Law Society of Scotland

Consultation Response

Scottish Sentencing Council

Consultation on Sentencing Young People

20 August 2020

Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Sentencing Council consultation on "Sentencing Young People." The consultation paper[1] includes the draft guidelines[2] and draft "impact assessment.[3] The committee has the following comments to put forward for consideration.

General

The issue of sentencing guidelines for young people (the Guidelines) is part of the ongoing programme of work being undertaken by the Scottish Sentencing Council to form the framework of sentencing decisions being taken in Scotland. The issue of these Guidelines is important to inform the public about how the sentencing decisions have been reached and within the judiciary, to promote transparency and consistency of sentencing.

The sentencing of young persons in respect of which the Guidelines are being produced is complex so that the principle of introducing such sentencing guidelines is welcomed.

We understand that these sentencing guidelines will be aimed only at those young persons who fall within the age scope of the Guidelines and not those who are being sentenced later for crimes committed when they were the appropriate age at the time. We understand the reasoning lying behind this limitation which reflects the current caselaw which we have outlined in Appendix 1 to this response, and assume that there is no view that this approach should be amended, we have a couple of observations to make:

[1] https://consultations.scottishsentencingcouncil.org.uk/ssc/young-people/supporting_documents/Sentencing%20young%20people%20%20public%20consultation%20paper.pdf

[2] https://consultations.scottishsentencingcouncil.org.uk/ssc/young-people/supporting_documents/Sentencing%20young%20people%20%20draft%20guideline.pdf

[3] https://consultations.scottishsentencingcouncil.org.uk/ssc/young-people/supporting_documents/Sentencing%20young%20people%20%20draft%20impact%20assessment.pdf-1

- We are aware of countries where the offender is tried by the youth court, notwithstanding their age.[4]
- We note the intention to cover such offending within the "Sentencing process" Guideline to be issued in due course. Publication of both Guidelines is important to ensure that the public understand the reasoning for the difference in sentencing practice and how it reflects the current case law. That should be stressed, given the increase in reports of historic sex offences and clarity over the need to distinguish each sentencing decision being made in any relevant cases.

Once publication of both sets of the Guidelines ensues, there would be some clarity on the Scottish position regarding sentencing in respect of criminal offending when young, irrespective when detection and conviction result.

We support the motivation behind the publication of the Guidelines of increasing public knowledge and understanding in order to promote confidence by providing an explanation as to how young persons are to be sentenced. Each offender is an individual and that should be mirrored in the approach to sentencing. What does require in our view is that emphasis to enhance the public understanding of Adverse Childhood Experiences (ACE).

By way too of background as indicated below, we consider that there are a number of parallels with the publication by the Sentencing Council of England and Wales of their Guideline[5] entitled "Sentencing children and young people: Definitive guideline on which it may be useful to reflect.

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

Yes.

We agree that the principle-based approach to the Guidelines is correct. This is consistent with the approach which is taken by the Sentencing Council too in their Guidelines[6] issued in 2017. This allows the approach to sentencing being taken to be based on the individual and focused on that young person, as opposed to being offence focused. Being offence focused seems more complex for the reasons outlined in the consultation.

This principle-based approach has clarity. Whether the Guidelines are intended to apply to those who are under 25 at the time of sentencing as opposed to offending will need to be confirmed following the consultation. As the prosecution process conducted by the Crown may well take some time to conclude,

[4] https://www.washingtonpost.com/world/2019/10/18/year-old-former-ss-guard-is-trial-german-juvenile-court-nazi-crimes-investigations-surge/

[5] https://www.sentencingcouncil.org.uk/about-sentencing/young-people-and-sentencing/#:~:text=When%20sentencing%20a%20young%20offender,the%20welfare%20of%20the%20child.

[6] https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/

should it be assumed that the age application is based on the age of the offender at the time of offending and not the date of sentencing?

The Guidelines will require to be read along with the Guidelines being issued in respect of both "the Principles and Purposes of Sentencing" and the "Sentencing Process" once finalised and approved. These will be taken together so that these should provide a clear and consistent explanation of how sentencing of young person's works in Scotland, which should provide the foundation for the development and issuing of further offence specific guidelines in due course. It may also provide useful comparison material when considering related topics such as any further increase in the age of criminal responsibility.

We do not favour the alternative of an offence-based approach given the complexities that it would engender regarding each set of offences and/or also the need potentially to future proof for new offences in the future. For instance, the Hate Crime and Public Order (Scotland) Bill currently making its way through the Scottish Parliament intends to create new offences; having a principle based approach for young person who contravene such new offences makes it much simpler to be consistent as to the factors which are important to take into account.

