



Standing Committee for Youth Justice

## **The Standing Committee for Youth Justice Submission to the Sentencing Council – Sentencing Youths – Overarching Principles and Offence-Specific Guidelines for Sexual Offences and Robbery – Consultation**

### **Overarching principles**

Q.1. Do you agree with the general principles for sentencing youths? Are there any additional principles that should be added?

SCYJ is pleased to see the acknowledgement of children’s lack of maturity and comprehension, and the focus on de-criminalisation and rehabilitation.

1.2 – Whilst we welcome the emphasis on the individual child when determining sentence, we are concerned that the overarching principles do not sufficiently recognise the importance of parity, fairness and proportionality in sentencing. In order to ensure parity and avoid the mis-use of discretion, SCYJ believes that sentencing should always be proportionate to the offence as well as the offender.<sup>1</sup> SCYJ also recommends that the guidelines be amended so that courts are required to take account of the *negative* effects of the sentence (rather than just ‘effects’ of the sentence) to avoid the possibility of a court imposing a more severe sentence/less proportionate sentence if it thinks it will be ‘good’ for the child.

1.3 – SCYJ would welcome the use of the term ‘reintegration’ rather than ‘rehabilitation’ to better reflect the language of the UNCRC.<sup>2</sup>

1.9 - We remain concerned about the value of deterrence as a consideration in sentencing decisions. There is little evidence to show that sentences imposed for the

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<sup>1</sup> UNCRC article 40.3.b requires that children in trouble with the law should have measures for dealing with them "without resorting to judicial proceedings". In other words, children should not be unnecessarily criminalised. Beijing Rules 5.1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

<sup>2</sup> UNCRC, General Comment, paragraph 71 “In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration”.





## Standing Committee for Youth Justice

purpose of deterrence have any impact either on the specific child or on others (while desistance is regarded as a far more effective approach).<sup>3</sup> The other principles seem to clearly indicate that children frequently do not fully understand the impact of their actions, or have the ability to foresee the consequences. If this premise is accepted in principles 1.3 to 1.6 it is difficult to see the logic for inclusion of deterrence as a determinate.

SCYJ points out that although s142A of the Criminal Justice Act 2003 – which would dis-apply deterrence to children – has not been implemented, it does not, as the draft guidance suggests, mean that deterrence should be one of the principles that applies (in the same way that the guidance does not suggest that the following principles which would have been introduced by the section - the punishment of offenders; the reform and rehabilitation of offenders; the protection of the public, and making of reparation by offenders to persons affected by their offences – do not apply just because the section was not implemented).

Consideration should be given to UNCRC, General Comment No 10, which notes that ‘The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety’.

1.8 – Paragraph 1.8 as currently drafted is ambiguous. The term ‘restriction of liberty’ could refer to custodial sentences only or it could also capture other sentences that restrict, but do not deprive entirely, a child of his or her liberty (for example the use of tagging or curfew). If it is intended to include or apply only to custodial sentences, this should be made clear. Further, SCYJ believes that imposing a custodial sentence on a child should only be a consideration in the most serious offences and where there is a demonstrable and substantial risk if the child is not detained.<sup>4</sup> We recommend that the overarching principles and this paragraph in particular include this commitment by specifying (as they do later in the guidance) that where a custodial sentence is imposed and a child is deprived of his or her liberty this should only be as a ‘last resort’ and for the minimum period necessary (in

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<sup>3</sup> Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court Chaired by Lord Carlile of Berriew CBE QC

<sup>4</sup> Article 37 UNCRC





## Standing Committee for Youth Justice

line with the UNCRC).<sup>5</sup> SCYJ also suggests that the principles reiterate here the language used earlier, that a custodial sentence should be proportionate to the offence and to the offender.

SCYJ notes that much of the detail around sentencing thresholds from the original sentencing guide is missing from the new draft, particularly around custody.

Q.2. Do you agree with the factors that should be taken into account when considering the welfare of a young person? Are there any additional factors which should be included?

1.10 – A child’s welfare has to be taken into account by the sentencing court according to the 1933 Children and Young Persons Act, and under the UN Convention the child’s best interest must be a primary consideration. However, there is a real risk that sentencing decisions may be made with the best intentions which result in loss of liberty when the offence/s alone may not otherwise warrant this, because sentencers believe they are acting to address issues of housing, education etc.<sup>6</sup> There is some evidence that this unintended consequence occurred after the establishment of Secure Training Centres. In light of this, and the Secure Schools proposals emerging from the Taylor Review of Youth Justice, SCYJ suggests that, in order to ensure that no child is sentenced to custody due to welfare reasons, the following be deleted from the guidelines: “to remove the young person from undesirable surroundings where appropriate”.

