

# **Older children in conflict with the law in Scotland:**

A legal analysis of Scots law compliance with the United Nations  
Convention on the Rights of the Child,  
for children aged 16 and 17 years



***“Scotland must develop a more progressive, rights-based youth justice approach that builds on the Kilbrandon principles and makes them a reality for all”***

The Promise  
Scottish Independent Care Review, May 2020

***“If we could get our response to 16 and 17 year olds right and make sure we recognised and truly treated all of these children as children, then we would go a long way towards really getting it right for every child”***

Children and Young People's Centre for Justice  
August 2020

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Children and Young People's Commissioner Scotland  
September 2020

*A child friendly version of this report is also available.*

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## **List of Abbreviations**

ASN	Additional support needs
CHS	Children’s Hearings System
CJS	Criminal justice system
CICL	Children in conflict with the law
CO	Concluding observations
COE	Council of Europe
GC	General Comment
PF	Procurator Fiscal
IHRL	International human rights law
The Committee	Committee on the Rights of the Child
UK	United Kingdom
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
WSA	Whole System Approach

## **List of Statutory Abbreviations**

1995 Act	Criminal Procedure (Scotland) Act 1995
2011 Act	Children’s Hearings (Scotland) Act 2011

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## **Executive Summary**

This report builds upon the conclusion reached by Lightowler, in her highly influential report, 'Rights Respecting? Scotland's approach to children in conflict with the law', that many children in conflict with the law ('CICL') in Scotland "*do not experience 'justice' in the true meaning of the word*".<sup>1</sup> It focuses specifically on children aged 16 and 17 and concludes that Scotland's approach to such children is not rights respecting. The principal reason for this is that Scots law does not adopt a universal definition of a child as a person under the age of 18 years, including in relation to child justice.<sup>2</sup> As a consequence, it has been revealed that many 16 and 17 year olds in Scotland are not recognised as children and are thus excluded from the child justice system and subject to adult processes and dispositions in the criminal justice system ('CJS'). By examining two particularly concerning manifestations of this, namely trial in adult courts and penal detention, this report seeks to illustrate how such an approach not only contravenes the rights of the child, but also fails to protect the public. It concludes that, if the interests of the child, those affected by their actions, and the wider community, are to be served, then Scots law must be amended to ensure the comprehensive child justice standards set out in the UN Convention of the Rights of the Child ('UNCRC')<sup>3</sup> are guaranteed to every person under the age of 18 at the time of their alleged offence.

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<sup>1</sup> Lightowler, C. (2020). 'Rights Respecting? Scotland's approach to children in conflict with the law', Centre for Youth and Criminal Justice, p.2, available at: <https://www.cycj.org.uk/wp-content/uploads/2020/01/Rights-Respecting-Scotlands-approach-to-children-in-conflict-with-the-law.pdf> [accessed 10.08.20].

<sup>2</sup> Note: the term 'child' is used throughout this report to refer to anyone under the age of 18, as consistent with the definition of a child in international human rights law, including the UN Convention of the Rights of the Child (Article 1). It is acknowledged, however, that some may prefer the terms 'young person', 'youth justice' or 'juvenile'.

<sup>3</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [accessed 10.08.20].

## **Introduction**

### *Aims:*

This report is prepared ahead of the UNCRC being fully and directly incorporated into Scots law.<sup>4</sup> Under Article 4 UNCRC, state parties are required to take “*all appropriate legislative, administrative and other measures*” to implement the Convention rights. This extends to devolved matters,<sup>5</sup> including justice and policing in Scotland.<sup>6</sup> Full and direct incorporation is the preferred method of implementation of the UN Committee on the Rights of the Child (‘the Committee’) but this does not obviate the need to bring existing domestic legislation into line with the Convention.<sup>7</sup> The purpose of this report, therefore, is to identify areas where Scots law is not UNCRC compliant and make recommendations for law reform.

Older children (aged 16/17) and trial in adult courts and punitive detention form the focus of this report, as these are the areas the writer considers the most problematic. The minimum age of criminal responsibility (‘MACR’),<sup>8</sup> police powers,<sup>9</sup> criminal records and disclosure,<sup>10</sup> as apply to all children, are not covered. The reader is directed to

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<sup>4</sup> A detailed analysis of the incorporation framework is outside the scope of this report, but the reader is directed to the work of the Independent UNCRC Incorporation Advisory Group at <https://cypcs.org.uk/positions/incorporation-of-the-uncrc/> and the Draft Children’s Rights (Scotland) Bill 2019, available at: <https://cypcs.org.uk/wp-content/uploads/2020/02/Childrens-Rights-Scotland-Bill.pdf> [accessed 10.08.20].

<sup>5</sup> UN Committee on the Rights of the Child (CRC), ‘General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child’, 27 November 2003, CRC/GC/2003/5 (‘GC No.5’), available at: <https://www.refworld.org/docid/4538834f11.html> [accessed 04.08.20].

<sup>6</sup> Scotland Act 1998.

<sup>7</sup> UN Committee on the Rights of the Child, GC No.5 (n 5); United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 27, available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> [accessed 23.08.20]. Also noted in: UN Committee on the Rights of the Child (CRC), ‘UN Committee on the Rights of the Child: Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 12 July 2016, CRC/C/GBR/CO/5 (‘COs 2016’), para.7, p.2, available at: <https://digitallibrary.un.org/record/835015?ln=en> [accessed 10.08.20]. See also Appendix V (p.67) (Table of key recommendations from the Universal Periodic Review Process, Cycle 3, Recommendations 134.64 and 134.6).

<sup>8</sup> Age of Criminal Responsibility (Scotland) Act 2019.

<sup>9</sup> Criminal Justice (Scotland) Act 2016. For details, see: Children and Young People’s Commissioner Scotland (‘CYPCS’). (2020). ‘Commissioner: Stop and search research highlights need for human rights-based approach’, available at: <https://cypcs.org.uk/news-and-stories/commissioner-stop-and-search-research-highlights-need-for-human-rights-based-approach/> [accessed 22.08.20].

<sup>10</sup> Disclosure (Scotland) Bill, details available at: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/112286.aspx> [accessed 22.08.20].

the existing submissions from the Children and Young People's Commissioner Scotland ('CYPCS') on Scots law in these areas.<sup>11</sup>

It must be stressed that the report offers a *legal analysis* of existing Scots law. It does not, therefore, analyse the domestic policy and guidance that supplements this. Whilst this may appear limited, amending the legal framework, to ensure it is UNCRC compliant, will lay the foundations for further policy and cultural change.<sup>12</sup> Furthermore, although the primary concern here is with the UNCRC, other regional and international instruments have still been referenced where these reaffirm the UNCRC standards. As with any international treaty, being based as they are on compromise between sovereign states, the UNCRC must in any event be regarded as setting the absolute minimum standards.<sup>13</sup> In line with the values Scotland has as a country, and as the Scottish Government has itself recently indicated, Scots law must always go further.<sup>14</sup>

#### *Methods:*

The research has taken the form of doctrinal research, supplemented by analysis of quantitative data (obtained by the writer through Freedom of Information requests)<sup>15</sup> and qualitative interviews with practitioners in the field and children and young people (undertaken throughout July 2020). Interviews were held with (i) discrete individuals with former experience of the criminal justice system ('CJS') and the Children's Hearings System ('CHS'); and (ii) young people at a secure care centre who are currently in contact with these systems. Participants were asked to share their experiences, from the time of their initial contact through to disposition, in order to

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<sup>11</sup> For further information, please refer to: CYPCS. (2019). 'Age of Criminal Responsibility (Scotland) Bill: Evidence to the Equalities and Human Rights Committee', available at: <https://cypcs.org.uk/wp-content/uploads/2020/02/ACR-evidence-Jan-19.pdf>; CYPCS. (August 2019). 'Evidence for the Scottish Parliament's Education and Skills Committee on the Disclosure (Scotland) Bill', available at: <https://cypcs.org.uk/wp-content/uploads/2020/02/Disclosure-Bill.pdf>.

<sup>12</sup> As, for example, noted by Sandberg, K. (May 2020). Presentation at Moray House Annual Lecture, 'Making Children's Rights Real: the opportunities for incorporating the Convention on the Rights of the Child', available at: [https://www.ed.ac.uk/files/atoms/files/mh-observatory-annual-lecture-slides\\_0.pdf](https://www.ed.ac.uk/files/atoms/files/mh-observatory-annual-lecture-slides_0.pdf) [attended 27.05.20 and slides accessed 13.08.20].

<sup>13</sup> As in line with Article 41, UNCRC.

<sup>14</sup> Scottish Government. (May 2019). 'Incorporating the UN Convention on the Rights of the Child into Scots law: consultation', available at: <https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/pages/2/> [accessed 10.08.20].

<sup>15</sup> Freedom of Information (Scotland) Act 2002.

explore the differences between these two systems. Additionally, practitioners at the secure care centre, and members of the CYPCS Young Advisers Group ('YAG'), were separately consulted on their views. Their insights are shared throughout the report.

The report's recommendations are founded upon the Committee's Concluding observations ('COs') on the fifth periodic report of the United Kingdom ('UK') in 2016.<sup>16</sup> The writer was able to identify the continued areas of concern through the independent monitoring work undertaken by Together (Scottish Alliance for Children's Rights), in their 'State of Children's Rights' reports.<sup>17</sup>

#### *Structure:*

The overarching international human rights law ('IHRL') framework, and the evidence-base behind this, is firstly introduced at **Section 1**. A summary of Scotland's child justice framework is then set out at **Section 2**, followed by an explanation of the definition of a child in IHRL at **Section 3**. Trial in adult court and penal detention are then explored at **Sections 4 and 5** respectively. In these sections, the applicable UNCRC standards, and the ways in which Scots law fails to comply with these, are firstly examined, before setting out recommendations. Concluding remarks are then offered at **Section 6**.

