2021-24 business plan, the Council carried out a survey of the judiciary in autumn 2023, supplemented by a series of interviews in early 2024, seeking judicial views and experiences of mental health and sentencing. This paper sets out the findings of these exercises.

9. As a result of this judicial engagement, the Council held a stakeholder conference, "Mental health, neurodivergence, and learning disability in sentencing", on 30 August 2024, involving members of the judiciary, legal and medical practitioners, academics and others who work in or have an interest in this area. A report about the conference can be read here. Having taken into account the views of the judiciary and participants in the conference, the Council has decided – as was recently announced in its new business plan for 2024-27[7] – that it will prepare a guideline on the sentencing of individuals with mental health issues.[8]

Judicial survey and interviews

10. The survey was open to all judicial office holders in Scotland in autumn 2023. There were 51 participants from all levels of the judiciary – High Court judges, and sheriffs principal, sheriffs, summary sheriffs, and justices of the peace drawn from all six sheriffdoms. The survey aimed to gather information on the challenges in sentencing individuals with mental health issues and asked questions on a number of key themes, including the statutory framework, provision of information and reports about mental health, and the availability and suitability of sentencing options.

11. In order to explore issues raised in the survey in greater detail, a series of supplementary face-to-face interviews were conducted with a total of 10 sentencers in the first quarter of

[5] https://www.scottishsentencingcouncil.org.uk/media/jtbhlsre/the-sentencing-process-guideline-d.pdf
[6] https://www.scottishsentencingcouncil.org.uk/media/4d3piwmw/sentencing-young-people-guideline-for-publication.pdf
[7] https://www.scottishsentencingcouncil.org.uk/media/jcbdlfbw/20241108-scottish-sentencing-council-business-plan-2024-27.pdf
[8] See paragraphs 17-18 below in relation to the use of 'mental health issues' as an umbrella term in this paper.

2024. Interviewees included High Court judges and sheriffs. As with the survey, these interviews aimed as far as possible to gather a sample that was geographically representative of the experiences of the judiciary throughout Scotland. .

About this paper

12. This paper provides a high-level overview of what the Council considers to be the key issues arising from the views expressed by the sentencers who participated in the survey and interviews. The Council is extremely grateful to all of them for giving up their time and for sharing their insights and expertise.

13. The relatively small number of sentencers who took part in the survey and interviews should be borne in mind when considering the findings set out in this paper. In particular, it should be noted that not all sentencers who took part in either exercise are necessarily of the same opinion in respect of all the matters discussed; and the views expressed to the Council are not necessarily representative of the views of the judiciary as a whole.

14. As well as informing the Council's decision to develop a mental health sentencing guideline, the findings from both exercises will assist in the preparation of guidelines generally. The Council also hopes that this paper will be of assistance to people involved in, or affected by, cases where mental health issues have been raised.

15. This paper is also intended to assist policy makers and service providers in further policy development and improved service provision and delivery. In particular, the Council hopes that it will be of use in relation to the wider policy context around mental health in the criminal justice system by ensuring the judicial perspective is available. In recent years, a number of wide-ranging reviews have been carried out in relation to mental health law in Scotland's justice system:

    - *The independent review of Learning Disability and Autism in the Mental Health Act* (known as the 'Rome Review'), which published its final report in December 2019[9]
    - *Independent Forensic Mental Health Review*, which published its final report in February 2021[10]
    - *Scottish Mental Health Law Review*, which published its final report in September 2022[11]

[9] https://webarchive.nrscotland.gov.uk/20200313213229/https:/www.irmha.scot/wp-content/uploads/2020/01/IRMHA-Final-report-18-12-19-2.pdf (accessed 28 November 2024)
[10] https://www.gov.scot/publications/independent-forensic-mental-health-review-final-report/ (accessed 28 November 2024). The Scottish Government response to the review is available here: https://www.gov.scot/publications/scottish-government-response-independent-review-delivery-forensic-mental-health-services/ (accessed 28 November 2024)
[11] https://webarchive.nrscotland.gov.uk/20230327160315/https://cms.mentalhealthlawreview.scot/wp-content/uploads/2022/09/SMHLR-FINAL-Report-.pdf (accessed 28 November 2024). The Scottish Government response to the review is available here: https://www.gov.scot/publications/scottish-mental-health-law-review-response/ (accessed 28 November 2024)

16. Various recommendations from these reviews, including some that have a bearing on sentencing,[12] are still under consideration or are in the process of being taken forward (the Scottish Government, for example, has consulted on proposals for a Learning Disabilities, Autism and Neurodivergence Bill and intends to introduce draft Bill provisions during the 2024-25 parliamentary year[13]). While these developments form an important backdrop to this paper, and could lead to changes or reforms that may address some of the issues raised, it is principally for the Scottish Government to address the respective recommendations from each review, the vast majority of these being outwith the Council's remit.

Terminology

17. Both the Rome Review and Scottish Mental Health Law Review highlighted concerns around the term 'mental disorder' and its statutory definition in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 as any mental illness, personality disorder, or learning disability.[14] The Rome Review recommended that learning disability and autism should be removed from the statutory definition, while the Scottish Mental Health Law Review recommended that the term 'mental disorder' should no longer be used, noting that it is regarded by many as stigmatising and offensive.

18. In acknowledgement of this, the umbrella term 'mental health issues'[15] is used for the purposes of this paper, with 'mental disorder' only being employed where necessary in the context of its use in Part VI of the Criminal Procedure (Scotland) 1995 Act. The Council recognises that learning disability and neurodivergence are neurodevelopmental differences rather than mental health issues but the latter term should be construed as covering them in this report, except where learning disability and neurodivergence are referred to directly. The umbrella term is used as a practical shorthand and it should be viewed in that light.

[12] For example, the final report of the Independent Forensic Mental Health Review recommended the creation of "an appropriately funded national framework to ensure the timely provision of court reports by psychiatrists and psychologists for assessment and sentencing purposes" (recommendation 63); and a review of the current limitations about which disciplines can complete court reports (recommendation 64).

[13] https://consult.gov.scot/mental-health-unit/learning-disabilities-autism-neurodivergence-bill/ (accessed 28 November 2024). The independent analysis of responses to the consultation was published in August 2024 and is available here: https://www.gov.scot/publications/learning-disabilities-autism-neurodivergence-bill-consultation-analysis/pages/2/ (accessed 28 November 2024). The Scottish Government's intentions regarding publishing draft Bill provisions are set out here: https://www.parliament.scot/-/media/files/committees/health-social-care-and-sport-committee/correspondence/2024/learning-disabilities-autism-and-neurodivergence-bill.pdf (accessed 28 November 2024)

[14] https://www.legislation.gov.uk/asp/2003/13/section/328.

[15] This is intended to include, but is not limited to, the following: psychotic illnesses; non-psychotic illnesses; personality disorders; neurodivergence (for example, autism, ADHD, learning disabilities); dementia; acquired brain injuries (ABI); substance use disorders; and any related conditions.

Summary of judicial views

19. The impact of significant resource constraints was a theme in relation to each of the topics discussed with sentencers, and perhaps the overriding issue raised throughout the Council's engagement with the judiciary. Most of the challenges highlighted by sentencers either result directly from a shortage of resources or are exacerbated by them. Sentencers recognised the pressures and competing demands faced by practitioners and service providers across the criminal justice and mental health systems and acknowledged the hard work being carried out in difficult circumstances. However, from the judicial perspective, resource limitations can affect the ability of courts to sentence individuals with mental health issues in the most efficient and effective way.

20. In respect of the statutory framework, Part VI of the Criminal Procedure (Scotland) Act 1995 – which contains provisions for people accused of a criminal act who may have a significant mental health issue – was felt to be difficult to navigate and implement, but there were differing views on the extent to which challenges may result from this. Some felt that the framework is necessarily complex because addressing mental health in criminal justice processes – requiring consideration of treatment and welfare alongside risk and public protection – inevitably cannot be straightforward.

