

Young People at Court in Scotland

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This paper refers to the young people appearing in adult courts in Scotland, looking at government policies, legislation and practices, before making recommendations for a legislative and policy change.

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Executive Summary

The purpose of this paper is to give an overview of the current situation in Scotland in relation to the prosecution of young people age 12 to 18 in adult courts. The data on young people who appear in court over a five-year period and the disposals they receive is examined. This paper then discusses trends in the data available as well as the legislative and policy context, undertakes an exploration of what could be done differently and offers recommendations for short term improvements and longer term goals.

With the principles of *Getting It Right For Every Child*, the Whole System Approach and the Children and Young People (Scotland) Act 2014, Scotland is moving towards meeting the requirements of the United Nations Convention on the Rights of the Child, of having child-centred and rights-based approaches to young people who offend. This paper will illuminate that we are still failing those children under 18 years of age who are being dealt with in the adult criminal justice system.

1. Introduction

Scotland prides itself on the welfare-based, holistic system it has developed to address the offending behaviour and care needs of children and young people up to the age of 18. This is a system that was introduced to acknowledge that children and young people involved in offending should not be treated as adults, due to their different needs. This system recognises their need for help and support rather than punishment. This is the Children's Hearing System.

As this paper will show, many children and young people under 18 are not appearing before the Children's Hearing System (CHS) and instead are being prosecuted as adults, in adult courts. Statistics show that a small percentage have committed serious offences, however, the majority, it could be argued, could have their behaviour addressed in the CHS, where their needs, age and stage of development would be taken into account. By appearing in court, children as young as 12 are treated as being fully responsible for their behaviour and are punished as such. This can result in a criminal record for the rest of their lives.

It not only seems unethical to treat children in this way, but it is also against their human rights according to the United Nations Convention on the Rights of the Child (UNCRC). How did Scotland become a country that punishes children, many of whom are the most vulnerable, instead of offering them the support and help they need?

This paper offers an overview of where we are today in relation to young people appearing in court. Examining legislation and government policies, and the recommendations from the UNCRC, proposals will be made for what should be changed to ensure that Scotland is responding effectively to the offending of children and young people.

2. Definition of a Child

Within Scotland, the legal status of a child is defined differently by different pieces of legislation. The Children (Scotland) Act 1995 (section 93), Criminal Procedures (Scotland) Act 1995 (section 307) and Children's Hearing (Scotland) Act 2011 (section 199) define 'children' as those 1. under 16 years, 2. referred to the children's reporter prior to their 16th birthday and 3. young people age 16 and 17 who are subject to a Compulsory Supervision Order (CSO) through the CHS. Young people therefore require to be treated as such when they offend by being jointly reported by the police to the Procurator Fiscal and Children's Reporter (with the exception of some minor offences, which should be reported to the reporter only). For those aged 16 and 17 years and not subject to a CSO, legally, they are defined as an adult.

The Children and Young People (Scotland) Act 2014 defines a child as someone under age 18. However, this has not superseded the above acts, where young people aged 16 and 17 years who are not subject to a CPO continue to be classed as adults. The 2014 Act does, however, place in statute the underpinning principles of *Getting It Right for Every Child* (GIRFEC) that positions children and their families at the heart of all services. It recognises that children and young people may require support and assistance beyond the age of 16 and, for the most vulnerable who have been looked after and accommodated, support to age 26.

Currently, in practice, even when defined as a child, many young people are still being treated as adults by the criminal justice system and processes. The '*Joint Agreement in Relation to the Cases of Children Jointly Reported to the Procurator Fiscal and the Children's Reporter*' (COPFS/SCRA, 2014, p.7) states that for children under 16, "there is a presumption that the child will be referred to the Children's Reporter in relation to jointly reported cases". For those aged 16 and 17 however, this position changes and the presumption is that the Procurator Fiscal will deal with all cases, even if the young person is subject to a CSO and regardless of the gravity of the offence. This therefore highlights that regardless of being defined as a child, these children are still treated as adults for the purpose of prosecution.

