

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

## **Section 12: Supporting Children in the Court System**

**June 2021**

## Contents

<b>1. Introduction</b> .....	<b>2</b>
<b>2. Values, principles and objectives</b> .....	<b>4</b>
2.1 Values and Principles.....	4
2.2 Objectives .....	4
<b>3. Criminal Justice (Scotland) Act 2016</b> .....	<b>5</b>
3.1 Children to be kept in Place of Safety Prior to Court.....	6
3.2 Undertakings .....	8
3.3 Closed Courts .....	8
3.4 Court Cells .....	9
<b>4. Court</b> .....	<b>9</b>
4.1 Pre-Court .....	9
4.2 Expedient Processing of Cases involving Children.....	10
4.3 Appearing in Court .....	10
4.4 An Agreed Model of Programming for Court Cases involving Children .....	12
4.5 Court processes and COVID-19.....	13
4.6 Ensuring Children Understand the Process.....	14
4.7 Special Measures for Children in Criminal Proceedings .....	15
4.8 Bail and Remand.....	16
<b>5. Completion of Criminal Justice Social Work Court Reports</b> .....	<b>21</b>
5.1 Sentencing Options.....	22
5.2 Informing Sentencing Decisions .....	23
5.3 Advice of and Remittal to a Children’s Hearing.....	23
<b>6. After Court</b> .....	<b>25</b>
6.1 Community Sentence .....	25
6.2 Sharing Information in Background Reports .....	25
6.3 Outstanding Charges .....	25
6.4 Maintaining Compulsory Supervision Orders.....	25
6.5 Breaches of Community Sentence .....	26
<b>7. Conclusion</b> .....	<b>26</b>
<b>9. References</b> .....	<b>28</b>
<b>Appendix 1</b> .....	<b>30</b>

**Appendix 2 ..... 32**

## 1. Introduction

This section focuses on the supports that should be provided for all children within the justice system and subsequently prosecuted in court. “Scottish Ministers view youth justice through the prism of children’s rights” (Scottish Government, 2018b:116) thus, the provision of support to navigate the justice system, as for all support and intervention with children in conflict with the law, should be underpinned and adhere to the guiding principles of the [United Nations Conventions on the Rights of the Child \(UNCRC\) 1989](#), [Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice](#) and [Getting It Right for Every Child \(GIRFEC\)](#). All the aforementioned recognise all under 18s as children and this is the definition used within this section.

However, within Scotland the legal definition of a child does not reflect this position and has a significant impact on their treatment within the justice system. This is in direct conflict with [Committee on the Rights of the Child, General Comment No. 10](#) which says that “States have to take all necessary measures to ensure that all children in conflict with the law must be treated equally”(United Nations Committee on the Rights of the Child, 2007:4). The United Nations Committee on the Rights of the Child (2007) recommended that those States where there were differences in the treatment of 16/17 year olds which resulted in them being treated as adults within the justice system change their laws, with a view to achieving a non-discriminatory full application of their juvenile justice rules to all under 18s. Independent Care Review (2020, p. 41) also stated that “traditional criminal courts are not settings in which children’s rights can be upheld and where they can be heard”.

This section provides a detailed overview on how to uphold the rights of children in conflict with the law and outlines the aspects of relevance whilst children in Scotland are subject to prosecution through the court.

On the 16th of March 2021, [The United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) was unanimously voted into law by the Scottish Parliament and is expected to commence six months from Royal Assent, four weeks after its passing in the Scottish Parliament. This would mean Scotland is the first country in the UK to fully incorporate the UNCRC into domestic law. The Bill is noted as taking a “maximalist” approach which means that the Bill adopts as far as possible within the competence of the Scottish Parliament with exception of the elements and first and second protocols which relate to reserved matters. However, the UK [government](#) has indicated it may consider a challenge to the legislation in the Supreme Court regarding the legislative competence of certain provisions of the Bill. Should this action be progressed, it could change the schedule for implementation of the Bill into law.

The practice outlined is intended to set the parameters for a minimum standard to be achieved and to give an overview of 'good practice' principles for all partners involved when children enter the court system and criminal justice services. Good practice indicates the principles are also applicable to over 18s and there is a particular need for various partners and agencies to take account of their [corporate parenting responsibilities](#) as outlined in the [Children and Young People \(Scotland\) Act 2014](#). The recognition of additional supports for young adults is also supported by the [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \("The Beijing Rules"\)](#) "efforts shall also be made to extend the principles embodied in the Rules to young adults"(United Nations General Assembly, 1985:3).

The 'good practice' proposed within this section will outline the application of the underpinning principles and ethos of GIRFEC for the handling of all cases involving children going through court. By embedding these measures in local practices, they will contribute to the continued efforts aimed at reducing the frequency and seriousness of offending and re-offending by children. Any child under 18 years may be prosecuted in the criminal court from the age of 12. However, for those between 12 and under 16, or aged 16/17 years, who are subject to a Compulsory Supervision Order (CSO) through the Children's Hearing System (CHS), then the Crown Office and Procurator Fiscal Service (COPFS) and Scottish Children's Reporter Administration ([SCRA decision-making in jointly reported cases](#)) provides the criteria by which such cases are considered as well as the [Lord Advocate's guidelines](#).

The key messages highlighted by the Scottish Government's [Assisting Young People aged 16 and 17 in Court](#) toolkit remain critical, that all agencies should maximise every opportunity in preventing children from entering the criminal justice system. However, where diversion from formal systems has not been possible:

- "The outcomes for children are enhanced when those involved work together and when there is effective information sharing and communication.
- Sentences imposed in closer proximity to the committing of an offence have a greater impact upon children and supports such cases to be handled without delay in line with Beijing rule 20 (1) that each case shall from the outset be handled expeditiously, without unnecessary delay.
- All children should be supported - failure to support children through the criminal justice process or address their wider risks and needs, can lock them into a cycle of reoffending.
- Courts must be provided with a range of credible alternatives to remand and custodial sentences that provide robust risk management and reduction processes as well as meaningful opportunities. It is recognised that short custodial sentences provide limited opportunities for children to engage in behavioural change or education programmes, which can significantly reduce reoffending" (Scottish Government, 2011:1).

## 2. Values, principles and objectives

### 2.1 Values and Principles

[The Council of Europe directions on Child Friendly Justice](#) stresses the importance of a multi-disciplinary approach to working with children involved in offending behaviour. It highlights that there is often a lack of sharing of knowledge and expertise in relation to the growing body of research regarding the understanding of children's psychology, behaviour, and development needs with professionals in the justice field. The provision of support for all children subject to the rigours of the justice system requires a recognition that such support is not a one size fits all "and the proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding which will allow the juvenile to participate therein and to express himself or herself freely" (United Nations Committee on the Rights of the Child, 2007:14). Flexibility is necessary to respond proportionately and appropriately to the needs and risks presented by aspects of the behaviour of individual children. Tailored [court support](#) should be adaptive to the continuum of risks and needs presented which may include: emotional support, explanation of the process, welfare checks, securing accommodation to prevent remand and linking with housing services, accessing benefits, employment, or training, supporting to attend appointments such as with legal representatives, attending future court appearances, linking with family, addiction services as well as health services. The support available should remain alongside the child as they navigate the justice system from beginning to end and be proportionate, appropriate, timely, and meaningful and take accordance of risk practice, as necessary.

In Scotland, there is currently significant variation of the depth and level of support provided when children enter the justice system. Processes and systems should be in place to identify all children, irrespective of whether they enter the justice system through custody, an undertaking or a scheduled court appearance and the support necessary for each child available.

### 2.2 Objectives

Finding the most efficient and effective approaches to cases involving children who are appearing in court should be underpinned by the following objectives:

- To reduce the frequency and seriousness of offending behaviour by children (Scottish Government, 2011)
- Ensure that all children appearing in court have access to proper support and information to assist their understanding and effective participation in the process (Scottish Government, 2011)
- Promote the social inclusion, citizenship, and personal responsibility of children subject to court processes (Scottish Government, 2011)
- Ensure effective and efficient multi-agency collaboration to promote information sharing that is relevant and proportionate to achieve better outcomes for all children in the court process in line with the principles of GIRFEC (Scottish Government, 2011)

- Ensure that children involved in offending behaviour receive the help they need, when they need it, to ensure their best chance of achieving their potential (Scottish Government, 2011)
- Judicial collaboration and direction to ensure effectiveness of any drafting of operational protocols and implementation, effective co-ordination of key delivery agencies involved within the court processes, ensuring the most appropriate approach to handling cases involving children, joint training, ensuring regular meetings and the evaluation of the effectiveness of the processes implemented (Scottish Government, 2011).
- Remittal to Children's Hearing should be a priority for all children under age 17.5 years
- Diversion as part of the range of prosecutorial options is maximised for all children when it is not in the public interest to prosecute (Gibson, 2019)
- Ensure robust community alternatives are available as meaningful alternatives to promote the use of community based disposals and minimise the use of remand to only the most serious of cases (see [Section 5](#)).
- Enhance community safety and promote community confidence as to how the risks and needs associated with the offending behaviour of children are being managed and addressed.
- Streamlining of court processes to ensure cases involving children are seen as a priority and reduce the duration and level of system contact on all children (e.g., promotion of undertakings, presumption to divert, rolling up of charges as appropriate).
- Develop the awareness and understanding of professionals involved in the criminal justice system working with children to recognise the importance of developmentally, systemically, and trauma-informed contact and interventions.
- CSO should not be terminated because a child is subject to the court system. Rather, this should be considered an indicator of risk and vulnerability ([Social Work Scotland, 2019](#)).

