



Children in conflict with the law: Key Messages

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Introduction

At CYCJ we believe in adopting a rights-respecting approach for all children and young people in conflict with the law. Knowing and understanding what children's rights are is essential to ensuring that those rights are upheld. The following key messages support this, as well as meeting the requirements of the [United Nations Convention on the Rights of the Child \(UNCRC\)](#), [The Promise](#) and [Getting It Right for Every Child](#).

Children in conflict with the law can be placed in vulnerable situations and it is widely recognised that their behaviour is often a reaction to their circumstances and experiences (McAra & McVie, 2022), (Vaswani, 2018), (Lightowler, 2020). We therefore need to treat children who offend as children, first and foremost (McAra & McVie, 2010) and ensure that they experience 'justice' in the true meaning of the word. By understanding their needs and upholding their rights we have a better chance of addressing offending behaviours and building a more inclusive/safe society for all, including those who have been harmed and communities. The Children (Care and Justice) (Scotland) Bill has the potential to significantly change the way in which children are responded to when they come into conflict with the law, ensuring that their rights are upheld in line with the UNCRC.

All those under 18 are children

The UNCRC was ratified by the UK Government in 1991. Under the UNCRC, a child is defined as a person under 18 years of age unless the laws of a country have set a younger legal age for adulthood. The UNCRC Incorporation (Scotland) Bill and Children (Care and Justice) (Scotland) Bill are both currently going through Parliament; these will change the legal definition of a child in Scotland.

Currently in Scotland there is a contradiction within Scots law regarding the definition of a child. Children aged 16 and 17 who are not subject to a compulsory supervision order (CSO) or open referral to the Scottish Children's Reporter Administration (SCRA), are legally defined as adults in our criminal laws; therefore they cannot be referred to the Children's Hearings System (CHS) or experience a child-friendly justice system, unless the Court decides they should be treated as a child and [remits the case back to the CHS](#) (up to age 17.5 years).

Children in conflict with the law are likely to have experienced trauma and adversity

Recent [research](#) has established a strong association between children who have experienced some form of trauma and adversity and those engaging in harmful or risk-taking behaviours (SCRA, 2022). [The Edinburgh Study of Youth Transitions and Crime](#) reported that exposure to poverty and trauma in childhood is strongly associated with offending behaviour in adolescence and early adulthood (McAra & McVie, 2022). Children who are in conflict with the law, particularly children who may be committing more serious and/or violent offences, are themselves vulnerable, with complex needs and experience of social adversity (Nolan, Dyer, & Vaswani, 2017), (Burman & McVie, 2017). This adversity can be compounded by the myriad negative effects of growing up in poverty, which impact upon the family's ability to navigate difficult circumstances and the resultant response from systems.

[This report](#) by Whitelaw and Gibson (2023) sets out to consider whether children placed within YOI are distinguishable from those entering secure care, in an attempt to more fully understand the children who are deprived of their liberty in Scotland. The research highlights data from the Secure Care Census showing the significant level of abuse that children in secure care have experienced (emotional neglect 72%; emotional abuse 69%; sexual abuse 44%; physical abuse 64%). Although not all those in secure care will have been in conflict with the law, most will have been placed there due to significant concerns that they will cause harm to themselves or others, or are at risk of exploitation. Regardless of the reason they are placed in secure care, children in these environments live together and are responded to in the same way. A [research report](#) by the Department for Education in England (2021) outlines not only that the children in the justice and welfare systems share the same profile in terms of needs and deeds, but that they are also literally the same children in many cases.

Furthermore, 82% of children referred for a welfare placement had past or outstanding criminal convictions. The majority of children who come into contact with the justice system have [speech, language and communication needs \(SLCN\)](#), estimated at between 50-70%. The presence and severity of SLCN appears to have associations with the seriousness of offending behaviour, particularly amongst children who cause the most harm. This invites the conclusion that practitioners must approach their work with children and young people with the expectation that SLCN will be present, unless there is specific evidence to the contrary.