Where there are serious concerns about a child’s welfare SCYJ would prefer to see a measure that enables the Youth Court to make a direct referral to the local authority for investigation of their concerns and an assessment of the child’s needs, as recommended by the Centre for Social Justice.<sup>7</sup> Because the measure for direct reference to the family court is not currently law, the Carlile report<sup>8</sup> recommended the use of section 37 of the Children Act to achieve this. Currently section 9 of the

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<sup>5</sup> Article 37 UNCRC

<sup>6</sup> This is a particular risk with the use of Asset plus that PSRs will unearth a range of welfare needs that may lead courts to sentence to welfare, forgetting the seriousness of the offence and proportionality

<sup>7</sup> Rules of Engagement. Centre for Social Justice. London. January 2012.

<sup>8</sup>[http://www.ncb.org.uk/media/1148432/independent\\_parliamentarians\\_\\_inquiry\\_into\\_the\\_operation\\_and\\_effectiveness\\_of\\_the\\_youth\\_court.pdf](http://www.ncb.org.uk/media/1148432/independent_parliamentarians__inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf)





## Standing Committee for Youth Justice

CYPA 1969 in being used in some areas (Northampton for example) to request reports from children's services.

1.11 – SCYJ welcomes the inclusion of speech and language difficulties as a factor to be taken into consideration. A Justice Select Committee report on youth justice highlighted this as a key difficulty in children fully participating in the court and sentencing process.<sup>9</sup>

1.13 – SCYJ shares the concerns about the overrepresentation in the criminal justice system of looked after children and therefore welcomes this principle. We would like to see explicit reference to the CPS guidelines regarding 'domestic' offences committed in the care placement, and encouragement to sentencers to refer back to the CPS if they feel the offence/s could have been dealt with by other measures. An independent review by Lord Laming into how the life chances of children in care can be transformed by protecting them from unnecessary involvement in the criminal justice system covers this issue comprehensively.<sup>10</sup>

Q.3 Are you confident that the guidance on grave crimes clearly and accurately reflects the relevant legislation and case law? If you disagree please state why.

SCYJ agrees that this section reflects current law, we would like to stress that the expectation is that the majority of cases where the defendant is a child can and should be dealt with in the Youth Court. A recent Law Commission report highlighted the inadequacies in the functioning and decision making of children and the high incidence of learning difficulties and mental health issues among children in the criminal justice system.<sup>11</sup> We remain concerned that despite the factors included as mitigation, the current law does not allow for 'unfitness to plead' in the youth court notwithstanding the seriousness of some offences dealt with there.

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<sup>9</sup> Justice Select Committee. Youth Justice. House of Commons 2013

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/339/339.pdf>

<sup>10</sup>In Care, Out of Trouble

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/In%20care%20out%20of%20trouble%20summary.pdf>

<sup>11</sup>Law Commission. Unfitness to plead. London 2016

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/339/339.pdf>





## Standing Committee for Youth Justice

Q.4. Does the allocation section include all the necessary considerations? Do you have any general observations on this section?

2.15 – SCYJ would like to see a greater emphasis on remittal back to the youth court for sentencing when there has been a finding of guilt in the crown court. We believe that a sentence be imposed by the crown court only where this is a statutory requirement.

Q.6 Do you agree with the approach taken to the assessment of seriousness? Is the approach useful and does it provide you with greater structure when assessing seriousness?

The overall approach to assessing seriousness would appear to be balanced, however SCYJ is concerned about the quality of information the court may receive in order to make their judgements. Some of the factors, both aggravating and mitigating can be subjective, e.g. 'good character'. SCYJ would be interested to know what consultation there has been, or will be, with the Youth Justice Board (YJB) in order to ensure an alignment with the information needed by sentencers and the current model used by Youth Offending Teams for their assessments for Pre- Sentence Reports (PSR).

Q.8. Do you agree with the Council's approach to 'persistent offenders'? If you disagree please give your reasons why.

SCYJ remains concerned about the definition of persistency which, despite this proposed guidance, is open to a wider interpretation.

