

# **A Guide to Youth Justice in Scotland: policy, practice and legislation**

## **Section 11: Children's Rights, Our Responsibilities**

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## 1. Introduction

This section sets out the principles and provisions of a rights-based approach to youth justice, grounded in the [United Nations Convention on the Rights of the Child \(UNCRC\)](#) and other international and European human rights conventions. It aims to provide support and guidance to those working in youth justice to ensure children and young people's rights are embedded across policy and practice. To achieve this, the section will set out the international obligations and standards against which Scotland has agreed to be held to account and offer guidance as to how these standards can be implemented across the youth justice system in practice. We recommend that it is read in conjunction with [Section 12](#) of this guidance, which focuses on upholding the rights of children in the court system, and Lightowler (2020) '[Rights Respecting? Scotland's approach to children in conflict with the law](#)'.

### 1.1 Background

Over 30 years ago, Scotland was said to be ahead of its time in initiating a rights-based approach to youth justice. Soon after the UNCRC had first been drafted, and before it had been ratified by the UK, Professor Sanford Fox of Boston College Law School gave the first ever Kilbrandon lecture in Scotland. He reflected that:

“the idea that children should be active participants in decisions affecting them...has only recently been enshrined in the new [UNCRC]...although these values have been the foundation stones of Scottish juvenile justice for 20 years now.” (Fox, 1991, p. 11)

The Kilbrandon Report and subsequent *Social Work (Scotland) Act 1968* took the initial steps to develop a child-centred approach to youth justice in Scotland. The UK's subsequent ratification of the UNCRC in 1991 has provided a focus through which children's human rights increasingly influence policy and legislation. Despite the progress made, a rights-based approach to youth justice does not always have public support across Scotland and is sometimes portrayed as a weak response to youth crime. There is also often a considerable gap between international human rights standards for youth justice, and the lived experience of children and young people who come into contact with the youth justice system.

To embed an approach to youth justice that respects, protects, and fulfils children's human rights, it is essential that legislators, policy makers and practitioners focus on the implementation of relevant international human rights standards. These include preventing children from entering the youth justice system, favouring alternatives to detention, and treating children with dignity and worth throughout all stages of the youth justice system. Such measures are not a matter of 'goodwill' or 'positive practice' (Muižnieks, 2014); they are a legal obligation to which Scotland, through the UK, has signed up by ratifying the UNCRC and other international human rights treaties. You can read more about this in '[Rights Respecting? Scotland's approach to children in conflict with the law](#)'.

## 1.2 Taking a Rights-Based Approach

International human rights law places governments (referred to as ‘State Parties’) under a legal obligation to respect, to protect and to fulfil human rights, including children’s human rights. The obligation to ‘respect’ means that governments must not interfere with or restrict the enjoyment of human rights. The obligation to ‘protect’ means that governments must protect individuals and groups against human rights abuses. The obligation to ‘fulfil’ means that governments must take positive steps to facilitate the enjoyment of basic human rights. These obligations are central to ensuring a rights-based approach to youth justice. A rights-based approach ensures that legislation, policy, and practice are all anchored in a system through which rights-holders (such as children and young people) can claim their rights and duty-bearers (such as national or local government) are given corresponding obligations. It is an approach that empowers people (as rights-holders) to take part in developing legislation, policy and practice, whilst also holding the government to account (as duty-bearer) in meeting the obligation to respect, protect and fulfil human rights.

As noted by the Scottish Human Rights Commission (2013) essential elements of a rights-based approach are:

- **Participation:** People should be involved in decisions that affect their rights
- **Accountability:** There should be monitoring of how people’s rights are being affected, as well as remedies when things go wrong
- **Non-Discrimination and Equality:** All forms of discrimination must be prohibited, prevented, and eliminated. People who face the biggest barriers to realising their rights should be prioritised.
- **Empowerment:** Everyone should understand their rights and be fully supported to take part in developing policy and practices which affect their lives
- **Legality:** Approaches should be grounded in the legal rights that are set out in domestic and international laws

These are known as the ‘PANEL Principles’ and are explained in more detail later in this section.

A rights-based approach to youth justice seeks to ensure that children are not unduly criminalised or stigmatised because of their behaviour, but instead supported to address that behaviour and to rehabilitate. It recognises that children involved in offending behaviour often have significant underlying needs, and a failure to address these needs is a violation of their human rights. A rights-based approach also takes into account the need to ensure public protection, and to acknowledge the harm that can sometimes be caused to others by a child’s behaviour.

## 1.3 The Whole System Approach

[The Whole System Approach \(WSA\)](#) is the Scottish Government’s response to children (under the age of 18 years old) who are involved in, or at risk of involvement in, offending behaviour. As Scotland’s approach to youth justice, it can be assessed against international human rights standards to ensure that it provides a comprehensive means through which offending behaviour by children can be prevented and addressed in a way that protects, respects, and fulfils their human rights.

WSA advocates a multi-agency, multidisciplinary approach “to put in place tailored support and management based on the needs of each individual child” (Scottish Government, 2017). It seeks to respond to offending behaviour as an indicator of need. In doing this, WSA stops children being unnecessarily pulled into formal systems such as the Children’s Hearing System or Criminal Justice System through diversionary processes, promoting the use of universal services where appropriate. WSA recognises that the continuum of offending behaviour is varied and there will be occasions and situations where aspects of a child’s behaviour poses significant risk of harm to others. In these situations, it is crucial that responses continue to be proportionate, developmental, systemic, and trauma-informed to reduce risk behaviours. Any response to children involved in, or at risk of involvement in, offending behaviour must be underpinned by a rights-based approach and embedded in the [Getting It Right for Every Child \(GIRFEC\)](#) principles.

Within the agencies involved in implementing WSA are many competent and caring people - police officers, lawyers, social workers, healthcare professionals and teachers, working alongside parents, carers, panel members and children and young people. Their work to defend children’s human rights makes a genuine difference to children’s lives on a daily basis. The aim of this section is to support and guide this work and to promote a robust understanding of the relevant international human rights framework and the application of children’s human rights in practice.

## 2. International Human Rights Framework

The international human rights framework sets out the human rights obligations which governments are bound by international law to respect.

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” (United Nations General Assembly, 1948, p. 2)

A fundamental principle of international human rights law is that it applies to all people at all times, meaning that it applies equally to children and young people.

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]” (United Nations General Assembly, 1948, p. 3)

International human rights law is founded upon the 1948 [Universal Declaration of Human Rights \(UDHR\)](#) which, together with the [International Covenant on Civil and Political Rights \(ICCPR\)](#) and the [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#), is known as the ‘International Bill of Human Rights’.

Other international and European human rights instruments provide additional specific legal protections applying equally to children and young people. In total, there are nine core international human rights instruments, each of which is accompanied by a committee of independent experts who monitor implementation. Additionally, within the international human rights framework are the Special Procedures of the Human Rights Council. These are independent human rights experts with specific mandates to report and advise on human

rights from a thematic or country-specific perspective. They include, among others, the Special Rapporteur on Arbitrary Detention, the Special Rapporteur on the Rights of Persons with Disabilities, the Special Rapporteur on the Right to Education and the Special Rapporteur on the Right to Privacy.

This section will set out the United Nations and the Council of Europe human rights standards, treaties, rules and conventions which impose a wide range of obligations and provide a well-established framework for modelling youth justice legislation, policy and practice.

## 2.1 The United Nations Convention on the Rights of the Child (UNCRC)

The [UNCRC](#) is an international human rights treaty that sets out the civil, political, economic, social, and cultural rights of every child under the age of 18 within its 54 articles. Since its adoption by the United Nations in November 1989, 195 countries have signed up to the UNCRC. The USA is the only country in the world yet to do so.

