CHILDREN AND YOUNG PEOPLE IN CONFLICT WITH THE LAW: POLICY, PRACTICE AND LEGISLATION

Section 17: Depriving Children of their Liberty and Alternative Measures

June 2023

Children and Young People's Centre for Justice

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1. Introduction

Children are deprived of their liberty in numerous ways and for various reasons, including: police custody; detention awaiting trial and/or following sentencing; placement in a secure facility for protection, assessment or treatment; or detention as part of the immigration or asylum system (Kilkelly, 2011). There may be levels of overlap and conflict across these systems which is particularly true for children who come into conflict with the law in Scotland, as these children often cross both welfare and justice systems. This overlap between child-friendly responses and justice responses often raises tensions. Our approach to children in conflict with the law in Scotland is underpinned by Getting it right for every child (GIRFEC), the United Nations Convention on the Rights of the Child (UNCRC), the Whole System Approach (WSA) and child protection, yet the justice system continues to make limited specific adaptations or accommodations for children.

The UNCRC explicitly recognises that children, by their very status, require further protections in addition to those enshrined in human rights statutes. The UNCRC recognises that all children, as rights holders, have the same entitlement to their rights being upheld. The responsibility for upholding these rights lies with parents primarily however states are responsible for facilitating the realisation of children's rights and, where necessary, supporting parents in their role.

General Comment 24 of the Committee on the Rights of the Child (CRC) (2019) states, "*the child justice system should provide ample opportunities to apply social and educational measures, and to strictly limit the use of deprivation of liberty, from the moment of arrest, throughout the proceedings and in sentencing*" (United Nations Committee on the Rights of the Child, 2019). This means that alternatives to depriving children of their liberty should be available for most children. Only a very small number will need to have their liberty deprived. Whilst personal freedom is not an absolute right the deprivation of liberty must only take place in accordance with Article 37b of the UNCRC, following an assessment that the individual poses a risk of serious harm to either themselves or others when aspects of their behavior cannot be managed safely in the community. Any instance should be rigorously defensible; it should never be adopted solely for reasons of procedural convenience. Balancing rights and risk of harm (Murphy, 2018) is never an either/or proposition; instead, it is a careful consideration of the rights of individuals alongside those of others and wider society which must be underpinned by defensible decision-making (Kemshall, 2021) and good risk management practice (Scottish Government, 2021b).

Both the *Human Rights Act 1998* (HRA), which incorporated the European Convention on Human Rights (ECHR) directly into UK law, and the UNCRC contain specific rights in relation to the protection of freedoms and liberty. Article 5 of the HRA clearly sets out the very specific circumstances prescribed by law in which our liberty can be removed; UNCRC Art 37b has additional safeguards in terms of children, stating that this should only be used as a measure of last resort and for the shortest possible time. In addition, the United Nations Committee on the Rights of the Child (2019, p. 3) GC 24 specifically highlights that in those few situations where deprivation of liberty is justified as a last resort, its application is for older children only, is strictly time-limited, and is subject to regular review. When children are referred to a welfare system from the criminal justice system "*the principle of "measure of last resort" equally applies to protect children from deprivation of liberty in all institutions"* (UN, A/74/136, 2019).

Whilst there are still children being deprived of their liberty there is an expectation from Scottish Government, under WSA policy launched in 2011, that processes and practices are in place at a local level to ensure that when children come into conflict with the law:

- They are actively diverted from formal systems at every opportunity
- They are supported to navigate the justice system until their journey is concluded (where diversion has not been possible)
- Responses and support are available irrespective of whether or not a child is known to, or currently involved with, services.
- If there is a risk of them being deprived of their liberty alternatives are available to the-
    - Police, in terms of alternatives to police custody
    - Panel members in the Children's Hearing System (CHS)
    - Chief Social Work Officers (CSWO); and
    - Court

2. Deprivation of Liberty

"Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood." (Nowak, 2019, p. 4).

Children in conflict with the law in Scotland are most likely to be deprived of their liberty through either the Children's Hearings System (CHS) or contact with the justice system or a combination of both. The seriousness of the incident that has occurred, and their age, often dictate which system will respond to these children. These factors are of critical importance; currently Scotland treats those legally defined as children (under 16), and those 16- and 17-year-olds subject to compulsory supervision orders (CSO) under the CHS differently to those 16- and 17-year-olds who are not subject to a CSO through the CHS. Individuals in this category are legally defined adults. The legal status of a child has significant implications for where they may be held if deprived of their liberty through the courts.

However, the Children's (Care and Justice) (Scotland) Bill currently progressing through the Scottish Parliament, seeks to address this inconsistency; legally defining all under 18s as children, in line with the UNCRC, it will cease the placement of children in Young Offenders Institutions (YOI). Until this legislation is passed and implemented, we are left with this inconsistent and often complex range of processes relating to children in conflict with the law, particularly in terms of deprivation of liberty. This legislation will not remove the use of deprivation of liberty for children but will prevent any child from being held in a YOI. Nor will it realise the principles of the SOFI report (Scottish Institute for Residential Child Care (SIRCC) 2009) strongly endorsed by the Scottish Government and COSLA (2009, p. 1) Scottish Government and COSLA, one of which was "*to have no child in Scotland in secure care and we must actively work to reduce the need for secure care".* Realising this aspiration will require courage and imagination. There is a need for credible alternative measures, accessible for all, which reduce and manage the risk of harm whilst upholding rights and meeting the needs of children, families, and communities.

3. How Many Children are we talking about in Scotland?

Children in Scotland are most likely to be deprived of their liberty in police custody. The Scottish Police Authority (SPA) 2021-2022 Report highlighted, "*there was a total of 4,012 children held in custody from 1st April 2021 – 31st March 2022. This is a year-on-year reduction in comparison with: 4,147 children in custody in 2020-21 and 5,359 in 2019-20.*" This snapshot does not reflect the circumstances in which a child may find themselves held in police custody, nor the duration. It does, however, raise the question of why police custody is being required for so many children even for short periods of time; this should challenge us to work together in developing alternatives that reflect how Scotland wants to respond to its children.

Some comfort can be taken from the fact that the downward trend of children being deprived of their liberty in police custody is also reflected across the use of both secure care placements and YOI. According to the Scottish Government (2022b) Children's Social Work Statistics Report 2021-2022:

- The average number of children in secure care at any one time decreased to 74 from 76 in the previous year, with 41 from Scotland (down from 47 in 2020-21) and 33 from outside Scotland (an increase of 14% on 2020-21).
- During 2021-22, there were 149 admissions to secure care accommodation (down 16% on the previous year).
- Across the different secure care centres, emergency beds were used on average 20 nights of the year. This is half the figure for 2020-21 and reflects a significant ongoing reduction (the figure was 209 for 2019-20). One secure care centre no longer offers short-term or emergency placements.
- On average the number of residents using emergency beds was eight – a decrease from 17 in the previous year.

The Scottish Prison population statistics 2017-18 to 2021-22 also reflect a significant reduction in the number of children (16/17 years) held in YOI. However, the data available requires further analysis if we want to understand why there is a significant disparity between the number of children remanded and the notably smaller number sentenced to detention.

NUMBER OF INDIVIDUAL CHILDREN SPENDING ANY TIME IN PRISON OVER THE PAST 5 YEARS BY LEGAL STATUS					
	2017-18	**2018-19**	**2019-20**	**2020-21**	**2021-22**
Untried	105	108	75	56	54
Convicted awaiting sentence	88	84	57	26	22
Sentenced	77	75	39	17	8
Unknown	2	1	2	-	-

Maximising alternative measures is critical to ensuring no child is deprived of their liberty that could be safely held in the community. In the small number of cases where alternative measures are not appropriate and deprivation of liberty is justifiable and necessary, then pathways to child-focussed environments are a must; children should all be seen as

"children and must be accommodated in secure care rather than YOIs - prison like settings are deeply inappropriate for children" (Independent Care Review, 2020).

4. Legislation

The following legislation outlines the points of the system where a child may be deprived of their liberty, and the legislation which permits this through the three pathways focussed on in this chapter: police custody, CHS, and court. It is the application of the legislation and processes in the overlap between these three areas which can ensure alternative measures are available for all who need them; meeting children's needs should be the priority irrespective of whether it is initiated via the welfare-oriented system or justice system.

4.1 Secure Care

For a child to be deprived of their liberty in secure care they must meet the secure care criteria and the statutory framework for decision-making as follows:

Through the Children's Hearings System:

- Subject to a Compulsory Supervision Order (CSO), Interim Compulsory Supervision Order (ICSO), medical examination order or warrant to secure attendance made under the Children's Hearings System (CHS) or by a sheriff who is satisfied that conditions set out under S.83(6), S87(4) OR S.88(3) of the Children's Hearings (Scotland) Act 2011 are met. These are
    - That the child has previously absconded and is likely to abscond again, and if the child were to abscond, it is likely that the child's physical, mental or moral welfare would be at risk
    - That the child is likely to engage in self-harming conduct
    - That the child is likely to cause injury to another person: and

Having considered the other options available (including a movement restriction condition (MRC) discussed in more detail later in this chapter) the Panel may conclude that it is necessary to include a secure accommodation authorisation in the order (Children's Hearings Scotland, 2022, p. 17).