21. More fundamentally, it was noted that Part VI of the 1995 Act is based upon the Mental Health (Care and Treatment) (Scotland) Act 2003. It reflects the civil disposals contained within the 2003 Act, but these are designed for those entering the mental health system rather than the criminal justice system. This can be problematic where there is a requirement for compulsory measures or an element of punishment, as these may conflict with the principles underpinning the 2003 Act. While some viewed the statutory definition of mental disorder in the 2003 Act, and the term itself, as inappropriate, most did not feel that it presented any particular difficulties in practice.

22. Perhaps reflecting the legislative complexity, sentencers frequently reported a lack of familiarity with the requirements of Part VI of the 1995 Act among legal and other practitioners. This included, on occasion, perceived challenges in fully grasping the applicable legal options, procedures not being followed correctly, and requests for incompetent disposals. It was also frequently suggested that prosecutors do not meet their statutory duty to bring before the court evidence of an accused person's mental condition as consistently as used to be the case and often seemed reluctant to use the powers available to them to instruct psychiatric assessments. This leaves it to the defence to obtain a report but the instruction of expert reports by defence agents can sometimes be lacking. The relative infrequency of relevant cases was noted as a contributory factor in these issues, but there was a clear underlying sense that pressure of work and lack of resources contribute to procedural delays and lack of knowledge.

23. While the views of sentencers on the prevalence of specific issues were necessarily of an impressionistic nature, non-psychotic illnesses such as depression, anxiety disorders, and

post-traumatic stress disorder (PTSD) were reported as particularly common in courts, as was substance use disorder. Neurodivergent conditions, learning disability, and personality disorders were also perceived as relatively common. Psychotic illnesses and neurological conditions were said to arise less frequently.

24. Determining the precise nature, degree, and effect of mental health issues was felt to be particularly challenging, especially in relation to establishing any causal link between the issue and the offence and in determining the level of risk of reoffending. In the absence of a diagnosis, there may be concerns about the potential for individuals to exaggerate or even fabricate mental health issues in order to secure a more lenient sentence.

25. Sentencers emphasised that they rely on others – including the prosecution, defence, justice social workers, psychiatrists, and psychologists – for information about an accused or convicted person's mental health issues, and for recommendations about assessment and sentencing. This means that the provision of timeous and accurate information is of vital importance.

26. However, delays in obtaining specialist reports about mental health are a very common and longstanding issue; it can sometimes take several months to receive a report, and experts often decline when asked to provide one. The process for requesting reports was described as ad hoc. Delays can be especially problematic where the accused is in custody, potentially due to the time and resource implications involved in psychiatrists visiting prisons, or in some circumstances their ability to access them. This can result in longer periods of remand than would otherwise be necessary, sometimes approaching the length of a likely custodial sentence. This makes such a disposal difficult to impose, or requires consideration of bail where the court may otherwise not have been inclined to grant it.

27. There was a clear recognition, however, that assessment and diagnosis can be difficult and should not be rushed. Sentencers also noted that the primary duty of medical practitioners is to their patients, and that they face very significant pressures and challenges in fulfilling this duty, distinct from those relating to assessments and reports for the courts, which they are not obliged to do.

28. A lack of availability of experts, particularly psychiatrists, to undertake the necessary assessments was cited as a key reason for delays in obtaining reports. It was reported that due to shortages, some courts have had to use locums, freelancers, or retired psychiatrists to carry out assessments, who may not necessarily be best placed to do such work. Sentencers also commonly reported a shortage of beds in psychiatric facilities, both in respect of pre-conviction/pre-sentence assessments and in respect of committal to hospital as part of a final disposal, which can cause difficulties and delays at crucial stages.

29. A perceived under-resourcing of community services was noted as an issue. There was also a clear sense that the options for community-based disposals are perceived as lacking. Treatment and programmes for mental health issues may not be widely available while delays in offenders being admitted to them means they may not be feasible. It was

suggested there is a need for additional options which incorporate targeted and tailored mental health treatment and programmes, and appropriate support and supervision, to make community disposals a robust and viable alternative to custody. Some sentencers felt that the introduction of hybrid sentences, combining custody and a form of community disposal, would provide courts with an effective option, and increase judicial and public confidence.

Issues for consideration

30. The issues identified during the survey and interviews are discussed in detail under the following overarching themes:

- The statutory framework
- Nature and impact of mental health issues raised in court
- Information and resources
- Availability and suitability of disposals

31. An outline of a number of other discrete issues raised is also provided. The key points that the Council considers require further exploration are set out following the discussion of each of the key themes.

The statutory framework

32. The following discussion focusses on Part VI of the Criminal Procedure (Scotland) Act 1995, which is entitled 'Mental Disorder' and sets out the procedures that apply, and orders that can be made,[16] where someone accused or convicted of an offence may have a significant mental health issue. In particular, it deals with procedures where a person is considered not criminally responsible or unfit for trial[17] because of a significant mental health issue. This can, depending on the circumstances, result in the person being acquitted of the offence.[18]

33. It is important to note that only sentencing after conviction in a criminal court is within the statutory remit of the Council. This means that certain procedures under Part VI of the 1995 Act – for example, the making of assessment or treatment orders at the pre-conviction stage, or any disposal following on a finding that a person is unfit for trial – are outwith the Council's remit. However, the Council was keen to engage with sentencers about these procedures because similar challenges to those in sentencing may arise, and a person subject to a pre-conviction disposal may subsequently be sentenced if convicted, whether in the same or other proceedings.

34. It should also be borne in mind that the majority of cases in which mental health issues are raised do not reach the threshold for the procedures and orders set out in Part VI of the 1995 Act, as the issues are of a less acute nature. Proceedings in these cases may therefore be of

[16] These include assessment orders, treatment orders, interim compulsion orders, temporary compulsion orders, compulsion orders, compulsion orders with restriction orders, guardianship orders, and hospital directions.
[17] A person may also be determined unfit for trial due to a physical condition. See section 53F of the Criminal Procedure (Scotland) Act 1995.
[18] Section 51A of the Criminal Procedure (Scotland) Act 1995 provides that, if a person is unable by reason of mental disorder to appreciate the nature or wrongfulness of their conduct, this amounts to a special defence. If the special defence is either accepted by the prosecutor or established at trial, the person is acquitted (see section 53E of the 1995 Act). A person who is unfit for trial due to due a mental health issue can be acquitted after an examination of facts in one of two ways. The first is if the court is *not* satisfied beyond reasonable doubt that they did the act or made the omission constituting the offence. The second is if the court *is* so satisfied but it appears to the court that the person was not criminally responsible for the conduct because of the special defence set out at section 51A.

a more 'standard' nature, involving a guilty plea or finding of guilt followed by a non-mental health disposal, but are nevertheless not straightforward, and may on occasion still require, for example, an accused to be remanded under section 200 of the 1995 Act for inquiry into their mental condition.

Complexity of the legislation

35. Among the sentencers who engaged with the Council, a majority felt that Part VI of the 1995 Act is complex and can be difficult to navigate and implement, but there were differing views on whether or not, or the extent to which, there were challenges resulting from this.

36. Some felt that the framework is necessarily complex because addressing mental health in criminal justice processes – involving considerations of treatment and welfare alongside public protection and punishment, as well as input from the medical profession – inevitably cannot be straightforward.

37. Others viewed the legislation, or aspects of it, as unclear and complicated, and felt that it should be reviewed in order to streamline the procedures and disposals and clarify the language. Particular issues noted included that:

- cases requiring careful consideration are often heard in busy courts with limited time available to go through the detail of the legislation, which is challenging when issues are not known of in advance
- the overlapping nature of mental health disposals means they are not sufficiently distinct from each other, and the circumstances in which each should be used is not always clear
- there is a lack of detail about implementation of certain disposals – section 58 of the 1995 Act, relating to the making of guardianship orders, was particularly noted in this respect
- compared to other parts of the 1995 Act, such as those relating to sentencing or evidence, Part VI is much harder to retain in mind and has to be consulted anew with each case.