#### *A note on the Committee's jurisprudence*

This report refers extensively to the Committee's Concluding Observations and General Comments (GCs). It is acknowledged that such jurisprudence is not strictly legally binding in international law and, in the UK, currently provides authoritative guidance only.<sup>18</sup> Jurisdictions that have successfully incorporated the UNCRC, however, have paid increasing regard to the Committee's jurisprudence, including Norway where the Supreme Court recently proclaimed that General Comments are to be given "*great weight*".<sup>19</sup> If Scotland is to establish itself as a world leader in children's

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<sup>16</sup> UN Committee on the Rights of the Child, COs 2016 (n 7).

<sup>17</sup> Together, Scottish Alliance for Children's Rights. (2019). 'State of Children's Rights in Scotland', available at [https://www.togetherscotland.org.uk/media/1436/socrr\\_online\\_version.pdf](https://www.togetherscotland.org.uk/media/1436/socrr_online_version.pdf) [accessed 10.08.20]. Reports for previous years are available at: <https://www.togetherscotland.org.uk/resources-and-networks/state-of-childrens-rights-reports/>.

<sup>18</sup> Mathieson v. Secretary of State for Work and Pensions [2015] UKSC 47, para.39; R (DA) v. Secretary of State for Work and Pensions [2019] UKSC 21, paras.68-69.

<sup>19</sup> Sandberg, 'Making Children's Rights Real' (n 12).

rights, then it must follow suit. In particular, the proposal set out in the Draft Children's Rights (Scotland) Bill 2019,<sup>20</sup> for a duty on relevant authorities including the Scottish Parliament and public bodies to have “*due regard*” to the Committee’s jurisprudence when exercising their functions, must be implemented. This will help to close the significant gap that exists - in Scotland but also across the globe<sup>21</sup> - between the standards set forth in the UNCRC and the actual lived realities of CIGL.

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<sup>20</sup> Draft Children's Rights (Scotland) Bill 2019, available at: <https://cypcs.org.uk/wp-content/uploads/2020/02/Childrens-Rights-Scotland-Bill.pdf> [accessed 10.08.20].

<sup>21</sup> Goldson, B. & Kilkelly, U. (2013). 'International human rights standards and child imprisonment: Potentialities and limitations'. *The International Journal of Children's Rights*, 21(2), pp.345–371.

## 1. International child justice standards

***“The Committee recommends the State party to bring its juvenile justice system, including in all devolved administrations...fully into line with the Convention and other relevant standards”***

Committee on the Rights of the Child, Concluding observations on the UK, 2016

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### 1.1. The international human rights law framework

Childhood has been afforded a special status in IHRL since the Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948, Article 25(2) of which proclaimed that childhood is “*entitled to special care and assistance*”.<sup>23</sup> Today, the human rights of children are protected in numerous treaties<sup>24</sup> but the UNCRC, being the only international treaty to focus exclusively on protecting and promoting children’s interests specifically,<sup>25</sup> is of particular importance. The Articles with the most direct bearing on child justice are:

- **Article 37(b): no child shall be subjected to unlawful or arbitrary deprivation of liberty;**<sup>26</sup>
- **Article 37(c): children deprived of their liberty shall be treated with humanity and dignity;**<sup>27</sup>
- **Article 40(1): CICL must be treated in a manner consistent with their dignity and worth, which considers their age and promotes their reintegration into society;**
- **Article 40(2): all children have the right to a fair trial;**<sup>28</sup>

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<sup>22</sup> UN Committee on the Rights of the Child, COs 2016 (n 7), para.79, p.22.

<sup>23</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: [https://www.ohchr.org/en/udhr/documents/udhr\\_translations/eng.pdf](https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf) [accessed 13.08.20].

<sup>24</sup> Including, for example, in the: International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination Against Women (1979); and Convention on the Rights of Persons with Disabilities (2007).

<sup>25</sup> Goldson, B. & Muncie, J. (2012). ‘Towards a global ‘child friendly’ juvenile justice?’, International Journal of Law, Crime and Justice 40: 47-64.

<sup>26</sup> **For a discussion of this, please see section 5 below.**

<sup>27</sup> Ibid.

<sup>28</sup> **For a discussion of this, see section 4 below.**

- **Article 40(3): state parties shall promote and establish laws, procedures and institutions specifically applicable to CICL.<sup>29</sup>**

These Articles must inform all responses to CICL. In accordance with the interdependence and indivisibility of all human rights, furthermore, the UNCRC must always be read in a holistic manner, including its four 'general principles' of non-discrimination (Article 2), best interests (Article 3), survival and development (Article 6) and participation (Article 12).<sup>30</sup>

The UNCRC is further supplemented by the 'UN Rules', namely the UN Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules'),<sup>31</sup> the UN Guidelines for the Prevention of Juvenile Delinquency ('the Riyadh guidelines')<sup>32</sup> and the UN Rules for the Protection of Juveniles Deprived of their Liberty ('the Havana Rules').<sup>33</sup> Although these standards are not strictly legally binding,<sup>34</sup> in General Comment No.24 on Children's rights in juvenile justice ('GC No.24') the Committee recommends they be integrated into domestic systems.<sup>35</sup>

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<sup>29</sup> **For a discussion of this, see section 3 below.**

<sup>30</sup> Hodgkin, R., Newell, P. & UNICEF (2007). 'Implementation handbook for the Convention on the Rights of the Child'. Fully revised third., Geneva: UNICEF, available at: <https://www.refworld.org/pdfid/585150624.pdf> [accessed 22.08.20].

<sup>31</sup> UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') : resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/33, available at: <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf> [accessed 13.08.20].

<sup>32</sup> UN General Assembly, United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") : resolution / adopted by the General Assembly, 14 December 1990, A/RES/45/112, available at: <https://www.refworld.org/docid/3b00f21d1c.html> [accessed 13.08.20].

<sup>33</sup> UN General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty ('the Havana Rules') : resolution / adopted by the General Assembly, 2 April 1991, A/RES/45/113, available at: <https://www.refworld.org/docid/3b00f18628.html> [accessed 13.08.20].

<sup>34</sup> Van Bueren, G. & Alen, A. (2006). 'Article 40 : child criminal justice', Leiden; Boston: Martinus Nijhoff Publishers.

<sup>35</sup> UN Committee on the Rights of the Child (CRC), 'General comment No. 24 (2019): Children's rights in the child justice system', 18 September 2019, CRC/C/GC/24 ('GC No.24') (updating UN Committee on the Rights of the Child (CRC), 'General comment No. 10 (2007): Children's Rights in Juvenile Justice', 25 April 2007, CRC/C/GC/10), available at: <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf> [accessed 13.08.20].

Additional standards are also set out at the European level, including in the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice ('the COE guidelines')<sup>36</sup> and the European Convention on Human Rights.<sup>37</sup>

## 1.2. Underpinning principles

From the above instruments, the following general principles arise. First and foremost, approaches to CICL must **respect and promote the child's dignity and physical and psychological integrity**.<sup>38</sup> This requires that every child, irrespective of their behaviour, legal status or capacity, is treated with a "*profound moral respect*"<sup>39</sup> in recognition of their individual and inherent value. Further, **separate and specialist child justice systems** must be established, different to the criminal systems applicable to adults;<sup>40</sup> **diversion**, as an alternative to formal judicial proceedings, is strongly encouraged;<sup>41</sup> and all responses must be **proportionate, age appropriate and focused on the needs and best interests of the child**.<sup>42</sup> Fundamentally, and as set out in Article 40(1) UNCRC, the principal aim when responding to child offending should not be deterrence, punishment or retribution (as are the orthodox aims of the CJS) but supporting the child's **reintegration into society**.<sup>43</sup> Responses that are primarily punitive cannot, as the Committee notes in GC No.24, ever be compatible with this.

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<sup>36</sup> Council of Europe. (2010). 'Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice' (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th Meeting of the Ministers' Deputies) Council of Europe, Strasbourg, available at: <https://rm.coe.int/16804b2cf3> [accessed 22.08.20].

<sup>37</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (as directly enforceable in Scots law, per the Scotland Act 1998). See also: Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, available at: <http://data.europa.eu/eli/dir/2016/800/oj> [accessed 22.08.20].

<sup>38</sup> Noted, for example, in: UNCRC (Article 40); COE Guidelines (Part III).

<sup>39</sup> Mahoney, J. (2007). 'The challenge of human rights: origin, development, and significance', Malden, Mass; Oxford: Blackwell, p.146.

<sup>40</sup> Noted, for example, in: Riyadh Guidelines (Guideline VI); UNCRC (Article 40(3)); and UN Committee on the Rights of the Child, GC No.24 (n 35).

<sup>41</sup> Noted, for example, in: Beijing Rules (Rule 11); the COE Guidelines (Guideline 24); and UNCRC (Article 40(4)). **For a definition of diversion, refer to the Glossary (Appendix IV, pp.64-66).**

<sup>42</sup> Noted, for example, in: UNCRC (Article 3(1)); Beijing Rules (Rule 1.1); Riyadh Guidelines (Guideline 52); and COE Guidelines (Part III).

<sup>43</sup> Lynch, N. (2018). "'The Other Child' - The Rights of the Child Victim in the Youth Justice System'. The International Journal of Children's Rights, 26(2), pp.228–250; Arthur, R. (2010). 'Protecting the Best Interests of the Child: A Comparative Analysis of the Youth Justice Systems in Ireland, England and Scotland'. The International Journal of Children's Rights, 18(2), pp.217–231.

### 1.3. Understanding children in conflict with the law

Children who harm others may, on the face of it, be the most difficult to sympathise with. There exists a popular rhetoric that such children, through their (deemed) choice to engage in criminality, are thereby less entitled to rights or even forfeit them altogether.<sup>44</sup> As one young person, who was tried in the CJS, stated:

***“You get like vilified...you’re not a child anymore, you’ve committed this offence now you’re a monster instead”***

Young person with criminal justice experience,  
Interviewed by the writer July 2020

When responding to child offending, it must be acknowledged that the state also has duties to protect members of the public under IHRL<sup>45</sup> and to ensure victims are granted an effective remedy.<sup>46</sup> This is of particular sensitivity given such victims are often *other children*.<sup>47</sup> Securing accountability and reparation for crime does not, however, necessitate a criminal justice response and may be secured through non-punitive, restorative means.<sup>48</sup> Furthermore, respecting the rights of CICL is not contrary to the public interest and in fact the very opposite applies.<sup>49</sup> This requires, firstly, an understanding of the links between vulnerability and offending.

