

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

Section 1: Background, Policy and Legislation

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1. Introduction

This 'Children and Young People in Conflict with the Law: policy, practice and legislation' guide is for those who support children and young people who have come into conflict with the law, or who are at risk of doing so. This section gives a broad overview of significant historical developments which have determined how Scotland responds to children and young people in such situations, outlining relevant policy, rights, and legislation.

One of the principles underpinning the philosophy and practice with children and young people who come into conflict with the law is a welfare approach. This stems from the work of the [Kilbrandon Committee in 1964](#). Many of the committee's recommendations were brought into law through the [Social Work \(Scotland\) Act 1968](#) and later led to the establishment of the Children's Hearings System (CHS).

Based on this principle, the primary role of youth justice in Scotland should be to improve the life chances of children and young people, and to work with them, their families/carers, and communities to prevent persistent offending. This approach should be guided by [Getting it right for every child \(GIRFEC\)](#), in recognition of the fact that those in question are children first and foremost. Youth justice services should seek to minimise the number of children and young people in the criminal justice system and within formal processes such as the [CHS](#). This can be achieved by the provision of timely, supportive, and effective interventions aimed at preventing further offending by addressing underlying causes and improving life chances. Where this is not possible, the aim should be to support children through the CHS, ensuring their welfare remains a priority. However, when children do enter the criminal justice system, youth justice services should seek community-based disposals appropriate to the child's age, developmental stage, and the seriousness of the offence. When secure care or custody is required, transition back to the community should be planned and supported, with input from the child and their family/carers.

Most youth justice practice in Scotland focuses on children aged between 12 - 18 who come into conflict with the law or are at risk of doing so. However, some local authorities provide 'youth justice' services for young people up to the age of 21. Notably, the [Children and Young People \(Scotland\) Act 2014](#) sets out an expectation that children and young people who are care experienced on - or beyond - their 16th birthday are entitled to support until they are 19, and up until their 26th birthday if they are found to have eligible needs. This suggests that there could potentially be an extension to the age range for youth services and supports.

How local authorities prioritise and resource youth justice varies significantly across Scotland. There are several reasons for this, including demand for services and geographical considerations, such as differences in the needs of rural and urban communities. Some local authorities have created and sustained specialist youth justice teams, while others deliver services from Children and Families or Criminal Justice Services. Irrespective of how individual local authorities are organised, it is important that staff who support and work with children and young people who come into conflict with the law retain and develop their skills, knowledge, and competencies, to deliver appropriate and timely services to our most vulnerable children and young people.

1.1 Definitions of a Child

In Scotland, a child is defined differently in different legal contexts:

- [The Children and Young People \(Scotland\) Act 2014](#) and the [United Nations Convention on the Rights of the Child](#) (UNCRC) define a child as under 18 years old.
- [The Children's Hearings \(Scotland\) Act 2011](#) s.199 defines a child as being under 16 or under 18 if subject to a Compulsory Supervision Order (CSO).
- [The Adult Support and Protection \(Scotland\) Act 2007](#) defines an adult as someone over the age of 16.

This degree of variance can lead to confusion as to whom which legislation, policy and practice guidance refers, and at what stage. This will change in due course when the [Children \(Care and Justice\) \(Scotland\) Act](#) is commenced (see 6.10 for more details). For the purposes of this guide, 'child' refers to all children under 18 and 'young person' to those aged 19-26, unless otherwise specified.

2. Key Policies and Approaches

This section describes four of the key policies and approaches to be aware of in youth justice: [GIRFEC: 'The Rights-Respecting Approach to Justice for Children and Young People - Scotland's Vision and Priorities 2021'](#); the updated [youth justice standards](#); and the [Whole System Approach \(WSA\)](#).

2.1 Getting it Right for Every Child (GIRFEC)

[Getting it right for every child](#) (GIRFEC) was introduced in 2004, as a national approach to working with children in Scotland. Following consultations and reviews of the CHS, held in April 2004, the Scottish Executive formally published proposals known as GIRFEC in April 2005.

GIRFEC is the Scottish Government's national approach for all services that are either delivered to, or affect, children. GIRFEC includes core principles and values which are now incorporated into Scottish legislation, policy, guidance, and practice relating to children and relevant adult services.

The GIRFEC agenda has evolved over time and has considered the following sources:

- [The Kilbrandon Report \(1964\)](#)
- [The Children \(Scotland\) Act 1995](#)
- [For Scotland's Children \(2001\)](#)
- [It's Everyone's Job to Make Sure I'm Alright \(2002\)](#)
- [Looked After Children: We Can and Must Do Better \(2007\)](#)

Based on research evidence and best practice, the overarching objective is to ensure all parents, carers and professionals work effectively together to give children the best start when it comes to improving their quality of life and opportunities.

GIRFEC sets out to achieve the following:

- Better outcomes for all children,
- A common co-ordinated framework across all agencies that supports the delivery of appropriate, proportionate, and timely help to all children who need it,
- Streamlined systems and processes; efficient and effective delivery of services that focussed on the needs of the child,
- A common understanding and shared language across all agencies.
- A child-centred approach,
- Changes in culture, systems, and practice across services for children,
- Joined-up policy development in the delivery mechanism of all policies for children, and policies for adults where children are involved.

GIRFEC is a way of working which focuses on improving outcomes for all children by placing them at the centre of thinking, planning and action. It applies to all services that work directly with children or make decisions that impact on children. Such services are expected to place the need of children first. GIRFEC insists that children should be listened to, and that they should be able to understand decisions which affect them. For their wellbeing, health, and development, GIRFEC states that children should get co-ordinated support. It requires that all services for children - social work, health, education, police, housing and third sector - adapt and streamline their systems and practices to improve how they work together to support children, including strengthening information sharing. Finally, GIRFEC encourages earlier intervention by universal services to avoid crisis situations. This ensures that children get the help they need when they need it and helps to identify those children facing the greatest social or health inequalities.

The Guide to [Getting it right for every child \(GIRFEC\)](#), published by the Scottish Government in 2008, outlines the process of assessing risk; it consists of a practice assessment and a planning model which can be used by any agency. Many of the principles of GIRFEC were given a legislative grounding with the passing of the [Children and Young People \(Scotland\) Act 2014](#). This formalised the approach to supporting the wellbeing of children, including the preparation of a Child's Plan for those who need one and the provision of a Named Person service to promote, support and safeguard the wellbeing of the child. Statutory guidance to support the implementation of parts of this legislation was published in 2015. Furthermore, [Guidance on Children's Rights](#) (Part 1, section 2) and [Guidance on Children's Services Planning](#) (Part 3) were published in 2016.

Following a stakeholder consultation in 2021, the Scottish Government published a refreshed policy on GIRFEC in 2022. This [refresh](#) aligns GIRFEC with The Promise and has more of a focus on children's rights.

2.2 A Rights-Respecting Approach to Justice for Children and Young People – Scotland's Vision and Priorities

'[A Rights-Respecting Approach to Justice for Children and Young People - Scotland's Vision and Priorities 2021](#)' has a particular focus on children's rights, [UNCRC \(United Nations Convention on the Rights of the Child\)](#) and meeting the recommendations in [The Promise](#).

The Vision states:

“We want Scotland to be the best place in the world to grow up, where all children and young people are loved, treated with respect, their voices are heard, their rights respected, and their outcomes improved.

Children, young people, and their families are supported at an early stage through early intervention and preventative approaches.

For those who come into conflict with the law, their rights must be upheld, their life chances improved, and services and systems must support them effectively to address their needs and the circumstances which have led to their behaviour, to achieve positive outcomes. Children are diverted away from the Criminal Justice System, wherever possible and appropriate, to avoid the criminalisation of their behaviour, but receive effective support to attend to any needs underlying the harmful conduct. For the small minority who will go through the Criminal Justice System then they are meaningfully supported to participate and understand the system and processes.

Support and information for victims is enhanced with work undertaken to ensure that victims are appropriately protected, irrespective of the age of the person who has caused the harm or the system that deals with them.

Trauma-informed approaches and continued commitment to partnership approaches are core to achieving this vision for Scotland.” (Scottish Government, 2021, p. 6)

With a particular focus on children’s rights; participation and engagement; the whole system approach; victims; data and evidence; and early intervention and support, specific outcomes include:

- Extending the CHS for all 16- and 17-year-olds
- Having no child in a Young Offender’s Institution (YOI)
- Ensuring that children’s rights are upheld.

2.3 Youth Justice Standards

Given that Scotland’s Youth Justice Standards had not been updated since 2002, in 2018 the National Youth Justice Advisory Group (NYJAG) recommended that these be refreshed. In October 2019 [draft standards](#) were produced, leading to a public [consultation](#). Shadowing the WSA, the updated standards set out how children and young people can expect to be supported at various stages within the justice system, ranging from Early and Effective Intervention (EEI), through to smoothing transitions and improving outcomes following time within secure care or custody. These standards complement the [Health and Social Care Standards](#) and the [Secure Care Pathway and Standards Scotland](#).

View the Youth Justice [standards here](#). A child-friendly version of the standards has been co-produced with children and young people and can be accessed [here](#).