3. Joint Reporting

Data from SCRA (2015), as shown in table 1, highlights that during a six-month period in 2014, 55% of all jointly reported cases for 16 and 17 year olds, (who were all subject to a CSO) were dealt with by the Procurator Fiscal. Therefore, the majority of jointly reported young people (364) aged 16 and 17 years are being prosecuted in adult courts.

Table 1 Retention by child age at joint report receipt¹

Age	Retention	Procurator Fiscal	Reporter	TBC	Total
12-15	Reports	178 (35%)	334(65%)	45	557
16-17	Reports	364 (55%)	301 (45%)	16	681

Perhaps more worryingly still, during this time period, in the case of young people aged 12-15, (where the presumption is to refer these young people to the CHS); 35% of the total 'jointly reported' cases were dealt with by the Procurator Fiscal.

4. Young People Prosecuted at Court

To address the issue of young people being prosecuted in adult courts and the time taken for cases to be brought to court, over a decade ago, the Scottish Executive introduced a youth court pilot in Hamilton in 2003 and a second in Airdrie in 2004. The policy directive at this time was to class young people who had committed more than five offences in a six month period as 'persistent offenders', and the requirements of the youth court, was to prosecute these young people, regardless of the type/seriousness of offences committed. Unsurprisingly, this had the detrimental effect of the youth courts actually 'up-tariffing' young people. Indeed, an evaluation of the courts suggested that its "introduction may have encouraged prosecution in cases that might previously have attracted an alternative" (McIvor et al, 2006, p.iv). While the courts definitively met the UNCRCs requirement, that young people are not prosecuted in adult courts (UNCRC, 1989), (although this was not their intention), the fact was that young people in need of support became "fast-tracked to punishment, supervision and increased regulation" (McNeill, 2009, p. 140) resulting in the end of the youth courts.

¹ Table produced by SCRA from July-December 2014 (snap shot of data)

The use of adult courts for young people was brought to the Government's attention again in 2008. Scotland's Choice, a report of the Scottish Prison's Commission, reported that in Scotland, at the age of 16:

“Many young people who commit offences face a very abrupt transition from the hearing system, where the emphasis is on helping them to develop and change, to adult courts, where the emphasis is on punishing them” (Scottish Prison Commission Report, 2008, p.30).

The commission recommended that the Government should divert 16 and 17 year olds to specialist youth hearings with a wider range of options than available to the CHS. Although all recommendations were fully accepted, this recommendation was, however, never actioned.

The majority of young people therefore continued to be prosecuted in adult courts in Scotland. Due to reducing crime rates, (recorded crime is down by 36% since 2006-07 (Scottish Government, 2015b)) there was a reduction in the number of young people appearing at court from 4,953 in 2009/10 to 2,101 in 2013/14. From this number, 1,944 (93%) were on summary proceedings and 157 (7%) solemn (Scottish Government, 2015b).

Table 2. Young People prosecuted in Sheriff Courts²

Type of Court	Age	Main Result of Proceedings	2009-10	2010-11	2011-12	2012-13	2013-14
Total Prosecutions			4,953	3,884	3,428	2,615	2,101
Sheriff Solemn	12	Guilty	2	-	-	-	-
	13	Guilty	1	-	1	-	-
	14	Not Guilty	2	-	-	-	-
		Guilty	4	4	2	3	1
	15	Not Guilty	3	2	2	2	-
		Guilty	13	15	12	6	2
	16	Not Guilty	18	8	10	16	11
Guilty		65	54	53	58	36	
17	Not Guilty	44	40	26	29	24	
	Guilty	169	131	122	129	83	
Sheriff Summary	13	Not Guilty	1	-	-	-	-
		Guilty	1	1	1	-	-
	14	Not Guilty	1	1	1	-	-
		Guilty	14	6	4	2	-
	15	Not Guilty	12	9	1	10	4
		Guilty	53	32	23	21	9
	16	Not Guilty	259	178	194	138	117
		Guilty	1,112	803	732	527	380
	17	Not Guilty	450	403	389	314	279
		Guilty	2,729	2,197	1,855	1,360	1,155

The above table shows a positive trend downwards over the last few years in the number of young people at court, although there are still substantial numbers being dealt with in the criminal justice system. The majority of these young people were on summary proceedings, whereby their offences were not 'as serious'.