The Edinburgh Study of Youth Transitions and Crime (a longitudinal study of 4,000 young people in Edinburgh, examining pathways into and out of crime) found that children involved in offending were “*significantly more likely*” than their peers to have experienced adversity (including victimisation, family breakdown or extreme poverty)

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<sup>44</sup> McDiarmid, C. (2016). ‘Making best interests significant for children who offend: a Scottish perspective’. In: Sutherland, E. & Macfarlane, L-A.B. (2016). *Implementing Article 3 of the United Nations Convention on the Rights of the Child: best interests, welfare and well-being*, Cambridge, United Kingdom: Cambridge University Press.

<sup>45</sup> *Osman v the United Kingdom* (Application 23452/94) ECHR 1998-VIII 3124 and *A v United Kingdom* (Application 35373/97) (2002) 36 EHRR 917, ECtHR (on the due diligence duties of the state to protect the public from threats to life).

<sup>46</sup> UN Committee on the Rights of the Child, GC No.5 (n 5), para.24, p.7.

<sup>47</sup> Lynch, “The Other Child”, (n 43).

<sup>48</sup> Skelton, A. (January 2019), Evidence to the Equalities and Human Rights Committee, 2<sup>nd</sup> Meeting 2019, Session 5, on the Age of Criminal Responsibility (Scotland) Bill 2019, available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11896&mode=pdf> [accessed 22.08.20].

<sup>49</sup> Goldson, B. (2019). ‘International Human Rights Standards and Youth Justice’ (2019/04). Manchester: Her Majesty’s Inspectorate of Probation, available at: <https://www.justiceinspectorates.gov.uk/> [accessed 22.08.20].

and/or to be engaged in problematic health risk behaviours (including drug and alcohol use, disordered eating and parasuicidal behaviour).<sup>50</sup> This led McAra and McVie, the co-directors of that research, to conclude that “*the more serious the deeds, the more deep-seated the needs*”.<sup>51</sup>

Maltreatment in childhood may, as noted by Delmage, in turn cause changes in brain functioning, resulting in behaviours such as increased impulsive aggression which are commonly associated with offending.<sup>52</sup> This correlates with the evidence that children with cognitive difficulties or compromised emotional and social development, along with care-experienced children, are disproportionately overrepresented in the CJS.<sup>53</sup> Whilst there will always be exceptions to this, it must be acknowledged that many CICL are often more appropriately categorised as victims themselves and may even simultaneously appear as an accused in one set of proceedings and a victim or witness in another.<sup>54</sup> Thus, as stated in General Comment No.20 on the child’s rights during adolescence (‘GC No.20’), it is important to recognise children’s vulnerability “*both as victims and perpetrators of crime*”.<sup>55</sup>

Adopting punitive responses to child offending, as Bernburg and Krohn note, stigmatises these children further and in fact increases the risk of reoffending, due to the knock on effect on educational attainment, employment, and future aspirations.<sup>56</sup> This is supported by McAra and McVie’s findings that contact with the CJS is a key

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<sup>50</sup> McAra, L & McVie, S. (2013). ‘Delivering Justice for Children and Young People: Key Messages from the Edinburgh Study of Youth Transitions and Crime’, p.3, in A Dockley (ed.), *Justice for Young People: Papers by Winners of the Research Medal 2013*. Howard League for Penal Reform.

<sup>51</sup> *Ibid*, p.4.

<sup>52</sup> Delmage, E. (2013). ‘The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective’. *Youth justice*, 13(2), pp.102–110.

<sup>53</sup> Lynch, N., & Liefwaard, T. (2020). ‘What is Left in the “Too Hard Basket”?’ *Developments and Challenges for the Rights of Children in Conflict with the Law*. *The International Journal of Children's Rights*, 28(1), pp.89–110; Armour, A. (2020). ‘Reducing the overcriminalisation of care-experienced young people in Scotland: towards a model of best practice’, available at: <https://www.iriss.org.uk/resources/student-research/reducing-overcriminalisation-care-experienced-young-people-scotland> [accessed 22.08.20].

<sup>54</sup> Lynch, “The Other Child” (n 43).

<sup>55</sup> UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20 (‘GC No.20’), para.87, p.23, available at: <https://digitallibrary.un.org/record/855544?ln=en> [accessed 22.08.20].

<sup>56</sup> Bernburg, J. & Krohn, M. (2003) ‘Labelling, life chances, and adult crime: The direct and indirect effects of official intervention in adolescence on crime in early adulthood’, *Criminology* (Beverly Hills), 41(4), pp.1287–1318.

predictor for future offending.<sup>57</sup> Diverting children from prosecution, as advocated for in IHRL, in contrast, has been proven to facilitate desistance from crime and to be more cost-effective.<sup>58</sup> According to research undertaken by Bateman, higher rates of diversion are associated with lower levels of child imprisonment,<sup>59</sup> and it is notable that in European jurisdictions such as Belgium that have adopted the most robust approach to diversion (namely, excluding children altogether from the CJS by raising the MACR), increased crime rates have not been seen.<sup>60</sup> Additionally, focusing on reintegration can foster a sense of worth, meaning and purpose in the child which, as Maruna and Mann advise, has proven integral to desistance from offending.<sup>61</sup>

There is, therefore, a strong evidence-base for the approach advocated for in IHRL, which weighs heavily against punitive responses. The extent to which this is honoured in Scotland, for all children, will now be explored.

## 2. Child justice in Scotland<sup>62</sup>

***Scottish incorporation “builds on a proud tradition of respecting children’s rights in Scotland that predates even the creation of the UNCRC in 1989, such as our pioneering and unique children’s hearings system...”***

Deputy First Minister, John Swinney  
On the 30<sup>th</sup> anniversary of the UNCRC, 20.11.19

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<sup>57</sup> McAra & McVie, ‘Edinburgh Study of Youth Transitions & Crime’ (n 50).

<sup>58</sup> Ibid; UN Committee on the Rights of the Child, GC No.24 (n 35), para.23, p.7; Inspectorate of Prosecution in Scotland. (2018). ‘Prosecution of young people: report’, available at: <https://www.gov.scot/publications/thematic-report-prosecution-young-people/> [accessed 22.08.20].

<sup>59</sup> Bateman, T. (2012). ‘Who Pulled the Plug? Towards an Explanation of the Fall in Child Imprisonment in England and Wales’. *Youth justice*, 12(1), pp.36–52.

<sup>60</sup> Goldson, B. (2019). ‘Reading the Present and Mapping the Future(s) of Juvenile Justice in Europe: Complexities and Challenges’, in Goldson, B. (ed.) *Juvenile Justice in Europe: Past, Present and Future*. London: Routledge; Goldson, B. (2013). ‘Unsafe, Unjust and Harmful to Wider Society’: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales. *Youth justice*, 13(2), pp.111–130.

<sup>61</sup> Maruna, S., & Mann, R. (2019). ‘Reconciling “Desistance” and “What Works”’, HM Inspectorate of Probation, Academic Insights 2019/1, London: HMI Probation.

<sup>62</sup> **For detailed guidance on Scotland’s child justice framework refer to: Centre for Youth & Criminal Justice (‘CYCJ’). (August 2020). ‘A Guide to Youth Justice in Scotland’, available at: <https://www.cycj.org.uk/resource/youth-justice-in-scotland-guide/> [accessed 27.09.20].**

<sup>63</sup> The Scottish Parliament, The Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney. Meeting of the Parliament 20 November 2019, United Nations Convention on the Rights of the Child, available at:

Scotland is internationally renowned for its welfare-based, and rights respecting, approach to CICL as a result of the CHS,<sup>64</sup> which was established following the Kilbrandon Report of 1964.<sup>65</sup> The fundamental principles to emerge from that report, namely that children who offend and children who require care and protection “*should equally be considered children in need*”<sup>66</sup> and that deeds must always be understood in the context of needs, have underpinned the CHS since its introduction in 1971.<sup>67</sup>

Children can be referred to the CHS (through the Children’s Reporter) on care and protection grounds or offence grounds.<sup>68</sup> Where it is considered necessary for a child’s protection, guidance, treatment or control,<sup>69</sup> and better for the child than taking no action at all,<sup>70</sup> the CHS may place them under a Compulsory Supervision Order (‘CSO’). CSOs, which cannot remain in place beyond a child’s eighteenth birthday, place responsibilities on the child’s local authority to support them and require the child to comply with specified conditions (including, in certain cases, to reside in secure accommodation).<sup>71</sup>

It is important to note that the CHS is still part of the formal justice system, with formal consequences for children. Where offence grounds are accepted or established through the CHS, this may still, as in the CJS, be classed as a criminal conviction. Scotland’s disclosure regime is currently under review but, pending this, criminal convictions can appear on a child’s Disclosure Certificate or Protection of Vulnerable Groups record into adulthood.<sup>72</sup> The fundamental difference between the CHS and the CJS, however, is that the CHS is a child-centred system, which was specifically

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[http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12376&mode=html#iob\\_111834](http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12376&mode=html#iob_111834) [accessed 10.08.20].

<sup>64</sup> Arthur, ‘Protecting the Best Interests of the Child’ (n 43).

<sup>65</sup> Lord Kilbrandon, et al. (1964). ‘Report of The Committee On Children And Young Persons, Scotland’. Edinburgh: HMSO, available at: <https://www.gov.scot/publications/kilbrandon-report/pages/4/> [accessed 23.08.20].

<sup>66</sup> Scottish Government. Child Protection Policy: Children’s hearings, at <https://www.gov.scot/policies/child-protection/childrens-hearings/> [accessed 04.08.20].

<sup>67</sup> Established by the Social Work (Scotland) Act 1968.