38. It was suggested that lack of familiarity with Part VI of the 1995 Act among the judiciary and legal practitioners (prosecution and defence) – which could sometimes lead to procedural difficulties – is due in part to the relative infrequency of cases that require to be dealt with under it.

39. A more fundamental issue raised was that Part VI of the 1995 Act is based upon the Mental Health (Care and Treatment) (Scotland) Act 2003.[19] Many of its provisions reflect the civil disposals contained within the 2003 Act, but these are designed for those entering the

[19] This was a result of the recommendations of the *Report on the Review of the Mental Health (Scotland) Act 1984* (sometimes referred to as the Millan Review or Millan Report) from 2001: https://www.mhtscotland.gov.uk/mhts/files/Millan_Report_New_Directions.pdf (accessed 28 November 2024)

mental health system rather than the criminal justice system. This can be problematic in cases in which compulsory measures are necessary or an element of punishment is required, as this may conflict with the principles underpinning the 2003 Act.[20]

40. However, the interaction of the 1995 Act with the 2003 Act, or with other related civil statutes, could be of assistance where sentencers were experienced in both criminal and civil contexts – for example, making a guardianship order under section 58 may be clearer for those who deal with civil cases under the Adults with Incapacity (Scotland) Act 2000.

41. A common, if not overriding, theme that emerged was that significant resource constraints mean the statutory framework rarely operates as intended. Proceedings are often affected by delays in the provision of information, shortages of key medical practitioners and hospital beds, and limited options available for community-based disposals. These difficulties exacerbate issues arising from the complexity of the statutory framework, which otherwise would be manageable.

Statutory definition of 'mental disorder'

42. Some sentencers expressed the view that the statutory definition of 'mental disorder'[21] is too wide, or too generalised. The very broad range of issues and conditions included within it could limit the value of the definition and make it difficult to understand the effect of a particular diagnosis. It was pointed out that the nature, extent, and pathway of 'disorders' can be very variable and can have very different implications for sentencing. A less common argument was that the term is too narrow or restrictive in that it excludes many conditions, which may limit recommendations in medical reports and sentencing options. It was suggested that while the breadth of the term could lead to problems, there were also cases that fell outwith the definition, which could create issues for sentencing.

43. Some sentencers thought that the term and its definition was not always well understood by legal practitioners (prosecution and defence) and medical professionals and was also out of step with current developments and understanding in the mental health field. It was described as representing the language of deficit, inappropriate for people with autism or learning disabilities, and as conveying a condition productive of disorderliness and chaos where there may be none. More neutral language such as mental health 'issue' or 'condition' may be more appropriate.

[20] All treatment under the 2003 Act must follow ten principles, known as the Millan Principles, which include making sure that any restrictions on freedom should be the 'minimum necessary in the circumstances': see https://www.mwcscot.org.uk/law-and-rights/mental-health-act (accessed 28 November 2024)

[21] As noted in the introduction to this paper, the term 'mental disorder' is defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 as any mental illness, personality disorder, or learning disability. The term and its definition are currently used across Scotland's justice system, in both civil and criminal contexts, including in the 1995 Act.

44. However, most sentencers did not think the definition presented significant challenges in court, with some feeling it is wide enough to incorporate a significant number of conditions and that while outdated, it is long-standing and well understood as a catch-all definition.

Prosecutor's statutory duty

45. Where it appears to the prosecutor that a person charged with an offence has a significant mental health issue, the prosecutor has a statutory duty to bring before the court such evidence as may be available of that person's mental condition.[22] The prosecutor also has powers to apply for, respectively, an assessment order and a treatment order in respect of a person with a significant mental health issue who is charged with an offence.[23] This means that one of the earliest opportunities to identify individuals in the criminal justice system with a mental health issue is during the initial stages of prosecutorial decision-making, including the decision about whether to proceed to trial.

46. Sentencers frequently suggested that prosecutors do not meet this statutory duty as consistently as used to be the case, and that they often appeared reluctant to use the powers available to them to instruct psychiatric assessments. This was said to occur even in cases where the defence agent raised concerns about the mental health of the accused. There was a view that prosecutors generally prefer to leave the defence to instruct the necessary assessment. It was suggested that this may be due to a lack of resources, but it was also felt that it may be due to some individual prosecutors not always fully appreciating the obligation to investigate the mental health of the accused. Where they did move for an assessment order, they sometimes appeared to lack appreciation of the statutory evidential requirements for the court to be able to make such an order.

47. It was acknowledged that prosecutors are to a degree dependent on the police making them aware of a mental health issue.[24] Part of the issue might be due to resource constraints on the police. There was a suggestion that fewer local police stations may mean the opportunity for individuals to be assessed in police custody can be more limited than in the past. However, it was felt prosecutors should be more proactive in meeting the statutory obligation. This may help to avoid difficulties that can arise where an accused person appears to the defence agent and the court to be seriously unwell based on their behaviour in court, having been previously assessed by the prosecution as fit to plead. Where the defence decides to instruct a report in such circumstances, its findings could lead to the subsequent commissioning of a separate prosecution report – it was felt the need for this could sometimes be avoided.

[22] Section 52(1) of the Criminal Procedure (Scotland) 1995 Act.
[23] Sections 52B and 52K of the 1995 Act.
[24] The Council's roundtable discussion event on mental health issues in 2019 noted difficulties the police can face in getting information about an individual's mental health when attending incidents.

48. In a few cases, sentencers noted concerns about decisions to prosecute individuals with serious mental health issues, where there was felt to be little public interest in doing so, and where the individual's mental health needs – which can influence offending behaviour – may have been better addressed by support in the community. It was suggested that, in some instances, initial assessment of the accused by a community psychiatric nurse on behalf of the prosecutor may not be sufficient, as it may focus on a narrow test of fitness to plead at that time, rather than a holistic psychiatric assessment encompassing fitness for trial.

49. It should be noted that subsequent to the survey and interviews on which this paper is based, the Lord Advocate[25] gave a statement to the Scottish Parliament about prosecution guidance on public safety and the prison population, in which she noted that:

> "…we continue to improve the information that is received from the police to ensure that we secure the right outcomes for the right people. As an example, we now receive additional information from the police regarding mental health issues that may be relevant to the accused's offending and personal wellbeing so that we can take informed views on decisions about whether to prosecute or to oppose bail."[26]

Awareness and understanding of practitioners

50. Sentencers reported a lack of familiarity with the requirements of Part VI of the 1995 Act among legal and other practitioners. They described practitioners, on occasion, experiencing challenges in fully grasping the applicable legal options, procedures not being followed correctly, and requests for incompetent disposals from both the prosecution and the defence. These issues were exacerbated by the relative infrequency of such cases, and, sometimes, by a lack of judicial continuity.

51. Some sentencers said that instruction of expert reports by defence agents can be lacking, resulting in reports that may be somewhat vague and unhelpful to the court. Some had experience of the defence instructing a psychological report where a psychiatric report was required, suggesting a need to improve understanding of the distinction between the two[27]. It was suggested that solicitors who are accredited specialists in mental health law may

[25] The Lord Advocate is the senior law officer responsible for the prosecution of crime in Scotland, and is the principal legal adviser to the Scottish Government.
[26] The Lord Advocate's statement was made on 10 October 2024 and is available here: https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-10-10-2024?meeting=16047&iob=137048 (accessed 28 November 2024)
[27] The Preliminary Hearings e-Bench Book published by the Judicial Institute for Scotland notes at page 10.3: "There is something of a trend at the moment for the defence to wish to investigate fitness for trial relying on reports from psychologists. The Crown will sometimes instruct a psychologist to respond. As noted above, this may deprive the court of the medical evidence necessary to make a temporary compulsion order, which will in some cases be appropriate, in addition to creating the problem of disposal which was illustrated starkly in *Patrick v HM Advocate* 2021 SCCR 207…" (accessed 28 November 2024)

practice more in the Mental Health Tribunal for Scotland[28] than in the criminal courts; greater specialist mental health knowledge across the criminal bar would, therefore, be welcome.

