

**'Sentencing young people' guideline – A Community Justice Scotland
response to the Scottish Sentencing Council consultation
Final Response**

In August 2020 Community Justice Scotland responded to the Scottish Sentencing Council's [consultation](#) on a draft guideline for the sentencing of young people convicted of offences.

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

Agree.

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

Agree. As evidenced in the literature review¹, it is clear that brain maturation and cognitive development coupled with the impact of external factors such as trauma have a significant bearing on decision making and subsequent behaviour, and that these processes continue well beyond the comparatively arbitrary age boundary of 12, 16 or 18. In our view, this merits a broader definition of young person in judicial settings. We would further note that age in itself nonetheless remains a relatively limited metric by which to understand capacity, vulnerability and so on. As reflected in the research report, traumatic injury and experiences are in some cases the greater influence.

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.

N/a

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

Agree.

Q5) Do you agree or disagree that paragraph 7 of the guideline gives enough information about the factors² that should be taken into account when sentencing a young person? * Agree * Disagree Please provide any reasons for your answer

Disagree.

¹O'Rourke et al (2020), "The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts", <https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf>

² These factors are; maturity; capacity for change; best interest of young person. See draft guideline for further detail.

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.

We welcome the content of paragraph 7, and the style in which factors are set out, with clear language that speaks to the evidence underpinning the rationale. We would suggest however that the first point regarding the maturity of the young person should more prominently highlight the potential for maturity to be impacted by severely traumatic experiences. As we state elsewhere in our response, while age can in general be taken as a rough indicator for likely maturity, the significant impact of trauma must also be taken into account where appropriate.

We would also caution that the bullet point highlighting a young person's capacity for change risks creating the impression that older people with more 'fixed characters' are incapable of change as regards offending behaviour. In a justice context, this does not seem to be the case, with desistance research strongly and consistently indicating that for the vast majority that following a peak in late adolescence, offending rates decrease as age increases (the age crime curve³).

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

Agree. Rehabilitation, best achieved through consideration and response to person-centred assessment of need, is the most effective route to reducing offending and future victimisation, and should be accorded primary emphasis. We think that smart justice solutions, delivered by local multi-agency cooperation and supporting connectedness with communities is the best route to delivering rehabilitation.

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

Agree – see answer 7.

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

From the 'Principles and Purposes of Sentencing'⁴, we would highlight the purpose "Giving the offender the opportunity to make amends".

³ Bersani & Doherty (2018), "Desistance from Offending in the Twenty-First Century", Annual Review of Criminology Vol. 1:311-332, <https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-032317-092112#abstractSection>

⁴ Scottish Sentencing Council (2018), 'Principles & Purposes of Sentencing', <https://www.scottishsentencingcouncil.org.uk/media/1927/guideline-principles-and-purposes-of-sentencing.pdf>

In working with any young person, we would suggest that restorative justice or restorative practice should be considered as an option wherever possible. The evidence base for the potential of restorative justice to contribute to this purpose, and to contribute to rehabilitation, is substantial. At the same time, participation in restorative justice can have a transformative impact for a victim's journey to recovery. We feel that it would be appropriate to specifically highlight restorative justice in the guideline.

**Q10) Is the section on the assessment of seriousness helpful? * Yes * No
Please provide any reasons for your answer.**

Yes. We found it helpful in that it describes in relatively clear and accessible terms a judicial perspective of the relationship between seriousness, culpability and harm. We would suggest it will likely be helpful for people in general including victims, people who have committed crime, and families.

We would highlight however that though the relevant section is written in relatively plain language, it still contains some comparatively obscure terms not normally found in everyday use outwith legal settings (e.g., 'culpability'). We would recommend SSC produce easy read versions of this and other guidelines to better support the understanding of young people and their families, and people with learning difficulties and their supporters, as well as translations for those whose first language is not English.

Q11) Do you agree or disagree that paragraph 13⁵ of the guideline identifies the information which is of most relevance to sentencing a young person? * Agree * Disagree Please provide any reasons for your answer, including any other information that you feel should be included.

Disagree. We welcome those points identified, and agree they highlight areas of vulnerability common amongst young people who find themselves in the criminal justice system. We would in particular highlight the importance of the point in relation to physical and mental health, given the high prevalence rates of issues present in this vulnerable population.

We would also however suggest considering highlighting learning disability as a factor to specifically consider, as it does not necessarily fall straightforwardly within the category of physical or mental health. There is likely to be a significant prevalence of learning disability or need related to communication and understanding in this group (though the exact rate of prevalence is hard to precisely quantify as at present many do not receive a formal diagnosis prior to becoming

⁵ "13. The judge should ensure that s/he has sufficient information to identify and impose the most appropriate sentence. This may include, for example, information and reports about:

- addiction or accommodation issues,
- the physical and mental health of the young person,
- whether the young person is or has been in care, and
- whether any proposed sentence is likely to be effectively implemented, and what steps can be taken to increase the likelihood of effective implementation."

involved in the justice system⁶). These needs may require specific assessment and in turn specialist support. It is clear that people with learning difficulties face many barriers in participating in the justice process up to and including their sentencing⁷ and beyond, and that this merits specific consideration by a sentencer in relation to young people, as it will have a direct impact on the other factors under consideration such as the likelihood of effective implementation.

We would further recommend an additional marker in respect of previous victimisation. The evidence suggests that young people involved in offending have in many cases been victims of crime. We think it important that this is taken into account in understanding their needs and vulnerabilities and in identifying the most appropriate sentence.

