

## Sentencing young people

### A Scottish Sentencing Council consultation

#### Response of the Children and Young People's Commissioner Scotland

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

**\* Agree**

**\* Disagree X**

**Please provide any reasons for your answer.**

In line with the Scottish Government's commitment to Scotland being "a world leader in putting human rights into practice"<sup>1</sup>, we believe that these guidelines should be underpinned by a human rights based approach. We note that there is no explicit reference to any human rights instrument, save two mentions of the United Nations Convention on the Rights of the Child (UNCRC). It is particularly concerning that no reference is made to the already justiciable rights of children and young people in conflict with the law under the European Convention on Human Rights (ECHR).

These guidelines should closely link sentencing practice to the rights of children and young people under the existing domestic Scots law and policy framework of the Youth Justice Strategy and Children's Hearings System as well as the UNCRC, ECHR and the broader international human rights framework. We would hope that the Sentencing Guidelines for children and young people would specifically refer to the UN Committee on the Rights of the Child's General Comment No 24 (2019) on Children's Rights in the Child Justice System;<sup>2</sup> the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules");<sup>3</sup> and the Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice ("CoE Guidelines")<sup>4</sup>.

Children's and young people's ECHR rights are enhanced by these additional safeguards from international law and policy. For those children and young people in conflict with the law, their rights to liberty and security of person (Art 5); protection from inhuman, degrading treatment or punishment (Art 3); privacy (Art. 8); fair trial and due process (Art. 6) must all be respected in line with the international standards of child-friendly juvenile justice.

A human rights based approach to disposals, sentencing and punishment requires that judicial decision-makers must take account of, not only the human rights

---

<sup>1</sup> [Protecting Scotland's Future p 18](#)

<sup>2</sup> UN Committee on the Rights of the Child (2019) '[General Comment No.24 \(2019\) on children's rights in the child justice system](#)'

<sup>3</sup> <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

<sup>4</sup> [Council of Europe Guidelines on Child Friendly Justice 2010.](#)

principles of **necessity, proportionality and prevention**, but also the General Principles of the UNCRC, acting in the 'best interests' of the child, taking account of their views throughout.<sup>5</sup> This right to 'effective participation' in all decision-making is one of the core concepts underlying the guidance and guidelines, from both the Council of Europe<sup>6</sup> and the UN Committee on the Rights of the Child<sup>7</sup>. It finds its legal basis in a child's UNCRC rights to be heard<sup>8</sup> and to a fair trial and treatment;<sup>9</sup> as well as the equivalent international treaties, including Articles 3 and 6 of ECHR. The European Court of Human Rights has, since the 1990's, made explicit reference to the rights of children in conflict with the law and Articles 12 and 40 of the UNCRC, holding that:

*'It is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that the steps are taken to promote his ability to understand and participate in the proceedings.'*<sup>10</sup>

We feel that the factors would be strengthened by additional explicit links being made with the human rights of children and young people in conflict with the law. Our evidence to the Scottish Parliament's Justice Committee, during the passage of the Age of Criminal Responsibility (Scotland) Act 2019, provides further detail on this<sup>11</sup>. We have referred throughout our response to the proposals and recommendations of Dr Claire Lightowler, Director of the Centre for Youth and Criminal Justice (CYCJ)<sup>12</sup>.

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

**\* Agree X**

**\* Disagree**

**Please provide any reasons for your answer.**

We very much welcome the extension of the protections contained within these guidelines to all children under the age of 18 and young people over the age of 18 to at least the age of 25. However, we would suggest that in accordance with the research evidence, that further consideration should be given to the need for flexibility in the guidelines around an arbitrary upper age limit. Whilst the UNCRC defines children as under the age of 18, the UN Committee on the Rights of the

---

<sup>5</sup> [UNCRC](#) Articles 3 and 12.

<sup>6</sup> [Council of Europe Guidelines on Child Friendly Justice 2010](#).

<sup>7</sup> UN Committee on the Rights of the Child '[General Comment No.24 \(2019\) on children's rights in the child justice system](#)' and UN Committee on the Rights of the Child (2009) '[General Comment No.12](#)'.

<sup>8</sup> [UNCRC](#) Article12 (see also '[Beijing Rules](#)' 14).

<sup>9</sup> [UNCRC](#) Article 40.

<sup>10</sup> ECtHR (GC), 16 December 1999, appl.no, 24724/94 (T v UK para 84).

<sup>11</sup> CYPES. [Age of Criminal Responsibility](#)

<sup>12</sup> [Lightowler, C., 'Rights respecting? Scotland's approach to children in conflict with the law'](#)

child, in General Comment 24, commends states which extend the juvenile justice system to persons aged 18 or over, and Article 41 of the UNCRC explicitly permits states to exceed the provisions of the UNCRC.