<sup>68</sup> s.67, Children’s Hearings (Scotland) Act 2011 (note: since November 2019, when s.3 of the Age of Criminal Responsibility (Scotland) Act 2019 became operational, only children aged 12 and over can be referred on offence grounds). **For a definition of the Children’s Reporter, refer to the Glossary (Appendix IV, pp.64-66).**

<sup>69</sup> s.91, Children’s Hearings (Scotland) Act 2011.

<sup>70</sup> s.28(2), Children’s Hearings (Scotland) Act 2011.

<sup>71</sup> Children’s Hearings (Scotland) Act 2011, Explanatory notes (section 83). **For further discussion of secure care, see section 5 below.**

<sup>72</sup> The reader is directed to the CYPSC submissions on this (n 11).

created for children and has continued to evolve and adapt in line with their rights and needs.<sup>73</sup> It is not, as the CJS is, a punitive, adult system, and instead seeks to respond to offending behaviour on a holistic, welfare-led basis. When decisions are being made about a child before the CHS, the child's welfare must either be the "*paramount consideration*"<sup>74</sup> or, if considered necessary "*for the purpose of protecting members of the public from serious harm*", the "*primary consideration*".<sup>75</sup> Where a child is brought before an adult court as an "*offender*", however, the court is simply required to "*have regard to*" their welfare.<sup>76</sup> This, as McDiarmid<sup>77</sup> and Tisdall<sup>78</sup> point out, is not an ambitious standard and does not comply with the clear requirement in Article 3 UNCRC that the child's best interests must always be (at least) a primary consideration.<sup>79</sup>

The number of CICL coming into contact with both the courts and the CHS has significantly reduced since Scotland's Whole System Approach ('WSA') was introduced in 2011.<sup>80</sup> The WSA, which is underpinned by 'Getting it Right for Every Child',<sup>81</sup> promotes multi-agency working and places a clear emphasis on Early and Effective Intervention for low-level offences;<sup>82</sup> maximising opportunities for diversion from formal measures and prosecution; and adopting holistic and proportionate responses to offending.<sup>83</sup> A key aim of this is to keep children out of the CJS wherever

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<sup>73</sup> For positive commentary on the CHS see: Arthur, R. (n 43); and Doob, A. & Tonry, M. (2004). 'Varieties of youth justice. Youth Crime And Youth Justice: Comparative And Cross-National Perspectives', 31, pp.293-347. For an alternative critique, see: Vaswani, N. & Gillon, F. CYCJ. (2018). 'CYCJ Stakeholder Consultation 2018', p.6, available at: <https://www.cycj.org.uk/wp-content/uploads/2019/01/CYCJ-Stakeholder-Survey-2018.pdf> [accessed 23.08.20]; McGhee, J. & Waterhouse, L. (2002). 'Family support and the Scottish children's hearings system'. *Child & Family Social Work*, 7(4), pp.273–283.

<sup>74</sup> s.25(2), Children's Hearings (Scotland) Act 2011.

<sup>75</sup> s.26, Children's Hearings (Scotland) Act 2011.

<sup>76</sup> s.50(6), Criminal Procedure (Scotland) Act 1995.

<sup>77</sup> McDiarmid, 'Making best interests significant for children who offend' (n 44).

<sup>78</sup> Tisdall, K. (1998). 'Children's best interests versus public safety: How are they balanced?' *The International Journal of Children's Rights*, 6(4), pp.395–405.

<sup>79</sup> **See recommendation (v), p.41 below.**

<sup>80</sup> Lightowler, C. & Nolan, D. CYCJ. (2017). 'The whole system approach: responding to complexity and lessons learned', available at: <https://cycj.org.uk/wp-content/uploads/2017/03/WSA-SASO-update-March-2017.pdf> [accessed 13.08.20]; Scottish Government. (2017). 'Youth justice strategy: progress report', available at <https://www.gov.scot/publications/youth-justice-strategy-preventing-offending-getting-right-children-young-people/>, p.2.

<sup>81</sup> Scottish Government. 'Getting it right for every child (GIRFEC)', available at <https://www.gov.scot/policies/girfec/> [accessed 04.08.20].

<sup>82</sup> **For a definition of Early and Effective Intervention, refer to the Glossary (Appendix IV, pp.64-66).**

<sup>83</sup> Scottish Government. Youth Justice Policy: Whole system approach to young offending, at <https://www.gov.scot/policies/youth-justice/whole-system-approach/> [accessed 23.08.20].

possible and to ensure that, where formal interventions are required, children are dealt with in the CHS and not the adult courts.<sup>84</sup>

Advancing the WSA, together with improving life chances for CICL and ensuring communities are safe from crime, is a key priority of the Scottish Government's youth justice strategy for 2015-20, 'Preventing Offending: getting it right for children and young people'.<sup>85</sup> Since this was launched, the harm that can be caused to children in the CJS has been highlighted by the following reports:

- (i) **Report on an Expert Review of the Provision of Mental Health Services at HMP YOI Polmont, May 2019 ('the Polmont Review');**<sup>86</sup>
- (ii) **Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty, November 2019 ('the Global Study');**<sup>87</sup>
- (iii) **'The Promise', Scottish Independent Care Review, February 2020.**<sup>88</sup>

In response to these reports, and in line with its vision of "*making Scotland the best place to grow up*",<sup>89</sup> the Scottish Government has repeatedly reaffirmed its commitment to seeing continued falls in the number of children entering the CJS.<sup>90</sup>

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<sup>84</sup> Scottish Government. (June 2015). 'Preventing offending: getting it right for children and young people, Our Youth Justice Strategy for 2015 to 2020', available at: <https://www.gov.scot/publications/preventing-offending-getting-right-children-young-people/pages/3/> [accessed 23.08.20].

<sup>85</sup> Ibid.

<sup>86</sup> HM Inspectorate of Prisons for Scotland. (May 2019). 'Report on an Expert Review of the Provision of Mental Health Services, for Young People Entering and in Custody at HMP YOI Polmont' ('the Polmont Review'), available at: [https://www.prisonsscotland.gov.uk/sites/default/files/publication\\_files/Report%20on%20Expert%20Review%20of%20Provision%20of%20Mental%20Health%20Services%20at%20HMP%20YOI%20Polmont%20-%20Final%20Version.pdf](https://www.prisonsscotland.gov.uk/sites/default/files/publication_files/Report%20on%20Expert%20Review%20of%20Provision%20of%20Mental%20Health%20Services%20at%20HMP%20YOI%20Polmont%20-%20Final%20Version.pdf) [accessed 13.08.20].

<sup>87</sup> United Nations. (October 2019). 'The United Nations Study on Children Deprived of Liberty' ('the Global Study'), available at: <https://www.refworld.org/docid/5ee761384.html> [accessed 13.20.20].

<sup>88</sup> Independent Care Review. (May 2020). 'The Promise', available at: <https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf> [accessed 13.08.20].

<sup>89</sup> Scottish Government. Children and families, at: <https://www.gov.scot/children-and-families/> [accessed 04.08.20].

<sup>90</sup> See, for example: Scottish Government. (Feb 2020). 'Report of Independent Care Review: First Ministers speech', available at: <https://www.gov.scot/publications/statement-report-independent-care-review/> [accessed 13.08.20]; Scottish Government. (June 2019). 'Ministerial Statement: Response to the Expert Review of Mental Health Services for Young People Entering and in Custody at HMP and YOI Polmont', available at: <https://news.gov.scot/speeches-and-briefings/ministerial-statement-response-to-the-expert-review-of-mental-health-services-for-young-people-entering-and-in-custody-at-hmp-and-yoi-polmont> [accessed 13.08.20].

## 2.1. Between rhetoric and reality: children aged 16/17 in Scotland

Whilst the above commitments are welcomed, further progress will be limited by the fact that many 16 and 17 year olds are excluded from the CHS as they are not recognised as children in Scots law. In fact, whilst the Kilbrandon Report is often hailed for the paradigmatic change it brought about in Scotland's approach to CICTL,<sup>91</sup> it was Lord Kilbrandon who first recommended 16 and 17 year olds be dealt with in the adult system, seeing "*little purpose in subjecting them to a procedure which purports to treat them as children*".<sup>92</sup> The consequence of this is that, of those remaining children who are still being dealt with in the CJS, the overwhelming majority are aged 16/17. In the years 2016/17 through to 2018/19, 99% of under 18s convicted in the CJS were aged 16/17.<sup>93</sup>

The source of this anomaly is the definition of a child in Scots law. Children under 16, or aged 16/17 if subject to a CSO ('under supervision'), are legally recognised as 'children' in the Children (Scotland) Act 1995;<sup>94</sup> the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act')<sup>95</sup> (which governs Scots criminal procedure); and the Children's Hearings (Scotland) Act 2011 ('the 2011 Act')<sup>96</sup> (which sets out the referral criteria for the CHS). Where a child has turned 16 between the date of referral to the Reporter and the date of a decision (an 'open referral'),<sup>97</sup> or is aged 16/17 and has been remitted to the CHS for sentencing by a sheriff,<sup>98</sup> they are also regarded as 'children' under the 2011 Act. However, 16 and 17 year olds who fall outside this criteria (including, notably, those who are 'looked after' but on a voluntary, not compulsory, basis) are regarded as adults and dealt with in the CJS.

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<sup>91</sup> Whyte, B. (May 2014). 'Young People in Conflict with the Law in Scotland - 50 Years after the Kilbrandon report. What does contemporary policy and practice tell us about our progress since and about the legacy of Kilbrandon?', Sutherland Trust Lecture Spring (May) 2014, available at: <https://pdfs.semanticscholar.org/5ba4/af8c8764fd3e6848b8cf0c741aab88612fe7.pdf%20-> [accessed 13.08.20].

<sup>92</sup> Lord Kilbrandon et al (n.65), p.41.

<sup>93</sup> See Table 2 (Appendix II, p.60).

<sup>94</sup> s.93(2)(b)(i) & (ii), Children (Scotland) Act 1995.

<sup>95</sup> s.307, Criminal Procedure (Scotland) Act 1995.

<sup>96</sup> s.199, Children's Hearings (Scotland) Act 2011.