Whilst there is limited research on the [mental health](#) needs of children and young people in conflict with the law in Scotland, this is growing (Dyer & Gregory, 2014), (Mental Welfare Commission for Scotland, 2014), (SCRA, 2022). The SCRA [research](#) highlights that 32% of children reported to the Children's Reporter on offence grounds were recorded as having mental health concerns, and almost a quarter were reported to have self-harmed, attempted suicide or displayed suicidal ideation. A [study](#) examining the mental health needs of a sample of children referred to the Intervention for Vulnerable Youth (IVY) service in relation to concerns about their violent behaviour found that on average, although not formally diagnosed, children displayed symptoms of four psychiatric disorders, with 64% of children displaying four or more. Symptoms of attachment disorder (92%) and post-traumatic stress disorder (75%) were overwhelmingly represented in this group.

The high levels of trauma experienced by children who come into conflict with the law mean that a Court appearance has the potential to be [additionally distressing and re-traumatising](#), and police custody even more so (Vaswani, forthcoming). We need to ensure that children are not brought into justice processes unnecessarily, as research indicates that this can result in lifelong involvement with the system (McAra & McVie, 2022).

The participation of children and families is essential

As Scotland strives to "Keep The Promise", to move towards UNCRC incorporation, and to become a rights-respecting nation, greater attention and focus has been given to the role that Article 12 plays in the lives of children. Article 12 of the UNCRC states the following:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[The Children and Young People's Commissioner's office](#) summarise this succinctly, stating that children "have the human right to have opinions and for these opinions to be heard and taken seriously."

Children and their families should be regarded as key partners in decision making about their lives and care and included as such. Care planning, support, provision and reviews have all been strengthened through their inclusion; rights have been upheld thanks to a greater role for children and families in assessments and planning. The participation of children in decision making is a right but too often children's voices, views, wants and needs are not heard, listened or responded to, or taken into account. Nor are children meaningfully involved in decisions affecting them, which is often compounded when children are in conflict with the law (Independent Care Review, 2020), (Lightowler, 2020), (Together Scotland, 2019). Providing children with information and an understanding of their rights and entitlements, as well as any resources needed to support engagement and inclusion, is key in supporting participation.

Advocacy has an important role in supporting children to have their voices heard and right to participation upheld, but access to independent services can be inconsistent. This is an area of current focus in Scotland, with the [Independent Care Review \(2020\)](#) outlining key principles for advocacy (Together Scotland, 2019).

It is however a responsibility of all members of the team around the child to uphold that child's right to [participation](#). This involves providing the opportunity for children and young people to influence change, to contribute to debate, to affect decision making processes and to achieve a degree of power in otherwise marginalised situations (Kosher & Ben-Arieh, 2020).

Language used should be child-friendly

The Council of Europe (2011) states that information “should be provided to children in a manner adapted to their age and maturity, in a language which they can understand, and which is gender and culture sensitive” (p.21).

There is work currently underway in Scotland to promote child-friendly language when talking about children and young people in conflict with the law. Our Hearings Our Voice launched a [virtual bin](#) project, to explore [which language](#) children and young people wanted to ‘bin’ from the Children’s Hearings system. Some local authorities have developed [language guides](#), and the [Talking Hope project](#) has been working with local authorities, secure care centres and partners to change the language used; there are also references to the language professionals use in the [40 Calls to Action](#) (Articles 12 & 13).

It is important that we listen to the views of children and young people in relation to the [language](#) they prefer when they are being spoken or written about; similarly we must communicate with them using language they know and understand. ‘Adopting clear and concise language to communicate (i.e. avoiding legal jargon or complex terms) is vital’ (Fernandez, Bermejo, & Baz, 2020), (Weijers, 2004). The CYCJ [Good Practice Guide](#) emphasises the need to use “clear and simple language, not legal jargon, and give space for children to process and respond”. This should be used through all forms of communication with all children.