Anomalies exist in Scots law in statutory definitions of ‘children’, ‘young people’ and ‘adults’. The UK has been specifically criticised regarding the treatment of children in ‘adult’ systems and contemporary research<sup>13</sup> and evidence<sup>14</sup> suggests that much greater consideration of childhood and adolescent maturation and developmental factors is necessary to ensure rights compliance in the criminal justice system. Of particular significance is the failure of the state to increase the age of criminal responsibility. In Scotland this age remains at 8 years of age as legislation to increase the age is not yet in force.<sup>15</sup>

The guidelines should explicitly align with the UNCRC and the Children and Young People (Scotland) Act 2014 (the 2014 Act), which defines a child as everyone under the age of 18. We would suggest that the Guideline be amended to include all ‘children and young people’.

The 2014 Act also extended continuing care, and corporate parenting statutory duties for care experienced (formerly ‘looked after’) young people until their 26<sup>th</sup> birthday. We ask that these guidelines are amended to ensure ‘young person’, for the purposes of sentencing, is defined as everyone between the ages of 18 and 25 inclusive. A child or young person who commits an offence prior to them turning 18 or 26 should be afforded the same human rights protections and safeguards, irrespective of when they are tried, convicted and sentenced.

**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.**

Please see our answer to Q2

---

<sup>13</sup> [O'Rourke, et al, Literature Review Feb 2020: 'The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts'](#)

<sup>14</sup> ['ACES, Places and Status: Results of the 2018 Scottish Secure Care Census' Gibson R., CYCJ](#)  
This study reflects the recommendations of Scotland's Independent Care Review, which called for therapeutic services within secure care, provision of care that reflects the needs of these children, and an increase in community alternatives to custodial sentences.

<sup>15</sup> The Age of Criminal Responsibility (Scotland) Act 2019 raises the minimum age to 12, but this has not yet been brought into force. The age of 12 falls below the internationally accepted norm as an absolute minimum of 14 years of age.

**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 X**

**\* Disagree**

**Please provide any reasons for your answer.**

**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**

**\* Disagree X**

**Please provide any reasons for your answer.**

We are pleased to see that the best interests of the young person is included in this list, however given its importance as one of the key principles of the UNCRC, we feel that it should be moved to the top of the list.

The CoE Guidelines state: "Measures and sanctions for children in conflict with the law should always be constructive and individualised approaches to the committed acts, bearing in mind the principle of **proportionality, the child's age, physical and mental wellbeing and development**".

Whilst physical and mental wellbeing are included in the guidelines under "best interests of the young person", we feel that it would be appropriate in this case to make these a separate factor, reflecting the emphasis given to appropriate sentencing in the Expert Review of Provision of Mental Health Services at HMP YOI Polmont<sup>16</sup>.

**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.**

See above

---

<sup>16</sup> [HMIPS. Report on an Expert Review of the Provision of Mental Health Services for Young People entering and in custody at HMP YOI Polmont.](#)

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

**\* Agree X**

**\* Disagree**

**Please provide any reasons for your answer.**

The international human rights framework makes it clear that rehabilitation should be one of the primary considerations when sentencing a young person in conflict with the law. The CoE Guidelines state that “the right to education, vocational training, employment, rehabilitation and reintegration must be guaranteed”. Article 39 of the UNCRC provides that the state must “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim...in an environment which fosters the health, self-respect and dignity of the child”.

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

**\* Agree X**

**\* Disagree**

**Please provide any reasons for your answer.**

See above

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

**Please provide any reasons for your answer.**

General Comment 24 emphasises the importance of reintegration and we are pleased to see that it is a primary consideration within the guidelines. However, the rights of children and young people in conflict with the law would be better realised if the protection of the young person from harm were given similar emphasis, acknowledging that custodial sentences, in particular, have the potential to harm both the physical and mental health of young people. As with all decisions relating to children and young people, furthering the best interests of the child should also be a primary purpose of sentencing.

**Q10) Is the section on the assessment of seriousness helpful?**

**\* Yes**

**\* No X**

**Please provide any reasons for your answer.**

We are concerned that regard to the character of a young person continues to be a factor in the assessment of seriousness of an offence. We feel that the concept of character is archaic and note that it does not feature in the CofE Guidelines; Beijing Rules or General Comment 24. In any case, paragraph 7 of the guidelines states, “the character of a young person is not as fixed as the character of an older person”.

There is significant evidence, not least from the Edinburgh Study of Youth Justice Transitions<sup>17</sup>, that young people from particular backgrounds, including those with experience of extreme poverty or who are care experienced, are disproportionately likely to be criminalised at a young age and that early involvement with the criminal justice system increases the likelihood they will continue to offend. This was the case even for similar offending behaviours.

We believe that a consideration of character as part of the sentencing process will, in some cases, serve to perpetuate these inequalities and serve to increase the likelihood of young people from disadvantaged backgrounds experiencing negative sentencing outcomes. All children and young people should be considered capable of changing, with appropriate sentencing focussed on their rehabilitation.

We therefore ask that the concept of character be removed from these guidelines.

**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**

**\* Disagree X**

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

We believe that the best interests of the child should be added, as the first bullet point, to this paragraph, in line with the requirement in Article 3 of the UNCRC that the best interests of the child be a primary consideration in all decisions made regarding them.