2.4 Whole System Approach (WSA)

The Scottish Government has prioritised work that supports partners to take forward the development of a [WSA](#). The WSA involves putting in place streamlined and consistent planning, assessment, and decision-making processes for children and young people on the cusp of and in conflict with the law, to ensure they receive the right help at the right time. The ethos of the WSA is that many children and young people involved in conflict with the law could and should be diverted from statutory measures, prosecution and custody through early intervention and robust community alternatives. The WSA works across all systems and agencies, bringing together the Scottish Government's key policy frameworks into a single holistic approach. This encompasses:

- The universal delivery of a reinvigorated WSA for under 18's, with cohesion and integrity in all its elements. The workforce will be supported to deliver effective multi-agency partnerships, co-creating enduring systems and culture change.
- Supporting social work and the wider workforce to develop a consistent approach to early and effective interventions.
- Supporting social work and the wider workforce to work with those whose behaviour presents a high risk of harm to others (including embedding Care and Risk Management processes (CARM)).
- Placing fewer under 18's in YOIs, including those on remand. Where therapeutic, trauma-informed approaches are required for the safety of the child / those around them, secure care and intensive residential and community-based alternatives should be explored.
- Extending the WSA to those beyond the age of 18, providing access to support for young people up to the age of 26, where possible and appropriate.
- Raising the age of referral to the Principal Reporter to the age of 18 for all children (with a presumption against under 18-year-olds in the criminal justice system) consistent with the Lord Advocate's prosecution policy. Where this is not possible children must be treated in a way that is trauma-informed and recognises their age and the stage of their development.

3. Historical Background: Children and Young People in Conflict with the Law in Scotland

3.1 Kilbrandon

There was a concern in the late 1950's and early 1960's that change was needed in the way in which society responded to children who came to the attention of the police, or who were at risk of doing so. A committee was therefore established in 1960 under Lord Kilbrandon to investigate the matter and suggest possible solutions. The committee found that children appearing before the courts - whether they had committed offences or not - had common needs. It concluded that the existing juvenile courts were not suitable for dealing with these problems because they had to combine the fact-finding characteristics of a criminal court with the role of an agency making decisions on welfare. As such, a separation of these functions

was recommended. [The Kilbrandon Report](#) recommended a co-ordinated national system for dealing with children in need of compulsory measures of care which stressed the importance of early intervention.

The establishment of facts, where disputed, would remain with the courts. However, decisions on what action - if any - was required in the best interests of the child would now be the responsibility of a new and unique kind of hearing. These findings were incorporated into the [Social Work \(Scotland\) Act 1968](#). In April 1971, Children's Hearings assumed most of the responsibility for dealing with children under 16 years of age - and in some cases up to 18 years of age - who commit offences or may need care and protection. This radical way of dealing with children in conflict with the law is now incorporated within legislation through the [Children \(Scotland\) Act 1995](#) and the [Children's Hearings \(Scotland\) Act 2011](#).

3.2 Scottish Policy Developments

Although some policy and legislative developments, such as the introduction of anti-social behaviour orders, restriction of liberty orders, electronic monitoring of children and young people and specialist youth courts have presented a challenge to the Kilbrandon principles, Scotland has avoided some of the more punitive aspects of other jurisdictions. However, despite Scotland's integrated and child-centred approach, 16- and 17-year-olds who come into conflict with the law are frequently dealt with by adult courts, and we continue to imprison more children than many other European countries. This section will outline some of the most significant developments in policy terms.

Scottish policy for children and young people in conflict with the law has been heavily influenced by the dominant cultural and political climate of the time; the establishment of the Scottish Parliament helped to bring a new focus, most notably in [national policy discussions](#) at the start of the millennium. In November 1999, the Scottish Cabinet held a strategy session which focused on issues relating to youth crime in Scotland. As a result of this, an Advisory Group on Youth Crime was commissioned to:

- Assess the extent and effectiveness of options available to Children's Hearings and Courts in cases involving 'persistent offenders',
- Look at the scope for improving the range and availability of options aimed at addressing the actions of 'persistent young offenders.'

This resulted in a national approach being adopted which incorporated the following components:

- A national strategy based on core objectives which delivered a consistent framework for local activity,
- Expansion of the range of community-based interventions for persistent offenders which could be used by Reporters, Hearings, Procurators Fiscal and the Courts,
- Expansion of diversion and supervision schemes for 16- and 17-year-olds,
- A review of the case for raising the age of criminal responsibility to 12.

The report also recommended the use of bridging pilots for 16- and 17-year-olds, with the aim of retaining children in the CHS, although this was not taken forward. Instead, in 2002 a

Ministerial Group on Youth Crime ordered a feasibility study to be carried out into the establishment of a Youth Court ([see Section 13](#)). Consequently, a pilot Youth Court was established within Hamilton Sheriff Court in June 2003 and in Airdrie Sheriff Court thereafter. Following an evaluation of the pilot in 2006, funding for the Youth Court was withdrawn after it was found to be a departure from children and their needs, with more of a focus on their deeds, and potential for net widening (Piacentini & Walters, 2006).

Audit Scotland (2002) published its review of Scotland's Youth Justice System '[Dealing with Offending by Young People](#)' which provided support for the underlying principles for youth justice in Scotland, but also identified several areas for improvement. In response to the report, [Scotland's Action Programme to Reduce Youth Crime](#) by the Scottish Executive (2002), was aimed at:

- Increasing public confidence in Scotland's systems of youth justice,
- Giving victims a greater stake in Scotland's systems of youth justice,
- Easing the transition between youth justice and the adult criminal justice system,
- Providing all young people with the opportunity to fulfil their potential,
- Early intervention.

The 'Improving the Effectiveness of the Youth Justice System' Working Group were thereafter asked to develop a [strategic framework of national objectives and standards](#) for Scotland's Youth Justice Services, to help achieve the national target of reducing the number of children who persistently came into conflict with the law by 10% by 2006. The National Standards for Scotland's Youth Justice Services were published by the Scottish Government in December 2002, defining a set of standards for youth justice strategy groups and youth justice practitioners to improve service delivery. These only applied to children within the CHS and shaped much of the work that has taken place across Scotland in respect of children and young people who come into conflict with the law.

Following a consultation by the Scottish Executive, the [Antisocial Behaviour etc. \(Scotland\) Act](#) came into force in October 2004 and gave local authorities and police new powers to tackle antisocial behaviour. In accordance with the Act, a person is defined as engaging in antisocial behaviour if that person:

- acts in a manner that causes or is likely to cause alarm or distress,
- pursues a course of conduct that causes or is likely to cause alarm or distress, to at least one person who is not of the same household.

Each local authority has a duty to work in partnership to prepare, publish and keep under review, a strategy for tackling antisocial behaviour in their authority area.

3.3 Antisocial Behaviour

[Anti-Social Behaviour Orders](#) (ASBOs) were intended to be preventative orders to protect victims and the wider community from further acts of anti-social behaviour. The *Antisocial Behaviour etc. (Scotland) Act* allows Sheriffs to grant an ASBO or interim ASBO against an individual over 12 years old following an application by a local authority or Registered Social Landlord (RSL).

Before a Sheriff can consider an ASBO application against someone under 16 years old, a Children's Hearing will be held to give advice on the application. When granting an ASBO against a child, Sheriffs also have the power to grant a Parenting Order (PO), if it is decided that this will help prevent the child from taking part in further anti-social behaviour.

Local authority accountability measures introduced by the *Antisocial Behaviour etc. (Scotland) Act 2004* give a Children's Hearing the power to place duties on the local authority when a Compulsory Supervision Order (CSO) is not being implemented. This includes an enforcement mechanism application to the Sheriff Principal.

Breach of an ASBO granted against a child is a criminal offence and must be reported to the Procurator Fiscal (PF). The PF, in consultation with the Scottish Children's Reporter Administration (SCRA), will determine the most appropriate course of action. Possible sanctions for under 16s do not include imprisonment, which is an option for breach of an ASBO against an adult.

The use of ASBOs, particularly in the case of children and young people, is minimal in Scotland. This is due to concerns over their effectiveness and their potential to criminalise so called 'problem families' rather than considering structural inequalities, like poverty and deprivation, and how adversity impacts on children, young people, and their families.

This legislation will be updated to reflect definition of a child as under 18 (except in respect of parenting orders) will change in due course when the [Children \(Care and Justice\) \(Scotland\) Act](#) is commenced (see 6.10 for more details).

3.4 Risk of Serious Harm

There were several influences in later government policies that placed more emphasis on serious offending, rather than focusing solely on persistence. Of significance was the Social Work Inspection Agency and Her Majesty's Inspectorate of Constabulary's review of how high-risk cases were coordinated. This raised concerns about the communication, assessment and management of a young person who was subsequently convicted of murder (Social Work Inspection Agency, 2005). Several recommendations were then made to the Scottish Government, including:

- The development of a National Strategy for meeting the needs of young people with sexually problematic or violent behaviour,
- Action to provide public agencies with a framework to address adolescent sex offenders, consistent across Scotland,
- The creation of measures to improve the identification, risk assessment, planning for and management of such young people,
- The development of specialist services delivered to a rigorous standard, supported by external quality assurance systems,
- The definition of Non-registered Sex Offenders and a review of guidance on managing Non-registered Sex Offenders,
- Ensuring young people are supervised appropriately as they move from youth justice to the adult justice system, and that appropriate information is transferred with them.

