



# Sentencing young people

**Scottish Sentencing Council report on public  
consultation exercise**

**September 2021**

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## Chair's foreword



On behalf of the Scottish Sentencing Council, I am pleased to introduce this report on the public consultation exercise on our draft sentencing young people guideline. This is the third such exercise that the Council has carried out. It follows those on our guidelines '[Principles and purposes of sentencing](#)' and '[The sentencing process](#)', which took place in 2017 and 2019 respectively.

When the consultation was launched at the end of February 2020 we had little idea of what was about to transpire as a result of the COVID-19 pandemic. Many of those involved in the Council's work, both directly and indirectly, became engaged in essential system-wide recovery efforts. Recognising the challenges to those we depend on to contribute to our work we decided to extend the consultation period to six months instead of the usual three.

It is a testament to the importance of this complex issue that, despite the difficult circumstances, 280 responses to the consultation were submitted. This is, by a considerable margin, the most we have ever received.

The Council is always grateful to those who take the time to provide their views on our work, but I want to express particular and sincere thanks to everyone who responded to this consultation during such trying times. Obtaining the views of organisations and individuals across Scotland is vital to the development of our sentencing guidelines and we are pleased that so many of you engaged with us on this guideline.

Every response has been carefully considered as part of an independently conducted consultation analysis. One important issue this has highlighted is an apparent gap in understanding of the criminal justice system between organisations and many individual respondents. Many individuals appeared to misunderstand what was being proposed in the draft guideline or were unaware of the current legislation relating to the sentencing of young people, which courts must follow and apply.

Some mistakenly thought we were proposing that no one under 25 should receive a custodial sentence or that those aged 18 to 24 should be dealt with by the children's hearings system rather than the courts.

The independent analysis suggests that some responses from individuals should therefore be treated with caution. We have been careful in taking this into account in our consideration of the responses and in making our final decisions on the guideline.

The gap in understanding highlighted by the analysis is perhaps unsurprising. Criminal justice and sentencing – especially in respect of young people – are highly complex areas which can be challenging even for those with detailed knowledge of the law. We consider it an important part of our remit to address this knowledge gap and in the coming months we will seek to raise awareness of the existing law as it applies to young people within the criminal justice system, what contributes to offending behaviour among young people and what might contribute to reducing reoffending.

This is a process that we hope will start with this report. It sets out our views on the key points raised in the consultation and explains the improvements we have made to the guideline after taking into account the various suggestions. The guideline which we will soon submit to the High Court has been restructured to make it clearer at which point the courts should consider separate matters and why. It also gives more clarity on how the impact on victims is to be taken in account and provides clearer guidance on how the assessment of a young person's maturity bears on culpability.

In other key respects we have decided against making changes to the guideline. It will continue to require courts to take an individualised approach when sentencing a young person, taking into account their personal circumstances; it will state that rehabilitation should be a primary consideration when sentencing a young person; and it will apply to all people under the age of 25 – this is on the basis that, as an evidence-led organisation, we have not seen anything in the responses which calls into question the strength of the evidence on the development of cognitive maturity we have drawn on in developing the guideline.

In our view, the guideline, with its key aim of reducing reoffending by young people, will bring positive benefits for all.

The finalisation of this guideline for submission to the High Court is a milestone for the Council. As well as fulfilling a key commitment in our business plan for 2018-21, it also marks the end of the first phase of our work. Since the Council was established in 2015, our main focus has been on completing a suite of general guidelines which will set out a high-level framework for sentencing in Scotland. This guideline joins the 'Principles and purposes of sentencing' and 'The sentencing process' guidelines as the final part of that framework, and allows us to turn our attention to guidelines on specific offences.

As well as all of those who have contributed to the development of the guideline through engagement with the Council or by responding to the consultation, I am very grateful to current and former members of the Council who have overseen this work. It has involved a considerable amount of effort and detailed consideration of highly complex matters; it is also, in my view, a considerable achievement which will promote consistency in sentencing and help to explain to the public how sentencing decisions are made.

**Rt Hon Lady Dorrian**  
**Lord Justice Clerk and Chair of the Scottish Sentencing Council**

## Introduction

### Public consultation exercise

1. The Scottish Sentencing Council launched a public consultation on its third draft guideline, 'Sentencing young people', on 28 February 2020. The consultation was originally due to run for 3 months, with views invited by 22 May 2020. Due to the impact of the COVID-19 pandemic the consultation was extended for 3 months. It closed on 21 August 2020.
2. 280 responses were received, 239 from individuals and 41 from organisations. We have published the responses<sup>1</sup> from organisations, along with those from individuals who gave their consent for this. An analysis<sup>2</sup>, conducted independently by Alison Platts Research Services, examines each of the questions posed by the consultation and summarises the key points and themes.

### Council response

3. The findings from the public consultation exercise informed our work to finalise the 'Sentencing young people' guideline, which will be submitted to the High Court of Justiciary later this year.
4. The purpose of this report is to set out the Council's views on some of the most common matters raised during the public consultation exercise and to give an indication of how the guideline submitted to the High Court will differ as a result. Should the guideline be approved (either as submitted or with modifications), it will be published by the Council shortly afterwards.
5. We have deliberately focused on addressing those matters which appear to be of most interest to respondents. While not all points raised are covered in this report, all of the responses received have been considered.

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<sup>1</sup> <https://consultations.scottishsentencingcouncil.org.uk/ssc/young-people/>

<sup>2</sup> <https://www.scottishsentencingcouncil.org.uk/media/2133/sentencing-young-people-consultation-analysis.pdf>

6. As part of the consultation exercise the Council carried out direct engagement with the Victims Organisations Collaboration Forum Scotland<sup>3</sup> and nine separate victims' and survivors' organisations. The views expressed in those discussions have been taken into account in the final decisions about the content of the guideline.
  
7. In order to obtain the views of young people on sentencing and the themes and issues addressed in the draft guideline, we commissioned the University of the West of Scotland to carry out focus groups with young people across Scotland. This included young people with experience of the criminal justice system, either through being convicted of a crime or as victims of crime. The findings, which suggest that the young people who took part in the focus groups were largely in agreement with the provisions in the draft guideline, are set out in a [report](#) published on the Council's website.
  
8. In reaching a decision on the final content of the guideline to be submitted to the High Court, we have also taken into account the full range of research and consultation activity carried out during the drafting stages. This includes:
  - A [stakeholder conference](#) in April 2017 to consider possible approaches to the guideline. Organisations and individuals from across the justice system and beyond were represented at the conference, including criminal justice organisations, charities including victim support groups, organisations with an interest and expertise in young people affected by the justice system, academics, and judges.
  - Research involving focus groups to examine [public views of youth offending](#).
  - A 2018 [stakeholder conference](#) which explored the sentencing of sexual offences.
  - A [literature review of youth offending and sentencing in Scotland and other jurisdictions](#), which examined the available research on this subject. This highlighted a number of things which we have considered in drafting the guideline, such as:
    - research on the stages of brain development

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<sup>3</sup> The organisations who are part of the Victims Organisations Collaboration Forum Scotland are: Abused Men in Scotland, Action Against Stalking, Children 1<sup>st</sup>, Moira Anderson Foundation, Rape Crisis Scotland, Shakhti Women's Aid, Scottish Campaign for Irresponsible Driving, Scottish Women's Aid, Victim Support Scotland.

- evidence of the high number<sup>4</sup> of young people who have offended who have had [adverse childhood experiences](#)<sup>5</sup> or experiences of trauma
  - the effect that adversity and trauma can have on brain development
  - research about the sentencing approaches which might be most effective in reducing reoffending
- Seeking the views of the judiciary, including judicial testing of the draft guideline.
  - Consideration of High Court guidance about the sentencing of children and young people.<sup>6</sup>
  - A [consultation workshop](#) with members of the Scottish Youth Parliament<sup>7</sup> in which we sought their views about some key aspects of the guideline.
  - A [systematic review](#) of the latest evidence concerning brain development, which we have taken into account in defining who young people are for the purposes of this guideline.
9. It is important to note that the guideline is not a standalone document and must be read alongside the Council's other general guidelines, '[Principles and purposes of sentencing](#)' and '[The sentencing process](#)', and any relevant offence guidelines which may apply. As we have been developing this guideline simultaneously with our sentencing process guideline, we have taken into account various issues and views expressed<sup>8</sup> in the development of that guideline in finalising this one, and vice versa.
10. **Part 1** of this report sets out the Council's views on the public consultation exercise, including the actions which will be taken as a result.