<sup>97</sup> s.199(4), Children's Hearings (Scotland) Act 2011.

<sup>98</sup> s.199(9), Children's Hearings (Scotland) Act 2011 (remittal power under s.49(7)(b) of the Criminal Procedure (Scotland) Act 1995). [For further discussion of this, see pp.32-33 below].

More recent legislation, including the Criminal Justice (Scotland) Act 2016,<sup>99</sup> correctly defines a child as a person under the age of 18. However, so entrenched is the earlier definition of a child in Scotland’s justice framework, that many older children are nonetheless treated as adults in practice.<sup>100</sup> The consequence of this, as the Scottish Government itself states, is that Scotland is *“the only western European country to routinely deal with 16 and 17 year olds in the criminal justice system”*.<sup>101</sup> As one young person, who was 16 when their case went to court, explained:

***“They just said I was still fully responsible as a woman...I guess at the time because that’s how they treated me I thought ‘oh well I am’...I didn’t see myself as a child, I thought ‘oh well I obviously am completely responsible for this, I am a woman, and do deserve this punishment’...at the time I didn’t question it”***

Young person with criminal justice experience,  
Interviewed by the writer July 2020

This position is, seemingly, overlooked when celebrating Scotland’s ‘unique’ approach to child justice and has significant implications for UNCRC compliance.

### 3. The importance of age

***“Ensure that children in conflict with the law are always dealt with within the juvenile justice system up to the age of 18 years”***

Committee on the Rights of the Child, Concluding observations on the UK, 2016

102

Across all relevant international and regional instruments, including the UNCRC, the UN Rules<sup>103</sup> and the COE Guidelines,<sup>104</sup> there is a broad consensus that **all persons under 18 are children** and are universally entitled to special protection until (at

<sup>99</sup> The Criminal Justice (Scotland) Act 2016 makes provision on criminal justice matters including policing, criminal evidence and sentencing.

<sup>100</sup> Dyer, F. CYCJ. (Jan 2016). ‘Young People at Court in Scotland’, available at: <https://cycj.org.uk/wp-content/uploads/2016/02/YoungPeopleAtCourtFINAL.pdf> [accessed 13.08.20].

<sup>101</sup> Scottish Government. (2011). ‘Assisting young people aged 16 and 17 in court’, available at: <https://www.gov.scot/publications/assisting-young-people-aged-16-17-court/pages/7/> [accessed 13.08.20]. See also: Piacentini, L. & Walters, R. (2006). ‘The Politicization of Youth Crime in Scotland and the Rise of the ‘Burberry Court’, Youth Justice, 6(1), pp.43–59.

<sup>102</sup> UN Committee on the Rights of the Child, COs 2016 (n 7), para.79(b), p.22.

<sup>103</sup> Havana Rules (Rule 11(a)); Beijing Rules (Rule 2).

<sup>104</sup> COE Guidelines, Part II (Definitions). Also mirrored in Article 1, European Convention on the Exercise of Children’s Rights.

least<sup>105</sup>) the age of 18.<sup>106</sup> This is unequivocally supported by the Committee's jurisprudence, including:

- General Comment No.4 on Adolescent Health: "*adolescents up to 18...are holders of all the rights enshrined in the Convention; they are entitled to special protection...*";<sup>107</sup>
- GC No.20: "*persons up to the age of 18...are entitled to continuing protection...*"<sup>108</sup>

In the context of child justice, the Committee further states:

- GC No.24: "*The upper age limit of the juvenile justice system...is universally fixed at 18...and corresponds to the definition of a child...in Article 1...every person under...18...at the time of the...offence has the right to be treated in accordance with the rules of juvenile justice, in a specific and specialized system...*";<sup>109</sup>
- GC No.24: state parties that limit the applicability of their child justice system to children under 16 must "*change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under...18...at the time of the offence*";<sup>110</sup>
- GC No.20: the Committee "*calls on States to maintain the age of criminal majority at 18*".<sup>111</sup>

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<sup>105</sup> Beijing Rules, Rule 3.3: '*Efforts shall also be made to extend the principles embodied in the Rules to young adult offenders*'. A discussion of this is outside the scope of this report, but for further details see: Herweijer M. & Van der Laan, P. (2018), '*Applying juvenile criminal law to young adult offenders. A promising innovation of the justice system in the Netherlands?*', presentation at the World Congress on Justice for Children 2018, UNESCO Paris; Perker, S., Chester, LEH., & Beyene, Y. (2018). '*Defining the Age of Juvenile Justice Jurisdiction: Current Practices and the Need for Reform*', presentation at the World Congress on Justice for Children 2018, UNESCO Paris. Both available at: <https://2018.justicewithchildren.org/en/home/> [accessed 22.08.20].

<sup>106</sup> Of note, this is firmly established in England & Wales. See, for example, The Queen on the Application of HC (A child, by his litigation friend CC) -v- The Secretary of State for the Home Department [2013] EWHC 982 (Admin).

<sup>107</sup> UN Committee on the Rights of the Child (CRC), 'General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child', 1 July 2003, CRC/GC/2003/4 ('GC No.4'), p.1, available at: <https://www.refworld.org/docid/4538834f0.html> [accessed 22.08.20].

<sup>108</sup> UN Committee on the Rights of the Child, GC No.20 (n 55), para.40, p.11.

<sup>109</sup> UN Committee on the Rights of the Child, GC No.24 (n 35), para.37, p.10.

<sup>110</sup> Ibid, para.40, p.10.

<sup>111</sup> UN Committee on the Rights of the Child, GC No.20 (n 55), para.88, p.23.

Setting age limits (both minimum and maximum) may be necessitated by the principle of legal certainty and the rule of law, but will always be arbitrary to a degree, for every child develops in a unique way.<sup>112</sup> Advances in developmental psychology and neuroscience have, however, highlighted “*consistent and universal differences*” in the functioning of children and adults.<sup>113</sup> This, as the Committee advises in GC No.24, means that children under 18 are not only less culpable than adults, but also require different treatment on account of their distinct needs.

In adolescent brains, the amygdala is more developed than the prefrontal cortex. This, as McDiarmid explains, means that even for adolescents who appear more ‘advanced’ in intellect, their “*decision-making tends to be more instinctive and directed by emotion (these being amygdala properties) than rational and considered (these belonging to the prefrontal cortex)*”.<sup>114</sup> Consequently, adolescents are more susceptible to peer influence and have an increased propensity to engage in impulsive, risky and sensation-seeking behaviours,<sup>115</sup> all of which are reflected in offending.<sup>116</sup> They may thus make decisions that, Bryan-Hancock argues, “*would not be made by an individual functioning at an adult level*”.<sup>117</sup> Additionally, the process of psychological maturation (through which one develops the skills required to function in everyday life, including social and emotional competence) is believed to continue until at least the age of 19.<sup>118</sup> This evidence is reflected in the offending patterns for children and young people, with

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<sup>112</sup> Hollingsworth, K. (2007). ‘Responsibility and Rights: Children and Their Parents in the Youth Justice System’. *International Journal of Law, Policy and the Family*, 21(2), pp.190–219.

Note: for the argument that a more nuanced approach, with capacity assessed on a case-by-case basis, should therefore be taken, see: McDiarmid, C. (2016). ‘After the age of criminal responsibility: a defence for children who offend’. *Northern Ireland legal quarterly*, 67(3), p.327; Delmage, ‘The Minimum Age of Criminal Responsibility’ (n 52).

<sup>113</sup> Delmage, ‘The Minimum Age of Criminal Responsibility’ (n 52), p.108. See also Scottish Sentencing Council. (April 2019). ‘Youth offending and sentencing in Scotland and other jurisdictions Literature review’, available at: <https://www.scottishsentencingcouncil.org.uk/media/1961/youth-offending-and-sentencing-in-scotland-and-other-jurisdictions-literature-review-2.pdf> [accessed 23.08.20], noting “*compelling evidence*” that the brain does not fully mature until at least 25.

<sup>114</sup> McDiarmid, ‘After the age of criminal responsibility’ (n 112), p.331, citing Walsh, C. (2010). ‘Youth Justice And Neuroscience: A Dual-Use Dilemma’. *British journal of criminology*, 51(1), pp.21–39.

<sup>115</sup> Delmage, ‘The Minimum Age of Criminal Responsibility’ (n 52); Bryan-Hancock, C. (2011). ‘Young People and the Justice System: Consideration of Maturity in Criminal Responsibility’. *Psychiatry, Psychology and Law*, 18(1), pp.69–78.

<sup>116</sup> Ramoutar, K., & Farrington, P. (2006). ‘Are the same factors related to participation and frequency of offending by male and female prisoners?’ *Psychology, Crime & Law*, 12(5), pp.557–572.

<sup>117</sup> Bryan-Hancock, ‘Young People and the Justice System’ (n 115), p.74.

<sup>118</sup> *Ibid.*

anti-social behaviour and offending known to peak in the upper teenage years and then decline between the ages of 18-21.<sup>119</sup>

In addition to behavioural differences, the developmental status of children, combined with the mere fact of their younger age, means that they possess greater capacity for change and reintegration than adults.<sup>120</sup> The “*newly emerging abilities, strengths and skills*”<sup>121</sup> that children acquire throughout adolescence makes the end of their teenage years (ages 15-17 in particular) “*great ages when they have the capacity to expand*”.<sup>122</sup> This also means that formal interventions are likely to have a disproportionate impact on their lives in contrast to adult offenders, hence the need, as stated in GC No.24, to respond “*to juvenile delinquency in ways that support the child’s development*”.<sup>123</sup>

### **3.1. Age in Scots law**

A primary reason for the current anomaly in Scots law, which may also explain some of the resistance to change,<sup>124</sup> are the competing views on the definition of a child in the UNCRC and how this should translate into domestic law. Whilst Article 1 UNCRC clearly states that “*a child means every human being below the age of 18*”, it also permits an exception where, under the applicable domestic law, majority is attained earlier. A common mistake when interpreting this provision is to overlook the important distinction between different types of rights. This can lead to a (misconceived) view that, if age-based criteria is raised in certain areas, children’s autonomy and the participation rights they are entitled to at an earlier age (for example, to vote at 16)<sup>125</sup> will be undermined. Decision-making competence is, however, affected by the nature of the environment (supportive or otherwise) and is thus context specific.<sup>126</sup> Although children in Scotland do attain an array of decision-making rights prior to turning 18,<sup>127</sup>

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<sup>119</sup> Lynch, “The Other Child” (n 43).

