

# Use and impact of bail and remand with children in Scotland

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## Introduction

Over the past ten years or so there has been a sizeable shift in how children come into contact with the justice system in Scotland. With falling crime rates, and a policy emphasis on early intervention and diversion from formal systems (Scottish Government, 2011) the number of children aged under 18 proceeded against in a criminal court has fallen from 7,798 in 2008/2009 to 1,776 in 2017/2018 (Scottish Government, 2019). Despite these positive gains, available data suggests an approach to justice that has not fully formalised a child-centred approach to children in conflict with the law. More than one-third of children who come into contact with formal justice in Scotland are prosecuted in court, rather than being referred to the Children's Panel (Lightowler, 2020) and the percentage of children held on remand in a YOI has been increasing, and stands at 67% in November 2020 (Lightowler & Adamson, 2020).

To explore the reasons behind the increasing use of remand, CYCJ undertook a small nationwide study of the use of bail and remand with children in Scotland. This research aims to develop our understanding of the use of remand, the decision-making process about how bail and remand is enacted, and how this is experienced by children, their families and professionals. In order to do so, the paper draws upon the lived experience of children, families and practitioners from across Scotland.

The research describes the complexity involved in decision-making about the use of bail and remand for children, with a multitude of factors to be balanced and deliberated, often hindered by the lack of information available and the short time-frames in which to make these decisions. Yet while the professionals involved expressed a desire and intent to adopt a more nuanced, flexible and child-friendly approach for those aged under 18, the testimonies of those children and families directly affected by the decision-making revealed a system which they did not understand and could not participate in, which in turn affected both their perceptions of procedural fairness and their ability to comply. As a result, many felt that the system was stacked against them and they were destined to fail, raising questions about whether justice for anyone could be achieved in this context. The authors argue that the positive, yet incremental, changes that have been observed in the adult justice system are no longer sufficient to ensure procedural justice for children in conflict with the law and propose that a more radical shake up of the system is needed. The policy and practice implications in supporting such a change are then discussed.

## Policy and Legislative Background

In accordance with [the UNCRC](#), all under 18s are children and should be treated as such. However, although the [Children & Young People \(Scotland\) Act 2014](#) states this, it has not superseded existing legislation (Dyer, 2016). Thus, in Scotland the [Criminal Justice \(Scotland\) Act 1995](#) continues to define a child as either someone aged under 16 or someone aged 16 or 17 and currently subject to a compulsory supervision order (CSO) through the Children's Hearings System (CHS) or an open case to the Scottish Children's Reporter Association (SCRA) (COPFS & SCRA, 2019, p. 3). Although those legally defined as children have the option to be referred to the Children's Reporter, for more serious

offences and those children defined as an adult, a referral is made to the Procurator Fiscal (PF). As the age of prosecution in Scotland is 12, this means that children as young as 12 who commit a serious offence, on the instructions of the Lord Advocate and in terms of the Lord Advocate's Guidelines, can be prosecuted in an adult court and face all of the adult disposals available, including being bailed or remanded to a YOI (or secure care if defined as a child). This leaves children in a justice system that they often do not fully understand, where their needs and development are not fully taken into account, and where they are expected to comply with, and bear the lifetime consequences of, an adult order and conviction (Bevan, 2016).

The [Criminal Justice \(Scotland\) Act 1995](#) sets out the rules which the court must follow when considering bail and remand. A child can be bailed subject to standard conditions e.g. attending future court dates; not interfering with any witnesses or doing anything to obstruct the conduct of the case, or anything that can cause distress or alarm to witnesses. Where the Sheriff or Judge feels it's appropriate, extra conditions including curfews can be added. A PF can indicate if they are opposed to bail on specific grounds, although the Sheriff or Judge will make the decision about bail and any attached conditions. These grounds could include the risk they are perceived to present, lack of appropriate accommodation and the seriousness of the offence. For children who are remanded for a set period of time, not exceeding 140 days, this can either be to a secure unit, if the child is legally defined as a child, or to a Young Offenders Institution (YOI), which in Scotland is HMP&YOI Polmont.

Information available to decision makers when considering bail conditions, opposing bail, or imposing remand can be limited to the complaint, previous history of offending and information from COPFS or the solicitor. However, when this involves a child the level of information available or actively provided/sought is often influenced by whether they meet the legal definition of a child or not. Whilst the decision regarding bail or remand is solely for the judiciary, decision-makers need relevant and timely information to make informed and critical decisions in the limited time available to them. For children aged 16 or 17 who are not on a CSO it is less likely that they will have someone to liaise on their behalf. This disparity reinforces the two-tier responses to children who do and do not meet the legal definition of a child.

## Methodology

### Ethics

Ethical approval for the study was obtained from the University of Strathclyde Ethics Committee which aims to ensure the safety and wellbeing of participants and researchers, as well as the integrity of the research. Informed consent was obtained in writing from all participants, and all data was stored securely.

### Participants

Thirty-three interviews were conducted with a range of participants across the key roles involved in a child's journey through the court system, including decision makers and legal

professionals. Contact was made with the Sheriff Principal in each Sheriffdom to request the participation of Sheriffs in the project. Five Sheriffs were interviewed from five different Sheriffdoms. PFs were approached through a representative on the national Whole System Approach (WSA) Implementation Group. Three defence agents volunteered to participate after the study was promoted via CYCJ's social media channels. The views of children, parents, social work and third sector practitioners were sought through the National Youth Justice Advisory Group (NYJAG) and the national Whole System Leads group. Children who were currently, or who had been in the last two years, subject to bail and/or remand after coming into conflict with the law were eligible for inclusion and interviews with 11 children were conducted. Eight of these children were in custody at the time of interview and three were children in the community. One child participant was female and ten were male. Of those interviewed three were subject to bail conditions presently, four were sentenced, three were subject to remand and one was sentenced and subject to remand for outstanding matters. Seven participants were 17 years and four were aged 16 years old. In addition, three parents/carers were interviewed.