52. Sentencers highlighted the important role of defence agents in bringing information about an offender's mental health issues to the court's attention. One repeated point was that defence agents are not always aware of an individual's (possible) mental health issues before a trial begins. They may have had very little time with the accused prior to the first court appearance, and might only have been able to interview them in a court cell, which is not an ideal environment for assessing an individual's condition. Sentencers pointed to the high volume of business going through courts, and the pressure defence agents are under.

53. Awareness and understanding of the statutory framework among medical practitioners was said to be better than among legal practitioners, although some felt it could vary and be at a more consistently high level in relation to High Court cases compared to sheriff court proceedings. Justice social workers were also felt to have varying levels of understanding.

54. Sentencers repeatedly emphasised their awareness of the significant pressures and resource constraints that legal, medical, and social work practitioners currently face. However, it was felt that improved awareness and understanding of the statutory framework among practitioners would help to alleviate pressures. It could lead to better informed prosecutorial decision-making, more relevant instruction of expert reports, more apt recommendations for disposal, and more effective use of court time, reducing drift and delay.

55. It is worth noting that the views of sentencers outlined above broadly align with what the Mental Welfare Commission for Scotland has said in relation to the mental health provisions in the 1995 Act:

> "These are important provisions, but are used in a relatively small number of criminal cases. Many professionals, including lawyers, doctors, and social workers, find it difficult to understand which option is most appropriate in a particular set of circumstances, and what evidence is needed for the court to make the appropriate disposal."[29]

Fitness to plead and fitness for trial

56. Some sentencers raised issues around the provisions concerning the assessment of an individual's fitness to plead and fitness for trial. It was felt that the test is increasingly being found to be met in circumstances where the accused has, for instance, a mild learning disability and may, on a strict application of the statutory test, be fit to plead, but is unable to fully understand trial proceedings. It was suggested that the test may no longer be suitable for its intended purpose and that it can have some unfair consequences. Accordingly, there

[28] The Mental Health Tribunal for Scotland considers and determine applications for compulsory treatment orders (CTOs) under the 2003 Act and deals with appeals against compulsory measures made under the 2003 Act.
[29] https://www.mwcscot.org.uk/law-and-rights/criminal-procedure-act (accessed 28 November 2024)

was a suggestion that there should be a review of the test to ensure that the bar for a finding of unfitness for trial leading to an examination of facts remains appropriately high, together with an associated review of provisions and procedures for dealing with those who may be assessed as fit to plead, but who are unable fully to understand what is happening in court.

57. Several sentencers expressed concern about situations where, following an examination of facts, the individual concerned does not meet the criteria for any of the mental health disposals set out at section 57(2)(a) to (d) of the 1995 Act. This can arise where an individual may have a fluctuating psychiatric illness. If their mental health has improved at the point of disposal, it can lead to medical advice that they are not amenable to psychiatric treatment and unsuitable for a mental health disposal. The court can be left with little choice but to make no order under section 57(2)(e), despite finding that the individual has carried out harmful acts constituting very serious criminality and may present a significant risk to the public. In such circumstances, victims and witnesses may also feel that they have given evidence to no effect and the purpose of the proceedings may be called into question. There was a view that it should be possible to impose a form of custodial sentence in such circumstances (imprisonment not being one of the disposal options available under section 57(2) of the 1995 Act).

Key issues the Council intends to explore further

1) **The complexity of the statutory framework at Part VI of the 1995 Act is widely recognised and challenges can result from this. It appears to the Council that many of these challenges may arise from resource constraints and lack of familiarity, which can make giving effect to the relevant provisions difficult at times. The question of legislative change is outwith the Council's remit, but it would support simplification of legislation and procedures around mental health and sentencing, particularly to make these more accessible for those with mental health issues and the general public, and it will consider what it might contribute in this area. However, any changes may be ineffective unless system-wide resource issues are addressed.**

2) **While the term 'mental disorder' and its statutory definition are under consideration as a result of concerns raised by the Rome Review and Scottish Mental Health Law Review, and are not matters for which the Council has responsibility, the Council has an interest in ensuring the terminology used in sentencing guidelines in relation to mental health issues is accessible and non-stigmatising, while also accurately reflecting relevant legislative provisions. It also has an interest in ensuring that any change in the definition does not have unintended consequences, which could affect sentencing considerations.[30] In**

[30] As was noted in the Millan Report (paragraphs 51-55), in the 1990s New Zealand removed intellectual disability from its mental health legislation with unintended consequences. This resulted in increased numbers of people with intellectual disability going to prison and a loss of clinical expertise - see 'The case against removing intellectual

this context, the Council will seek the perspectives of those who have experienced mental health issues, as well as medical professionals and relevant officials, on appropriate terminology.

3) **In respect of the various issues raised by sentencers regarding levels of understanding and awareness of the statutory framework among legal and medical practitioners, the Council will seek views from the Crown Office and Procurator Fiscal Service (COPFS), the Faculty of Advocates, the Law Society of Scotland, the Mental Welfare Commission for Scotland, and relevant professional organisations. The Council will also engage with these bodies, and the Judicial Institute for Scotland, regarding joint activities to improve awareness and understanding among practitioners and the judiciary.**

4) **Concerns raised by some sentencers around the test for determining unfitness for trial and the available disposal options after an examination of facts have an indirect bearing on sentencing and are therefore issues which the Council will consider further.**

Nature and impact of mental health issues raised in courts

Frequency and range of mental health issues in courts

58. Most sentencers said it was very common for the mental health of individuals accused or convicted of offences to be raised in court. This aligns with the available evidence on the prevalence of mental health issues in the offending population, although this is primarily based on research in prisons, with there being little evidence on the prevalence of such issues in respect of those who receive non-custodial disposals.[31]

59. Due to the nature of the engagement carried out, sentencers' views on what, in their experience, were the most common mental health issues seen in courts are necessarily of an impressionistic, anecdotal nature. They cannot be taken to be a true reflection of the experiences of the judiciary as a whole, or of the actual prevalence of the various issues discussed. However, they may still be helpful in giving some insights into the judicial experience.

60. Non-psychotic illnesses such as depression, anxiety disorders, and PTSD were reported as particularly common in courts, as was substance use disorder involving drugs or alcohol[32] (it was noted this could mask other mental health issues and be a means of self-medicating).

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disability and autism from the Mental Health Act' (accessed 28 November 2024). Separate legislation for people with intellectual disabilities was introduced in 2004, which replicated the safeguards of the existing mental health legislation.

[31] See the discussion of the available evidence in chapter 1 of Mental Health and Sentencing - Literature Review (Scottish Sentencing Council, 2022).

[32] Section 328(2) of the 2003 Act lists a number of things that do not constitute "mental disorder" by themselves, including "dependence on, or use of, alcohol or drugs".

Neurodivergence and learning disability were also felt to be relatively common, as were personality disorders. Psychotic illnesses (such as schizophrenia and bipolar disorder), acquired brain injury (which evidence shows is very common in both female[33] and male[34] prison populations) and degenerative disorders such as dementia were perceived as being less common, as were cases involving co-occurring issues. (It is possibly noteworthy that less acute issues appeared to be considered most common, reflecting views that more serious issues requiring use of Part VI of the 1995 Act are comparatively infrequent.)

