

CYCJ's response to the Bail and Release from Custody (Scotland) Bill

The Children's and Young People's Centre for Justice (CYCJ) works towards ensuring that Scotland's approach to children and young people in conflict with the law is rights-respecting, contributing to better outcomes for our children, young people and communities.

CYCJ produces robust internationally ground-breaking work, bringing together children and young people's contributions through participation and engagement, research evidence, practice wisdom and system know-how to operate as a leader for child and youth justice thinking in Scotland and beyond. CYCJ works closely with other organisations and individuals to ensure that children's rights are upheld and respected throughout the justice process, and that children are deprived of their liberty only when this cannot be avoided, and for the shortest time possible.

CYCJ is primarily funded by the Scottish Government and based at the University of Strathclyde.

General approach

[Paragraphs 4 to 13 of the Policy Memorandum](#), written by the Scottish Government, sets out the policy objectives of the Bill.

The Scottish Government states that the proposals in the Bill are underpinned by a commitment to public safety and the protection of victims and are intended to lead to a reduction in the risk of future reoffending, leading to fewer victims in the future.

Q1. Do you have any comments on the general approach taken in relation to the use of bail and remand?

CYCJ agrees with the general approach taken in the Bill; however, we remain concerned at the lack of specific consideration for children in the justice process.

The wider position of seeking to reduce the likelihood or necessity of anyone being deprived of their liberty when alternatives could be utilised is clearly in alignment with human rights and reflects the [Whole System Approach](#) to children in conflict with the law. The lack of specific reference and emphasis on the additional safeguards and protection warranted for children in the Justice System and reliance on forthcoming legislation specifically relating to children through the Children's Care and Justice Bill, Incorporation of UNCRC and the future Promise legislation, which is still some way off, seems inconsistent with the Scottish Governments commitment to upholding children's rights.

"Primary legislation is one of the most powerful tools with the potential to minimise the use of custody to a last resort in practice" (SCYJ, 2020). This is an opportunity for Scotland to firmly place children's rights within all contexts, to guard against future shifts should the numbers of children in conflict with the law increase and make primary legislation that truly is rights upholding with a particular acknowledgment to UNCRC art 37b. "Due consideration must also be made to, amongst other things, the best interests of the child (Article 3), the need for regular review of the child's treatment (Article 25), access to education (Article 38), the right to leisure, play and culture (Article 31), protection from inhumane treatment and detention, being treated with respect and care (Article 37), and recovery from trauma and reintegration into society (Article 39)." (SCYJ, 2020).

The [Report on Expert Review of Provision of Mental Health Services at HMYOI Polmont](#) (2019) stated that, "as numbers [...of children and young people] reduce in custody, the needs of those few who are imprisoned are

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increasingly complex. With young people reporting multiple types of trauma exposure in their lives and significant vulnerability as a result, identifying and managing risk becomes a priority.” And evidence review authors are concluding, “younger people’s rate of suicide in prison internationally and in Scotland is much higher compared to older age groups in prison, and the disproportion between the suicide rate for people in prison and in the general population is greatest for younger age cohorts; and most suicides of young people take place within three months of being detained”.

This is an opportunity for Scotland to be explicit in relation to children and legislate that they are only deprived of their liberty where there is a risk of serious harm ([RMA \(Risk Management Authority\), 2011](#); [SG, 2021](#)) and no other reason. However, even in the case where consideration of risk of serious harm is the case, community alternatives to deprivation of liberty should always be explored. There could also be specific measures included within the legislation to prioritise children when remanded to custody by creating a review mechanism to ensure it only is for the shortest time and alternatives are actively explored. In addition, being explicit that the court must receive an assessment completed by an appropriately trained individual where a child is at risk of remand would ensure their status as a child is respected and rights upheld.

Without a specific inclusion of how children should be considered within the Bill there is a significant risk that services will not be created, resourced, or designed with core principles of GIRFEC (Getting It Right For Every Child), UNCRC and fail to consider the developmental, systemic and trauma informed needs of children. Whilst recognising that the number of children prosecuted at court in Scotland has declined there were still 1208 children aged between 12-17 years prosecuted at court in 2019/2021. Most children who come into conflict with the police will not be prosecuted at court as diversionary processes enable more child focussed ways of responding to such behaviour. Subsequently, those cases of children being prosecuted at court may be more likely to be of a serious nature, particularly when it is a child under 16 years. The majority of children prosecuted at court are 16/17 years and the largest proportion are 17 years old.