<sup>120</sup> Lynch, ‘What is left in the ‘Too Hard Basket’?’, (n 53).

<sup>121</sup> UN Committee on the Rights of the Child, GC No.20 (n 55), para.9, p4.

<sup>122</sup> Quote from Dr Tracy Kirk, Lecturer in Law, Glasgow Caledonian University, in conversation with the writer 22.07.20. Notes are held on file.

<sup>123</sup> UN Committee on the Rights of the Child, GC No.24 (n 35), para.13, p.5.

<sup>124</sup> An issue that has been highlighted by practitioners interviewed for this report, including the Children and Young People’s Centre for Justice (interviewed 19.06.20 & 02.07.20). Interview notes are held on file.

<sup>125</sup> Age of Legal Capacity (Scotland) Act 1991.

<sup>126</sup> With thanks to Dr Tracy Kirk, Lecturer in Law, Glasgow Caledonian University, for drawing this point to the writer’s attention.

<sup>127</sup> Note, however, that certain of these rights have come under criticism, including subscription to the armed forces at 16 (see Together, ‘State of Children’s Rights’ (n 17), p.151).

and this is consistent with their evolving capacities as they transition from childhood to adulthood,<sup>128</sup> this does not mean that they lose their right to protection.<sup>129</sup> Rather, and as the Committee states in GC No.20, *“the right to exercise increasing levels of responsibility does not obviate States’ obligations to guarantee protection”*.<sup>130</sup>

This was a theme raised by the CYPCS YAG, including one young person who stated:

***“In Scotland it feels very much that 16 feels to be more like the change age rather than 18...[but]...you’re a child up to 18 as defined by [the UNCRC]...we can vote at 16 in Scotland but that’s as a young person, not an adult”***

Member of CYPCS Young Advisers Group  
Interviewed by the writer August 2020

A helpful distinction is made here by Child Rights International Network between situations where: (a) the child’s protection is at risk (where special protection is required until 18); (b) the child’s capacity may be arbitrarily denied (where a minimum age is necessary); and (c) age-based restrictions may curtail a child’s development or civil rights and serve no protective purpose (where there should be no age-based criteria).<sup>131</sup> Due to the potential for children to suffer harm in the CJS,<sup>132</sup> the UNCRC rights relating specifically to child justice issues (Articles 37 and 40) fall clearly into category (a). This is clearly supported by the Committee’s consistent requests, in the context of child justice, for state parties that recognise a lower age of majority to review this.<sup>133</sup> Protection and participation are not, in any event, necessarily mutually exclusive, and recognising children’s autonomy, while also acknowledging the need to protect them, is not a concept the UK courts are unfamiliar with.<sup>134</sup>

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<sup>128</sup> UNCRC (Article 4).

<sup>129</sup> UN Committee on the Rights of the Child (CRC), GC No.4 (n 107).

<sup>130</sup> UN Committee on the Rights of the Child, GC No.20 (n 55), para.19, p.6. Also noted by the UN Human Rights Committee (HRC), CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989, available at: <https://www.refworld.org/docid/45139b464.html> [accessed 22.08.20].

<sup>131</sup> Child Rights International Network (‘CRIN’). (2016). ‘Age is Arbitrary: setting minimum ages’, available at: [https://archive.crin.org/sites/default/files/discussion\\_paper\\_-\\_minimum\\_ages.pdf](https://archive.crin.org/sites/default/files/discussion_paper_-_minimum_ages.pdf) [accessed 22.08.20].

<sup>132</sup> See, for example, Child Rights International Network (‘CRIN’). (2013). ‘Stop Making Children Criminals’, available at: [https://archive.crin.org/sites/default/files/crin\\_policy\\_paper\\_-\\_stop\\_making\\_children\\_criminals.pdf](https://archive.crin.org/sites/default/files/crin_policy_paper_-_stop_making_children_criminals.pdf) [accessed 22.08.20]. **[See also sections 4 and 5 below].**

<sup>133</sup> See, for example, Concluding observations on Mozambique (2002) (CRC/C/15/Add.172), Sri Lanka (2003) (CRC/C/15/Add.207), Dominica (2004) (CRC/C/15/Add.238) and Saudi Arabia (2006) (CRC/C/SAU/CO/2), all noted in UNICEF. ‘Implementation Handbook’ (n 30), p.3.

<sup>134</sup> See, for example, Re S (A Minor) (Independent Representation) [1993] Fam 263; Roddy (A Child) (Identification: Restriction on Publication), Re, [2004] E.M.L.R. 8 (2003); Mabon v Mabon [2005] 3

Even where lower minimum ages are recognised, this must also be consistent with the text and spirit of the UNCRC, including its four general principles.<sup>135</sup> The differential treatment that 16 and 17 year olds in Scotland are subjected to, by comparison to their counterparts in the rest of the UK who are universally recognised (*and protected*) as children, is not consistent with the non-discrimination principle.<sup>136</sup> Such a concern was noted by the Committee in its Concluding Observations on the UK in 2002, specifically recommending that the UK “*monitor the comparative enjoyment by children of their rights*” (including, specifically, children aged 16-18) in its separate jurisdictions, yet still lies unaddressed in Scotland. This has significant consequences in terms of trial in adult courts and punitive detention, which will now be explored in turn.

#### 4. Children at court

***“The Committee recommends that “children in conflict with the law are always dealt with within the juvenile justice system and never tried as adults in ordinary courts, irrespective of the gravity of the crime they are charged with”***  
Committee on the Rights of the Child, Concluding observations on the UK, 2008

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##### 4.1. IHRL standards

Article 40(3)(b) UNCRC provides that state parties shall establish measures for dealing with CICL without resorting to judicial proceedings. This is echoed in the Beijing Rules (Rule 11) and the COE Guidelines (Guideline 24). However, where judicial proceedings are absolutely required, this should take place in a child-specific

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WLR 460; *The Queen on the application of Just for Kids Law v Secretary of State for the Home Department* [2019] EWHC 1772 (Admin). With thanks to Dr Tracy Kirk for discussion with the writer on this point.

<sup>135</sup> UNICEF. ‘Implementation Handbook’ (n 30).

<sup>136</sup> See CYPCS. (May 2020). ‘A new emergency Bill around Coronavirus is before the Scottish Parliament today. Here are two amendments that would protect young people’s rights’, available at: <https://cypcs.org.uk/news-and-stories/a-new-emergency-bill-around-coronavirus-is-before-the-scottish-parliament-today-here-are-two-amendments-that-would-protect-young-peoples-rights/>, for details of the most recent manifestation of this.

<sup>137</sup> UN Committee on the Rights of the Child (CRC), ‘Concluding observations: United Kingdom of Great Britain and Northern Ireland, 20 October 2008’, CRC/C/GBR/CO/4 (‘COs 2008’), para.78(c), p.19, available at: <https://www.refworld.org/docid/4906d1d72.html> [accessed 22.08.20]. Also noted in: UK’s Children’s Commissioners’ Recommendations. (May 2016). UN Committee on the Rights of the Child, Examination of the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, para.86, p.15, available at: <https://www.niccy.org/media/2461/uk-childrens-commissioners-final-recommendations-crc-examination-of-the-uk-2016.pdf> [accessed 22.08.20].

institution (Article 40(3)), such as a specialist juvenile court,<sup>138</sup> as seen in many European jurisdictions including England and Wales, Germany and Belgium.<sup>139</sup> The Committee has consistently advised state parties that **children under 18 should never be tried as adults in adult courts**, including in its Concluding Observations on the UK in 2002,<sup>140</sup> 2008<sup>141</sup> and 2016.<sup>142</sup> The Office of the UN High Commissioner for Human Rights, the UN Office on Drugs and Crime and the UN Special Representative of the Secretary-General on Violence Against Children are among the bodies who support this position, collectively advising that “*states should establish child-friendly courts and procedures which should include the prohibition of referral to adult courts*”.<sup>143</sup> It is of particular note that the International Criminal Court has no jurisdiction over anyone who was under 18 at the time of their alleged offence.<sup>144</sup>

#### 4.2. The domestic framework

CICL under 16, or aged 16/17 subject to a CSO or to an open referral, who cannot be effectively managed through informal measures or otherwise diverted, can be brought before the CHS. Even here, however, the Lord Advocate’s Guidelines on Joint Reporting<sup>145</sup> provide that the following offences must be jointly reported to the Reporter and the Procurator Fiscal (‘PF’):

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<sup>138</sup> UN Committee on the Rights of the Child, GC No.24 (n 35).

<sup>139</sup> Dünkel, F. (2014). ‘Juvenile Justice Systems in Europe – Reform developments between justice, welfare and ‘new punitiveness’. *Criminology Studies* 1(1), 2014–01-01, Vol.1 (1).

<sup>140</sup> UN Committee on the Rights of the Child (CRC), ‘UN Committee on the Rights of the Child: Concluding observations: United Kingdom of Great Britain and Northern Ireland, 9 October 2002’, CRC/C/15/Add.188, para.60(b), p.16, available at: <https://www.refworld.org/docid/3df58f087.html> [accessed 22.08.20].

<sup>141</sup> UN Committee on the Rights of the Child (CRC), COs 2008 (n 137).

<sup>142</sup> UN Committee on the Rights of the Child, COs 2016 (n 7), para.78(b), p.21. Note similar recommendations have been made to other state parties including, for example, in Concluding observations on Ethiopia (2001) (CRC/C/15/Add.144), Canada (2003) (CRC/C/15/Add.215) and Belgium (2010) (CRC/C/BEL/ CO/3-4).