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<sup>4</sup> Vaswani, N. (2018). *Adverse Childhood Experiences in Children at High Risk of Harm to Others: A Gendered Perspective*. [https://cycj.org.uk/wp-content/uploads/2018/08/Adverse-Childhood-Experiences-in-high-risk\\_CYCJ- Final-Version-proofed.pdf](https://cycj.org.uk/wp-content/uploads/2018/08/Adverse-Childhood-Experiences-in-high-risk_CYCJ- Final-Version-proofed.pdf)

<sup>5</sup> <https://www.gov.scot/publications/adverse-childhood-experiences/>

<sup>6</sup> This is set out in a number of High Court judgments on appeals against sentence. In particular, we looked at the judgments in [Kane vHMA](#), [Greig vHMA](#), [McCormick vHMA](#) and [Smart vHMA](#).

<sup>7</sup> The Scottish Youth Parliament provides a national platform for young people to discuss issues important to them and influence change. Every two years approximately 160 Members of the Scottish Youth Parliament (MSYPs: aged 14-25) are elected to represent all 32 local authorities, and several national voluntary organisations. Further information about the Scottish Youth Parliament can be found at <https://syp.org.uk/>.

<sup>8</sup> <https://www.scottishsentencingcouncil.org.uk/media/2111/20210506-sentencing-process-report-on-public-consultation-exercise-final.pdf>



11. **Part 2** explains the likely next steps in relation to the ‘Sentencing young people’ guideline.
  
12. The original consultation paper, associated documents, responses, and analysis can be accessed at: <https://consultations.scottishsentencingcouncil.org.uk/ssc/young-people/>.

## Part 1: Response to public consultation exercise

### Approach to providing the Council's views

13. In this part we first discuss the contrasting nature of the views expressed by organisations and individuals before giving a summary of the decisions we have made about the content of the guideline in response to these views. This is followed by a discussion of the key points raised in relation to each question posed in the consultation paper. We have also indicated how the guideline submitted to the High Court for approval will differ as a result of these, and what other action may be taken.
14. While a brief summary of the key points raised by respondents is provided, we suggest that you refer to the consultation analysis<sup>9</sup> (or its executive summary<sup>10</sup>) for further context.

### Contrasting views of organisations and individuals

15. The Council is grateful to all respondents who took the time to provide views on the draft guideline and each response has been fully considered.
16. The consultation analysis reveals that organisations often expressed views which contrasted with those expressed by individuals on the issues under consideration. Organisational responses showed a more in-depth awareness and understanding of current sentencing policy and practice, and the research and evidence base relating to the proposals, than many individual responses. Organisations generally commented on the proposals in greater detail than individuals. And in some instances, the consultation analysis suggests that the views of individuals should be treated with caution due to apparent confusion about the statutory framework behind the provisions suggested in the draft guideline.

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<sup>9</sup> <https://www.scottishsentencingcouncil.org.uk/media/2133/sentencing-young-people-consultation-analysis.pdf>

<sup>10</sup> <https://www.scottishsentencingcouncil.org.uk/media/2133/sentencing-young-people-consultation-analysis.pdf#page=3>

17. This paper may therefore discuss points raised by organisations in more detail than those raised by individuals.
18. We believe that the apparent difference in views is indicative of a gap between the experience of organisations and professionals working in the justice sector and public perceptions and awareness of sentencing. In particular, responses from many individuals generally indicated a lower awareness of:
  - What contributes to offending behaviour among young people and what might contribute to reducing reoffending.
  - The existing law as it applies to young people within the criminal justice system.
  - The fact that more young people under the age of 18 are referred to the [children's hearings system](#) on offence grounds than are convicted of an offence in the criminal courts.
19. This highlights the complex nature of sentencing and the importance of the Council's statutory objective to promote greater awareness and understanding of sentencing policy and practice. While the guideline will play an important role in increasing public knowledge about how young people are sentenced the Council will consider further activity and engagement with others in this area. In particular, we will seek to raise awareness of how younger people are currently dealt with in the criminal justice system and to promote a better understanding of the reasons for offending in young people and the role of sentencing in addressing these.
20. Overall, organisations were generally very supportive of the draft guideline, and in particular welcomed its evidence-based, person-centred approach. While some individuals shared this view, individual responses in general diverged from organisational responses, with some strong opposition expressed to specific aspects of the draft guideline, such as the range of people to whom it should apply. There were some shared opinions, or comments offering qualified support, in relation to other parts by both individuals and organisations.

## Summary of the Council's decisions in response to the consultation exercise

### *Changes we will make to the draft guideline*

21. We have considered carefully the various suggestions and while we propose to retain the general approach to the sentencing of young people outlined in the draft guideline consulted on we intend to make improvements in several key areas:

- **The guideline has been restructured.**
  - Having taken on board several suggestions made during the consultation process, we have decided on an improved structure for the guideline. This will: make it clearer at which point the courts should consider separate matters and why; be simpler for sentencers and practitioners to use; and be easier to navigate and understand (particularly to assist with public awareness).
- **The guideline will give more clarity on how the impact on victims is to be taken in account.**
  - We have made it clearer that harm to victims is to be considered when assessing the seriousness of an offence and that the guideline does not affect that assessment of harm.
  - We have also taken into account the responses received to this consultation in finalising our sentencing process guideline, which now gives greater prominence to the harm caused to any victim or victims, as a key part of the overall assessment of seriousness.
- **The guideline will provide clearer guidance on how the assessment of a young person's maturity bears on culpability.**
  - We consider that it is vital to be clear about how the assessment of a young person's culpability is affected by their level of maturity and have therefore addressed the issue in a new subsection.
- **Some of the terminology in the guideline has been revised.**
  - We have made changes to the language used for clarity and precision and to minimise the likelihood of unnecessary negative associations and 'labelling'.

*Features of the draft guideline we will retain*

22. Although we are making some changes to the guideline, having considered the views expressed in the consultation in the context of the full range of work we have carried out in developing it, we intend to retain the following key features of the guideline:
- **Courts should take an individualised approach when sentencing a young person, taking into account their personal circumstances and their level of maturity when assessing their blameworthiness for an offence.**
  - The sentencing of young people is complex and challenging. It generally requires a more individualistic approach. Many young people who have committed offences have high levels of adverse childhood experiences, such as emotional, physical and sexual abuse, neglect, domestic violence and household substance misuse. They are also more likely than the general population to have experience of trauma, including higher than average experience of traumatic bereavement.<sup>11</sup>
  - When deciding on sentence courts will, as always, take into account the circumstances of the offence and the harm caused to any victim. But the guideline will also encourage courts to seek information about the young person before them and to select a sentence appropriate to that person and their circumstances: for example, a sentence aimed at addressing the reasons for the offending behaviour.
  - For these reasons, the guideline will encourage increased use of the children's hearings system for advice in relation to those under 18; encourage review hearings to be fixed in appropriate cases to support the successful completion of community-based sentences; and place particular emphasis on rehabilitation as a purpose of sentencing.
  - It is a longstanding and accepted element of sentencing practice that where the offender's age or level of maturity affects their level of responsibility for the offence this should be taken into account in determining their level of culpability. This is also reflected in our sentencing process guideline, which was approved by the High Court on 15 July 2021 and which will take effect from 22 September 2021. And the criminal law already recognises that younger people should be treated differently.

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<sup>11</sup> <http://www.cycj.org.uk/wp-content/uploads/2016/11/Our-Lives-with-Others-Evaluation-Report-.pdf>

- **Rehabilitation should be a primary purpose when sentencing a young person.**
  - The views expressed in the consultation echo those expressed by members of the public in research that rehabilitation is deserving of special emphasis when dealing with a young person.<sup>12</sup>
  - We acknowledge some concerns that the draft guideline might have appeared to suggest other purposes of sentencing are not relevant. The final guideline will make it clear that rehabilitation is not the only possible purpose of a sentence for a young person. However, we believe that when sentencing young people the courts play an important role in helping those young people to move away from their offending behaviour and should seek to do so by giving additional weight to rehabilitation when selecting a sentence.
  - This also recognises the disproportionate effect some sentences may have on younger people compared with older people. For example, young people are more likely to be in education or to have less secure employment or housing prospects. Sentences can therefore have a more disruptive and longer-term impact on young people than on older people.
- **The guideline will remain principle based and will apply to all offences.**
  - We do not believe it necessary, or practical, to disapply the guideline to any specific offences. Moreover, as intellectual and emotional maturity in younger people has a bearing on their level of culpability, it automatically follows that its consideration is relevant in all cases. To put it another way, it would be unfair not to consider a young person's culpability (as affected by their maturity) because they had committed a specific type of offence. We do not consider this will limit sentencers' discretion to select sentences which are appropriate to the offence and circumstances of the case before them.
- **The guideline will apply to all people under the age of 25.**
  - Our initial decision to define a young person for the purposes of the draft guideline as someone under the age of 25 was informed by a number of considerations.