The interviews conducted are summarised as follows:

**Table 1: Participants (n=33)**

Respondent group	Number	Respondent Code <sup>1</sup>
Children	11	CH
Parents/carers	3	P
Procurator Fiscals	4	PF
Sheriffs	5	SH
Defence Solicitors	3	DS
Social Workers	4	SW
Third Sector workers	3	3S
<b>Total</b>	<b>33</b>	

## Data collection

### Interview data

Semi-structured interviews were completed in 2019 and early 2020 and focused on: the process and experience of justice as well as the supports received (for children, parents and carers); roles, responsibilities, processes and available supports; as well as the understanding of the needs of children in conflict with the law (professional respondents). Justice professionals were sent the information sheet and consent form by email in advance of the interview. For children and parents/carers, information sheets were sent out to the practitioners they were working with, who then shared them with the participants and helped answer any queries about the study. Interviews were arranged through practitioners at a place and time that the child and parent/carer felt comfortable with. Of the 33 interviews completed, 31 were audio recorded, while the remainder were recorded in the form of handwritten notes.

<sup>1</sup> This code is used to signify the different respondent groups in the Findings section

## Survey data

In addition, an online survey, developed using Qualtrics survey software, was sent to a named contact within each of the 32 local authority areas who would be in a position to describe the type of support and provisions available to children attending court in their area. The survey asked nine questions in relation to:

- supporting children in court
- information-sharing with the court
- bail supervision
- alternatives to remand
- Processes associated with children appearing at court such as custody, transportation to and from court and communication between agencies, and;
- what would be the gold standard in court support for children appearing at court

The link to the survey and reminders were sent an average of four times throughout the fieldwork period of the study and in some cases the information was received by phone. This data was then added to the Qualtrics database prior to analysis. By the end of the fieldwork period a response had been received from 20 local authorities.

## Analysis

Interviews were transcribed verbatim where possible and individual members of the research team were allocated one or more cohort groups to analyse. Survey responses were downloaded from Qualtrics and treated as one local authority cohort. Transcripts and surveys were analysed using a thematic approach. The first coding cycle was undertaken within the cohort groups using a primarily inductive approach, meaning that themes were extracted from the raw data with as few preconceptions as possible. A second round of coding was then undertaken to categorise these codes into emerging themes. This second round of coding was reviewed by two of the other authors who had not coded that specific cohort's transcripts. Any divergences and discrepancies were discussed, clarified and amended. A third round of coding was then collectively undertaken by three of the authors to generate cross-cutting and overarching themes across the different cohort groups.

## Findings

### The experience and impact of bail

#### Bail conditions

The children interviewed had been subjected to a range of different conditions whilst on bail, including being prohibited from a certain area, prohibited from contact with a certain person or group, required to attend meetings and/or placed on curfews. The length of time children were subjected to these conditions varied, with the longest period reported as two years.

Children, parents and professionals all detailed bail conditions that had a significant impact on children's lives, families and pro-social opportunities, at times with unintended effects. Children noted that conditions often had a significant impact on their support networks, in that they were banned from communicating with friends and/or family members. One parent noted the difficulty their 13 year old child had faced when they were restricted from communicating with anyone under 16, so had to make friends with older people. In addition, some children were banned from certain areas or streets which often posed significant issues. One child reported that the street they were not allowed to enter was the only way to their grandmother's house, but when these issues were raised with the Sheriff the child was told "you'll find a way". Another parent highlighted that the conditions meant their family had not been able to visit relatives in England, and that the child was not able to visit their grandparent in hospital. One child was also unable to start the job they had secured as the hours of work conflicted with the curfew in place and another had to move house because of the conditions, showing the challenge that adhering to conditions presents:

*CH3: I was only 15 at the time but once I turned 16 I was going to get a job wi ma dad, but I went for the interview and that and I could've got the job but it was the times and that didn't fit with my curfew so I couldn't get it.*

This highlights some of the tensions of our justice system - between the need for public protection and upholding the rights of children subject to bail conditions. There were also significant examples of confusion by children and parents about what bail was, or the conditions and curfews that were in place, which inevitably caused further issues with adhering to them:

*CH1: I didnae really understand what bail was until I got papers - they told me basically you have to stay away from such and such.*

*P1: But [social workers] have contacted the PF numerous times to find out about the bail conditions because even [they] didn't know about it.*

#### Length of time on bail

The implications of lengthy court processes and delays featured prominently in accounts from children and their parents. Some children interviewed advised that they were on bail for up to two years, over which time they were required to adhere to a range of stringent conditions. These are significant sacrifices for children who often lack the maturity level required to understand the importance of complying and the seriousness of the

consequences if they do not. Children discussed the impact these conditions had on their daily lives and how as time went on their motivation and ability to comply decreased:

*CH3: See how I turned 16 at that point it was just, you're on a curfew, stick to it or you'll be back up for remand. I was trying to stick to it, I stuck to it for a good couple of months, I felt like when I was stickin to it nobody noticed so I was like I cannae be bothered with this anymore.*

*CH8: It was over a year I was on bail for and that's a long time, no support, can't go into the areas, can't do this and can't do that, at a young age, it was matter I knew I was going to get sentenced for it, it was just when and that's when I started doing more serious stuff.*

The social work and third sector respondents also often felt that the lengthy delays, and bureaucracies in the system, resulted in reduced motivation and compliance, and at times led to children being breached of their order. In addition, they observed that children often felt demotivated and demoralised by what they saw as the inevitability of a custodial sentence:

*3S1: It's one of our biggest frustrations, a young person faces a charge, keep them in the community, you're on bail, fine - 18 months might go by...that young person has peaked and troughed, peaked and troughed and whatever else and it weighs heavy on the young person's minds, they are sitting there and they want to do well but it can quite often mean that young person, they're not invested in reforming themselves as the fear's still there that "I'm gonna go to custody anyway".*

*SW2: It's a long long time, especially for a young person, it can kinda drag on and they are like I just want this done, I just want it over with and you're like well you're still on bail for the next 4 months or whatever. And if they are young and they are getting in trouble, it's unlikely they are going to stay out of total trouble for that length of time so is that going to get another charge and escalate it because they are still teenagers, they are still learning.*

## Maturity

Both parents and professionals agreed that the long waits and delays had an additional bearing on children who were in a rapid phase of development, with children often maturing significantly in the period between their initial arrest and eventual court date. Thus, the person the Sheriff is meeting and sentencing can be a "completely different person" than the one who committed the original offence and might be very unlikely to engage in the risk-taking behaviours they once did:

*SW1: That bit about behaviour/ consequence I don't really think that's there all the time. The young person...has seven pending charges for serious violence and a lot of that is stuff that happened 18 months ago and he might now at 16 recognise that was reckless but he can't undo the past so those will come back to bite him.*

