Independent Advisory Panel on Deaths on Custody

Sentencing Council: Overarching principles: Sentencing offenders with mental health conditions or disorders - Consultation

July 2019

Independent Advisory Panel on Deaths in Custody response to Sentencing Council: Overarching principles: Sentencing offenders with mental health conditions or disorders – Consultation – July 2019

About the Independent Advisory Panel on Deaths in Custody

The Ministerial Council on Deaths in Custody formally commenced operation on 1 April 2009 and is jointly sponsored by the Ministry of Justice, the Department of Health and the Home Office. The Council consists of three tiers:

- Ministerial Board on Deaths in Custody
- Independent Advisory Panel (IAP)
- Practitioner and Stakeholder Group

The remit of the IAP (and overall of the Council) covers deaths which occur in prisons, in or following police custody, immigration detention, the deaths of residents of approved premises and the deaths of those detained under the Mental Health Act (MHA) in hospital. The principles and lessons learned as part of this work also apply to the deaths of those detained under the Mental Capacity Act in hospital.

The role of the IAP, an arms-length body, is to provide independent advice and expertise to the Ministerial Board. It provides guidance on policy and best practice across sectors and makes recommendations to Ministers and operational services. It assists Ministers to meet their human rights obligations to protect life. The IAP's aim is to bring about a continuing and sustained reduction in the number and rate of deaths in all forms of state custody in England and Wales.

Juliet Lyon CBE was appointed Chair of the IAP in September 2016.
Members of the IAP appointed in July 2018:

- Deborah Coles
- Professor Seena Fazel
- Professor Jenny Shaw
- Jenny Talbot OBE
- John Wadham

Further information on the IAP can be found on the website:
http://iapdeathsincustody.independent.gov.uk/

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Introduction

The IAP welcomes the consultation, and the attention the Sentencing Council is giving to mental health conditions or disorders during the sentencing process. It gives greater guidance to those responsible for sentencing people with mental health conditions and disorders. It should enable sentencers to take an informed and considered approach to individuals in such circumstances

The IAP is concerned about high rates of suicide and rising levels of self-harm in prison. Concerns about prisoners' unmet mental health needs have been expressed by, amongst others, the National Audit Office (NAO)[1]; the Justice Committee[2]; HM Prisons Inspectorate[3]; and respondents to IAP widescale consultations with men[4] and women[5] in prison and senior health and justice professionals on how best to prevent deaths in custody. The then Prisons and Probation Ombudsman noted in his thematic review in 2016[6] that, in over 500 cases investigated between 2012 and 2014, 70% of those who died by suicide had mental health needs at the time of their death.

As a measure of risk and vulnerability and according to Ministry of Justice figures, 46% of women and 21% of men in custody have attempted suicide at some point in their lives compared to 6% of the general population. In 2018 there were 92 self-inflicted deaths in prison in England and Wales and 55,598 incidents of self-harm, the highest number ever recorded. In the same year, of the 75,750 community orders made, fewer than 1% (just 458) included a mental health treatment requirement.

In the light of this, the IAP and the Magistrates Association have recently conducted a survey to collect magistrates' views on sentencing powers and practice in relation to offenders with mental health conditions, learning disabilities and other needs, with a particular focus on community sentences as an alternative to custody. Further information on this can be found here.

Question 3: Do you have any comments on the proposed contents of paragraphs one to six? Do you think the information will be helpful to courts? If not, please tell us why.

The IAP agrees with the proposed conditions to be taken into consideration at the sentencing stage. We very much welcome the approach that sentencers

[1] https://www.nao.org.uk/press-release/mental-health-in-prisons/
[2] https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/
[3] https://www.justiceinspectorates.gov.uk/hmiprisons/
[4] http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2017/12/Keeping-Safe-FINAL-Dec-2017.pdf
[5] http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2017/12/Keeping-Safe-FINAL-Dec-2017.pdf
[6] http://www.ppo.gov.uk/wp-content/uploads/2016/01/PPO-thematic-prisoners-mental-health-web-final.pdf#view=FitH

consider each person's circumstances and needs and each case on its own merits.

Question 5: Do you think the guidance within paragraphs eight and nine is helpful? Is there any of the guidance that you disagree with? If so, please tell us why you disagree with it.

And

Question 6: Please tell us your views on the contents of paragraph ten- do you think this will be helpful to courts? If not, please tell us why and suggest any alternative approaches to assessing culpability that you think may be more appropriate.

We agree with the Prison Reform Trust that, except in extreme cases of acute illness, diagnoses on their own are an unreliable guide to whether the person understood what they were doing at the time of the offence or the likely consequences of their actions. It is important that the sentencer has access to the necessary information and advice on which to base their decision. This may come from a range of sources, including health professionals, the police, liaison and diversion services, the defence lawyer and the person's own testimony.

For example, individuals who have or are thought to have mental health conditions and/or disorders may have received support from an Appropriate Adult (AA) while in police custody and have been assessed by liaison and diversion services. As part of their assessment, liaison and diversion services may include information: about a person's history of engagement with mental health and/or learning disability services, whether the person is currently receiving treatment or support, and whether referrals have been made to relevant health, social care and/or support services. Information concerning whether an AA was called and any reports by liaison and diversion services should be made available to the sentencer to inform their decision making.

However, lack of such information *cannot* be taken as evidence that the individual does not have any mental health issues and/or disorders. In the absence of information concerning a person's mental health/mental disorder, we support the suggestion made by the Prison Reform Trust in their response to the CPS consultation that a mechanism be introduced that indicates to the sentencer:

- that the person does not have mental health conditions and/or disorders,

  or

- the custody sergeant considered that an AA was not necessary.

  and

- the person was not referred to or assessed by liaison and diversion services.