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<sup>12</sup> <https://www.scottishsentencingcouncil.org.uk/media/1996/20190902-public-perceptions-of-sentencing-report.pdf>

- As noted above, the law already treats young people differently from older people in many ways, both within the criminal justice system and in many other spheres.
- Practitioners within the criminal justice system have long observed that offending behaviour often subsides in a person's mid-twenties. This is backed up by research suggesting that most young people who offend begin to give up crime around this stage. This is linked to the development of strong social bonds brought about by, among other things, getting a job or getting married (or entering a stable relationship), which can increase financial stability and improve emotional wellbeing.<sup>13</sup>
- There is now significant scientific evidence drawn from numerous studies from around the world that brain development in younger people affects intellectual and emotional maturity. This makes them more prone to taking risks, less able to think about the consequences of their actions, and contributes to offending behaviour. It highlights the need for courts to consider the extent to which young people may be less blameworthy for their actions than people who are older.
- There is sufficiently strong evidence that this can be the case up to at least the age of 25 in some individuals that we reached the view that the offender's level of maturity should be given particular consideration when sentencing anyone under the age of 25.
- As well as considering this research and current practice within Scotland, we looked at the arrangements in other countries. As we noted in the consultation paper, Germany allows courts to treat people of 21 and under as juveniles.<sup>14</sup> In the Netherlands, people up to the age of 23 can be treated as juveniles.<sup>15</sup> In Switzerland, young adults are given less severe sentences until they are 25

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<sup>13</sup> Sapouna, M., Bisset, C., Conlong, A. and Matthews, B. (2015) What Works to Reduce Reoffending: A Summary of the Evidence. Justice Analytical Services, Scottish Government. Available from: <http://www.gov.scot/Resource/0047/00476574.pdf>

<sup>14</sup> Hazel, N., (2008). *Cross-national comparison of youth justice*. The University of Salford. Available from: [http://dera.ioe.ac.uk/7996/1/Cross\\_national\\_final.pdf](http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf)

<sup>15</sup> Sibella Matthews, Vincent Schiraldi & Lael Chester (2018): *Youth Justice in Europe: Experience of Germany, the Netherlands, and Croatia in Providing Developmentally Appropriate Responses to Emerging Adults in the Criminal Justice System*, Justice Evaluation Journal, DOI: <https://doi.org/10.1080/24751979.2018.1478443>

- years old.<sup>16</sup> Other provisions and developments, both in Scotland and elsewhere in the world, which align with our decision are set out at paragraphs 61-62 below.
- Our view on how a young person should be defined in the guideline has not been changed by the results of the consultation exercise. It is notable that the vast majority of the organisations operating within the criminal justice system were supportive of the guideline applying to persons under 25. They agreed that the lack of maturity in those under that age, the effect of adverse childhood experiences and trauma on a young person's development, and the greater capacity of young people to change justified a different approach to that adopted in the sentencing of older people.
  - While most individuals disagreed with this proposal, they did not cite any evidence which contradicts the research and information the Council has drawn on. Many also appeared to mistakenly believe that we were proposing that those under 25 should be treated as children or should not receive custodial sentences. The guideline does not alter any of the statutory provisions in Scottish criminal law that apply to children or young people.
  - The guideline is intended to reflect and complement the existing statutory provisions around the imposition of custodial sentences in Scotland. These are that: (i) where the person being sentenced is under 21<sup>17</sup>; (ii) where the person being sentenced is over 21 but has never served a custodial sentence before<sup>18</sup>; or (iii) where the sentence is likely to be one of 12 months in custody or less<sup>19</sup>; the court shall not impose a custodial sentence unless it considers that no other method of dealing with the person is appropriate.
  - We are not suggesting that courts should treat all 24 year olds in the same way they treat 16 year olds. A 16 year old may well be less mature and therefore less blameworthy than a 24 year old. It is also possible that someone who is 23 or 24 could be less mature than an 18 year old. The guideline we will submit to the High Court will make it clear that the sentencing court should assess the

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<sup>16</sup> Hazel, N. (2008)

<sup>17</sup> [Section 207\(3\)](#) of the Criminal Procedure (Scotland) Act 1995.

<sup>18</sup> [Section 204\(2\)](#) of the Criminal Procedure (Scotland) Act 1995.

<sup>19</sup> [Section 204\(3A\)](#) of the Criminal Procedure (Scotland) Act 1995.



- maturity of anyone under 25 when assessing their level of blame for the offence in question and to help it identify and impose the most appropriate sentence.
- The full range of sentencing options, including custodial sentences, will continue to be an option under the guideline, although we believe that custodial sentences should generally be shorter for a younger person than for an older person in part because of the lower culpability involved. This, however, will remain a decision for the sentencing court.
23. Our intention with all of this is to ensure that the sentencing process takes proper account of the circumstances of the offence, including the harm to any victim, while encouraging and supporting young people who have committed offences to move away from offending behaviour. The Council's hope and expectation is that by promoting tailored sentences with a greater emphasis on rehabilitation and increased use of review hearings and the children's hearings system in appropriate cases, sentences will be more effective in reducing offending behaviour, bringing long-term social and economic benefits and making communities safer.

## Discussion of consultation questions

### Approach to the guideline

24. **Question 1 asked respondents if they agreed or disagreed that a principle-based approach to the guideline was the right approach to take.**
25. Respondents who agreed with the principle-based approach to the guideline felt that it would promote transparency, fairness and consistency. They also suggested that it was relatively straightforward, which should make it easy for young people and the public to understand, and that it would avoid the risk of repetition and complexity – and therefore confusion – which might arise out of taking an offence-specific approach.

### *Appropriateness for specific offences*

26. Some respondents suggested that a principle-based approach to the sentencing of a young person was not appropriate for certain types of offence. One respondent argued

that it should not be applicable to driving offences because issues of maturity, culpability and responsibility are less relevant in such cases. Another respondent argued that it should not apply to offences related to domestic abuse and violence against women because of the complex dynamics and vulnerabilities of the victim in such cases.

27. While the Council recognises these concerns, our view is that it is not necessary or practical to exclude certain offences from the guideline.
28. The aim of the guideline is to enable the court to select the most appropriate sentence for the circumstances of the case before it; this includes giving consideration to the circumstances of the offence, any harm arising, and the circumstances of the offender. We therefore believe the guideline should apply to all offences.
29. A young person could also be charged with different types of offence on the same complaint or indictment. If some of these offences were outwith the scope of the guideline it means they could be sentenced in an inconsistent and confusing fashion. On some offences the person being sentenced would be treated as a young person who was subject to the guideline. On other offences they would be treated as an older person who was not subject to the guideline.
30. In addition, there are difficulties in determining which offences should be excluded and why. Each time a new offence came into law we would have to consider whether or not it should fall within the scope of the guideline. This would require extensive research and consultation.
31. We think that the dynamics of specific offences would be better addressed in our offence guidelines, the first of which will be on offences of causing death by driving followed by guidelines on rape, sexual assault, and indecent images. A guideline on domestic abuse is also being considered for inclusion in the Council's next business plan. We intend to consider further how these will interact with the sentencing young people guideline.

### *Impact on victims*

32. There were suggestions that the draft guideline did not sufficiently take into account the views of, or impact on, victims. Similar points were made in response to other questions in the consultation, and in our meetings with victims' and survivors' organisations. In relation to the principle-based approach the main issue was that it resulted in a focus on the offender without due weight being given to the victim.
33. Because of the nature of this guideline, it necessarily focuses on the category of person to whom it applies. However, it is one of three general guidelines which will apply to the sentencing of all young people in Scotland, each of which will deal with different aspects of sentencing decisions and as such highlight different considerations. The principles and purposes of sentencing guideline requires the impact on the victim to be considered in all cases. The consideration of harm to victims is also central to every sentencing decision as part of the critical assessment of the seriousness of the offence. This is explicitly addressed in the sentencing process guideline.
34. The principles and purposes of sentencing and sentencing process guidelines are of a general nature and both apply to all sentencing decisions, including the sentencing of young people. The sentencing young people guideline is intended to focus on the ways in which sentencing is *different* for young people. In respect of the consideration to be given to the impact on the victim, a different approach is not required and this is why it was not explicitly mentioned in the guideline.
35. We do, however, recognise the concern expressed and have made changes to the guideline to make it clear that the assessment of harm to any victim is not affected by the provisions of the guideline (this is discussed at paragraphs 108-115 below).