² Source: Scottish Government Criminal Proceedings database

1.1. Outcomes at Court

The table below shows data for all young people age 12-18 who have appeared at court in Scotland in the last five years. 333 children under age 16 were prosecuted in adult courts during this time. Many (137) received adult convictions including custody (55), as opposed to being remitted to the CHS (97). Twenty-eight children under 16 were also sentenced by means of a monetary penalty.

Overall, the majority of young people who appeared at court received non-custodial disposals, with many receiving community based supervision (i.e. were judged to be in need of compulsory measures), approximately 28% of the total appearing at court, with an average of 10% receiving custodial sentences, 19% being admonished and 19% being found not guilty. For a small proportion their standing as children was recognised by the process of a referral to the CHS (approximately 3%) but for most they continued to be prosecuted as adults, resulting in adult convictions and sentences.

Table 3. Young People age 12 to 17 years proceeded against in Scottish Courts³

Age	Result	2009-10	2010-11	2011-12	2012-13	2013-14
12	Total	6,237	4,907	4,153	3,161	2,542
	Custody	1	-	-	-	-
	Remit to childrens hearing	1	-	-	-	-
	Admonished	-	1	-	-	-
	Total	2	1	-	-	-
13	Not guilty	1	-	-	-	-
	Custody	2	-	1	-	-
	Community sentence	-	1	-	-	-
	Remit to childrens hearing	-	-	1	-	-
	Admonished	1	-	-	-	-
Total	4	1	2	-	-	
14	Not guilty	3	1	2	1	-
	Custody	3	3	-	3	-
	Community sentence	2	1	2	1	1
	Monetary	3	8	1	1	-
	Remit to childrens hearing	12	2	3	3	-
	Admonished	3	-	-	-	-
	Other	-	-	1	-	-
Total	26	15	9	9	1	
15	Not guilty	19	11	4	14	5
	Custody	16	9	5	7	5
	Community sentence	15	15	7	6	2
	Monetary	7	5	1	1	1
	Remit to childrens hearing	29	13	16	10	7
	Admonished	11	9	9	4	-
Total	97	62	42	42	20	
16	Not guilty	332	218	241	173	146
	Custody	148	102	122	74	42
	Community sentence	496	364	332	285	210
	Monetary	430	276	184	110	81
	Remit to childrens hearing	80	88	66	65	45
	Admonished	235	216	198	128	108
	Other	18	7	14	11	6
Total	1,739	1,271	1,157	846	638	
17	Not guilty	602	557	512	403	343
	Custody	494	336	333	243	142
	Community sentence	1,050	871	729	596	566
	Monetary	1,381	991	687	478	390
	Remit to childrens hearing	51	64	53	55	40
	Admonished	753	712	599	478	373
	Other	38	26	30	11	29
Total	4,369	3,557	2,943	2,264	1,883	

³ Source: Criminal Proceedings database, Scottish Government

5. Remittals from Court

Scotland has legislative measures to divert young people under 18 who appear in court but as can be seen in tables 3 and 4, these are not used as often as they could be. For young people subject to CSO, once at court, the Sheriff must (a Judge ‘may’) request the advice of the children’s panel and the case can be disposed of there (Criminal Procedures (Scotland) Act 1995 section 49(3)). For young people who are not subject to a CSO and are under 17 years and six months, the Criminal Procedure (Scotland) Act 1995 section 49(1) provides for these young people to be remitted to a CHS for advice or disposal.

