

Scottish Sentencing Council consultation on guidelines for sentencing young people:

Response by the Centre for Youth & Criminal Justice (CYCJ)

1. Do you agree or disagree that a principle-based approach to the guideline is the right approach?

CYCJ agree that a principle-based approach makes more sense than an offence-specific approach. We believe this because the needs or drivers underpinning the various behaviours within different types of offences are often similar in nature. Therefore, if an offence-specific approach was taken there would be considerable overlap and repetition in guidelines across the offence types as the principles would be the same or very similar for each of them.

CYCJ are also of the view that matters which bring a child or young person into conflict with the law are often a manifestation of their ecological circumstances, and that consideration of these - rather than solely focusing on the nature of the offence - afford the court a greater chance of promoting desistance, rehabilitation and reintegration as well as reparation.

It is important that these considerations apply to all children and young people as opposed to this being determined by the type of offence committed. This is particularly important given the scope for rights violations in our approaches to children who commit the most serious harms, as detailed by Lightowler (2020).

2. Do you agree or disagree that the guideline should apply to people under the age of 25?

CYCJ agree that the guideline should apply to people under the age of 25. We are pleased that the evidence base on neurodevelopment has been used to inform this proposal and that there is recognition that the brain is still developing until mid-late 20's, which has an impact on culpability (McEwan, 2017; O'Rourke et al., 2020). As a result, it has been concluded that, child and youth justice rationale and functions should extend to the young adult age group because of psychosocial immaturity (McEwan, 2018). Such recognition would afford consistency with the attention being given to young adults within the criminal justice system elsewhere, with the House of Commons Justice Committee (2016, p.3) concluding "there is a strong case for a distinct approach to the treatment of young adults in the criminal justice system" and that "[d]ealing effectively with young adults while the brain is still developing is crucial for them in making successful transitions to a crime-free adulthood".

The age of 25 also takes into account what we know about the age/crime curve and the fact that the majority of children and young people will naturally desist from offending as the factors linked to desistance come into play, and the increasing age at which this is occurring over time (McNeill et al., 2012). This would also be in accordance with other policy and legislation including the UNCRC and the Children and Young People (Scotland) Act 2014, which defines childhood as up to 18; the Whole System Approach where many local authority areas have already, or are interested in, extending such support up to 21 or 26 years; and the duties on corporate parents to care leavers up to (and including) the age of 25 under the Children and Young People (Scotland) Act 2014 in order to uphold the rights and safeguard the wellbeing of these young people and young adults, in recognition that they have not yet fully reached adulthood and the importance of gradual, supported transitions.

Whilst we welcome the age of 25, we have some concern about the proposed boundary of applying the guidance to those who are *sentenced* before the age of 25, and would want to safeguard against sentencing inadvertently being delayed for those who are close to the age of 25 when the offence was committed.

We would also like to see explicit reference to children under the age of 18 years in the guideline with an acknowledgement that children have additional rights under the UNCRC. It would be helpful if the title of the guideline also included 'children' as well as 'young people' as an explicit recognition that the guideline applies to children not just young people, and takes account of their unique legal status and rights this affords. We have similar concerns about sentencing inadvertently being delayed for those who are close to the age of 18 when the offence was committed.

3. If you disagree that the guideline should apply to people under the age of 25, at what age should the guideline cease to apply?

Not applicable.

4. Do you agree or disagree that the relationship between this guideline and the 'Principles and purposes of sentencing guideline' is set out clearly?

We agree that the relationship between this guideline and the principles and purposes of sentencing guideline is set out clearly. Both guidelines are succinct and clear.

5. Do you agree or disagree that paragraph 7 of the guideline gives enough information about the factors that should be taken into account when sentencing a young person?

Disagree.

6. If you do not agree that paragraph 7 of the guideline gives enough information about the factors that should be taken into account when sentencing a young person, what additional information should it provide?

