



JUSTICE
Scotland

**Scottish Sentencing Council consultation
on sentencing young people**

JUSTICE Scotland Response

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For further information contact

Tariq Desai, Criminal Justice Lawyer
email: tdesai@justice.org.uk direct line: 020 7762 6414

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. In Scotland we work under our title JUSTICE Scotland and through the assistance of our expert volunteers.
2. JUSTICE broadly welcomes the proposed changes set out by the draft guideline. We consider that the guideline will be useful in ensuring that sufficient regard is paid to the unique circumstances of young people at the sentencing stage. We nevertheless make some observations that we hope will assist in improving the guideline.
3. We also wish to highlight what we consider the main principles to be when contemplating sentencing reform. These are:
 - **Rehabilitation should be the primary goal.**
 - **Brain development suggests that a welfare-based approach is still appropriate up to the age of 25.**
 - **The focus should be on the needs of the individual in order to deter them from reoffending.**

Q1) Do you agree or disagree that a principle-based approach to the guideline is the right approach? Please provide any reasons for your answer.

4. Agree. The principle-based approach allows different factors to be taken into account depending on the individual circumstances of each young person. It therefore provides flexibility for judges and gives them a wide scope to consider what is best for that individual. At the same time, it provides clear guidance as to what should be considered and avoids the possibility of a “box-ticking” approach being adopted. This also avoids the risk of pigeonholing young people at the sentencing stage.

Q2) Do you agree or disagree that the guideline should apply to people under the age of 25? Please provide any reasons for your answer.

5. Agree. We consider that the sentencing of people under the age of 25 should be more focused on them as adolescents, rather than adults. Young people aged 18-25 are a unique group that is still maturing.¹ Indeed, the research used to inform the guideline suggests that the brain may not be fully developed until at least the age of 25.² People in this age group have distinct needs, and these needs must be the main consideration in relation to sentencing, rather than focusing on guilt. Involvement in the criminal justice system at this age can have a significant impact on a young person’s development and chances in later life.³ It is therefore important that this is recognised by the guideline. Setting a lower age limit for the application of the guideline would not address these needs or differences.
6. We would, however, question whether the age limit could be increased to the age of 26. The research states several times that brain development continues until “at least the age of 25”. Setting the cut off at the lower limit of the estimate, risks denying the best opportunity for rehabilitation for many young people. Further, setting the age limit at 26 would mean that the guideline would apply to the sentencing of a young person who commits a crime at the age of 25 but is then sentenced at 26.

¹ Howard League for Penal Reform, *Sentencing Young Adults*, (2018), <https://howardleague.org/wp-content/uploads/2019/01/Sentencing-Young-Adults.pdf>

² O’Rourke & ors, *The development of cognitive emotional maturity in adolescents and its relevance in judicial contexts*, The Scottish Sentencing Council, February 2020, <https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf>

³ Howard League for Penal Reform, *Sentencing Young Adults*, (2018), p. 3.

Q3) If you disagree that the guideline should apply to people under the age of 25, at what age should the guideline cease to apply? Please provide any reasons for your answer.

7. See our answer to Question 2.

Q4) Do you agree or disagree that the relationship between this guideline and the 'Principles and purposes of sentencing' guideline is set out clearly? Please provide any reasons for your answer.

8. Agree. It sets out clearly that the judge must have regard to other guidelines and read the guidelines alongside each other. However, we consider that the 'Sentencing Young People' guideline should detail that a judge is to first have as their primary consideration this guideline, as the 'Principles and Purposes of Sentencing' guideline includes more purposes, some of which may not be appropriate for the sentencing of young people, such as punishment.

Q5) 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? Please provide any reasons for your answer.

9. Disagree. We consider that more information about each factor should be provided. Studies have shown that whilst judges are capable of considering factors such as age and maturity when sentencing a young person, this is less likely to happen without clear guidance detailing these factors.⁴ Examples detailing how the principles should be applied in practice should be provided so that judges have a clearer idea of how to use the guideline. This is important as without this type of guidance, some judges may interpret each principle differently. For example, judges may have differing opinions on what "the best interests of the young person" principle means. A commitment to providing judges with training on what each of the principles mean would also be beneficial and ensure that there is consistency in the application of the principles.

Q6) 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? Please provide any reasons for your answer, including any examples that you feel should be included.

⁴ Howard League for Penal Reform, *Judging Maturity*, (2017), available at <https://howardleague.org/wp-content/uploads/2017/07/Judging-maturity.pdf>.

10. See our answer to Question 5. Additional factors to take into account could include ensuring that custody is a last resort for young people and how mitigating factors particularly affect young adults. For example, young adults with brain injury and other forms of trauma may find difficulty during these years of transition from adolescence to adulthood.⁵

Q7) Do you agree or disagree that rehabilitation should be given greater emphasis than other purposes of sentencing in this guideline? Please provide any reasons for your answer.