Once a secure authorisation has been made the CSWO has responsibility for decision making regarding the implementation of the order, as per The Children's Hearings (Scotland) Act 2011 (Implementation of Secure Care Accommodation Authorisation) (Scotland) Regulations 2013 and accompanying Guidance. They may only do so with the agreement of the head of the secure care centre.

- Where: a child is subject to a relevant order, which does not include a secure accommodation authorisation; or is being provided with accommodation by a local authority under s.25 of the Children (Scotland|) Act 1995 (CSA 1995) ; or is subject to a permanence order under the Secure Accommodation (Scotland) Regulations 2013 they can be placed in secure care in specific circumstances. There are associated regulatory requirements for CSWO and Principal Reporter.

Where a child is not subject to the above legislation and orders - for example, those children aged 16 or 17 that cannot be referred to the Children's Hearings System as they are beyond the age of referral - there are still routes into secure care, but they are limited. In these circumstances the child can only be placed in secure care if they are, "looked after" - specifically if they are being provided with accommodation via section 25 of the Children (Scotland) Act 1995. A local authority can provide accommodation for any child within their area if they consider that doing so safeguards the child or promotes their welfare. The definition of "child" for the purposes of section 25 covers any child under 18; thus, it includes children aged 16 and 17 who are otherwise legally defined as adults and are presently beyond the age of referral to the CHS. If accommodation were to be provided under section 25 to a child aged 16 or over then this could only be done with their agreement" (Dyer, 2022a). This would then trigger the same process and requirements as outlined above.

In relation to secure care from court:

- When a child who is legally defined as a child is remanded by the court, under Criminal Procedure (Scotland) Act 1995 s.51 they can release the child to the care of the local authority, with the court requiring the child to be placed in secure care or an appropriate place of safety.

- Where a child pleads or is found guilty of an offence then under Criminal Procedure (Scotland) Act 1995 s.44 they may be ordered by the court to be detained in residential accommodation deemed appropriate by their local authority. Under Regulation 12 of the Secure Accommodation (Scotland) Regulations 2013, if regulation 11 requirements are met, the child may be placed in secure care. Review requirements are specified within the regulations.

- Under the Criminal Procedure (Scotland) Act 1995 s.205 (2) and s. 208 children can be sentenced to detainment following a conviction, and the Scottish Ministers will determine the location. Scottish Government policy is that this will usually be in secure accommodation.

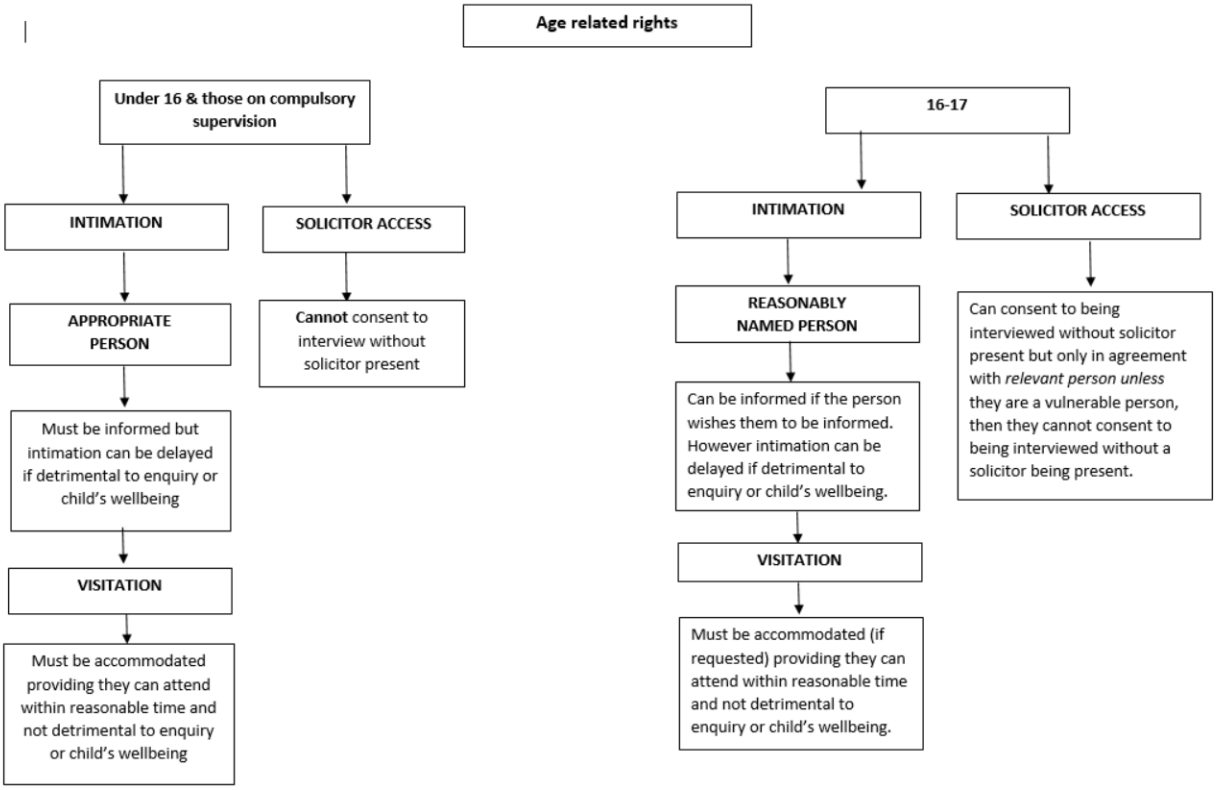
(Nolan, 2019)

4.2 Police Custody

The Criminal Justice (Scotland) Act 2016 provides additional safeguards for children; s.51 necessitates that the police safeguard and promote the wellbeing of a child as a primary consideration, though not the only consideration, when deciding whether a child should be arrested, detained, interviewed, or charged (Dyer, 2018). The Criminal Justice (Scotland) Act 2016 s. 38-41 contains the specific directions as to notification of a child under 18 years in police custody and when social work should be notified. Though this Act and associated police SOPs (Standard Operating Procedures) (Criminal Justice Act (Scotland) 2016 (Arrest Process) Standard Operating Procedures and Offending by Children SOP) state that all under 18s are children there continues to be a differentiation between the processes and duties in place for younger children (those legally defined as a child) compared to older children (those aged 16 &17, not legally defined as a child).

The processes and protections in place under this Act for children in police custody are detailed in the chart below (Dyer, 2018) as well as in The Child's Journey: A guide to the

Scottish Justice System, and in a guide co-produced with children and young people to help other children know about their rights in custody.



(Dyer, 2018)

Due to legislative changes, which commenced on the 17th May 2022 under the Management of Offenders (Scotland) Act 2019 two points of information sharing with Criminal Justice Services (CJS), have now been created from Police Scotland and Crown Office and Procurator Fiscals Service (COPFS) respectively:

- Police will notify all CJS where an individual has been held in police custody for court; and
- Marking information from prosecutor fiscals (PF) in those cases where bail will be opposed will be made available to CJS single points of contact (Scottish Government, 2022).

The above changes are welcomed though such processes should already be in place at a local level under WSA court support (see Section 12). This remains inconsistent across the country; if not in place, then local arrangements will be required to ensure CJS link with appropriate children and family social work services when they are notified that a child is being held in custody. This is to ensure any bail supervision assessments are appropriately informed, recognising the specific needs and responses required for children are different

from those required for adults. Further information is available in the Bail Supervision Guidance (2022) Annex 1 for children and young adults.

When a child is being held in police custody the police have other options which can be considered, such as undertakings and place of safety, explored further below. Critical to the success of any alternative package or response (whether at the point of police custody, CHS or court) is an expectation of access to alternative measures that will, in most cases, require intensive support services or equivalent with practitioners who are experienced in supporting children and families through what is a traumatic and often confusing period. This support should be flexible to meet the needs of the child and their placement prior to appearing at court, should that be the outcome.

In addition, for those children meeting the legal definition of a child (unless the offence which they have allegedly committed is to be jointly reported) then the child:

- Cannot be kept by the police in a place of safety (whether or not it is a police station) in order to be brought before a court (in terms of Criminal Justice (Scotland) Act 2016 s.21 and s.22
- Cannot be released on an undertaking to appear at court (in terms of Criminal Justice (Scotland) Act 2016 s.26

4.3 Police Undertakings

It is important that, in recognition of the minimal intervention principle, all potential opportunities to avoid a child being held in police custody are maximised. This includes police undertakings. Police Scotland should always ask the question: 'could this child be released on an undertaking? If at first consideration the response would be no, then it should be considered whether there are any additional proportionate measures that could be put in place to provide confidence that an undertaking is appropriate, rather than holding a child or seeking a place of safety, as discussed later in this chapter.

Police undertakings (Criminal Justice (Scotland) Act 2016, S. 25 -30), are often referred to as a "pink slip". An undertaking is when a person who has been charged with an offence is then released from a police station with certain paperwork which they must sign, giving an 'undertaking' that they will appear at court on a given date. For younger children this must be signed by parents or guardians. Undertakings will usually have conditions attached, which could include that the person should not:

- commit an offence;
- interfere with witnesses or evidence or otherwise obstruct the course of justice;
- behave in a manner which causes, or is likely to cause, alarm or distress to witnesses.
- Other conditions may also be deemed necessary.