Question 2: Do you agree or disagree that the guideline should apply to people under the age of 25? ∗ Agree ∗ Disagree

We recognise too that the acceptance of the principle-based approach means that there is to some degree an arbitrary decision to be made about the age at which the Guidelines should apply.

We support the principle of the age criteria in respect of how the Guidelines will operate. To that extent, we recognise other groups are better placed than we are to provide the necessary expertise as to what age the Guidelines should apply. Whatever decision is reached, there is a need to factor in all the machinations of the Scottish youth justice system. A number of these expert groups are best placed to advise on identified aspects such as the age thresholds for entering and leaving juvenile justice, prevention and early intervention, processes in youth justice, including investigations and decision-making and outcomes and disposals.[7]

There is support for different ages to be adopted as we note that:

The only country that currently suggests the age of 25 from the consultation is Switzerland.[8]

Picking out the practice in one country, while interesting, we would suggest does present one example to follow. The Cross-national comparison of youth justice recognises that there are a range of factors as

[7] https://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf

[8] https://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf

“youth justice systems are extraordinarily varied, while at the same time there are patterns and trends in policy development.”[9]

For Scotland, we understand that YouthlinkScotland[10] focuses on young people aged 11-25 which provides support for the age guideline of 25. By contrast, more widely the United Nations Convention on the Rights of the Child[11] only applies up to the age of 18.

What that we stress is that there are inconsistencies not only within Scotland but also taking the international perspective into account as well. It also flags up the differences between the age of criminal responsibility which should be a factor when considering the group to which these Guidelines will apply. There is the possibility too that the age of criminal responsibility too may change in due course.

What might have been useful is to consider statistics as an evidence base such as the Scottish Government statistics on Criminal Proceedings in Scotland 2018-19 that were published on 31/3/2020.[12] What would be salient to compare is if the Guidelines are to come into effect what proportion of those sentenced for offences prosecuted under solemn/summary proceedings would be affected if, for instance, the Guidelines applied to those sentenced under 18, 21 and 25. Unfortunately, these statistics only divide those offenders into categories under 16, 16-17, 18-20 and 21-30 which does not help to ascertain fully how many in the 12-30 category are aged under 25.

In 2009-10, 53% of those convicted were aged under 30, falling steadily to 52%, 51%, 48% and 44% in the years from 2010- 2013, holding at 43% in 2014- 2016 inclusive and 41% in each of the years 2017 and 2018. Even excluding those aged 25-30, this would mean that a significant proportion of those sentenced each year would require to be treated “differently” with the Guidelines.

The position of repeat offenders is also an inevitable factor to consider where prior to the Guidelines coming into force, they may well have been sentenced without the reference to such Guidelines.

We anticipate that this may well cause some challenges with future disposals when required to have regard to their previous convictions and disposals. In such disposals, their background, history of previous offending behaviour, circumstances and their “criminogenic needs” such as substance use, antisocial cognition, antisocial associates, family and marital relations, employment, and leisure and recreational activities would all have been factored in. The Guidelines do not deal with that transition which will cause judges to have to assess how previous offending and sentencing should be relevant in their application of the Guidelines.

[9] https://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf

[10] https://www.youthlinkscotland.org/

[11] https://www.unicef.org.uk/what-we-do/un-convention-child-rights/

[12] https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/14/

We understand the basis of the consultation setting out the age at 25. We tend to the view that there is a risk that the public will perceive for all the reasons outlined in the consultation that offenders are not being encouraged to be responsible for their own actions. After all, they can drink, get married and have a mortgage but are not deemed "adult enough" to be treated in the Scottish criminal justice system in the same way as adults.

Many working with the justice sector will have roles and may be aged under 25 which includes qualified solicitors, both defence and COPFS, staff working for the Scottish Tribunals and Court System and police officers with Police Scotland. Resilience too which is stressed in the considering ACEs may be relevant.

Without expressing any views were 25 to be accepted as the age, as the consultation highlights that decision may well be "controversial [since] we understand that cognitive maturity does not develop fully until one's mid-twenties and are persuaded that there is a case for sentencing young adults under the age of 25 on a different basis to older people." There would require to be much careful handling and justification to ensure that the public understand why this is being chosen as the relevant age. That is fundamental to the public facing role of the Scottish Sentencing Council.

Question 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? Please provide any reasons for your answer.

We refer to our answer to Question 2. We recognise that there are arguments in support of different ages.

However, we are aware that the Guidelines published in England and Wales refer to 21[13] which may provide a reasonable and realistic cut-off point. The law in Scotland currently differentiates between offenders who are under the age of 21 and those over in respect of the need to call for Criminal Justice Social Work Reports before there is the imposition of any custodial sentence. That could form a more natural age from which to differentiate.