11. Agree. Effective rehabilitation is the best way to reduce repeated offending. As the guideline itself sets out, young people generally have a greater capacity for change. It is therefore important that rehabilitation is given greater emphasis in the guideline. Effective rehabilitation programmes should focus on building personal strengths and skills of a young person in order to educate and assist them, rather than shaming or castigating them.⁶ They should address the underlying behaviours and needs that lead to offending and work on building a relationship with the individual.⁷ Young people also have different rehabilitative needs than older people.⁸ Rehabilitation schemes therefore give young people a chance to change their behaviour. They are more desirable than other types of sentencing, such as short custodial sentences, which can have a greater negative impact on a young person. This can be seen by the high reoffending rates and the large number of self-inflicted deaths of young people in custody.⁹ Other purposes of sentencing, whilst relevant, are therefore not as important when sentencing young people.

Q8) Do you agree or disagree that rehabilitation should be a primary consideration when sentencing a young person? Please provide any reasons for your answer.

⁵ See, Howard League, *Sentencing Principles for Young Adults*, <https://howardleague.org/wp-content/uploads/2019/01/Sentencing-principles-for-young-adults.pdf>

⁶ See Chapter 3 of our Working Party Report *Prosecuting Sexual Offences* (2019). Although this relates to a different cohort of individuals who have committed criminal offences, the principles should apply more broadly.

⁷ We consider that diversion schemes, or deferred prosecution schemes, are an effective method of rehabilitation and reducing reoffending. However, these take place after arrest and before prosecution and sentencing. Two good examples of this type of scheme are Operation Checkpoint and Operation Turning Point. See P. Neyroud & M. Slothower, *Operation Turning Point: interim report on a randomized trial in Birmingham, UK*, (2013), available at <https://www.crim.cam.ac.uk/global/docs/events/ebp2013/operation-turningpoint-ebp2013.pdf>.

⁸ Howard League for Penal Reform, *Sentencing Young Adults*, (2018).

⁹ Lord Harris, *The Harris Review*, 2015, available at <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2015/07/Harris-Review-Report2.pdf>.

12. Agree. See our answer to Question 7.

Q9) Which, if any, other purposes of sentencing should be emphasised in this guideline? Please provide any reasons for your answer.

13. Although rehabilitation should be the primary consideration, making amends should also be highlighted, as restorative justice can be included in this purpose. Restorative justice has been shown to reduce offending and increase victim satisfaction.¹⁰ With young people's greater capacity for change, emphasising the value of this as a disposal option would be a step in the right direction.

Q10) Is the section on the assessment of seriousness helpful? Please provide any reasons for your answer.

14. Yes. It ensures that the young person's maturity is a key consideration when assessing their culpability, and that each case is assessed according to its individual circumstances.
15. We would, however, question one part of this section. Paragraph 12 begins "In assessing the culpability of a young person, the judge should have regard to the character and maturity of the young person at the time when the offence was committed." Whilst we agree with this principle, we reiterate our concerns that we highlighted in response to Question 2, namely that the guideline does not apply to those individuals who commit a crime at the age of 25 but are then sentenced at 26.

Q11) Do you agree or disagree that paragraph 13 of the guideline identifies the information which is of most relevance to sentencing a young person? Please provide any reasons for your answer.

16. Agree, although more categories of information could be included. For example, information relating to whether the young person has a learning disability or communication impairment; whether there are co-existing mental health, learning disability and/addiction features and their impact. Furthermore, although it references physical and mental health, there should be a specific reference to whether the young person has suffered a traumatic brain injury. These

¹⁰ H. Strang & ors, *Restorative justice conferencing (RJC) using face-to-face meetings of offenders and victims: effects on offender recidivism and victim satisfaction*, Campbell Collaboration, 2013, available at 0145_CJCG_Strang_Restorative_justice_PLS_EN

categories of information are important to consider as studies have found that young people in custody have higher levels of neurodisability compared with the general population.¹¹ WE also consider it important for the sentencing judge to have information not only on whether the young person is or has been in care, but, where age appropriate, what their current caring and educational arrangements are. It should also be made clear that this is not an exhaustive list, and that all young people will have unique circumstances and needs that should be taken into consideration.

Q12) 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? Please provide any reasons for your answer.

17. We agree that cases should be referred to a children’s hearing for advice where it is competent to do so. Children’s Hearings adopt a welfare-based approach and consider the unique circumstances and needs of each young person.¹² As such, the Children’s Hearing is well experienced in designing disposals aimed at addressing the needs of children and young people. The ‘Whole System Approach for Young People who Offend’ aims to provide tailored support for each individual based on their unique circumstances and needs.¹³ By drawing on the experience of the Children’s Hearing, this should further ensure that the best interests of the young person are taken into account.

Q13) 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? Please provide any reasons for your answer.