61. Sentencers' thoughts on specific challenges related to some of these mental health issues are outlined below.

Neurodivergence and learning disability

62. Due to the growing awareness of, and various recommendations regarding, the treatment of neurodivergent individuals in the criminal justice system, particularly people with autism and individuals with a learning disability, the Council sought sentencers' views on their experiences of sentencing such individuals. Views expressed included that:

- autism is often not addressed in great detail; a criminal justice social work report may say that an individual has autism but not how this manifests, what effect it had on commission of the offence, and how it might affect sentence
- some younger individuals with a learning disability may have structured support programmes in place before they come to court, with issues having been identified in school, but the same is not true of older people
- attention deficit hyperactivity disorder (ADHD) can be a feature in reports about breaches of community sentences (although it was not clear if this meant ADHD was a direct contributory factor in breaches)
- the impact of a sentence can be different for, or greater on, people who are neurodivergent or have a learning disability
- many young people may need to wait until they are older for a formal diagnosis.[35]

63. The need for courts to make reasonable adjustments to ensure neurodivergent people can understand and participate in a trial (and understand the sentencing process) was highlighted. These might include, among other things, frequent short breaks to allow the individual to speak to their agent and/or a supporter to ensure they have understood

[33] A 2021 University of Glasgow study found that 78% of women prisoners in Scotland have a history of significant head injury, most of which occurred in the context of domestic abuse that often lasted over periods of several years (https://www.gla.ac.uk/news/archiveofnews/2021/may/headline_792437_en.html, accessed 28 November 2024).
[34] A 2023 University of Glasgow study, which included a third of young males in youth offender institutes in Scotland, found that 80% have a history of significant head injury with many exposed to repeated head injuries over time (https://www.gla.ac.uk/news/archiveofnews/2023/july/headline_972208_en.html, accessed 28 November 2024)
[35] The Council has heard, anecdotally, that there are very long waiting times for autism assessment in the NHS. Waiting times are not as long for a private assessment but still an issue.

proceedings. It was noted that similar adjustments are made for neurodivergent victims and witnesses (and indeed in respect of mental health issues more generally, as well as physical disability).

64. Most of the sentencers the Council engaged with on this particular issue were not aware of specific programmes for neurodivergent people in the context of sentencing.

Impact on culpability and sentence

65. One of the key challenges for sentencers is assessing an individual's level of culpability where they have mental health issues. The complexity of the many and varied mental health issues that come before the courts means an individualised approach is necessary. Each case is unique and fact specific. Circumstances arising from a particular mental health issue may reduce culpability in some cases, but increase it in others. The nature and severity of issues experienced by an individual can also fluctuate, including during the course of court proceedings (particularly where there has been any delay around psychiatric assessment and/or preparation of reports), resulting in changing assessments both in a psychiatric sense and in respect of the court's view of culpability and the likely sentence.

66. Challenges can also arise where, in line with certain provisions in Part VI of the 1995 Act (but not only when these apply), sentencers are required to have regard to whether, if medical treatment is not provided, there would be a significant risk to the health, safety, or welfare of the person being sentenced, or a significant risk to the safety of any other person. There can be a tension between the need to consider treatment options for the individual (and how this bears on their prospects for rehabilitation) with purposes of sentencing such as protection of the public and punishment. The availability and suitability of treatment programmes was raised in this context – this is discussed later in this paper.

67. The points raised by sentencers suggest that key questions they consider include:

- Is the issue the result of a mental health crisis/psychotic episode or a more persistent mental illness?
- Is the issue self-induced (e.g. due to a refusal to take medication) or are other external factors involved (e.g. abuse by others)?
- Is there a causal connection between the issue and the offence, and if so, to what degree?
- Has there been a diagnosis or not?
- Is the issue being treated or, if not, is it treatable?

68. It was noted that assessing culpability can be difficult if someone was on medication at the time of the offence and has no recollection of it.

69. Particular challenges were said to arise in respect of young people, as the diagnosis of an issue and its impact may be different in respect of those who are still developing. (The

Council understands, for example, that diagnosis of personality disorders usually is not made until around the age of 18 and that the trajectory of certain issues can change as individuals mature.[36]) This can affect consideration of culpability and sentence.

70. In relation to specific mental health issues, sentencers highlighted, among other things, the following matters:

- Depression/anxiety – it was said that depression and/or anxiety are frequently raised, including in criminal justice social work reports, without supporting information, but that they would generally not be a consideration in relation to culpability. They may, however, be considered mitigatory or have a bearing on the individual's ability to carry out a sentence.
- Personality disorders – these were said to be particularly challenging as they involve behavioural issues that can be difficult to manage and treat, especially in the community.
- Dementia/brain injury – there can be difficulties where offending behaviour arises late in life due to dementia or brain injury, especially where the individual may have had no previous involvement with the criminal justice system. A punitive sentence may not be appropriate if, for example, the individual's condition essentially confines them to their home.

71. In the absence of a diagnosis, some sentencers had concerns about the potential for individuals accused or convicted of offences to exaggerate or even fabricate mental health issues in order to secure a more lenient sentence. It was said that many pleas in mitigation start with a submission that the individual suffers from mental health issues. Where a formal diagnosis or medical assessment is not available or possible, it is necessary to inquire further. Some sentencers said that they would consult authorities, such as the ICD-10 or DSM-5,[37] to see if symptoms matched those self-reported by an individual. It was also said that evidence of prescribed medication may be taken into account in lieu of a diagnosis in some cases.

Differences between male and female offenders

72. The mental health and sentencing literature review commissioned by the Council found that "Male and female offenders often present with different mental health disorders".[38] Sentencers the Council engaged with were divided on this, with some saying they had not

[36] NHS information on antisocial personality disorder states: "This behaviour usually becomes most extreme and challenging during the late teens and early 20s. It may improve by the time the person reaches their 40s." https://www.nhs.uk/mental-health/conditions/antisocial-personality-disorder/ (accessed 28 November 2024)
[37] The International Classification of Diseases (ICD) is a globally used medical classification maintained, and periodically revised, by the World Health Organisation. ICD-10 has been replaced by ICD-11, which came into effect in January 2022. An alternative classification, the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which is used in the United States and some other countries, was also referred to in the engagement carried out by the Council as a source of information for sentencers.
[38] Mental Health and Sentencing - Literature Review (Scottish Sentencing Council, 2022), page 77.

encountered any differences. Among those who felt there were differences, there were two recurring themes. (The greater number of male offenders compared to female offenders should be borne in mind when considering these points.[39])

73. The first was that female offenders are more likely than males to present with a complex combination of trauma-related mental health issues – including depression, anxiety, PTSD, and addiction – often linked to being the victim of physical or sexual abuse as an adult or child, or from suffering domestic abuse. Anxiety regarding their children who may be in care can further complicate the mental health issues of women. The second theme was that males are more likely than females to have formal diagnoses of a mental health issue – and psychosis-related conditions in particular. They are also more likely to present in court with drug and alcohol problems (including addictions rooted in mental illnesses).

74. Other views included that female offenders were more likely than males to suffer from mental health issues, or that there is a wider range of mental health issues associated with male offenders (but it was noted this may be because more male offenders appear in court). It was suggested that the lives of female offenders can appear to be more 'chaotic' than those of males, due to the impact of violent relationships and because their mental health issues have greater consequences for the care of their families (and their children, specifically). This can make it challenging to identify the best options for sentencing females.