We think it would aid individuals understanding if paragraph 7 was explicit about the brain not being fully developed until mid-late 20's and that the last parts of the brain to develop are those that are involved in controlling impulses and more rational and considered judgments. In addition, it would be helpful if it was highlighted that adversity and trauma can have an impact on the rate of brain development (McEwan, 2017).

Despite the introduction to the guidelines by Lady Dorian, Lord Justice Clerk, in which she highlights adverse childhood experiences (ACEs) being a key matter for all judges to understand in sentencing, the draft guidelines fail to list ACEs or Childhood Trauma as a key consideration when sentencing children and young people. If judges are not informed about the impact of childhood trauma and development and not encouraged to consider these factors when sentencing, the determination to effect punishment over help and support will continue. The result will be a continued cycle of offending, hopelessness and despair. When judges can recognise the link between trauma, child development and issues such as drug addiction, alcohol abuse and poor self-regulation / mental health, they may determine it is better to help the young person out of that situation than to punish. This does not mean punishment has no role to play but earlier and more age appropriate intervention may prevent the cycle of offending continuing. For children, we would argue that there is a clear focus on education, reintegration and reparation.

In addition, the significance of Speech, Language and Communication Needs (SLCN) in the youth justice population is also relevant. Major studies to date have focused on the prevalence of language difficulties in males, with 50% to 70% of this group found to have significant difficulties with language function (Bryan, Freer, & Hanson, 2007; Snow, Powell, & Sanger, 2012). The presence and severity of SLCN appears to have associations with offending severity, in particular, violent offending. Whilst

SLCN are relatively common in all youth justice populations, they are particularly common amongst those engaging in more severe offences, and amongst violent offenders (Snow & Powell, 2011).

We suggest:

(a) Revising and expanding the last sentence of the first bullet point: "Judges should not rely solely on age when determining the maturity and responsibility of a child or young person, but should also attend to such factors as the child or young person's stage of development, living environment including care experiences, any adverse childhood experiences, experiences of trauma and any vulnerabilities that may bear on the commission of the offence".

(b) Revising the second sentence of the third bullet point: "This requires the judge to take into careful account the particular circumstances and background of the child or young person, including, for example, the child or young person's prospects of rehabilitation, and the ways in which sentences can have a more lastingly adverse impact on a child or young person than on someone of greater maturity. In addition, consideration should be given to the culpability of the child or young person at the time of the commission of the offence as there can sometimes be a significant change in circumstances between this time and the time of sentencing".

7. Do you agree or disagree that rehabilitation should be given greater emphasis than other purposes of sentencing in this guideline?

Yes we agree that rehabilitation should be given the greatest emphasis in the sentencing of children and young people. The research base indicates that the brain is still developing which provides greater potential for change in children and young people. There is also considerable evidence that developmentally appropriate interventions can be effective in producing change in behaviour (O'Rourke et al., 2020). In particular, community based, systemic interventions that take into account changes required in the systems around the child or young person as well as within the individual have been found to be most effective (CYCJ, 2019). Custodial sentences can disrupt the very factors that lead to desistance. There is also considerable evidence that children and young people who engage in the most serious offending behaviour are some of our most vulnerable children and young people (CYCJ, 2016; 2019; Vaswani, 2018; Murphy, 2018). From a rights perspective we should be upholding their right to support to help them recover their health, dignity, self-respect and social life (Article 39). An emphasis on rehabilitation will be cost and resource effective in the longer term if we can address the underlying needs of children and young people at an early stage and reduce the likelihood of future victims of offending (CYCJ, 2016). Rehabilitation must therefore include providing satisfactory access to education, training, life skills and the whole suite of abilities and knowledge that a child or young person will require when making the transition from the custodial estate to the community.

8. Do you agree or disagree that rehabilitation should be a primary consideration when sentencing a young person?

CYCJ agree that rehabilitation should be a primary consideration when sentencing a child or young person for the reasons detailed in Q7.

9. Which, if any, other purposes of sentencing should be emphasised in this guideline?

CYCJ believes that rehabilitation should be the primary consideration. Greater emphasis on giving the opportunity to make amends would tie in with the current promotion of Restorative Justice approaches.