In the spirit of Kilbrandon, only those charged with the most serious matters should be prosecuted at court; thus, this would lead to an assumption they are more likely to be at risk of remand and require child specific alternatives to remand. This raises issues for the capacity, ability and skills of the professionals involved in relation to working with older children, aged 16/17 years often responded to as adults, especially within the court system with a significant body of research highlighting the reasons this is unacceptable.

The Committee on the Rights of the Child (CRC) has highlighted the necessity for adequate support from trained professionals within the youth justice system, and the need to adapt processes so that they are more suitable for children (CRC, GC No.24, para 46, 2019). By creating legislation that does not recognise the specific consideration of children, it creates the potential for them to be subject to adultification, and it is likely they will continue to receive responses developed and delivered through the lens of adult needs and services. There could therefore remain an inequality in the application of the legislation for children, an implementation gap.

Q2. Do you have any comments on the general approach taken in the Bill to the arrangements for the release of prisoners?

Again, CYCJ agrees with the general approach pertaining to the release of prisoners and whilst this emulates the principles of the Whole System Approach, the omission of explicit reference to children creates the same concerns as in relation to approach to bail.

Q3. Do you have any comments on the practical implementations of the proposed changes in the Bill, including resource implications?

It is important to acknowledge that the Whole System Approach to children in conflict with the law which was rolled out nationally in 2011 articulated the expectation in relation to children appearing at court, bail, and remand considerations, sentenced, and returning to the community. It explicitly outlines the specific considerations and practice required with children which would address many of the issues and concerns CYCJ has regarding the Bill as proposed and court system in Scotland. One of the most significant issues remains resourcing and prioritisation of children in these circumstances, and the Bill as proposed does not address these hard issues.

Ensuring that the professionals involved in implementing the legislation, across the justice continuum, are skilled, knowledgeable, and trained in engaging and working with children, particularly in recognition of the prevalence of speech language and communication needs ([MacRae & Clark, 2020](#)), will have resource implications. The frequency will vary across the country as to being able to respond to children across the justice continuum; however, this creates its own difficulty with responses often adult and justice focussed without a child lens which is developmentally, systemic and trauma informed. Ensuring that services either have access and can call on professionals with the necessary skills as and when required, or have these individuals within their service, will require specific consideration of resourcing.

This will be easier to navigate and address in more central areas and where there is a greater frequency of children in the court processes. It will be more problematic to provide in rural areas that have geographical challenges. Further consideration as to the level of resource commitment required whether a child is known to services or not, will there be a commitment and expectation assessments for alternatives, are fully informed by an understanding of the child and their wider context. An example would be completing a home visit where supervised bail and particularly EM bail is being considered, contact with parents/carers as routine, unless there are specific concerns regarding the child's welfare. What commitments will be put in place to ensure children appearing at court will have a child focussed response and to ensure appropriate information is gathered to inform assessments and shared with Sheriffs. Consideration of how this can be equitable will be critical to ensuring no child is disadvantaged by the legislation and its implementation.

Specific proposals (1/4)

Q4. Input from justice social work in relation to bail decisions

Section 1 of the Bill seeks to encourage input from justice social workers in relation to court decisions on whether pre-trial bail should be granted and under what conditions.

CYCJ reiterates the necessity that for all children where bail is a consideration then information should be provided by social work. These workers must have the necessary skills, training, and knowledge in working with children to be able to undertake appropriate assessments to provide information to the court. Considerations of the application of supervised bail, and electronic monitoring of bail with children, has nuanced application from that with adults. Whilst the information gathered may be remarkably similar, what that means for a child includes additional factors to consider than for most adults.

It is important to ensure that appropriate information is gathered regarding a child's living environment, and in most cases, they will not be the householder but live with others, parents, or carers. What safeguards will be put in place to ensure these relevant others are linked with, consideration of that home environment specifically, for example will home visits be completed at bail stage or not in consideration of time constraints? It would be helpful if this could be explicit, regarding the expectations around children as opposed to fitting children into a system and subsequent processes.

Q5. Grounds for refusing bail

Section 2 seeks to narrow the grounds upon which a court may decide to refuse bail by:

- **adding a specific requirement that reasons for refusing bail must include that this is necessary in the interests of public safety (including the safety of the complainer) or to prevent a significant risk of prejudice to the interests of justice**
- **limiting the circumstances in which grounds for the refusal of bail in summary procedure (less serious) cases may include a risk that the person might abscond or fail to appear**

As noted, CYCJ would seek an explicit reference to children in the legislation that prohibits them from being deprived of their liberty unless there is a risk of serious harm and if convicted, they will receive a long-term sentence/ life sentence. Thus, there would be no deprivation of liberty for any child due to procedural breaches, lack of appropriate accommodation or any other reason other than risk of serious harm.