Where an undertaking has been used for a younger child, the local authority should be notified as well. To maximise police undertakings the following practice is required as a minimum-

- Effective communication and partnership working between partners as well as with the child and their family.
- Where proportionate, clarity regarding appropriate risk management processes, such as Care and Risk Management (CARM) (Scottish Government, 2021b, pp. 33-58) or local equivalent providing immediate safety and contingency plans until fuller assessment can be completed.
- A risk management plan, specifying what will be put in place for the child and family, with contingency plans which would be implemented, should the child's situation in the community deteriorate. Clear roles, responsibilities and timeframes for action are required here. This should always be proportionate and appropriate to level of concern, balancing individual rights with the wider rights of others, and be credible in terms of managing the level of potential harm (Scottish Government, 2021b).
- Range of developmentally appropriate resources that can be individualised to provide proportionate and appropriate supports for the child and their family.

In supporting the use of undertakings where there may be concerns, good communication between the police and local authority is vital. Potential interventions and supports should be put in place to address these concerns, in addition to any specific conditions police deem necessary. The additional supports that could be offered to scaffold the use of an undertaking should be proportionate to the level of concern and potential harm; these could include but are not limited to:

- remaining within the family home or that of another family member (as noted below additional supports must be available).
- foster or residential childcare, again with additional supports
- self-contained emergency housing placement provided by housing (this could include provision for members of the child's family, or residential staff).

When police are releasing a child on an undertaking, it would be good practice to share the impact of any restrictions, through communication between the defence, police, and/ or social work, as well as the child themselves. Applying standard conditions, or any additional conditions, without an understanding of the individual child's context can have significantly detrimental implications. Conditions which are not fully informed may inadvertently prevent the child from accessing their home, their educational placement, or the homes of family members who provide significant support. Such blanket conditions, that are not individualised in terms of the child's situation and circumstances, fail to reflect GIRFEC at the most basic level and are likely to decrease the child's ability to stick to the conditions. Subsequently, poorly applied process and practice may then increase the likelihood of the child being returned to police custody for failure to comply, which can then have implications for remand or bail when appearing at court if the child's case is progressed down that pathway rather than CHS. In addition, these conditions could potentially be in place for an extended period leading up to the child's appearance at court; such delays can have a negative impact on the child's understanding of the importance of compliance, and their ability to comply (McEwan, Maclean, Dyer, Vaswani, & Moodie, 2020).

4.4 Place of Safety

'Place of safety' in this context is different from that which is referred to under the Age of Criminal Responsibility (Scotland) Act 2019 s.28-32 for children under 12 years who have or may have been involved in behaviour which poses a significant risk of harm to others.

Place of safety is only an option for younger children; presently older children can continue to be held in police custody whilst younger children:

"*must be kept in a place of safety (as defined in the Children's Hearing (Scotland) Act 2011 s.202 (1)) until taken before the court. The place of safety must not be a police station unless an Inspector or above certifies that keeping the child in a place of safety other than a police station would be: (a) Impracticable, (b) Unsafe, or (c) Inadvisable due to the person's state of health (physical and mental).*" (Police Scotland, 2019).

A Child Detention Certificate will be needed if the decision has been taken to detain a 'younger child' in a police station. This must be endorsed by someone at Inspector level or above. When the decision is taken to hold a child in custody for court the local authority must be notified of the circumstances relating to the detention.

Whilst a place of safety should consider all the options (including an undertaking), it is likely that in most cases a secure care placement will be sought under s.22 of the Criminal Justice (Scotland) Act 2016.Police may have assessed that it is necessary for the child to remain in a locked environment, and that secure care is unquestionably preferable to a police custody suite. However, this is only permitted under Regulation 12 of the Secure Care Accommodation (Scotland) Regulations 2013 if the requirements under regulation 11(3) and (b) are met; the child can only be held there if the CSWO and head of centre consider this necessary (Nolan, 2019). If there is no appropriate alternative, the Children (Scotland) Act 1995 s.25 (referenced above) is required for older children to be able to access secure care. This would trigger the appropriate review procedures and can only happen if the child agrees.

When attempts to implement alternative measures have not been successful, this work can be capitalised on in several ways, to reduce the amount of time in which a child is deprived of their liberty either through court or CHS. If a child has been deprived of their liberty in police custody or released on an undertaking or place of safety it would be prudent to be proactive in initiating discussion with SCRA and the PF for singly or jointly reported cases, as per the Lord Advocates Guidelines (COPFS, 2021). This proactive discussion should be used as an opportunity to share what resources, supports and interventions are available should the case be held by the Children's Reporter (rather than prosecuted at court) or considered for diversion from prosecution. Where alternative routes to divert from court are not deemed appropriate this early communication and action can enable robust alternative measures to be refined for presentation to court (if needed) to support use of bail supervision, with electronic monitoring, if necessary, especially where the PF has opposed bail.

5. Court

Whilst a child *may* be prosecuted at court in Scotland from the age of 12, in practice this is exceptionally rare. Though the numbers continue to reduce, annual figures from 2016-2019 show 99% of those children who were prosecuted were aged 16/17 (Whiting, 2020). When a child first appears at court the sheriff will have to decide, often with limited information, in short timescales, and with limited resources, as to whether the child should be remanded or released to the community (which could involve bail conditions). The decision regarding bail or remand is solely for the judiciary; however, decision-makers need relevant and timely information to make informed and critical decisions in the limited time available to them (McEwan et al., 2020).

Good practice under WSA (see Section 13) directs that whenever a child appears at court information should be shared with the sheriff either directly (through court notes) or via the defence solicitor, sharing proportionate and appropriate information regarding the child and their circumstances. E.g., any legal orders in place, whether they are or have been known to services and what supports are being offered. It is important to illustrate that these supports are voluntary; however, where there is a risk of remand these could be incorporated into a proposed plan for the sheriff as part of bail conditions and, if required, a bail supervision plan.

5. 1 Bail Supervision

Supervised bail or bail supervision is where individuals are supported to adhere and comply with their bail conditions through the support of social work services and/or 3rd sector organisations. It is intended as a credible alternative to remanding someone when they have been "*accused or convicted of an offence (or offences) [and] are assessed as requiring a level of supervision, monitoring, and support to adhere to bail conditions*" (Scottish Government, 2022a, p. 4). It requires individuals to meet with a bail supervisor, or relevant agency, a specified number of times per week. For someone to be considered for bail supervision an assessment of their suitability and likelihood/ability to comply is undertaken by social work services having been requested by the court or defence solicitor. Should the PF oppose bail, this is where the new points of contact can be helpful, triggering an assessment at the earliest opportunity (as referenced previously). If an individual placed on bail or supervised bail fails to adhere to the conditions this is a further offence. Thus, there must be careful consideration when advocating for bail and supervised bail with children, given the evidence and research in relation to the difficulties they can experience in adhering to such conditions. This is especially the case when conditions have been in place for a prolonged period of time.

There is pending legislation (Bail and Release (Scotland) Bill) which will make significant changes to bail legislation. At present the Bail Supervision: National Guidance (Scottish Government, 2022a) outlines the current legal framework and considerations for bail and supervised bail, as well as specific considerations for children and young adults. It is critical that any use of bail supervision with children must respond to the specific developmental, trauma-informed, and systemic needs of children, with such schemes having significant success (Naughton, Redmond, & Coonan, 2019). Merely fitting children into processes and practice designed for adults does not comply with UNCRC and is likely to compound the challenges and difficulties they already face in the justice system.

The relevant legal provisions in relation to bail are contained within Part III of the Criminal Procedure (Scotland) Act 1995; section 23C states the points that the court must consider in deciding whether to bail or remand someone. There is a presumption for bail in all cases with limited exceptions, though pending legislation is likely to remove these exceptions.

Section 23C lays out the grounds for refusing bail (none of which have specific considerations for children). These include any substantial risk that if the person was granted bail they may:

- abscond;
- fail to appear in court as required;
- commit further offences;
- interfere with witnesses;
- otherwise obstruct the course of justice;
- Any other substantial factor which appears to the court to justify keeping the person in custody.

In assessing these grounds, the court must have regard to all material considerations. Such considerations include (but are not limited to) the following:

- Nature and seriousness of the offence;
- Probable disposal of the case if convicted;
- Whether the person was subject to a bail order, other court order, on licence, or on a period of deferment of sentence when the alleged offences were committed;
- The character of the person, including:
    - previous convictions;
    - previous breach of bail or licence;
    - whether they are currently serving a sentence or have recently served a sentence;
    - associations and community ties of the person.

Section 23D of the 1995 Act sets out in solemn proceedings that where a person is accused of a drug trafficking offence, a violent offence, sexual offence, or domestic abuse offence and has a previous conviction on indictment for such an offence, that person is to be granted bail only if there are exceptional circumstances justifying bail.

In determining a question of bail, section 23B of the 1995 Act provides that the court is to consider the extent to which the public interest could, if bail were granted, be safeguarded by the imposition of bail conditions (with the public interest including the interests of public safety). The provision of any bail supervision or provision of supports to a child of any age in this situation should take recognisance of the potential aspects a sheriff or judge must be satisfied of. Thus, it should be clear how any supports and restrictions in the community can be managed, responding as necessary (including to the potential for risk of harm) whilst remaining credible.