18. Agree. Although as with our response to question 11 regarding paragraph 13, we consider that paragraph 15 should make clear that it is a non-exhaustive list of features. Once again, every case concerning a young person will have different circumstances that should be considered.

¹¹ N Hughes et al, *Nobody made the connection: The prevalence of neurodisability in young people who offend*, (2012), available at https://dera.ioe.ac.uk/16045/1/Neurodisability_Report_FINAL_UPDATED_01_11_12.pdf.

¹² G Henderson, *Criminal Advice and Remittals to the Children’s Hearings System*, (2017), available at <https://www.scra.gov.uk/wp-content/uploads/2017/06/Criminal-advice-and-remittals-to-the-Childrens-Hearings-System.pdf>

¹³ Supra.

Q14) Do you agree or disagree that the approach set out in paragraphs 17 and 18 of the guideline is appropriate? Please provide any reasons for your answer.

19. We agree that the approach is appropriate. However, we also consider that paragraph 18 should reinforce the main principle which is that sentencing should be designed for rehabilitation.

Q15) Do you agree or disagree that judges should consider remitting each case to a children’s hearing for disposal, where it is competent to do so? Please provide any reasons for your answer.

20. Agree. Remitting a case to a children’s hearing “provides a route by which more young people could be diverted from the adult criminal justice system and its disposals.”¹⁴ This is in line with Scotland’s Youth Justice Strategy for 2015 to 2020, which aims to support young people in the transition to adult services. The Strategy includes remitting more criminal cases to children’s hearings.¹⁵ This would also address findings that the remittal of cases to children’s hearings for disposal was not being used to the extent that it could be.¹⁶ See also our response to question 12.

Q16) Do you think the guideline will influence sentencing practice in Scotland? Please provide any reasons for your answer.

21. Yes. However, although a good starting point, in order for sentencing practice to be influenced by the guideline, judges must receive appropriate training on how the guideline should be used. This will enable a culture of recognising and taking into account the unique circumstances and needs of each young person to be embedded into sentencing practice.

Q17) Do you agree or disagree that the guideline will increase public understanding of how sentencing decisions in respect of young people are made? Please provide any reasons for your answer.

22. Yes. The principles are clearly set out and are accessible. This should therefore increase public understanding. However, to ensure improved public understanding, more proactive efforts must be made to educate the public about sentencing practice, rather than relying on

¹⁴ G Henderson, *Criminal Advice and Remittals to the Children’s Hearings System*, (2017).

¹⁵ Supra.

¹⁶ Supra.

the public to seek information out themselves. This could be achieved with an introductory video and clear signposting from the mygov.scot website. We also consider that a child friendly version of the guideline should be produced – in accessible, clear and simple language and making use of the “easy read” format.

Q18) Do you agree or disagree that the guideline will increase public confidence in the sentencing of young people? Please provide any reasons for your answer.

23. We consider that the guideline will provide increased transparency into sentencing decisions concerning young people. It provides more information about the purpose of sentencing young people as well as the reasoning behind sentencing decisions, and how these differ from the sentencing of older people. This should therefore increase public confidence in the sentencing of young people, which we welcome. However, confidence also requires sentencing decisions being made correctly, fairly and consistently. As such, proper training on the guidelines is required, as well as continuing evaluation of the implementation and use of the Guideline. As we set out in the previous paragraph, the guideline must also be accessible for the public in order to increase understanding and, therefore confidence.

Q19) Do you agree or disagree with the assessment of the specific, identified impacts the guideline is expected to have? Please provide any reasons for your answer.

24. We agree with the identified impacts set out in the impact assessment. As set out above, we agree that the guideline will increase public confidence and understanding in the sentencing of young people. We also agree that some financial costs will be incurred, as discussed in response to the questions below. As for the guideline’s impact on sentencing practice, we once again highlight the need for clear examples and training so that the guideline is applied with consistency. This will also avoid the guideline being interpreted in a different fashion than that intended by the Council.

Q20) What benefits do you think will come from the introduction of this guideline, if any? Please provide any reasons for your answer.

25. We consider that several benefits will come from the introduction of this guideline. Firstly, by placing a focus on the rehabilitation of young people, this should lead to a demand for and, therefore, improved rehabilitation programmes. The guideline should also lead to a more welfare-based approach to the sentencing of young people, which, as stated above, we consider to be of fundamental importance. These benefits should lead to a reduction in crime.

It should therefore also reduce the economic impact of crime and the financial costs of prosecuting crime.

Q21) What costs (financial or otherwise) do you think will come from the introduction of this guideline, if any? Please provide any reasons for your answer.

26. By placing an emphasis on rehabilitation, this may incur financial costs due to the potential need for creating additional rehabilitation schemes. However, this should lead to a reduction in crime and by extension the public expenditure of prosecution and detention in the long term.