The Scottish Parliament passed the [Management of Offenders etc \(Scotland\) Act](#) in November 2005. It introduced a legislative basis for agencies to work together not only to assess and manage Registered Sex Offenders, but also any other individuals who are considered to pose a risk of serious harm. As a result, it brought certain Non-registered Sex Offenders who may cause serious harm to the public into new risk assessment arrangements.

3.5 National Outcomes

A change of government in 2007 led to a shift in tone and emphasis in national youth justice policy, with efforts and resources directed towards the three new priorities of: early intervention, prevention, and diversion. The Concordat between Scottish Government and Local Government, published in 2007, highlighted the requirement for the public sector to deliver these three priorities [through 15 national outcomes](#). This commitment included an agreement to work together as equal partners on policy development. The Scottish Government set the direction of policy with 'Single Outcome Agreements', in which local authorities - often through the vehicle of their Community Planning Partnership - prioritise how they will demonstrate progress towards the overarching national objectives of a fairer, wealthier, safer, and stronger, smarter, greener, and healthier Scotland. As a result of this change in focus, Youth Justice National Outcomes became difficult to enforce and they ceased to be compulsory. However, these objectives were built upon through the introduction of a [National Performance Framework](#) in 2018, which examined a broad range of domains:

- Create a more successful country,
- Give opportunities to all people living in Scotland,
- Increase the wellbeing of people living in Scotland,
- Create sustainable and inclusive growth.

3.6 Preventing Offending

In June 2008, the Scottish Government published the strategy document [Preventing Offending by Young People: A Framework for Action](#). The Framework was endorsed by relevant inspection agencies and professional organisations, and Audit Scotland was represented in its development.

The Framework outlined a shared vision of what national and local agencies working with children and young people who are in conflict with the law, or who are at risk of coming into conflict with the law, should do to prevent, divert, manage, and change that behaviour. It also recognised that a small number of children and young people who present with high-risk behaviours need to be managed safely and effectively, including those who sexually or violently offend. Best Practice Guidance was published in 2008 by the Scottish Government for managing and working with young people who pose a high risk of harm. The framework also noted that GIRFEC should guide and underpin the work of all agencies working with children and young people who offend. There were five strands to the Framework:

- Prevention
- Early and effective intervention
- Managing high risk

- Victims and community confidence
- Planning and performance improvement.

The framework focused on the needs of 8- to 16-year-olds but also covered preventative work with younger children and transitional support into the adult system up to the age of 21.

As previously mentioned in this section, in 2011 the Scottish Government introduced the [Whole System Approach \(WSA\)](#), a streamlined approach to working with children to divert them from formal systems where possible. Areas of the WSA, many of which have been updated over the past ten years and incorporated into the 2021 vision, include: [Early and Effective Intervention \(EEI\)](#); [Diversion from Prosecution \(DfP\)](#); [alternatives to secure care and custody](#); court support; Framework for Risk Assessment Management and Evaluation ([FRAME](#)) with children aged 12-17; and reintegration and transitions.

In 2012, the Scottish Government published [Preventing Offending by Young People: A Framework for Action – Progress \(2008-2011\) and Next Steps](#), which outlined what had been delivered under the five key strands of the Framework and set out the remaining priorities. These included: the implementation of multi-agency EEI in Scotland; the abolition of unruly certificates and an increase in the minimum age of prosecution through the [Criminal Justice and Licensing \(Scotland\) Act 2010](#); and the development of guidance for police officers in dealing with young people who come into conflict with the law in partnership with ACPOS (now Police Scotland).

The Scottish Government's Youth Justice Strategy was refreshed and launched in June 2015. [Preventing Offending: Getting it right for children and young people \(2015\)](#) identified three themes for action for 2015-2020:

- Advancing the WSA
- Improving Life Chances
- Developing Capacity and Improvement.

These three themes are interlinked, but in broad terms: the first was primarily concerned with children and young people supported by youth justice services; the second focused on preventing offending in the first place and improving the journey from involvement in offending to something more positive; and the third theme focused on supporting and developing the workforce to enable them to better support children and young people. These priorities build on the WSA and focus attention on some of the areas where implementation has been limited.

Unlike the previous strategy, [Preventing Offending by Young People: A Framework For Action](#), this one specifically references children as well as young people, and acknowledges, implicitly at least, [the United Nations Rights of the Child \(UNCRC\)](#). In doing so, it more clearly places the strategy in the context of wider children's policy and children's rights. In particular, the Preventing Offending strategy reflects the Scottish Government's GIRFEC policy and the UNCRC, by defining a child as 'someone under the age of 18'. This policy and intent was underlined and emphasised in 2018 when the government included incorporation of the UNCRC within its [2018/19 Programme for Government](#); it has featured frequently in governmental communications since then.

To 'get it right for every child', the strategy directly emphasises the importance of responding to the 'needs and the deeds' of children involved in offending as children. By explicitly echoing

the words of Lord Kilbrandon (1964) in the ministerial foreword (p.1), the 2015 strategy clearly aspires to build on wider developments, underpinned by the principles set out in that important report. Critically, Preventing Offending: Getting it right for children and young people also revisited the structures in place to support the implementation of the strategy. The Youth Justice Improvement Board (YJIB) was tasked with overseeing implementation of the strategy, which was underpinned by three implementation groups to support the three strategic themes. This strategy ended in 2020 and the [new vision and action plan](#) were launched in June 2021.

Under the new strategy, there are two implementation groups that report directly to the YJIB:

1. Children's Rights Implementation Group (CRIG) aims to identify human rights issues that impact upon children and young people in conflict with the law. It includes two subgroups, **Participation** and **Speech Language and Communication Needs (SLCN)**, which examine these respective areas in greater detail.

2. Advancing the Whole System Approach Implementation Group identifies areas of focus for the progression of Scotland's Approach to Children in Conflict with the Law: Vision & Priorities and includes two subgroups focusing on **Alternatives to Secure Care and Custody**, and **EEI**.

3.7 The Independent Care Review and The Promise

Following the conclusion of the Independent Care Review in 2020, [The Promise](#) implementation body was set up to drive forward the changes outlined and mandated within the Independent Care Review's final report (also named '[the promise](#)'). With an expected lifespan of ten years, The Promise aims to support various actors across Scotland to promote practice, policy, and a change in culture in order that Scotland's children and young people grow up in a country that is loving, safe and respectful, and which allows them to realise their full potential.

The Promise published its [first plan](#), highlighting several priorities to achieve between 2021 - 2024:

- The right to a childhood
- Whole family support
- Supporting the workforce
- Planning
- Building capacity.

Whilst the work of The Promise encompasses a broad range of activities that do not directly impact upon children and young people who come into conflict with the law, at times it will make a direct impact upon the Youth Justice landscape, with Children's Hearings, secure care, court, and the unnecessary criminalisation of children in the care system all featuring within the conclusions of '[the promise](#)'. Within the plan, there are four key areas for youth justice:

- The disproportionate criminalisation of care experienced children and young people will end,
- 16- and 17-year-olds will no longer be placed in YOI for sentence or on remand,

- There will be sufficient community-based alternatives so that detention is a last resort,
- Children who do need to have their liberty restricted will be cared for in small, secure, safe, trauma-informed environments that uphold their rights.

The Promise [Change Programme ONE](#) considers the work to be undertaken and any progress that needs to be made towards reaching the five priority areas of change which must be completed by 2024. In June 2021, Change Programme ONE reiterated the need for investment in community-based support for children and young people in conflict with the law.

4. Rights

The [Kilbrandon Report](#) written in 1964 and the [Social Work \(Scotland\) Act 1968](#) were, many would argue, ahead of their time in developing a child-centred approach and giving the child a voice in proceedings. Over the period since that Act, our understanding of human rights in general, and children's rights in particular, has developed and influenced policy and legislation. The most significant developments in relation to this agenda are as follows:

4.1 The European Convention on Human Rights

[This Convention](#) applied in the UK before the [Human Rights Act 1998](#), but was not enforceable in domestic courts until the Human Rights Act came into force in 2000. The Convention guarantees certain rights and freedoms, some of which have relevance to children and young people looked after away from home, including in secure accommodation:

- Article 3: Right to freedom from torture and inhumane or degrading treatment or punishment,
- Article 5: Right to liberty and security of person (with qualifications),
- Article 6: Right to a fair and public trial within a reasonable time,
- Article 8: Right to respect for private and family life, home, and correspondence,
- Article 14: Prohibition of discrimination in the enjoyment of the Convention Rights.

Human rights apply to everyone, but children have additional rights through the United Nations Convention on the Rights of the Child.

