



LIBERTAS CHAMBERS

clerks@libertaschambers.com | www.libertaschambers.com

Sentencing Young People – The Scottish Approach

By Marie Spenwyn

The Scottish High Court of Justiciary has recently approved a sentencing guideline drafted by the Scottish Sentencing Council that relates specifically to young people. A focus of the new guideline – which will come into effect from the 26th January 2022 – is on rehabilitation with the aim of reducing re-offending. So far nothing new in approach as compared to England and Wales – the Sentencing Council’s overarching guideline which applies to sentencing children and young people sets out the following as the first principles:

When sentencing children or young people (those aged under 18 at the date of the finding of guilt) a court must have regard to:

- the principal aim of the youth justice system (to prevent offending by children and young people); and
- the welfare of the child or young person.

However, what is strikingly different is whom the new guideline in Scotland will apply to – not those under 18 but those under 25.

On detailed consideration, the Scottish guideline – developed following a public consultation - draws together a number of strands of thinking from experts who work with younger offenders. It recognises the capacity there is for change in young people and the fact that this does not cease when they turn 18. This concept is not new – a number of cases before the Court of Appeal in this jurisdiction have focused on the fact that the notion of a birthday representing a ‘cliff-edge’ for the purposes of sentencing is not a proper approach (the key case being *R v Clarke and others [2018] ECA Crim 185*). What is arguably innovative is the shift in applying such principles in a wholesale way by drafting a guideline that specifically applies to a much wider age bracket.

In the announcement made of the approval of the guideline Lady Dorrian, Lord Justice Clerk and Chair of the [Scottish] Council, said: “The guideline explains in a clear and accessible way why a young person should be sentenced differently from a fully mature adult, with rehabilitation as a primary consideration. Its

approval by the High Court...is a significant milestone which will help to increase understanding and awareness of this complex and challenging area, and by setting out the various matters which should be taken into account when sentencing a young person, will be of assistance to sentencers and practitioners alike". At the outset of the guideline it is stated that a 'young person' is someone who is under the age of 25 when they plead guilty or a finding of guilt is made against them.

The guideline goes on to set out how the exercise of sentencing a young person differs from sentencing those over 25 – specifically because of the lower level of maturity and a greater capacity for *'change and rehabilitation'*. The factors to be taken into account recognise research into the physical and psychological differences between 'younger' (under 25) and 'older' (over 25) people. The guideline provides a link to a detailed research paper that has drawn together learning on the relevance of cognitive and emotional development – in essence the fact that brain development continues meaning that there is less impulse control and ability to make rational decisions, along with more susceptibility to peer pressure and negative influences. The research relied upon also focuses on the impact of trauma on young people – both physical and mental. The guideline itself then enjoins a sentencer to have regard to how culpability of a young person is to be assessed bearing in mind maturity. At paragraph 10 of the guideline the research is summarised as demonstrating that young people are not fully developed and may not have attained full maturity. The effect of this is that they are *"generally less able to exercise good judgement when making decisions; more vulnerable to negative influences such as peer pressure and exploitative relationships; may be less able to think about what could happen as a result of their actions, including the impact on any victim and other affected by those actions; and may take more risks"*. At paragraph 15 the guideline states that the court should ensure there is sufficient information to assess the maturity of the young person to arrive at the 'most appropriate' sentence. The list of potential sources of material includes trauma and adverse childhood experiences. Towards the end at paragraph 20 the guideline has this statement *"...the nature or 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 the same, or a similar, offence"*.

The guideline is straightforward – it is not long (8 pages in total). Reading through it, the key principle to remember is that every reference to 'young person' must be read as 'under 25'. This recognition of the differences in brain development, maturity, the impact of trauma and childhood experiences is not something absent from the holistic approach taken to sentencing children in the criminal justice system in England and Wales – but moving all of those features into a much wider bracket is the real difference here. The recognition of these underlying features that might apply to younger offenders but those over 18 in

the case-law is useful for practitioners representing those who have turned 18 or are perhaps a little older (in *Clarke* the reference to young people continuing to mature 'for some time beyond their 18th birthdays'). However, it would likely be some stretch in the absence of very specific reports to suggest on sentence that 'some time beyond their 18th birthday' extends to the age of 25. Similar recognition in England and Wales of how much the age bracket needs to be expanded when seeking to fairly assess culpability and attain the principal aims for sentencing children and young people may be crucial to ensure just outcomes and the reduction in re-offending that the Scottish guideline strives for.

Marie Spenwyn is a criminal defence practitioner who frequently appears in serious cases involving defendants who are children. She is a committee member of the Youth Practitioners Association (YPA) and is a member of an ICCA working group tasked with developing a national training course for the bar focusing on representing children in the criminal justice system.

December 2021

20 Old Bailey, London, EC4M 7AN | 0207 036 0200

Chambers is Regulated by the Bar Standards Board

Libertas Chambers Ltd (Co. No. 12890783) is operated by the members of Libertas Chambers
Libertas Chambers Ltd 20-22 Wenlock Road, London, N1 7GU