Underpinning the UNCRC are three core concepts:

- **Protection** against violence, abuse, neglect, maltreatment, or exploitation
- **Provision** of name and nationality, social security, adequate standard of living and education
- **Participation** through the right of a child to express their views, to freedom of thought and to freedom of association

Four general principles have been highlighted as being key to interpreting all the other articles and as playing a fundamental role in realising all the rights in the UNCRC for all children. These are:

- The principle of **non-discrimination** (Article 2)
- The **best interests** of the child (Article 3)
- The **right to life**, survival, and development (Article 6)
- Respect for the **views of the child** (Article 12)

The UNCRC is binding under international law and carries a clear obligation for governments to ensure its full implementation. It is not yet, however, incorporated into Scots or UK law and therefore most of its provisions are not legally enforceable through the courts. Some elements have been brought into Scots law on a piecemeal basis. An example is the best interests of the child (Article 3) which is particularly prominent through provisions that treat welfare as 'the paramount consideration' in the *Children (Scotland) Act 1995* and *Children's Hearings (Scotland) Act 2011*. Both the 1995 Act and the 2011 Act place an obligation on the courts, Children's Hearings panel members, and those fulfilling parental responsibility, to give children an opportunity to express their views (Article 12), and to have regard to these views as far as practicable, considering the age and maturity of the child.

In April 2019, the First Minister committed to pass a law within the following two years to incorporate the UNCRC into Scots law and make the rights enshrined within the UNCRC rights binding on all levels of government. In May 2019, the Scottish Government launched a consultation to look at how a new Act could take forward this commitment<sup>i</sup> and give "practical

effect to the UNCRC in a way that demonstrates international leadership and works for every child and young person in Scotland” (Scottish Government, 2019, p. 5). The Scottish Parliament unanimously passed the [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) on March 16, 2021. The Bill was expected to receive Royal Assent four weeks from that date and commence in October 2021 meaning that Scotland would be the first UK country to fully incorporate the UNCRC into domestic law. However, the [UK Government](#) has indicated it may challenge the Bill in the Supreme Court as they have concerns regarding the legislative competence of certain provisions within the Bill. Whilst the Scottish Government remains committed and disagrees with these objections, should this proceed to the Supreme Court it may have implications for the scheduled enactment of the Bill in October 2021.

## 2.2 UNCRC General Principles and Youth Justice

In relation to youth justice, the four General Principles can be applied as follows:

### **Non-discrimination (Article 2)**

All children in conflict with the law should be given equality of opportunity. To do this, practitioners must pay particular attention to those children who may require additional support, such as children with a disability, with communications needs or with mental health needs. Steps must also be taken to ensure that children who have been in conflict with the law do not face discrimination in relation to accessing education or employment and are able to assume a constructive role in society.

### **Best interests of the child (Article 3)**

The best interests of the child must be at the heart of all decisions relating to children in the youth justice system, both in terms of any child exhibiting offending behaviour and in terms of child victims of this behaviour. A rights-based approach recognises that children differ from adults in their physical and psychological development, and their emotional and educational needs. This underpins the basis for the lesser culpability of children and means that in order to protect the best interests of the child, rehabilitation and restorative justice must be at the forefront of all approaches that deal with children who exhibit offending behaviour.

### **The right to life, survival, and development (Article 6)**

When a child comes into contact with the youth justice system, it can have a detrimental impact on their development. Detaining children can have extremely negative consequences and seriously hamper their reintegration in society. As such, the entire youth justice system should support children’s development and a related article (Article 37) explicitly sets out that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time.

### **The right to be heard (Article 12)**

The right of the child to express their views freely in all matters affecting them should be fully respected and implemented throughout every stage of the process of the youth justice system. The UN Committee recognises that children involved in the youth justice system are increasingly becoming a powerful force for improvements and reform and for the fulfilment of their rights.



### **Other relevant UNCRC rights**

The UNCRC contains two further provisions particularly relevant to children in the youth justice system. These include:

#### **The right not to be punished in a cruel or harmful way (Article 37)**

Article 37 requires that the arrest, detention or imprisonment of children must be lawful, must be used only as a measure of last resort and be used only for the shortest possible period of time. Children deprived of their liberty must be treated with humanity, in a manner that respects their individual needs and their age. This means separating them from adults unless it is not in their best interests to do so. Every detained child must have prompt access to legal and other assistance and has a right to challenge their detention before a court or other authority.

#### **Children's rights in juvenile justice (Article 40)**

Article 40 requires states to develop and promote specialised systems for children accused of, or found to have committed, crimes. It includes a requirement to establish specialised laws and policies, as well as authorities and institutions. It requires the establishment of a minimum age of criminal responsibility, and measures to divert children from formal judicial processes.

Importantly, Article 40 sets out the right for children in contact with the youth justice system to be treated in a way that is "consistent with the child's sense of dignity and worth". This inherent right to dignity and worth must be respected and protected throughout the entire youth justice system, from first contact with law enforcement agencies through to implementing measures to work with the child. It also contains the principle of treating a child in a way that "reinforces the child's respect for the human rights and freedoms of others".

This means that, within the youth justice system, the treatment and education of children should be directed to the development of respect for human rights and freedoms and that it requires a full respect for and implementation of the guarantees for a fair trial. The UN Committee asks:

"If the key actors in juvenile justice, such as police officers, prosecutors, judges, and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedoms of others?" (United Nations Committee on the Rights of the Child, 2019, p. 6).

A further principle is that the youth justice system must take into account the child's age, promote the child's reintegration, and support the child in assuming a constructive role in society. Again, this principle must be applied, observed and respected throughout the entire youth justice system. It means that all professionals involved in the youth justice system should be knowledgeable about child development and promoting child wellbeing. Across the world, violence occurs in all phases of the youth justice system, from first contact with the police, during pre-trial detention and during the stay in treatment and other facilities for children sentenced to detention. The principle of respect for the dignity of the child means that all forms of violence in the youth justice system must be prohibited and prevented.

## 2.3 The European Convention on Human Rights (ECHR)

The European Convention on Human Rights (ECHR) protects the civil and political human rights of people in countries that belong to the Council of Europe. The ECHR seldom refers to children specifically, but its provisions are equally applicable to adults and children alike. All 47 Member States of the Council of Europe, including the UK, have signed the Convention. It was incorporated into UK law through the *Human Rights Act 1998* which means that its provisions are enforceable through Scottish and UK courts.

Certain ECHR rights are particularly relevant to children and young people in the youth justice system:

- The right to **freedom from torture** and inhumane or degrading treatment or punishment (Article 3)
- The right to **liberty and security** of the person (Article 5)
- The right to a **fair and public trial** within a reasonable time (Article 6)
- The right to **respect for private and family life**, home, and correspondence (Article 8)
- **Prohibition of discrimination** in the enjoyment of the ECHR rights (Article 14)

Although the ECHR omits the social, economic, and cultural rights that are such an intrinsic part of the UNCRC, it has made a substantial contribution to the advancement of children's human rights. The UNCRC has been ratified by all member States of the Council of Europe and therefore binds all States party to the ECHR. The European Court of Human Rights (ECtHR) has described the UNCRC as setting out "the human rights of children and the standards to which all governments must aspire in realising these rights for all children" ("Sommerfeld v Germany," 2004) and takes account of the UNCRC in many of its judgments.

The ECtHR often deals with cases that relate to children and young people in youth justice systems and has developed a great deal of case law that reinforces the importance of taking a rights-based approach to youth justice. In 1999, the ECtHR concluded that:

"...it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings" ("Adamkiewicz v Poland," 2010).

The ECtHR was clear that this also includes a requirement on domestic courts to promote the child's ability to participate in the proceedings. In recent years, the Court has found a range of violations of the European Convention on Human Rights with respect to children, for instance of Article 8 (Right to respect for private and family life), Article 9 (Freedom of thought, conscience, and religion), and Article 14 (Prohibition of discrimination) (European Union Agency for Fundamental Rights, 2015b). The ECtHR has increased the standards of protection guaranteed in the Convention when ruling in cases concerning children and young people, particularly in relation to detention. As such, the standards for demonstrating the need for detention in accordance with the ECHR are higher for children than for adults. Furthermore, the ECtHR has ruled that detaining children in pre-trial detention should be a measure of last resort and be as short as possible. When detention is necessary, the ECtHR has ruled that children should always be kept apart from adults ("Nart v Turkey," 2008).