Key issues the Council intends to explore further

5) **As a first step towards determining the scope of a guideline on sentencing individuals with mental health issues, the Council will seek to find out more about the nature and effect of psychotic and non-psychotic illnesses, neurological and neurodivergent conditions, and learning disabilities among the offending population and their relevance in sentencing. This will involve engaging with experts and practitioners with relevant expertise.**

6) **As a key part of the Council's evidence-based approach to guideline development, it will consider in due course undertaking research on the prevalence of mental health issues in the offending population, with a particular focus on the rates of issues among those who receive non-custodial sentences as this appears to be an under-explored area when compared to studies of rates in the prison population. Alongside this, the Council will consider research into any differences in the issues experienced by, and sentencing outcomes for, males and females and minority groups with mental health issues; and on public perceptions of sentencing of individuals with mental health issues.**

[39] The most recent Criminal Proceedings Scotland bulletin states that in 2021-22 there were 20 convictions per 1,000 population for males compared to four for females: https://www.gov.scot/publications/criminal-proceedings-scotland-2021-22/pages/17/ (accessed 28 November 2024).

Information and resources

Sufficiency of reports and information

75. Sentencers noted that they are dependent on others for information about the mental health of individuals who appear before them. In some cases, they may try to assess behaviour in court, but some individuals may never speak in the proceedings, so this is difficult to do, except where the person appears floridly unwell. While the court has power under section 200 of the 1995 Act to remand an individual for inquiry into their mental condition, it was suggested that this rarely happens without the prosecutor, defence agent, or some other person (for example, a medical professional or member of prisoner escort staff) informing the court of a potential issue.

76. Court reports on mental health issues are, therefore, fundamentally important in informing judicial decision-making. The main expert reports relied on specifically in relation to mental health are psychiatric reports, psychological reports, and, to a lesser extent, mental health officer reports and GP reports. Criminal justice social work reports are also obtained and may address mental health but cannot provide a medical diagnosis or recommendations about medical treatment.

77. Sentencers had mixed views on the nature of information provided in reports. Some noted that psychiatric reports are not always helpful, and may not provide any more detail than a criminal justice social work report. It was suggested that reports being based on a single assessment by a practitioner unfamiliar with the individual's history was a factor in this. There was also perceived to be a mismatch between information received in psychiatric reports and the needs of the court, on the basis that doctors are mainly concerned with diagnosis and treatment whereas the criminal justice system needs information about how an individual's mental health affects criminal responsibility, which is a legal, and not a medical, concept.

78. The formatting of some psychiatric reports was noted as an issue, with an example given of reports that essentially narrated an individual's full medical history, making it difficult to locate the key information needed, such as the nature of the individual's issue and their current mental condition.[40]

79. In the majority of cases in which mental health issues arise there is no question around fitness for trial. There was a general feeling that criminal justice social work reports in such cases rarely give any detailed information about the nature and impact of the issues, an informed assessment of risk in relation to the individual concerned, or details of what

[40] Training material for approved medical practitioners provides a suggested structure for a good psychiatric report to the court: https://www.gov.scot/publications/approved-medical-practitioners-mental-health-care-treatment-scotland-act-2003-training-manual/pages/14/ (accessed 28 November 2024)

programmes addressing mental health might be suitable and/or available in the community or prison.

Issues in receiving mental health reports

80. As has been indicated earlier in this paper, the impact of significant resource constraints was a theme in relation to each of the topics discussed with sentencers, and perhaps the overriding issue in the entire engagement exercise. Most of the challenges highlighted by sentencers either result directly from resource constraints or are exacerbated by them (and may in turn have been made worse by the disruptions caused by the Covid-19 pandemic). This section of the paper covers delays in obtaining reports, followed by sections on shortages of medical practitioners and shortages of beds. These three matters are interlinked and have ramifications for each of the other sections, particularly in respect of the longer periods of remand that individuals with mental health issues may be subject to as a result. While the discussion of them that follows may be relatively brief, this should not be taken as a sign of their relative importance.

81. Nearly all sentencers the Council engaged with had experienced delays in obtaining specialist reports about mental health and they commonly referred to these when discussing other matters. Sentencers said it can sometimes take several months to receive reports, and that qualified experts will often decline when asked to provide a report. Some said these problems arise 'all the time' and have existed 'for many years'. There were suggestions that the process for requesting reports is ad hoc and disorganised.

82. To some, the difficulties of delay appeared to be especially problematic where the accused was in custody, potentially due to the time and resource implications involved in psychiatrists visiting prisons, or in some circumstances their ability to access them. Regardless of the cause, delays in producing reports can result in longer periods of remand in custody than would otherwise be necessary, potentially conflicting with the Millan Principles. Sometimes, this can result in periods of remand approaching the length of a likely custodial sentence,[41] which makes such a disposal difficult to impose, or requires consideration of bail where the court may otherwise not have been inclined to grant it. It was suggested – although no specific examples were cited – that such lengthy delays can result in the complainer disengaging, the case falling, and proceedings having to be started again, in something of a vicious circle.

83. Reports were also said to be frequently received at the last minute, meaning they cannot be properly considered by the court, or provided to defence agents in time to be discussed with the accused, before the next scheduled hearing, resulting in further adjournment. Although some suggested that COPFS may have less difficulty in obtaining reports than either the

[41] This point may also apply to the initial 6 month period of a compulsion order.

court or the defence, others said that, in their experience, it does not matter whether it is the prosecution, defence, or court making the request.

84. The difficulty of meeting the statutory timeframes for obtaining psychiatric reports was noted, but some sentencers felt that the timescales were necessary to try to keep up momentum and mitigate drift and delay. At the same time, it was recognised that assessment and diagnosis can be difficult and time-consuming and cannot be rushed. Sentencers also noted that the primary duty of medical practitioners is to their patients, and that they face very significant pressures and challenges in fulfilling this duty, distinct from those relating to assessments and reports for the courts, which they are not obliged to do.

85. A lack of funding to pay for assessments and reports was also noted as contributing to delays: the defence may have difficulties securing funding through legal aid, the court may be reluctant to call for reports due to the cost, and experts may decline to prepare them due to the level of fees.

Availability of medical practitioners and other experts

86. A lack of availability of experts (psychiatrists, psychologists, and psychiatric nurses) to undertake the necessary assessments was cited by many sentencers as a key reason for delays in court reports being obtained. The shortage of psychiatrists was recently noted by the Scottish Parliament's Public Audit Committee in its report 'Adult mental health'. Conclusion/recommendation 29 in the Committee's report states:

> "The Committee is deeply concerned by the workforce crisis facing psychiatrists in Scotland. It is also troubling to hear that there is an overreliance on locum psychiatrists. This approach represents poor value for money and poses a risk to the quality of the services provided."[42]

87. This reflects the experiences of sentencers who engaged with the Council. It was reported that due to shortages, some courts have had to use locums, freelancers, or retired psychiatrists to carry out assessments, who may not necessarily be best placed to do such work. Courts have also experienced difficulties getting information about approved medical practitioners currently in post from health boards.[43] It was suggested that lists of these used to be available but that this no longer seems to be the case. Instead, one sentencer said that the Risk Management Authority's website had been used to find risk assessors who are qualified psychiatrists.[44] Another sentencer said they had experience of repeated requests for assessments simply being returned to the court with a letter advising that the report could not be allocated and that the request was now closed.

[42] https://digitalpublications.parliament.scot/Committees/Report/PA/2024/2/28/c0ad50ea-5444-452a-b67a-a285ea574ff6-1 (accessed 28 November 2024)
[43] Under section 22 of the 2003 Act, health boards must maintain a list of approved medical practitioners.
[44] https://www.rma.scot/olr/risk-assessors/ (accessed 28 November 2024)

Availability of beds in psychiatric facilities

88. Sentencers commonly reported a shortage of beds in psychiatric facilities, both in respect of pre-conviction/pre-sentence assessments and in respect of committal to hospital as part of a final disposal. One sentencer described a 'chronic lack of beds' for individuals who meet the criteria for an assessment order, present too high a risk to be released on bail, but for whom a suitable bed is not available within the statutory time limit of seven days from the making of the order. The end result is that the order cannot be made and the individual remains in custody until a bed becomes available and an assessment order can be made. The same scenario was reported by others, with it being reported as a nationwide issue which meant there are sometimes no beds available in a suitable hospital anywhere in Scotland.