The age of criminal responsibility should be increased

[The Age of Criminal Responsibility \(Scotland\) Act 2019](#) (‘the Act’) came into force on 17th December 2021, which raised the age of criminal responsibility in Scotland from 8 to 12 years old. This means that, a child under the age of 12 cannot be charged or arrested for an offence, and police will no longer have recourse to their criminal justice powers. In response to their behaviour children should be managed through [child protection](#) protocols and referred to the CHS on non-offence grounds where assessed as needing compulsory measures of supervision.

As part of the Act, a 3-year review period was included, which places a duty on Ministers to review the operation of the Act with a view to considering a future age of criminal responsibility within 3 years of commencement. The three-year review period started on 17 December 2021, the day that Section 1 came into force.

The UNCRC advises that the minimum age of criminal responsibility that state parties should adopt is 14. That is currently the European average, with some countries having a higher age of criminal responsibility. The Promise states that the age of criminal responsibility in Scotland should be in line with the most progressive Global governments.

Currently the [number of](#) children aged 12 and 13 in conflict with the law who are involved in high-risk behaviours is [very low](#), suggesting that an increase in age to the European minimum of 14 may not result in high numbers of children being dealt with through the Act rather than standard police procedures. The evidence in relation to children and [brain development](#) demonstrates why we should not hold children as young as 12 and 13 criminally responsible for their actions. As a minimum, CYCJ supports an increase in the age of criminal responsibility to at least 14 years, if not higher.

Children should be kept out of police stations

In 2021, 3730 children were taken to a police station after being arrested. Of these, 568 were held in police cells to appear before the courts, including 78 children who were under 16 or subject to compulsory measures of supervision by SCRA (Police Scotland Place of Safety event, 2022).

Articles 37 and 40 of the [UNCRC state](#) that children should only be detained as a last resort, for the shortest time, and in conditions that are appropriate to their needs, promoting a sense of ‘dignity and worth’, and not with adults, unless in their best interest. In line with these UNCRC stipulations, our position is that no child should be held in a police cell. Police custody is not a place for punishment. It is instead a place to hold people that are suspected of committing a crime, either for questioning or for appearance in court. There is, however, a growing body of evidence that children and young people consider police custody to be highly punitive and traumatising (CYCJ, forthcoming). Alternative, trauma-informed places should be explored, which take the needs of the child into account, like the [Bairns’ Hoose](#) model, currently being piloted.

“Children held in police custody are inherently vulnerable. This vulnerability is not only due to their age, but also likely due to the circumstances which brought them into contact with the police” (Police Scotland, Place of Safety event 2022). This vulnerability, and their experiences while held in custody, make it much more difficult for children to meaningfully engage with justice processes, or present their best selves in court – as such it makes it harder for them to access justice. Alternative, trauma-informed venues should always be explored where possible.

Children should only be responded to in specialist child justice systems

In 2008 the UNCRC underlined the importance of ensuring that all children in conflict with the law are always dealt with within the juvenile justice system and never tried and prosecuted as adults. “When faced with the justice system, children are thrown into an intimidating adult world which they cannot understand. Adapting justice to their needs is therefore necessary” (Council of Europe, 2010). This is an area where we fail in Scotland.

[Evidence](#) highlights that bringing children into a justice system that does not recognise or meet their needs can have a detrimental impact on their future behaviour and outcomes, often leading to further, more serious offending. Scottish Government guidance under the [Whole System Approach \(WSA\)](#) stresses that agencies should maximise every opportunity to prevent children from entering into any justice system, to prevent these lifelong consequences.

The Independent Care Review (2020, p. 41) stated that: “despite the principles of Kilbrandon that aimed to ensure a welfare-based approach to offending, a significant number of children involved in offending behaviour are dealt with in criminal courts rather than through the Children’s Hearings System...Traditional criminal courts are not settings in which children’s rights can be upheld and where they can be heard.”

