



Response from the Faculty of Advocates

to the

Consultation on Sentencing Young People Guideline

Q1. Do you agree or disagree that a principle-based approach to the guideline is the right approach?

Agree

Please provide any reasons for your answer.

In our opinion a principle-based approach is patently better and is to be preferred over an offence-specific approach.

A principle-based approach allows general guidance for the manner in which the sentencing of younger persons is to be undertaken. While the sentencing of younger persons calls for a more individualistic, bespoke, approach than is sometimes the case with older offenders, the general approach to such sentencing and the general principles underpinning that general approach, are consistent and do not overly vary from offence to offence. A principle-based approach allows for a cleaner, clearer, and more user-friendly approach than would an offence specific approach.

An offence-specific approach would involve extensive needless repetition, with each offence sentencing guideline required to state how to sentence a young person for that particular offence and why such a different approach should be taken – essentially justifying a separate approach to the sentencing of young persons in each separate offence sentencing guideline. There is also the possibility of confusion should there be separate guidelines for younger and older persons within the same offence guidelines with courts or practitioners looking, for example, at one table when a different table is applicable based on the age of the offender.

It is also observed that one does not necessarily preclude the other. In the event that the principle-based approach is taken, no doubt it would still be possible to make mention of particular issues relating to the sentencing of younger persons in specific offence guidelines, should there be particular issues that arise when those specific offences are committed by younger persons.

Q2. Do you agree or disagree that the guideline should apply to people under the age of 25?

Agree

Please provide any reasons for your answer.

The finding of the Scottish Sentencing Council's commission research project informed the provisional view, as expressed in the draft guideline and the consultation paper, that the guideline should apply to young people under the age of 25. That suggestion, of 25, seems to be consistent with the commissioned

research and other research that full development and maturity is, dependent on the individual, perhaps to be anticipated at around the age of 25, with physical development of the brain anticipated to conclude at around 12 years of age (consistent with the onset of adolescence); intellectual maturity concluding at around 18 years or so (consistent with the conclusion of adolescence); and emotional maturity with the control of higher functions such as long term planning and the controlling of emotions at around the age of 25.

Of necessity, there requires to be a cut-off point which will always be somewhat arbitrary. Those under the age of 25 can, as is acknowledged in the consultation document, marry, vote, join the armed forces, and learn to drive. Someone under the age of 25 may have completed tertiary education; may have secured employment; may have their own property; may indeed have children of their own. By the same token, they may have experienced only deprivation; lacked parental guidance; and had negative peers which have hindered their ability to progress.

As is observed in the consultation document, the intention does not seem to be to suggest that all persons under the age of 25 years should be treated identically to one another. A patently immature and developing 13 year old who has suffered a number of adverse childhood experiences and comes from a deprived background will, of course, be dealt with differently by the court to a 24 year old from a positive background who is already settled down with a partner and a profession. The court may well consider that the latter is much more mature than the former such that some, many, or all of the young person sentencing considerations will not be applicable in that particular case, whereas they are at the forefront of the mind of the court in relation to the former. By the same token, a court approaching the sentencing of that same 13 year old when he is before the court aged 23 or 24 may well still have many of the same sentencing considerations as were present when he was younger, such that the young person sentencing guidelines are still very much applicable to him, despite his more advanced age.

We consider that the most important outcome from this proposed guideline is that the individual court retains the overall flexibility to deal with the particular offender before it appropriately and to take account, as best it can, of the level of maturity of that offender. It would seem that the most sensible way of achieving that aim, in line with the research, would be to have guidelines which apply and thus must be considered in all cases of young people who have committed offences and are being sentenced under the age of 25. Those guidelines could then be departed from or minimised in importance for a demonstrably developed and mature young person, but could assume central importance for a clearly developing and immature young person, even when those two different individuals are of similar age. The significant factor would appear to be the maturity of the individual and the consequent capacity for change of that individual, rather than necessarily the age of the individual. The research suggests that maturity may only arrive at 25 years, if even then, for many people. On that basis, it makes sense, in our opinion, to have courts consider the young person sentencing guidelines to the age of 25.

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?

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?

Disagree

Please provide any reasons for your answer.

While the draft guideline makes clear that “the judge must also have regard to” the “Principles and purposes of sentencing” guideline, and that the draft guideline should be “read alongside” it, the draft

guideline does not advise which of the two ought to be given precedence where the application of the “Principles” guideline may lead to a different outcome than the “sentencing young people” guideline. For example, the “Principles” guideline requires that people should be treated equally and that similar cases should be treated in similar ways, both of which may be departed from when dealing with a young person who has offended, or young co-accused where one presents as more mature than his similarly aged co-accused. It would be helpful if, for example, the draft guidelines made specific reference to the elements of the sentencing principles that it is intended to impact, which presumably is principally the “circumstances of the offender” from the first listed sentencing principle. It may be helpful if the draft guidelines could, if this is what is intended, make clear that it augments that principle, or any of the other principles of sentencing specifically.