4.2 The United Nations Convention on the Rights of the Child

[This](#) was ratified by the UK Government in 1991. Key principles include:

- A child is defined as a person under 18 years of age, unless the laws of a country set a younger legal age for adulthood,
- Each child has the right to be treated as an individual,
- Each child who can form a view on matters affecting him or her has the right to express those views if he or she wishes,
- Parents should normally be responsible for the upbringing of their children and should share that responsibility,
- Each child has the right to protection from all forms of abuse and exploitation,

- So far as it is consistent with safeguarding and promoting their welfare, public authorities should promote the upbringing of children by their families,
- Each child has the right not to be subjected to discriminative action by others on grounds of race, ethnicity, gender, disability, or social circumstance,
- No-one is allowed to punish children in a cruel or harmful way. Children should not be put in prison with adults or sentenced to death or life imprisonment without the possibility of release.

In April 2019, Scotland's First Minister committed to incorporating the United Nations Convention on the Rights of the Child (UNCRC) into law in Scotland. To help inform the best way to put children's rights into the law in Scotland, the Scottish Government held a public [consultation](#) in 2019. This included speaking directly to children and young people, including holding seven events where the Scottish Government heard from over 180 children and young people. As a result of this on September 1, 2020, the [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) was introduced to the Scottish Parliament in order to incorporate the UNCRC into the law of Scotland, and thereafter passed in March 2021. In October 2021, a Supreme Court judgement highlighted four sections of the Bill which noted technical matters going beyond the powers of the Scottish Parliament. After some time to consider how to progress, the Scottish Government brought forward the necessary amendments, leading to the Bill being [approved](#) on 7th December 2023, and becoming an [Act](#) on 16th January 2024.

[UNICEF](#) recognise the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill as unique; in addition to incorporating the Convention, it contains several proactive measures of implementation to ensure the full realisation of children's rights. For example:

- The Bill contains a 'compatibility duty' which makes it unlawful for public authorities, including Scottish Government Ministers, to act incompatibly with the incorporated UNCRC requirements. If a breach occurs, children, young people and their representatives will be able to use the courts to enforce their rights.
- The Bill also requires that legislation be interpreted in a UNCRC compatible way. It includes powers to allow the courts to make strike down or incompatibility declarators in respect of incompatible legislation.
- The Bill contains specific measures to remove barriers which children and young people may face in realising their rights and accessing justice. These include provisions ensuring that claims are not time-barred during childhood.
- The Bill will require the Scottish Government to lay an annual Children's Rights Scheme before the Scottish Parliament setting out arrangements for fulfilling the compatibility duty under the Bill and to report on the actions taken and plans for children's rights.
- There is an obligation on the Scottish Government to conduct a Child Rights Impact Assessment on every new policy and legislation that affects children and young people to ensure that children's rights are respected when considering new policy and fiscal decisions.

4.3 Council of Europe Guidelines on Child Friendly Justice

[The Council of Europe Guidelines](#), which define a ‘child’ as any person under the age of 18, promotes the principle that the best interests of the child should be given a primary consideration under the Rule of Law. It also states:

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

Finally, the guidance states clearly that: “Referral of children to adult courts and procedures and adult sentencing shall not be allowed” (United Nations Committee on the Rights of the Child, 2007, p. 15).

There are several further guidelines and standards which are of relevance including:

- [The UN Guidelines on the Prevention of Juvenile Delinquency](#) (Riyadh Guidelines) 1990.
- [The UN Standard Rules on the Administration of Juvenile Justice](#) (Beijing Rules) 1985.
- [The UN Rules for the Protection of Juveniles Deprived of their Liberty](#) (Havana Rules) 1990.
- [Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime](#) 2005.
- [Human Rights in the Administration of Justice, in particular of Children and Juveniles in Detention](#) 1996.

4.4 The Carloway Review

Following the decision of the United Kingdom Supreme Court in *Cadder v HM Advocate*, a review team, led by Lord Carloway, was tasked with considering issues relating to the right of access to legal advice, police questioning of suspects, the operation of the existing system of detention, evidence including corroboration and adverse inference, and issues arising from the [Criminal Procedure \(Legal Assistance, Detention and Appeals\) \(Scotland\) Act 2010](#). [The review](#) was asked to recommend both legislative and procedural change and identify where new guidance may be needed.

Several recommendations were made specifically in relation to child suspects:

- In relation to arrest, detention and questioning, a child is defined as anyone under 18. Notification of a parent, carer or other responsible person and their access to a child suspect applies to all persons under 18 years of age.
- Whether by the police or the procurator fiscal, there should be a general statutory provision that the child’s best interests should be of primary concern in any decision to arrest, detain, question, or charge a person under 18.

- All children should have the right to access a parent, carer, or other responsible person if detained, and in advance of (and during) any interview, if access can be achieved within a reasonable time. The police can delay or suspend that right in exceptional circumstances.
- The role of the parent, carer or responsible person should be defined in statute as providing moral support, parental care, and guidance, and promoting the understanding of communications between the child, the police, and the solicitor.
- Where the child is under 16, he/she must be provided with access to a lawyer; neither the child, parent, carer nor responsible person can waive that right.
- Where the child is under 16, he/she must be provided with access to a parent, carer or responsible person and the child cannot waive that right.
- Where the child is 16 or 17 years old, he/she may waive right of access to a lawyer but only with the agreement of a parent, carer, or responsible person.
- Where the child is 16 or 17 years old, he/she may waive right of access to a parent, carer, or responsible person, but in such cases must be provided with access to a lawyer.

4.5 Rights Respecting? Scotland's Approach to Children in Conflict with the Law

In early 2020, CYCJ published ['Rights Respecting? Scotland's approach to children in conflict with the law'](#). Reflecting on existing practices, and how they comply - or not - with existing children's rights legislation, treaties, and charters, identifying a range of steps that could be taken to ensure that children in conflict with the law are afforded their human, civic and legal rights.

4.6 State of Children's Rights in Scotland by Together 2023

Produced by Together (Scottish Alliance for Children's Rights), this [annual report](#) looks at current practice in Scotland. It makes several recommendations for the UN Committee to consider as regards ways in which the UK and Scottish Government can improve in relation to children's rights.

5. Children's Hearings

5.1 Children's Hearings System

A Children's Hearing is part of the legal and welfare systems in Scotland. This is a tribunal system comprising a panel of three lay members of the public who are trained to undertake the duties and responsibilities of a hearing. Children's Hearings are subject to regulations as guided by the [Children's Hearings \(Scotland\) Act 2011 \(Rules of Procedure in Children's Hearings\) Rules 2013](#), and by some 20 associated Statutory Instruments on connected matters.

The [Scottish Children's Reporter Administration \(SCRA\)](#) was formed under the [Local Government \(Scotland\) Act 1994](#) and became fully operational in April 1996. Children's Hearings are convened by SCRA whose role in the hearing is to:

- Facilitate the work of the Children's Reporter
- Investigate and make effective decisions about the need to refer a child to a Children's Hearing
- Provide suitable accommodation and facilities for Children's Hearings
- Enable children and families to participate in Children's Hearings
- Disseminate information and data to inform and influence improved outcomes for children and young people.

The Children's Reporter does not participate in the decision-making process in a Children's Hearing. Rather, they have a statutory duty to keep a record of the proceedings of the hearing and support fair process within the hearing.

A hearing takes place in private and will consider and make decisions on the welfare of a child, considering their individual, family, social and educational background, and any offending behaviour. A hearing can only consider cases where the child and their parent/carer accept the grounds of referral. If they do not, the case may be referred to the Sheriff Court for the Sheriff to decide whether the facts – i.e., the grounds of referral - are established. An exception to this is where the child is unable to make an informed decision due to age or mental capacity, in which case the matter must be referred to the Sheriff Court. If the Sheriff finds the grounds of referral are established, the case is sent back to a hearing to decide whether compulsory measures of care are necessary. While the grounds are being established by the Sheriff, the Children's Panel may issue an interim order, if a matter of urgency, to safeguard the safety of the child.

Children from age 12 in Scotland can also appear in Court. This results in both child and adult justice legislation being of relevance. With regards to children's hearings, the following legislation applies:

5.2 Children's Hearings (Scotland) Act 2011

The Scottish Government is clear that Scotland's unique CHS remains the best way of providing support and assistance to our most vulnerable children and their families. Although the system, in which lay people make decisions to improve the lives of children, remains the best way of providing this support, children and their families today face significantly different challenges to those who it attended to in the 1960s.

The structure of the CHS was partially reformed by the [Local Government \(Scotland\) Act 1994](#). Children's Reporters were removed from the local authorities and placed within a non-departmental public body: SCRA, which has the statutory role of facilitating the work of the Principal Reporter and is overseen by a national board. Under this Act, the children's and safe guardians panels also changed from a regional structure to reflect the new 32 local government authorities. More information on the role of SCRA can be found in [Section 2](#).

The Children's Hearings (Scotland) Bill was passed by the Scottish Parliament in November 2010, received Royal Assent in January 2011 and is now called the [Children's Hearings \(Scotland\) Act 2011](#) (2011 Act). The purpose of the 2011 Act is to: strengthen, modernise, and streamline the CHS; ensure improved support for the most vulnerable children; and deliver

greater national consistency. It is also intended to ensure that the system is robust in the face of European Convention on Human Rights challenges.