Q6. Removal of bail restrictions

Section 3 would remove some existing restrictions on granting bail in solemn procedure (more serious) cases; thereby allowing the courts to simply apply the tests used in other cases.

The restrictions currently apply where a person, who is being prosecuted for certain offences, has a previous conviction for such an offence. In those cases, the law provides that bail should only be granted in exceptional circumstances. The relevant offences are ones involving drug trafficking, violence, sexual offending or domestic abuse.

CYCJ agrees with this aspect of the bill.

Specific Proposals (2/4)

Q7. Stating and recording reasons for refusing bail

Section 4 seeks to expand the current requirements for a court to state its reasons for refusing bail and to require the recording of reasons.

This would be welcomed for the reasons intended, to provide transparency and increased understanding as to the decision-making regarding bail or remand, which may assist in developing services and informing Sheriffs as to the impact of services to increase confidence in community alternatives. Increase of confidence would also be beneficial for the wider public to understand the decision-making processes, what alternatives are available and what they can and cannot do.

For children in the court process given that evidence shows high prevalence of speech, language and communication needs, neurodevelopmental and traumatic brain injuries then how decisions are verbalised/ written must be done in a manner that ensures children can understand. This may require additional adaptations than that required for adults. If considering an approach that supports children's participation, and engagement in the court process, then wider changes ([COE, 2010](#)) are required; however, language and manner of explaining decisions is a starting position. It is of most importance that the person subject to bail understands what any conditions are and being able to understand the reasoning can assist and encourage people to engage.

Q8. Consideration of time spent on electronically monitored bail in sentencing

Section 5 would require a court, when imposing a custodial sentence, to have regard to any period the accused spent on bail subject to an electronically monitored curfew condition. It generally provides for one-half of the period to be deducted from the proposed sentence, whilst allowing a court to disregard some (or all) of the time on bail where it considers this appropriate.

CYCJ has no opposition to this aspect of the legislation.

Q9. Prisoners not to be released on certain days of the week

Section 6 seeks to improve access to services for prisoners upon release by bringing forward their release date where they would otherwise fall on certain days (e.g. Fridays).

CYCJ supports legislative change to ensure individuals are released with opportunity to access necessary services. This should also be in accordance with the shift in services to assist people at the point of release to return to their communities and homes and meet with those services that they need to as a matter of urgency, especially housing, benefits, health. Such supports and interconnection with other aspects of the legislation and resourcing will be critical to this change having the desired impact on people's lives. In addition, this is particularly welcomed for children; again, the consistency in resourcing the required supports at point of release is paramount. Being able to attend the necessary services or appointments necessitates, often for children, someone to accompany them.

Specific Proposals (3/4)

Q10. Release of long-term prisoners on reintegration licence

Section 7 seeks to replace the current possibility of release on home detention curfew (HDC) for long-term prisoners (those serving a fixed term of four years or more). It would be replaced with a new system of temporary release under what the policy memorandum refers to as a reintegration licence.

Release on reintegration licence:

- would include a curfew condition and be subject to supervision by justice social work
- could not occur earlier than 180 days before the half-way point of the sentence (the earliest point at which a long-term prisoner may be released on parole) and could last for up to 180 days
- could be used prior to the Parole Board deciding whether to grant release on parole as well as in the run-up to the start of parole where this has already been granted.

CYCJ would support the opportunity of the reintegration licence. However, the detail of what this means between an individual serving parts of their sentence in the community as opposed to early release seems opaque. Will the expectation be whether individuals can complete interventions in the community or will all interventions be expected to have been completed prior to consideration of release on reintegration licence? Potentially, is it pre-parole without the certainty of remaining in the community?

Again, the resourcing will have significant impact on the meaningful and effective implementation of such an order and requires clarity as to the expectations of individuals, as well as services.

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Q11. Emergency power to release prisoners early

Section 8 seeks to give the Scottish Government a regulation making power to release groups of prisoners in emergency situations. It could be used in relation to those serving custodial sentences, with various restrictions, but would not apply to prisoners held on remand.

Examples of emergency situations could arise where the spread of an infection might present significant harm to health, or an event leads to part of a prison becoming unusable.