<sup>143</sup> UN Human Rights Council. (2012). ‘Joint Report of the High Commissioner for Human Rights, The United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence Against Children on prevention of and responses to violence against children within the juvenile justice system’, 27 June 2012, A/HRC/21/25, para.87, p.17, available at: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-25\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-25_en.pdf) [accessed 22.08.20].

<sup>144</sup> Rome Statute of the International Criminal Court, adopted 1998, entered into force July 1 2002 (Article 26).

<sup>145</sup> The Crown Office and Procurator Fiscal Service (‘COPFS’). ‘Lord Advocate’s Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children’, available at: [https://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Lord\\_Advocates\\_Guidelines/Lord%20Advocates%20Guidelines%20offences%20committed%20by%20children.pdf](https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Lord_Advocates_Guidelines/Lord%20Advocates%20Guidelines%20offences%20committed%20by%20children.pdf) [accessed 22.08.20].

- (i) The most serious offences that give rise to solemn proceedings;
- (ii) Offences that may result in disqualification from driving (for children aged 15 and over);
- (iii) The majority of offences committed by children aged 16/17 under supervision.<sup>146</sup>

For children under 16, prosecution is only permitted with the instruction of the Lord Advocate<sup>147</sup> and, since June 2019, there has been a presumption that *all* jointly reported cases will be referred to the Reporter, thus being dealt with in the CHS.<sup>148</sup> Promisingly, the proportion of children aged 16/17 being retained by the PF has gradually decreased, from 43% in 2016/17 to 31% in 2018/19 (**Figure 1, p.31**).<sup>149</sup> This is consistent with the aspirations of the WSA and IHRL. However, these provisions do not extend to children aged 16/17 who are not subject to a CSO or to an open referral. As a result, where such children cannot be effectively managed through alternative measures, they are prosecuted in the adult courts and may be subject to adult disposals.<sup>150</sup> It has even been found that children aged 16/17 who are not under supervision are twice as likely to be prosecuted as those who are.<sup>151</sup>

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<sup>146</sup> For further guidance on this, see CYCJ, 'A Guide to Youth Justice in Scotland' (n 62), section 2, p.10. **For a definition of the Procurator Fiscal, refer to the Glossary (Appendix IV, pp.64-66).**

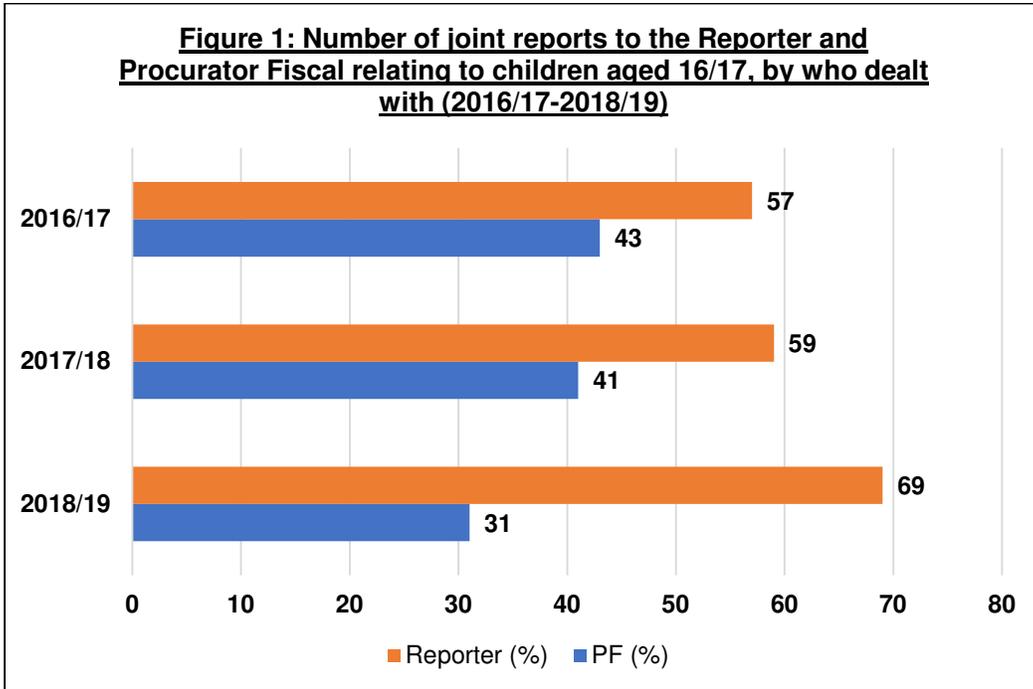
<sup>147</sup> s.42(1), Criminal Procedure (Scotland) Act 1995.

<sup>148</sup> COPFS and Scottish Children's Reporter Administration ('SCRA'). (June 2019). 'Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter', available at: <https://www.copfs.gov.uk/images/2019%2006%2013%20Joint%20Agreement%20COPFS%20and%20SCRA%20Decision%20Making%20in%20Jointly%20Reported%20Cases.pdf> [accessed 22.08.20].

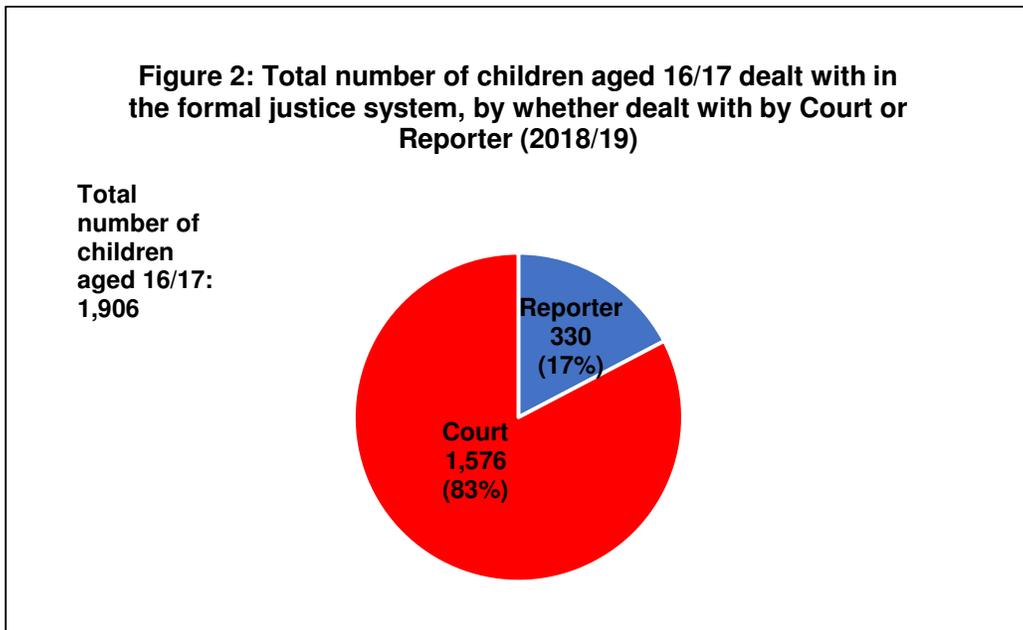
<sup>149</sup> Data provided by the Scottish Children's Reporter Administration ('SCRA') to the writer, May 2020. Note from SCRA: "*this data is based on live operational data and as such may change over time and will not necessarily match data published as part of SCRA's Official Statistics. This data includes offence referrals marked as additional so will include some referrals which are filtered out from the official statistics due to being mis-recorded. Joint report retention is also calculated on the basis of whether a ground has been added or not which is slightly different than current official statistics methodology*".

<sup>150</sup> Dyer, 'Young People at Court in Scotland' (n 100).

<sup>151</sup> Inspectorate of Prosecution in Scotland, 'Prosecution of young people' (n 58).

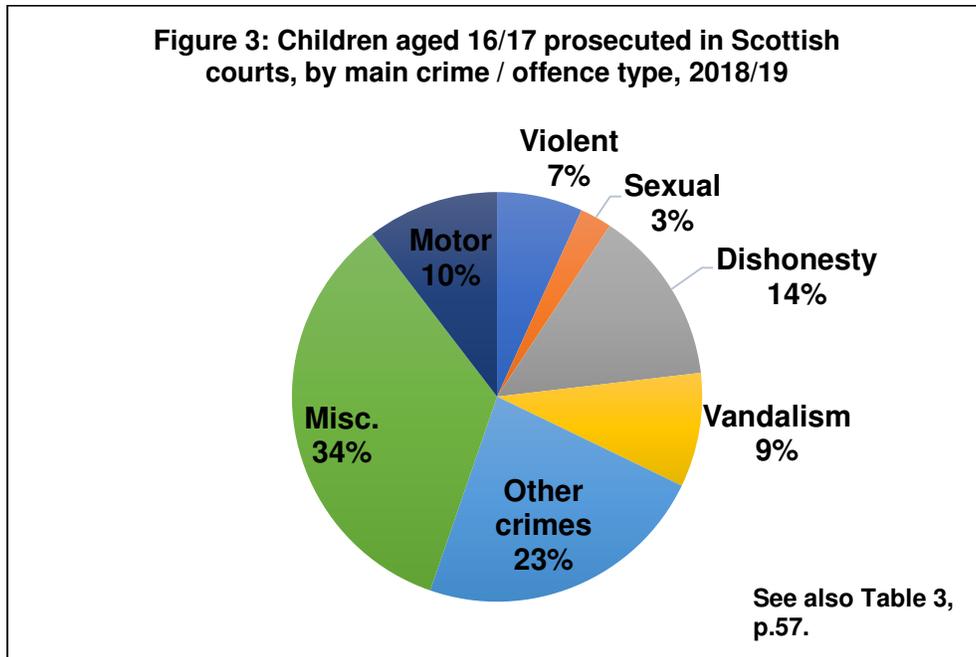


In 2018/19, 1,906 children aged 16/17 came into contact with the courts and the CHS for offending, **1,576 (83%)** of whom were dealt with in the courts:<sup>152</sup>



<sup>152</sup> See also Figure 4 (Appendix II, p.59) for details of previous years and trends.