The combination of the restrictive nature of bail conditions, the lengthy court process, a lack of clarity around expectations and the unique phase of development that is adolescence was often perceived as setting children (who were often particularly vulnerable) up to fail in a

system that was stacked against them. This was referred to and discussed across social work, third sector, PF, defence and Sheriff interviews, and children and parents agreed that at times conditions imposed had unrealistic expectations on children with complex needs:

*SH1: What you tend to find with young people who are appearing from custody is there is a tendency for their lives to be somewhat chaotic, their home situation isn't brilliant, they may have issues with regard to substance misuse...I think if you say you'll be released on bail subject to a curfew condition, say 7pm to 7am daily in actual fact that is one of the quickest ways of having a young person accumulate quite a significant record ...I am very, very reluctant to make a young person subject to curfew.*

*PF4: Children...are caught up in these chaotic lifestyles, they are sort of, they've just not really found their way, they don't have stability so asking them to comply with orders and stringent special conditions is sometimes I think setting them up to fail.*

Sheriffs discussed attempts to make conditions and curfews suitable for children, but this was reliant on information about their home and family environments that was often not available. The impact that this had on decision-making was perceived by defence solicitors as causing additional issues by not taking into account the child's age or their circumstances and setting some children up to fail:

*DS2: You are creating a situation if a curfew is put on...he's been curfewed to his mum's address, he's not getting on with his mum, his mum throws him out he's breached his curfew he's then immediately remanded because he might not have another address or because he's breached a court order, so they're far more likely to fall into that trap.*

*DS1: There is a massive problem with sheriffs just having totally unrealistic expectations of what an under 18 is capable of staying on top of and of doing, there's a real lack of knowledge of the chaos that an under 18 that is really going through the criminal justice system might be living in, which causes all sorts of problems then in their case because there's just a lack of understanding and a lack of sympathy.*

## Supports on Bail

Sheriffs and PFs both noted that knowing about the support that social work was able to offer a child could be vital in deciding whether to bail or remand them. In particular, the availability of supervised bail was considered a key mechanism through which they could offer bail to children who may otherwise be remanded. The availability of bail supervision across the country varied, with 11 of 20 local authority survey responses identifying access to a bail supervision scheme and only one of five Sheriffs doing so. This obviously limits what can be offered to the court/child. The four Sheriffs who did not have access to a bail supervision scheme discussed this with frustration. One Sheriff referred to the lack of universal access as a postcode lottery:

*SH3: I would say it's a failing if there's not bail supervision available throughout the country, particularly for young people because you shouldn't have a kind of postcode lottery about whether you can be granted bail or not because there's no bail supervision.*

Two of the defence solicitors interviewed viewed supervised bail favourably both as an alternative to remand, and to help the child to adhere to bail conditions:

*DS1: Supervised bail can be helpful because it can give a child structure as long as the social worker is there giving them help rather than giving them a row.*

Social workers and third sector workers detailed various supports they can provide to children on bail. Key provisions included: referring children to services to support them with specific issues (substance misuse, education, mental health etc.), arranging adequate housing for bail, meeting with children regularly, explaining conditions and the significance of breaching them etc. Two local authority survey responses detailed the benefits to children in their local authority of a Structured Deferred Sentencing model; which operates alongside bail and provides ongoing and direct support, referrals to other services, relationship building, regular court reviews and assistance with attending these. Others tried to be flexible and child-friendly with how they implemented and negotiated the bail conditions. One social worker described an instance where they had been concerned a child was going to breach their bail by going out drinking for their 18<sup>th</sup> birthday. To mitigate this risk, they had requested and secured a removal of the conditions and curfew of bail for a weekend, so the child could go on a short break in Scotland with their family instead.

Meeting all these needs required a consistency and intensity of service provision that far exceeded routine monitoring, but there were unintended consequences of providing formal support. Two social workers detailed that although supervised bail can be a mechanism through which to provide support, the requirements set were intensive, and children may struggle to, for example, attend three appointments every week for months at a time. In these instances, children were a higher risk of breaching bail which could lead to an increase in charges and the possibility of remand. One parent observed that being involved with statutory, rather than voluntary, services could in fact increase the stress on families:

*SW2: If it's supervised bail when you know they are no gonna comply with it's setting them up to fail...whereas some young people will make their bail appointments because myself or someone else is taking them, if it's up to them to get a bus where they're maybe anxious even though they come across as like a wee hard nut though, they are not gonna do it.*

*P1: Involving social work into a child's life especially on criminal activity is not the best on a family because that puts more pressures on a family. If there were another agency available to just turn round and say look this young person is going down a wrong road we need to get interventions in now.*

Despite this, many children articulated that they needed more clarity and boundaries around what was allowed, and support to implement the structure required for them to adhere to their conditions, but not all were aware that help was available, or they found support to be lacking. Many relied on family members to support them, but not all children had access to

that support within their family units. One child described being supported to comply with the conditions by workers in a residential unit previously, but as he 'matured' out of the system and into his own tenancy these supports fell away and he ended up breaching his order:

*CH10: I wasn't told that I could go to social work and try to get help, I wasn't told I could ask for help, I was just kind of sat there thinking if they're not giving me help I'm on my own because they didn't explain to me at all that I was to get help.*

*CH5: See for court an that they'd [residential workers] at least wake me up and gie me a lift to the court an that so I always had someone to wake me up, take me there...I had that for a while so that's just what I was used to an that and then it went to having to get up myself an that...*

For the majority of children, there is no additional support while they are on bail and many do not appreciate that there are consequences to non-compliance. Defence solicitors also commented on the lack of support for children who had been looked after, within the court process itself as well as part of bail conditions:

*DS1: Idea that they've been granted bail really doesn't mean that much to them (child), all they know is they're getting out and they're going home.*

*DS3: So for me, that should immediately alert prosecutors, police officers, judges lawyers etc to say "Hang on a minute - what has happened to this child? What was going on?" - rather than thinking "This is a bad un".*

Third sector workers and social workers also described the level and types of support they would offer families, noting that supporting a child to adhere to bail conditions and change behaviours usually meant supporting the parents and families too. A range of needs-led support services were demonstrated, including providing updates on the child's case, providing transport to get to court, listening to concerns, emotional support, information on processes, arranging meetings, signposting to different services etc.