As soon as a child's offending behaviour becomes subject to the criminal justice system a co-ordinated response, which has been developed and agreed, as is appropriate, with the judiciary, prosecution, Police Scotland, court service and social work as well as including and potentially their parent or carers and defence solicitors, should be initiated. This then extends outwards to include education, health, anti-social behaviour, housing and voluntary and charitable intervention bodies as appropriate (Scottish Government, 2011).

### 3. Criminal Justice (Scotland) Act 2016

The [Criminal Justice \(Scotland\) Act 2016](#) came into force on January 25, 2018, and is the Scottish Government's commitment to modernise the Scottish justice system. The 2016 Act aims to enhance efficiency and bring the appropriate balance to the justice system so that rights are protected, whilst ensuring effective access to justice for victims of crime (Sheriff Principal Bill 35 – Policy Memorandum). The 2016 Act sought to implement recommendations from two significant reviews, Lord Carloway's Review of Scottish Criminal Law and Practice (Carloway, 2011) and Sheriff Principal Bowen's Independent Review of Sheriff and Jury Procedure (Sheriff Bowen, 2010).

The 2016 Act repeals all legislation regarding arrest for criminal offences. Part 1 of the 2016 Act:

- Abolishes the separate concepts of arrest and detention and replaces them with a single statutory power of arrest without warrant where there are reasonable grounds for suspecting a person has committed an offence.
- Enables police to release a suspect for further investigation with conditions (for up to 28 days) with the power to re-arrest.
- Places a duty on police to take every precaution to ensure a person is not unnecessarily held in police custody and explicitly protects a person's right to remain silent.
- Extends the rights of those held, giving them the right to speak to a solicitor, regardless of whether they are going to be interviewed
- Enhances protections for under 18s and includes protections for 16- and 17-year-olds not subject to CSO which balance the right to self-determination and make decisions relating to whether and whom should be advised of their arrest and being in custody.
- Includes a duty to safeguard and promote the wellbeing of a child as a primary consideration when deciding whether to arrest the child.

The 2016 Act refers to younger children as anyone under 16 years, or aged 16/17 years, and subject to CSO. An older child is referred to as 16/17 years and not subject to CSO. This does not change the legal definition of a child and the associated legal processes they may be subjected to when considered an adult. The 2016 Act stipulates that all under 18s are children and should have the same recognition of their vulnerabilities and need for additional supports as directed by the overarching principles of [UNCRC](#) and [Child Friendly Justice](#), irrespective of their legal status. Dyer (2018) outlines the requirements of the 2016 Act highlighting s. 51, which requires police to consider the wellbeing of a child as a primary, though not the only, consideration before deciding to arrest a child under 18 years, hold a child in custody, interview a child regarding an offence, or charge them with an offence. The 2016 Act also legislates that all under 18s have the right to a private consultation with a solicitor before and/or during questioning and to have another person informed that they are being held in police custody (Dyer, 2018). [UNCRC Article 40. 2](#) and [Beijing Rules](#) 7(1) and 15 (1) highlights the basic procedural safeguards and 15.1 the right of juveniles throughout proceedings to be represented by a legal adviser as well as apply for legal aid where available, respectively. The differences as related to 'younger children' and 'older children' are that the former will automatically have a parent or guardian notified and cannot waive their right to having a solicitor present. For 'older children' the police can request an adult of the child's choosing is advised of their being interviewed at a police station and the child can waive their access to a solicitor, but only where the relevant person they identified agrees with this decision.

### 3.1 Children to be kept in Place of Safety Prior to Court

It is important to highlight that the Place of Safety as explained in this section should not be confused with that in s.28 Age of Criminal Responsibility (Scotland) Act [2019](#) for children under 12 years who have or may have been involved in behaviour which poses a significant risk of harm to others.

The [Criminal Justice \(Scotland\) Act 2016 \(Arrest Process\)](#), Police Scotland Standard Operating Procedure (SOP) outlines the full details of the implementation of the 2016 Act in relation to all children. There is a requirement to consider at all steps of an enquiry whether it is necessary to arrest, or if a lesser action could be used as emphasised in the [GIRFEC](#) principles and minimum intervention. Where it is necessary for a 'younger child' to be arrested and detained in a place of safety or police custody this should always be a last resort. [The UNCRC Article 37](#) (b) states that no child shall be deprived of his or her liberty unlawfully or arbitrarily. That the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period applies to all children, not just younger children as defined by the [Criminal Justice \(Scotland\) Act 2016](#). Where a case has been jointly reported a discussion should take place between the Procurator Fiscal (PF) and Children's Reporter at the earliest opportunity, prior to the child appearing in court, in relation to which agency will progress with the case.

The above SOP outlines that the [Lord Advocate's Guidelines](#) inform the retention of any 'younger child' for appearance at court. They must be held in a place of safety as defined by the [Children's Hearing \(Scotland\) Act 2011](#) s.202 (1) until they are brought before the court. The only occasion where this could be a police station is if an Inspector or above certifies that keeping the child in a place of safety other than a police station would be impractical, unsafe or inadvisable due to the person's state of health (physical or mental).

This does not include 'older children' dealt with through the justice system, as they will continue to be held in a police station. All under 18s detained in police custody should be separated as far as possible from others also being held, especially adults. A Child Detention Certificate will be needed when the decision has been taken to detain a 'younger child' in a police station and must be endorsed by an Inspector or above. [The 2016 Act](#) makes provision under s.25(2)(a) that in relation to when a 'younger child' is either being brought before a court from custody, or released on an undertaking, that the parent must be provided with certain information unless it is considered this would be detrimental to the wellbeing of the child. Local authorities must be notified when a young person under 18 is being brought before court when the following criteria are met:

Older children:

- If they are being kept in custody to appear in court
- Since being arrested they have not exercised their right to have intimation sent to another person
- They have declined to exercise their right to have intimation sent to another person after being reminded.

Younger children:

- If they are being kept in custody to appear in court
- If they are being released on an undertaking

In these cases, the appropriate local authority must be informed of the following:

- The court date on which the child is to be brought
- The date on which the person is to be brought before the court



- The general nature of the offence, which the person has been officially accused of committing

Once notified the local authority should visit the child in custody. Whilst this is not a duty under the 2016 Act it is good practice following the principles of [GIRFEC](#), [Child Friendly Justice](#) and [UNCRC 1989](#). The local authority in this context is where the court sits. If this is not the same local authority where the child lives, then discussion should take place between the local authority where the child usually lives and that where the court is found to agree how support shall be provided.

When a 'younger child' has been kept in a place of safety, the Principal Reporter must be advised as soon as is reasonably practical when the decision has been taken by the Crown Office not to prosecute, as per s.22(2) of the [2016 Act](#). In such situations, the 'younger child' can only be released from the place of safety once the Principal Reporter gives direction that the child can be released or that the child continues to be kept in a place of safety until the Principal Reporter decides whether they consider that the grounds apply to convene a Hearing in respect of the child and if so, whether the Principal Reporter considers that it may be necessary for a CSO to be made in respect of the child.

### 3.2 Undertakings

The use of the undertaking procedure to bring cases to court, and the [Summary Justice Review Committee](#) recommends that when an accused is liberated on undertaking, their case should call in court within 28 days of the undertaking being issued.

Where the child is under the age of 16, the parent or guardian signs the undertaking, in accordance with the [Criminal Procedure \(Scotland\) Act 1995](#) s.43. Cases involving children should be held in a closed court, in a different building or room from those dealing with adult cases.

### 3.3 Closed Courts

Under the [Criminal Procedure \(Scotland\) Act 1995](#) s.142 if a child is charged with a summary offence, then the court should be closed. This provision stipulates that no person will be present at any sitting other than specified persons. This includes the Sheriff, who will sit in a different building or room from that in which he usually sits, or on different days from those on which other courts in the building are engaged in criminal proceedings. One caveat is that this provision does not apply to summary proceedings before the Sheriff in respect of an offence where a child has been charged jointly with a person who is not a child (s.142 (5)).

In regard to Solemn proceedings, the [Criminal Procedure \(Scotland\) Act 1995](#) s.92(3) states, "From the commencement of the leading of evidence in a trial for rape or the like (sexual offences) the judge may, if he thinks fit, cause all persons other than the accused and counsel and solicitors to be removed from the court-room." While this is not specific to children, it could be used in regard to those who are accused of sexual offences.

[Beijing Rules](#) 8 (1) states that the child's "right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of

labelling and 8(2) that in principle, no information that may lead to the identification of a child offender shall be published” (United Nations General Assembly, 1985:5). As noted, the differences in how an under 18 is legally defined have implications as to the extent as to which any legal proceedings are conveyed in closed courts or not. Furthermore, the United Nations Committee on the Rights of the Child (2007:19) recommends “that all State parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be extremely limited and clearly stated in law.”