UNCRC Article 40(3) (b) provides that state parties shall establish measures for dealing with children in conflict with the law without resorting to judicial proceedings. This is echoed in the [Beijing Rules](#) (Rule 11) and the [Council Of Europe Guidelines](#) (Guideline 24). However, where judicial proceedings are required, this should take place in a child-specific institution (Article 40(3)). The Committee has consistently advised that children under 18 should never be tried as adults in adult courts, including in its [Concluding Observations](#) on the UK in 2002, 2008, 2016 and 2023.

Due to the Age of Criminal Responsibility in Scotland being 12, children accused of crimes or offences who are over the age of 12 can be prosecuted within adult Criminal Courts.

Despite the welfare-based principles of [Kilbrandon](#), a significant number of children involved in alleged offending behaviour are dealt with in Criminal Courts. Although the presumption is for children to be dealt with in the Children’s Hearings System, or to be diverted from prosecution if referred to the Procurator Fiscal, there are still too many appearing [in Court](#).

Tackling the cause and impact of offending behaviour through addressing the wider needs of the child and keeping them out of the formal criminal justice system, wherever possible, is a key objective of the [Scottish Government's Justice for children and young people - a rights-respecting approach: vision and priorities](#) (2021). While significant efforts have been made under WSA to improve on this position, [research](#) has highlighted that the majority of children who end up in Court could have had their behaviour addressed through the CHS.

Early and Effective Intervention and Diversion should be used wherever possible

Diverting those who have been accused of criminal behaviour away from formal justice responses is successful in supporting desistance from offending (McAra & McVie, 2022) (Hartsell & Novak, 2022) and is part of Government policy through WSA. Avoiding contact with courts and other legal proceedings can reduce the risk of being labelled, making children less likely to internalise labels and their negative associations (Hartsell & Novak, 2022) (Wilson & Hoge, 2013).

UNCRC reiterates that [early intervention](#) processes should be developed, and non-judicial measures actively promoted. This includes [diversion](#), mediation and counselling for children accused of causing harm. The [Beijing Rules](#) also state that diversion should be the priority from the earliest point of contact with systems.

Restorative Justice should be consistently available across Scotland

The [Scottish Government's Restorative Justice Action Plan](#) presents an opportunity for [Restorative Justice](#) (RJ) to be offered across Scotland "to those who wish to access it at a time appropriate to the people and case involved" (p4). The action plan states that approaches taken must be consistent, evidence-led, trauma-informed and of a high standard. This seeks to ensure the centrality of the needs and voices of persons harmed, and supports a reduction in harmful behaviour across our communities. Although services are not consistently available throughout Scotland, there is work ongoing to ensure that, as [this develops, the rights and needs of children and young people are included](#) throughout. Furthermore, the [Hearings for Children: Hearings System Working Group's Redesign Report](#) clearly highlights the significance of RJ and considers it important that consistent provision of RJ services is available across Scotland.

The use of the Children's Hearings System should be maximised for all children up to 18

The CHS is our unique welfare-based system that views children through the lens of their needs and not their deeds. The system is participatory, allowing for the involvement of children and their families. The best interest of the child is of paramount importance in any hearing decision.

It is really important to [retain children within the CHS](#) wherever possible. Children's CSO should never be terminated if they have outstanding charges as this could lead to Court appearance and children not being able to meaningfully [participate](#) in their hearing.

The role of the CHS for those aged 16 or 17 is well established, and each year large numbers of children have their CSOs extended beyond their 16th birthday. Indeed, [research](#) suggests that this occurs in the majority of cases where children approach their 16th birthday. Currently only children under the age of 16 can be referred to the CHS unless remitted from Court up to the age of 17.5. The Children (Care and Justice) (Scotland) Bill proposes to extend the CHS to all children under 18. Extending the upper age limit at which children can be referred to the Reporter aligns with Article 1 of the UNCRC, which calls for everyone under the age of 18 to be afforded the same rights.

Recently the Promise Scotland published [Hearings for Children: Hearings System Working Group's Redesign Report](#); over 100 recommendations to change and improve the current system have been made. The Scottish Government are reviewing all recommendations and will report back by the end of 2023.