5.2 Bail Conditions

Under the statutory provisions contained in Part III of the 1995 Act, when a person is released on bail, conditions are imposed. There is a list of standard bail conditions that are imposed in all cases at Section 24(5)5 of the Act. In addition, Section 24(4)(b) allows the court or Lord Advocate, in granting bail, to impose 'further conditions' considered necessary to ensure that standard bail conditions are observed. The court may decide to add bail supervision as one of these further conditions of bail in order to support compliance with the standard conditions. Examples of conditions could include, but are not limited to, the following: curfew; not contacting victims, witnesses or specific named individuals; staying away from certain locations, addresses or areas; city exclusion zones; handing over to police any electronic devices/internet devices; attending a police station to sign on; presenting at the door when police call at the house for checks; and handing over your passport (Scottish Government, 2022a).

As bail and special conditions can be tailored, it is important that those supporting a child at court liaise with court social work, defence solicitors, and PFs to share what supports are available, and potentially reduce the likelihood of inappropriate conditions being requested. This should take place in addition to providing court notes. The same considerations as outlined in the earlier section on police undertakings are applicable here, to ensure the most effective and meaningful use of bail conditions is promoted, with appropriate wraparound supports in place. The support afforded through bail support or formal bail supervision should maximise the child's ability to engage and comply with imposed conditions; this should keep them and others safe, whilst responding to the needs of the child and promoting developmental opportunities to build their skills and capacity.

5.3 Electronic Monitoring as part of Bail

Electronic monitoring (EM) as part of bail commenced from May 2022, under Part 1 of the Management of Offenders (Scotland) Act 2019. This now enables the court to use electronic monitoring as part of bail should they consider it appropriate, in line with the considerations for bail already outlined. It can be imposed without bail supervision. However, this must not be the case when used with children; additional developmental, systemic and trauma informed supports must be put in place alongside the use of electronic monitoring for bail, just as should be the case if EM is used as a disposal post-conviction, or through the CHS with an MRC. The practice outlined in the section relating to MRCs has relevance for EM bail, and the same considerations should be taken.

5.4 Bail Review

Where bail has been refused by the court, or the court has granted bail but the individual has not accepted the conditions of bail imposed, or an individual has accepted the bail conditions imposed but is seeking to have any of the conditions removed or varied then the court can on application by that individual review the decision and/or conditions imposed. This is outlined under the Criminal Procedure (Scotland) Act 1995 s.30. However, this is only possible if the person's situation has changed materially, or they can provide information to the court that was not available when the decision on bail was taken. S.31 of the Criminal Procedure (Scotland) Act 1995 outlines how the prosecutor can also appeal bail decisions

where they can provide the court with information that was not available at the time the decision was taken. S.32 allows any individual refused bail to appeal the decision.

Bail reviews are further opportunities where potential alternative measures can be put in place and presented to the court to either support the release of the child on bail or seek the transference from HMYOI to secure care if they were not remanded there in the first instance. This is where the CSA 1995 s.25 pathway could be utilised as referred to in legislation section, secure care.

Where someone has appeared before the court on petition matters and has not been granted bail in the first instance, they will be subject to what is often referred to as " a 7 day lie down"; this means they will be held in custody for 7 days for further examination before coming before the court again for what is known as the full committal hearing.

Particularly for children, this period of further examination should be used to develop the robust plan presented as an alternative measure where it is assessed that the risk of harm can be managed in the community. All options and associated processes should be explored (as outlined in this chapter) including EM bail, CARM process (or equivalent local risk management process for children) to support return to the community, release to Local Authority care and subsequent options. Where it is deemed unlikely that the child will be bailed or the risk of harm is not considered manageable in the community at that time, then the pathway to secure care through s.25 of the Children (Scotland) Act 1995 could again be explored to create a pathway to secure care for the child rather than YOI.

5.4 Sentencing

The Scottish Sentencing Council (2022) "Sentencing Young People" guideline highlights the need for a different approach to sentencing children and young people due to their neurodevelopment (O'Rourke et al., 2020). In order to aid sentencing, Social Work Reports for Court should be completed for all children as outlined in the Criminal Justice Social Work Reports and Courts Based Services Practice Guide, National Outcomes and Standards for Social Work Services in the Criminal Justice System, and the Community Payback Order Practice Guidance.

GIRFEC must inform all reports for court in relation to children; an appropriate Structured Professional Judgement (SPJ) risk assessment tool should also be employed. In addition, report authors must comment on the option of advice/remittal to a children's hearing for all children up to 17yrs 6mths; restriction of liberty orders; and the responsibility of Scottish Ministers, if sentenced via section 205 or 208 of the Criminal Procedure (Scotland) Act 1995 (Standard 5 Scottish Government, 2021). The use of all appropriate sentencing options should be considered to ensure the most appropriate recommendations are put forward for the court's deliberation. Reports should make clear which disposal social work believe would be most effective and why and share any reservations regarding disposals whilst being mindful to keep open as wide a spectrum of disposals as possible for the court's consideration. This is particularly relevant where remittal is not an option.

In framing the potential disposals for the court's deliberation reports should emphasise which actions will meet the child's needs and build capacity whilst reducing the potential for further offending behaviour and/or harm. When presenting preferred options before the court the

disposal you assess as the most appropriate should be the first and most detailed one put forward. It should:

- Detail how the plan will address the issues identified through the risk assessment and analysis.
- Clearly outline what is in place and can be accessed, as well as any formal risk management process required, such as CARM.
- Confirm all options that require funding or specific services,making clear what still needs to be progressed/ agreed, by whom, and in what timeframe.

There should be no differences between what can be delivered under CHS if remitted where remittal is an option.

Whether remitted to the CHS or held by the court any plan of intervention can include electronic monitoring (EM). Within remittal to CHS it would currently only be available where a child meets the secure care criteria, and MRC could then be included to aid with monitoring as part of the plan. EM can provide a physical prompt for children to deflect from negative peer pressure, for example or those who may seek to exploit them (Simpson & Dyer, 2016). If the court does not remit the case, then EM is available now as a specific requirement of a Community Payback Order or remains available as a standalone Restriction of Liberty Order (RLO). However standalone use of EM with a child is not best practice as it provides no additional supports or intervention.

This plan can then be framed within the appropriate disposal, with advice and remittal always the starting point. Under other disposals, the plan should be referenced making clear that it could also be delivered under for example – Community Payback Order.

5.5 Remittal to CHS from Court

Remittal to the CHS continues to be underused in every area of Scotland (Henderson & CYCJ, 2017), with recent figures showing that on average only 5% of children whose cases could be remitted to the CHS are in fact remitted (Dyer, 2022b). Henderson and CYCJ (2017) illustrated that, of the children from their study, all had backgrounds characterised by trauma and neglect, with 98% being involved in the hearings system prior to the request for advice or remittal from court.

All children aged 12-17.5 years old can be remitted from Court to the CHS unless the sentence is fixed by law, under s.49 (5) Criminal Procedure (Scotland) Act 1995. For all children subject to CSO/ ICSO then the High Court may, and the sheriff court shall, obtain advice from the CHS as to how the case should be disposed. Either the court can then deal with the case itself or remit back to the CHS, at which point the court's involvement ceases, unless the child appeals the decision to remit to the CHS.

National Guidance (Scottish Government, 2010, p. 50) states that the individuals completing Justice Social Work Reports (JSWR): "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)… it is critical to demonstrate 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". It is important for JSWR authors 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, 2010). When making an assessment within JSWR these areas should all be emphasised. If the case is remitted to the CHS, the panel will decide whether to make a CSO, or if there is a CSO in place, whether to continue or vary that Order, which could include a period in secure care (subject to the appropriate legislation and criteria as outlined earlier in this chapter).

5.6 Movement Restriction Conditions (MRC)

Children's Hearings (Scotland) Act 2011 s.83 (4) and (6) stipulate that a MRC can only be made if the child meets one or more of the criteria for secure care and a children's hearing, or a sheriff determines that an MRC is necessary and should be included in the order (CSO/ICSO). MRCs are a restriction of liberty and appear to have been utilised sparingly across Scotland since their introduction in 2013. It is currently unclear why. Statistics from G4S, who hold the contract for all electronic monitoring in Scotland, highlight that there has been little shift in the level of MRCs imposed:

- Figures from 2014 - 2019 reflect a range of 20 to a maximum of 41 MRCs implemented each year.
- From April 2021 to March 2022 there were 17 MRCs implemented (G4S, 2022, p. 7)
- From April 2022 to March 2023 30 MRCs were implemented (G4S, 2023, p. 9).
- The gender split indicates, in the main, a higher proportion of MRCs are made for males than with females.