### *Reference to human rights instruments*

36. One respondent recommended that the guideline should make specific reference to other human rights instruments concerning children aside from the UNCRC. We do not consider the guideline to be inconsistent with any of the human rights instruments

suggested, and have taken account of them, particularly the UNCRC, in developing the guideline.

37. Our preference is to avoid, as far as possible, restating or referring to existing legislative provisions or specific instruments in our guidelines. This is in order to keep them concise and easy to refer to, and to avoid the need to update them should whatever is referred to be amended or revoked. We do not therefore consider there is a need to include any specific references beyond the one to the UNCRC.

#### *Extending the approach to other cases or types of offender*

38. There were arguments that key features of the guideline, such as consideration of the level of maturity and capacity for change, should be considered in all cases no matter the age of the offender. Those with autism spectrum disorders or learning disabilities were specifically mentioned as groups to which the features should apply.
39. In respect of lack of maturity, the sentencing process guideline requires courts, when assessing culpability, to consider an offender's age or level of maturity at the time of the offence in all cases.
40. The Council also recognises that older people may still have the capacity to change, but this is something that is of particular relevance to the sentencing of young people. Rehabilitation is listed as a possible purpose of sentencing in our principles and purposes of sentencing and sentencing process guidelines, which both apply to all cases.

#### **What does the Council intend to do?**

41. While we do not consider that any changes to the guideline are required to address any of the views provided in response to this question, we intend to consider further the issue of whether, and if so how, the sentencing of young people is addressed in our offence guidelines. We will also consider whether more specific guidance might be required on the interaction between different guidelines.

## Applicability

42. The questions on this section of the guideline concerned who should and should not be treated as a young person when being sentenced. The Council's proposal was that those under the age of 25 should be regarded as young people for the purposes of the guideline.
43. The responses reveal a range of differing views on this issue, with arguments being made in favour of lower, and in some instances, higher, age limits. Some respondents also suggested that the guideline should apply to all offenders regardless of age as the factors it highlights are relevant considerations in most circumstances.
44. **Question 2 asked respondents if they agreed or disagreed that the guideline should apply to people under the age of 25.**
45. Those who agreed with the Council's proposal to define a young person as someone under the age of 25 said that it was supported by the neurological and criminological evidence referred to in the consultation paper. They also agreed that it was important for courts to assess the level of maturity of those under 25, including the effect any adverse childhood experiences or trauma may have had on their development; and that the greater capacity for change of young people merited a different approach to sentencing, with a focus on addressing individual needs to help reduce reoffending. A small number of those who disagreed did so because they thought the approach suggested in the guideline should apply to people *over* the age of 25.
46. The Council nevertheless acknowledges the significant level of disagreement to the proposal that the guideline should treat those under 25 as young people. Overall, 71% of respondents disagreed. However, there was a clear divergence in the views of individuals (81% of whom disagreed with the proposal) and organisations (94% of which agreed) which merits some exploration.

*Higher or lower age threshold*

47. Some respondents argued for a higher age threshold on the basis that this was justified by the neurological evidence that brain development can continue until around age 30. Although there may be some evidence to support this, the bulk of the evidence we have considered is weighted towards the mid-twenties being the approximate age at which brain development is complete for most people, so we do not intend to raise the age threshold.
48. Suggestions about lower age thresholds are addressed in relation to question 3 below.

*Differentiating between children and young people*

49. Several respondents argued that the guideline should be much more explicit about the distinct rights of those under 18, who are children in terms of the UNCRC. It was suggested that the guideline should only apply to those aged 18-25 as it would be problematic if it defined those under 18 as young people instead of children. There were proposals that the guideline should state that the definition of a young person includes children up to the age of 18 and that the name of the guideline should be changed to "Sentencing children and young people".
50. Our view is that the guideline does not change any of the statutory protections afforded to those under 18. Drawing more of a distinction – beyond the reference to the UNCRC – between how it applies to under 18s compared to under 25s would potentially make it more complex without significantly altering its approach.

*Age at the time of the offence or at the time of sentencing*

51. A number of respondents suggested that the guideline should apply to those under the age of 25 at the time of offending, rather than at the time of sentencing.
52. We do not think this would be appropriate. While it would mean the guideline would apply to someone only slightly older than 25 it would also mean that someone much

older would fall within the scope of the guideline, including persons convicted of historic offences, who may be well into adulthood or even old age.

53. While some of the same issues are involved in the sentencing of older people who were young at the time of the offence, it is also significantly different in a number of important ways from the sentencing of young people. Amongst other things, the fact that young people have greater capacity for change and rehabilitation would not be as relevant.
54. Additionally, as has already been mentioned, the sentencing process guideline requires the court, when assessing culpability, to consider an offender's age or level of maturity at the time of the offence. We believe this goes some way towards addressing this issue. We also think it may help to address a point made in some responses about young people who are close to the age of 25 at the time of the offence falling outwith the scope of the guideline due to delays in criminal justice system, which could result in them being sentenced once they are over 25.
55. There is one respect in which we consider that the applicability of the guideline should be made clearer. Although it is implied in the 'Applicability' section of the guideline (paragraphs 1 and 2 of the draft as consulted on) that the age cut-off applies from the date of sentencing, it is not explicit. On reflection, though, we believe that it should be from the date of a plea of guilty or the finding of guilt, and have amended paragraph 2 accordingly.

*Widely recognised milestones and age-related legal thresholds*

56. A common point was that young people are regarded as adults in many contexts at a much earlier age than 25 (for example, as we stated in our consultation paper, they can vote, marry, join the armed forces or learn to drive at earlier ages). It was reasoned that this means they should not be treated differently in the criminal justice system.
57. The Council is not persuaded that this provides grounds either for a lower age limit or to set aside the evidence on cognitive development that informed the decision to fix the

cut-off at age 25. The fact that different age thresholds apply in distinct areas of public and social policy is accidental: they have been arrived at for a variety of purposes, and through reaction to specific issues, as opposed to being a consequence of any consistent grand design. Even within the criminal justice system, different age limits apply for different purposes.

58. For example, Scottish law provides that: a child is defined as someone who is under 16; children under 12 years old cannot be prosecuted; children over 12 and under 16 who have committed an offence can be dealt with in either the children's hearings system or the criminal justice system;<sup>20</sup> there is a presumption against imposing a custodial sentence on anyone under 21; and under 21s cannot be sent to an adult prison.
59. Reaching some of the age-related milestones suggested by respondents is likely to be a positive step in a young person's development but this does not in and of itself mean full maturity is reached by the relevant birthday. The parts of the brain concerning the ability to plan and to control emotions may continue to develop until around age 25. Even if a young person has voted, married, or learned to drive before that age, they may still have less self-control and be more likely to make poor decisions and take more risks until around 25. We do not believe that there is any inconsistency in requiring this to be taken into account in sentencing.
60. Put simply, the fact that young people are permitted to do a multitude of different things at different ages does not detract, in our view, from the evidence that the weight of scientific evidence points to brain development in the under 25s being a contributory factor to offending behaviour. Reaching developmental maturity is a process; it is not an event which takes place upon reaching a particular age milestone.
61. We also note that while the guideline goes further than existing age-related criminal laws in Scotland, it aligns with some other existing provisions or developments in this

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<sup>20</sup> And the Scottish Government proposes to increase the age of referral to the children's hearings system to include all persons under the age of 18.



area in Scotland and with developments in the rest of the UK and elsewhere in the world. For example:

- The United Nations defines “youth” as “persons between the ages of 15 and 24 years”<sup>21</sup>.
- The new youth justice vision and priorities<sup>22</sup> prepared by the Scottish Government and the Youth Justice Improvement Board proposes to extend the Whole System Approach<sup>23</sup> to those up to age 26 where possible and appropriate.
- The Scottish Government has recently published research<sup>24</sup> on what works to prevent youth violence. This adopts the World Health Organisation’s definition of youth violence as “violence that occurs among individuals aged 10–29 years”.
- The National Probation Service in England and Wales assesses the maturity of offenders up to age 25 in pre-sentence reports.
- The Irish government has announced in its Youth Justice Strategy 2021-27 that it will look at steps to increase the age limit for its youth diversion scheme from 18 to 24.<sup>25</sup>

62. There are also some non-criminal legislative provisions in Scotland that align with the Council’s decision to define a young person as someone under the age of 25:

- Sections 29 and 30 of the Children (Scotland) Act 1995<sup>26</sup> (as amended by the Children and Young People (Scotland) Act 2014) provide for a local authority to give after-care and support to a young person who was previously looked after until they turn 26.
- Sections 1(5) (a) and (b) of the Family Law (Scotland) Act 1985<sup>27</sup> define, for the purposes of the obligation of aliment, a child as, first, a person under 16 and second, a person “over that age and under the age of 25 years who is reasonably

<sup>21</sup> <https://www.un.org/en/global-issues/youth>

<sup>22</sup> <https://www.gov.scot/publications/rights-respecting-approach-justice-children-young-people-scotlands-vision-priorities/>

<sup>23</sup> The [Whole System Approach](#) is the Scottish Government’s programme for addressing the needs of young people involved in offending.