If an approach to be adopted of 21, there would be nothing to stop a judge applying the principles of the Guidelines even where the offender is over 21 and under 25 if they considered it relevant so to do.

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

Yes.

[13] https://www.sentencingcouncil.org.uk/publications/item/sentencing-children-and-young-people-definitive-guideline/

We do have concerns about the suggestion in relation to maturity that "it is important for the judge to take this into account when deciding how much a young person should be held responsible for their actions." This may mean mitigation where this could be made clearer.

That sentence could be interpreted as undermining the academic concept of criminal responsibility.[14] Could this be clarified? If what is meant is blameworthy, or that there is an argument that the court should allow mitigation that because the person was young, foolish and reckless, this could be made clearer.

Question 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?

The information included in paragraph 7 of the Guidelines is clearly explained. However, it might also be useful to include some content on:

- Adverse Childhood Experiences (ACE): Bearing in mind the public awareness which is part of the purpose in publication of the Guidelines, consideration may be given to what that means and how that may have been an influence on a young person's offending behaviour. ACEs tend to refer to those experiences which took place when a child or young person was aged between 0-17 and are linked to potentially traumatic events that occur in childhood including experiencing violence, abuse, or neglect, witnessing violence in the home or community or having a family member attempt or die by suicide.[15]Their effects continue beyond that age as the person matures and copes with what has happened.
- Vulnerability regarding the welfare of the child or young person such as any mental health problems or learning difficulties/disabilities, any experiences of brain injury or traumatic life experience (including exposure to drug and alcohol abuse). Then consideration of the developmental impact that this may have had and any speech and language difficulties and the effect this may have on the ability of the child or young person (or any accompanying adult) to communicate with the court. This is essential to understand the sanctions to be imposed or to fulfil the obligations resulting from that sanction.[16]

Question 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? Please provide any

[14] Actus reus and mens rea – "moral and legal safeguards to ensure that only those who deserve it are convicted and made liable to punishment." Timothy H. Jones and Ian Taggart Criminal Law 7th edition W. Green, Edinburgh

[15] https://www.cdc.gov/violenceprevention/acestudy/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fchildabuseandneglect%2Faces%2Ffastfact.html

[16] ttps://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/

reasons for your answer, including any examples that you feel should be included.

We refer to our answer to Question 5.

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

We understand why rehabilitation would be given greater emphasis as outlined in paragraph 10 of the Guidelines. However, we wonder too where the role and inter-relationship with restorative justice[17] should lie. Restorative justice and rehabilitation should go together.

The Guidelines refers to rehabilitation as being a "primary consideration." It should therefore be made clear that in normal circumstances this is the priority. How then is that to be qualified in the most serious of cases needs to be made clear where the public interest would require to take account of the need for public protection and punishment being of paramount importance.

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

We refer to our answer to Question 7 above.

In some of the most serious cases involving young accused, there may be worrying indications that rehabilitation is unlikely to succeed – for example, a sex offender in his early 20s with no insight into the impact of his behaviour, who refuses to take responsibility for the crimes.

We suggest that there needs to be a stress that rehabilitation needs to be the primary consideration but not the only consideration in every case involving the sentencing of a young person.

Question 9: Which, if any, other purposes of sentencing should be emphasised in this guideline? Please provide any reasons for your answer.

There is reference made to the Principles and Purposes Guideline, which has been already published[18] There is a need to refer to rehabilitation as being the primary consideration.

17 Crime causes harm and justice should focus on repairing that harm. The people most affected by the crime should be able to participate in its resolution.

18 https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development/principles-and-purposes-of-sentencing-guideline/

Question 10: Is the section on the assessment of seriousness helpful?

We have no specific observation to make but reflect that the assessment of seriousness in paragraphs 11 and 12 involves quite a sweeping generalisation, notwithstanding the reference to the "yet to be published" Guidelines on the process of sentencing. It also requires both these Guidelines to cross-refer.

Though we understand the reference to "the maturity of a young person will generally be lower" this has a somewhat negative connotation. Could the approach not be of maturity being less developed? There will be times when those older behave in less mature ways.

Question 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? ∗ Agree ∗ Disagree Please provide any reasons for your answer, including any other information that you feel should be included.

We agree that paragraph 13 does refer to information relevant to sentencing. How about reference to the impact or capacity of education? Reference to the young person's personal circumstances may also be helpful. The cross-references to ACEs referred to in our answer to Question 5 may also be relevant; such as where they have experienced bereavement of a close relative, the circumstances of that loss, or if they had been the victim of a serious crime.

These could have had an influence on the subsequent development of their offending behaviour.