The ECtHR set specific Article 6 requirements to ensure children's effective participation in criminal trials. As a general rule, proceedings should ensure that account is taken of the child's age, level of maturity and emotional capacities ("T v The United Kingdom," 1999). Examples of 'effective participation' would include the child's presence during the hearings, holding of in camera hearings, limited publicity, ensuring that the child understands what is at stake and limiting the formality of court proceedings.

### 2.3 Guidelines of the Committee of Ministers of the Council of Europe Child-Friendly Justice

The Council of Europe (2010) [Guidelines on child-friendly justice](#) set out basic rules that Council of Europe countries should follow when adapting justice systems to meet the specific needs of children. Although the guidelines are not legally binding, they provide authoritative guidance on how justice proceedings (including those of the criminal, civil and administrative justice systems, Tribunals, the Children's Hearings System) should take into account the rights of children. The Guidelines are based on existing international and European standards, including the UNCRC, the European Convention on Human Rights, the jurisprudence of the ECtHR and a wide range of Council of Europe instruments relating to children's human rights including the European Social Charter, the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, and the European Rules for Juvenile Offenders subject to sanctions or measures. They apply to all situations in which children and young people are likely to be in contact with criminal, civil or administrative justice systems and, in line with the UNCRC, define a 'child' as any person under the age of 18 years old.

According to the Guidelines, child-friendly justice is a system which guarantees the respect and the effective implementation of all children's human rights, giving due consideration to the child's level of maturity and understanding and to the child's circumstances. The guidelines emphasise the importance that justice is accessible, age-appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity. Importantly, the Guidelines state that:

"Elements of due process such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimised or denied under the pretext of the child's best interests. This applies to all judicial and non-judicial and administrative proceedings" (Council of Europe, 2010, p. 19).

The Guidelines are underpinned by the following six principles, which echo those enshrined within the UNCRC and ECHR:

- **Participation:** Children have the right to be heard in decisions that affect them. Adults must take children's views seriously.
- **Best interests of the child:** When decisions are being made, children's human rights must be respected, and all their needs taken into account according to their

age. In doing this, judges are encouraged to seek the opinion of experts, such as psychologists or social workers.

- **Care and respect:** Children must always be treated with care and respect. In particular, his or her privacy must be protected.
- **Equal treatment:** Children must be treated equally, regardless of their country of origin, group or religion, or the language they speak. Children with disabilities, children who are homeless or those placed in residential care, and Gypsy/Traveller and foreign children need particular protection.
- **Rule of law:** Children should be treated fairly in the justice system. Those in the youth justice system should have a lawyer and the court should take into account their specific situation and needs. Children have the right to complain about their treatment to an independent and impartial person or body.

Through the Guidelines, these principles are embedded within seven key areas that impact on children and young people in the youth justice system:

- **Information, representation, and participation:** Children should be informed of their rights, have free access to a lawyer, and have a say in decisions that affect them, which should be explained in a way that they can understand.
- **Protection of privacy:** A child's privacy should be protected, including from the media. In particular, no one is allowed to print a child's name, picture, or personal information, including about their family, in the newspaper or on the internet. If children are being heard in court or other official settings, only the relevant people should be present.
- **Safety:** Children should be protected from harm and when they have been hurt, it is important to keep them safe. Everyone working with children should be checked to make sure they are not likely to harm them.
- **Multi-disciplinary approach and training:** Professionals working with children should work together towards the child's best interests. They should receive training on children's human rights, communication and needs at different ages to support and protect children in the youth justice system, as well as to ensure the reliability and good administration of justice.
- **Safeguards before, during and after all proceedings:** When children go to court, the settings and process should be described and explained to them in a way that they can understand. They should have the opportunity to have their own lawyer and to have a say in cases that affect them. Decisions should be taken as quickly as possible and be clearly explained to children.
- **Deprivation of liberty:** A child should be detained only when there is no other option, and never on immigration grounds. If a child is detained, it should be as briefly as possible and separate from adults (except when this is in their best interests). Despite the detention, they should enjoy all their other rights, especially the right to contact family and friends, education or training, religion and access to sports and leisure facilities. Children should be properly prepared for their return home.
- **Promoting and monitoring child-friendly actions:** Governments should set up information structures for children (for example; free helpline or Children's Commissioner), make sure children know how and who to complain to about their treatment, teach children, parents, and professionals about children's rights, foresee protective legislation understandable for children, regularly check children's treatment in justice systems and take measures to improve it.

The Council of Europe Guidelines on child-friendly justice have been taken into account by the Scottish Government in the development of legislation and policy relating to youth justice, for example in the [Guidance on the use of Movement Restriction Conditions in the Children's Hearing System](#) and in the [Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland](#).

## 2.4 Parliamentary Assembly of the Council of Europe – Child-Friendly Juvenile Justice: from rhetoric to reality

In 2014, the [Parliamentary Assembly agreed a resolution](#), calling on Council of Europe countries to bring their law and practice into conformity with existing human rights standards. Highlighting “considerable and continuing dissonance between the rhetoric of human rights discourse and the reality of juvenile justice interventions” (Council of Europe, 2014, p. 1), the resolution aims to refocus attention on existing European and international standards. It includes key recommendations for Council of Europe countries, including setting the minimum age of criminal responsibility to at least 14 years old, establishing a maximum period of detention to which a child may be sentenced and decriminalising status offences.

## 2.5 Council of Europe Strategy for the Rights of the Child (2016-2021)

[The Council of Europe Strategy for the Rights of the Child](#) acknowledges progress made in implementing the UNCRC across Council of Europe countries but is clear that children's rights are still violated on a daily basis. The Strategy notes that European judicial systems are still insufficiently adapted to the specific needs of children, drawing on research that demonstrates that the rights of children to be heard, to be informed, to be protected, and not to be discriminated against, are not always fulfilled in practice (European Union Agency for Fundamental Rights, 2015a). It raises concerns that the justice system does not respond adequately to the rights of children in conflict and in contact with the law, highlighting the restriction of children's liberty and administrative detention of migrant and other children as particular issues. Five priority areas are identified in the Strategy, one of which is child-friendly justice for all children. Within this priority are three key areas: promoting child-friendly justice; protecting children in the context of deprivation of liberty; and children's rights in the family. The Strategy sets out how the Council of Europe will promote the implementation of child rights standards in each of these areas, including the Council of Europe Guidelines on child-friendly justice, the [European Rules for juvenile offenders subject to sanctions or measures \(2009\)](#), [Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(2015\)](#), the [European Convention on the Adoption of Children \(Revised\) \(2008\)](#), and the [Committee of Ministers Recommendations on family mediation \(1998\)](#).

### Others

There are a number of further guidelines and standards which are of relevance including:

- [Council of Europe Committee of Ministers Recommendation on restorative justice and criminal matters \(CM/Rec\(2018\)8\)](#)
- [UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime 2005](#)

- [United Nations Resolution on Human Rights in the Administration of Justice, in particular of Children and Juveniles in Detention 1996](#)
- [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \(the 'Beijing Rules'\) 1985](#)
- [United Nations Rules for the Protection of Juveniles Deprived of their Liberty \(the 'Havana Rules'\) 1990](#)
- [United Nations Guidelines for the Prevention of Juvenile Delinquency \(the 'Riyadh Guidelines'\) 1990](#)

## 3. The Scottish Human Rights Framework

### 3.1 Human Rights Act 1998

*The Human Rights Act 1998* came into force in the UK in 2000 and incorporates much of the ECHR into UK law. It gives adults and children the ability to protect their ECHR rights through the domestic courts and includes a range of provisions to ensure the realisation of ECHR rights. According to s. 2 of the *Human Rights Act 1998*, Scottish and UK courts are required to take account of the case law of the ECtHR. All laws must be understood as far as possible in a manner compatible with the rights contained in s. 3 of the *Human Rights Act 1998*. Public authorities (including the UK and Scottish Governments, local authorities, Police Scotland, and the courts) must act compatibly with the rights in the *Human Rights Act 1998* (s. 6). It has been applied in a series of legal cases affecting children and young people, a growing number of which place considerable emphasis on articles in the UNCRC. As such, the *Human Rights Act 1998* has had a significant impact on Scottish child law (Cleland & Sutherland, 2009).