### 3.4 Court Cells

As stated within [Child Friendly Justice](#) children should be separated from adults when appearing at court from custody. The [Criminal Procedure \(Scotland\) Act 1995](#) s.42 (9) also stipulates “Any child being conveyed to or from any criminal court, or waiting before or after attendance in such court, shall be prevented from associating with an adult (not being a relative) who is charged with any offence other than an offence with which the child is jointly charged.”

Discussion should take place with local courts to establish the opportunity to have under 18s held in other areas within the court, with the necessary support, whilst awaiting their appearance before the court. This should also be organised when children are appearing from remand for further court dates irrespective as to whether this is from secure care, HMP&YOI Polmont or any SPS establishment. There should be advance liaison with the court to decide if such a room is available or whether an alternative entrance to the court may be available rather than via the court cells. Necessary preparations and appropriate risk assessments should be undertaken to establish possible risk scenarios and prevent absconding. Due to the age and physical structure of some courts, this may not be possible. It should only be in the exceptional circumstances with regard to risk that children are held in court cells pending appearance and this should be with due regard to separating them from adults and ensuring they are responded to as children.

## 4. Court

### 4.1 Pre-Court

Whilst the occasions where a child may be detained in police custody to appear at court should be minimal (and it would be suggested such occasions would relate to the more serious levels of offending behaviour as outlined within the [Lord Advocates Guidelines](#)) the opportunity to divert from court must not be missed. To maximise all opportunities to divert from prosecution, a mechanism to discuss the appropriateness of this with the PF prior to the child appearing in court is crucial. This action should be incorporated into the local authority court support process and clearly identify whose responsibility it would be to contact and discuss with the PF (please refer to [Section 4](#) for further information).

## 4.2 Expedient Processing of Cases involving Children

For children to associate the sentence with their offending behaviour, it is particularly important that prosecutions be dealt with as quickly as possible (Scottish Government, 2011; United Nations General Assembly, 1985).

[The Summary Justice System Reform Model](#) was developed and agreed by the main criminal justice organisations in 2007. It provides the national framework for the handling of summary cases, following on from the package of Summary Justice Reforms (SJR) including the [Criminal Proceedings etc. \(Reform\) Scotland Act 2007](#).

Whilst 93% of children who appear in court are prosecuted on summary level cases (Dyer, 2016) it may now be the case that the serious nature of the charges involved, and often their complexity, could pose a barrier to the expedient handling of such cases. This makes it difficult to make blanket recommendations on how quickly cases should be prosecuted; they should, however, be considered as a matter of priority.

## 4.3 Appearing in Court

Robust and effective support whilst going through the court process is needed when the decision has been taken to prosecute. This enables contact at the earliest opportunity to offer support in navigating the complexities of the criminal justice system.

Processes should be in place to ensure that all children are identified and offered support, guidance and assistance whether appearing from custody, or on undertaking, cited, trial or remand courts in both the Sheriff Court and Justice of the Peace Courts (Scottish Government, 2011).

In accordance with information sharing legislation, arrangements should be in place to enable court staff to notify the appropriate point of contact in the local authority that a child will be appearing as far in advance as possible of whatever diet they are appearing on. Court lists will **not** include children who appear in custody courts. The notice of those appearing for scheduled diets is available on the [Scottish Courts and Tribunals](#) website five days in advance though this does not provide details of age.

For those children appearing from custody, court support staff should see them prior to their court appearance, and where possible it is encouraged that alternative locations are identified where children may be held other than police or court cells. This may not be possible in all locations, though should be tried. They should engage with them to explain and clarify the court process and to stress the significance of attendance at court on all dates set by the court. Where possible, and with the child's agreement, background information concerning their personal circumstances should be discussed with a view to identifying areas of need, and linking them with ongoing supports (Scottish Government, 2011) to promote their positive engagement and compliance during their involvement in the court process. This also allows for provision of information to Sheriffs that may aid with their consideration of bail and identifying alternatives to secure/remand if needed. In circumstances where remand is being considered, information relating to the available risk management and reduction processes as outlined within the [Framework for Risk Assessment Management and Evaluation \(FRAME\)](#) and standards for risk practice with

children 12-17 years ([Care and Risk Management Procedures \(CARM\)](#)) for local authorities, and partners, may support the child to remain in their community. It is recommended that court support or social work staff are present in court when the child appears to answer any additional questions the Sheriff may have, and ensure the outcome of proceedings can be communicated to the child following their appearance and answer any questions they may have (Scottish Government, 2011).

Following their appearance in court the supporting worker should at a minimum signpost the child to partner agencies and if needed, set up first appointments, though it would be preferable to support the child to attend any subsequent appointments as appropriate to their needs, capacity and existing support networks. As best practice, specific workers whom the child has a relationship with should be available to support them to attend any further appointments. These would be appointments to address needs that could affect their ability to comply with the requirements of the court and avoid reoffending, including future court dates, liaising with solicitors, source training, employment or education. Modelling positive behaviour and prompting compliance with any conditions imposed by the court must be informed by a child-centric lens and understanding.

All children should be offered support for all court appearances irrespective of whether they have family or wider support systems in place. A full explanation of the support available will enable the child and their support system to determine their right to choose whether they want additional assistance and support. Where such support is in place any staff member accompanying the child to court should notify court social work staff of their role and presence in court. Where they are unable to attend with the child they should contact the appropriate court support worker to ensure the child is supported.

National variation in court support is reflected in how it is delivered. This may be solely by Court Social Work Units or involve specific under 18s court support teams/workers from Children & Family Social Work Services, third sector partners or a combination of these services. In the absence of dedicated court support services for children, Court Social Work as part of their role should offer the child information on the court process to ensure they have some understanding of what will happen. The minimum requirements of Court Social Work are set out in the [Criminal Justice Social Work Report and Court Based Services Practice Guidance](#) (2010) and should be read in conjunction with the [Community Payback Practice Guidance \(2019\)](#). Court social workers should provide support, guidance and assistance to all children going through the court process where there is no additional system in place (Scottish Government, 2011).

The court social work team member should act as an intermediary between community-based social work and partners to assist children to successfully attend all the various appointments required by the court or otherwise i.e., court dates, court report appointments, job centre, interviews, housing, offending focussed services etc. (Scottish Government, 2011).

Where a child under 16 years, or 16/17 years, and subject to CSO is appearing before the court then social work services have a duty to respond. If a lead professional is not allocated this should be undertaken as a matter of priority. Links between court social work staff and

community-based social workers are paramount to ensure an existing Child's Plan informs any discussions, including a review of the Child's Plan.

## 4.4 An Agreed Model of Programming for Court Cases involving Children

### Solemn cases

The [Criminal Procedure \(Scotland\) Act 1995](#) s.65 outlines the time limits associated with cases appearing in court. When an individual has been charged on indictment then the timescales for initial appearance in court (whether High Court or Sheriff Court) are 11 months for the preliminary Hearing and first diet respectively, and in both cases the trial should be commenced within 12 months. Any individual remanded to custody until liberated in due course of law should not be detained by virtue of that committal for a total period of more than:

“(a) 80 days, unless within that period the indictment is served on him, which failing he shall be [F11 entitled to be admitted to bail]; or

F12 (aa) where an indictment has been served on the accused in respect of the High Court:

- (i) 110 days, unless a preliminary hearing in respect of the case is commenced within that period, which failing he shall be entitled to be admitted to bail; or
- (ii) 140 days, unless the trial of the case is commenced within that period, which failing he shall be entitled to be admitted to bail.”

The lengthy timescales relate to the complexity of jury cases. The defence agent of a child placed on petition will receive most statements within 28 days, which ensures that the child knows what the nature and strength of the case against them is at an early stage (Scottish Government, 2011).

### Summary cases - Rolling up outstanding charges

One of the greatest obstacles to working effectively with children involved in offending behaviour is the knowledge that they are due to appear again in court during their sentence in respect of other charges that were outstanding at the time of sentence (Scottish Government, 2011). The detrimental impact of outstanding matters on the factors known to promote desistance and reintegration are well established. Cases for an accused are rolled up where possible, and where it is known that there are outstanding cases. There could be occasions where it may not be practical to roll up certain cases, depending upon the stages at which the outstanding cases are in the court process. Details of outstanding cases are accessible on the Scottish Criminal History system.

COPFS electronic system has the ability to identify cases of repeat offences. When the police report a case, the system performs a check against the name of the accused and his/her SCRO number. The PF will seek to roll up any outstanding charges. Where the cases are all live within the one court this can be done by using the process for accelerating

diets (s. 137). This may be done on the motion of the PF, or the defence, or on joint motion. The PF can also apply to have cases pending in different courts within the Sheriffdom moved using the provision for transferring cases (s. 137a).

Where two or more complaints against the same accused are calling on the same day in the same court, the court on application by the prosecutor can try the complaints together as one trial under s. 152a (2) of the [Criminal Procedure \(Scotland\) Act 1995](#). There are no notice requirements for the prosecutor to make any applications under this section and the court is to grant such an application where it appears that it is expedient to do so. The two complaints will be treated as separate complaints for the purposes of sentencing.

Defence agents have a responsibility to assist in identifying outstanding cases, as may a social worker who has knowledge of the child. If there is an option to roll up outstanding charges, then the benefits of doing so should be explained to the child (Social Work Scotland, 2019) . On occasions, concern is expressed that an agent may be doing his/her client a disservice by drawing the court's attention to other outstanding charges. The child, however, is much more likely to derive benefit from any sentence imposed if it is known that there are no further cases pending.