<sup>24</sup> <https://www.gov.scot/publications/works-prevent-youth-violence-summary-evidence/>

<sup>25</sup> [http://www.justice.ie/en/JELR/Pages/Youth\\_Justice\\_Strategy](http://www.justice.ie/en/JELR/Pages/Youth_Justice_Strategy)

<sup>26</sup> <https://www.legislation.gov.uk/ukpga/1995/36/part/II/chapter/1/crossheading/advice-and-assistance-for-young-persons-formerly-looked-after-by-local-authorities>

<sup>27</sup> <https://www.legislation.gov.uk/ukpga/1985/37/section/1>

and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation”.

*The evidence base*

63. Some respondents questioned the evidence presented in the consultation paper on cognitive development and/or did not think it provided a strong enough basis for the proposed age threshold. However, no alternative evidence calling into question the research drawn on by the Council was cited by these respondents.
64. It is important to reiterate the strength of the evidence the Council has drawn on:
- We asked the University of Edinburgh to carry out a systematic and comprehensive review and evaluation of the current neurological, neuropsychological, and psychological evidence on the development of cognitive maturity in younger people and to assess its relevance in judicial contexts. This was a ‘study of studies’ from around the world rather than a singular investigation.
  - It found that the adolescent brain continues to develop into adulthood and does not reach full maturity until approximately 25-30 years of age.
  - In particular, the areas of the brain governing emotion develop sooner than those which assist with cognitive abilities and self-control. This imbalance explains the increased risk-taking and emotionally driven behaviour commonly attributed to young people.
  - Brain development may be delayed or hindered by other factors such as mental disorders and distress, adverse childhood experiences, traumatic brain injury (“TBI”), and alcohol and substance use.
  - There is a well-established correlation between TBI and antisocial behaviour and violent offending.
65. In addition to this, there is also, as we have noted above, research and anecdotal evidence that most young people who offend begin to desist from offending by their mid-twenties.

66. Nothing in the consultation has persuaded us that it is anything other than appropriate and necessary for these factors to be important considerations in the sentencing of those aged up to 25 years.

*Responsibility and accountability*

67. Some respondents argued that young people were mature enough to know right from wrong and to be held accountable as adults for their actions before the age of 25, and that this would be undermined by the proposed guideline.

68. We are not suggesting that young people do not know right from wrong. Rather, they are less likely to be able to control their actions than older people and this can lead to offending behaviour. The guideline does not stop young people from being held accountable. On the contrary, it explicitly states that:

- An appropriate sentence for a young person should give them the opportunity to understand the consequences of their offending behaviour.
- The full range of sentencing options remains open to courts, including custodial sentences.

*Arbitrary age-limit*

69. Although some respondents thought that any age selected would be arbitrary, the Council does not consider that there is any alternative to setting an age limit. As we stated in the consultation paper, we consider it vital that we make it as clear as possible who the guideline applies to. A court needs to be sure whether a guideline applies or does not apply to the case before it. We think that defining a young person by their age is the only practical way of achieving this.

70. **Question 3 sought views from those who disagreed with this on what age they thought the guideline should cease to apply.**

71. As is noted above, some respondents who disagreed with the proposal to define a young person as someone under 25 did so because they felt that a higher age limit

should apply – for example, ages 30 and 35 were suggested. These respondents agreed with the approach being taken in the guideline but felt a higher age limit was supported by the evidence on neurological development. Some also thought it would reflect the ongoing impact of experiences of trauma and adversity in childhood.

72. The most common alternative age thresholds put forward were 16 and 18, each of which were proposed by just over a third of respondents (mainly individuals). We indicated in the public consultation paper that we had ruled out both of these ages, as the existing statutory framework means that a cut-off point at age 21 is, in our view, the only realistic alternative to one at age 25. Most importantly, the characteristics which we think the guideline should take into account – such as risk-taking behaviour, poor decision-making, lack of maturity, and greater capacity for change – extend beyond childhood into young adulthood.
73. Although the guideline will apply to the sentencing of a child under 16 who has committed an offence, we do not think that it should apply only to those under that age. It is unusual for children under 16 who commit offences to be prosecuted at all: most are referred to the Children’s Reporter and dealt with in the children’s hearings system and only 12 under 16s were convicted in a criminal court in 2018-19. In addition, the current statutory framework already makes specific separate provision for those under 21 meaning that the courts already take a significantly different approach to the sentencing of those under 21. These matters did not always appear to be well known among some of the individual respondents to the consultation, and we believe there are opportunities to broaden public knowledge on the justice system and law as it relates to children and young people who offend.

### **What does the Council intend to do?**

74. In response to the points noted above, the Council has agreed to retain the definition of a young person as someone under the age of 25 in the guideline that will be submitted to the High Court. However, the applicability of the guideline will be made clearer by attaching it to a date of a guilty plea or finding of guilt.

## Principles and purposes of sentencing a young person

75. Some overarching themes emerged in responses from those who disagreed in answer to the questions on this section, and the following two sections, of the guideline. These were:
- The relationship between the guideline and the other two general guidelines on the principles and purposes of sentencing and the sentencing process could be clearer, particularly in respect of the other purposes of sentencing aside from rehabilitation.
  - There needed to be greater clarity about how the maturity of a young person and their capacity for change should be determined by the court.
  - Additional factors or information to be taken into account should be included.
  - Some of the language in the guideline lacked precision.
76. After carefully considering how to address these issues, the Council has restructured the guideline and revised the language used.
77. It should therefore be noted that while these issues are threaded through many responses to this and the next two sections of the guideline, they may not be directly addressed in the discussion that follows in order to avoid repeating them.
78. **Question 4 asked respondents if they agreed or disagreed that the relationship between the guideline and the ‘Principles and purposes of sentencing’ guideline is set out clearly.**
79. The majority of organisations agreed the relationship between the guidelines was clear, with some suggesting that the links to the ‘Principles and purposes of sentencing’ and the sentencing process guidelines allowed the sentencing young people guideline to be concise as it did not need to repeat material covered elsewhere. It was also suggested that it was clear that the guidelines formed ‘a clear cohesive framework’ and that this would help consistency in the sentencing of young people.

### *Hierarchy of guidelines*

80. It was suggested that the guideline may be in conflict with the 'Principles and purposes of sentencing' guideline, which requires people to be treated equally and that sentencing decisions should treat similar cases in a similar way. As a result, guidance is required on which guideline should take precedence where the two appear to be in conflict.
81. The Council considers it overly complex to introduce a system of precedence among guidelines. We believe the courts are capable of balancing the various considerations that apply in each case.
82. We consider that it is better to leave it open to courts to decide whether or not it is appropriate to apply each guideline in its entirety when there is more than one applicable guideline. The sentencing process guideline includes a provision to that effect.
83. Furthermore we do not consider the guidelines to be in conflict with one another. On the possibility that this could lead to disparities in treatment for those only slightly on either side of the age 25 threshold, the guideline would be no different from current statutory age limits which can also result in offenders being treated differently despite being close in age, for example, whether someone is sent to a young offenders institution or an adult prison.
84. **Question 5 asked respondents if they agreed or disagreed that paragraph 7 of the guideline gives enough information about the factors that should be taken into account when sentencing a young person.**
85. **Question 6 sought views from those who disagreed at question 5 about what additional information they thought it should provide.**
86. The factors set out in paragraph 7 of the draft guideline were described as comprehensive by a number of organisations and some of them welcomed references

to things they saw as particularly important considerations in the sentencing of young people, such as the mention of the UNCRC. Some individuals also thought the factors included in paragraph 7 gave a good overview of what courts should take into account.