### 3.2 Children and Young People (Scotland) Act 2014

*The Children and Young People (Scotland) Act 2014* aims to further the Scottish Government's ambition for Scotland to be the best place to grow up in by putting children and young people at the heart of planning and services and ensuring their rights are respected across the public sector.

#### **Rights of Children and Young People**

Part 1 of the 2014 Act placed the UNCRC on statute for the first time. It includes:

- A duty on the Scottish Ministers to keep under consideration and take steps to further the rights of children and young people, to promote and raise awareness and understanding of the UNCRC and prepare three-yearly reports on the implementation of the UNCRC. The first report will be laid before the Scottish Parliament in autumn 2018.
- A duty on the wider public sector to report on what they are doing to take forward realisation of the rights set out in the UNCRC
- An extension to the powers of the Children and Young People's Commissioner Scotland that enables the office to undertake investigations in relation to individual children and young people.

Whilst the 2014 Act is clearly a step forward in terms of enshrining children's human rights in law, it is not equivalent to the incorporation of the UNCRC into Scots law and does not enable children's UNCRC rights to be directly enforced through the courts. It has, however, provided several opportunities to further embed rights-based approaches into youth justice legislation, policy, and practice. For example:

- **Child Rights and Wellbeing Impact Assessments:** The 2014 Act has resulted in the use of child rights and wellbeing impact assessments (CRWIA) within the Scottish Government. The Scottish Government's CRWIA model provides a robust process through which officials can identify, research, analyse and record the anticipated impact of any proposed law and policy on children's human rights. The Scottish Government guidance is clear that the CRWIA should be used on all legislation and policy that impacts on children, not just children's services. The CRWIA model is available for use at a national and local level and can be used across youth justice services to inform the development of legislation, policy and practice.
- **Public sector child rights reporting duty:** This duty applies to a wide range of public bodies including Scotland's Children's Reporter Administration (SCRA), Children's Hearings Scotland (CHS), the Chief Constable of the Police Service of Scotland and local authorities. As such, it will encourage a range of youth justice services to consider the extent to which a rights-based approach is reflected in policies and service delivery and enable youth justice services to make steps to improve implementation of the UNCRC. Extensive guidance by the Scottish Government has been published to support the implementation of this duty. The first reports are due to be published in 2020.

### Information sharing and the Named Person

In 2016, the UK Supreme Court found relevant provisions of the *Children and Young People (Scotland) Act 2014* to be out with Scottish Parliament's legislative competence, ruling that information-sharing provisions included in the Named Person scheme in Parts 4 and 5 of the *Children and Young People (Scotland) Act 2014* may result in a disproportionate interference with the rights of children, young people, and their parents under Article 8 of the ECHR. [The Court was very clear](#) that the policy intention behind the 2014 Act is "unquestionably legitimate and benign" and does not breach human rights. After exploring steps to amend legislation to bring it within competence and produce a draft Code of Practice, which was unsuccessful, the relevant parts of the 2014 Act will not be enacted.

The Scottish Government has been clear that the Named Person scheme can still be taken forward on a non-statutory basis as an assessment and planning framework to meet children's rights and wellbeing needs and within existing information sharing thresholds, ensuring adherence to relevant legislation. Children's Services must comply with existing law and protect privacy and participation rights by seeking the informed consent of any child or parent for the sharing of their personal information. Only in the most exceptional circumstances should consent not be sought, or confidentiality breached, such as where there is a Court Order, or a likely risk of significant harm. Children must be consulted and have their views taken into account in all matters that affect them, which includes situations where professionals are considering sharing information about them.

### 3.5 Children and Young People's Commissioner Scotland

The Children and Young People's Commissioner Scotland's role is to promote and safeguard the rights of children and young people under the age of 18 years old, or up to the age of 21 if they are care experienced. The current Commissioner Bruce Adamson took up the post in May 2017 for a fixed term of six years. The responsibilities and powers of the Commissioner are laid out in the *Commissioner for Children and Young People (Scotland) Act 2003*. This protects the independence of the Commissioner and provides real weight in holding the government to account in upholding its international human rights obligations. As set out in the 2003 Act, the Commissioner has a responsibility to:

- Raise awareness and understanding of the rights of children and young people.
- Keep under review the law, policy and practice relating to the rights of children and young people
- Promote best practice by service providers.
- Promote, commission, undertake and publish research on matters relating to the rights of children and young people

In doing this, the Commissioner must have regard to the UNCRC and act in a way that encourages equal opportunities. The Commissioner must also encourage the involvement of children and young people in his work and consult relevant organisations working with and for children and young people.

[The Commissioner's Strategic Plan for 2020-2024](#) sets out the goals of his office over the remaining period, as he works towards a Scotland where all children and young people can enjoy their human rights. This plan was informed by the views and experiences of children and young people gathered through the Commissioner's Young Advisers Group as well as events, workshops, and surveys. Also driven by children and young people are the office's shared values which are to be brave, respectful, leaders, independent, and enabling children and young people to participate. The Strategy sets out two priorities which are to nurture a culture of children and young people's human rights in Scotland and to make sure that children and young people's human rights are at the centre of law, policies, and practice.

#### Investigations

The Commissioner has the power to carry out an investigation as to whether service providers have failed to:

- Uphold the rights, interests and views of individual children and young people when taking actions or making decisions that affect them; or
- Uphold the rights, interests, and views of a group of children and young people when taking actions or making decisions that affect them

These powers are limited, and the Commissioner cannot investigate a case if:

- It relates to matters reserved to the UK Government
- It concerns the decision-making of a court or tribunal in a particular case; or
- It concerns a case currently before a court of tribunal



The Commissioner also cannot investigate an issue if it would duplicate another organisation's legal powers. In 2018, the Commissioner completed a formal investigation on the use of restraint and seclusion in schools. This found inconsistent policies on use of seclusion across local authorities, with some not having any policy in place and incidents being largely unmonitored. After the initiation of a Judicial Review, the Scottish Government agreed to follow the Commissioner's recommendations and establish a working group to create human rights-based national guidance to ensure a "consistent and uniform approach" by local authorities. The Commissioner is conducting a further ongoing investigation into secure accommodation and local authority compliance with legal duties.

## 4. UN Committee General Comments

The UNCRC Committee publishes General Comments which provide additional guidance and support in taking forward the various principles and provisions of the UNCRC. There are currently 24 General Comments, including General Comment No.24 which replaces General Comment No.10 (2007) on children's rights in juvenile justice. The General Comments provide a useful tool to support a rights-based approach to planning, implementing, and evaluating youth justice services.

### 4.1 General Comment No. 24 (2019): Children's rights in juvenile justice

In September 2019, the UN Committee published [General Comment No.24 \(GC24\)](#) on children's rights in the child justice system, replacing [General Comment No.10 \(2007\)](#) on children's rights in juvenile justice. Through GC24, the Committee provides further explanation of specific rights outlined in UNCRC and guides countries in implementing child justice systems that promote and protect children's rights. GC24 reflects the developments that have occurred since 2007 as a result of changing international and regional standards, the Committee's jurisprudence, new knowledge about child and adolescent development, and evidence of effective practices, including those relating to restorative justice. It reflects concerns such as trends relating to the minimum age of criminal responsibility and the persistent use of deprivation of liberty against children and young people.

The objectives of GC24 are specifically to:

- Provide a contemporary consideration of the UNCRC that guides States towards implementing child justice systems that promote and protect children's rights
- Reiterate the importance of prevention and early intervention
- Promote key strategies for reducing the especially harmful effects of contact with the criminal justice system, in line with increased knowledge about children's development; including an appropriate minimum age of criminal responsibility, diverting children away from formal justice processes, expanding the use of non-custodial measures, ending the use of corporal punishment, capital punishment and life sentences and setting out strict parameters in situations where deprivation of liberty is justified as a last resort.
- Promote the strengthening of juvenile justice systems, and;
- Provide guidance on new developments in the field.