Table 4. Remittals to CHS from Sheriff Court for 16 and 17 year olds⁴

Year	2009-10	2010-11	2011-12	2012-13	2013-14
Advice	383 (9%)	332 (10%)	262 (9%)	236 (11%)	173 (10%)
Disposal	191 (5%)	164 (5%)	135 (5%)	128 (6%)	92 (6%)

With reducing numbers of young people offending and appearing in court (table 2) it is understandable that there has been a corresponding reduction in number of young people remitted to the CHS for advice and disposal, although it has remained consistent in relation to the percentage referred. The above table shows, as a percentage, those 16 and 17 year olds attending summary court who were referred to the CHS from the Sheriff Court for advice or disposal, since 2009/10 until 2013/14. For approximately 10% of the total number of young people appearing at court advice was sought and only 5% (on average) of these young people were ultimately remitted for disposal to the CHS. This is regardless of changes in Government policy, like the introduction of the Whole System Approach in 2011, where the ethos includes remitting more young people to the CHS from adult courts (Scottish Government 2011), or the provisions in the Criminal Procedure (Scotland) Act 1995..

It is a requirement for advice to be sought for all young people on summary proceedings who are subject to a CSO. In addition, national guidance⁵ states that all criminal justice social work reports should give this option to the court for *all* young people under age 17.5 years.

⁴ Data provided by Scottish Court Service

⁵ *National Outcomes and Standards for Social Work Services in the Criminal Justice System: Criminal Justice Social Work Reports and Court-based services – Practice Guidance* (Scottish Government, 2010)

As the above table shows, and through recent research undertaken in Scotland, this does not always happen in practice (Nolan, 2015).

6. Discussion

To stop prosecuting young people in adult courts and meet UNCRC requirements, firstly there needs to be agreement in Scotland on the definition of a child, which should be up to age 18, and the age of criminal responsibility and prosecution should be raised. Having various pieces of legislation defining children differently adds considerable confusion in a currently cluttered landscape. The Children and Young Person (Scotland) Act 2014 and section 42 of the Criminal Justice Bill enshrines GIRFEC policy at the heart of legislation and as such defines all young people under 18s as children. Why has this Act not superseded previous legislation which continued to define children differently depending on which system they are involved in? As the Children and Young Person (Scotland) Act 2014 has acknowledged the particular vulnerability of young people over the age of 18, why are we content with allowing some 16 and 17 year olds to be classed as adults, and to prosecute children as young as 12 in adult courts?

Once all young people under 18 are defined as children, this will require changes to be made to the systems and processes around them. If a young person under 18 offends, Early and Effective Intervention, as part of the WSA, should be the first priority and then a referral to the CHS. If a referral is made to the Procurator Fiscal, diversion should be considered before any young person appears in court. Young people should only attend court if they have committed the most serious offences (those prosecuted under solemn procedures) until there is an alternative system in place. Even then, remittal to the CHS should be considered in all cases. As stated in the evaluation of the WSA (Murray et al; 2015), for those young people assessed as not needing a CSO, “diversion should be the presumption before prosecution. Attending court should be a last resort” (p.3). Keeping young people out of court would exert a significant impact on the use of youth custody (10% of those appearing at Court) because it is known from research evidence that higher rates of diversion from formal processing by the courts are related to lower levels of youth imprisonment (Bateman, 2012).

The prosecution of children as young as 12 in adult courts means that many are receiving adult disposals, and as a result will have adult criminal records, which will impact on them in adulthood. This could potentially have enormous implications for future careers and prospects. Through the criminalisation and conviction of these young people, adults, service providers and the community are absolved of any responsibility or accountability Whyte (2014)..

Table 3 shows that children as young as 14 and 15 also received a fine or compensation order at court. As these children are too young to work or have an independent income, why were such disposals given? Why were these children not referred to the CHS where work to address their offending and impact on victims could have been undertaken, instead of inappropriate financial penalties being imposed. Such penalties are (i) unlikely to be adhered to because of the child's or the parents' inability to pay, or (ii) the parents/carers will be effectively punished by paying on their behalf.

The same table also shows that custody is used for 10% of young people under 18, including some children under 16. Why is custody being used for lower tariff offences on summary proceedings? Could a community-based order not be considered? Or could the secure estate be used as an alternative to a Young Offenders Institution? Why are we letting our children go to prison in the first place?

The majority of young people appearing at court appeared on summary proceedings (93%, table 2), thereby, their offence/s were not deemed 'as serious'. Why are these young people not managed under the CHS? What do we need to do to keep these young people out of court? The majority could be referred to the CHS where resources to meet their needs could be available. As many of these young people received a community based disposal at court, a CSO through the CHS would not only allow for this supervision to take place in the community but would also allow their offending and welfare needs to be addressed in a child-centred way. Why do we think it is appropriate to prosecute children as adults? And if we do not agree to this, why are we continuing to let it happen?

