

Howard League for Penal Reform's response to the Scottish Sentencing Council's consultation on sentencing young people

August 2020

Summary

1. The Howard League for Penal Reform welcomes the opportunity to comment on the Scottish Sentencing Council's consultation on sentencing young people. We are a separate entity from the Howard League Scotland and our work relates to criminal justice in England and Wales. This short response draws on our particular expertise in sentencing children and young adults. We have contributed because we think this experience will be useful to Scotland and the principles are transferable.
2. We welcome this progressive guideline, which acknowledges that young adults have distinct characteristics and needs that are relevant to the sentences they receive.
3. In England and Wales, case law and Sentencing Council's expanded definitions have recently acknowledged that turning 18 should not represent a cliff edge for the purpose of sentencing. However, the English and Welsh system still falls far short of what is proposed here in terms of ensuring an entirely distinct approach is taken to young adults. The proposed distinct approach for young adults reflects developing knowledge in law and science, as well as the reality of young people lives. The Howard League and the Transition to Adulthood Alliance have advocated for such changes in the criminal justice system for many years.
4. In line with international law, the Scottish Sentencing Council may wish to consider building into the guideline a particular distinction to preserve the sacrosanct rights of children under 18. This will avoid the unintended consequence of creating a tougher approach to children under 18 if they are grouped together with young adults aged 18-25. Given that in practice sentencers will deal with more young adults than children, unless children are singled out as a particularly vulnerable group, there is a risk of children being treated more like young adults than young adults being treated more like children.

1. About the Howard League for Penal Reform and summary of response

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government. The Howard League a separate entity from the Howard League Scotland and our work relates to criminal justice in England and Wales. This short response has been prepared in light of our particular expertise in sentencing children and young adults. We contributed because we think this experience will be useful to Scotland and the principles are transferable.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.
- 1.3 Our legal team works directly with children and young adults in prison. In particular, the Howard League, alongside the Transition to Adulthood Alliance, has advocated for a distinct approach for young adults in the criminal justice system for many years.¹
- 1.4 We have drawn on our legal and policy work in responding to this consultation.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. Young adults' distinct characteristics and needs

- 2.1 The Howard League has particular expertise in the experiences of young people in the criminal justice system and legal requirements that pertain to them due to our specialist legal work. In particular, we have carried out significant research into sentencing young adults and produced a number of publications exploring the issue and proposing specific sentencing principles for young adults.² This response draws on that expertise.
- 2.2 Our work on sentencing young adults is rooted in the fact that young adults have distinct characteristics and needs. Young adults are still maturing and developing. Neurological and psychological evidence shows that the development of the frontal lobes of the brain does not cease until around 25 years old.³ Reaching adulthood is not an event at 18, but a process, which can happen at different times for young people.
- 2.3 As such, we welcome the Scottish Sentencing Council's progressive guideline focussing specifically on the needs of young people.

3. Young adults in the English system

¹ See <https://howardleague.org/legal-work/sentencing-young-adults/> and <https://www.t2a.org.uk/>

² All the publications and further information is available here: <https://howardleague.org/legal-work/sentencing-young-adults/>

³ Blakemore et al 2006, T2AA, 2012; https://www.barrowcadbury.org.uk/wp-content/uploads/2012/11/Repairing-Shattered-Lives_Report.pdf

3.1 The distinct characteristics and needs of young adults have been increasingly acknowledged in the English system. In *R v Clarke* [2018] EWCA Crim 185, the Lord Chief Justice emphasised that reaching the age of 18 should not present a cliff edge for the purposes of sentencing, given that full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays.

3.2 In 2019, the Sentencing Council introduced an expanded explanation on "age and/or lack of maturity" as a mitigating factor:

Age and/or lack of maturity can affect:

- *the offender's responsibility for the offence and*
- *the effect of the sentence on the offender.*

Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:

- *evaluate the consequences of their actions*
- *limit impulsivity*
- *limit risk taking*

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development.

An immature offender may find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody.

An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

Many young people who offend either stop committing crime, or begin a process of stopping, in their late teens and early twenties. Therefore a young adult's previous convictions may not be indicative of a tendency for further offending.

3.3 However, the English and Welsh system has stopped short of a tangible framework that requires sentencers at first instance to take a completely different approach to young adults aged 18 to 25. There are no specific sentencing guidelines for this age group. Moreover, it has recently been suggested that steps may be taken to increase minimum terms for older children convicted of murder which would be contrary to developing

thinking in both domestic and international law about the need to take a completely different approach to children in the criminal justice system. We welcome the approach in this guideline which is progressive and reflects the reality of young adult lives.

4. Preserving the sacrosanct rights of children under 18

- 4.1 In line with international law, the Scottish Sentencing Council may wish to consider building into the guideline a particular distinction to preserve the sacrosanct rights of children under 18, as provided for by the UN Convention on the Rights of the Child. The approach taken in the latest General Comment from the Committee from September 2019 is to ensure that the rights of children under 18 are particularly protected but consideration is given to extending them to young adults. This is reflected in paragraph 32 which states:⁴

“The Committee commends States parties that allow the application of the child justice system to persons aged 18 and older whether as a general rule or by way of exception. This approach is in keeping with the developmental and neuroscience evidence that shows that brain development continues into the early twenties.”

- 4.2 Such an approach would avoid the unintended consequence of creating a tougher approach to children under 18 if they are grouped together with young adults aged 18-25. The impact assessment data that accompanies the report shows that more young adults appear before the Courts than children. Given that in practice sentencers will deal with more young adults than children, unless children are singled out as a particularly vulnerable group, there is a risk of children being treated more like young adults than young adults being treated more like children.

5. Concluding observations

- 5.1 The Howard League welcomes the Scottish Sentencing Council’s proposals that will lead the way in showing that the criminal justice system can be tailored to reflect the developing knowledge and evidence, resulting in more appropriate outcomes for young people.
- 5.2 We would be happy discuss any of these observations in further detail.

**The Howard League for Penal Reform
28 August 2020**

⁴ See General Comment No 24

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en