The UN Committee is clear that whilst the preservation of public safety is a legitimate aim of the youth justice system, this aim is best served by a full respect for and implementation of

the overarching principles of youth justice as enshrined in the UNCRC. GC24 elaborates on youth justice specific articles of the UNCRC (Articles 37 and 40) while also taking into account broader social, cultural, economic, civil, and political rights and also providing recommendations based on the rights included in other international standards on youth justice. GC24 sets out what is needed to develop and implement a comprehensive youth justice policy that prevents and addresses offending behaviour by children and young people in a manner that is compatible with the UNCRC.

It explores several aspects of juvenile justice policy, including: prevention of juvenile delinquency; diversion from judicial proceedings; minimum age of criminal responsibility; guarantee to a fair trial; prohibition of the death penalty and life imprisonment; and deprivation of liberty. It articulates the leading principles and core elements of a comprehensive youth justice policy, and sets out the training, awareness-raising, monitoring, and evaluation needed to support the approach.

### **Preventing offending behaviour by children, including early intervention for those below the minimum age of criminal responsibility**

The UN Committee is clear that States must prioritise efforts to prevent situations in which children come into conflict with the law, rather than focusing only on children who have come into conflict with the law. Comprehensive youth justice strategies should include prevention and early intervention programmes that focus support for families, particularly those in vulnerable situations or where violence occurs. The Committee calls on governments to:

- Develop evidence-based intervention programmes that address the causes of offending behaviour as well as the protective factors that may strengthen resilience
- Close the pathways into the child justice system by decriminalising minor offences which are often the result of poverty, homelessness, or family violence
- Support parents, carers and families through early childhood care and education and home visitation programmes

### **Promoting Diversion for those above the minimum age of criminal responsibility**

Promoting Diversion is about the promotion of alternative measures to judicial proceedings, usually to programmes or activities. GC24 stresses that diversion should be the preferred manner of dealing with children in the majority of cases and should be an integral part of the justice system. Keeping children away from the formal justice system reduces the subsequent stigma they may otherwise face, yields good results for children, is consistent with public safety and has proved to be cost-effective. To ensure that diversionary activities are effective and in keeping with a rights-based approach, the Committee recommends that:

- Diversion is only used when there is a sufficiency of evidence that an offence has been committed and that the child committed it
- The child (and the child's parents or carers) must freely and voluntarily give consent in writing to the diversion
- Legislation should contain specific provisions that indicate the cases in which diversion is possible
- Police, prosecutors, and other agencies who make decisions on these provisions should be regulated and reviewed

- The child must have the opportunity to seek legal or other assistance on the diversionary measure offered
- Diversion should not include the deprivation of liberty
- The completion of any diversion by the child should result in a definite and final closure of the case

### **Minimum age of criminal responsibility**

The minimum age of criminal responsibility refers to the age at which a child or young person may be charged with a criminal offence. This means that if a child below that age breaks the law, he or she will not be held criminally responsible. At present there is a wide range of minimum ages of criminal responsibility across the world - from as young as eight (in Scotland) up to age 18 (including Colombia, Ecuador, Mexico, and Uruguay). GC24 states:

- States should set their minimum age to at least 14 years of age and commends those that have a higher minimum age, for instance 15 or 16 years of age (as previously mentioned, the Council of Europe has subsequently set the age of 14 years old as the recommended minimum age).
- Children below the minimum age have a right to assistance or services according to their needs
- Children whose age cannot be proven to be above the minimum age should not be formally charged
- Children with development delays or neurodevelopment disorders or disabilities should not be in the child justice system at all
- The child justice system should apply to all children above the age of criminal responsibility but below the age of 18 years old at the time of the commission of the alleged offence.
- Children who turn 18 before completing a diversion should be permitted to complete the diversion and not be sent into the adult justice system.

### **Guarantee to a fair trial**

Guaranteeing a fair trial refers to the process of upholding certain rights while dealing with and sentencing a child who has come into conflict with the law. GC24 recommends that high quality training should be provided to all those involved in the justice system, including the police, prosecutors, legal representatives of the child, judges, probation officers, social workers, and others. This should include developing an understanding of the child's psychological, physical, and developmental capacities as well as his or her racial, ethnic, social, religious, and linguistic needs in order to provide appropriate support to the child throughout the process. GC24 sets out particular considerations around:

- No child shall be held guilty of any criminal offence that did not constitute a criminal offence at the time it was committed
- The presumption of innocence requires that the burden of proof of the charge is on the prosecution, regardless of the nature of the offence
- Children have the right to be heard directly, and not only through a representative, at all stages of the process, starting from the moment of contact
- A child who is above the minimum age of criminal responsibility should be considered competent to participate throughout the child justice process

- Every child has the right to be informed promptly and directly (or where appropriate through his or her parent or guardian) of the charges brought against him or her
- Every child should be guaranteed legal or other appropriate assistance throughout the proceedings until all appeal rights are exhausted
- The time between the commission of the offence and the conclusion of proceedings should be as short as possible
- States must ensure that a child is not compelled to give testimony or to confess or acknowledge guilt
- Children have the right to examine witnesses who testify against them and to involve witnesses to support their defence
- A child who cannot understand or speak the language used in the child justice system has the right to the free assistance of an interpreter at all stages of the process.
- Child justice hearings should be conducted behind closed doors with exceptions being very limited and clearly stated in the law

### **Prohibition of the death penalty and life imprisonment**

The death penalty continues to exist in several countries in the world. Although the banning of this practice for both children and adults has become an international norm, children who are under 18 years old in some States may still receive the death sentence. Five States are known to have executed a juvenile since 2005 (Child Rights International Network, 2015).

For children, a sentence of life imprisonment without parole essentially means that the child will remain in prison throughout his or her adult life, for an offence committed as a child. Throughout the world, 67 countries have laws that allow a life sentence to be imposed on children under the age of 18 years old (Child Rights International Network, 2015). GC24 recommends that:

- States Parties should completely abolish the death penalty for children under 18 years of age at the time of the offence. Any pending executions should be suspended until domestic legislation is passed to abolish them.
- During sentencing, States Parties should take into account the age of the child when they broke the law rather than the age at which they are being tried. This would prevent the practice of States waiting for children to reach 18 before executing them.
- There should be no life imprisonment (neither with nor without possibility of release) for children who infringed the law before reaching the age of 18 years. The possibility of release should be realistic and regularly assessed and must comply with the aims of youth justice.

### **Deprivation of liberty**

The deprivation of liberty refers to “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority” (United Nations Committee on the Rights of the Child, 1990). GC24 calls for the need for better monitoring and data collection on the number of children in detention and recommends:

- The arrest, detention or imprisonment of a child must be in conformity with the law; no child can be deprived of his/her liberty unlawfully or arbitrarily.
- The deprivation of liberty should be used only as a measure of last resort and for the shortest appropriate period of time
- States must ensure that children are not held in pre-trial detention for months or years. If necessary, they should be released conditionally, and the law should state the conditions under which children can be placed in pre-trial detention.
- Alternatives to detention should be used wherever possible. These may include community service or restorative justice.
- The time period from arrest to sentencing should not last more than six months and should be reviewed by independent and qualified inspectors
- Every child deprived of liberty should be separated from adults, including in police cells, and has the right to maintain contact with their family

## 4.2 Other General Comments

Many other General Comments are of relevance to youth justice, as outlined below:

### General Comment No. 12 (2009): Voice of the Child

General Comment No. 12 includes specific provisions relating to children in the youth justice system. It emphasises that the right of the child to express his or her views must be “fully respected and implemented” (UN, 2009, para. 57) throughout every stage of the youth justice system, stating that:

“This right has to be fully observed during all stages of the judicial process, from the pre-trial stage when the child has the right to remain silent, to the right to be heard by the police, the prosecutor and the investigating judge. It also applies through the stages of adjudication and disposition, as well as implementation of the imposed measures” (United Nations Committee on the Rights of the Child, 2009, p. 58).