Two of the parents interviewed discussed in detail these positive relationships they had with either social workers or third sector workers. These relationships were an important source of emotional support and practical advice and were greatly valued by both parents; with one referring to their worker as a "thread of gold throughout". Having someone at the other end of the phone to listen and offer assurances whilst being honest and transparent had been hugely beneficial for both parents. One parent discussed how despite changing jobs the social worker had continued to keep their child's case allocated. This level of trust and support was deeply valued:

*P2: She'll gie me a phone to reassure me he's alright, he's a bit upset and she's honest wi me...I mean I trust her and anything that I need to ask even if it's about the other kids or myself am on the phone ...because she knows us, she doesnae know us from a piece of paper she knows us from a person.*

## The experience and impact of remand

### Effects of remand

Several of the children interviewed had experienced periods on remand in secure care and a YOI. They expressed a range of different experiences and feelings towards their time in remand. Most children who went to a YOI reported feeling scared and intimidated when they were first remanded. They expressed disappointment at losing their liberty and a sense of frustration, and in some cases, shame with themselves for being in a YOI. One parent spoke vividly about how terrified and stressed they were for their child, who was the youngest in the YOI at that time and was considered still just “a wee boy”. Children recounted feeling isolated and stressed while on remand. The waiting and not knowing inherent in a period of remand was a specific source of stress, with some describing almost a sense of relief at sentencing, even if a custodial sentence was imposed:

*CH6: I'm not expecting to get out, I know I'm getting a sentence; I just want to get it over and done with innit. Like sitting on remand I don't have a lib date, I'd rather have a lib date...then I know am not in here for ever. With that lib date I know that my days are numbered in here.*

*CH4: Aye, see when you're waiting to get sentenced its torture cos you don't know what's going to happen and you just want sentenced to get it over and done with but when you get sentenced it's “oh fuck”, then you get used to it.*

Sheriffs displayed an awareness of how traumatic remand can be for children, and the disruption caused by being away from their community and family for long periods of time. For these reasons, remand was reported to only be used in the most extreme circumstances for children:

*SH2: [They can be] in custody for 110, 140 days so that person's liberty is at stake for quite a period of time...and of course a remand for a young person might be particularly...because a week's a long time in politics but three months is a desperately long time if you're a young person.*

Social workers equally highlighted the negative effects remand can have on children, with even a short period of remand being enough to derail positive progress or cause the loss of opportunities that may help children desist from further offending:

*SW1: Remand is a disaster, all the stuff we know about remand - first it's the 7 day lie down which is enough to scupper a lot of stuff or sow the seeds, anything more than 7 days you start to like lose tenancies, benefits claims screwed up, education - the course you fought to get them on is gone because of heavy demand. It just has knock on effects, they're taken out of society you know.*

### Supports on Remand

Although the children interviewed did not want to be on remand, for some, once there the reality was often not as bad as had been anticipated. Some experienced building positive and supportive relationships with their peers, and that this was facilitated by peer mentoring programmes and opportunities to socialise. Moreover, some children reported receiving

support from the officers in the YOI and care staff within the secure unit, with some positive relationships evident:

*CH2: Scared, petrified, I like my freedom and being outside...not sure what it would be like, you hear stories about [YOI]. The reception process was good actually, it put my mind at ease, the staff were really nice 'told us to chill out and try not to impress anyone'.*

*CH4: I've known the staff for that long, they come and bring me presents in...They all like me, they've come to my dad's funeral an all that, that I trust or they came when my dad was in intensive care, like she finished her shift but she still came with me...it does mean a lot.*

However, others felt very isolated and did not have access to this support, especially if they were new to the custodial environment, as these relationships took time to build. One social worker noted that impact of this isolation was particularly difficult for care leavers, who may have no family coming to visit them and whose key workers from their residential units are unable to visit them once they are in custody:

*SW4: I've found from doing 72 hour reviews in [YOI] you can almost gauge if someone's a care leaver just by the first 5 or 10 minutes of speaking to them because they do seem to have this, they're always quite hectic, quite agitated, a lot more animated because I suppose there is that, they're totally on their own they don't have anyone that's going to come and visit them, that kind of thing...*

*CH2: It's hard in there [YOI]...people shouting...I felt I had nobody there...at least I had my co-accused...I started greetin' and that...need young people to be checked up on, people self-harm in there.*

One parent also discussed the support they received from social work. Their child had been remanded and was suffering extremely poor mental health, and so the parent spoke with their social worker who was able to quickly arrange a Care and Risk Management (CARM) meeting and put the child on observation for their safety. One child also noted that they received regular support from social work on a voluntary basis - and that being able to choose how much involvement social work had was much more preferable.

However, there were examples across interviews with children, parents and professionals that demonstrated obstacles to providing quality support to children whilst they were on remand. A key frustration shared by social workers and children regarding being remanded to a YOI was the difference between the activities and opportunities available when they were on remand compared to being sentenced. Once sentenced, children had access to a range of different work parties, they were able to work towards qualifications, and could take part in more leisure activities, but these were largely not available when a child was on remand. Children noted that there were only two job choices on remand - cooks or pass - and that vacancies for these were infrequent. Without work, children on remand could be in their rooms for up to 23 hours a day - which meant more time to worry about what was going to happen to their case and less time to engage in any form of rehabilitation:

*SW4: Nothing, just sitting there, I've had one or two young people who have done work parties in Polmont while on remand but again you kind of have to push for it...other than you end up just sitting there for months waiting... it's not making any impact of any sort on the issues he had in the community that have led to this.*

*CH3: I can get one job [on remand] the cooks but once am sentenced I can get a good job. [On remand it's] 23hrs a day, 45 mins out to go for a shower, shot of the phone and game of pool an that...brutal...*

*CH9: When I was on remand I was locked up 23 hours a day it's not good...then when I got convicted I'm out all the time, I'm never in my room, only at night... remand's boring, you only get the gym and rec and that's it, or a visit, there's no work parties, there's no nothing.*

## Children and families' participation in decision-making

### Language & Participation

A key theme that emerged across the interviews with all participants was that a lack of understanding of the court process, and the language used throughout all stages of the process, was a barrier to even the most basic participation in justice. Children and parents reported frustration at the frequent use of jargon and terminology that required previous knowledge and experience of legal processes that they did not have. Moreover, several children noted how inaccessible the language used in court was to them, and the confusion it caused intensified existing feelings of panic and anxiety. This resulted in a vicious cycle, as the more anxious they grew, the less they could follow what was going on. This affected children's and parents' engagement, understanding of decision-making and ultimately their perceptions and experiences of a fair and just process:

*CH10: It was easy to understand in certain parts, harder in the rest...obviously when they're in court they use the full lingo and it's just hard to pick up on if you've never been in court before, so they're saying things that are maybe not bad but it's making me freak out because I don't know what they mean, which was difficult.*

*P3: Maybe if someone was able to guide me on the law and say to me this is allowed, this isn't allowed this is what will happen... I'm now in panic mode and he feels that panic as well as his own panic; if I don't understand it how do you expect a 13yr old to understand it?*

While there was consensus from Sheriffs that it was essential to ensure that children understood the proceedings and bail conditions, the interviews revealed differing approaches to this in practice. One Sheriff reported a commitment to using plain language with children, whilst another argued that courts should remain solemn places with a degree of formality and formal language, with one noting that it was the role of the defence agent to ensure their client understands. However, Sheriffs also noted that the heightened emotionality in the courtroom, coupled with limited time available likely meant that, regardless of the language used, children would find it difficult to follow the proceedings. For this reason, there was a consensus that the role for translating what happened in the courtroom into accessible language largely fell to their solicitor:

*SH5: I suppose being as clear and as straightforward in your words as possible, not using words that ... checking who's spoken to them before and you are putting a lot of trust in the solicitors or at least you are giving them the responsibility that the solicitors can and do explain things clearly to young people.*

Defence solicitors also saw it as their role to ensure their client understands the process, with all three interviewed acknowledging that for children, this was especially important:

*DS2: It's very important we explain to them the process because they don't have a clue of the process that they're going through, they just don't understand it at all, if you've got a 16/17 year old kid in you're going to spend a bit longer with them that you will with a 35 year old.*

Two children also spoke explicitly about experiencing distress because they did not understand what was happening and conversations had been held "above their head". There was a perception that, in these instances, professionals would then relay only positive information to the child, when they would rather just know everything so they could understand and be prepared for the final outcome. Communicating the decision-making process and how decisions were reached is essential for increasing children's understanding of the system, as well as being an important factor in perceptions of procedural fairness:

*CH9: Some things should change because when I got charged, a big charge, I never really got told anything, it was mostly my dad and my lawyer and he says well expect this and don't worry about this but when I was going to court I wasn't being told what was happening.*

Closely linked to issues of understanding and communication, was children's lack of participation throughout their justice journey. The children interviewed indicated that they had not been provided with opportunities to share their perspectives during their court process. Several felt they did not have the right language or knowledge to contribute to discussions effectively, whilst others reported being explicitly told to stay quiet in these circumstances. One child highlights how not being able to speak directly with professionals other than through the interpretations of a gatekeeper served to intensify feelings of powerlessness:

*CH6: Like they [social workers] take my word and discuss it with everyone else innit, that I just tell them what I have to say and they do whatever they want with it, I have no control over what they say.*

The defence solicitor's interview agreed with this perception:

*DS1: For children under 18, it is a worry whether they actually get to participate because they don't understand the language, it is lawyers talking riddles, the prosecutor talking riddles and the sheriff talking riddles and they are excluded from that - sometimes that happens with adults as well but children are particularly susceptible to being left out in the court setting.*

This was also largely reflected in the interviews with Sheriffs, who did not appear to seek out children's voices or perspectives during the decision-making process and instead relied on information from defence solicitors or social work. Within courts in Scotland adult defendants also do not have a voice in proceedings/decision making, as communication through solicitors is the way courts are run.

Yet the children interviewed were adamant that they should have had a voice. They felt the Sheriff, social worker and PF would understand more about them as a person, the reason for the offence and how they felt about it now if they were to come directly to the child to hear their perspective. This sentiment was also expressed by one parent, who adds how the formal and intimidating environment of the courts can serve to intensify the lack of voice that children experience:

*P1: The court should be asking as well - how are you feeling now? Do you regret it? How do you feel within yourself about it? But she didn't get asked that... Especially young persons, they are too feart to ask someone in shirt and tie or robes, they feel they don't have a voice or they lose that voice.*

One third sector worker also acknowledged these concerns and noted that a key element of the support they provide involves trying to balance this lack of voice by engaging the young person in the process as much as possible. Central to ensuring their engagement and participation is the use of child-friendly language and communication, and they highlighted the need for professionals at all stages to be engaged in this:

*3S3: You want to empower them within this and getting communication right in a way that works for them is key to helping them to communicate their views.*

## Decision-making about bail and remand

The evidence that has emerged about children and families' experiences of both bail and remand, and the impact that has on both children's wellbeing and lifelong outcomes, highlight both the importance of decision-making, and the complexities that justice professionals face when navigating the decision-making process. This section will explore the different stages of the justice process and how decisions about children are reached.

### Decision to divert or prosecute

The decision to divert or prosecute a child's case is taken by PFs who identified a range of factors that they considered when making this decision, including: the needs and background of the child; the nature and seriousness of the offence; the risk the child posed to the public; the needs of the victim; and whether there was a policy focus on specific offences.

All PFs noted that they would treat a child's case differently than an adult's, and demonstrated an awareness of the different needs of children and the impact that prosecuting them through the adult justice system can have. PFs discussed the change in COPFS' thinking in recent years, with the Lord Advocate guidelines now stating that diversion should be considered for all children where appropriate. However, PFs displayed varied levels of commitment towards diversion. Two of those interviewed stated that all

attempts would be made to divert children and argued this was crucial in supporting children to resolve their issues and reduce the likelihood of reoffending. Another indicated they had additional priorities, emphasising the need to consider victims and weigh up potential risks:

*PF1: If I know there are needs and divert and they don't comply then what does that leave, only prosecution. Also there are victims to be aware of, people require justice, we can't do nothing just because someone has needs, some people want to have their day in court.*

*PF4: Now I think we treat more under 18s as children so the presumption has now gone very more towards under 18s whether they're on supervision or not, we'll either try to give you back to the reporter or to try to do an alternative to prosecution.*

### Decision to bail or remand

PFs and Sheriffs displayed a strong awareness of the negative effects of remand for children, and the level of disruption it causes to their daily lives and futures. However, the complexity of the decisions and the range of factors to be considered, as well as the independence and individuality of decision-makers often led to perceived or actual inconsistencies in decision-making.