Having legislation in place to remit young people to the CHS again acknowledges that an adult court may not be the best place for these children. They could have their needs met and offending addressed in a child-centred system but instead are being prosecuted as adults. Why are Sheriffs not remitting these children to the CHS? Why are social workers not following guidelines by discussing this option for all young people under 17 and a half years

old in all social work court reports, or referring a young person to the Children's Reporter when they are nearing 16 and have outstanding offences? Why are Government policies like GIRFEC and WSA not being followed by agencies who have agreed to do so? To what extent does this reflect a lack of faith in the CHS for dealing with offending related issues? And if so, who by – Sheriffs, social workers or panel members? Or are there other issues that are preventing this happening? What disposals would the CHS need to have to be creditable as a robust alternative to Court? As stated by Lightowler et al., (2014), there would need to be some concession by the CHS extending its age limit to allow a CSO to work for those young people age 17, which is not out of the realms of possibility within the current system. Many issues need to be addressed and questions answered before we can start to make the changes that are needed to stop these young people being prosecuted in summary adult courts.

Finally, for those young people who commit the most serious offences (the 7% shown in table 1), there needs to be a system in place that is effective in addressing their behaviour whilst also meeting their needs as children. As we have seen, the youth courts in Scotland did not work as intended or indeed hoped, but there needs to be an alternative in place to ensure no young person under 18 appears in an adult court. Perhaps, as recommended by the *Scotland Choice* report (2008), youth hearings should be created or as recently recommended in the UK's response to the implementation of the UNCRC "all children who commit offences should be dealt with in a non-adversarial system with a strong welfare orientation" (Harris and Grindulis, 2015. p.41).

7. Recommendations

From the evidence presented, the following recommendations are proposed:

- All young people under age 18 are legally defined as children and not adults and are therefore treated as such. Amendments to Children (Scotland) Act 1995, Criminal Procedures (Scotland) Act 1995 and Children's Hearing (Scotland) Act 2011 would be required.
- All young people under age 18 who offend and cannot be diverted to non-formal measures such as EEI, should be reported to the Children's Reporter.
- Only in the most serious cases/harm caused should a young person be reported to the Procurator Fiscal.

- Until a legislative change is made, there is a change in policy that the presumption is for ALL those under 18 are to be dealt with in the CHS, or diverted from prosecution.
- The CHS increases its age limit to allow children to remain on a CSO until their 18th year. This would allow time for work to be undertaken with them to address their needs/risks/behaviour.
- The CHS has more disposals available to them, or more conditions are attached to CSO to meet the needs of the young people referred.
- Only on those occasions, where it is in the public interest/the most serious of cases, should the decision be made to prosecute.
- No young person under age 18 should appear in an adult court. Youth hearings, based on a child-centred ethos, should be created for the most serious offences.

To meet these recommendations, ultimately, legislative changes are needed. To fully endorse the requirements of the UNCRC, the age of criminal responsibility should be raised and there should be no young people under 18 appearing in adult courts. All young people who commit less serious offences should go to the CHS, where there should be appropriate resources to meet their needs and for the most serious offences, specialist child-centred youth courts. As well as meeting UNCRC requirements the CHS would be used as it was originally intended - to address the needs rather than the deeds of children.

Until these changes are made, the principles of the WSA should be fully endorsed and enacted by all agencies. Practice should always be to recommend that young people remain subject to CSO if they have outstanding offences and for this to be the decision of the CHS. Furthermore, it should also recommend that young people nearing 16 who have outstanding offences should be referred to the Children's Reporter, and will therefore, as a minimum, be an 'open' case prior to appearing at Court, or attend a hearing and be made subject to a CSO. Finally, it should divert young people from prosecution wherever possible, and the recommendation to remit all young people aged under 17 years and six months to the CHS should be included in criminal justice social work reports and acted upon when at court.

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