*Additional factors to be taken into account*

87. Both those who agreed and those who disagreed with the content of paragraph 7 suggested that a range of additional factors should also be taken into account in the sentencing of a young person. There was also a suggestion that it might be helpful to list these in detail in an appendix or annex.
88. There were mixed views on whether the guideline should address a young person's education and employment prospects. After giving this careful consideration, we decided not to mention either in the guideline. This decision was informed by the position we took in response to the public consultation on our draft sentencing process guideline, which included employment as a mitigating factor.
89. Some respondents to that consultation felt this was discriminatory, and was likely to operate against those of a lower socio-economic status, who are less likely to be in employment, perhaps through no fault of their own. This might in turn lead to members of this group being sentenced more harshly, thus increasing any marginalisation.
90. We decided to remove this factor from the sentencing process guideline, and we consider that it would be inappropriate to take a different position in respect of the sentencing young people guideline. We do wish to make it clear, however, that there may well be cases in which the education or employment status of a young person, or their willingness to pursue training or educational opportunities, form part of the whole circumstances of a sentencing decision and should quite properly be taken into account in reaching that decision.
91. While many of the other factors suggested for inclusion by respondents were valid, our aim is to produce a guideline which distils the key factors into a concise and accessible document. This does not preclude anything that has not been explicitly mentioned from

being raised in court – indeed, many of the things suggested by respondents are already likely to be presented by defence lawyers or covered in criminal justice social work reports.

92. Key factors will also serve as umbrella terms that will implicitly cover – and guide courts and practitioners towards – more specific issues without running the risk of seeming to downplay the importance of anything that is not mentioned. For example, a reference to mental health covers a range of issues and conditions without the need to mention these explicitly.
93. However, we agree that some additional factors should be added. These will be discussed in relation to question 11 below, which concerns the information which is of most relevance to sentencing a young person.

#### *Structure and terminology*

94. A number of respondents noted that paragraphs 7 and 13 of the draft guideline both required maturity to be taken into account in relation to culpability. Some suggested that the paragraphs should be combined. It is vital to be clear about how we expect courts to assess culpability with regard to maturity so we have restructured these paragraphs to ensure this.
95. It was also clear from some responses that the terminology in this section of the draft guideline could be improved. The section on the ‘Principles of sentencing’ listed maturity, capacity for change, and best interests as “factors” to be taken into account. Some respondents referred to these factors as principles. As the two are not the same, we have adjusted the language to avoid any confusion.
96. **Question 7 asked respondents if they agreed or disagreed that rehabilitation should be given greater emphasis than other purposes of sentencing in the guideline.**



97. **Question 8 was along similar lines and asked if respondents agreed or disagreed that rehabilitation should be a primary consideration when sentencing a young person.**
98. There was near unanimity among organisations in support of the greater emphasis given to rehabilitation than other purposes of sentencing in the draft guideline. As the analysis notes, these respondents thought that this was “(i) consistent with an international human rights framework, and with research that shows the potential for a young person to change their behaviour, (ii) was likely to reduce reoffending, (iii) provided a way to address the young person’s adverse early life experiences, and (iv) was likely to benefit the individual and society as a whole”<sup>28</sup>.
99. There was a general view that while rehabilitation should be an important consideration, it should not be the only purpose considered, particularly in serious cases where protection of the public or punishment may be more important. This has always been the Council’s intention. All of the purposes of sentencing set out in the principles and purposes of sentencing guideline apply to the sentencing of young people; the sentencing young people guideline simply emphasises one of them in order to highlight the ways in which sentencing young people is a different exercise from sentencing an older person.
100. Nevertheless, we accept that a reference to other purposes of sentencing would be helpful to avoid causing any doubt as to whether they are also to be considered.
101. One respondent queried the use of the phrase “a primary consideration”. They asked for clarity about whether the Council intends as a matter of policy that rehabilitation be *the* primary consideration. That is not our policy intention. In our view, it would be overly prescriptive to state that rehabilitation should be *the* primary consideration. This point may have been prompted by the fact that two things are referred to as a primary consideration in the guideline – the best interests of the young person (which replicates the language used in the UNCRC) and rehabilitation. It is possible, however, for more

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<sup>28</sup> See consultation analysis at [paragraph 4.44](#).

than one thing to be a primary consideration so we do not see any need to use the term only once.

102. Despite the reservations expressed by a majority of individuals about this part of the guideline, organisations were strongly supportive with some noting that a majority of the public believe that rehabilitation is the single most important thing Scottish courts should be trying to achieve when sentencing young people, according to a nationally representative study carried out on the Council's behalf by Ipsos MORI<sup>29</sup>.
103. The emphasis placed on rehabilitation in the draft guideline is also a recognition of the fact that some sentences can have a disproportionate impact on younger people compared with older people. Young people are less likely than older people to have stable relationships, secure employment or settled accommodation. This can make it harder for them to move away from offending behaviour after completing some sentences than might be the case for older people sentenced for the same, or a similar offence. By treating rehabilitation as a primary consideration, the guideline will encourage courts, where it is appropriate to do so, to mitigate the disruptive effects of a sentence on a young person, and reduce the likelihood of them reoffending.
104. **Question 9 asked respondents for their views about any other purposes of sentencing that should be emphasised in the guideline.**
105. The main suggestions for other purposes that should be emphasised in the guideline were making amends, public protection, and punishment. These are all mentioned in the principles and purposes of sentencing guideline but we agree that they should also be referred to in the sentencing young people guideline.
106. Two other main suggestions were:

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<sup>29</sup> <https://www.scottishsentencingcouncil.org.uk/media/1996/20190902-public-perceptions-of-sentencing-report.pdf>

- Justice for victims – we consider that this is sufficiently covered by the purpose ‘Giving the offender the opportunity to make amends’ in our ‘Principles and purposes of sentencing’ guideline.
- Restorative justice – as restorative justice does not yet have a formal role in court disposals in Scotland we consider that it is primarily parallel or alternative to the sentencing process rather than an integral part of it. As with justice for victims, we believe that it is sufficiently covered by the ‘Principles and purposes of sentencing’ guideline.

### **What does the Council intend to do?**

107. In response to the points noted above, the guideline has been given a clearer structure that is easier to follow. The guideline submitted to the High Court for approval will:

- Provide more clarity on how the guideline should interact with other guidelines.
- Bring the two central themes of the guideline – maturity and rehabilitation – into much sharper relief by discussing them in a new, separate section.
- Provide clearer guidance on how the assessment of maturity bears on culpability.
- Highlight the other purposes of sentencing in addition to rehabilitation.
- Be more precise in use of language by drawing a clear distinction between principles, purposes and factors to be taken into account.

### **Assessment of seriousness**

108. **Question 10 asked if the section of the draft guideline on the assessment of seriousness was helpful.**

109. Respondents who agreed that this section of the draft guideline was helpful welcomed the fact that it highlighted the fact that courts must take account of the seriousness of an offence. Some thought that the section was clear and understandable and that the link to the sentencing process guideline was a useful way of signposting how culpability and harm were to be evaluated.

110. Some respondents who felt that this section was unhelpful argued that it should be removed. The reasons for this were varied, with some arguing that the assessment of

seriousness is distinct from the issue of culpability and that the age of the young person does not alter the level of seriousness. This part of the guideline relates to our sentencing process guideline, which explains that culpability is an essential feature of the assessment of seriousness. The fact that maturity bears on culpability, and the evidence to support it, is something that we have addressed above.

111. A number of organisational respondents suggested that the assessment of culpability should be addressed at paragraph 7 instead. As previously noted, paragraphs 7 and 13 both required maturity to be taken into account in relation to culpability. We agree that this is confusing and unnecessary and have addressed it by restructuring the guideline.
112. Another argument we accept is that it would be helpful for public understanding if it was stated that the evaluation of harm is unaffected by the age or maturity of the young person. We also agree with suggestions that the language in this section could be made more user-friendly.

### **What does the Council intend to do?**

113. The separate section on the assessment of seriousness has been removed and the issue is now addressed in a new subsection on maturity. This also provides clearer guidance on how, in assessing the seriousness of the offence, maturity bears on culpability.
114. We have also made it clear that the evaluation of the level of harm, including the impact on any victim or victims, is not affected by the guideline's provisions on the age or maturity of the young person.
115. In response to points made about the suitability of some of the language in this section, we have made improvements for better clarity and understanding and to reduce the likelihood of negative connotations, or unhelpful 'labelling'.