There was a consensus that for these reasons, under-18s should only be remanded in the most extreme circumstances. However, one Sheriff indicated that, for them, the justification to avoid remand is much clearer for under-16s than those aged 16 or 17, suggesting that they do treat this age group differently. For 16 and 17 year olds who did not meet the legal definition of a child this had implications as to whether they were remanded to a YOI rather than secure care. This was reflected in the testimonies of children and parents, who felt that once they turned 16 they were treated like an adult:

*CH7: Because it was my first time up in court my social worker said a bed was available in secure and if it wasn't here it would have been secure and that but because obviously of how serious it was the judge just overruled it and said look he's 16 now man just get treated as an adult so I got took up. Got treated like an adult now innit.*

Interviews with Sheriffs and PFs revealed a variation in their decision-making perspectives and practices. Once the defence agent has made a motion for bail, PFs can indicate to the court whether they are opposed to bail or not, but the decision is solely the court's to make after hearing from both parties. However, the court can ask the PF for relevant information to clarify and inform their decisions. Two Sheriffs discussed that they found the reasoning of PFs in terms of bail or remand inconsistent - with the reasoning often unclear as to why one child might be remanded and another not. However, Sheriffs and PFs cited a similar range of factors that they would take into consideration, including:

- The existence of a fixed abode from which the child could be bailed to
- History of (re)offending and whether there has been an escalation
- History of complying with/breaching court orders
- Likelihood of interfering with witnesses
- The needs and background of the child
- Risk the child poses to public safety/a victim

- Nature and seriousness of offence
- The support social work/third sector could offer the child if bailed
- For the Sheriffs, whether the child had made progress since the time of the offence

A key area where variation in perspective was demonstrated was in relation to whether children who breached bail conditions should be remanded or not:

*PF1: But what are we to do with young people who are out of control, who are feral, we need to give the family or the community some respite.*

*PF4: I think sometimes with children we have grounds to oppose bail but you still don't sometimes because you don't want them to be in custody and we do try very much to keep them out of the justice system so you have a lot times that you have a child but maybe the offence isn't serious enough that you would think oh they don't need to be remanded for this but you could easily because they've breached an order so many times so in fact they do get a bit more leeway.*

For some, compliance with the process, and thus for justice to be seen to be done, was a contributory factor in decision-making. In that respect, two Sheriffs and one PF remarked that if a child was repeatedly offending (even low-level offending) and breaching court orders then remand would be necessary. Defence agents witnessed this inconsistency and belief that no other options were considered appropriate:

*DS3: There are some sheriffs, who if somebody is on bail, even on one occasion and appears for a second offence will take the view that the person should be remanded, now I think that's a lot of nonsense, I think that is a draconian outdated approach to sheriffing that really needs to be looked at.*

For others, the risk to public safety was the overriding factor, and where public safety was not a concern then they should be bailed - even if the child was struggling to comply. One Sheriff noted that you need to "plug away" with children, trying as many alternatives to remand as possible and acknowledge the additional challenges they face in complying with bail conditions or curfews. However, both Sheriffs and PFs frequently described decision-making around public safety as a tricky "balancing act" where the needs of a child had to be weighed against the risk they posed:

*SH4: I suppose nobody wants to be the person who let out the person who then went onto murder somebody and that's always concerning ... It's very difficult, it's just a balancing exercise and it's not easy.*

Moreover, defence agents argued that Sheriffs often underestimate the negative effects of remand for children and believe that they often justified the use short periods of remand as the opportunity to make an impact on a child:

*DS2: One of the arguments a sheriff will make is oh but it's only for two or three weeks or whatever, it's a short period and I think some of them see it as a short sharp shock and okay.*

*DS2: A young kid misses court because they're just a bit of a mess, are we really saying that what should happen when they appear again, rather than them being given another chance, is that they should be told no you missed court once you're getting locked up for the next 3 weeks and we're going to have your trial with you in custody, because you missed a court date, now that still happens.*

Perceptions of inconsistency in decision-making were also shared by some social workers, who noted that the outcome of a child's cases was heavily dependent on the beliefs and values of the individual Sheriff they presented in front of:

*SW1: This idea that there, we talk about the court, it's not like a single entity - sheriff A B C D could make 4 different decisions and exist on a spectrum from punitive to relaxed. And that will dictate where you end up as much as anything.*

*CH10: I feel like I should have got more of an explanation why I wasn't getting diversion, one of my friends was accused of the same thing at 17 and was found with no evidence of anything and he was given a diversion and let off, he was older than me at the time.*

One Sheriff observed that these differences are to be expected as their role, which relies upon the application of individual judgment within a guiding framework, means that other Sheriffs might take a different view of the best course of action.

### Decision around bail conditions

PFs are able to inform the court that they are not opposed to bail with standard conditions, or that they are not opposed to bail with additional or special conditions, but the decision about which conditions are imposed is made by the Sheriff. Sheriffs highlighted that conditions were used to ensure children could be bailed into the community with the lowest likelihood of reoffending and lowest risk to the public. PFs and Sheriffs both acknowledged the unique difficulties that children faced in adhering to conditions, and particularly curfews, for a long period of time and Sheriffs indicated that at times this could mean setting the child up to fail as there are significant implications for children who breach court orders.

Attempts were made by Sheriffs to mitigate this possibility, with one Sheriff noting that they would tailor timings of a curfew to suit the child as much as possible whilst maintaining public protection, and another adding that they attempt to avoid curfews unless absolutely necessary, or another tried to fix an earlier court diet so that the length of bail did not exceed the timeframe for those on remand:

*SH5: I think the whole system can make itself a hostage to fortune by imposing unachievable conditions because the temptation for the fiscal and for the defence is to say well instead of remanding let's impose all these conditions, the defence will do anything to get them out at that time but in the long run that might not be the best thing to do.*

*SH1: I won't say I won't do it but I am very very reluctant to make a young person subject to curfew because then if they face another charge it will actually be a substantive criminal offence.*

## Sources of information for decision-making

Across all four PF interviews the police report was identified as the main and sometimes only source of information for which they would base their decision, first on the decision whether to prosecute, and then on whether they are opposed to bail or not. However, three of four PFs raised significant concerns with the detail and quantity of information provided in the police report. They identified that the length and quality of these reports was inconsistent - sometimes it was sufficient, and other times lacked important information they needed to make the best decisions:

*PF1: We have been arguing to get greater detail from the police, in some cases there is more background about the needs of the individual but in others they are more empty.*

Social work was the second main source of information used in PFs' decision-making, and this input was considered highly valuable in understanding the background, needs of the child and the support that would be put in place for them:

*PF4: I think with children it's really important to speak to social work and things like that to see what they think they can do because they are often quite keen that they're not remanded in custody and they'll be quite proactive in saying oh we could do this or that you know, we could have meetings with them or make sure that he does this or that and at least you've got somebody taking responsibility for that.*

Despite the high value placed on social work information, the PFs displayed a variety of different processes for engaging with social work. PF1 did not communicate with social work at all, PF2 would discuss with social work but only if social work contacted them, PF3 appeared to initiate conversations with social work where the child was known to social work, and PF4 actively sought out communication with social work where this was deemed necessary. This variation is also reflected in the local authority survey responses and social work interviews, where different participants had different ideas of what the process was for sharing information with the PF. This variation in process potentially leads to confusion on both sides in terms of who is expected to initiate discussions about children:

*LA11: We have problems being able to do this as communication with the PF is not easy. This is not written into guidance so we have a point of contact if we know when a young person is in.*

Sheriffs explained that their role involved being able to assimilate a range of information in a very short period of time, with bail hearings, for example, only lasting a couple of minutes. They received a one-page document with a list of the charges against the child, along with the record of the accused and information on whether the crown was opposed to bail or not. During the hearing they would then receive information, mainly from the defence solicitor, on the background and needs of the child, as well as their family circumstances and anticipated ability to comply with conditions. If the child was under 16 or on a CSO, they would also expect to get information from social work detailing their background, any progress made already and importantly what support they could provide the child with to adhere to conditions and resolve underlying issues. Sheriffs noted that this information was only received where police had notified the social work team that they had a child in custody -

and often this information was absent. Moreover, for 16 and 17 year olds who were not on CSOs, they noted they were unlikely to receive information from social work.

There was a definite appetite across Sheriffs for more information and input from social work. This was mirrored in interviews with social workers and in the local authority survey responses, where participants highlighted that they would like to have easier access to the Sheriff. A key issue here was a lack of clarity about the process for notifying social work that a child was appearing in court and the process for sharing relevant information. Often this happened by chance rather than by design:

*SW2: I sat on the steps of the court and hand wrote stuff...it was all about he's had a hard life, external things, he's really vulnerable, he's on the CARM register...if I didn't go through that there's no really any clear way like how do we get this information to the right people?*

*SH4: I had a boy who was 15 who appeared in the petition court ...now because I knew he was coming through, somehow I had got wind of it, maybe I had seen something in the press the night before that somebody had been arrested. I don't know if this happens routinely, I actually got the Clerk to contact the social work department and ask them to prepare a bail report for me to see what they could actually offer.*

### The timing of decision-making

There were several examples across interviews with children, parents and social workers having to wait long periods of time to be seen by the Sheriff on the day of court. Often children were waiting from the early morning and did not have their case heard until the early evening. Reasons for long waiting times again appear to be due to bureaucracy within courts, with all defendants being told to arrive at 10am, and children not being prioritised. This practice carries the potential to have significant negative impacts for the wellbeing of children:

*CH8: It was a long day, got to the court at half eight and didn't get took up till 4 o'clock, up in the court cells... after just doing a full weekend in the cells (child under age 16).*

*SW1: They may be seen at 10am or they may be seen at 10 to 5 and frankly that is an issue, the waiting for decisions for juveniles.*

However, social workers also detailed with frustration the impact that children not being seen until later in the day had on their practice and the communication and implementation of decisions with children and their families. It meant they had limited time after the child had been seen by the Sheriff to complete necessary interviews and assessments. The most significant issue that arose, however, was the impact on arranging transport or accommodation for children who were to be remanded or sentenced to custody. Social workers explained how limited resource and providers being based far away from court meant usually waiting with children for hours. Moreover, children in these circumstances then do not arrive to secure care or YOI until late into the night - exacerbating what is often already a traumatic move.

*LA2 We have huge concerns that those remanded are frequently not dealt with until late in the day resulting in them spending all day in the court cells or the secure van and then have a long journey before arriving at the receiving prison where there is also often a delay before they are taken in.*

*SW1: We were being told he was going to be seen at 2pm and by twenty to 5 there was still no outcome and my phone was ringing pretty relentlessly with [transport provider] saying we need to know because our teams is three hours away so had he been remanded it would have been a bloody disaster. HERE*

## Discussion and Conclusions

This research provides a snapshot of the various perspectives of the actors within the court system, the decisions and factors that are considered regarding bail and remand, as well as how these decisions and the wider court journey affect and are experienced by children and their families. For all of the aspirations of Scotland being the best place to grow up (Scottish Government, 2018), children from the age of 12 years can still be prosecuted in court with little recognition of the disadvantage that their very position as children places them at within our justice system. This led the Independent Care Review (2020, p. 41) to conclude that “traditional criminal courts are not settings in which children’s rights can be upheld and where they can be heard”. But children involved in offending often straddle the policy arenas and differing legislative context of both children’s and criminal justice. One offers some level of participation by taking the views of children into account, which may increase the likelihood of perceived procedural fairness, and the other is a more formal system where the defendant does not have a voice (Tyler & Hugo, 2002). Just as these two policy and legislative contexts struggle to interact harmoniously, the practice that sits beneath them often reflects this discord.

The decision-makers, presented with what often appeared to be limited information, had to grapple with a myriad of complex factors and proprieties to be balanced in their decisions about the use of bail, bail conditions and remand. The decision-makers described a clear sense of deliberation and flexibility in their decision-making processes, but this was in contrast to the perceptions and experiences of the children and families who encounter the justice system. Instead, what was revealed was a justice system that children were unable to participate in or understand. Consistently the children interviewed revealed that they do not understand what happens at court and how the decision-making process is enacted, and they did not have the opportunity to be included, or even heard, in decision-making.

This highlights how poorly equipped children are for the court system, as well as how ill-equipped the court system, as it stands, is for them. Whilst there were clear attempts to accommodate the status of the accused as a child, this seemed constrained by the parameters of the court processes and structures, as well as the weight of tradition. There appeared to be a lack of alignment and flexibility between the needs of the court and what is required to meet the needs of children and upholding their rights within these processes, which meaningfully facilitates every child’s participation and engagement.