5.9 - Where a child has no previous findings of guilt, and the nature of the three or more offences is minor, SCYJ does not think that the child should be sentenced in line with the persistency principle. Furthermore, SCYJ proposes that no pre-court findings of guilt should count towards persistence. This does not appear to be consistent with previous proposed guidelines which emphasises the need to take into account particular circumstances and characteristics and could lead to over - criminalisation. This is also inconsistent with international law which specifically refers to 'serious offences' in assessing persistence.<sup>12</sup>

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<sup>12</sup> Beijing rules 17.1 states: '( c ) Deprivation of personal liberty shall not be imposed unless the juvenile is





## Standing Committee for Youth Justice

Q.11. Do you agree that the varying long term effects of different sentences should be taken into consideration when determining the sentence?

There is now a significant body of evidence to suggest that contact with the criminal justice system is criminogenic for children<sup>13</sup> and the more intrusive and punitive the sentence, the more likely the child is to continue to offend. Therefore, SCYJ agree that the long-term effects should be taken into consideration. We are concerned that the chart suggests that a Detention and Training Order (DTO) should be considered for 12 – 14 year olds under the 'persistence' principle. SCYJ opposes the use of custody for this age group solely based on a judgement of persistence.

Q.12. Is there sufficient guidance offered on the suitability of discretionary referral orders, in particular when they may no longer be the most suitable disposal for preventing reoffending?

SCYJ understands the need to provide some guidance on the use of discretionary referral orders. However, we have some concerns as to the basis for a decision regarding prevention of re-offending. Again there would seem to be some disconnect between this and previous principles which outline the need to take individual factors into account.

Q.13. Is the additional detail regarding the requirements of a YRO helpful?

5.31 – SCYJ is concerned about this principle. If the risk of reoffending or causing serious harm is low, we do not believe that a disposal should be imposed merely as a punitive measure.

5.34. – Please see comments on 5.9. SCYJ does not agree that only a finding of persistence should warrant such a high tariff disposal for those aged below 15.

Q.14. Do you agree that in light of current sentencing practice, the provisional starting point for 15 to 17 year olds compared to the appropriate adult sentence, should be changed, to between one half and two thirds?

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adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response'

<sup>13</sup> e.g. Edinburgh Youth Transitions Study. McAra. L and McVie.S.





## Standing Committee for Youth Justice

In 2010, SCYJ campaigned for a change in the custody threshold for children, arguing that legislation should preclude the use of custody for all but the most serious of offences.<sup>14</sup> We believe that the decision making on disposals for children should not be linked to that of adults at all,<sup>15</sup> and that the starting point for sentencers should always be consideration of a community based sentence.

5.42 This paragraph is ambiguously worded. The reference to 'domestic law and international convention' should be changed to 'domestic and international law'. The use of the word 'convention' implies the principle of last resort is required only because it is practice, not because it is legally binding. The principle *is* legally binding in international law and this should be reflected in the language used in the Guidelines.

### **Sexual offences**

Q.18. Do you find the short narrative on sentencing youths for sexual offences helpful? If not please specify what you would add or remove and why.

SCYJ is pleased to see the emphasis on the differences between adults and children in regard to sexual offences. We would however, like this narrative to make it clear that sexual exploitation is not only gang related and putting the two together could be confusing or lead to only gang related exploitation being consider as a factor.

Q.19. Do you agree with the harm and culpability factors proposed at step one which indicate a non-custodial sentence? If not please specify which you would add or remove and why.

The nature of the relationship - SCYJ would argue that such a relationship as described here should not warrant an appearance before the court. Where this happens we would argue for courts to ensure that they impose the least intrusive and punitive sentence available.

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<sup>14</sup> Raising the Custody threshold. Standing Committee for Youth Justice. 2010.

<sup>15</sup> UNCRC Article 40 requires that specific laws and procedures be applied to children in the YJS. Adult models should not be used.





## Standing Committee for Youth Justice

Psychological and/or physical harm – SCYJ would like to see some guidance for sentencers as to how they ascertain the degree of any psychological harm if expert opinion is not available.

### **Robbery**

Q.29. Do you agree with the harm and culpability factors proposed at step one which indicate a custodial sentence? If not, please specify which you would add or remove and why.

SCYJ does not agree that the highest culpability factors should be the same as those for adults. Again this would seem to conflict with some of the previous guidance proposed which emphasises the developmental differences in cognition between children and adults. SCYJ believes these factors are slightly ambiguous. For example, does “threat” of a weapon include circumstances when an offender says they have a knife, but actually doesn’t? What is “very significant force”? A definition, with examples, is necessary to make sense of this term.

***The contents of this document do not necessarily reflect the views of all member organisations of the SCYJ***