The presence of complex mental health conditions and disorders, fluctuating conditions, substance misuse, and social disadvantage will affect a person's capacity to make sensible and informed decisions. This may vary over time and across different kinds of decisions. In other words, a person may be affected by their mental health issues in different ways and in different circumstances.

In describing arrangements for the Mental Health Treatment Requirement, the Mental Health Act requires only that *'the mental condition of the offender…is such as requires and may be susceptible to treatment'*. It is important that previous engagement with treatment that has not been successful does not exclude a person from being offered the opportunity again. There are many reasons that may affect a person's engagement and response to mental health treatment.[7] The guidance should ensure that the 'likelihood of repetition' for suspects with mental health conditions and/or disorders, as currently framed, does not impose a more stringent 'test' than for suspects without such conditions, as described in the overarching Code for Crown Sentencers (2018):

> *'whether the offending was or is likely to be continued, repeated or escalated.'*

The question of 'maturity' is not cited at the public interest stage in this guidance and we suggest that a reference is made to the relevant section of the overarching Code for Crown Sentencers (2018): The Public Interest Stage: 4.14 (d).

People with mental health conditions and/or disorders and learning disabilities may be especially susceptible to coercion. The guidance should, therefore, refer to s45 Modern Slavery Act 2015 (Defence for slavery or trafficking victims who commit an offence).

Liaison and diversion services should have a designated women's lead and, given evidence of the unmet mental health needs of women in the criminal justice system, all women suspects should be assessed. A woman prisoner wrote to the IAP':

> *'Judges use prison as the default option but prison officers are not mental health nurses. Judges need to understand that prison is not a place to keep women safe.'*

Similarly, a male prisoner responded to the IAP Keeping Safe consultation in 2017:

> *'Jail is not a mental hospital. Well it shouldn't be. But it is at present.'*

[7] Hammond, T., Talbot, J. et al (2019) Out of the Shadows: Women with learning disabilities in contact with or on the edges of the criminal justice system, London: Prison Reform Trust

Question 7: Please tell us your views on the contents of section three - do you agree with the guidance in this section? If not, please tell us why.

Guidance should make clear that in waiting for admission to hospital, a police cell can never be considered a 'place of safety' and that prisons are both overcrowded and unsafe. The guidance should further note the recommendation made by the independent review of the Mental Health Act that

> '*Prison should never be used as 'a place of safety' for individuals who meet the criteria for detention under the Mental Health Act'*.[8]

A clinical director wrote to the IAP about improvements needed:

> *' … stop using prison as a place of safety for patients with acute mental health problems. They are not therapeutic environments, we cannot enforce treatment. Sending acutely psychiatrically unwell patients to prison does not improve their health and it is extremely difficult to manage patients in this condition in prison. The wait for transfer to a secure psychiatric hospital can be long and patients often worsen while waiting.*'

The guidance should refer to the damage and disproportionate impact that a custodial sentence has on many individuals with mental health conditions and/or disorders. We obviously agree that for some people this is an appropriate disposal—with the necessary reasonable adjustments to ensure the person understands the implications of such disposals. It should be noted, however, that crown sentencers can only consider a 'suitable out of court disposal' where they exist, and out of court disposals have been in marked decline since 2008.[9]

Although the following point is beyond the scope of this consultation, for diversion from prosecution to work effectively, adequate disposal options and local services must be made available. Innovative out of court disposals do exist and should be encouraged, especially for this cohort. For people with learning disabilities and/or autism, it is worth noting that while Transforming Care ended in March 2019, there is an ongoing commitment in The NHS Long Term Plan for

> '*increased investment in… forensic community support'* for this group.[10]

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[8] Recommendation 130 in Wessely, S. (2018) Modernising the Mental Health Act: Increasing choice, reducing compulsion—Final report of the Independent Review of the Mental Health Act 1983, London: Department for Health and Social Care

[9] Table Q5.1b and Q5.4, Ministry of Justice (2019) Criminal justice statistics quarterly December 2018, London: Ministry of Justice

[10] NHS England (2019) The NHS Long Term Plan, London: NHS England, paragraph 3.35

Decisions concerning a caution or conditional caution should take into consideration a person's capacity to understand the implications and requirements of a caution or conditional caution, and to give informed consent. Reasonable adjustments to ensure understanding should be employed, as necessary.

While the decision to take 'no further action' may be appropriate in some circumstances, it is important also to ensure the person understands the gravity of their alleged offending behaviour to help prevent an escalation of the behaviour that brought them into contact with the criminal justice system.

Other factors that should be taken into account should the person be found guilty of an offence are the paucity of adapted community orders for offenders with mental disorders and the Mental Health Treatment Requirement (MHTR) for offenders with mental health conditions. MHTRs may become more readily available following the development and trialling of a Community Sentence Treatment Requirement protocol under the auspices of the Department of Health and Social Care and the Ministry of Justice. The guidance should be updated as information about a national roll-out becomes available. Community sentencing options provided for in law that are not available locally, in a timely manner, should not result in a more punitive custodial sentence.

Information on MA survey can go here

Based on our consultations with men and women in prison; health and justice professionals and the charity INQUEST, the IAP has a particular concern about people who may have committed an offence in the course of attempting to take their own life. This raises questions about the CPS prosecuting individuals for offences that were the direct result of a mental health crisis. The offense of arson appears to be an example of this. There have been incidents where someone has set themselves on fire and have been charged with, and subsequently convicted of, arson with intent to endanger life. Inquests into the deaths of Mark Saunders and Emily Hartley drew attention to deaths of people imprisoned for offences that were primarily attempts to harm themselves. In their preventing future deaths reports, Coroners have repeatedly drawn attention to the inappropriate use of prison for those who should have been diverted into the treatment they needed.