A more obvious and easily understood integration between the two documents would allow the courts, practitioners, and the general public to more readily understand how the different sentencing guidelines fit together and which, if either, takes precedence over the other where they may, on one reading, appear to be in conflict.

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?

Agree

Please provide any reasons for your answer.

The draft guideline states at the beginning of paragraph 7 “The following factors should be taken into account” and then lists the three factors with explanatory notes for each. While paragraph 5 makes clear that the sentencing judge must also have regard to the “Principles and purposes of sentencing” guideline, we would invite the Scottish Sentencing Council to consider extending the introductory sentence of paragraph 7 to make clear that these factors are in addition to the more general factors contained in the “Principles and purposes of sentencing” guideline. We suggest that the inclusion of reference to the “Principles and purposes of sentencing” guideline would assist understanding for the general public at least who may otherwise be left with the impression that the only factors relevant to sentencing of young persons are factors which could be anticipated to be mitigatory. It would be helpful, we submit, if the draft guideline clarified that these factors are additive to the “Principles and purposes of sentencing” guideline.

The headlines and the explanatory notes themselves are broadly satisfactory. We do wonder whether, however, there could be some expansion of the first point, the “Maturity of the young person”, to include reference in very general terms to what is meant by “not fully developed”. As we have understood the research there are physical, intellectual, and emotional developmental markers, as we have discussed above in this response and as are discussed in the consultation document and in the research referenced. We wonder if it may be helpful for the explanatory note for the first heading to make even brief reference to what is meant by “not fully developed”. The three identified stages of development could be summarised in a sentence or two and would put the scientific research at the heart of the proposed guideline.

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.

Please see our response to Q5 above.

Q7. Do you agree or disagree that rehabilitation should be given greater emphasis than other purposes of sentencing in this guideline?

Agree

Please provide any reasons for your answer.

We would respectfully adopt what is said within the consultation document. The young person who offends has greater potential to change and to develop and maintain a life away from crime than the older, mature, offender. A young person who offends but who is then rehabilitated would, by definition, not develop into the older, mature, offender. That is a legitimate, admirable, aim for sentencing of the young person who has offended.

We are pleased to note that the majority of the public surveyed in the cited research also consider that, for young offenders, rehabilitation is the most important sentencing consideration. It would appear, therefore, that public perception and our own thoughts on the matter align.

Q8. Do you agree or disagree that rehabilitation should be a primary consideration when sentencing a young person?

Agree

Please provide any reasons for your answer.

Please see our response to Q7 above.

Q9. Which, if any, other purposes of sentencing should be emphasised in this guideline?

Please provide any reasons for your answer.

Any concerns we have would be adequately dealt with by the clarification sought as to the interaction between these draft guidelines and the foundational “Principles and purposes of sentencing” guideline. So long as it was clear that all sentencing considerations are still relevant, such that, for example, protection of the public is still relevant when dealing with a serious, High Court, offence, then we are satisfied that no other sentencing purposes need to be highlighted in particular for young people who offend.

Q10. Is the section on the assessment of seriousness helpful?

Yes

Please provide any reasons for your answer.

In our view this section echoes what is already the law in Scotland for young offenders from the *Kane v HM Advocate* 2003 SCCR 749 line of authorities. We think it is sensible to include such a section, with such echoes to the case law, in these draft guidelines.

We note, however, that reference is made to assessing culpability and harm, but that only culpability is further expanded upon. It may serve clearer understanding, particularly by the public, if it is stated at this section that the evaluation of the harm is, presumably, unaffected by the age/maturity of the young person who has offended. The age/maturity of the young person who has offended will not, we assume,

have an impact on the level of harm caused by the offence, at the same time as their age/maturity may have an impact on culpability.

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?

Agree

Please provide any reasons for your answer, including any other information that you feel should be included.

We consider that the information set out in paragraph 13 is important and of most relevance to the sentencing of a young person. We note, however, that addiction and accommodation issues have been placed into one heading together, and it is not immediately clear why those two factors have been grouped together. We also wonder whether it may be sensible to expand the “in care” section to include simply reference to social work involvement. Many young people who offend have some history of social work involvement which may relate to difficulties in the family home and/or adverse childhood experiences but may never have been “in care”. A more broadly worded heading in the guideline may assist in ensuring that courts have available the relevant background information that will assist in identifying the appropriate disposal in any given case.