### **Summary cases - Trial diets**

Where a child pleads not guilty and their case is proceeding to trial, cases should be allocated the earliest available trial diet (Scottish Government, 2011).

In the longer term, making best use of diversion and retaining under 18s within the CHS should result in fewer 16 and 17 year olds needing to attend court. This should free up court resources accordingly, which can then be redeployed to ensure that children proceed through the court process with appropriate efficiency.

## **4.5 Court processes and COVID-19**

The COVID-19 pandemic had a significant impact upon the court system and processes which has resulted in years of backlogs in criminal cases. Several provisions were implemented during 2020 which reflected the safety precautions and requirements to facilitate the re-commencement of court processes. In relation to criminal matters these included better utilisation of technology which included accused appearing from custody electronically and not having to appear in person, [remote jury centres](#) which allowed facilitation of High Court and Sheriff Court Solemn cases, introduction of [Pre-Indeterminate Diet Engagement](#) (PIDM) to streamline processes to facilitate non-custody cases coming to court ready to proceed seeking to reduce delays and unnecessary wastage of court time. Whilst the impact of the pandemic has presented significant challenges in supporting children in the court system it is imperative practitioners ensure local discussions take place to ensure they can continue providing the support that all children should be receiving in the court system.

As the information may have changed from the time of updating this section it is advised that practitioners check [SCTS](#) and [COPFS](#) websites which provide detailed information and guidance in relation to court processes. These websites also advise when you should and

should not attend in person as either an accused or as a witness. The information is updated regularly to reflect any changes in process or legislation under COVID-19 regulations.

The Court Recovery Programme will commence from September 2021 and presently will include expansion of remote jury centres, four additional High Courts, two Additional Sheriff Solemn Courts and up to ten Sheriff Summary Courts. The focus of the plan is recovery by return to pre-pandemic capacity, renewal by prioritising resolution of cases as early as possible and embedding new ways of working and finally to transform by changing the outcomes for those affected by the criminal justice system. It is anticipated that by 2025 High Court and Sheriff Solemn cases will have returned to pre-COVID levels and this will be the case for Summary cases by 2024.

#### 4.6 Ensuring Children Understand the Process

It is critical that children are supported to understand their rights as well as all aspects of the court and justice system such as: what will happen from police interview; when they attend court; requirements and conditions of bail; implications of breach and consequences; sentencing options; and how to conduct themselves. Using clear and concise language to communicate is important, as well as actively considering whether the child may have a speech language and communication need (SLCN) and what this may mean for their ability to take part and understand the process they are in. A study by Nolan, Dyer, and Vaswani (2017) stated that it should not be assumed that just because the child has previously attended court that they understand what is expected of them.

Barnes and Wilson's (2008) quantitative study concludes that young people's lack of appropriate understanding of the criminal justice system and their human rights is a deep concern as this suggests that they may be unable to exercise their rights under the UNCRC.

The Prison Reform Trust's report *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (Jacobson & Talbot, 2009) found that the evidence for communication difficulties in children within the criminal justice system added to their vulnerability in navigating the court system. Promoting their understanding also has positive implications for engagement and compliance. According to Bevan (2016:7) "research suggests that people are more willing to comply with rules set by legal authorities if they understand the processes and believe that those authorities act in ways that are procedurally just".

[Youth and Criminal Justice in Scotland: The Young Person's Journey](#) and the [Journey through Justice](#) are comprehensive online interactive tools designed for professionals and children respectively to provide an easy to follow step-by-step guide through all stages of the formal processes related to offending behaviour including the CHS, the court system and adult criminal justice.

With the child's consent their family should be included in discussions wherever appropriate and applicable for their age and capacity. They should also be advised of the process and the potential options available in a manner that respects their level of understanding and consideration of the complexity of the court landscape. The United Nations Committee on the Rights of the Child (2007:16) recommended that "State parties explicitly provide in law for the maximum possible investment of parents or legal guardians in the proceedings

against the child...to promote parental involvement, parents must be notified of the apprehension of their child as soon as possible.” The [Criminal Procedure \(Scotland\) Act 1995](#) details that parent(s) or guardian(s) of children under the age of 16 are required to attend all the court hearings if they reside within a reasonable distance of the court, unless the court is satisfied that it would be unreasonable to require their attendance (s. 42(2)).

Scottish Government (2011) recommends that the judiciary and other professionals involved with children in court and the criminal justice system takes account of the additional needs that this group present, prior to, during, and after court. Defence agents, social work and other professionals should consider what additional support those under 18 years may require, paying particular attention to mental health problems, learning disabilities, and learning difficulties. They should also consider how best to communicate this information in a form that would be accessible, attract their interest and help their understanding.

#### 4.7 Special Measures for Children in Criminal Proceedings

[The Victims and Witnesses \(Scotland\) Act 2014](#) introduced a number of measures to improve support for victims and witnesses. The [Working Together for Victims and Witnesses Protocol \(2017\)](#) states for cases reported to the PF on or after September 1, 2015, child witnesses (aged under 18 at the commencement of proceedings) and adult witnesses who are considered to be vulnerable are entitled to one or more standard special measures. In summary cases, commencement of proceedings is the date of service of the complaint. In solemn cases, this refers to the date of service of the Indictment. If cases are deserted and later re-raised it is the date of service of the new complaint or Indictment that applies. Justification is not needed for the use of standard special measures by a child in court.

The above [protocol \(2017\)](#) explains fully the measures available under [The Victims and Witnesses \(Scotland\) Act 2014](#), these being standard special measures: use of a screen, the assistance of a supporter or giving evidence using a live television link. [The Vulnerable Witnesses \(Criminal Evidence\) Scotland Act 2019](#) made provision for child witnesses to provide evidence in advance of the hearing only in solemn criminal proceedings relating to certain alleged offences and is not available for child accused. However, child accused are also entitled to use the standard special measures, other than the use of a screen. Witnesses aged under 18 years can also apply for the use of other special measures, which the court may grant if thought to be appropriate in the circumstances of the case.

Justification must be made to the court for the use of non-standard special measures, which can be objected to by the defence. These non-standard special measures are giving evidence in the form of a prior statement, excluding members of the public while the witness is giving evidence, or the taking of evidence, by a commissioner. An accused aged under 18 cannot apply for the court to be closed while they give evidence.

If a child wishes to give evidence without the use of special measures, that must be justified to the court.

For accused aged under 18 years, defence agents should be alert to the need to apply for special measures. In addition, if a social worker or support worker considers that the use of special measures might be appropriate, they should bring this to the attention of the defence agent in order that an application be made to the court (Scottish Government, 2011).



## The Barnahus Model (Children's House)

[The Evidence and Procedure Review Child and Vulnerable Witnesses Project](#) 2017 reported on a number of recommendations regarding the manner in which child evidence should be gathered. A significant influence upon the review was the Barnahus Model implemented in Iceland from 1998, which evolved from the Child Advocacy Centres in Huntsville, Alabama in 1985. It sought to develop a more child friendly process in the investigation and prosecution of child sexual abuse. The development of the Barnahus Model in Iceland was set within a shifting context of cultural change, which recognised the prevalence of violence and sexual abuse perpetrated against children (Council of Europe, 2010). The Council of Europe promotes the model, and several European countries have or are adapting the model. The Scottish Government have commissioned Health Improvement Scotland along with the Care Inspectorate to develop a set of standards for a Barnahus response to violence for victims and witnesses in Scotland based on the Europe wide [PROMISE Barnahus Quality Standards](#). Following a [scoping workshop](#) in July 2019, a small working group was created to progress the standards and though this work was delayed by the impact of COVID-19 it was re-started in December 2020 with a revised timetable to support the continued co-design of draft standards for consultation in 2021. Presently a pilot model, the Child's House for [Healing Center of Excellence](#), is being set-up in East Renfrewshire and expected to be open at the end of 2021.

### 4.8 Bail and Remand

Unless a case is disposed of the first time it calls in court, one of the early [judicial decisions](#) will relate to whether the child should be ordained to appear at the next calling of their case, whether they should be remanded in custody until their next court appearance, or whether they should be released on bail. Evidence shows that children are part of a vulnerable group who may suffer extreme difficulties if remanded to custody (Scottish Government, 2011). Barry and McNeill (2009) recognised the vulnerability of young people, highlighting that 18-20 year olds demonstrated criminogenic needs one third higher than the already limited abilities of older prisoners. Research carried out by McEwan, Maclean, Dyer, Vaswani, and Moodie (2020, p. 23) highlighted the ability of children to comply with bail conditions as a particular concern and a "strong agreement that support to aid children in navigating their court journey - particularly where bail conditions are in place - is required".

Article 37 of the [United Nations Convention on the Rights of the Child \(UNCRC\)](#) explicitly states that:

- Children and young people who are deprived of their liberty should be able to challenge this quickly in court.
- Children and young people must only be arrested, detained or imprisoned as a last resort and for the shortest possible time
- Every child or young person who is deprived of their liberty must be treated with respect
- Every child or young person who is deprived of their liberty must be separated from adults, unless it is better for him or her to be with adults

It is essential to ensure that the courts have alternatives to custody available to them that provide robust wraparound support packages, which may also include bail supervision as an alternative to remanding children. These must be evidence-based, manage risk of harm and lead to positive outcomes to provide decision makers with confidence in their effectiveness. It is anticipated that ensuring robust services are in place will ultimately reduce the use of custody, thereby supporting children in their own community, leading to better outcomes for both. The importance of a more holistic and collaborative approach is central to the development and implementation of Community Justice across Scotland. Community Justice was defined by the Scottish Government (2016:1) in The New Model for Community Justice in Scotland as “The collection of individuals, agencies and services that work together to support, manage and supervise people who have committed offences, from the point of arrest, through prosecution, community disposal or custody and alternatives to these, until they are reintegrated into the community.”