To support this, the General Comment recommends that:

- Children must be informed promptly and directly about charges against them and in a language that they understand
- Children must be informed about the juvenile justice process and possible measures which may be taken
- Proceedings involving an accused child must be conducted in an atmosphere which enables the child to participate and to express themselves freely
- Any court or other forms of hearings involving an accused child should be conducted behind closed doors. Only narrow exceptions to this are permitted, and these must be guided by the best interests of the child.

Reinforcing General Comment No. 10, it is also clear about what is needed in order to obtain a child’s consent to participate in diversionary activities, including:

- Adequate information to inform their consent
- The opportunity to give free and voluntary consent
- The opportunity to obtain legal and other advice and assistance to decide the appropriateness and desirability of the proposed diversion

In noting the strong impact that child participation plays in preventing rights violations, the General Comment also specifically highlights the importance of involving children and young people in the formulation of youth justice legislation and policy, and in the drafting, development and implementation of plans and programmes.

#### **General Comment No. 14 (2013): Best Interests of the Child**

General Comment No. 14 provides a focus on rehabilitation and restorative justice for children in the youth justice system. It reiterates that the best interests principle applies to all children in conflict with the law, and that this means that “the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders” (*United Nations Committee on the rights of the Child, 2013, p. 28*).

#### **General Comment No. 5 (2003): General Measures of Implementation**

General Comment No. 5 sets out legislative, policy, institutional, budgetary and statistical actions which States must undertake for the effective implementation of the UNCRC. It is clear that all actions taken by Government, including the development of criminal justice legislation, policy, practice and budgeting, must be compatible with the UNCRC.

#### **General Comment No. 20 (2016): Implementing Rights of Child during Adolescence**

General Comment No. 20 again places an emphasis on diversion, restorative justice, preventative interventions, and on avoiding detention. It recognises the vulnerability of children in contact with the law and sets out the steps that States need to take to reduce this vulnerability (in relation to both children displaying offending behaviour and child victims). It reiterates the need for a focus on rehabilitation and reintegration. It stresses the principle that detention should only be used as a measure of last resort and for the shortest appropriate period of time, and that children should be detained separately from adults.

#### **General Comment 13 (2011): Freedom from all forms of Violence**

General Comment No. 13 reiterates that States are under a duty to take proactive measures to prevent violence against children. It stresses the importance of community-based services and alternatives to detention as a way of preventing children from being exposed to violence.

## **5. Monitoring children’s human rights in the youth justice system**

The implementation of the UNCRC in Scotland is monitored by the UN Committee. The UN Committee’s examination is informed by reports from the Children’s Commissioners across the UK as well as reports submitted from children’s rights alliances across Scotland, England, Wales, and Northern Ireland. In Scotland, evidence was submitted by Together (Scottish Alliance for Children’s Rights) and supported by 66 non-governmental organisations across Scotland (Together Scotland, 2015). Furthermore, the Vice Chair of the UN Committee visited Scotland to speak to children and young people, including those who had been involved in the youth justice system (Children and Young People’s Commissioner Scotland, 2015). As such, the recommendations made by the UN Committee clearly reflected the views and experiences of children and young people across Scotland.

Following its 2016 examination of the UK, the Committee highlighted a number of concerns and made many recommendations. The State of Children's Rights Report 2016 (Together Scotland, 2016) provides a baseline for the implementation of these recommendations. It also reflects on areas where progress is being made and identifies where further efforts are needed. The State of Children's Rights Report (Together Scotland, 2019) provides an update on the 2016 report across a number of areas relating to youth justice, as detailed below.

## 5.1 Civil rights and freedoms

### Non-statutory stop and search

The UN Committee expressed concerns over the use of non-statutory stop and search powers against children. A non-statutory (consensual) stop and search is one where the police officer asks for verbal consent to perform the search. There were concerns that officers were not under a duty to disclose reasons for the search and that children were not made aware of their right to refuse consent. A 2014 report noted that stop and search powers tended to be used disproportionately on younger age groups and also found that young people were significantly more likely to be searched on a non-statutory basis than older age groups (Murray, 2014). The UN Committee on the Rights of the Child (2003) recommended that the UK prohibit the use of non-statutory stop and search checks against children. The Scottish Government, in partnership with the Scottish Youth Parliament and Children's Parliament, consulted with children and young people on the issue. Children and young people said that stop and search practices damage their relationships with the police, describing the practice as "degrading", "humiliating", "embarrassing", and "scary". Younger children said that they would be "anxious", "embarrassed" and "worried" if they were stopped and searched by the police (Children's Parliament, 2016). The Scottish Government considered evidence that where consensual stop and search has been employed as a means of attempting to recover alcohol from children, it has been unsuccessful in 90% of cases. In response, under the *Criminal Justice (Scotland) Act 2016*, the use of non-statutory stop and search has come to an end through the entry into force of a new Code of Practice in May 2017. The Code of Practice states that "Constables must not search a person, even if they are prepared to submit to a search voluntarily, where no statutory power to search is applicable, and they have no warrant to do so" (Scottish Government, 2017, p. 6).

### Statutory stop and search

For statutory stop and search checks, the UN Committee called on the UK to ensure that their use was non-discriminatory and proportionate, taking into consideration the age and maturity of the child (UN Committee on the Rights of the Child, 2003). The *Criminal Justice (Scotland) Act 2016* placed a duty on Scottish Ministers to draft a Code of Practice on the use of statutory stop and search. The 2016 Act additionally imposes a duty on police to treat the need to safeguard and promote the wellbeing of a child as a primary consideration when deciding whether to search that child. The [Code of Practice](#) was laid before Scottish Parliament on January 11, 2017. Section 7 of the Code was addressed specifically to the use of stop and search powers on children and young people and Police Scotland provided training for all officers aimed at improving methods of engagement with young people. A six-month review of the Code of Practice's implementation was published on February 21, 2018. This review found that, although the rate of stop and searches against young people had declined, they were still more likely to be stopped and searched than adults (Scottish

Government, 2018). A short guide on [Stop and Search](#) has since been published specifically for children and young people to set out the purpose of stop and search and the rights of children and young people in an age-appropriate manner. Although the number of searches is in decline, statutory stop and search powers remain widely used by Police Scotland.

### **Searches in police custody, secure care, and Young Offenders Institutions**

It is standard practice to search children detained in police custody (Police Scotland, 2019), although public data on the practice is not readily available. An FOI request revealed that 6,982 searches were conducted on children in police custody between August 1, 2017, and August 31, 2018. Of these, 788 were strip searches (753 negative, 35 positive) (Police Scotland, 2018). In 2018, HMICS raised concerns that police officers were not taking a consistent approach to strip searching of children and recommended that “Police Scotland should ensure there are appropriate safeguards in place when strip searching children under the age of 16, and 16 and 17, in police custody” (HM Inspectorate of Constabulary in Scotland, 2018, p. 3). Data on the use of searches, including strip searches, on children in secure care or Young Offenders Institutions (YOI) is not routinely published. Following an independent review of mental health services at HMP&YOI Polmont, the Chief Inspector recommended that the Scottish Government and Scottish Prison Service changes to “legislation and organisational practice which seeks to minimise retraumatisation and stigma e.g., body searching should be intelligence led only” (HM Inspectorate of Prisons for Scotland, 2019, p. 5).

## **5.2 Violence against children**

### **Tasers**

The UN Committee expressed concerns over the police use of Tasers and called on the UK to prohibit their use. Police Scotland’s use of Tasers complies with their internal Armed Policing Policy. Police Scotland’s Equality and Human Rights Assessment Standard Operating Procedure does not comply with the UN Committee’s above recommendation that the use of Tasers on children be outlawed. The Scottish Government states that taser use is an “operational decision” to be determined by Chief Constables. A 2011 Legal Opinion commissioned by Amnesty International (2010) contested this interpretation. Additionally, there has been no civil society engagement by Police Scotland on Taser use. The number of officers trained to carry Tasers has increased, with 500 additional officers trained in May 2018. Police Scotland does not routinely publish data on Taser use on children. Police Scotland must notify the Police Investigations & Review Commissioner (PIRC) every time a Taser is discharged against a person. PIRC reviews the incident and considers if an investigation is required. Investigation reports may be published on PIRC’s website. In response to a Freedom of Information (FOI) request by Together, PIRC said it has a general policy of not publishing reports that may impact on children (persons under 18), unless there is a clear need to do so and that it does not disaggregate data on Taser use. This means that data on Taser use against children is not publicly available.