Question 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? ∗ Agree ∗ Disagree Please provide any reasons for your answer.

We fully agree with the premise that cases should be referred to children's hearings for advice where it is competent to do so. This replicates what happens at present. There should be no need to remind the judiciary, but it does perhaps provide relevant information for the general public.

There is a question of how the judiciary should and by what means should they obtain the information outlined in paragraph 13 of the Guidelines and/advice referred to in paragraph 14 of the Guidelines.

Question 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?

The definition of an appropriate sentence as set out in paragraph 15 of the Guidelines seems fine.

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

We understand the approach outlined in paragraphs 17 and 18 of the Guidelines. However, we question the direction of the wording in paragraph 17 that "the nature and duration of a sentence imposed on a young person should be different from that which might be imposed on an older person being sentenced for a similar offence." (Our emphasis is provided by the underlining.)

The application of the Guidelines may result in a different sentence, but it is not inevitably going to be the result. See our earlier observations regarding the age set for the Guidelines as there may be little difference in the sentence imposed for someone who is 24 and 11 months and 25. Illustration of the application of the Guidelines with examples may help make that point.

Regarding paragraph 18, this represents a change in that at present custodial sentences for anyone of up to 12 months cannot usually be imposed due to the Presumption against Short Periods of Imprisonment (Scotland) Order 2019.[19] No length of a custodial sentence will be justified unless "the judge is satisfied that no other sentence is appropriate." Even if justification is made for a custodial sentence, if this refers to life imprisonment, we assume that the reference to being shorter "than that which would have been imposed on an older person for a similar offence" applies to the punishment part. We wonder if there are certain categories of offences such as terrorism where this cannot or should not apply.

We are aware that all sentencing cannot be rebuttable in providing the judge with an appropriate discretion. Should this be made clearer?

Question 15: 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?

We agree.

Should every relevant case be remitted? If so, how will this affect the resourcing of the Children Panel System. There may be circumstances where no significant disposal is involved so that the court can deal with the case without advice. It is important to consider that inter- relationship carefully between the respective discretion and expertise.

Question 16: Do you think the guideline will influence sentencing practice in Scotland? *

[19] https://www.legislation.gov.uk/sdsi/2019/9780111042281

We have no comment. This is a question best answered by the judiciary. Is this intended to be a radical and novel approach or to encapsulate the sentencing decisions which are taking place at present?

It may influence solicitors in how they formulate and prepare their plea in mitigation[20] and provide a focus for the sort of relevant information to obtain to assist the court in their sentencing decision.

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

The Scottish Sentencing Council has an important role in education of the public regarding how sentencing takes place and reducing the mystic of the process. In publishing these Guidelines, this should assist all in the process and in the important role in raising awareness.

We refer to our answer to Question 2 if the decision is taken to apply these Guidelines in Scotland to those under 25. Careful consideration does need to be given to ensure that there is no impression that should be given to those who are the victims of crime that this is a soft approach. A useful analogy would be with Community Payback Orders being referred to as offenders walks free.

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

We refer to our answer to Question 17 above.

Much depends on what effect the Guidelines have on the sentencing of young people and how successful attempts to rehabilitate are. If there are frequent breaches, for instance, of Community Payback Orders (CPO) that are imposed, as a direct alternative to custodial sentences, there may be objections made from the public as to the lack of punishment. As highlighted above, there is already a somewhat mistaken view that the imposition of a CPO means in effect that the accused has walked free.

This could be a greater risk of the public attitudes of confidence being reduced if the Guidelines apply to all offenders under the age of 25 but there is then scope for better awareness raising.

[20] Anecdotally we understand in court reference has been made to the draft successfully.

Conclusion

We are surprised in the Impact Assessment that no specific account being made of all the "protected characteristics "as these need to be considered. How do they factor into these Guidelines? Has any equality impact assessment been undertaken?

Appendix 1

We understand that in recent caselaw that the Appeal Court has acknowledged that in cases of historical sexual offending, the adult perpetrator who has committed offences whilst a child, must be sentenced as an adult (certain protections related to the child offender do not apply), nevertheless the sentence imposed must also take into account the offender's age, and hence relative immaturity, at the time of the offences.[21] The sentence must also take into account the lack of any offending in the intervening period and positive employment record of the offender (where relevant). It is unlikely too that any sentence imposed will require to contain any element to protect the public[22] which is another mitigatory factor.

The distinction which the Guidelines will continue to make is that the first offender (presently under the age of 21 etc.) actively could change their behaviour, assisted by the intervention of the court. Where it is a historic case, that opportunity has passed.

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[21] *Greig v HMA*, 2013 JC 115

[22] *Greig v HMA; HM v HMA,* [2018] HCJAC 26