Youth Courts should be available across Scotland for all children and young people up to 25

Some local authorities, Sheriff Principals, and Courts have created alternative Court environments for children and young people up to age 21 or 25. The Structured Deferred Sentencing Court in the Lanarkshire's, and the [Sentencing Youth Court in Glasgow](#), are two such examples. These Courts were created to provide a more age-appropriate response for children and young people. While these Courts go some way to achieving the requirements of the UNCRC, this was not their original intention, and children still appear in the adult court before sentencing.

Although these Courts are a step in the right direction, they are not fully compliant with children's rights under international human rights law and standards. CYCJ, with the agreement of Sheriff Principals, are working with different local authorities to support the developments of youth courts across Scotland. No child under 18 should be in an adult court, and youth courts should be available across Scotland for all young people under age 25. Until youth courts are widely available, it is essential that [children who appear in court are supported](#), as part of the WSA, due to their lack of understanding of the process, and in order to reduce the negative impact of this experience. Ultimately, the WSA emphasises the need to keep children out of Court - diverting them wherever possible - but for those that do appear in Court, [support](#) is required at every step of the process (Scottish Government, 2011). Whilst disparate in its implementation, this remains the Scottish Government's policy today, and advancing the WSA is a key aspect of their [vision and action plan](#).

Children should only be deprived of their liberty as a last resort

[Depriving a child of their liberty](#) is the most critical decision a professional can make due to the potential consequences for the child. It should only happen as a last resort, and for the shortest time possible (UNCRC article 37b); children should be held within a [child-centred environment](#) to reduce the potential trauma. Even very short periods of detention can have a disproportionate and negative impact on children's physical, emotional and cognitive wellbeing and development due to their developmental stage (Mendez, 2015).

[The Global Study on Children Deprived of Liberty](#) found that children experience "...fear, isolation, trauma and harm in addition to discrimination, stigma and disempowerment". The negative impact of detention contributes to poor physical and mental health, a lack of access to education, a high rate of recidivism, family breakdown and unemployment, resulting in higher costs for the State in the long term. It is also recognised that the removal of children from their families and communities to secure care or custody interferes with processes and factors generally thought to promote desistance, including developmental processes, positive links with the community, family ties, employment and housing. This has led the United Nations Human Rights Committee (2019, p. 23) to conclude "deprivation of liberty constitutes a form of structural violence against children", and that the treatment of children during these times may amount to torture. Furthermore, this study highlights that any deprivation of liberty should be regularly reviewed to ensure that it lasts for the shortest appropriate period of time. This practice is not always adhered to in Scotland.

Scotland has known of these detrimental effects for some time, as documented in the [HMIPS Inspection Report \(2019\) of HMP&YOI Polmont](#) which offers an expert review of the provision of mental health services for children and young people both when entering custody and during their time in custody.

If a decision is made that there is no other option but to deprive a child of their liberty, secure care should be prioritised as opposed to a Young Offenders Institution (YOI). [Alternatives to YOI](#) and secure care should always be explored and offered to the Court/CHS. No child according to the UNCRC should be given life imprisonment.

Inhumane or degrading treatment or punishment should not be used

In line with the UNCRC concluding observations (UNCRC, 2023), the use of any harmful device including spit hoods, plastic bullets and taser guns, attenuating energy projectiles and other electrical discharge weapons should be explicitly prohibited against children. Furthermore, strip searches on children, solitary confinement, isolation, seclusion and restraint as disciplinary measures in school and within alternative care and health care settings should be prohibited. Within the justice system the use of any separation of the child, including solitary confinement, should be used for the shortest possible time and only as a measure of last resort for the protection of the child or others.

In order to be rights-respecting, there are many things for practitioners to consider when working with children and young people in conflict with the law. The above are what we at CYCJ consider to be the key messages and areas of focus at this time.

If you would like more detailed information on any of the topics included in this document, please see the [CYCJ Guide to children and young people in conflict with the law](#) or contact us at CYCJ@strath.ac.uk

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