

## Chapter 15 (Sentencing young offenders): Update

### 15.1 Sentencing young offenders

A new sentencing guideline on Sentencing Children and Young People came into effect on 1 June 2017. This guideline includes 'Overarching Principles', as well as offence-specific guidelines for sexual offences and robbery. The Overarching Principles begin by considering the general approach to be taken to sentencing young offenders.

Where the offender is under the age of 18 at the date of the finding of guilt, the court must have regard to (a) the principal aim of the youth justice system, namely to prevent offending by children and young people (s 37(1) of the Crime and Disorder Act 1998); and (b) the welfare of the child or young person (s 44(1) of the Children and Young Persons Act 1933).

Paragraph 1.2 says that, although the seriousness of the offence will be the starting point, the approach to sentencing should be:

individualistic and focused on the child or young person, as opposed to offence focused. For a child or young person the sentence should focus on rehabilitation where possible. A court should also consider the effect the sentence is likely to have on the child or young person (both positive and negative) as well as any underlying factors contributing to the offending behaviour.

A custodial sentence should always be a measure of last resort for children and young people (para 1.3).

Paragraph 1.4 makes the point that:

It is important to avoid 'criminalising' children and young people unnecessarily; the primary purpose of the youth justice system is to encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish. Restorative justice disposals may be of particular value for children and young people as they can encourage them to take responsibility for their actions and understand the impact their offence may have had on others.

Paragraph 1.5 discusses factors that may diminish the culpability of a child or young person. The fact that they are not fully developed and have not attained full maturity can "impact on their decision making and risk taking behaviour":

It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater).

It follows that children and young people should, if possible, "be given the opportunity to learn from their mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the child or young person and hinder their re-integration into society" (para 1.6).

Paragraph 1.7 adds that offending by a child or young person “is often a phase which passes fairly rapidly”, and so the sentence should not result in their alienation from society if that can be avoided.

Moreover, the impact of punishment is likely to be felt more heavily by a child or young person in comparison to an adult as any sentence will seem longer due to their young age (para 1.8).

Paragraph 1.10 notes that s 142A of the Criminal Justice Act 2003, which sets out the purposes of sentencing for children and young people, has not been brought into force. The difference between s 142 (sentencing adults) and s 142A (young offenders) is that s 142A does not include as a purpose of sentencing ‘the reduction of crime (including its reduction by deterrence)’. Unless and until s 142A is implemented, “deterrence can be a factor in sentencing children and young people although normally it should be restricted to serious offences and can, and often will, be outweighed by considerations of the child or young person’s welfare”.

Paragraph 1.12 addresses the duty to have regard to the welfare of the child or young person. A court should ensure that it is alert to:

- any mental health problems or learning difficulties/disabilities;
- any experiences of brain injury or traumatic life experience (including exposure to drug and alcohol abuse) and the developmental impact this may have had;
- any speech and language difficulties and the effect this may have on the ability of the child or young person (or any accompanying adult) to communicate with the court,
- to understand the sanction imposed or to fulfil the obligations resulting from that sanction; • the vulnerability of children and young people to self-harm, particularly within a custodial environment; and
- the effect on children and young people of experiences of loss and neglect and/or abuse.

Paragraph 1.13 notes a number of other factors that are commonly encountered in the case of young offenders: “deprived homes, poor parental employment records, low educational attainment, early experience of offending by other family members, experience of abuse and/or neglect, negative influences from peer associates and the misuse of drugs and/or alcohol”. The court should therefore always seek to ensure that it has access to information about how best to identify and respond to these factors (para 1.14). The court should also consider the reasons why, on some occasions, “a child or young person may conduct themselves inappropriately in court (e.g. due to nervousness, a lack of understanding of the system, a belief that they will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc.) and take this into account” (para 1.15).

Paragraph 1.16 refers to evidence shows that looked after children and young people are over-represented in the criminal justice system, and say that, when dealing with a child or young person who is ‘looked after’, the court should also bear in mind the additional complex vulnerabilities that are likely to be present in their background.

Paragraph 1.18 goes to say that there is also evidence to suggest that black and minority ethnic children and young people are over-represented in the youth justice system. One factor “is that a significant proportion of looked after children and young people are from a black and minority ethnic background”. A further factor “may be the experience of such children and young people in terms of discrimination and negative experiences of authority”. The particular factors which arise in the case of black and minority ethnic children and young people need to be taken into account by sentencers.