Even with a collective agreement that children, under the age of 18, are not the same as adults and require additional considerations and a different approach, our response to

children in the justice system is like trying to fit a round peg in a square hole: it can go through it but doesn't quite fit. But there is both a human cost and a procedural cost to this. Long, drawn out processes that children do not understand limit and often prohibit children's meaningful participation. For those disenfranchised in a justice system they feel neither part of or heard within, evidence tells us this reduces the effectiveness of achieving the end goal of less harm caused to others and fewer victims (Centre for Justice Innovation, 2018). We know that when people feel valued and heard and included, they are more likely to accept the decisions of others even when they disagree, and nowhere is this more pertinent than in justice. Yet the children and families in this research do not have a sense of procedural justice, and instead feel that the system is not fair or just, but is deliberately stacked against them.

The ability of children to comply with bail conditions was acknowledged as a particular area for concern. Children are still developing the ability to plan, make reasoned decisions and consider the longer-term consequences over immediate gratification and reward (T2A, 2015). Adhering to conditions can become challenging and results in breaches of bail, especially over the months or years it can take for justice processes to conclude. Thus, there was strong agreement that support to aid children in navigating their court journey - particularly where bail conditions are in place - is required.

There is also unequal access to age-appropriate resources, such as secure care as opposed to a YOI. It is well established that depriving a child of their liberty, (even for very short periods) impacts on their wellbeing, in both the short and longer-term, with children experiencing "...fear, isolation, trauma and harm in addition to discrimination, stigma and disempowerment" (Mendez, 2015; United Nations Human Rights Committee, 2019, p. 8). Scottish Parliament Justice Committee (2019, p. 37) highlights that "...unless there is strong evidence to the contrary, no young person under the age of 18 should be placed in HMP&YOI Polmont when a place in a secure care unit would be more suitable". Similarly, the Independent Care Review (2020, p. 82) stated that in line with the UNCRC, 16 and 17 year olds who are remanded or sentenced must be accommodated within secure care rather than a YOI, concluding that "being in prison like settings is deeply inappropriate for children". Ultimately, we need to address this anomaly in legislation as well as the number of children being placed on remand, regardless of it being secure care or YOI, to ensure that these decisions are only being made as a last resort for the shortest period of time.

We acknowledge that our justice system has made changes over the years in relation to how it responds to children, and there is evidence of shifts in policy and practice such as the presumption to divert 16 and 17 year olds from prosecution to diversion schemes and to the CHS where appropriate, as recommended in Dyer (2016). However, some changes have gained little traction and others do not go far enough. We can continue to tinker round the edges of our adult justice system, but this is no longer sufficient to ensure procedural justice for children in conflict with the law. Until all under 18s are legally defined as a child, and have the same access to the CHS, there will continue to be differences in how under 18s are treated in the pursuit of justice. This requires a more radical re-shaping of our justice system, which engages and co-designs with children, young people, victims and professional stakeholders. Ultimately, a justice system that is modelled on participation, procedural fairness and equity.

## Practice Implications

From our research there are several main areas that need to change to address the issues highlighted. These include ensuring Scotland is fully compliant with the UNCRC; that children are kept out of adult justice systems; that there is a redesign of the justice system for the most high-risk children that can't be managed in the CHS; and in the interim changes to the current system to ensure procedural fairness for children.

### System Change

As this and other research has evidenced (Nolan, Dyer, & Vaswani, 2017), the current justice system in Scotland has not been designed with children in mind. To ensure a justice system that is seen to serve justice and is a 'just' system for children, then one that is designed to meet their individual needs is required. Children and young people should be directly involved in helping to design and shape this system. However, a new system should include:

- All children under age 18 being referred to SCRA, and only the most serious cases being referred to the PF
- For these most serious offences, children should go to a specialist child-friendly justice arena that has the same standing as the formal court; however, its design and implementation upholds children's rights, reduces the barriers to their understanding and inclusion and enhances the sense of legitimacy paramount to adhering to the law.
- The professionals in this arena should all have additional training, to ensure the needs, experiences, maturity and development of the child are considered; and that all age-appropriate disposals are discussed and available, to encourage desistance and rehabilitation.
- The disposals open to these child-friendly justice arenas would include the child receiving timely and appropriate supports
- Where possible, to improve communication and easy access to support, professionals and services should be co-located

### Interim Improvements

By the creation of a new system that directly meets the needs of children who present the most significant risk, their age, maturity and development would be taken into account and they would be offered the support and the help they need to desist from future offending. This would also ensure that children's rights are upheld (Lightowler, 2020). Until this happens, there are several changes that can be made to the current system to ensure children's rights are upheld and their needs met:

- Separate courts at set times should be used for children
- All children should be fully supported at all stages of the court process and procedures explained to them in a way that they understand.

- There should be 'easy read resources' and a film produced by children, for children, to explain processes and online resources to answer any questions they may have
- The professionals involved in prosecution of children should have specialist training in relation to the SLCN, additional needs, risks and strengths of children to promote their ability to communicate and deliver process of justice in a manner that is effective and recognisant of the fact it is children they are dealing with.
- Within the courtroom, the solicitor should speak with the child as often as possible to ensure their understanding and offer additional breaks
- To reduce the stress and anxiety, the child's case should be prioritised, set for a specific time, with the court closed to the public
- If they are in custody/bailed or ordained to appear, children should not be held with adults, and should be placed in a room with games/books/comics to ease their anxieties. For all children under age 17.5 the advice of the CHS should be sought and remittal where possible.
- To support decisions regarding bail, information should be shared with PFs, Sheriffs/ judges as to what resources are available
- Any additional bail conditions should also be the least restrictive and for the shortest time possible
- For all children where bail is opposed, social work should be given the opportunity to offer a supportive package that manages risk within the community
- Where it is deemed that a period of remand is the only option, this should be to a secure unit if legally viable and for the shortest time possible
- If the child is not subject to a CSO but there is a need for such an order to offer the child the protection of the CHS and allow the court the ability to remit the case to the CHS and use secure care over a YOI, this should be a priority for social work.

By undertaking the above, we would go some way in Scotland to meeting the requirements of the UNCRC and achieving procedural fairness for all children in the justice system.

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