The 2011 Act restates some of the existing law on Children's Hearings, but also includes many changes and new provisions, as detailed below. It also creates a new national body, [Children's Hearings Scotland](#), responsible for all functions relating to the recruitment, appointment, and training of panel members. Instead of 32 separate local panels, there is one single national panel appointed by a National Convener.

The 2011 Act is a large piece of legislation, which brings almost all the legislation relevant to Children's Hearings into one place; it replaces large sections of the [Children \(Scotland\) Act 1995](#). Many changes are introduced which seek to promote and strengthen children's rights, but those of most significance to local authorities [can be accessed here](#). Other sections of relevance may include the role of the National Convener and function of Children's Hearings Scotland (s.1-13); the role and function of the Principal Reporter and SCRA (s.14-18); the welfare of the child (s.25 and s.26); the importance of the views of the child (s.27); appointment of a safeguarder (s.30 and s.31); child assessment and protection orders (s. 35-43); grounds of referral (s.67). In 2020 a new national advocacy scheme to provide independent advocacy for all children attending children's hearings became operational. Therefore, the panel must advise children of this option, should they wish to have an advocate to support them at their hearing. [Our Hearings. Our Voice](#) has also since been established as an independent children and young people's board for the CHS.

[The Promise Plan 21- 24](#) recommended that the CHS be redesigned in collaboration with children and families, alongside the Scottish Government, SCRA, Children's Hearings Scotland and The Promise. This [redesign](#), to be completed by 2024, should ensure that the CHS and Courts can facilitate child friendly justice that upholds children's rights, enabling children to meaningfully participate in the processes and systems they find themselves in. The Hearings System Working Group's Redesign Report was published in May 2023 and can be accessed [here](#).

Other 'older' pieces of legislation in use today can be found in Appendix 1. The following laws are used on a more regular basis:

5.3 Children and Young People (Scotland) Act 2014

[The Children and Young People \(Scotland\) Act 2014](#) was passed in the Scottish Parliament in February 2014, and received Royal Assent in March 2014. The Act will further the Scottish Government's ambition for Scotland to be the best place to grow up in, by putting children and young people at the heart of planning and services, and ensuring their rights are respected across the public sector. The Act was scheduled to be fully implemented in August 2016. However, following a Supreme Court ruling, parts 4 and 5 could not commence as planned. These sections involve information in relation to Named Person functions and the Child's Plan, with the Scottish Government later acknowledging that the creation of a code of practice to govern the Named Person scheme was not possible, and that such a scheme would therefore not have legislative underpinning.

Rights of Children and Young People:

To ensure that children's rights properly influence the design and delivery of policies and services, the Act:

- Places a duty on Scottish Ministers to keep under consideration and take steps to further the rights of children and young people; promote and raise awareness and understanding of the United Nations Convention on the Rights of the Child (UNCRC); prepare reports describing this activity.
- Places a duty on the wider public sector to report on what they are doing to take forward realisation of the rights set out in the UNCRC.
- Extends the powers of Scotland's Commissioner for Children and Young People, so that this office will be able to undertake investigations in relation to individual children and young people.

Wellbeing and Getting it Right for Every Child (GIRFEC):

To improve the way services work to support children, young people and families, the Act:

- Ensures that all children and young people from birth to 18 years old have access to a Named Person,
- Puts in place a single planning process to support those children who require it,
- Places a definition of wellbeing in legislation, and
- Places duties on public bodies to coordinate the planning, design, and delivery of services for children and young people with a focus on improving wellbeing outcomes. They should then report collectively on how they are improving those outcomes.

Early Learning and Childcare:

To strengthen the role of early years support in children and families' lives, the Act:

- Increased the amount and flexibility of funded early learning and childcare from 475 to 1140 hours per year for three- and four-year-olds, and two-year-olds who are, or have been at any time since turning two, looked after or subject to a kinship care order.

Getting it Right for Care Experienced Children:

To ensure better permanence planning for care experienced children, the Act:

- Provides a clear definition of corporate parenting and defines the bodies to which it will apply.
- Places a duty on local authorities to assess a care leaver's request for assistance up to and including the age of 25.
- Sets out provision of 'continuing care' whereby young people are enabled to remain in their care placement until the age of 21.
- Provides for additional support to be given to kinship carers in relation to their parenting role through the Kinship Care Order.
- Stipulates, as part of a preventative approach, that local authorities must provide relevant services where a child is at risk of becoming looked after, and
- Puts Scotland's Adoption Register on a statutory footing.

Other Proposals:

The Act also:

- Strengthens existing legislation that affects children and young people by creating a new right to appeal a local authority decision to place a child in secure accommodation and makes procedural changes in the areas of Children's Hearings support arrangements and school closures.

5.4 Age of Criminal Responsibility Scotland Act (2019)

Following public consultation and much debate within Parliament, [legislation was passed raising the age of criminal responsibility from eight to 12](#); this was implemented in December 2021. Incorporated into the Act is [provision](#) which ensures that this change is reviewed, and consideration given to further possible increases to the age of criminal responsibility. The Scottish Government subsequently formed an [advisory board](#) which will monitor the preparations and shift to this change in legislation.

In October 2019, the UNCRC issued [General Comment no.24](#) (replacing no.10) which encourages states to adopt a minimum age of criminal responsibility of 14; as such, Scotland continues to fall behind international norms.

Part 2 of the *Age of Criminal Responsibility (Scotland) Act* commenced on November 30, 2020. This means that information about behaviour which occurred while a person was under 12 can only be included on an enhanced disclosure or Protecting Vulnerable Groups (PVG) scheme record if the independent reviewer agrees that it should be. For more information see [CYCJ Info Sheet 92](#). The Scottish Government recently published statutory guidance to support police, local authorities and others with functions related to investigative interviews of children under the age of 12, to ensure the child and their family receive the right support and have their rights upheld and protected in line with UNCRC. The Act provides for a child who is involved in an investigative interview to be supported by a child interview rights practitioner (ChIRP), a solicitor who will provide any advice, support and assistance to the child and their family. The guidance can be viewed [here](#).

5.5 Disclosure (Scotland) Act (2020)

[The Disclosure \(Scotland\) Act 2020](#) made significant changes in respect of childhood offences, making many of the Management of Offenders (Scotland) Act changes irrelevant for children, as the disclosure period for childhood convictions will be zero. This means these will become immediately spent, apart from excepted sentences which are childhood convictions that resulted in a custodial sentence of more than 48 months, and convictions for a sexual offence that resulted in a custodial sentence of more than 12 months. Young people over 18 will be able to provide context to any childhood convictions eligible for review before any disclosure is made to a third party.

More information can be accessed on the Clan Childlaw [website](#) including:

[Disclosure of childhood criminal records – explained!](#) An in-depth look at the Disclosure (Scotland) Act 2020 and what it means in practice.

6. Children in the Criminal Justice system

Although the aim of youth justice in Scotland is to keep as many children under the age of 18 in the CHS as possible, some, due to legal status, the type of crime (e.g., road traffic offences), seriousness of offence and/or circumstance, will be dealt with by the criminal justice system. In December 2021, following the decision of the Scottish Parliament, the age of criminal responsibility was increased to 12 years old. This means, that in addition to children under 12 not being able to be subject to prosecution in the criminal courts, they also cannot be referred

to the Children's Reporter for behaviours that previously were deemed to be criminal. They may, however, be referred to the Children's Reporter due to concerns over their welfare. For an overview of criminal justice for under 18-year-olds, see the interactive guide, [The child's journey: A guide to the Scottish justice system \(iriss.org.uk\)](http://iriss.org.uk).

Crime rates have been falling in much of the Western world for the past 30 years (McAra & McVie, 2018). Provisions set out in the [Criminal Justice \(Scotland\) Act 2016](#) state that under 18s in custody should have an adult attend the police station. For those under 16 this should be a parent or guardian, and for children aged 16 or 17, this can be an adult named by them.

The extension of the WSA to 16 and 17-year-olds has supported more streamlined planning, assessment and decision-making processes for children who come into conflict with the law. This includes diversion from statutory measures, prosecution, and custody through early intervention and robust community alternatives. Children and young people involved in the adult criminal justice system are also subject to services governed by the National Outcomes and Standards for Social Work Services in the criminal justice system, irrespective of whether they are involved in the CHS.

Depending on the nature and severity of the offence, other frameworks may apply to children and young people in the adult system, including the Multi-Agency Public Protection Arrangements (MAPPA), developed under the [Management of Offenders etc. \(Scotland\) Act 2005](#), which protect the public and manage the highest risk offenders in the community.

Recent legislation related to the adult justice system includes:

6.1 Victims and Witnesses (Scotland) Act 2014

The [Victims and Witnesses \(Scotland\) Act 2014](#) was passed by the Scottish Parliament in December 2013. It brings into law several changes to improve the experience victims and witnesses have of Scotland's justice system, including:

- Creating a duty for justice organisations to set clear standards of service for victims and witnesses,
- Giving victims and witnesses new rights to certain information about their case,
- Improving support for vulnerable witnesses in court - for example, changing the definition of 'child witness' to include all those under 18 (instead of under 16), creating a presumption that certain categories of victim are vulnerable, and giving such victims the right to utilise certain special measures when giving evidence,
- Introducing a victim surcharge so that offenders contribute to the cost of supporting victims,
- Introducing restitution orders, allowing the court to require that offenders who assault police officers pay to support the specialist non-NHS services which assist in the recovery of such individuals,
- Allowing victims to make oral representations about the release of life sentence prisoners,
- Providing support to victims' organisations,
- Improving communication to reduce witness non-attendance at court,
- Giving victims better access to information about how to get help and advice.