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

Please provide any reasons for your answer.

The children’s hearing system allows for volunteers to be involved, at a local community level, in making decisions in the best interests of the children involved. To have their input in all cases where it is competent provides more information to the court to allow the court to make the best informed sentencing decision that it can. The only caveat may be where the young person has committed an offence the sentence for which is fixed by law, in which circumstances seeking the input of the children’s hearing system may serve no purpose.

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

Please provide any reasons for your answer.

The features highlighted in paragraph 15 are features which we believe should be considered by the court when attempting to arrive at an appropriate sentence for a young person. The consultation document, however, does make clear that in any particular case it may be that some but not all of the features will be met by the particular sentence ultimately imposed. Perhaps it could be clarified within the guidelines that while consideration should be given to each of those issues by the sentencing court, in certain cases not all considerations can be afforded weight by the appropriate sentence in due course. Some High Court indictment offences, for example, may be anticipated to result in a lengthy custodial sentence which benefits society by reducing the possibility of further offending, but does not necessarily assist the young person in developing or maintaining positive connections with society.

Q14. Do you agree or disagree that the approach set out in paragraphs 17 and 18 of the guideline is appropriate?

Agree

Please provide any reasons for your answer.

We agree in principle with the sentiments expressed in the paragraphs 17 and 18. We have a slight concern at the use of “should”. The effect of the guidelines would be that the 24 year old who has a partner and has started a profession “should” receive a shorter custodial sentence than, for example, his 28 year old work colleague co-accused. We consider that it may be appropriate to have some qualification to the “should” to reflect the fact that some young people under the age of 25 will be mature despite their age.

We further consider that it may assist if the first sentence of paragraph 18 simply echoes the terms of the legislation. While we understand that section 207(3) of the 1995 Act only applies to those under 21 and the draft guideline would apply to those under 25, the guideline does encompass those who are under 21 and in place of whom there is that specific legal test. The wording of the section, with “no other method of dealing with [the offender] is appropriate” does not seem to require a gloss to be understood by the public. Keeping consistency across the guideline and the legislation would ease comprehension.

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

Please provide any reasons for your answer.

We consider it appropriate that a judge consider exercising the power to remit, where it is available, and where the judge considers such a course of action would serve the interests of justice. We agree that this should be a matter for the judge’s discretion, rather than a direction.

Q16. Do you think the guideline will influence sentencing practice in Scotland?

Yes

Please provide any reasons for your answer.

The biggest influence in our view will arise from the requirement to treat adults under a certain age – who hitherto would have been sentenced as adults – as young people.

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

Please provide any reasons for your answer.

We agree that the guideline will increase public understanding by its mere existence as a relatively brief, easily understood, court approved, document which encompasses the principles of sentencing young people.

As has been touched upon in some of our earlier responses, however, in our opinion this guideline requires to make it more clear than it presently does that while this draft guideline, which on the face of it is essentially wholly mitigatory, has to be seen in a broader context. A broader context, specifically a stronger link to or integration with the “Principles and purpose of sentencing” guideline, would allow the public to understand that this is not a guideline which aims to have young people ‘get off scot-free’.

Q18. Do you agree or disagree that the guideline will increase public confidence in the sentencing of young people?

Agree

Please provide any reasons for your answer.

Subject to the concerns that we have expressed in our responses above about the manner in which the sentencing of young people fits into the broader sentencing process generally, we consider that the public will be able to understand the considerations involved in sentencing of young people and also that, with a focus on rehabilitation, it marries with the view of the majority of the public that rehabilitation should be the primary sentencing concern for young people who offend.

Q19. Do you agree or disagree with the assessment of the specific, identified impacts the guideline is expected to have?

Agree

Please provide any reasons for your answer.

We concur with the assessed impact as discussed in the consultation document and the draft impact assessment.

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

We anticipate greater clarity as to the particular considerations that are of relevance when sentencing a young person. There will also be greater transparency of the process of the sentencing of a young person. The guideline can also be anticipated to encourage greater consistency in approach to sentencing of young persons.

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.

Given the weight to be attached to an individual’s maturity and capacity for rehabilitation, we anticipate that an assessment will sometimes require to be made, and specific comment offered, in CJSWRs which may have some impact on the preparation of such reports. We also note that there will be additional advice sought from and/or referrals made to the children’s hearing system which may have some impact on their volume of business. We would, however, overall anticipate that any additional costs arising from the guideline would be modest.

Q22. Would you like to make any other comments about any matters arising from this consultation?

All comments we would wish to make have been set out in our answers to the preceding questions.