10. Is the section on assessment of seriousness helpful?

We consider that the section on assessment of seriousness is not helpful. Paragraph 11 is covered in the Principles and Purposes of Sentencing guideline where it is placed in the context of other

considerations. In this draft guideline it is not placed in context and could be misinterpreted. Paragraph 12 could be incorporated into Paragraph 7.

It would also be helpful to emphasise that the child or young person's living environment (including care experience), any adverse childhood experiences, experiences of trauma and any vulnerabilities should also be taken into account.

11. Do you agree or disagree that paragraph 13 of the guideline identifies the information which is of most relevance to sentencing a young person?

The fourth bullet point is important. The evidence shows that children and young people often have difficulty understanding and complying with the disposals and sentences given. For example, in research by Nolan, Dyer and Vaswani (2018) with young men in custody, almost all reported having previously experienced some form of community-based measure via the adult court. The range and number of measures that had been utilized was vast, with significant issues reported in compliance. Issues included lack of workers support, timing of curfews including that this constrained the ability to work removing this pro-social activity, and having different requirements for different orders (including different times for different curfews), often resulting in multiple breaches in any one incident. These experiences led a number of respondents to conclude that community orders were impossible to comply with and contributed to these young men's overall ingrained sense of hopelessness at the chances of successful completion, which is consistent with other research findings (Bateman, 2011; Scottish Government, 2011; Smith et al., 2014). This is particularly crucial given the significant costs of non-compliance, as illustrated by Bateman (2011) in the link between non-compliance and entrance to custody, especially for short-term sentences, which are recognized as particularly ineffective (Bateman, 2016). This is further reinforced in the Youth Justice Improvement Board's 2018 Behind the Data Paper, which highlights for under 18s and 18-21 year olds in custody at the time of study, bail offences were the most common offence.

We believe that this section could provide clarity about the need to have information on the underlying needs that the offending behaviour is meeting. This would aid the decision making and ensure sentences are most likely to address the rehabilitation needs effectively. Examining how, and how far, any proposed sentence is likely to assist, or to hinder, the child or young person's rehabilitation should be considered. Information on any additional support needs, family circumstances, and developmental stage would also appear important.

12. Do you agree or disagree with paragraph 14 of the guideline stating that cases should be referred to a children's hearing for advice where it is competent to do so?

We agree that cases must be referred to a children's hearing for advice, and disposal, where it is competent to do so and welcome the inclusion of this expectation in the guideline. Although this provision is already in place this does not happen as frequently as it could and children are therefore not always getting their needs met and offending addressed within a child-centred system but instead are being prosecuted in the adult court system (Dyer, 2016). There has been little change in the proportion of requests for advice from criminal courts to the Children's Hearing System (CHS) and criminal proceedings where the outcome was to remit to a Children's Hearing, which remains extremely low (Dyer, 2016; Henderson, 2017). On average only 10% of those 16 and 17 year olds attending summary court were referred to the CHS from the Sheriff Court for advice and 6% for disposal between 2009/10 and 2013/14 (Dyer, 2016). In 2015/16, the court requested criminal advice from Children's Hearings for 109 young people, 49 of whom were remitted by courts to Hearings for disposal (Henderson & CYCJ, 2017). Many children or young people entering the criminal justice system have a range of unmet needs, which if not met, and the child or young person not supported through the criminal justice process, can lock them into a cycle of reoffending (CYCJ, 2016). The Independent Care Review (2020, p.41) recently concluded that "Despite the principles of Kilbrandon that aimed to ensure

a welfare based approach to offending, a significant number of children involved in offending behaviour are dealt with in Criminal Courts rather than through The Children's Hearing System.... Traditional criminal courts are not settings in which children's rights can be upheld and where they can be heard". In our view it is essential that this expectation is incorporated within the guideline, and in doing so Scotland can go some way towards meeting international standards for those children and young people who are in conflict with the law.

13. Do you agree or disagree with the proposed features of an appropriate sentence for a young person set out at paragraph 15 of the guideline?