6.2 Criminal Justice (Scotland) Act 2016

The [Criminal Justice \(Scotland\) Act 2016](#) seeks to modernise and enhance the efficiency of the Scottish criminal justice system. It is made up of seven parts including: Arrest and Custody; Corroboration and Statements; Solemn Procedure; Sentencing and Appeals and Scottish Criminal Case Review Commission referrals. The Act sets out changes to police officers exercising their power. Police officers are now able to make arrests without warrant and can arrest an individual several times for the same offence, should further evidence come to light. The Act also clearly indicates the timescales for detaining an individual in police custody.

The Act abolishes the requirement for corroboration, meaning facts can be proven in court without the evidence being corroborated, overriding the requirement for this in Scots Common Law.

6.3 Community Justice (Scotland) Act 2016

Although the primary responsibility for supervising those who have come into conflict with the law within the community lies with criminal justice social work services, the [Management of Offenders etc. \(Scotland\) Act 2005](#) requires all relevant local authority services to contribute to the area plan and provide relevant services to people who have been involved in offending.

Following a consultation on the redesign of community justice services, key changes and improvements were set out in the Community Justice (Scotland) Bill. The Bill was passed by the Scottish Parliament in February 2016, and received Royal Assent in March 2016, making it the [Community Justice \(Scotland\) Act 2016](#).

The new Community Justice Model for Scotland included a transition from Community Justice Authorities (CJAs) to an integrated planning model as part of Community Planning Partnerships. This included:

- The establishment of a new national body, [Community Justice Scotland](#), to provide national, professional, and strategic leadership across the community justice landscape. It will also report to Scottish Ministers and Local Government leaders on delivery of Community Justice Outcomes across Scotland and can make improvement recommendations locally and nationally where necessary,
- Transfer of the responsibility of planning and delivery of services from the eight CJAs to 32 Community Planning Partnerships,
- A duty under s.35 of the Act for Community Justice Scotland and the Statutory Community Justice partners to work together and at a local level with Transition Co-ordinators to produce Community Justice Outcome Improvement Plans and jointly resource services,
- The implementation of a [National Strategy for Community Justice](#) and a Community Justice [Outcomes, Performance and Improvement Framework](#) to guide local planning, delivery and monitoring of services,
- Regular meetings between Ministers and local elected members to agree areas of mutual interest in improving offender management.

From April 1st, 2017, the new model for Community Justice placed statutory responsibility for the delivery of services designed to prevent and reduce further offending with local strategic

planning partnerships. This would include organisations and agencies who best understand the needs of their area.

6.4 Children (Equal Protection from Assault) (Scotland) Act 2019

[This Act](#) provides equal protection from assault to all children, meaning there is no longer a distinction between those under or over 18. Simply put, parents will not be able to cite the defence of justifiable assault that was previously permitted under the Criminal Justice (Scotland) Act 2003. The physical assault of a child will be treated in the same manner as an assault upon an adult. In doing so, Scotland joins the [majority of European nations](#) in providing equal protection.

6.5 Management of Offenders (Scotland) Act 2019

The implementation of sections of the ['Management of Offenders \(Scotland\) Act 2019'](#) will change the conviction information on all disclosures. The length of time for which many convictions will be disclosed to potential employers (or college, university etc.) has been reduced. For those under 18 when convicted, the disclosure period for a six-month custodial sentence, for example, has been reduced from three-and-a-half years to one-and-a-half years and a fine will be six months instead of two-and-a-half years.

All offences established in the CHS now become immediately 'spent' ([section 29 of the Act](#)), meaning they will not have to be disclosed on job applications and basic criminal record checks. They could, however, still be disclosed on enhanced criminal record checks (find out more [here](#).)

Prison sentences over 48 months remain excluded sentences and do not become spent, but there will be review mechanisms for this. Scottish Government's guidance on these changes can be accessed through their website ([summary of changes](#), [technical guidance](#), [summary guidance](#) and tables listing [disclosure periods](#)).

6.6 Alternatives to Secure Care and Custody

The Scottish Government is clear: where it is possible to meet the needs and risks of those children whose behaviour may pose significant risk to themselves or others safely and cost effectively within their communities, these opportunities should be maximised. [Intensive Support and Monitoring Services \(ISMS\)](#) were introduced by the [Antisocial Behaviour etc. \(Scotland\) Act](#) in 2004 as an alternative to Secure Care. The [Children \(Scotland\) Act 1995](#) was amended to enable supervision requirements imposed by a Children's Hearing to include a Movement Restriction Condition (MRC), requiring the child to comply with arrangements for monitoring their compliance with such a restriction in the form of an Electronic Monitoring Device (tag). [Guidance on the use of Movement Restriction Conditions \(MRCs\) in the Children's Hearings System](#) was published by the Scottish Government in 2014. Children and young people can be required to remain in certain locations for a specified period, or conversely be required to keep away from specified locations. In accordance with the welfare principle of the CHS, any child subject to an MRC must receive an intensive package of

support, with access to at least some of the support 24 hours a day, seven days a week. ISMS were introduced to seven 'phase one' local authorities in 2005, and following evaluation and analysis over a two-year period, were rolled out to all 32 local authorities in April 2008.

6.7 Parenting Orders

The Children's Hearings (Scotland) Act 2011 makes provision for the local authority or the Principal Reporter to make an application to the Sheriff Court to impose a Parenting Order (PO). Local authorities can apply for a PO on two grounds:

- The child has engaged in anti-social behaviour and the Order is desirable in the interests of preventing further anti-social behaviour,
- The child has engaged in criminal conduct and the order is desirable in the interests of preventing further criminal conduct by the child.

In addition to these grounds, the Principal Reporter can also apply on the basis that a PO is in the best interests of the welfare of the child. An Order can last up to 12 months and includes a requirement to comply with conditions as directed by the local authority supervising officer, which could include participation in a parents' group or the meeting of pre-set standards, for example, getting child to school on time etc. Although PO are civil orders, breach of an order constitutes a criminal offence with the usual sanctions attached, including imprisonment. To date, there have been no applications for PO in Scotland by a local authority of the Principal Reporter.

6.8 National Outcomes

[2004 National Outcomes and Standards for Criminal Justice Social Work](#) (Previously National Objectives and Standards for Social Work Services in the Criminal Justice System).

Since 1968, when the [Social Work \(Scotland\) Act](#) merged probation and welfare services, criminal justice services within local authorities have been responsible for the delivery of pre-sentence reports to courts, provision of community sentences, post release supervision of offenders on statutory licence and voluntary throughcare. The one exception is Restriction of Liberty Orders (electronic tagging), where responsibility lies with a private contractor, although an assessment of suitability remains the responsibility of the local authority.

[National Outcome and Standards](#) set down the expected operational standards and objectives for criminal justice social work in Scotland. They were first introduced in 1989 for Community Service Orders and extended to Social Enquiry Reports, probation and throughcare in 1991, and to Supervised Attendance Orders in 1998. Although National Standards have been in place since the early 1990s, when ring-fenced funding for criminal justice social work was first introduced, there have been some subsequent revisions to take account of new responsibilities and changes in policy and practice.

Section 6 of the [Practice Guidance relating to the completion of Justice Social Work Reports](#) highlights the importance of considering the needs of young people involved in the adult criminal justice system when planning and providing services.

Section 6.2 of the [Practice Guidance relating to the completion of Justice Social Work Reports](#) also highlights the power of the Sheriff Court (Summary) to remit any offender under the age of 17 years and six months to a Children's Hearing for advice and possible disposal. Some young people are excluded from this process depending on the seriousness of the offence and will be dealt with by the court.

Throughcare is the provision of social work and associated services to prisoners and their families from the point of sentence or remand, during the period of imprisonment and following release into the community. Local authorities have a statutory responsibility under National Standards to provide throughcare services to individuals who are sentenced to more than four years in prison on release, and for those sentenced to Supervised Release Orders and Extended Sentences. Local authorities must also offer voluntary aftercare to those who request such a service within 12 months of their release.

The revised National Outcomes and Standards provide a clear framework of professional accountability for the outcomes of community safety, justice and social inclusion. They reflect changes in policy, practice and legislation in respect of criminal justice social work in Scotland, particularly relating to pre-sentence court reports, community sentencing and post release supervision of offenders.

Community Payback Orders (CPOs) replace the probation, community service and supervised attendance orders sections in the previous National Standards, and past guidance for community reparation orders.

The [Justice Social Work Reports \(JSWR\) and courts-based services practice guidance](#) includes practical direction on how to complete a JSWR for court. A JSWR should assist the sentencing process by complementing the other range of information available (e.g., from the victim and the PF) to the sentencer, providing information on potential social work interventions and how they may impact on offending behaviour. Risk assessment forms a central part of any court report. This guidance was published in 2010 and is currently being updated to incorporate age and developmentally appropriate risk assessments and disposals. This is particularly relevant given the [Scottish Sentencing Council Guidelines](#) require sentences for those up to the age of 25 to be fair and proportionate; consideration should be given both to "the intellectual and emotional maturity of the young person at the time the offence was committed" (Scottish Sentencing Council, 2022, p. 4), and to what's in the best interests of the child, if the individual is under the age of 18 (in line with UNCRC).