Where a young person has experienced early trauma and abuse, they often present with additional complexity and problematic behaviours. These behaviours are associated with increased risk of victimisation and in turn, escalating complexity and need over their adolescence and adulthood. This can also manifest in escalating offending. It is also worth noting that evidence suggests that involvement in formal justice measures can have a criminalising effect on young people – in effect the criminal justice system can actively contribute to this damaging cycle. It is important the sentencer recognises the needs as outlined in this context.

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? * Agree * Disagree Please provide any reasons for your answer.

Agree

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? * Agree * Disagree Please provide any reasons for your answer.

Disagree. We support the content of the proposed features and particularly appreciate the weight given towards reintegration, rehabilitation and connectedness to society. We do however question the second bullet point as set out as present, as by our reading it conflates two distinct factors for consideration, that of the risk of unnecessary stigmatisation and the potential for failure to comply. We suggest these should be made as separate bullet points.

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

⁶ Loucks (2007) “No One Knows: The prevalence and associated needs of offenders with learning difficulties and learning disabilities”, <http://www.prisonreformtrust.org.uk/Portals/0/Documents/No%20One%20Knows%20Nancy%20Loucks%20prevalence%20briefing.pdf>

⁷ SOLD Network (2015) “The Criminal Justice Pathway For People With Learning Disabilities: Challenges And Opportunities For Change”, <https://soldnetwork.org.uk/wp-content/uploads/criminal-justice-pathway-challenges-opportunnities-for-change.pdf>

Disagree. We agree with the spirit in which points 17 and 18 are made, which we interpret to mean that sentences should in effect be less punitive or onerous than those imposed on an older person for the same or similar offence. Point 18 specifically relates to custodial sentences, and gives us pause. We support the presumption against short sentences of less than 12 months, and we feel those principles remain appropriate in relation to sentences for young people. We feel that custody should only be used where there is no other option and is needed in the interests of public protection. Even a short prison sentence can be immensely damaging to a traumatised young person. We would suggest this point be strengthened to highlight this important consideration, and to remove any doubt about the appropriateness of even short custodial sentences in relation to young people.

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? * Agree * Disagree Please provide any reasons for your answer.

Agree.

Q16) Do you think the guideline will influence sentencing practice in Scotland? * Yes * No Please provide any reasons for your answer.

Yes. If implemented and communicated effectively, these guidelines could contribute to a further shift in the sentencing of young people, in particular by broadening the traditional definition of young person. In order to have the greatest impact, implementation may require revised training for sentencers, social workers writing reports, and require greater availability of community-based services to enable them to respond.

We would also suggest that one option would be to develop a group of sentencers who have specific training and understanding of young people's offending, using principles drawn from the concept of problem-solving courts to produce problem-solving sheriffs, who would be best placed to respond to the complexities and subtleties of young people's offending.

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

Agree. The guideline uses comparatively plain language, it is clearly articulated and relatively accessible, and we believe it will be of great assistance to people affected by the offending of young people. We reiterate however, as in our answer to Question 9, we recommend SSC produce easy read versions of this and other guidelines to better support the understanding of young people and their families, and people with learning difficulties and their supporters, as well as translations for those whose first language is not English.

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

Agree. It is feasible that this guideline will contribute to increased public confidence, however it should be noted that confidence in justice is influenced by a wide range of factors and is very difficult to directly influence with any single intervention. Any assessment of impact should take this into account, and allow time for implementation and shift in practice, and in turn confidence, to occur. We would suggest that primary feedback on confidence should be sought from those involved in justice proceedings, victims, perpetrators, families and communities affected by crime.

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

Agree. We feel the guideline has the potential to contribute substantially in all the identified impact areas.

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

We believe the guideline has the potential to increase understanding of the factors which may underpin offending behaviour in many young people. This could contribute to the development of smarter solutions to offending behaviour in young people including a greater focus by wider justice stakeholders on prevention activity as well as on rehabilitation

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.

In order to have full impact, it is likely that revised training will be required for sentencers, social workers producing court reports, and people working in community justice. Furthermore if there is a substantial shift in sentencing trends resulting in greater use of community options, it follows that there will be greater demand on community resources, including on specialist services working with young people.

We would also suggest that for greatest impact, resources should be invested in a communication strategy to accompany the publication of this guideline, aimed at a wide range of audiences.

We would be keen to work with the Scottish Sentencing Council and other stakeholders in community justice to further explore these possibilities.

Q22) Would you like to make any other comments about any matter arising from this consultation?

We recognise that this guideline is in some respects a radical proposition, recognising and responding to the offending of a greater number of young people in a way that would take into account their needs and vulnerabilities. For some it will be familiar practice, and for others very bold.

We would highlight that nonetheless, for young people, even a welfare-orientated system of justice can have negative effects in terms of secondary labelling and criminalization⁸. Evidence suggests that involvement in formal criminal justice proceedings risks increasing offending behaviour. We would suggest that wherever possible, the justice system should create the potential for diversion from prosecution, taking any opportunity to break the cycle of repeat contact with formal justice processes.

⁸ McAra &McVie (2010), Youth crime and justice: Key messages from the Edinburgh Study of Youth Transitions and Crime, https://www.research.ed.ac.uk/portal/files/8195355/Youth_crime_and_justice_Key_messages_from_the_Edinburgh_Study_of_Youth_Transitions_and_Crime_Criminology_and_Criminal_Justice.pdf