### **Restraint**

The UN Committee also expressed concerns over the increased use of restraint against children as a disciplinary measure. This included the use of restraint in YOIs. The Committee called on the UK to abolish all methods of restraint against children for disciplinary purposes



in all settings and ban the use of any other technique designed to inflict pain on children (UN Committee on the Rights of the Child, 2003). The Committee urged the UK to ensure that restraint would be used only where it was necessary to prevent harm to the child or others, and only as a measure of last resort (UN Committee on the Rights of the Child, 2003). The Scottish Prison Service uses 'Pain Compliance' restraint as a last resort and are trained to take account of age and gender. The lack of publicly available data on the use of pain compliance techniques in YOIs remains a concern. It is unclear how such techniques are being measured and monitored out with the Scottish Prison Service (Together, 2019). Pain compliance techniques have the potential to be traumatic and harmful to children in YOIs, who are likely to be vulnerable (CYCJ, 2016).

### 5.3 Administration of juvenile justice

#### Minimum Age of Criminal Responsibility

The UN Committee expressed concerns that the minimum age of criminal responsibility in Scotland is eight years old. The Committee called for this age to be raised in accordance with "acceptable international standards" (UN Committee on the Rights of the Child, 2003, p. 79). Although the majority of children under 16 are dealt with through the Children's Hearing System, rather than the criminal courts, there were significant implications for the potential [impact of childhood offending](#) behaviour through Disclosure Certificate or PVG record until well into adulthood. Significant changes to the [Management of Offenders \(Scotland\) Act 2019](#) and implementation of Part 2 of the Age of Criminal Responsibility (Scotland) Act 2019 (ACR 19) and full commencement of the [Disclosure \(Scotland\) Act 2020](#) significantly addresses this issue with further details below. ACR 19 was passed by the Scottish Parliament in May 2019. Once fully commenced, the Act will raise the minimum age of criminal responsibility from eight to 12 years old. This remains below the internationally acceptable minimum of 14 years old as highlighted by the UN Committee and the Council of Europe. The Children and Young People's Commissioner Scotland has said that raising the age to 12 years old does not go far enough and that it needs to be raised further (Children and Young People's Commissioner for Scotland, 2018). In April 2019, Scottish Government announced that an Age of Criminal Responsibility Advisory Group would be established to review operation of the 2019 Act and consider potential future ages of criminal responsibility.

The [ACR 19](#) will enter into force incrementally. Section 1 of ACR 19 - which raises the age of criminal responsibility from eight to 12 - has not yet been brought into force. Sections 3 (referral to Children's Reporter) and 27 (victim information) became operational on November 29, 2019. Whilst the police will continue to refer children under 12 years on offence grounds until the commencement of Section 1 of the Act it is now no longer possible for the Children's Reporter to convene a hearing on offence grounds, and they must use another ground. Prior to this change, the number of eight to 11 year olds referred for offending had been in steady decline. In relation to disclosure of information for children under the age of criminal responsibility the implementation of Part 2 of ACR 19 which commenced on November 30, 2020 means that information about behaviour which occurred while a person was under 12 years can be included on an enhanced disclosure or PVG scheme record only if the independent reviewer agrees that it should be. For children aged 12-17 years the Disclosure (Scotland) Act 2020 changes the language to outcome rather than conviction for disposals in relation to offence grounds referrals to the Children's Reporter which are either accepted or the grounds are found. Any such outcome is

immediately spent for the purpose of disclosure with clear criteria as to when information, though spent, would be relevant for purposes of disclosure and PVG.

The 2019 Act sets out a range of police powers to enable investigation into alleged harmful behaviour by children under 12 years old. The relevant provisions have not yet entered into force. The powers include:

- The power to take a child to a 'place of safety' if they believe that the child's behaviour may cause significant harm to another person, and their removal is necessary to protect a person from "an immediate risk of significant harm".
- The power to search children under 12 in the most serious cases. This includes searches without a warrant under existing legislation and searches authorised by a court order.
- Samples and prints can be taken from children under 12 under a court order, or in an emergency situation with authorisation from a senior ranking police officer
- The use of 'reasonable force' in relation to exercising the above powers, only as a measure of last resort and after all reasonable steps have first been taken to try to obtain the child's cooperation.

## **Youth Justice System**

The United Nations Committee on the Rights of the Child (2016) expressed further concerns that children were sometimes tried in adult courts and recommended that the UK ensure that children in conflict with the law are always dealt with through the youth justice system. Although the aim of youth justice in Scotland is to keep as many under 18s as possible in the Children's Hearing System, some are still dealt with by the adult criminal justice system. This can be due to the nature of the offence, legal status and/or circumstances. A 2020 report into Scotland's approach to children in conflict with the law showed that 37% of children who come into contact with the 'formal justice system' for their offending behaviour (either going through the Children's Hearing System or the Courts), go to court (Lightowler, 2020).

## **Detention and deprivation of liberty**

The UN Committee expressed concerns over the high number of children in custody and secure care accommodation where they are deprived of their liberty, particularly the disproportionate representation of ethnic minorities, care-experienced children, and children with psychosocial disabilities. The Committee recommended that the UK establish a statutory principle that detention be used only as a measure of last resort, for the shortest possible period of time, and on a non-discriminatory basis (United Nations Committee on the Rights of the Child, 2016). There are widespread concerns about the detention of children (Hammarberg, 2008), with the UN Special Rapporteur on Torture stating that even "very short periods of detention can undermine the child's psychological and physical well-being and compromise cognitive development" (Mendez, 2015, p. 5). The Child Rights International Network (CRIN) has long argued that "the only justification for the detention of a child should be that the child has been assessed as posing a serious risk to public safety" (Child Rights International Network, 2015, p. 3). The UNCRC (2019, p. 146) Global Study on Children Deprived of their Liberty urged States "to develop national action plans aimed at an overall reduction in the numbers of children in detention and/or the elimination of detention for children".

Currently, in accordance with the *Criminal Justice (Scotland) Act 2016*, if a police officer suspects that an arrested or detained person is under 16, the officer must inform a parent or guardian. If the child cannot be seen before a Sheriff, police can (but need not) release the child, with or without a written undertaking to appear in court. If the child is not released, he or she must not be detained in a police station, unless arranging an alternative is impracticable or unsafe. Figures on the number of children held overnight in police custody under this procedure are unavailable. Improved data needs to be made available here, and Scottish Government must ensure that overnight police detention is only used as a last resort.

Offences committed by children are normally dealt with via the Children's Hearing System. This cannot result in criminal prosecution although offence grounds through the hearing system if found or accepted are criminal convictions, though as noted will now be referred to as outcomes from the CHS, and subject to disclosure. Measures may include a Compulsory Supervision Order (CSO), which may involve a restriction of the child's liberty, movement restrictions or placement in secure accommodation.

The Scottish Government's WSA advocates that secure care should be used where possible rather than YOIs (Gough, 2016; Scottish Government, 2011). Whilst both facilities deprive children of their liberty, secure care establishments are deemed more age-appropriate, being more relationship-based, providing therapeutic trauma-informed support, child-care trained staff, and with stricter limits on the use of restraint. If deprivation of liberty is really the only option to keep the child and other people safe, then secure care may be a more appropriate setting than a YOI (Lightowler, 2020). Nevertheless, there are a range of concerns about compliance with rights in secure care, with measures that are designed to 'protect' children regularly leading to breaches of their rights in relation to interactions and intervention which do not prioritise the child's participation or best interests.