Though an MRC is currently a direct alternative to depriving a child of their liberty (Children's Hearings Scotland, 2022, p. 35), it is always important to ensure risk practice is proportionate, and in line with the minimum intervention principle to keep the child and others safe. MRCs must be used as part of a Child's Plan, with appropriate wraparound supports to support the risk management plan. When considering depriving a child of their liberty it is important to explore all potential measures, evidencing what has been included or excluded and why. This must be informed by appropriate assessments (using the relevant risk assessment tool (Scottish Government, 2021a)); the needs of the child and their support systems; and their ability to manage potential risk of harm. The following may be helpful to consider, though this list is not exhaustive:

- As a minimum, CARM, or local formal risk management process should be explored, and a decision taken as to whether formal risk management is required or not. Decision making should be clear and well-evidenced.
- Whatever process is deemed appropriate, there should be clear evidence of review and oversight of any risk management plan, to ensure restrictions on freedoms and interventions are proportionate and necessary. Plans should look to reduce the risk of harm occurring and impact should it occur whilst building the capacity of the child and their support system ensuring developmentally appropriate opportunities.
- The Child's Plan should be informed by a full risk assessment using appropriate risk assessment tool, with analysis of the potential risk of harm from aspects of the child's behaviour to others, (and to the child from others). This should include potential indicators of an increase/ decrease in the likelihood of harm occurring, clear

intervention and harm reduction strategies that addresses identified needs, build strengths, and reduces the likelihood and impact of potential harm occurring with contingency plans in place that can be triggered if required (Scottish Government, 2021a).

- Any limitations to the proposed plan should also be stated.
- Consideration by secure care screening group or secure care screening process to ensure appropriate resources and responses are in place or highlight areas of unmet need which may affect the success of the risk management plan.
- There should be clear evidence that the child and family have been included in the risk management process and development of the risk management plan. Any disagreements should be included within the plan.
- All alternatives to depriving a child of their liberty where they could be safely supported to remain in the community should be explored and any decisions as to why this is suitable or not should be clear and transparent. This must include MRC and other potential proportionate strategies and responses which may be more appropriate than MRC e.g., voluntary curfew with wraparound supports.
- When an MRC is appropriate the child and family's views and agreement must be sought. Whilst their agreement is not required for an MRC to be made it is more likely to have the desired impact when they agree and feel included.
- When an MRC is appropriate then it is critical that there is clarity over how it will reduce the risk of harm occurring. It may be helpful to consider the following:
    - During what times, the restrictions will be active, and over how many days a week. The MRC must fit around the child's situation and needs rather than being imposed for a blanket 7 days, 12hrs a day (unless this is assessed as appropriate, proportionate, and necessary).
    - What contingency plans are in place to provide respite if the situation at home breaks down or becomes difficult? Is there a second address that can be used?
    - How is time for positive activities (e.g., sports clubs, visits with family, time with positive peers) incorporated into the plan?
    - Be clear what amount of flexibility will be accepted for the restrictions should the child struggle to precisely adhere to it. What can be tolerated by the system? What will engagement and success look like?
    - Who will respond, and what will that response look like, should the child not return in time for their curfew, or leave when they are not supposed to?
    - Is there a need to include an 'away from' element within the MRC, such as away from a specific person or place? Can the restriction be to a place other than the home address, e.g., school or placement?
- There should be a clear connection between Secure Care Pathways and Standards, Standards for those working with children in conflict with the law and local processes and procedures.

6. Why Do We Need Alternatives?

"Evidence available shows that deprivation of liberty is fundamentally harmful for children, jeopardising their development and putting them at increased risk of abuse, violence, social discrimination, and impeding their right to education."

(Care Inspectorate, 2023)

The Global Study conclusions, as referenced in The Global Study Toolkit: Administration of Justice (Sax, 2022, p. 9), make clear that children are often detained in a justice context because of dysfunctional justice systems (that are over-reliant on arrest and detention) and a lack of dedicated child justice systems being established internationally. That children consulted in the Global Study process highlighted that these dysfunctional systems are characterised by a lack of child friendly procedures and inadequate access to information or to contact with the outside world; meanwhile research findings highlight that detaining children is generally ineffective and cost inefficient. Furthermore, discrimination in justice is widespread in pathways and conditions leading to detention, during detention, and in relation to post-release support, with insufficient investment in effective rehabilitation and reintegration. Several of the findings of the Global Study reinforced the importance of ensuring alternative measures are available:

- "Safeguards to ensure that children deprived of their liberty only in exceptional circumstances in line with Art 37b are widely insufficient or non-existent.
- The combination of a lack of support for caregivers and families and insufficient inter-agency cooperation to create comprehensive, integrated and rights-based child protection systems, are together key driving factors that lead to deprivation of liberty.
- Deprivation of liberty is linked to discrimination of certain groups of children, who are overrepresented in such settings, ranging from children from minorities, children of afro-descent and migrant children to boys/girls (depending on setting), children in street situations, LGBTQI children and children with disabilities.
- Detention of children can be considered a form of structural violence; it leads to children becoming 'invisible', with a lack of attention paid to their best interests."

(Sax, 2022, p. 30)

The international research evidence is comprehensive as to why children in conflict with the law require a tailored approach, which must be developmentally, trauma, and systemically informed. This is particularly important when considering depriving children of their liberty, as a significant proportion have often been victims of abuse, trauma, and neglect, with high rates of substance and alcohol misuse, child protection involvement and school exclusion (Jesuit Social Services, 2013). In addition, they have often experienced a higher frequency of adverse childhood experiences (ACEs), with Vaswani (2014, 2018) finding a higher prevalence of traumatic bereavements in children and young people held in HMYOI Polmont than children in the general population. This understanding of the level of exposure to trauma and adversity (see Section 5) as well as the intersectionality of factors such as poverty is further reinforced through evidence from the Scottish Secure Care Census (Gibson, 2020, 2021), and snapshots from Scottish Prison Service (SPS) records (Scottish Government, 2022c):

SPS Records illustrated:

- Half of the children in custody lived in some of the most deprived communities in Scotland and around half were care experienced.
- The children in custody had needs associated with mental health, drugs and alcohol, and additional needs including speech, language and communication needs (SLCN).
- These children have often been the most marginalised and excluded, with disrupted school attendance and major - often unrecognised - gaps in, for example, literacy, communication, comprehension, numeracy, and life skills.

Secure Care Census snapshots illustrated:

- Approximately half of children in secure care were from a family living in relative poverty
- The children from the most deprived areas of the United Kingdom are disproportionately represented within secure care.
- 74% of the children in secure care in 2019 had experienced four or more separate types of ACEs.
- Of the children in secure care who lived in relative poverty, 86% had encountered four or more ACEs, while this figure was lower (56%) for those children who did not live in relative poverty. The number of children from a background of relative poverty who had 4 or more ACEs within the secure care populations has risen from 70% of children in the 2018 census to 86% in 2019.

7. A Framework for alternative measures

There is no definition of alternative measures, however Article 4(2) of the Optional Protocol to the UN Convention against Torture defines deprivation of liberty as "*any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority*". Understanding the widest context in which deprivation of liberty occur enables us to consider an expansive application of alternative measures, rather than a narrowly defined set of circumstances. This helps to ensure that the use of deprivation of liberty is genuinely a measure of last resort.

From international literature reviewing promising practices re. alternatives to deprivation of liberty (Sax, 2022) recommendations themed under 5 action areas:

- Review existing legislation, procedures and structures
- Provide non-custodial measures for children
- Ensure adequate treatment during deprivation of liberty
- Ensure a systemic approach to prevent deprivation of liberty
- Monitor implementation and ensure access to justice for children.

Key points from the recommendations that may be beneficial to consider from a Scottish perspective to support the development and implementation of alternatives measures consistently could be:

- Development of a child friendly justice system which includes specifically trained police, prosecutors, judges, social workers, health workers; establishing interface

structures for exchange and cooperation between police, the justice sector and child protection services.
- Apply child justice principles for a transition period also to young adults
- Set the minimum age of deprivation of liberty at 16 (or above)
- Limit police custody for children to 24hrs
- Limit pre-trial detention for children to 30 days/6 months until outcome
- Ensure (child specific and general) legal/procedural safeguards available to children are consistently applied.
- Implement and adequately fund early- and post-release programmes.
- Take a systemic approach to prevention of child detention.
- Establish formalised cooperation mechanisms for inter-agency cooperation between families, communities, schools, social services, youth work, health services, local administration, police and the justice sector, in order to create integrated, effective child protection systems- requires children at risk of deprivation of liberty to be seen through the lens of child protection, and not criminalised
- Ensure personal contact between the child and people in the outside world, including parents, siblings and persons of trust.
- Provide children deprived of their liberty with access to quality education, healthcare including mental health and access to interventions
- Establish effective feedback and complaint mechanisms that are accessible to children, in a language they can understand.

(Sax, 2022)

Whilst a number of the above recommendations may be reflected across Scottish legislation, policy and practice there remains a significant gap in the implementation of alternative measures. Often this is attributed to resourcing, knowledge gaps (given the complexity of interfacing across children's and justice systems) and inconsistency due to variation in how often such measures are required.

8. What could alternative measures look like?

Alternatives to deprivation of liberty are integral to a rights-based response to children in conflict with the law; Article 40 (4) of the UNCRC directs that there should be a range of measures available. Such alternatives can include anything that does not fully restrict the liberty of a child. It is also important that any alternative measure available is flexible to meet the needs of individual children in line with GIRFEC and does not merely seek to fit children into a one-size fits all response. Responses must consider the needs of not just the child in the context of their circumstances and support systems but also the needs of those support systems.