Following a recent high-profile case which have been dealt with in what the public may see as a more lenient way due to these guidelines the Scottish Sentencing Council is reported to be [reviewing](#) their guidelines.

The Scottish Government provide a webpage hosting all the most recent [Justice social work guidance](#); updates to guidance can be found here, some of which is currently under review.

6.9 Multi-Agency Public Protection Arrangements (MAPPA)

The [Management of Offenders etc \(Scotland\) Act 2005](#) introduced a statutory function for responsible authorities such as local authorities, Scottish Prison Service, police and health to

establish joint arrangements for the assessment and management of risks to the public posed by sex offenders in Scotland. [MAPPA](#) was introduced in Scotland in 2007, as a consistent approach to the management of offenders across all local authority and police force areas, providing a framework for assessing and managing registered sex offenders. Registered sex offenders are required to notify the police of their name, address and other personal details, and of any subsequent changes.

In March 2016, the [MAPPA guidance](#) was updated to include:

- Registered Sex Offenders
- Mentally Disordered Restricted Patients
- Other Risk of Serious Harm Offenders.

The fundamental purpose of MAPPA is public safety and managing the risk of serious harm. Several agencies are placed under a duty to co-operate with the responsible authorities, and are known as 'Duty to Co-operate' agencies. They include housing providers, the voluntary sector and the Children's Reporter. They are required to share information which will enable different agencies to work together within their legitimate or statutory role. Information about offenders is gathered and shared across relevant agencies, the nature and level of risk of harm is assessed, and a risk management plan is implemented to protect the public.

The most recent [MAPPA guidance](#) published in 2022 outlined 3 risk management levels:

- **Level 1:** Ordinary management. The risk can be managed by one agency without active involvement by others; however, information is required to be shared and there should be collaboration between agencies.
- **Level 2:** Multi-agency management. The risk management plans require the active involvement of several agencies via regular multi-agency public protection meetings.
- **Level 3:** Multi-agency Public Protection Panel. As with Level 2, but requires the involvement of senior officers to authorise special resources and/or provide senior management overview. These cases are assessed as being high or very high risk of harm and are the critical few.

Depending on the nature and severity of the harm, or potential harm, children and young people may benefit from the [Framework for Risk Assessment Management and Evaluation \(FRAME\)](#), incorporating Care and Risk Management (CARM) and Multi-Agency Public Protection Arrangements (MAPPA). Although MAPPA guidance applies to all those who have attained the age of criminal responsibility, in practice it generally deals with those who have been convicted through the criminal courts.

6.10 Children (Care and Justice) (Scotland) Act

Following a public consultation in 2022, the Scottish Government's [Programme for Government 2022/2023](#) outlined that "The Children's Care and Justice Act will help us Keep The Promise by ensuring that children who come into contact with care and justice services are treated with trauma-informed and age-appropriate support and will put an end to placing under 18s in Young Offenders' Institutions". This brings Scotland into alignment with UNCRC

in this respect. The Act contains provisions that apply to various pieces of childcare, children's hearings and criminal justice legislation. The [Act](#) - which was passed by the Scottish Parliament on 25th April 2024 has four main parts.

- Part 1 of the Act relates to the CHS and changes to the Children's Hearings (Scotland) Act 2011, including: Raising the age of referral so all children under the age of 18 can have the opportunity to be referred to the Principal Reporter, where there are concerns for the child's care or welfare, including the child's involvement in offending behaviour;
- Changes to the measures that can be included as part of a Compulsory Supervision Order via the CHS, for example, through enhancing prohibitions that can be placed on a child and decoupling and updating the conditions for a movement restriction condition and secure accommodation authorisation;
- A requirement for the Principal Reporter to inform a person harmed (including their relevant person if they are a child) of their right to request information, with certain exceptions, and enhances the information that the Principal Reporter can share [with them](#), alongside a responsibility on Scottish Ministers to provide support those people via a single point of contact;
- Where a child is to be taken to and kept in a place of safety under certain child assessment/protection measures, the child could be placed in secure accommodation if the secure care criteria are also met;
- On terminating a child's order, the hearing is required to consider if the child might need supervision or guidance after they turn 18. Where the children's hearing makes a statement to the effect that the child does, the relevant local authority has a duty to provide this, subject to the child accepting it. However, the relevant local authority does not need to provide supervision and guidance after the child turns 19.

Part 2 of the Act relates to the criminal justice system and procedure, providing:

- An updated definition of a child in respect of criminal proceedings and the prosecution of children to cover under 18s (by amending the Criminal Procedure (Scotland) Act 1995);
- Enhanced safeguards for children in police custody for all children under 18, through amendments to the Criminal Justice (Scotland) Act 2016. These include requiring considerations of alternative places of safety to police custody if a child is to be kept in legal custody pending a court appearance, [parental notification that an under 18 is to be brought before a court](#), the inability of the child to consent to interview without a solicitor being present, and increased points of local authority notification and opportunities for visiting the child;
- Enhanced steps to safeguard the welfare and safety of children in criminal proceedings, including considerations of steps that can be taken to support a child's participation in proceedings, where and when proceedings should be conducted and who should be present during proceedings;
- Maximising of the courts to remit the cases of children who have pled or been found guilty of an offence to the children's hearings system for advice or disposal, including where a child has been made subject to sexual offence notification requirements, disqualified from driving, or a non-harassment order;
- Removing the ability for children to be remanded or sentenced to detention in YOIs or prisons, instead requiring that where a child is to be deprived of their liberty this should normally be in secure accommodation;

- The ability to make regulations so a child who has been sentenced or remanded in secure accommodation under the age of 18 can remain there until they reach the age of 19;
- Allowing hospital directions to be made for children aged under 18 who have been convicted on indictment and sentenced to detention should other [legal criteria](#) be met;
- Where a child is detained in secure accommodation under section 51, 205, 208 or 216 of the Criminal Procedure (Scotland) Act 1995, the child will be treated as a child “looked after” by the local authority, with the associated rights including to access aftercare;
- Placing a duty on the Scottish Ministers to prepare, in consultation, and publish standards, applicable to a “secure transportation service” in relation to children and young people (those under 19). There will be a duty on providers of secure transportation services to meet the applicable standards, and on those commissioning a secure transportation service to ensure that the service meets the applicable standards, and report on this.

Part 3 relates to residential and secure care, including:

- Amending the definition of “secure accommodation” in Scotland to accommodation provided for the purposes of depriving children of their liberty which is provided in a residential establishment by a secure accommodation service. The service must also provide in such an establishment, appropriate care, education and support for the purposes of safeguarding and promoting the welfare of the children who are accommodated there, taking account the effects of trauma which the children may have experienced. The service must also be approved by the Scottish Ministers, in accordance with regulations;
- Ministers can produce standards and outcomes applicable to residential care services including secure accommodation, who are providing placements for children placed cross-border. Should such a service be applying for registration with the Care Inspectorate, they must provide any required information about cross-border placements, and confirm that notice of the application has been given to the local authority and health board where the service is to be provided.
- Extends the powers of Scottish Ministers to regulate cross-border placements of children into Scotland which are underpinned by a non-Scottish court order which appears to them to correspond to a compulsory supervision order and to impose conditions on these placements.

Part 4, 4A and 4B:

- Amends the Antisocial Behaviour etc. (Scotland) Act 2004 so that, except for parenting orders, “child” in that Act will mean a person under 18;
- Repeals Parts 4 and 5, as well as schedules 2 and 3, of the Children and Young People (Scotland) Act 2014 in respect of named persons and child’s plans (provisions which had never been commenced);
- Allows in cases where a criminal court has determined that the decision to prosecute a child was incompatible with the UNCRC requirements and is contemplating deserting the case, that instead the prosecutorial decision can

be reconsidered to decide whether criminal proceedings brought in a way that is compatible with the UNCRC requirements in limited circumstances;

- Requires ministers to annually review and lay before Parliament a report on the operation of the Act.

Part 5 makes standard final provisions.

A timeline for the commencement of provisions is currently being agreed. Provisions that would end the use of YOIs for children are due to commence by the end of 2024. Further information on the Act is available on the CYCJ website, which will continue to be updated. If you have any queries, please get in touch.

6.11 Bail and Release from Custody (Scotland) Act 2023

The bill for this new piece of legislation was passed by the Scottish Parliament on 22nd June 2023 and received Royal Assent on 1st August 2023. In terms of children and young people, this [legislation](#) is relevant as it:

- Requires social work to be given the opportunity to provide information to the court when making decisions about bail.
- Changes the test that the court must apply when making decisions about bail.
- Requires the court to record reasons for refusing bail.
- Allows time spent on electronically monitored bail to be counted as time served against a custodial sentence.