Between January 2012 and September 2019, 204 people died in Scottish Prison Service custody, with many of the causes of death unclear ('awaiting determination'). Ten of these deaths were of individuals aged 21 or younger, eight of which occurred at HMP&YOI Polmont. Two deaths were children who took their own lives. The State of Children's Rights Report 2019 (Together Scotland, 2019) sets out serious concerns about the apparent increase in the number of deaths by suicide and the lack of publicly available information on instances of attempted suicide, self-harm, and learning taken from reviews of these.

## 6. Resources

There are many frameworks and tools available to support policy makers and practitioners in taking a rights-based approach to their work. Whilst not all are specific to youth justice, they can be used and adapted to inform and develop legislation, policy, and practice across the youth justice system.

### 6.1 Children's Rights and Wellbeing Impact Assessment

The Scottish Government has developed a Child Rights and Wellbeing Impact Assessment (CRWIA) which has been made available for public bodies and children's services to adapt for their own use. A CRWIA is a process through which decision-makers can identify,

research, analyse and record the anticipated impact of any proposed legislation or policy on children's human rights. It should be used on all legislation and policy that impacts on children, not just children's services. The CRWIA provides a template to help assess whether the proposal complies with the UNCRC and the wider human rights framework, and how it can help to protect, respect and fulfil children's human rights. In particular, the CRWIA can be used to ensure that the best interests of the child (UNCRC, Article 3) and children's views (UNCRC, Article 12) are an integral part of policy development.

- [CRWIA guidance](#)
- [CRWIA template](#)
- [CRWIA training tool](#)

## 6.2 Part 1 Guidance, Children & Young People (Scotland) Act 2014

The Scottish Government's guidance for public bodies to support Part 1 of the [Children and Young People \(Scotland\) Act 2014](#) includes a range of information which is of wider relevance to all those working with and for children and young people. As well as providing a framework for children's rights reporting, it also contains further supporting resources, including how to involve children and young people in reporting, an overview of reporting frameworks and the relationship between children's rights and wellbeing, as well as many useful links to other relevant information.

## 6.3 State of Children's Rights reports

Together (Scottish Alliance for Children's Rights) annually publishes the State of Children's Rights in Scotland report to monitor implementation of the UNCRC and wider international human rights obligations for children and young people across Scotland. Each report takes a different approach to scrutinise efforts to respect, protect and fulfil the human rights of children living in Scotland. Research for the reports is undertaken through a variety of methods, including seminars, surveys and desk research. Together undertakes extensive engagement with its membership throughout this process and much of the evidence included within the reports draws from civil society experience in policy and practice.

The [2016 State of Children's Rights report](#), published by Together (Scottish Alliance for Children's Rights) provides a non-government perspective on the extent to which children and young people in Scotland are able to enjoy the human rights enshrined in the UNCRC and other international treaties. The report provides a baseline against which progress in implementing the recommendations made by the UNCRC and other international treaty bodies can be measured. It also reflects on areas where progress is being made, identifies where further efforts are needed and makes several recommendations of relevance to youth justice.

The [2017 State of Children's Rights report](#) sets out promising rights-based practice taken by public bodies across Scotland. It includes a wide range of case studies from Together's members that illustrate how a rights-based approach can make a significant difference to children and young people's lives. The report was specifically written to provide ideas, inspiration and evidence to those working with and for children and young people to support further implementation of the UNCRC and other international human rights obligations to children and young people.

The [State of Children's Rights Report 2019](#) considers the extent to which children in Scotland are able to exercise their human rights as set out in the UNCRC. It builds on recommendations made to the UK by the UNCRC in 2016. These covered a wide range of issues from education, health, privacy, and protection from violence to discrimination. The report draws on information provided by Together's members to give an update on how these recommendations are being implemented and what more needs to be done. For the first time, Together also published [a child-friendly version](#) of the 2019 report. The UK's next review by the UN Committee will take place in 2021-22. Together will draw from this report, and wider consultation with members, to inform the UN Committee as to the priority issues impacting on children's human rights in Scotland.

## 6.4 Common Core of Skills, Knowledge, Values and Understanding for the Children's Workforce

The [Common Core](#) was produced by the Scottish Government in 2012 to describe the skills, knowledge, values and understanding that everyone should have if they work with children, young people, and their families, whether they are paid or unpaid. The skills, knowledge and understanding are underpinned by the UNCRC and are set out in two contexts: relationships with children, young people and families, and relationships between workers. From the perspective of children, young people and their families, the Common Core describes what is fundamentally important to them, no matter what service they are using or their own circumstances or backgrounds. From the perspective of workers (whether paid or unpaid) the Common Core describes the fundamentals that every worker should demonstrate and contains the basics needed to build positive relationships and promote children's human rights. It can be used in several ways, including framing recruitment materials, drafting staff guidance, in support and supervision, and in induction training.

## 6.5 PANEL principles

The [PANEL Principles](#) are one way of breaking down what a human rights-based approach means in practice. The principles provide a process through which international human rights standards can be embedded at the very centre of policies and practice, ensuring that people know and claim their rights and that organisations, public bodies and businesses fulfil their human rights obligations. They also create solid accountability, so people can seek remedies when their rights are violated.

## 6.6 The 7 Golden Rules of Participation

The [7 Golden Rules for Participation](#), created by the Children and Young People's Commissioner Scotland, are a set of principles that anyone working with children and young people can use. They remind adults about what children and young people may need from participation and help children and young people tell adults about the things that are important to them. They can be used throughout the planning, delivery, and evaluation of work with and for children and young people. The Golden Rules support a rights-based approach to:

- Planning work with children and young people
- Informing dialogue and relationships with children and young people
- Deciding which approaches to use to engage children and young people

- Checking how things are going
- Reviewing work and making decisions about what should happen next

They are available in a range of accessible versions and in a number of languages.

## 6.7 Rights Respecting? Scotland's approach to children in conflict with the law'

CYCJ's 2020 report calls for Scotland to ensure its youth justice system is truly 'rights respecting', if it is to uphold the terms of the UNCRC. The report is the first of its kind to translate the UNCRC into Scottish specific actions to improve policy, practice and experience in youth justice.

It was written by CYCJ's former director, Dr Claire Lightowler, who took a year's sabbatical to dedicate herself to exploring the complex and often emotive issues around offending by children, based on CYCJ's belief that youth justice in Scotland requires a reconfiguration on a scale not seen since Kilbrandon. [Read it here](#). A [child friendly version](#) is also available.

## 7. Conclusion

This section has emphasised the importance of taking a rights-based approach to the youth justice system, across all stages of legislative and policy development as well as in practice. It has set out the international human rights framework that must be used to underpin a rights-based approach and has provided an overview of resources that can be used by policy makers and practitioners to embed this approach into the youth justice system.

Whilst all international human rights obligations must be taken into account across the youth justice system, this section has highlighted the particular importance of UNCRC Articles 37 and 40: the right of the child not to be punished in a cruel or harmful way, and the right of the child to be treated in a way that is "*consistent with the child's sense of dignity and worth*" throughout the youth justice system. It has also demonstrated how the Council of Europe Guidelines on child friendly justice and UN Committee's General Comments should be used to inform youth justice policy, by setting out the leading principles and core elements of a comprehensive youth justice policy, alongside the training, awareness raising, and monitoring and evaluation needed to support the approach.

Whilst progress has been made in embedding a rights-based approach into Scotland's youth justice system, this section has set out a number of areas that have been highlighted by the UNCRC as needing improvement. These include the age of criminal responsibility (which, even when the provisions in the 2019 Act are commenced to increase it from eight to 12 years old, will still be one of the lowest in the world), the use of restraint and the number of children still being tried in adult courts.

When a rights-based approach to youth justice is fully embedded across Scotland, children will no longer be unduly criminalised or stigmatised as a result of their behaviour, but always supported to address that behaviour and to rehabilitate. Whilst recognising the need to ensure public protection and acknowledging the harm that can sometimes be caused to

others by a child's behaviour, there will also always be full recognition that young people at risk of, or involved in, offending behaviour often have significant underlying needs, and that failing to address these needs would be a violation of their human rights. This section has set out the human rights frameworks and tools needed to turn this ambition into a reality across Scotland.

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