Kilkelly (2011) specifies that alternatives should be, "based on individualised assessments and best practice in social work and youth care":

"the international standards reflect the evidence that measures that engage with the child – rather than purely treat him/her – within the broad family context and in a community setting are most likely to achieve success."

There are several opportunities to implement alternative measures when a child may come into contact and/or conflict with the law. Whilst the systems, processes, and legislation within which an alternative to deprivation of liberty may be triggered differs, the principles and practice to implement alternative measures for all children should adhere to the same principles. The Global Study (Nowak, 2019) suggests that best outcomes will be achieved when they are:

- Holistic, dynamic and participatory
- Based on integrated approach between stakeholders in the justice, child welfare and social services systems,
- Reliant on resources allocated at national and local level that guarantee an equal provision of services throughout the country
- Inclusive in that it involves families and communities through support and/ or training as well as relationship building activities between the child and the family
- Designed to reduce stigmatisation, and
- Committed to broaden a sense of ownership and shared responsibility.

The need for alternatives will most likely occur at points of crisis and turbulence in a child's life; this may be the result of chronic exposure to trauma and adversity, and the harmful nature of the child's survival mechanisms and coping strategies, or it may be a response to one-off events of potential or actual harm. Irrespective of the reason for the need or the system in which an alternative is required, flexibility is key within, and across, the systems responding to children.

There is no one-size-fits-all alternative measure that could meet the needs of each local authority or every child in Scotland. Issues which have influenced the availability of alternatives create layers of complexity that are not easily solved. Such difficulties could relate to geographical footprint, demographics, and a reduction in the number of children requiring to be deprived of their liberty due to the impact of policy and practice developments, such as WSA. Thus, specific services that provide alternatives may be more likely to exist in areas with larger, denser populations with easier access to services than in more rural areas with low-density populations and less access to (and need for) such services.

The frequency of need re. alternative measures is likely to have an impact on both what is available, and the confidence of practitioners in such situations. This is especially true when the processes can be complex and unfamiliar, for example within the court process as opposed to CHS. Access to a greater number of services is likely to mean that, within densely populated urban areas, a more bespoke, flexible approach is possible when required. Similarly, the opposite is likely to be true in more sparsely populated rural areas.

Local authorities must be able to respond in a manner that reflects the needs of their communities; for some this will be specific services for alternatives and for others will mean a bespoke response each time, drawing on existing resources or commissioning a specific agency or combination of agencies depending on the needs of the child.

As stated earlier in this chapter, the pathway by which a child comes to be at risk of having their liberty deprived will have specific legislation, processes and procedures. However, the practice which underpins any alternative measure should be therapeutic in approach.

9. Giving Voice to Children, Parents, Carers and Families in Alternative Measures

9.1 Child's Voice

"*Article 12 of the Convention establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity. This right imposes a clear legal obligation on States parties to recognize this right and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child. The child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation. States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests. Article 12 manifests that the child holds rights which have an influence on her or his life, and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision)"* (United Nations Committee on the Rights of the Child, 2009). Article 12 also states "that States parties "shall assure" the right of the child to freely express her or his views" thus there is no leeway in the facilitation of the state's duty here. However, within a Scottish context for children in conflict with the law, and particularly where they enter the justice system, this remains questionable.

General Comment 12 on the right to be heard notes that "a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age" (United Nations Committee on the Rights of the Child, 2009). Therefore, states "need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives" (United Nations Committee on the Rights of the Child, 2009). Such procedures "should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance" (Fridriksdottir, 2015). Child-friendly information means that it should be provided in a manner adapted to the child's age, maturity and specific circumstances. For children who do not speak the language of the country in which they are, it is essential that information is conveyed in a language they understand (United Nations Committee on the Rights of the Child, 2006). Information must also be 'gender and culture sensitive'.

Article 12 is interconnected with Article 13: "the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice" (United Nations Committee on the Rights of the Child, 1989). Voice is not only being able to articulate ones thoughts, views and opinions but being supported to do this through a means that is relevant for you: "*through the use of varying techniques, the child and young person's view can be heard at any age or within difficult circumstances… Methods of listening are therefore imperative to ensure that it is the child's voice, their views that are heard, understood and responded to"* (Bradwell, 2019). Both the justice system and the CHS have issues as to how they hear or do not hear children's voices. Often insufficient support in helping the child to understand what is happening compromises the child's ability to participate; there is also a lack of opportunity to

express their views directly (Dyer, 2016; McEwan et al., 2020). When their views are sought it can feel tokenistic:

"*participants perceived that, during Children's Hearings, their views tended to be overlooked in favour of those of professionals. In this sense, they felt that the conditions necessary for their effective participation to occur were not being met. "[…] you're expected to talk to 3 different people you barely know and ask questions that are really personal, but at the same time, you don't get asked a lot of questions either. It's sort of like "we'll come to you last" as it's a tick box exercise that we need to have spoken to the child*." (Who Cares? Scotland, 2020, p. 4).

Jones and Welch (2018) identified that children's voices can be seen as being silenced in three ways:

- The worth of children's voices
- The ways that social exclusion silences children
- The dominance of adult-oriented ways of communicating and decision-making.

In order to ensure children's voices are sought, heard and have impact upon the decisions which affect them, it is important that the professionals within these systems, processes and procedures practice in ways that actively seek to support children to realise their right to be heard and influence the decisions made about their lives. Whilst barriers remain to the realisation of Article 12, Field (2007) suggested that the actions of practitioners in how they implement legislation and policy could have a significant impact. This is critical in relation to alternative measures; ensuring children are heard and influence any decision making often falls to those directly supporting a child. Individual practitioners become responsible for adapting the language and information, explaining the potential outcomes and options, as the systems themselves either struggle or fail to do so meaningfully, thus in most cases professionals out with specific children's services do not have the skills, knowledge, or expertise to do this (Council of Europe, 2010, p. 65).
Involving children in decisions about their lives may not lead to the decision the child wants, but by feeling included and heard the child is more engaged with the outcome and likely to comply (Bevan, 2016). It can also contribute to:

- Increased empowerment and belief in their own agency.
- Increased self-esteem and confidence.
- Increased social skills.
- Increased awareness of their rights and positive life options.

(Paterson, 2020)

For the success of any alternative measure, the child's views must be sought, heard and inform decision-making, the development of any plans, and subsequent interventions and risk management strategies. Failure to do so could have significant implications for the success of any alternative.

9.2 Voices of Parents, Caregivers, and Families

The importance of engaging with families of children in conflict with the law is explicit within General Comment No. 24 (2019, p.10) which states:

"*that State parties explicitly legislate for the maximum possible involvement of parents or legal guardians in the proceedings because they can provide general psychological and emotional assistance to the child and contribute to effective outcomes. The Committee also recognizes that many children are informally living with relatives who are neither parents nor legal guardians, and that laws should be adapted to allow genuine caregivers to assist children in proceedings, if parents are unavailable.*"

The importance of this is evidenced in research, with suggestions that children involved in family-based interventions have recidivism rates 16% - 28% lower than comparable control groups (Trotter, 2021). There is evidence to suggest that family interventions are more effective than cognitive behavioural and group therapy interventions (Hartnett, Carr, & Sexton, 2016). The importance of family support is a core pillar of the Promise (Independent Care Review, 2020), that it is clear children should remain with their families, and one of the pillars to achieving this is providing family support, of which they identify 10 principles:

- Community Based
- Responsive and Timely
- Work with Family Assets
- Empowerment and Agency
- Flexible
- Holistic and Relational
- Therapeutic
- Non-Stigmatising:
- Patient and Persistent
- Underpinned by Children's Rights

The Bail Supervision Scheme (BSS) piloted in Dublin, the Family Engaged Case Planning developed by the Anne E Casey Foundation in America, and the Collaborative Family Work used in Australia and England and Wales (Trotter, 2021) are examples of how holding family engagement at the core of responding to, and engaging with, children in conflict with the law is beneficial. These approaches reflect many similar core components of meaningful engagement including valuing parents and caregiver's opinions; actively seeking their input and contribution to identifying concerns, developing plans and interventions; and agreeing boundaries, rules, and consequences. In addition, they are strengths-based approaches that would uphold the rights of children in recognising their position as outlined within the UNCRC, and the role of the state to provide support to them in carrying out their roles and responsibilities as required. The importance of including and hearing parents and engaging with families was summed up as follows by a member of the BSS: "if you don't have that [engagement] nothing else is going to work' (Naughton et al., 2019, p. 21).

Engaging with the child and their family, in their community, is critical. Whilst services may have a role to play in most cases, their involvement will cease whilst families and communities, in the main, have a stronger longer-term influence. Family engagement is described by Justice for Families (2015, p. 6) as "a meaningful partnership with families and

youth at every level of the agency and system...[where] families are truly valued, and when they are appreciated as experts and critical stakeholders in the shaping of positive outcomes." Research suggests that family empowerment is a mediator of family-centred support and positive outcomes (Damen, Scholte, Vermulst, van Steensel, & Veerman, 2021; Graves & Shelton, 2007).