Where custody is the only option, [secure care](#) should be considered for all children under 18. The [secure unit website](#) should be consulted in the first instance, but where there are no beds identified, all units should be contacted, to provide the Sheriff with a viable alternative to a YOI.

Many children in YOIs in Scotland are on ‘remand’ and should be presumed as innocent. In December 2020, an average of 68% of the total YOI under 18 population was on remand. [The Havana Rules](#) states that detention before trial should be avoided where possible and limited to exceptional circumstances. Therefore, all efforts should be made to apply alternative measures and detention, especially remand, should only be used as a last resort (Nowak, 2019). Evidence from children shows that detention in Scotland is not being used as a last resort or for the shortest time possible, with many reporting being subject to long periods on remand with no option for community based alternatives (McEwan et al., 2020). This sentiment is also mirrored in England and Wales (Bateman, 2020).

## **Bail Supervision**

Bail supervision may be necessary for some children and early identification of such individuals enables support services to be put in place at the earliest possible stage. Local agreements should be in place to ensure those children for whom bail is opposed, or those where there is a high risk of remand, are highlighted. Agreements should also be in place for any specific additional requirements necessary to support those children for whom a condition of bail supervision is considered necessary (Scottish Government, 2011). Judges, Sheriffs, PFs and defence agents can request assessments for bail supervision. In some locations there are existing processes where bail supervision assessments are automatically undertaken when court social work are notified that bail is being opposed. Where this process is not in place then a referral should be made through the child’s defence agent if social work identifies possible candidates. Whilst Bail Supervision Schemes are not yet available in all courts in Scotland, [National Guidance on Bail Supervision](#) provides an overview of the aims, objective and principles and the information necessary to develop, implement and monitor any such schemes. Bail supervision is intended to have a monitoring and support role for the child. Additional support to adhere to the conditions may be required that is reflective of their age and stage of development, level of understanding and considerate of their holistic needs. The level of weekly contact can vary depending on whether the case is a summary or solemn matter. Supervision aims to encourage and

support the child to keep any court appearances or meet other court requirements such as appointments for preparation of reports; support them to access appropriate services to meet their assessed needs; and working with them to avoid breaching bail by further offending (Scottish Government, 2011). Successful completion of a period of bail supervision increases the child's chance of being made subject to a community disposal if their case progresses to sentencing (Scottish Government, 2012).

Bail supervision is particularly appropriate for children to offer them support to adhere to their conditions. Experience has shown that reminding those aged under 18 that breaching bail conditions could lead to custody may also be enough to deter breach. A 2019 evaluation study into a bail supervision scheme (BSS) for children 12-17 years in Dublin at high risk of bail denial by Naughton, Redmond, and Connan (2019) showed positive changes in the young people's behaviour with a 72% reduction in reoffending behaviour in the six month post involvement in the scheme. The young people who completed the BSS with a planned exit also showed marked improvement in complying with bail conditions as the intervention progressed, with the majority who completed the intervention showing full adherence to bail conditions on exit from the scheme. Furthermore, 85% of the young people who completed the BSS with a planned exit received a community disposal at sentencing. The focus of the scheme was providing support to caregivers through use of multi-systemic therapy (MST), to increase their ability to manage and encourage positive change within the family dynamics and the young person's behaviours. This research highlights the importance of not just focussing support and intervention on the child but recognising the importance of the systems around the child in supporting and facilitating change. In order that courts can take appropriate decisions about children pending trial and/or sentence they must be satisfied that they have all relevant information about the child and that appropriate bail supervision or support schemes are available.

## **Bail opposition**

When a child is appearing in court it is recommended there are processes in place to promote timely and effective communication between the PF and those staff supporting them in court, whether this is court social work staff or specific court support staff. This is paramount when the risks associated with ordaining the child or releasing him/her on bail may result in bail being opposed (Scottish Government, 2011). Direct communication between appropriate staff supporting the child and the PF provides an opportunity to outline clearly the robust alternatives to secure/custody and CARM procedures for managing risk of harm/serious harm (see [Section 5 Managing Risk of Serious Harm](#)), which can be utilised where appropriate to monitor and manage the risk and needs of children in the community. Best practice highlights that the provision of information to Sheriffs, PFs and defence solicitors regarding the level of supports and risk management procedures available can inform the decision to release a child into the community.

In order that the court has available to it all the relevant information when the case calls, it is recommended that all courts adopt the practice whereby the PF makes a bail opposition list available to the Court Social Work Unit/Court Support worker prior to the court day commencing (Scottish Government, 2011). This will ensure that they can gather information to offer the courts on the suitability of the child's circumstances in the community and any arrangements for alternatives to remand e.g. supervised bail. There may be practical implications in implementing this as the PF can only mark a custody case once it has been

received by the police. Once received, the PFs are marking all custody cases, and it is possible that they will still be marking custody cases once the court has already commenced.

## **Bail Information Reports**

Bail should not be refused due to a lack of information about the child's circumstances (Scottish Government, 2011). Every effort should be made to identify children due to appear at court to ensure all the required information is available irrespective as to whether they are known to social work services or not. Limitations to the information gathered should be acknowledged when sharing this with the court, PF or other appropriate parties, particularly when they are appearing from custody and timescales are restricted.

Where a child is known to be homeless, every effort should be made to secure an address before they appear in court (Scottish Government, 2011). The court social worker or court support staff, once aware of a child appearing from custody (court custody lists, contact from the PF or other professionals working with the child) and where no alternative family address is available, should liaise with housing colleagues and make a referral to the housing department. Care should be taken in arranging an address, to ensure any concerns expressed by the PF are considered, for example that it should not be close to the victim (Scottish Government, 2011). Occasionally it may not be possible to obtain an alternative address before the end of the court day, but every effort should be made to do this at the earliest possible opportunity.

## **Remand Options**

When the court decides to remand a child to secure care or custody, they should be interviewed prior to leaving court by the court social worker or court support worker (Scottish Government, 2010). This will be particularly relevant where it has not been possible to identify that the child was appearing at court in advance to obtain further information that may be relevant for future appearances. It may be possible to identify information, which could support a review of the decision to remand.

The interview should include support to the child ensuring they understand what will happen next, explain the [initial custody review](#) process, and offer to contact family if unaccompanied. An assessment of the vulnerability of the child and of the risks of harm to self and others should be undertaken. Where risks of harm or vulnerabilities are identified this should be communicated to the Young Offenders Institution (YOI) or secure care estate in the form of a risk alert and shared with the allocated worker or appropriate social work office (Scottish Government, 2010). Risk alerts are needed for all occasions of first custodies, whether remand or detention, in recognition of the impact of such experiences upon children. Sharing of appropriate information and reports to ensure suitable supports are identified for the child should also be undertaken during remand or detention (Nolan, 2016).

When a child under 16 years, or 16/17 years, who is subject to a CSO or an open case through the CHS is to appear in court, the responsible local authority should make enquiries regarding secure care provision and availability when there is a likelihood that the child may be remanded. Should the court decide the child needs to be remanded and seeks a secure care placement, this is not at the discretion of the local authority, though they may express a

view if asked by the court. The responsible local authority funds the placement of a child in secure care for remand purposes and they must arrange all transport for future court appearances as needed. It would be best practice when the charges are of a serious nature that the lead professional makes contact at the earliest opportunity with the Children and Young Person's (CYP) Placement Manager) (Mary Amos: 0131 244 0996, [mary.amos@gov.scot](mailto:mary.amos@gov.scot)) at the Scottish Government (2018) to share information. This helps ensure that should the child be sentenced on indictment to detention, they are placed in the most appropriate establishment and may allow the provisional booking of a bed in [secure care](#).

Early communication with the Scottish Government is crucial if the child is convicted and when the child, as noted above, is at risk of or sentenced to a period of detention. Scottish ministers are responsible for the placement and management of:

- Children under the age of 16
- Children between 16 and 18 who are subject to a CSO, who have been convicted under solemn procedures and sentenced to detention under s. 208 of the [Criminal Procedure \(Scotland\) Act 1995](#)
- All children under 18 years who have been convicted of murder under s. 205(2) of the [Criminal Procedure \(Scotland\) Act 1995](#)

(Scottish Government, 2018a)

The position of this section would advocate that a secure placement should always be looked for and offered to the court as an alternative to a YOI.