### **Identifying the most appropriate sentence**

#### ***Information and advice***

116. **Question 11 asked if respondents agreed or disagreed that paragraph 13 of the guideline identifies the information which is of most relevance to sentencing a young person.**
117. As with the suggestions about additional factors that should be added to paragraph 7 of the guideline, there were many suggestions about additional information to be added to paragraph 13 from those who agreed and those who disagreed (with a quite a number of the latter only having done so because they did not feel the information listed was comprehensive). Again, many of these suggestions were valid, but our intention is only to list the key information.
118. In introducing a clearer structure to the guideline, we realised there is a need to make it clear that the court should also ensure that it has sufficient information to assess the maturity of the young person as well as to identify and impose the most appropriate sentence.
119. As a consequence, from among the many suggestions made by respondents, we decided to add two which are highly relevant to the assessment of maturity: ‘trauma’ and ‘speech, language and communication needs’. To pick up on the point made earlier about umbrella terms, our intention is that the reference to trauma should include within its scope traumatic bereavement and traumatic brain injury (which were both also suggested by respondents, and which have both been shown to be common among young people who commit crimes, as well as factors which can affect brain development), while ‘speech, language and communication needs’ points to a range of issues as well as the requirement to find a way to address them.
120. Adverse childhood experiences, which were previously mentioned in relation to the best interests of the young person at paragraph 7, have been moved so that they are now – more suitably – included in this list as they are relevant to the assessment of maturity. Although there are various definitions of adverse childhood experiences, we decided not to refer to any particular list or suggest any specific examples. We intend that courts should take a broad view of the types of situations or events that can affect a child’s physical and psychological development and that may therefore fall within the

scope of this term, including, for example, bereavement (which is not usually listed among some commonly referred to lists of adverse childhood experiences).

121. One respondent queried use of the term “in care” in the third bullet point of paragraph 13. They noted that this term had passed out of Scottish legislation in 1995, and had been replaced, in the Children (Scotland) Act 1995, with “looked after”. However, another respondent noted that the phrase “care experienced” was now preferred to “looked after”. We considered carefully the most appropriate term to use in the guideline. In the end we felt that the meaning of both “looked after” and “care experienced” may not be particularly clear to members of the public and both would require further explanation, perhaps by way of a footnote.
122. As we prefer to avoid using technical terms wherever possible in order to make our guidelines accessible to those without detailed knowledge of the justice system, we decided that “in care” was the term most likely to be widely understood. In reaching this decision we took account of the fact that the Scottish Government’s definition of the term “care experienced” includes that it “refers to anyone who has been or is currently in care”<sup>30</sup>.
123. **Question 12 asked if respondents agreed or disagreed 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.**
124. Nearly all organisational respondents agreed with this proposal. Reasons given were that it was consistent with the Whole System Approach; it would provide courts with more detailed information about the young person’s background; it would ensure the rights of children under 18 were upheld; and it would help to reduce the likelihood of the young person reoffending if it ultimately resulted in their being taken out of the criminal justice system and into the children’s hearings system instead.

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<sup>30</sup> <https://www.gov.scot/publications/care-experienced-children-and-young-people-fund-operational-guidance/>. A similar definition is given by Who Cares? Scotland on its website: <https://www.whocarescotland.org/what-we-do/participation/>.

125. The consultation analysis notes that some individual respondents appeared not to be aware of the legislative background to this question (and the related question 15 on remitting cases to a children’s hearing for disposal), with some appearing to believe that we were proposing that those aged 18 to 24 should be dealt with by the children’s hearings system rather than the courts. It may therefore assist to explain the legislative background here as it is not straightforward.
126. Seeking the advice of a children’s hearing is mandatory for the court in some cases, and in others legally competent but not obligatory. In summary, the position – which is set out in [section 49 of the Criminal Procedure \(Scotland\) 1995 Act](#)<sup>31</sup>– is that courts *must* refer for advice when the accused is under 18, the subject of a compulsory supervision order, and being prosecuted in the sheriff court. Courts *can* refer for advice when the accused is:
- under 18, the subject of a compulsory supervision order, and being prosecuted in the High Court;
  - under 16 and not the subject of a compulsory supervision order; or
  - aged 16 – 17½, not the subject of a compulsory supervision order, and being prosecuted on summary complaint.
127. In 2020 the Scottish Government held a consultation on a proposal to raise the age of referral to the Principal Reporter on care, protection and offence grounds to include all young people under 18. Amongst other things this would enable the joint reporting to the Crown Office and Procurator Fiscal Service (COPFS) and the Principal Reporter of all cases involving 16 and 17 year olds accused of committing an offence.
128. The Council submitted a response to the consultation in which we noted that this is likely to lead to fewer 16 and 17 year olds being prosecuted in court. Those who are prosecuted will have had their case jointly reported and COPFS will have decided that it is in the public interest to proceed with prosecution.

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<sup>31</sup> The provisions of this section do not apply to “an offence the sentence for which is fixed by law”, of which the most obvious example is murder.

129. The proposal received overwhelming support in the consultation and is likely to be implemented in due course. After careful consideration, we have therefore decided to change the guideline to place less of an expectation on the court to refer cases to a children's hearing for advice.

*Features of an appropriate sentence*

130. **Question 13 asked if respondents agreed or disagreed with the proposed features of an appropriate sentence for a young person set out at paragraph 15 of the guideline.**
131. Organisations and individuals who agreed with the proposed features of an appropriate sentence listed at paragraph 15 thought that they were all important and would contribute to the young person's understanding of the impact of their offending and therefore help to reduce the likelihood of their reoffending. In particular, these respondents welcomed the references to reducing the likelihood of the young person being stigmatised.
132. We broadly agreed with the most common suggested changes to paragraph 15. These were as follows:
- The first bullet point, on increasing the likelihood of aiding reintegration, is unnecessary as it is covered by the final bullet point on assisting and developing positive connections between the young person and society.
  - The second bullet point on reducing the likelihood of unnecessary stigmatisation and / or the young person failing to comply with the sentence should be split into two separate points.
  - The last two bullet points, on addressing the underlying causes of behaviour and assisting in developing or maintaining positive connections between the young person and society, should be moved to become the first two, which would put a greater emphasis on rehabilitation.
  - The term 'reintegration into society' assumes that the young person is excluded from society – which may not be the case. Some respondents suggested that this



phrase should be dropped entirely, preferring to continue use of the term 'rehabilitation'.

133. We decided to adopt most of these and have made some further changes to this section to improve its readability. In doing so we have changed the emphasis from being on the *features* of an appropriate sentence to the process of *selecting* an appropriate sentence. This means that while we have not specifically changed the order of the list of features as suggested, the redrafting makes the process of selecting them more logical.
134. An important aspect of this part of the guideline is that it is attempting to fulfil a difficult task, which is one of proportionality. The guideline applies to the full range of offences, from relatively straightforward speeding offences where a fine might be imposed without the offender needing to be present in court, to murder. In setting out features of an appropriate sentence, the guideline has to strike a balance. Some sentences may involve all of the features, some perhaps only one or two.
135. This is also the reason why the guideline says that the court should explain the sentence to the young person where it "considers it appropriate to do so" – it would be a disproportionate use of court time to require this in the example of the speeding case mentioned, where the offender might not be personally present at sentencing.
136. We have also decided to strengthen the provision on fixing review hearings. Where a court imposes a community payback order (or certain other orders, such as a drug treatment and testing order) it can fix periodic review hearings to get an update on how the offender is complying with the order. In the draft guideline consulted on we said that courts should consider fixing review hearings in appropriate cases. This has been strengthened to say that where the court considers it appropriate to do so in order to support compliance with the sentence, it should fix review hearings to monitor the young person's progress. We believe that this will encourage more review hearings to be fixed in appropriate cases, and help to reduce the number of young people who fail to comply with community disposals such as community payback orders.