We also must recognise that often there are significant expectations placed upon parents by services to supervise and monitor their children, especially in the context of alternative measures. The parents' backgrounds and experience of services, either in their own life or in relation to their child, must be understood to ensure engagement is done in a manner that does not compound previous traumas, and is non-judgemental and supportive. Often a parent's experience of trauma and adversity does not shape how services engage with them as this is overshadowed by the service's desire to act in the best interests of the child; they fail to realise that engaging parents in a more meaningful way is more aligned with the best interests of the child.

Engaging meaningfully with families entails more than providing information, explaining things, and supporting them to understand what can often be a complex and confusing process. Although these are essential, working with families goes beyond this; we should seek their input on what they think will be beneficial, fully including family members and the child in the development of any intervention or action plan. "*Family engagement begins with a fundamental belief that all families care for their children, have strengths that can be built upon and can be engaged and empowered. Family engagement is not about one single policy or practice or program, rather it lives in the culture of an organization and its evidence is seen in how families are treated and partnered with at a systemic level.*" (Justice for Families, 2015, p. 6).

This approach to engagement with families can be challenging, especially where parents have their own negative experiences with services such as welfare, justice, or both; this can present as unwillingness to engage but is more reflective of a lack of trust -family members might feel unable, rather than unwilling. Professionals can often get stuck in a need for compliance that becomes the only focus; when sought in an authoritarian manner this is more likely to jeopardise the formation of trusting relationships with either the child or their parents. Changing the focus of engagement to include families and parents may be particularly challenging for services at pinch points, where timeframes are limited, such as a child appearing from custody. Particularly in these situations, assessing whether the risk of harm can be managed safely, establishing what is required to do so, and engaging with the child and family must all be completed quickly. This has implications for the depth and breadth of engagement, and the type of assessment that can be completed, with fewer family members involved over a shorter period. This is a prime example of where the stark differences between children and adults are not consistently reflected in process or practice; children get pushed through processes that are not designed with their rights or needs in mind, and which are thus not fit to meet those rights and needs.

These pinch points in the justice system require collaboration between justice services and children's services, as noted earlier in this chapter; this is essential to ensure that engagement with families (especially parents) informs any discussion regarding conditions which may be attached to bail, or bail supervision, as an alternative measure. Engaging effectively with families should be at the core of all work with children across any system in which they find themselves, especially where they are at risk of having their liberty deprived.

The following 3 steps may be helpful to support effective family engagement within the context of children in conflict with the law:

1. **Use a broad definition of family that includes all adults with a commitment to the child's well-being.**
2. **Give families a meaningful voice in framing and overseeing the child's plan, irrespective of the system the plan is developed within.**
3. **Build a family-centric culture across the justice system in relation to children.**

(The Annie E. Casey Foundation, 2022)

Engagement with families must meet a range of needs from demystifying the language and processes (thereby facilitating their participation) to practical aspects, such as supporting them to attend court or children's hearings that could be difficult for them due to other childcare needs/work commitments/lack of funds. Supporting parents to address other issues which affect their parenting abilities and capacity should be integrated into any responses to children in conflict with the law whether via the welfare or justice system; failure to do so can decrease the likelihood of success for any alternative measure.

Further research regarding parents' and caregivers' experiences of FCAMHS services, (Jacob et al., 2023) referenced above, noted a range of facilitators and barriers to support which may be helpful when considering how services can go beyond just including parents to empowering them to care for their children.

Facilitators of Support:

- Clear joined up communication
- Co-production of strategies and practical advice
- Facilitating understanding
- "Holding" the case, or acting on behalf of parents/carers
- Sense of being supported or protected

Barriers to Support:

- Lack of communication, awareness, or contact

10. Conclusion

Establishing alternatives to the deprivation of liberty is a rights issue; the effective implementation of alternatives is one of the key issues facing the realisation of a rights-upholding child justice system. There is a need for a wide range of alternative measures to meet the individualised needs and contexts of children. The provision of alternative measures must uphold the rights of children, ensuring that their best interests are paramount; any decisions taken *about* them must be made *with* them and their parents/carers, whilst balancing the rights and protections of the wider community or any specific individuals who may be harmed.

There is no one-size-fits-all approach for an alternative; it needs to be flexible not solely to meet the needs and manage potential harm for individual children but also to reflect the local authority's needs. This creates extremely wide parameters for what an alternative may look like. It could be a concrete process and service which is established, such as bail supervision or consideration of MRCs, or it could be something that is completely bespoke. Irrespective, alternative measures for children in Scotland must be grounded in GIRFEC and child protection. They need to be underpinned by good risk management practice, with a shared understanding across partner agencies as well as the child and their parents/carers; any measures must be regularly reviewed and monitored to ensure restrictions are effective, proportionate, and appropriate.

11. References

Bevan, M. (2016). *Investigating young people's awareness and understanding of the criminal justice system: An exploratory study*. Retrieved from https://howardleague.org/wp-content/uploads/2016/06/Investigating-young-people%E2%80%99s-awareness-and-understanding-of-the-criminal-justice-system.pdf

Bradwell, M. (2019). Voice, views and the UNCRC Articles 12 and 13. *Journal of Early Childhood Research, 17*(4), 423-433. doi:10.1177/1476718x19875780

Care Inspectorate. (2023). *Position paper -Depriving and restricting liberty for children and young people in care home, school care and secure accommodation services*. Retrieved from https://www.careinspectorate.com/images/documents/Depriving_and_restricting_liberty_for_children_and_young_people_in_care_home_school_care_and_secure_accommodation_services.pdf

Children's Hearings Scotland. (2022). *Practice and Procedure Manual*. Retrieved from https://www.chscotland.gov.uk/media/upyba23h/master-copy-practice-and-procedure-manual-v4-0-3-2022.pdf

COPFS. (2021). *Lord Advocate's Guidelines - Offences alleged to have been committed by children, version 1.2, September 2021*. Retrieved from https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Lord_Advocates_Guidelines/Lord%20Advocates%20Guidelines%20to%20the%20Chief%20Constable%20on%20the%20reporting%20to%20Procurators%20Fiscal%20of%20Offences%20alleged%20to%20have%20been%20committed%20by%20children.pdf

Council of Europe. (2010). *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*. Retrieved from https://www.coe.int/en/web/children/child-friendly-justice

Damen, H., Scholte, R. H. J., Vermulst, A. A., van Steensel, P., & Veerman, J. W. (2021). Parental empowerment as a buffer between parental stress and child behavioral problems after family treatment. *Children and Youth Services Review, 124*, 1-8. doi:https://doi.org/10.1016/j.childyouth.2021.105982

Dyer, F. (2016). *Young People at Court in Scotland*. Retrieved from https://cycj.org.uk/wp-content/uploads/2016/02/YoungPeopleAtCourtFINAL.pdf

Dyer, F. (2018). *Information on the Criminal Justice (Scotland) Act 2016*. Retrieved from https://cycj.org.uk/wp-content/uploads/2018/02/Info-sheet-70ab.pdf

Dyer, F. (2022a). *Alternatives to Young Offender Institutions for children under 18*. Retrieved from https://www.cycj.org.uk/wp-content/uploads/2022/09/Alternatives-to-Young-Offender-Institutions-for-children-under-18.pdf

Dyer, F. (2022b). *Remittal from Court*. Retrieved from https://www.cycj.org.uk/wp-content/uploads/2022/09/Info-Sheet-104-2.pdf

Field, S. (2007). PRACTICE CULTURES AND THE 'NEW' YOUTH JUSTICE IN (ENGLAND AND) WALES. *The British Journal of Criminology, 47*(2), 311-330. Retrieved from http://www.jstor.org/stable/23639685

Fridriksdottir, H. (2015). Relational Representation: The Empowerment of Children in Justice Systems. In S. Mahmoudi, P. Leviner, A. Kadal, & K. Lainpelto (Eds.), *Child-*

Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child (pp. 55-72). Leiden: Brill.

G4S. (2022). *Statistical Bulletin: statistical analysis of the Scottish electronic monitoring contract from April 2021-March 2022*. Retrieved from

G4S. (2023). *Statistical Bulletin: electronic monitoring to the Criminal and Youth Justice Systems in Scotland April 2022-March 2023*. Retrieved from

Gibson, R. (2020). *ACEs, Places and Status: Results from the 2018 Scottish Secure Care Census*. Retrieved from https://www.cycj.org.uk/wp-content/uploads/2020/07/ACEs-Places-and-Status.pdf

Gibson, R. (2021). *ACEs, Distance and Sources of Resilience*. Retrieved from https://www.cycj.org.uk/wp-content/uploads/2021/05/ACEs-Distance-and-Resilience.pdf

Graves, K. N., & Shelton, T. L. (2007). Family Empowerment as a Mediator between Family-Centered Systems of Care and Changes in Child Functioning: Identifying an Important Mechanism of Change. *Journal of Child and Family Studies, 16*(4), 556-566. doi:10.1007/s10826-006-9106-1

Hartnett, D., Carr, A., & Sexton, T. (2016). The effectiveness of functional family therapy in reducing adolescent mental health risk and family adjustment difficulties in an Irish context. *Family Process, 55*(2), 287-304. doi:10.1111/famp.12195

Henderson, G., & CYCJ. (2017). *Criminal Advice and Remittals to the Children's Hearings System*. Retrieved from https://www.scra.gov.uk/wp-content/uploads/2017/06/Criminal-advice-and-remittals-to-the-Childrens-Hearings-System.pdf

Independent Care Review. (2020). *The Promise*. Retrieved from https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf

Jacob, J., Lane, R., D'Souza, S., Cracknell, L., White, O., & Edbrooke-Childs, J. (2023). "If I Didn't Have Them, I'm Not Sure How I Would Have Coped with Everything Myself": Empowering and Supporting Parents/Carers of High-Risk Young People Assisted by Community Forensic CAMHS. *International Journal of Forensic Mental Health, 22*(1), 56-68. doi:10.1080/14999013.2022.2060382

Jesuit Social Services. (2013). *Thinking Outside: Alternatives to remand for children* Retrieved from https://apo.org.au/sites/default/files/resource-files/2013-02/apo-nid33145.pdf

Jones, P., & Welch, S. (2018). *Rethinking Children's Rights*. London: Bloomsbury Publishing.