When a child is remanded or sentenced, irrespective of their statutory position, an initial review in custody should be held. The purpose of reviews involves: sharing information (including on need and risk); supporting children throughout their time in custody; continuity of planning (both for sentence and release); promoting partnership working; and engaging children and their families in this process, as appropriate. The type and timescale for initial custody reviews is dependent on the child's legal status:

- "For children entering custody on remand for over seven days, or who have been sentenced, reviews should be held within ten working days of being detained, although within 72 hours remains best practice.
- For children on seven-day remand a telephone call should be undertaken with the personal officer as soon as possible, although best practice would be to visit.
- For children looked after by the local authority, reviews should be held within 72 hours as per good practice guidance." (Nolan, 2016)

Subsequent review meetings should take place throughout the child's detention at a frequency determined by the length of sentence or remand and the child's needs. This will allow continued support to the child on remand as well as planning, if necessary, for robust community alternatives to be put in place for their effective reintegration and transition back into the community - see [Section 6](#).

## 5. Completion of Criminal Justice Social Work Court Reports

When a child pleads guilty or is found guilty, the court must request social work to prepare a criminal justice social work report (CJSWR). The court social worker should contact the relevant social work service for an appointment, which should be passed to the child and/or their parent/carer before they leave court that day (Scottish Government, 2011). The requirements for writing court reports are set out in the [Scottish Government Criminal Justice Social Work Reports and Court Based Services Practice Guidance \(2010\)](#), [National Outcomes and Standards for Social Work Services in the Criminal Justice System](#). The requirements for the Child's Plan are set out in the [Getting it Right for Every Child](#) Framework.

The [Scottish Government Criminal Justice Social Work Reports and Court Based Services Practice Guidance \(2010\)](#) highlights the specific considerations necessary in relation to 16 and 17 year olds and should be referenced alongside the [Community Payback Order Practice Guidance \(2019\)](#) to ensure all CJSWRs provide the appropriate information to inform sentencing decisions. Both these documents emphasise the importance of application of the [GIRFEC](#) principles for 16 and 17 year olds, highlighting that "despite the fact that young people find themselves being dealt with in the adult system, they are not adults and have unique needs and risks which require to be considered in a young person-centred approach (wherever possible). Adolescence is a time of development and many young people who offend do not continue to do so in adult life" (Scottish Government, 2010:54).

Where appropriate, court reports should consider community alternatives as a disposal and remit to the CHS even where the child is not subject to a CSO up to the age of 17 years and six months. They should include the Child's Plan, in line with the requirements of [GIRFEC](#). Plans should be tailored to meet the needs of the child, as should the disposal options included within the report. To ensure that information for the court is as comprehensive as possible, liaison should take place between all social work services, and where appropriate, other partners who have been working with the child (Scottish Government, 2011).

It may be helpful to contact the child's solicitor to discuss the proposed disposals and explain how they would address the risks and needs of the child.

A structured professional judgement (SPJ) risk assessment tool should inform all risk assessments and be reflected in CJSWRs and the Child's Plan. The selection of appropriate risk instruments is the responsibility of the practitioner and the agency, and may be guided by criteria outlined by the [Risk Management Authority](#) (Scottish Government, 2011). This is to ensure that all risk assessments are informed from a developmental perspective that recognises children are not mini adults. Risk assessments should seek to develop an understanding of harmful behaviour within the experiences of that child and how these may be driving, maintaining and perpetuating the harmful behaviour. This individualised understanding of the risk behaviours should inform meaningful and appropriate risk management and reduction strategies. Failure to utilise appropriate risk assessment tools leaves practitioners in an indefensible position and this is particularly relevant regarding children convicted of sexual offences. Assessments should be grounded in research and

evidence in relation to children rather than a knowledge base exclusively relating to adult offending.

There is recognition that some children cannot always be managed in their communities and custodial sentences are the only option (Scottish Government, 2011). Where this is the case, the following options can be considered:

- A child appearing at court on indictment who is subject to CSO and at risk of a custodial sentence, where the child could be sentenced to a secure unit, should be considered, and written within the court report ([Criminal Procedures \(Scotland\) Act 1995](#), s. 208).
- If a child is not subject to a CSO but is under 17 years and six months, remit to a Children's Hearing for disposal is still an option under s. 49(6) of the [Criminal Procedure \(Scotland\) Act 1995](#).
- In making a CSO the hearing can authorise that the child be kept in secure accommodation if the child meets the criteria in s. 70(10) of the [Children \(Scotland\) Act 1995](#); s. 97(5) (c) of the [Children's Hearing \(Scotland\) Act 2011](#). (See section below, Advice of and Remit to a Children's Hearing).

As with remand, good practice includes a 72 hour Looked After Review being arranged by the local authority to take place in the YOI or secure unit for those who are Looked After Children, or Initial Custody Review for those who are not. This will allow continued support to the child during their sentence as well as planning to take place for effective [reintegration](#) back into their communities.

If a child is subject to a CSO, this should **not** be terminated because they have been given a custodial sentence. Any decision to terminate should be based on a need and risk assessment as outlined in the [Social Work Scotland 2019 position paper](#).

## 5.1 Sentencing Options

Whilst recognising that on occasions, for some children the court has no other option than to impose detention, this section looks to raise awareness and promote the robustness of the following sentencing options:

- Remit to the Children's Hearing
- Structured/deferred sentences to include a package of support tailored to meet the needs of children.
- Community sentences, including Community Payback Orders

For more information, read [Section 6](#).

## 5.2 Informing Sentencing Decisions

The [Beijing Rules](#) 5 (1) specify that the juvenile justice system should emphasise the wellbeing of the child and that any response should be proportionate to the circumstances of the child and the offence. This also must include an understanding of the level of responsibility of the child for that offence which is highlighted by the [UNCRC](#), which states “The Committee emphasizes that the right to exercise increasing levels of responsibility does not obviate States’ obligations to guarantee protection which is underpinned by [UNCRC](#) Articles 32-39. Gradual emergence from the protection of the family or another care environment, together with relative inexperience and lack of power, can render adolescents vulnerable to violations of their rights”.

Reference has been made above to the need to ensure that alternatives to secure care and custody wraparound supports are available for children who commit the most serious offences (Scottish Government, 2011). Decision makers and other professionals involved with the child need to have confidence that these are robust evidenced-based services that lead to positive outcomes. This is of most importance when new packages of support have been developed (Scottish Government, 2011). Awareness raising events, briefings and leaflets may raise the profile and knowledge of available supports. It is important to ensure the same information is made available to visiting (part-time) judges and Sheriffs.

Lead professionals and other agencies must ensure that robust and proportionate risk assessment and risk management procedures as outlined in [CARM](#) is in place for those children whose involvement in offending behaviour poses the most significant risk of harm to others.

## 5.3 Advice of and Remittal to a Children’s Hearing

When a child or young person who is aged 17 years and six months, or less, pleads guilty to, or is found guilty of an offence, the court may dispose of the case by remitting it to the Children’s Hearing. The court can seek the advice of the Children’s Hearing prior to disposing of the case. Where the child is subject to a CSO the Sheriff Court must obtain the advice of the Children’s Hearing before disposing of the case. It is important to reflect this within CJSWRs, and the [National Guidance](#) (2010) states that the individual completing the report “must always comment on the option of remittal back to the Children’s Hearing (where the subject of the report meets the criteria of being under 17 years and six months), but it is critical to be clear that remittal is being considered with a view to work being undertaken which will address both the needs and risks already identified as well as being tailored to the young person’s stage of development”.

The interventions and actions identified to address the risks and needs of a child, and to support them to develop their ability to desist from offending and reduce their harmful behaviour are applicable across both court and the CHS. The lead professional must evidence that the robust multi-agency risk management protocols in place are effective to ensure panel members’ confidence in the ability to manage those children within the CHS where aspects of their behaviours pose the most concerning risk of harm to others.



The rules that apply to advice and remit to a Children's Hearing, in accordance with the [Criminal Procedure \(Scotland\) Act 1995](#) are set out below:

Child on a CSO (under 18 years) (s. 49 (3))

- The Sheriff or Justice of the Peace Court **must** obtain the advice of a Children's Hearing before disposing of the case.
- The High Court **may** obtain the advice of the Children's Hearing before disposing of the case.
- After considering the advice of the Children's Hearing the sentencing court either disposes of the case itself or remits it to the Children's Hearing for disposal.

Child not subject to a CSO (under 16 years) (s. 49 (1))

- The Court **may** remit the case to a Children's Hearing for disposal without first seeking the advice of a Children's Hearing.
- The Court **may** obtain the advice of a Children's Hearing and then dispose of the case itself or remit it to a Children's Hearing for disposal.

Child not subject to a CSO (16 -17.5 years) (s. 49 (6))

- Applies only when a child is charged summarily
- The Court **may** obtain the advice of a Children's Hearing before disposing of the case
- After considering the advice, the Court **may** either dispose of the case itself or, if the Children's Hearing has so advised, remit it to a Children's Hearing for disposal.

Appendix 1 provides two flow charts setting out the advice and remit process for children under 16 and those over 16 years.

It is important for report writers to bear in mind that remittal to a Children's Hearing may be a suitable disposal even in cases where the offence is serious, and a custodial sentence would be a consideration were the court disposing of the case (Scottish Government, 2011). If the case is remitted to the Children's Hearing, the Hearing will decide whether to make a CSO, or if there is a CSO in place, whether to continue or vary that Order. In making, continuing, or varying a CSO where the hearing is of the view a child meets the criteria for secure care in [s. 83 \(4\) of the Children's Hearing \(Scotland\) Act 2011](#) they must consider the use of a Movement Restriction Condition (MRC). [An MRC](#) should form part of a robust wraparound plan that seeks to manage and reduce the risks posed by aspects of the child's behaviour. The hearing should only authorise the secure placement of a child where they are satisfied, they meet the criteria, and the hearing is satisfied that such measures are necessary.