---

<sup>17</sup> [University of Edinburgh. Edinburgh Study of Youth Transitions and Crime.](#)

**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 X**

**\* Disagree**

**Please provide any reasons for your answer.**

Many children aged between 12 and 17 continue to be prosecuted in the adult criminal justice system and are not referred to the Children’s Hearings System. We agree with the conclusions of the Independent Care Review<sup>18</sup> 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 line with the CoE Guidelines and UN General Comment 24, Children’s Hearings should be the default forum when decisions are made about any child in conflict with the law. As outlined in our evidence to Committee regarding the Age of Criminal Responsibility (Scotland) Act 2019<sup>19</sup>, the current maximum age of 15 for new referrals to Children’s Hearings is incompatible with children and young people’s human rights. We are pleased that the Scottish Government is now consulting on extending children’s hearings beyond 16 and will be responding to that consultation in due course.

We ask that these guidelines be drafted in such a way as to make referral to a Children’s Hearing the default where this is possible, without reference to a specific age, in anticipation of an increase in the maximum age for referral.

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.

**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 X**

**Please provide any reasons for your answer.**

As detailed above, international human rights frameworks make it clear that sentencing should be focussed on the successful rehabilitation and reintegration of

---

<sup>18</sup> [Reports of the Scottish Independent Care Review ‘The Promise’ 2020](#), p.41

<sup>19</sup>CYPCS. Age of Criminal Responsibility (Scotland) Bill [Evidence to Equalities and Human Rights Committee](#)

young people and as such the best interests of the young person should be at least a primary consideration in accordance with Article 3 UNCRC. This is consistent with every child's rights to recovery from trauma in terms of Article 39 of the UNCRC. Whilst the prevention of further offending is a legitimate purpose of sentencing, we feel it should not be placed above addressing the underlying causes of behaviour or maintaining positive connections between the young person and society, as these features are key to their recovery, rehabilitation and reintegration.

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

\* Agree X

\* Disagree

**Please provide any reasons for your answer.**

Whilst we agree with the approach, it needs to be clear that any deprivation of liberty interferes with children and young people's right to liberty and security under Article 5 of the ECHR and that it should only ever be used as a disposal of last resort, for the shortest appropriate period of time due to the detrimental impact such sentences have on children and young people.

This includes placement within a secure accommodation or a residential care home if there are significant restrictions placed on their movements. As such any deprivation of liberty should be treated as a last resort, for example where the young person presents a danger to themselves or others.

Such sentencing to deprivation of liberty has been directly criticised in the UN 'Global Study on Children Deprived of Liberty'. 'In some cases, children have been sentenced to imprisonment for up to 25 years. The UN independent expert Manfred Novac considers that lengthy prison sentences violate the legal requirement of the 'shortest appropriate period of time' under Article 37 (b) of the Convention'.<sup>20</sup> We would suggest that criminal prosecutions and proceedings for the most serious offences which cannot be dealt with in the Children's Hearings System, are processed as quickly as possible and prioritised in the justice system, particularly where conviction of the alleged offences is likely to result in deprivation of liberty in either secure care centres or the prison estate. We would suggest that further consideration be given to ensure that any child who is convicted of an offence will only be detained in Secure Care Centres, rather than in a Young Offenders Institution.

---

<sup>20</sup> Novac, M. [Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty](#)(2019) Para 44

**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 X**

**\* Disagree**

**Please provide any reasons for your answer.**

See our answer to Question 12.

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

**\* Yes X**

**\* No**

**Please provide any reasons for your answer.**

These guidelines will have a positive impact on sentencing. In order to be most effective, they need to be accompanied by a programme of human rights training and awareness raising across all justice services.

**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 X**

**\* Disagree**

**Please provide any reasons for your answer.**

Significant work is required to address attitudes to the sentencing of children and young people held by the press and the general public. The continued stigmatisation of children and young people by the media was highlighted as an area of concern by the UN Committee on the Rights of the Child in their 2016 Concluding Observations on the UK's compliance with the UNCRC<sup>21</sup>.

We believe that the Scottish Sentencing Council has an important role to play in addressing this, through ensuring that there is a comprehensive public awareness raising campaign.

---

<sup>21</sup> United Nations Committee on the Rights of the Child. [Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland](#) p5

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

**\* Agree X**

**\* Disagree**

**Please provide any reasons for your answer.**

If these guidelines adopt a human rights based approach, they will improve public confidence, and provide transparency and consistency in responses to children and young people in conflict with the law.

**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.**

The primary impact of these guidelines should be to ensure that sentencing is compliant with and promotes the human rights of all children and young people in conflict with the law.

**Q20) What benefits do you think will come from the introduction of this guideline, if any?**

**Please provide any reasons for your answer.**

These guidelines will improve transparency and understanding of the reasons behind specific sentencing decisions.

**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 response**

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

We agree with the suggested amendments and responses to this consultation submitted by CYCJ,<sup>22</sup> and consider it vital that children and young people with experience of sentencing are included in the development, consultation and

---

<sup>22</sup> [Scottish Sentencing Council consultation on guidelines for sentencing young people](#): CYCJ Response

production of the guideline to ensure the guideline fully considers their needs, rights and best interests.