Justice for Families. (2015). *Focus on Youth and Families*. Retrieved from https://www.justice4families.org/wp-content/uploads/2013/04/J4F_Report_FINAL_082815.pdf

Kemshall, H. (2021). *Bias and Error in Risk Assessment and Management*. Retrieved from HM Inspectorate of Probation: https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2021/12/Academic-Insights-Kemshall-1.pdf

Kilkelly, U. (2011). *Measures of Deprivation of Liberty for Young Offenders: How to enrich International Standards in Juvenile Justice and promote alternatives to detention in Europe?* Retrieved from European Council for Juvenile Justice: https://archive.crin.org/en/docs/documental_9674_en.pdf

McEwan, D., Maclean, H., Dyer, F., Vaswani, N., & Moodie, K. (2020). *Use and impact of bail and remand with children in Scotland*. Retrieved from Glasgow: http://www.cycj.org.uk/wp-content/uploads/2020/12/Bail-and-Remand-in-Scotland-final-report-1.pdf

Murphy, C. (2018). *Balancing rights and risk: How can we get it right for children involved in violent behaviour?* Retrieved from https://www.cycj.org.uk/wp-content/uploads/2018/10/Balancing-Rights-and-Risk.pdf

Naughton, C. M., Redmond, S., & Coonan, B. (2019). *Evaluation of the Bail Supervision Scheme for Children (Pilot Scheme)*. Retrieved from https://www.ul.ie/artsoc/ccjvs/research/youth-justice/bail-supervision-scheme-bss

Nolan, D. (2019). Reviews for young people in custody under the Whole System Approach - information for local authorities. Retrieved from https://cycj.org.uk/wp-content/uploads/2019/11/Info-sheet-44-Nov-2019-final.pdf

Nowak, M. (2019). *Global Study on Children Deprived of Liberty*. Retrieved from https://digitallibrary.un.org/record/3813850?ln=en

O'Rourke, S., Whalley, H., Janes, S., MacSweeney, N., Skrenes, A., Crowson, S., . . . Schwannauer, M. (2020). *The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts - Literature Review*. Retrieved from https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf

Paterson, N. (2020). *Emerging Minds*. Retrieved from https://d2p3kdr0nr4o3z.cloudfront.net/content/uploads/2020/08/28140744/CHILDR1.pdf

Police Scotland. (2019). *Offending by Children - Standard Operating Procedure*. Retrieved from Scotland: https://www.scotland.police.uk/assets/pdf/151934/184779/offending-by-children-sop

Sax, H. (2022). *Ending Deprivation of Liberty of Children: Administration of Justice*. Retrieved from Global Study on Children Deprived of Liberty: https://omnibook.com/view/5c527ceb-ab16-410c-b863-a97fb9949fcb/page/1

Scottish Government. (2010). *Criminal Justice Social Work Reports And Court- Based Services Practice Guidance*. Edinburgh Retrieved from https://www.gov.scot/resource/doc/925/0110144.pdf

Scottish Government. (2021a). *Framework for Risk Assessment Management and Evaluation (FRAME) for Local Authorities and partners: For Children and Young People under 18*. Retrieved from https://www2.gov.scot/Resource/0046/00466882.pdf

Scottish Government. (2021b). *Framework for Risk Assessment Management and Evaluation (FRAME) with children aged 12-17Standards, Guidance and Operational Requirements for risk practice*. Retrieved from Gov.Scot: https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2021/06/framework-risk-assessment-management-evaluation-guidance/documents/framework-risk-assessment-management-evaluation-frame-children-aged-12-17-standards-guidance-operational-requirements-risk-practice/framework-risk-assessment-management-evaluation-frame-children-aged-12-17-standards-guidance-operational-requirements-risk-practice/govscot%3Adocument/framework-risk-assessment-management-evaluation-

frame-children-aged-12-17-standards-guidance-operational-requirements-risk-practice.pdf

Scottish Government. (2022a). *Bail Supervision: National Guidance*. Retrieved from https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2022/05/bail-supervision-national-guidance/documents/bail-supervision-national-guidance-updated-05-01-2023/bail-supervision-national-guidance-updated-05-01-2023/govscot%3Adocument/bail-supervision-national-guidance-updated-05-01-2023.pdf

Scottish Government. (2022b). *Children's Social Work Statistics: 2020-21*. Retrieved from https://www.gov.scot/publications/childrens-social-work-statistics-scotland-2020-21/

Scottish Government. (2022c). *Covid-19 Children and Families Collective Leadership Group: Short-Life Group on Under-18s in custody Recommendations and Report from Short-Life Group on Under-18s in Custody*. Retrieved from https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/07/covid-19-children-families-collective-leadership-group-short-life-group-under-18s-custody-recommendations-report-short-life-group-under-18s-custody/documents/covid-19-children-families-collective-leadership-group-short-life-group-under-18s-custody-recommendations-report-short-life-group-under-18s-custody/covid-19-children-families-collective-leadership-group-short-life-group-under-18s-custody-recommendations-report-short-life-group-under-18s-custody/govscot%3Adocument/covid-19-children-families-collective-leadership-group-short-life-group-under-18s-custody-recommendations-report-short-life-group-under-18s-custody.pdf

Scottish Government, & COSLA. (2009). *Securing our Future: A Way Forward for Scotland's Secure Care Estate - A response from the Scottish Government and COSLA*. Retrieved from https://lx.iriss.org.uk/sites/default/files/resources/0080508.pdf

Scottish Institute for Residential Child Care (SIRCC) (2009). Securing Our Future A Way Forward for Scotland's Secure Care Estate. *SIRCC*. Retrieved from https://lx.iriss.org.uk/content/securing-our-future-way-forward-scotlands-secure-care-estate-response-scottish-government-an

Scottish Sentencing Council. (2022). *Sentencing Young People: Sentencing Guideline*. Retrieved from https://www.scottishsentencingcouncil.org.uk/media/2171/sentencing-young-people-guideline-for-publication.pdf

Simpson, S., & Dyer, F. (2016). Movement Restriction Conditions (MRCs) and Youth Justice in Scotland: Are we there yet? Retrieved from https://www.cycj.org.uk/resource/movement-restriction-conditions-mrcs-and-youth-justice-in-scotland-are-we-there-yet/

The Annie E. Casey Foundation. (2022). *Family-Engaged Case Planning: a practice guide for transforming juvenile probation*. Retrieved from https://assets.aecf.org/m/resourcedoc/aecf-familyengagedcaseplanning-2022.pdf

Trotter, C. (2021). *Collaborative Family Work In Youth Justice*. Retrieved from https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2021/02/Collaborative-Family-Work-in-Youth-Justice-KM2.pdf

United Nations Committee on the Rights of the Child. (1989). United Nations Convention on the Rights of the Child. Retrieved from https://www.unicef.org.uk/what-we-do/un-convention-child-rights/

United Nations Committee on the Rights of the Child. (2006). *General Comment No. 7*. Retrieved from https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf

General Comment No. 12 Convention on the Rights of the Child, (2009).

United Nations Committee on the Rights of the Child. (2019). General comment No. 24 on children's rights in the child justice system. Retrieved from http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vEnG3QGKUxFivhToQfjGxYjV05tUAIgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2bf0RPR9UMtGkA4

Vaswani, N. (2014). The ripples of death: Exploring the bereavement experiences and mental health of young men in custody. *The Howard Journal of Criminal Justice*, *53*(4), 341-359.

Vaswani, N. (2018). *Adverse Childhood Experiences in children at high risk of harm to others. A gendered perspective.* Retrieved from https://cycj.org.uk/wp-content/uploads/2018/08/Adverse-Childhood-Experiences-in-high-risk_CYCJ-_Final-Version-proofed.pdf

Whiting, K. (2020). *Older children in conflict with the law in Scotland: A legal analysis of Scots law compliance with the United Nations Convention on the Rights of the Child for children aged 16 and 17 years* Retrieved from Children & Young People's Commissioner Scotland: https://www.cypcs.org.uk/wpcypcs/wp-content/uploads/2020/10/Older-children-in-conflict-with-the-law.pdf

Who Cares? Scotland. (2020). *Young People and Parents' views on privacy and how this affects theirparticipation in the Children's Hearings System*. Retrieved from https://www.scra.gov.uk/wp-content/uploads/2020/11/Who-Cares-Scotland-privacy-research-policy-briefing.pdf