A secure placement may be a more appropriate and effective intervention than custody because such measures are primarily directed towards meeting the needs of the child. Placements last for as long as is necessary to promote the welfare of the child and are the subject of regular review. A child cannot be kept in secure accommodation for longer than three months unless, on review of the case, the Children's Hearing continue that authorisation. In this way, the length of the child's detention is based on their level of need

and risk rather than on a pre-determined 'sentence', which better supports their reintegration to the community.

The [Scottish Sentencing Council website](#) outlines the broad range of Orders available to the court and when they can be used, which can be used as standalone disposals or in conjunction with other disposals, such as Community Payback Order. Appendix 2 considers some of the more commonly used sentencing options and gives a brief outline of the Problem Solving Court Model piloted at Aberdeen Sheriff Court.

## 6. After Court

### 6.1 Community Sentence

All children should be seen by the court social worker and their defence agents to ensure that:

- Their disposal is explained to them and the requirements it will place on them (Scottish Government, 2011)
- Where possible, initial appointments to see their allocated worker are made and the importance of attending these meetings explained (Scottish Government, 2011)
- An explanation is given of any conditions placed on them by the judge, along with the consequences of breaching the conditions. Given the profound consequences of breaching conditions, it is important to ensure that the young people understand the explanation provided. (Scottish Government, 2011).

### 6.2 Sharing Information in Background Reports

In case of a sentence of detention being imposed, court staff should ensure that the CJSWR and any other background reports obtained on the child go with them to the establishment (Scottish Government, 2011).

### 6.3 Outstanding Charges

In case of a sentence of detention being imposed, defence agents should learn whether there are any outstanding cases in relation to the child and link with the PF to have these accelerated as quickly as possible (Scottish Government, 2011). Defence agents should likewise arrange with the Responsible Officer to have any pending community sentence breached or reviewed and brought back to court for sentence as right for the individual circumstances of each child (Scottish Government, 2011). Similarly, defence agents should ascertain whether there are any outstanding fines, and if so, link with the Fines Enforcement Officer with a view to having the alternative imposed. In exceptional circumstances, e.g. where there is no defence agent, social work can write to the PF or the court, as appropriate, to follow these up.

### 6.4 Maintaining Compulsory Supervision Orders

It is crucial that CSOs under the CHS are not terminated when the court has given a child a custodial sentence ([Social Work Scotland, 2019](#)). This is in recognition of the complex

transition a child faces on returning to their community. It is essential to plan for their return and identify the right supports at the earliest stage, as recommended in the [Secure Care Pathways and Standards Scotland](#) (2020) and earlier [Scottish Government Reintegration and Transitions Guidance](#) ensuring the child and those important to them are included in these discussions and decisions. The impact of short sentences that will end before the child reaches 18 years can impede any stability they may have gained, resulting in, or compounding accommodation issues, as well as difficulties accessing benefits and employment or training. Subsequently, extensive support packages may be required.

Where a child is subject to a CSO and released prior to turning 18 years, offences can continue to be jointly reported, continuing a welfare-based approach, and allowing a Children's Hearing to deal with these. Whilst a child may express the wish to terminate their CSO, it is the responsibility of the lead professional and team around the child to articulate the reasons for continuing the order to ensure they receive the right level of support. When a child subject to CSO disengages, "in line with the Kilbrandon principles, non-engagement can actually be a reason to ensure compulsory measures are in place and every effort should be made to improve the child's response, taking into account their individual needs and views. Responsibility for the decision to terminate lies with children's panel members, thus it is important professionals recognise the child's position: they have a responsibility to advocate for what has been assessed as in their best interests. A comprehensive need and risk assessment (Scottish Government, 2011) with clear evidence to support any recommendations should be supplied to assist the panel members in their decision-making process.

## 6.5 Breaches of Community Sentence

The specific penalties for breaching a community sentence vary in relation to the type of sentence, but in all cases the decision about what sanction to impose for breach rests with the court (Scottish Government, 2011). These sanctions could include imposing a fine; varying the original order; revoking the original order and imposing any alternative disposal including custody, which could have been imposed for the original offence; or revoking the original order and imposing a sentence of imprisonment for a term within statutory timescales (Scottish Government, 2011).

The importance of complying with a community sentence should be communicated to a child both at the time of sentence and during the lifetime of the order imposed (Scottish Government, 2011). It is also important that the court is in possession of as much information about the child as possible and is aware of all the options available to them to avoid custodial sentences for all children where appropriate.

## 7. Conclusion

This section highlights the complexities associated with navigating the court system and why all children should have available, and be able to access, such support from their earliest contact with the court system, throughout that journey and beyond. They are children first and accordingly all responses and supports must be developmentally and systemically trauma-informed and uphold children's rights. All opportunities must be maximised to reduce the often-traumatic experience of children in the court system. Robust supports that are

proportionate and able to respond to individual levels of need and risks are crucial for both judicial and community confidence. This requires professional recognition and understanding of not just when risk can be managed but a transparency in what that looks like, the limitations to any risk practice and importantly, when it is assessed that the level of risk posed cannot be managed in the community at that time.

The provision of child friendly justice must be underpinned by an understanding and active adherence to and upholding of children's rights. This is the responsibility of all agencies, services, and professionals to deliver, and the inconsistencies and inequalities faced by children in Scotland in the court system can only be addressed through effective multi-agency partnership working, and a Whole System Approach.