In paragraph 15, we would suggest that, in line with the ethos of the guideline, the last two bullet points are moved to become the first two, therefore emphasising rehabilitation. This is supported by the evidence as summarised by O'Rourke et al. (2020), particularly in respect of the crucial importance of relationships, consistent adults, and positive role models in promoting desistance and positive outcomes for children and young people. Reintegration should follow in recognition of the necessity of upholding our rights, obligations and international standards for children in conflict with the law. In doing so, it would be pertinent to recognise that the core is the need to support children and young people to facilitate a shift in the way that they see themselves, from an identity that promotes offending to one that promotes positive contribution to society (Beyond Youth Custody, 2017). The fourth bullet point could be reworded to include 'and make amends to the person or community harmed by their behaviour'

We would welcome the inclusion of a reference to an appropriate sentence additionally being one that increases the opportunities for the factors known to be linked to desistance to be developed/strengthened (McNeill et. al., 2012).

14. Do you agree or disagree that the approach set out in paragraphs 17 and 18 of the guideline is appropriate?

CYCJ agree that the approach set out in paragraphs 17 & 18 is appropriate and welcome the clarity that a custodial sentence should only be imposed on a young person when no other sentence is appropriate. It would also be beneficial for Sheriffs or Judges to advise in writing why a community sentence is not appropriate to aid rehabilitation if a custodial sentence is imposed. If a custodial sentence is imposed, to meet UNCRC, it should be for the shortest appropriate period of time due to the detrimental impact such sentences have on children and young people. It is well evidenced that long sentences have a disproportionate effect on children, 'with minimum terms of imprisonment sometimes exceeding the child's lifespan to date' (Lynch, 2018c: 214). Such sentencing has been directly criticised in the 'Global Study on Children Deprived of Liberty'. 'In some cases, children have been sentenced to imprisonment for up to 25 years. The Independent Expert considers such lengthy prison sentences to violate the legal requirement of the 'shortest appropriate period of time' under Article 37 (b) of the Convention' (Nowak, 2019: para 44). We would also welcome an addition in this section about processing cases for children as quickly as possible, so that where offences are serious and deprivation of liberty is ultimately required there is the opportunity for as much as possible of their sentence to be served in Secure Care rather than a YOI.

We also agree with the extension of this to age 25 years as community based sentences will provide more opportunities for the factors known to be linked to desistance to be developed and maintained (McNeill et. al., 2012). However, community based sentences should be developmentally appropriate given the difficulties highlighted in question 11 above.

15. Do you agree or disagree that judges should consider remitting each case to a children's hearing for disposal where competent to do so?

Yes we agree that judges must consider remitting all cases involving children under 18 to a children's hearing for disposal where competent to do so for the reasons detailed in Q12. This would allow their behaviour to be addressed in an age appropriate way by age appropriate services, by staff skilled in working with children to address their offending behaviour and the underlying causes, as well as offering support for them to reach their potential and cease offending. As summarised in CYCJ (2019) A Guide to Youth Justice in Scotland: policy, practice and legislation, there is a need for the Children's Hearing System to be made available to all children through addressing the existing anomaly of *some* 16 and 17 year old children having access to that forum, whilst their peers – of the same age – often being unable to be referred to the Principal Reporter.

16. Do you think the guideline will influence sentencing practice in Scotland?

We believe that if the definition of a young person is accepted as someone aged 18-25 then the guideline will have a substantial influence on sentencing practice in Scotland. However, if the age is lowered then the influence will be reduced. With improved understanding of the rationale for a young person being defined as 18-25 then the guideline should influence sentencing practice.

It will be crucial that training is provided alongside the guideline to ensure evidence continues to be made available to sentencer's so they understand why this change is important, as well as ensuring consistency and transparency in sentencing decisions and the manner in which these are made. Procedural fairness matters, as research has shown that when people feel they have been treated fairly, they are more likely to accept that the courts have a moral right to make decisions and subsequently to comply with such decisions. Murphy (2015) has additionally found that this has greater importance for young people than for adults. Key components of procedural fairness include individuals having the opportunity to be heard; feeling they have been respected; and understanding the decision-making processes, deeming that decisions have been made in a trustworthy and unbiased manner and the requirements and expectations on them of such decisions (Bowen & Whitehead, 2016).