CYCJ has no opposition to this aspect of the legislation. However, we would highlight the fact that the prison estate has mixed new and old accommodation and should not be a reason for early release. Prisons have adapted for many years with infectious outbreaks and managed it within the wider estate. In addition, as the legislation will not prevent individuals being remanded for the processing of courts business, it would seem prudent to avoid a blanket exclusion of remand prisoners who may not pose risk of serious harm from such measures in exigent circumstances.

Q12. Duty to engage in planning for the release for prisoners

Section 9 seeks to facilitate the development, management and delivery of release plans for prisoners – both sentenced and remand. A release plan would deal with:

- the preparation of the prisoner for release
- measures to facilitate the prisoner's reintegration into the community and access to relevant general services (e.g. housing, employment, health and social welfare)

In relation to all children in custody there should be a Child's Plan, and these children should be considered looked after whether they have the legal status or not. They must be responded to through the lens of GIRFEC and not just recognition of the interface with corporate parenting responsibilities as directed by the Children & Young People (Scotland) Act 2014 but actively involve a multi-agency partnership approach that includes the third sector. It is imperative that effective planning is undertaken with a child during any period that they are deprived of liberty, whether remand or custody. The purpose is to ensure appropriate supports are in place during this period as well as to promote connection with family and community-based professionals to create smooth transition for return to the community. Whilst some interventions may be limited in accessibility due to status, whether convicted or not there should be meaningful activities and interventions available that meet the child's need irrespective of status. It is important that all agencies have a shared responsibility which necessitates clear pathways and responses from health and education that can support and improve children's mental health and wellbeing.

Again, this reflects the Whole System Approach reintegration and transition aspect, which may provide a blueprint for how this could effectively be implemented consistently for all children and young adults, including those with care experience.

Specific Proposals (4/4)

Q13. Throughcare support for prisoners

Section 10 would require the Scottish Government to publish, and keep under review, minimum standards applying to throughcare support for both sentenced and remand prisoners. Throughcare support covers a range of services, provided in custody and during transition back into the community, which can help in the successful reintegration of people on release. The new standards would replace existing ones which are more narrowly focused on services provided by justice social work.

Development of standards is only part of the process. It is the real application of these standards in practice as well as the oversight and scrutiny of how people use and meet the standards that will make them effective. This would set a minimum standard on how agencies and services are supported to apply them in a meaningful and effective way. This also requires consideration of resourcing, skills for working with the range of groups the standards will apply to, and the specific needs of these groups. Again, we would highlight the need to ensure any development of standards is done jointly with children and young people to fully understand their specific needs and incorporates their voice and views. Standards developed which apply to children and young adults without their being considered and added as an afterthought is inappropriate, and not reflective of the human and child's rights approach Scotland is keen to develop.

Q14. Provision of information to victim support organisations

Section 11 seeks to provide that certain information about prisoners that can be given to a victim (e.g. on the planned release of the prisoner) can also be given to a victim support organisation helping the victim.

The specification of timescales and specific trigger points for victims to be notified provides clarity and opportunity for improved victim notification and safety planning. The consideration of providing additional information has been resolved by focussing on the opportunity to ensure victims get the necessary information at the critical point. This promotes their engagement and any necessary safety planning and additional supports to be triggered.

It would be prudent to await the review of the VNS to consider what, if any, other changes would be beneficial.

Q15. Do you have any other views on the Bill?

We have highlighted our concern that there is no explicit reference to children in the legislation. At CYCJ, we fully acknowledge the universal application of the legislation but believe there needs to be specific reference to children to ensure their specific needs are met. However well intentioned, this repeats long-standing issues concerning children in the justice system by failing to recognise their explicit and specific needs and the additional rights they hold by their status as children. We do acknowledge that there will be circumstances where the risk of serious harm requires a child to be deprived of their liberty; however, this is an exceedingly small number of children.

“The process of transitioning from childhood to adulthood is influenced by context and environment” (CRC, GC, 20, 2016) which has significant resonance considering the impact depriving a child of liberty may have on their social and cognitive development and brain maturation. The impact upon children and young people of being remanded or sentenced to custody is traumatic and the referenced report by the Expert Review of Mental Health Provision in HMYOI Polmont reinforced the concerns regarding the deprivation of liberty for any child or young person. This is an opportunity to explicitly include children and for legislation to protect their status and rights as children, and ensure they are only deprived of their liberty as a last resort and for the shortest period. Looking to other pending legislation creates confusion, complexity, and an otherness as to who is responsible for children in the justice system when the answer is: we all are.