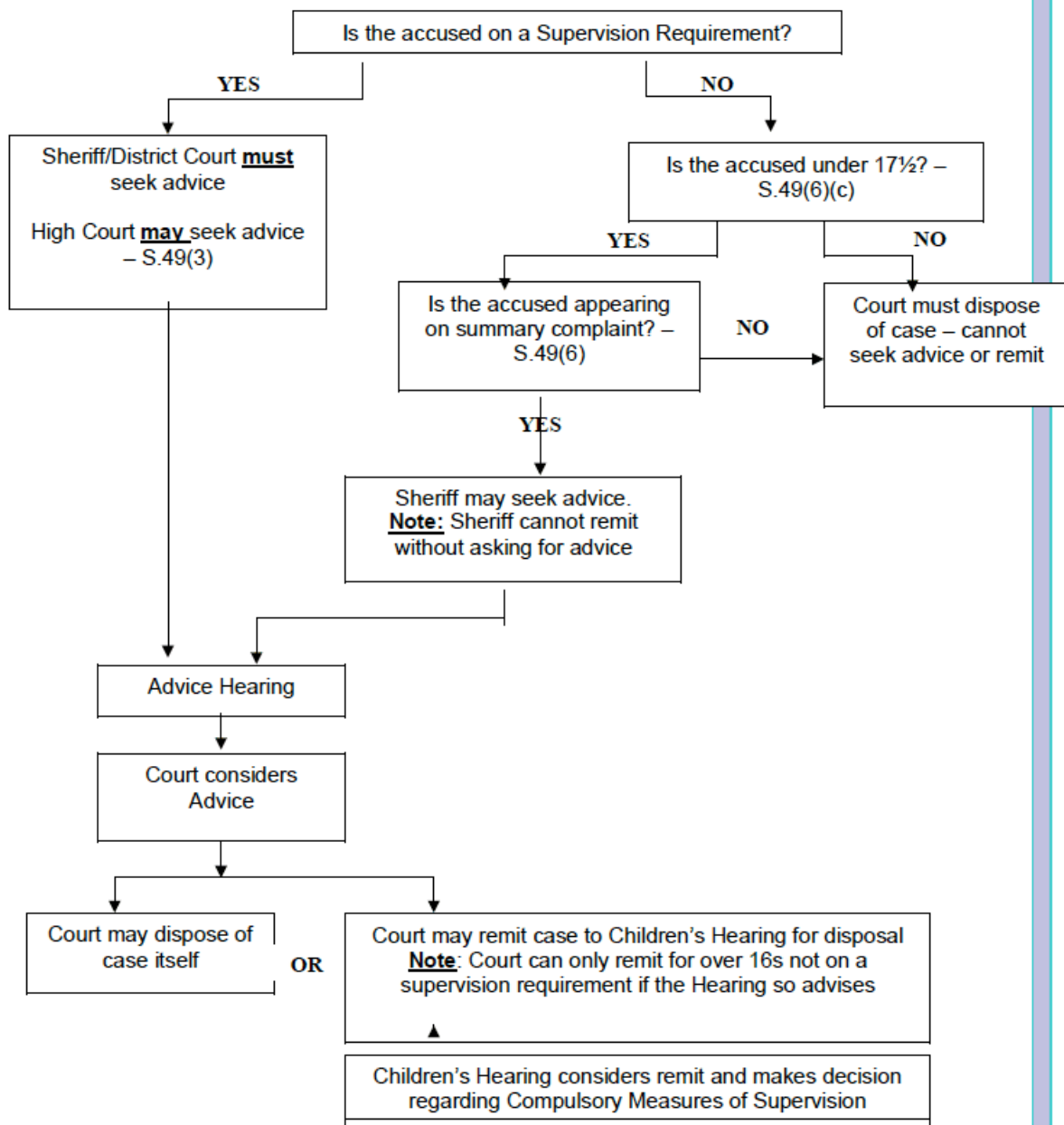
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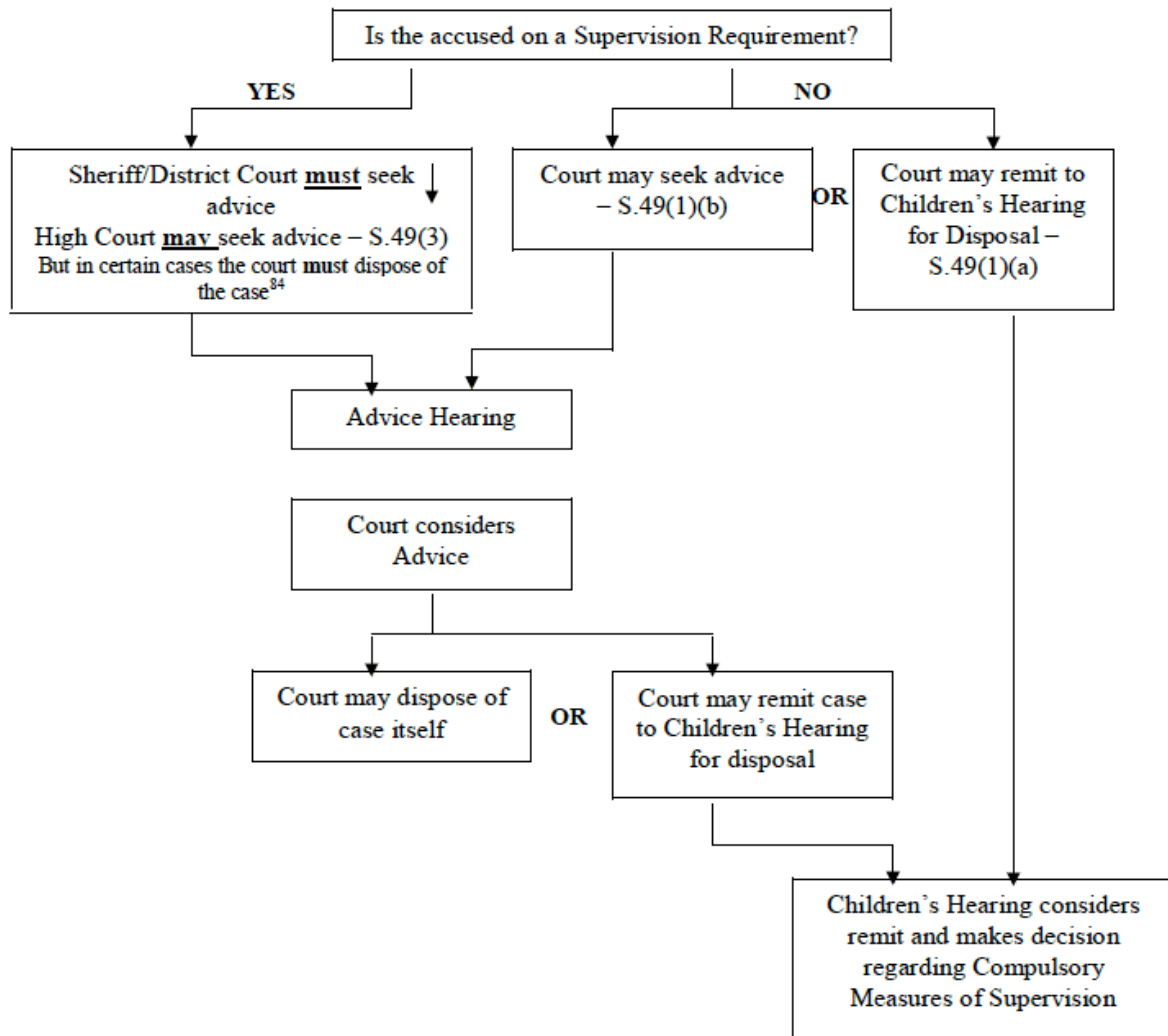
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## Appendix 1

### Responsibilities and Options in relation to Children's Hearings for accused persons over 16 in terms of S.49 of the Criminal Procedure (Scotland) Act 1995



**Responsibilities and Options in relation to Children's Hearings for accused persons under 16 in terms of S.49 of the Criminal Procedure (Scotland) Act 1995**





## Appendix 2

### Consideration of post-conviction and Sentencing Options

#### Post-Conviction but prior to Sentencing

##### Structured Deferred Sentence

The [Structured Deferred Sentence](#) (SDS), referred to in some areas as a Youth Structured Deferred Sentence (YSDS), is not a disposal. An SDS is a period of deferment within which the child agrees to undertake a period of intervention. This usually involves an initial period of deferment for three months to allow the intervention to be undertaken, following which a further report would be submitted to the court outlining the progress over the past three months. Either the court will consider the position and may defer for good behaviour for a further period (at which point the hope would be for an admonishment), or there may be deferment to allow specific aspects of work to be completed. The court may also choose to sentence the child using the wider range of options available to them. The intervention identified should correlate with the assessed risks and needs underlying the individual child's involvement in offending behaviour. Actions should be proportionate and meaningful to develop strengths and build capacity to avoid further offending.

The SDS provides an opportunity for individualised structured social work intervention post-conviction but prior to sentencing. It is an opportunity for a more proportionate response, eliminating the need to up-tariff children unnecessarily to ensure they receive support. The SDS evolved in response to the perceptions that low-tariff offenders with high levels of need were being up-tariffed to CPOs (previously Probation Orders) to ensure social work intervention that would not be available through lower tariff sentence options.

SDS or YSDS cannot be breached. However, should an individual not engage with the identified intervention during the period of deferment, then it is likely that the court would impose a sentence which has further elements of compulsory conditions that may have significant consequences if breached.

##### Sentencing Options

###### Community sentences

As highlighted within this guidance, local authorities should ensure the provision of robust alternative services to secure care, custody and remand, to minimise the occasions on which children require to be detained in the prison estate.

Children often have difficulties adhering to the conditions associated with bail orders and community sentences, particularly over extended periods of time. However, there is evidence that these high rates of non-compliance are associated with a failure to provide programmes and supports which recognise the specific needs of these children. This is one of the reasons why a supervision requirement, which should not be confused with a CSO made by the CHS, has been made mandatory for all under 18s as part of a [Community Payback Order \(CPO\)](#). This means that they will have an allocated worker who will provide support to fulfil the requirements of their Order.

As with Bail Supervision schemes, judges, and sheriffs need to be satisfied that robust community sentences offer appropriate alternatives to custodial sentences.

There is provision for continuing regular judicial oversight of the response of the child to the Community Payback Order or Drug Treatment and Testing Order (DTTO), and progress reviews could be suggested within the CJSWR as a means by which the court can consider progress of the order imposed. Reviews are not always requested and are done so at the discretion of the court at the point of sentencing. A supervising officer may request a review of an order for a specific purpose. This periodic return to court could be undertaken by means of regular Court Review hearings where non-compliance can be addressed, or fast track breach process instigated. The regularity of such hearings is at the discretion of the presiding judge or sheriff, considering the circumstances presented in each individual case.

Where children are subject to court orders, the judge or Sheriff who imposed the order should, where possible, deal with any reviews or breaches of the order or any new offences.

### **Fine**

The individual convicted must pay money to the court within a certain amount of time. The highest level of fine that can be given is set by law depending on which court the case is heard in.

### **Restriction of Liberty Order (RLO)**

An RLO can last for up to a year and may be given as a direct alternative to imprisonment. Individuals subject to an RLO must be in a certain place, such as their home, for a set amount of time - this can be up to 12 hours a day. They can also be restricted from going to certain places. They are closely monitored - usually by wearing an electronic tag.

Research highlights that electronic monitoring is most effective when it is used in conjunction with supervision and supports flexibility, opportunity for engagement and reduction in restrictions when an individual demonstrates positive progress. Length of time being subject to such restrictions has also been identified as a factor in success, as longer periods of restriction can negate initial positive progress. When considering the use of electronic monitoring with young people it is crucial that consideration to these points is given to promote flexibility and creativity, support engagement and reduce the risk of setting them up to fail.

### **Aberdeen Sheriff Court Problem Solving Court Structured Deferred Sentence (PSC SDS)**

The Aberdeen Problem Solving Approach seeks to reduce the use of short custodial sentences by providing new community disposals to women and young adult males with complex needs and multiple previous convictions.

It works with women over 16 and men aged 16-25, providing them with wrap-around support from a combination of CJSW services and the voluntary sector. Alongside the support package the court regularly reviews the progress of offenders to encourage them to comply.

Whilst this is an SDS there are a number of differences from the standard SDS process within this model of approach. It is only available for summary matters and there are set criteria for inclusion; however, this is constantly reviewed and evaluated allowing for flexibility and adaptability within the scheme. The location of this court has been carefully considered to support the ethos of what a PSC represents. It is located within a smaller court, scheduled during periods when the court is less busy, and reviews are scheduled

regularly for individuals. This allows privacy and for Sheriffs to have dialogue with individuals, creating a sense of relationship and communication. It also allows for cases to be rolled up and if necessary, the PSC SDS can be extended in consideration of this. The outcome for individuals for successful engagement and undertaking of the PSC SDS is hoped to be an admonishment.