Paragraph 1.20 adds that, when considering a child or young person who may be particularly vulnerable, “sentencers should consider which available disposal is best able to support the child or young person and which disposals could potentially exacerbate any underlying issues”. This is particularly important when considering custodial sentences as “there are concerns about the effect on vulnerable children and young people of being in closed conditions, with significant risks of self-harm, including suicide”.

This section of the guideline concludes with the point that the “vulnerability factors that are often present in the background of children and young people should also be considered in light of the offending behaviour itself”. Although they do not alone *cause* offending behaviour (many children and young people who have experienced these circumstances do not commit crime), “there is a correlation and any response to criminal activity amongst children and young people will need to recognise the presence of such factors in order to be effective” (para 1.21). However, these general principles “do not undermine the fact that the sentence should reflect the seriousness of the offence”.

Section 4 of the guideline considers the determination of the sentence for a child or young person. Paragraph 4.3 emphasises that the “approach to sentencing children and young people should always be individualistic and the court should always have in mind the principal aims of the youth justice system”.

Paragraph 4.5 of the guideline addresses culpability:

In assessing culpability the court will wish to consider the extent to which the offence was planned, the role of the child or young person (if the offence was committed as part of a group), the level of force that was used in the commission of the offence and the awareness that the child or young person had of their actions and its possible consequences. There is an expectation that in general a child or young person will be dealt with less severely than an adult offender. In part, this is because children and young people are unlikely to have the same experience and capacity as an adult to understand the effect of their actions on other people or to appreciate the pain and distress caused and because a child or young person may be less able to resist temptation, especially where peer pressure is exerted. Children and young people are inherently more vulnerable than adults due to their age and the court will need to consider any mental health problems and/or learning disabilities they may have, as well as their emotional and developmental age. Any external factors that may have affected the child or young person’s behaviour should be taken into account.

So far as the age of the offender is concerned, para 4.9 makes the point that, even within the category of child or young person, “the response of a court to an offence is likely to be very different depending on whether the child or young person is at the lower end of the age bracket, in the middle or towards the top end”. Paragraph 4.10 makes the point that it is not just the person’s actual age that matters:

Although chronological age dictates in some instances what sentence can be imposed (see section six for more information) the developmental and emotional age of the child or young person should always be considered and it is of at least equal importance as their chronological age. It is important to consider whether the child or young person has the necessary maturity to appreciate fully the consequences of their conduct, the extent to which the child or young person has been acting on an impulsive basis and whether their conduct has been affected by inexperience, emotional volatility or negative influences.

### **15.2.1 Detention and Training Orders (DTOs)**

Section 106B of the Powers of Criminal Courts (Sentencing) Act 2000 applies where the offender is aged 18 or over at the halfway point of their DTO, and the DTO is of less than 24

months. It makes provision for a further period of supervision after end of term of DTO. Under s 106B(3), the supervision period for such an offender begins at the end of their DTO and ends 12 months after the halfway point of the detention and training order. So, for example, an offender serving a DTO of 10 months would spend half of the sentence (i.e. 5 months) in custody and half under supervision; they will now have an additional supervision period (to start once the DTO comes to an end) of 7 months.

The Sentencing Council guideline on sentencing children and young persons emphasises (at para 6.42) that, under both domestic and international law, a custodial sentence must only be imposed as a 'measure of last resort'. If a custodial sentence is imposed, a court must state its reasons for being satisfied that the offence is so serious that no other sanction would be appropriate "and, in particular, why a YRO with intensive supervision and surveillance or fostering could not be justified".

Given the minimum term of a DTO, any case that warrants a DTO of less than four months must result in a non-custodial sentence (para 6.43).

Apart from the guidelines on sexual offences and robbery, there are no offence-specific guidelines for young offenders. Courts therefore have to use the adult guidelines as a starting point. Paragraph 6.46 of the guideline says:

When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.

However, para 6.47 makes it clear that this is just a starting point:

The individual factors relating to the offence and the child or young person are of the greatest importance and may present good reason to impose a sentence outside of this range. The court should bear in mind the negative effects a short custodial sentence can have; short sentences disrupt education and/or training and family relationships and support which are crucial stabilising factors to prevent re-offending.

Paragraphs 6.48 and 6.49 emphasise the caution that must be exercised by the court before imposing a custodial sentence and, if one has to be imposed, determining its length:

There is an expectation that custodial sentences will be particularly rare for a child or young person aged 14 or under. If custody is imposed, it should be for a shorter length of time than that which a young person aged 15 – 17 would receive if found guilty of the same offence. For a child or young person aged 14 or under the sentence should normally be imposed in a youth court (except in cases of homicide or when the dangerous offender criteria are met).