*Sentencing range*

137. **Question 14 asked if respondents agreed or disagreed that the approach to the range of sentencing options and use of custodial sentences set out in paragraphs 17 and 18 of the guideline is appropriate.**
138. A large majority of organisations and just under a third of individuals indicated agreement with the approach set out in paragraphs 17 and 18 of the draft guideline. They welcomed the approach for its recognition that the factors which contribute to offending in young people require a different response in terms of sentencing. It was also suggested that the approach was consistent with recent appeal court decisions, reflected the statutory arrangements already in place for those under 21, and provided clarity on the issue of custodial sentences. Overall it represented a positive and appropriate approach to sentencing.
139. One respondent queried the statement in paragraph 17 of the draft guideline 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. It was suggested that this paragraph should instead state that the length of a sentence imposed on a young person should be shorter (as paragraph 18 says in respect of a custodial sentence).
140. Paragraph 17 was formulated in these terms to acknowledge that a community sentence for a young person could, in some circumstances, be more effective in achieving the aim of rehabilitation if it involves more onerous conditions, or is *longer*, than an order imposed on an older person for a similar offence. The point here is that a non-custodial sentence should be individualised to the young person and their circumstances as appropriate.
141. A number of respondents highlighted what they felt to be the lack of discretion afforded to the court by both paragraphs, particularly paragraph 18. One respondent said that the effect of the guideline would be that a 24 year old who may present as relatively

mature “should” receive a shorter custodial sentence than, for example, his 28 year old work colleague co-accused.

142. It is important to note in respect of each of these issues that the guideline affords sentencers the discretion to select the most appropriate sentence having regard to the particular facts and unique circumstances of the individual case before them.

143. **Question 15 asked if respondents agreed or disagreed that judges should consider remitting each case to a children’s hearing for disposal, where it is competent to do so.**

144. While organisations were unanimously in favour of this proposal, the consultation analysis notes that some individuals who were opposed to it had misunderstood the question and did not realise that the provision would relate specifically to young people under 18. These responses should be treated with caution, as they may have been different had individuals concerned fully understood what was being proposed.

145. As a result of this, we have not made any change to this paragraph of the guideline.

### **What does the Council intend to do?**

146. In response to the points noted above, the guideline submitted to the High Court for approval will:

- Make it clear that the court should ensure that it has sufficient information to assess the maturity of the young person.
- Refer to trauma and speech, language, and communication needs.
- Say that courts must consider referring cases to a children’s hearing for advice where it is competent to do so, rather than that they should do so.
- Provide greater clarity on the selection and features of an appropriate sentence.
- Encourage courts to fix review hearings where they consider it appropriate to do so in order to support compliance with the sentence.

## Potential impacts of the guideline

147. Questions 16-21 sought views on the likely impact of the guideline, including in relation to potential costs and benefits. Due to the overlapping nature of the views expressed, questions 16-18 and 19-21 can be grouped together.
148. **Question 16 asked respondents if they thought the guideline would influence sentencing practice in Scotland.**
149. **Question 17 asked respondents if they agreed or disagreed that the guideline would increase public understanding of how sentencing decisions in respect of young people are made.**
150. **Question 18 asked respondents if they agreed or disagreed that the guideline would increase public confidence in the sentencing of young people.**
151. Most organisations – and some individuals – felt that the guideline would have a positive influence on sentencing practice and would also increase understanding of, and confidence in, the sentencing of young people. The main reasons given for this were that the guideline would:
- Lead to greater transparency and consistency in sentencing decisions.
  - Encourage a welfare-based approach which would deliver better outcomes for individuals and society.
  - Increase awareness of the issues affecting young people in the criminal justice system.
  - Help to change public perceptions.
152. However, many of these respondents also felt that the guideline alone would not achieve these goals. They highlighted a number of important steps that they felt were necessary for it to have the desired effects:
- Suitable training and guidance for the judiciary and others who deal with young people in the criminal justice system.

- Adequate resourcing and consistent provision of community-based disposals, including rehabilitation programmes and support services for young people.
- Active promotion of the guideline by the Council and other bodies.
- Engagement and activities aimed at educating the public contributing to offending behaviour among young people.

153. In contrast, most individuals felt that the guideline would have a negative impact on sentencing practice and public understanding and confidence. The main reasons given for this were that it would encourage lenient sentencing, result in courts taking less account of the impact on victims, lead to more offending and reoffending, and cause discontent with sentencing and a loss of trust in the justice system.

154. While the Council understands the concerns that some individuals may have about the potential impact of the guideline, we believe that it will encourage fair and proportionate sentencing rather than leniency and will reduce, rather than increase, offending or reoffending. The principles and purposes of sentencing guideline requires the impact on the victim to be considered in all cases. Consideration of the impact on victims is also an important part of the assessment of seriousness in the sentencing process guideline. The sentencing young people guideline does not affect this.

155. **Question 19 asked respondents if they agreed or disagreed with the assessment of the specific, identified impacts the guideline is expected to have.**

156. **Question 20 asked respondents what benefits they thought will come from the introduction of the guideline, if any.**

157. **Question 21 asked respondents what costs (financial or otherwise) they thought would come from the introduction of the guideline, if any.**

158. Most organisations agreed with the potential impacts set out in the draft impact assessment, with some commenting that they found it to be a clear and comprehensive document with well-founded conclusions. In contrast, most individuals disagreed with

the assessment of the guideline's expected impacts and felt it was unbalanced and subjective.

159. Some organisations felt the impact assessment implied that the guideline would have a limited impact on sentencing decisions because it reflected existing practice. Others felt that the impact on social work services may have been underestimated, although, as the analysis notes, it was acknowledged that the costs and benefits associated with the guideline were difficult to predict and quantify. The availability and resourcing of rehabilitation services for offenders was also highlighted as a concern by some.
160. Organisations highlighted a number of benefits they thought would or could come from the introduction of the guideline. These were broadly the same points as are mentioned at paragraph 151 of this report, but reduced rates of offending and longer term cost savings for the justice system and other public services were also mentioned as clear benefits.
161. Most individuals felt that there would be no benefits from the introduction of the guideline, other than for offenders – who they suggested would be sentenced more leniently – or professionals, such as lawyers, who might gain from an increase in offending. Individuals were more likely to focus on what they perceived to be the costs of the guideline both in terms of additional financial costs for the justice system and costs for society resulting from increased offending by young people.
162. In contrast, many organisations felt that the costs required to ensure successful implementation of the guideline (including, among other things, training and the adequate provision of community-based disposals and support services) were necessary and would be offset by savings elsewhere in the justice system resulting from fewer custodial sentences and reduced reoffending.

### **What does the Council intend to do?**

163. As already indicated, the Council is mindful of its statutory objective to promote greater awareness and understanding of sentencing policy and practice. We will consider

further activity and engagement with others to help increase public knowledge about how young people are sentenced in this area. In particular, we will seek to raise awareness of how younger people are currently dealt with in the criminal justice system and to promote a better understanding of the reasons for offending in young people and the role of sentencing in addressing these. We will liaise with other bodies regarding training, resourcing, and promotion of the guideline as appropriate.

164. In relation to the impacts of the guideline we have considered the range of views provided and, where appropriate, have incorporated these into the final impact assessment for this guideline.

### **Further comments**

165. Question 22 was the last question in the consultation paper. It was an open question which invited respondents to make any other comments about matters arising from the consultation. A range of points and suggestions were made. Most of these have either been addressed elsewhere in this report (such as a call for greater use of restorative justice) or are outwith the Council's remit (such as a suggestion that the upper age threshold for young offenders institutions should be raised to keep young people out of the adult prison system).

## Part 2: Next steps

### Submission of guideline for approval

166. Sentencing guidelines developed by the Council must be approved by the High Court of Justiciary before they apply to decisions about sentencing. The High Court has the power to approve or reject a guideline, or to approve it with modifications.<sup>32</sup>

167. The Council finalised the ‘Sentencing young people’ guideline at its meeting in June 2021 and agreed to submit this to the High Court for approval as soon as is practicable.

### Entry into force

168. Should the guideline be approved (either as submitted or with modifications), it will likely come into force later in 2021, though this is a matter for the High Court to determine. We intend to work with the judiciary ahead of this to ensure they are familiar with the guideline and its applicability, as well as carrying out further public education and awareness raising work.

169. Further details about this guideline will be made available on the Council’s website at [www.scottishsentencingcouncil.org.uk](http://www.scottishsentencingcouncil.org.uk) in due course.

### Future guidelines and engagement with Council

170. The Council has committed to consulting publicly on all of its draft guidelines. Future consultations will be available on the Council’s website.

171. We welcome views from all interested parties on our draft guidelines, business plan, or sentencing in general. If you wish to get in touch with the Council, you can do so at: <https://www.scottishsentencingcouncil.org.uk/contact-us/>

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<sup>32</sup> See section 5 of the Criminal Justice and Licensing (Scotland) Act 2010 (<http://www.legislation.gov.uk/asp/2010/13/section/5>)



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