89. Some sentencers highlighted issues with particular services, mentioning, for example:

- an intermittent shortage of medium secure facilities
- high demand for residential rehab places
- a shortage of beds for those with serious conditions such as schizophrenia
- a particular shortage of beds for female patients, which was likely to lead to female offenders being treated differently from male offenders.

Key issues the Council intends to explore further

7) A number of key challenges arise in the sentencing of individuals with mental health issues regarding the provision of information and expert reports and as a result of resource constraints. To address these challenges, the Council will:

i. Seek an update on implementation of the recommendations of the Independent Forensic Mental Health Review regarding the creation of a national framework to ensure the timely provision of court reports by psychiatrists and psychologists for assessment and sentencing purposes.

ii. Engage with SCTS, health boards, and others concerning communication channels between courts and approved medical practitioners for the purpose of preparing reports.

iii. Engage with the relevant professional bodies regarding the format and content of expert court reports on individuals with mental health issues.

iv. Discuss the shortages of psychiatrists and beds in psychiatric units with relevant stakeholders.

Suitability and availability of disposals

90. In October 2021, the Council published the findings of a consultative exercise[45] with sentencers in relation to the provision of community-based disposals, which included that mental health needs may not be adequately addressed in such disposals due to issues or barriers in respect of the provision of information. The findings of that exercise are of direct relevance to the discussion that follows, as is a report of a subsequent stakeholder event held by the Council on community sentencing, which took place in 2022.[46] Additionally, as was noted by some sentencers, many of the challenges around the suitability and availability of sentencing options apply to all cases, not just those in which mental health is an issue.

Sufficiency of available disposal options

91. Most of the sentencers the Council engaged with thought there were insufficient sentencing options available for individuals with mental health issues and they highlighted the need for a range of additional disposals. Particular issues raised relating to community payback orders (CPOs) are discussed below in the section '*Treatment and supervision in the community'*. Some specific suggestions relating to individuals who meet the custody threshold are noted below in the section '*Hybrid or combined disposals*'.

92. There was a clear sense that sentencers felt the options for community-based disposals are lacking. There was a need for:

- options which incorporated targeted and tailored mental health treatment and programmes, and appropriate support and supervision
- more structured community-based options
- provision to include further direction on treatment within a mental health order attached to a CPO
- provision for more stringent mental health orders
- an option to require compulsory attendance at a residential centre.

93. The use of approaches involving increased judicial engagement, such as structured deferred sentences (SDS),[47] was discussed. For some, these provided a flexible and effective way to address an individual's mental health issues by allowing for continuous monitoring and oversight of progress, and the possibility of judicial continuity. They gave scope to adapt to

[45] https://www.scottishsentencingcouncil.org.uk/media/ncklyckq/20211028-judicial-perspectives-of-community-based-disposals-ssc-issues-paper.pdf

[46] https://www.scottishsentencingcouncil.org.uk/media/ii4oqfoy/community-sentencing-stakeholder-event-march-2022-report.pdf

[47] In very general terms, SDS can be used after conviction and before sentencing to allow a period of structured support with lower risk individuals to address needs and promote rehabilitation, to reduce offending behaviour and to avoid unnecessary intensive periods of supervision in the community. SDS can also be used to assess an individual's suitability for a CPO or a drug treatment and testing order (DTTO), or to assess an individual's ability to comply with supervision.

the individual's circumstances without the risk of breach proceedings that might arise under a CPO, while also preserving the option to impose sanctions for failure to engage. It was said that such an approach offered accountability for both offenders and service providers.

94. Some sentencers also felt that structured deferred sentences offered the possibility of a more holistic approach involving mental health and social work teams, bespoke interventions and programmes and appropriate supervision tailored to the needs of individuals.

95. However, others felt that the court is not well placed to determine treatments and provide the monitoring and supervisory input required of SDS-type arrangements, both in terms of expertise and time and resources, and that such matters should fall to medical professionals by way of disposals with a more formal legislative basis.

96. The Council's community-based disposals issues paper referred to above noted that there are variations in the nature and availability of structured deferred sentences in different parts of the country and suggested that further research into their use would be welcome. The Council's position remains unchanged.

Consistency of provision

97. Sentencers also felt that limited disposal options are exacerbated by resource constraints. A perceived under-resourcing of community services was noted as an issue. A number of sentencers gave examples of how shortages of suitable services could affect particular groups. They described:

- a lack of services for those with borderline personality disorders – this meant that such individuals ended up in prison, which was said to be the 'the worst place for them'
- the long-term absence of a local specialist in learning disability psychology in one area resulting in a very vulnerable person being unable to get the support required to commence a CPO.

98. As already noted, structured deferred sentences may also not be consistently available across the country.

Treatment and supervision in the community

99. The Scottish Mental Health Law Review (SMHLR) commented on two types of disposal for individuals with mental health issues, both of which involve treatment and supervision in the community: CPOs with a mental health treatment requirement under section 227R of the 1995 Act,[48] and supervision and treatment orders under 57(2)(d) and Schedule 4 of the 1995 Act. Sentencers raised issues concerning their abilities to use each of these disposals (it should be noted that the latter is only available where the individual has not been convicted and is therefore outwith the Council's remit).

[48] https://www.legislation.gov.uk/ukpga/1995/46/part/XI/crossheading/mental-health-treatment-requirement

100. In respect of CPOs, the SMHLR said[49] that the use of the mental health requirements of such orders could be expanded. Most of the sentencers the Council engaged with said that they had only rarely, if ever, been able to impose a CPO with a mental health treatment requirement. They offered a range of reasons for this, including that:

- such disposals are rarely recommended in reports – one sentencer said they were discouraged from making mental health treatment requirements by medical practitioners on the grounds that it was better to leave the responsible officer free to arrange suitable supervision and support services
- individuals often did not meet the statutory criteria set out for such disposals
- such disposals required the stipulation of a named service, and places in appropriate services were not always available at the right time
- a mental health treatment requirement is rarely effective as there is no obligation on NHS hospitals to deliver treatment via a named Responsible Medical Officer – it is, in effect, an enhanced supervision requirement, rather than a binding disposal.

101. The views expressed reflect the findings of the Council's community-based disposals issues paper referred to above, which said (at paragraph 75):

> "There appear to be impediments to the imposition of CPOs with additional requirements. For example, a CPO with a mental health requirement can only be imposed if certain information, normally in the form of a medical report, is before the court. However, in practice these medical reports are not always available despite there sometimes being a clear need for the accused to receive mental health support…supplementary information to that in the CJSWR[50] would usually be required to enable this, delaying treatment. The Council has a general concern that this issue, coupled with the delays in obtaining psychiatric and psychological reports…presents a risk that mental health needs are not adequately addressed."

102. The Council's community-based disposals issues paper went on to note (at paragraph 76) that, as an alternative, courts may impose a conduct requirement in relation to mental health. However, this is problematic because section 227W(4) of the 1995 Act prevents a conduct requirement from including anything that could be required by imposing one of the other requirements listed in section 227A(2), which includes a mental health treatment requirement.

103. Some sentencers the Council engaged with in respect of the present paper said that they had imposed a conduct requirement in relation to mental health as just such an alternative.

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[49] SMHLR, para 10.5: "Greater use should be made of existing options, for example, Community Payback Orders. These orders allow for mental health requirements as well as supervision, unpaid work, programme work, residence requirements, drug and alcohol treatment requirements and conduct requirements. The use of the mental health requirements of such an order could be expanded."

[50] Criminal justice social work report.

Others said that they made had mental health treatment a requirement of supervision instead, which they recognised involves an informal approach not envisaged under the legislation.[51] They reported trying to 'craft' suitable orders incorporating appropriate support and supervision or a requirement to engage with a mental health practitioner.