Training for those Social Workers submitting assessments and recommendations to inform sentencing decisions may also be required to ensure all the relevant factors that should be taken into consideration are highlighted in an accessible format.

It will also be important to monitor the impact this has on sentencing practice and the experiences of children and young people.

17. Do you agree or disagree that the guideline will increase public understanding of how sentencing decisions in respect of young people are made?

We believe that the guideline, in its current form, will increase public understanding of how sentencing decisions are made for children and young people. However, we think that with some amendments (as suggested above) their understanding of the rationale for this could be improved.

18. Do you agree or disagree that the guideline will increase public confidence in the sentencing of young people?

To be effective at increasing public confidence in sentencing children and young people a public communication strategy around the guideline will need to be prioritised with a focus on engaging with

communities across Scotland, as well as national communication endeavours. In doing so, strategies that had already been utilised such as Community Justice Scotland's Second Chancers campaign and the Frameworks Institute could provide valuable learning, with a range of partners identifiable who could support with such communication, including CYCJ.

19. Do you agree or disagree with the assessment of the specific, identified impacts the guidelines is expected to have?

The impact assessment appears to be comprehensive. However, we think it important that more information is obtained about the potential costs for SCRA and the CHS so that any changes in financial resources across services or organisations are transferred to ensure efficient and effective delivery to improve outcomes for children.

We agree that this will have an impact on resource for Children and Families Social Work, as detailed in paragraph 50, and agree that work should be undertaken to ensure that resource is transferred from Criminal Justice Social Work resources to enable this need to be met. Without the proportionate transferring of resource there is an inherent risk that teams will be unable to effectively and efficiently meet the needs of children and young people and that outcomes will not be improved as intended. There may also be additional requirements for secure care placements should this be used more frequently rather than custodial sentences.

In addition, there are potentially staff development requirements for those providing the community sentences for young people so that the interventions and techniques used within these are developmentally appropriate.

Given the vitally important contribution this guideline could make to our approaches to upholding the rights of children and young people and meeting our international obligations meeting such costs is key.

20. What benefits do you think will come from the introduction of this guideline, if any?

We would hope that the introduction of this guideline would result in fewer children and young people receiving custodial sentences, thus reducing stigmatisation and improving life chances through a greater focus on rehabilitation. However, this will only be achieved if there is appropriate resource provision in the community.

Moreover, sentencing guidelines for those under 25 ought to result in a more age appropriate response at the point of sentencing, with wider consideration of the social, biological and neurological features of someone that age.

Through the provision of more effective supports to children and young people, through more effective sentencing and disposals, children and young people should have a greater chance of having their needs met, their rights upheld, of flourishing and in turn of reducing future offending and thus victims (CYCJ, 2016).

21. What costs (financial or otherwise) do you think will come from the introduction of this guideline, if any?

As detailed above there are potential resource implications for Children and Families Social Work departments, Secure Care, SCRA and CHS. If these are not addressed then there is a risk that outcomes will not be achieved and public confidence in the sentencing of young people will be reduced.

22. Would you like to make any other comments about any matter arising from this consultation?

The role restorative justice could play during the sentencing process, including pre and post sentencing, of a child or young person is something that could be further considered and explored. There is a plethora of research which highlights the benefits of restorative processes for all parties involved. Most significantly research indicates that restorative justice reduces the likelihood of reoffending, benefiting both the individual who has caused harm and also the wider community by preventing further victims. In addition to supporting the primary consideration of sentencing (rehabilitation for the child or young person) restorative justice considers the rights and needs of victims in the sentencing process which in turn has the potential to increase public confidence.

It is vital that children and young people with experience of sentencing are included in the development, consultation and production of the guideline to ensure the guideline fully considers their needs and interests.