The welfare of the child or young person must be considered when imposing any sentence but is especially important when a custodial sentence is being considered. A custodial sentence could have a significant effect on the prospects and opportunities of the child or young person and a child or young person is likely to be more susceptible than an adult to the contaminating influences that can be expected within a custodial setting. There is a high reconviction rate for children and young people that have had custodial sentences and there have been many studies profiling the effect on vulnerable children and young people, particularly the risk of self-harm and suicide and so it is of utmost importance that custody is a last resort.

## Persistent offenders

A DTO is not available in the case of defendants aged 12-14 at the date of conviction unless they are persistent offenders. The term persistent offender is not defined in the statute. Paragraph 6.5 of the Sentencing Council guideline on sentencing children and young persons says that, in general, "it is expected that the child or young person would have had previous contact with authority as a result of criminal behaviour. This includes previous findings of guilt as well as admissions of guilt such as restorative justice disposals and conditional cautions". Paragraph 6.6 goes on to say that:

A child or young person who has committed one previous offence cannot reasonably be classed as a persistent offender, and a child or young person who has committed two or more previous offences should not necessarily be assumed to be one. To determine if the behaviour is persistent the nature of the previous offences and the lapse of time between the offences would need to be considered.

Paragraph 6.7 goes on:

If there have been three findings of guilt in the past 12 months for imprisonable offences of a comparable nature (or the child or young person has been made the subject of orders as detailed above in relation to an imprisonable offence) then the court could certainly justify classing the child or young person as a persistent offender.

It is possible for someone to be regarded as a persistent offender because of the number of offences being dealt with on that occasion. Paragraph 6.8 says:

When a child or young person is being sentenced in a single appearance for a series of separate, comparable offences committed over a short space of time then the court could justifiably consider the child or young person to be a persistent offender, despite the fact that there may be no previous findings of guilt. In these cases the court should consider whether the child or young person has had prior opportunity to address their offending behaviour before imposing one of the optional sentences available for persistent offenders only; if the court determines that the child or young person has not had an opportunity to address their behaviour and believes that an alternative sentence has a reasonable prospect of preventing re-offending then this alternative sentence should be imposed.

Paragraph 6.9 encourages sentencers to look for signs of improvement in the offender's behaviour:

The court may also wish to consider any evidence of a reduction in the level of offending when taking into account previous offending behaviour. Children and young people may be unlikely to desist from committing crime in a clear cut manner but there may be changes in patterns of criminal behaviour (e.g. committing fewer and/or less serious offences or there being longer lengths of time between offences) that indicate that the child or young person is attempting to desist from crime.

Paragraph 6.10 makes the important point that, even where a child or young person is found to be a persistent offender, "a court is not obliged to impose one of the optional sentences. The approach should still be individualistic and all other considerations still apply. Custodial sentences must be a last resort for all children and young people and there is an expectation that they will be particularly rare for children and young people aged 14 or under".

## Reduction in sentence for pleading guilty

The Sentencing Council guideline on sentencing children and young persons applies the same approach to reduction in sentence for a guilty plea to young offenders as applies to adult offenders. However, para 5.9 notes that a DTO can only be imposed for the periods prescribed (4, 6, 8, 10, 12, 18 or 24 months). If the reduction in sentence for a guilty plea results in a sentence that falls between two prescribed periods, “the court must impose the lesser of those two periods. This may result in a reduction greater than a third, in order that the full reduction is given and a lawful sentence imposed”.

## 15.6 Youth rehabilitation orders (YROs)

The Sentencing Council guideline on sentencing children and young persons (at para 6.28) says that:

When determining the nature and extent of the requirements the court should primarily consider the likelihood of the child or young person re-offending and the risk of the child or young person causing serious harm. A higher risk of re-offending does not in itself justify a greater restriction on liberty than is warranted by the seriousness of the offence; any requirements should still be commensurate with the seriousness of the offence and regard must still be had for the welfare of the child or young person.

Paragraph 6.30 states that, if a child or young person is assessed as presenting a high risk of re-offending or of causing serious harm but the offence that was committed is of relatively low seriousness, “the appropriate requirements are likely to be primarily rehabilitative or for the protection of the public”. Paragraph 6.31 goes on to say that “if a child or young person is assessed as presenting a low risk of re-offending or of causing serious harm but the offence was of relatively high seriousness then the appropriate requirements are likely to be primarily punitive”.