6.12 National Care Service (Scotland) Bill

The [Independent Review of Adult Social Care](#) was published in February 2021 and recommended the creation of a [National Care Service](#) (NCS) “to drive national improvements, to ensure strategic integration with the National Health Service, to set national standards, terms and conditions, and to bring national oversight and accountability” (Feeley, 2021, p. 5), subsequently transferring the responsibility of social care from local authorities to a NCS. The Bill is at Stage 2 in parliament currently.

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8. Appendix 1

Legislation still in use today for children & young people in both child and adult justice systems

[Children and Young Persons \(Scotland\) Act 1937](#)

Although this Act has now largely been replaced by new legislation, some elements are still valid. This Act provides the statutory basis for protecting young children from cruelty and is often the legislative underpinning of child protection investigations and proceedings.

[Children \(Scotland\) Act 1995](#)

The Act defines parental responsibilities and rights in respect of children in Scotland. It sets out the duties and powers available to public authorities to support children in need, looked after children, young people, and care leavers and to intervene when their welfare requires it. The Act considers children as every child under 16, young people on supervision between 16 and 18 and young people affected by a disability aged up to 19.

The Act is based on the [UN Convention on the Rights of the Child](#). The three over-arching principles of the Act are:

- The welfare of the child is the paramount consideration when his or her needs are being considered by courts, Children's Hearings and local authorities,
- No court should make an order relating to a child, and no Children's Hearing should make a supervision order, unless the court or hearing considers that to do so would be better than making no order,
- The child's views should be considered where major decisions are to be made about his or her future and must be considered where the child is aged 12 or older.

[Criminal Procedure \(Scotland\) Act 1995](#)

This Act consolidates certain enactments relating to criminal procedure in Scotland. It has a specific focus on children and young people in Part V and outlines:

- Age of criminal responsibility
- The prosecution of children
- Arrangements where children are arrested
- Detention of children
- Reference or remit to Children's Hearing
- Remand and committal of children and young persons
- Punishment for murder
- Detention of young offenders
- Detention of children convicted on indictment

The Act also introduced supervision for young people as defined in the [Children \(Scotland\) Act 1995](#), if sentenced to a period in custody.

[Criminal Law \(Consolidation\) \(Scotland\) Act 1995](#)

This Act consolidates, creates offences, and enacts legislation. It has relevance here to consolidating law on sexual offences including those against children. Most of the offences in this Act have been repealed and replaced by offences in the [Sexual Offences \(Scotland\) Act 2009](#).

Human Rights Act 1998

An Act to reinforce the rights and freedoms guaranteed under the European Convention on Human Rights. It makes provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

Commissioner for Children and Young Persons (Scotland) Act 2003

An Act of the Scottish Parliament to provide for the establishment and functioning of a Commissioner for Children and Young People in Scotland, and for connected purposes.

Protection of Children (Scotland) Act 2003

An Act of the Scottish Parliament: to require the Scottish Ministers to keep a list of individuals whom they consider to be unsuitable to work with children; to prohibit individuals included in the list, and individuals who are similarly regarded in other jurisdictions, from doing certain work relating to children; to make further provision in relation to that list; and for connected purposes.

Sexual Offences Act 2003

An Act of the UK Parliament which makes provision about sexual offences. This applies mainly to England and Wales but clarifies requirements for Scotland as regards notification for those subject to the *Sex Offenders Act 2007*.

Vulnerable Witnesses (Scotland) Act 2004

An Act of the Scottish Parliament which makes provision for the use of special measures for the purpose of taking the evidence of children and other vulnerable witnesses in criminal or civil proceedings; provide for evidential presumptions in criminal proceedings where certain reports of identification procedures are lodged as productions; make provision about the admissibility of expert psychological or psychiatric evidence as subsequent of the complainer in criminal proceedings in respect of certain offences; prohibit persons charged with certain offences from conducting their own defence at the trial and any victim statement proof where a child witness under the age of 12 is to give evidence at the trial; enable the court to prohibit persons from conducting their own defence at the trial and any victim statement proof in other criminal proceedings in which a vulnerable witness is to give evidence; prohibit persons charged with certain offences from seeking the precognition personally of a child under the age of 12; make provision about the admissibility of certain evidence bearing on the character, conduct or condition of witnesses in proceedings before a Sheriff relating to the establishment of grounds of referral to Children's Hearings; abolish the competence test for witnesses in criminal and civil proceedings; and for connected purposes.

The Education (Additional Support for Learning) (Scotland) Act 2004

An Act of the Scottish Parliament to make provision for additional support in connection with the school education of children and young people with additional support needs, and for connected purposes.

The Antisocial Behaviour etc. (Scotland) Act 2004

As previously mentioned elsewhere in this section, the *Antisocial Behaviour etc. (Scotland) Act* came into force in October 2004 and gave local authorities and the police new powers to tackle antisocial behaviour. In accordance with the Act a person is defined as engaging in antisocial behaviour if that person:

- acts in a manner that causes or is likely to cause alarm or distress.
- pursues a course of conduct that causes or is likely to cause alarm or distress, to at least one person who is not of the same household.

In this definition 'conduct' would include speech, and a 'course of conduct' must involve conduct on at least two occasions. Antisocial behaviour itself does not have to involve committing a criminal offence as it is the effect or likely effect of the behaviour on other people that determines whether the behaviour is antisocial. The authority applying for the order does not have to prove intention on the part of the defendant to cause alarm or distress.

Each local authority has a duty to work in partnership to prepare, publish and keep under review a strategy for tackling antisocial behaviour in the authority area.

Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

An Act of the Scottish Parliament to make it an offence to meet a child following certain preliminary contact. Other provision is made for the purposes of protecting children from harm of a sexual nature and to make further provision about the prevention of sexual offences.

Family Law (Scotland) Act 2006

An Act of the Scottish Parliament to amend the law in relation to marriage, divorce and the jurisdiction of the courts in certain consistorial actions; to amend the *Matrimonial Homes (Family Protection) (Scotland) Act 1982*; to amend the law relating to the domicile of persons who are under 16 years of age; to make further provision as respects responsibilities and rights in relation to children; to make provision conferring rights in relation to property, succession and claims in damages for persons living, or having lived, together as husband and wife or civil partners; to make provision in relation to certain rules of private international law relating to family law; and for connected purposes.

Protection of Vulnerable Groups (Scotland) Act 2007

An Act of the Scottish Parliament to: bar certain individuals from working with children or certain adults; require the Scottish Ministers to keep lists of these individuals; make further provision in relation to those lists; establish a scheme under which information about individuals working or seeking to work with children or certain adults is collated and disclosed;

amend the meaning of school care accommodation service in the [Regulation of Care \(Scotland\) Act 2001](#); and for connected purposes.

[Sexual Offences \(Scotland\) Act 2009](#)

An Act of Scottish Parliament which covers all sexual offences in Scotland. Part 4 is specific to sexual acts against younger (under 13) and older (over 13 but under 16) children.

[Criminal Justice and Licensing \(Scotland\) Act 2010](#)

This Act came into force in August 2010. This legislation relates to a wide range of distinct policy proposals including those relating to sentencing, criminal offences, criminal procedure, disclosure of evidence, protection of victims and witnesses, and licensing. It deals with issues ranging from combating alcohol misuse to the creation of a Sentencing Council, community payback orders and the presumption against short prison sentences of three months or less. S. 14 of the Act relates to [community payback orders](#) (CPOs) and introduces a number of provisions to the [Criminal Procedure \(Scotland\) Act 1995](#) to replace community service orders, probation orders, supervised attendance orders, and community reparation orders. Other existing court orders, including drug treatment and testing orders and restriction of liberty orders, remain unchanged.

The introduction of the CPO aimed to create a robust and consistently delivered community penalty which can provide a viable alternative to custody in appropriate cases. It emphasises that a community sentence is a punishment and not merely a supportive intervention. The CPO came into force in February 2011 to provide those responsible for sentencing with a range of options from which they can choose the most appropriate disposal.

The CPO was designed to ensure that those involved in offending behaviour pay back to communities and society in two ways:

- By requiring the offender to make reparation, often in the form of unpaid work,
- By requiring offenders to address and change their offending behaviours to improve the safety of local communities, providing opportunities for their reintegration as law abiding citizens.

A CPO may contain several different requirements which are set out in legislation and may include unpaid work, supervision requirements, programme requirements, residence requirements and conduct requirements. An [evaluation](#) of the CPO was completed by the Scottish Government (2015). Key features are applicable to children and young people under the age of 18:

- A CPO is a disposal of the court and is an alternative to custody,
- There is no minimum age for a CPO, other than the age of criminal responsibility (12 years old),
- Where unpaid work or another activity requirement is made, the young person must be aged 16 or over,
- Where a young person is under 18, the court can remit back to the CHS for disposal. A CPO is not available to a Children's Hearing as a disposal.

When the court imposes a CPO for a young person under the age of 18, an Offender Supervision Requirement is mandatory. The court must also be satisfied that the local authority can support and rehabilitate the young person. When the court imposes a CPO in respect of a young person under 18 years old who is subject to a compulsory supervision order through the CHS or assessed as needing support on care and protection grounds, the young person should be supported through effective interventions which address both the risks and the needs they present.