104. Turning to supervision and treatment orders – which require a person to accept supervision from a social worker and submit to medical treatment with no sanctions for non-compliance – the SMHLR recommended that their use should be monitored by the Mental Welfare Commission and that the Scottish Government should engage with the judiciary and the Judicial Institute regarding any barriers to their use.[52]

105. Sentencers the Council engaged with had little experience of considering or imposing these orders. It was suggested that there is very little guidance on their nature and use. The sense given was of a kind of vicious circle – as these orders are seldom recommended and very rarely used, there can sometimes be a gap in understanding of, and information about, them, which in turn may create a reluctance to recommend them. However, perhaps a more significant issue is that the court has no power to enforce compliance with a supervision and treatment order as it is not a criminal sentence following on from conviction. One sentencer stated that medical practitioners were reluctant to recommend them as they felt that they were unenforceable.

Hybrid or combined disposals

106. Sentencers suggested a number of different options, not currently available, which they felt would be useful in relation to the sentencing of individuals with mental health issues who have committed more serious offences or require a custodial sentence:

- a wider range of mental health interventions in custody settings
- a sentencing option (distinct from currently available supervised release orders and extended sentence options) that combined custody and community disposals
- a hybrid order involving secure care and treatment
- a post-release supervision requirement that was not based on the posing of serious risk.[53]

[51] A related and important consequence of this is that the number of CPOs which address mental health may be under-reported, as the Council understands that statistical reporting may only relate to CPOs with a mental health treatment requirement.

[52] SMHLR: 'Recommendation 10.5: The use of supervision and treatment orders should be monitored by the Mental Welfare Commission. Recommendation 10.6: The Scottish Government should engage with the judiciary and the Judicial Institute to better understand any barriers to the use of these orders.'

[53] As noted at the second bullet point in para 106, current sentencing options where risk is a key consideration are supervised release orders and extended sentences. A supervised release order can be imposed on people convicted of an offence on indictment (more serious crime) to come into force once they have been released from prison. It is put in place in order to protect the public and can last up to 12 months. It orders the offender to be under the

107. As the Council noted (at paragraph 81) in its community-based disposals issues paper, the Appeal Court has stated[54] that there would be utility in a form of extended sentence[55] being available for cases where the statutory tests for such disposals are not met and that the Scottish Government or the Scottish Sentencing Council might wish to consider the matter. The Council's position on this remains the same: it supports the Appeal Court's view and suggests that there is merit in giving some consideration to the creation of a custodial sentence combined with a period of extended supervision thereafter. In light of the findings of this exercise, the Council considers that there would also be merit in considering similar options tailored to individuals with mental health issues who do not meet the threshold for a compulsion order, but for whom neither a standalone custodial or community sentence would be appropriate.

Key issues the Council intends to explore further

8) **There appear to be legislative and practical barriers to the imposition of community payback orders with a mental health treatment requirement, meaning these orders are not used as frequently as they might be. Further work is required to explore the nature and impact of these barriers; the effectiveness, or otherwise, of the alternative orders courts impose when unable to make a mental health treatment requirement; and what steps can be taken to address these issues.**

9) **The Council will raise with the Scottish Government the resourcing of community disposals and the issue of additional disposal options for offenders with mental health issues, including the potential for a hybrid sentence combing a period of secure care of custody with supervision or treatment in the community.**

10) **Through further engagement with sentencers and others, the Council will seek to explore any geographical variations in the availability and effectiveness of community sentencing options and programmes for offenders with mental health issues; what impact inconsistency of provision may have; and how greater consistency might be achieved.**

Other issues raised

108. A number of discrete issues were raised, which sentencers suggested should be given consideration to:

supervision of a criminal justice social worker and follow any conditions that have been set. See footnote 55 for information about extended sentence.

[54] Notes Of Appeal Against Sentence by (First) Kenneth Wood; (Second) Thomas Tennant and (Third) Darryl Mclean

[55] An extended sentence combines a period in prison with a further set time of supervision in the community (the extension part). It is used to protect the public and can be given to offenders who have committed a sexual or violent crime; or abduction on indictment (more serious crime). For a violent crime or abduction, the custodial term of the sentence must be four years or more. Automatic early release provisions do not apply to extended sentences.

- initiatives – in the form of advocacy or support workers – to assist offenders with mental health issues in engaging with the court procedures and the sentencing process
- establishing a specific court or forum to deal with individuals with mental health issues (or diagnosed conditions) where more time and thought could be given to disposals in a way that addresses the offence, the individual, and the wider public interest
- how witnesses and victims who have mental health issues should be treated in court and supported in giving evidence
- the use of 'all stakeholder meetings' to consider how best to address the many issues often faced by individuals with poor mental health in a coordinated way, which may be particularly helpful in difficult cases
- the option of diversion and support for frequent offenders.

109. In respect of the final bullet point, several sentencers noted that some individuals, particularly those who have persistent mental health issues (with personality disorder being specifically highlighted), can accumulate numerous summary complaints for offences such as breaches of the peace and threatening or abusive behaviour. It was suggested that it may not be in the individual's or society's best interests to deal with them through the criminal justice system, which can be a blunt instrument in such circumstances. It was particularly noted that:

- such offences can be committed against medical professionals who may be treating the individual in a secure unit, perhaps due to a previous mental health disposal
- considerable court time and resources can be required to deal with such offences but the sentencing options available may be limited if measures are already in place.

110. Sentencers recognised that these offences are committed against professionals and other workers who are vulnerable because of their role in providing treatment and support, and so deserve protection. Dealing with these offences through the criminal justice system can be an important way of recognising this and addressing issues of risk. Nevertheless, sentencers felt there may be merit in exploring whether there might be other approaches that could address these issues.

Key issues the Council intends to explore further

11) The Council considers that a number of initiatives and innovations suggested by sentencers merit further consideration, although it does not have the power to introduce any of them. In future engagement, it will seek views on whether, and if so how, the following suggestions, among others, might improve sentencing for individuals with mental health issues:

i. Specialist mental health courts

ii. Dedicated court teams of psychiatrists, psychologists and other relevant practitioners

iii. Use of advocacy and support workers to assist offenders with mental health issues in engaging with the sentencing process

12) While the Council's role does not extend to the provision of support to victims and witnesses, it recognises the need for appropriate levels of help, information, and support to be provided to all victims and witnesses and in particular those with mental health issues. It will consider, and seek views on, how any of the initiatives outlined in this paper might contribute to this.

Conclusion

111. This paper highlights a range of complex and interrelated challenges in relation to the sentencing of people with mental health issues. Some of these are practical, and relate to the ability of courts to obtain the relevant information to assist in their decision-making. Others are of a more systemic or structural nature, relating to, for example, the complexity of the relevant legislation or the availability and suitability of current disposal options. There can also be challenges around the applicable principles and purposes of sentencing in such cases: tensions and complexities inevitably arise in balancing considerations around treatment and welfare alongside public protection and punishment. More fundamentally, system-wide resource constraints – which were a consistent theme in the views sentencers expressed to the Council – directly contribute to or exacerbate these distinct but interlinked challenges.

112. Most of these challenges, and the actions required to address them, are outwith the Council's remit. The Council therefore hopes that this paper will be of assistance to government and others, including practitioners and service providers across the criminal justice and mental health systems, who have responsibilities for the various issues identified.

113. The Council looks forward to continuing engagement with key stakeholders in this area, both in respect of the challenges highlighted and also in respect of the development of a guideline on the sentencing of individuals with mental health issues. While most of the challenges that arise in these cases are not capable of being resolved by a guideline, the Council will, as part of the development process and in pursuit of its objective to provide policy assistance, endeavour to carry out further research and engagement with interested parties to assist in identifying potential solutions and examples of best practice to overcome some of the difficulties in this complex area.

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