Paragraph 6.32 notes that an intensive supervision and surveillance requirement and a fostering requirement are both “community alternatives to custody”. Unlike the other requirements under a YRO, “the offence must be punishable by imprisonment, cross the custody threshold and a custodial sentence must be merited before one of these requirements can be imposed” (para 6.33). An order of this nature may only be imposed on a child or young person aged below 15 (at the time of the finding of guilt) if they are a persistent offender (para 6.34).

Paragraph 6.41 states that it is ‘unlikely’ that the statutory criteria for the imposition of a fostering requirement ‘will be met in many cases’; where they are met and the court is considering making an order, “care should be taken to ensure that there is a well developed plan for the care and support of the child or young person throughout the period of the order and following conclusion of the order”.

## 15.8 Referral orders

Section 43 of the Criminal Justice and Courts Act 2015 amends sch. 1 to the PCC(S)A 2000 so that, where a young offender has been referred back to the youth court, and it is proved to the satisfaction of the court that the offender has failed, without reasonable excuse, to comply with the terms of the referral order contract, the court may (if it does not revoke the order) order the offender to pay a fine of an amount not exceeding £2,500, or may extend the length of the period for which the contract has effect (but not so as to extend that period so that it becomes longer than 12 months).

The Sentencing Council guideline on sentencing children and young persons makes the point (at para 5.15) that, because a referral order is only available upon pleading guilty, there should be no further reduction of the sentence to reflect a guilty plea.

The guideline (at para 6.20) goes on to note that (whereas a referral order is mandatory in a youth court or magistrates' court for most children and young people who have committed an offence for the first time and have pleaded guilty to an imprisonable offence, unless the court deems a custodial sentence, an absolute or conditional discharge or a hospital order to be more appropriate), a discretionary referral order can also be imposed for any offence where there has been a plea of guilty regardless of previous offending history. The guidelines says that it should be remembered that referral order "are not community orders and in general terms may be regarded as orders which fall between community disposals and fines. However, bearing in mind that the principal aim of the youth justice system is to prevent children and young people offending, second or subsequent referral orders should be considered where:

- (a) the offence is not serious enough for a YRO but the child or young person does appear to require some intervention, OR
- (b) the offence is serious enough for a YRO but it is felt that a referral order would be the best way to prevent further offending (as an example, this may be because the child or young person has responded well in the past to such an order and the offence now before the court is dissimilar to that for which a referral order was previously imposed).

The guideline observes that referral orders "are the main sentence for delivering restorative justice" and that "they can be an effective sentence in encouraging children and young people to take responsibility for their actions and understand the effect their offence may have had on their victim".

Paragraph 6.21 deals with cases that at or very close to the custody threshold:

In cases where children or young people have offended for the first time and have pleaded guilty to committing an offence which is on the cusp of the custody threshold, YOTs should be encouraged to convene a Youth Offender Panel prior to sentence (sometimes referred to as a "pseudo-panel" or "pre-panel") where the child or young person is asked to attend before a panel and agree an intensive contract. If that contract is placed before the sentencing youth court, the court can then decide whether it is sufficient to move below custody on this occasion. The proposed contract is not something the court can alter in any way; the court will still have to make a decision between referral order and custody but can do so on the basis that if it makes a referral order it can have confidence in what that will entail in the particular case.

### **15.11 Bind over: parental recognisance**

The Sentencing Council guideline on sentencing children and young persons notes (para 3.3) that, if the child or young person is aged under 16, the court has a duty to make a parental bind over or impose a parenting order, if it would be desirable in the interest of preventing the commission of further offences. The guideline states that, if the court chooses not to impose a parental bind over or parenting order it must state its reasons for not doing so in open court, and adds that, in "most circumstances a parenting order is likely to be more appropriate than a parental bind over".

Paragraph 3.4 goes on to note that a court cannot make a bind over alongside a referral order. If the court makes a referral order, the duty on the court to impose a parenting order in respect of a child or young person under 16 years old is replaced by a discretion.

### **15.12 Relevant age for determining age of offender**

The Sentencing Council guideline on sentencing children and young persons notes (at para 6.1) that there will be “occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old)”. Paragraph 6.2 says that, in such situations, “the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed”. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence, but when this occurs the statutory purpose of sentencing adult offenders (s 142 of the Criminal Justice Act 2003) has to be taken into account.

Paragraph 6.3 states that, when any significant age threshold is passed, “it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate”.