It should be noted that the majority of these children were not charged with serious offences, with “*other crimes*” (namely, crimes against public justice, handling offensive weapons, drugs and other crime) and “*miscellaneous offences*” (common assault, breach of the peace, drunkenness and other disorderly conduct, urinating and other miscellaneous offences) being the most common.<sup>153</sup> Sexual crimes and violent crimes were the least common, making up 3% and 7% respectively:<sup>154</sup>



### Reference and remittal powers

If any child aged 16/17 is charged in summary procedure (for the less serious offences, such as drunkenness and other disorderly conduct)<sup>155</sup> and is not within six months of

<sup>153</sup> A similar observation was made by Lightowler, ‘Rights Respecting?’ (n 1), in relation to the comparable data from 2017/18.

<sup>154</sup> Data provided by Scottish Government Justice Analytical Services (‘JAS’) to the writer, July 2020. Note from JAS: “*individuals are counted once for each occasion they are proceeded against. If they are proceeded against more than once on the same day, each proceeding will be counted separately. The reference year used is the year in which the individual is sentenced and the age of each person is calculated as at the date of sentence or acquittal. Crimes / offences are categorised in accordance with the Scottish Criminal Proceedings database. Further information is available from the ‘Criminal Proceedings in Scotland, 2018-19’ bulletin, available online at: <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/>. The latest available criminal proceedings statistics are up to and including 2018-19. Information for 2019-20 will not be available until publication of the ‘Criminal Proceedings in Scotland, 2019-20’ statistical bulletin. This is expected to be published towards the end of 2020.*”

<sup>155</sup> For a definition of summary and solemn procedure, refer to the Glossary (Appendix IV, pp.64-66).

their eighteenth birthday, the court does at that stage have discretion under the 1995 Act to request the Reporter to arrange a Children’s Hearing to obtain advice as to that child’s treatment (s.49(6)) and, following this, may remit the case to the CHS for disposal (sentencing) (s.49(7)). However, this is not mandatory. In cases involving children under supervision, whether charged in summary or solemn proceedings, in contrast, the Justice of the Peace (‘JP’) or Sheriff Court *must* (and the High Court may) obtain advice on their treatment and, thereafter, may either dispose of the case itself or remit it to the Reporter (s.49(3)).<sup>156</sup>

The s.49 powers are only used in a small proportion of cases.<sup>157</sup> In 2018/19, only 6% of children aged 16/17 who were convicted in the Scottish courts had their cases remitted to the CHS for disposal (**Figure 6, p.47**). Hearings for advice, furthermore, took place for only 104 children, this amounting to 7% of the total children (across all ages) prosecuted in the courts.<sup>158</sup>

A criminal trial, whether in the Sheriff Court, JP Court or High Court, is an adversarial process, designed to determine guilt and impose punishment. It is not, as the CHS is, a child-centred process concerned with addressing the child’s needs. The disparity that results here was highlighted by a response from one young person:

***“I still don’t understand why the Children’s Reporter didn’t recommend I have a Children’s Hearing...I feel like that’s one of the things that would have protected and actually prevented me doing some of these things in the first place...”***

Young person with criminal justice experience,  
Interviewed by the writer July 2020

For children with previous experience of the CHS, the transition into the court environment may also be particularly abrupt.<sup>159</sup> This is exacerbated further by concerns, expressed by practitioners interviewed for this report, that CSOs are

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<sup>156</sup> Note: even here, these powers do not apply to offences for which the sentence is fixed in law, including murder (s.49(5), Criminal Procedure (Scotland) Act 1995). **For a discussion of sentencing in murder cases, refer to the full version of this report.**

<sup>157</sup> This issue was also raised by the Independent Care Review (n 88).

<sup>158</sup> Data provided by the SCRA to the writer, May 2020 (seen 151).

<sup>159</sup> Notably, an observation that was made by the Scottish Prisons Commission in their 2008 report, ‘Scotland’s Choice’, available at: <https://www2.gov.scot/Publications/2008/06/30162955/0> [accessed 22.08.20].

sometimes prematurely terminated upon the approach to a child's sixteenth birthday.<sup>160</sup>

#### 4.3. The right to a fair trial and effective participation

***“Establish structures for the active and meaningful participation of children”, paying particular attention to “children in vulnerable situations”***

Committee on the Rights of the Child, Concluding observations on the UK, 2016

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In addition to the clear implications for Article 40(3) UNCRC, it can be questioned whether the child's right to a fair trial can ever be fully realised in an adult court. Such a concern was noted by the Independent Care Review and has been raised by all practitioners interviewed for this report.<sup>162</sup> As one member of staff at a secure care unit stated:

***“The fear of going to court is strong; the court environment needs to be bespoke and suited to children's needs”***

Member of staff at secure care unit  
Interviewed by the writer July 2020

Article 40(2)(b)(iii) UNCRC requires that the right to a fair trial must be 'ensured', thus imposing an affirmative obligation *“to take whatever measures are necessary”* to enable all children to enjoy and exercise it.<sup>163</sup> A fundamental aspect of this is the right to effectively participate in proceedings (Articles 12(2) and 40(2)(b)(iv) UNCRC), requiring that children be enabled to express their views freely throughout all stages of the justice process and that such views be given due weight according to their age and maturity.<sup>164</sup>

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<sup>160</sup> This includes practitioners at a Scottish secure care unit (name withheld for anonymity purposes) (interviewed 23.07.20). Similar concerns were expressed to the writer by practitioners at the Children and Young People's Centre for Justice (interviewed 19.06.20 & 02.07.20). Interview notes are held on file.

<sup>161</sup> CRC Committee, COs 2016 (n 7), para.31(a), p.7.

<sup>162</sup> This includes practitioners at a Scottish secure care unit (n 160). Similar concerns were expressed to the writer by practitioners at the Children and Young People's Centre for Justice (n 160). Interview notes are held on file.

<sup>163</sup> Alston, P. 'The legal framework of the Convention on the Rights of the Child', Bulletin of Human Rights, 91/2, p.5, noted in UNICEF, 'Implementation Handbook' (n 30).

<sup>164</sup> UN Committee on the Rights of the Child, GC No.24 (n 35); UN Committee on the Rights of the Child (CRC), 'General comment No.12 (2009): The right of the child to be heard', 20 July 2009, CRC/C/GC/12, ('GC No.12'), available at: <https://digitallibrary.un.org/record/671444?ln=en> [accessed 22.08.20].

Lundy describes the right to participation as one of the “*most crucial dimensions of a modern child rights lens*”, for recognising children not as passive objects, but as independent rights-holders and active agents in their own lives.<sup>165</sup> The imbalance of power, and consequent substantial disadvantage, that children are subjected to “*by the very nature of criminal proceedings*” (Lord Dyson, *McGowan (Procurator Fiscal, Edinburgh) v B*)<sup>166</sup> makes effective participation especially important. Understanding decisions, and the role they have played in this, has also been shown to increase the likelihood of a child complying with the court’s directions.<sup>167</sup> Conversely, where participation is denied, “*a self-fulfilling cycle of learned helplessness*” may result, with the child reacting against adult instruction due to their perception that they are not being taken seriously.<sup>168</sup> Indeed, if children are unable to effectively participate and understand proceedings, then one of the very purposes of the criminal law – to communicate a message that one should refrain from certain acts – is defeated.

#### 4.3.1. Requirements

In all proceedings, the child must be dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacities (*T v UK*).<sup>169</sup> As stated in General Comment No.12 on the child’s right to be heard (‘GC No.12’), environments that are “*intimidating, hostile, insensitive or inappropriate*” for the child’s age are fundamentally incompatible with effective participation.<sup>170</sup> Hearings must therefore be “*conducted in an atmosphere of understanding*” (Rule 14.2, Beijing Rules);<sup>171</sup> be accessible and child-appropriate (GC No.24); and be centred on the

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<sup>165</sup> Lundy, L. (2019). ‘A Lexicon for Research on International Children’s Rights in Troubled Times’. *The International Journal of Children’s Rights*, 2019(4), pp.595–601, p.596.

<sup>166</sup> [2011] UKSC 54. Similar observations were also made in: *Delcourt v Belgium* [1971] EHRR 355, para.28; *R (D) v Camberwell Green Youth Court* [2005] UKHL 4 [2005] 1WLR 393, paras.58-61; *V v United Kingdom* [1999] 30 EHRR 121, 179 para.86; *R (S) v Waltham Forest Youth Court & Ors* [2004] EWHC 715 (Admin).

<sup>167</sup> Bevan, M. (2016). ‘Investigating young people’s awareness and understanding of the criminal justice system: An exploratory study’, available at: <https://howardleague.org/wp-content/uploads/2016/06/Investigating-young-people%E2%80%99s-awareness-and-understanding-of-the-criminal-justice-system.pdf> [accessed 22.08.20].

<sup>168</sup> Rap, S. (2016). ‘A Children’s Rights Perspective on the Participation of Juvenile Defendants in the Youth Court’. *The International Journal of Children’s Rights*, 24(1), pp.93–112, citing Lansdown, G. (2005). ‘The evolving capacities of the child’ (Florence: UNICEF Innocenti Research Centre), p.24, available at: <https://www.unicef-irc.org/publications/384-the-evolving-capacities-of-the-child.html> [accessed 22.08.20].

<sup>169</sup> *T v UK* ECtHR (GC), 16 December 1999, appl.no, 24724/94, para.84.

<sup>170</sup> UN Committee on the Rights of the Child, GC No.12 (n 164), para.34, p.12.

<sup>171</sup> UN Committee on the Rights of the Child, GC No.24 (n 35), para.57, p.12.

child's needs.<sup>172</sup> The child must have a clear understanding of the charges and the possible consequences, in order to direct legal representatives, challenge witnesses, provide their account of events and make appropriate decisions about evidence, testimony and dispositions.<sup>173</sup> Respect for Article 13 (freedom of expression) and Article 17 (access to information) are prerequisites for this, for, without adequate information including as to one's rights, participation cannot be informed and cannot, therefore, be effective.<sup>174</sup>

In order to enhance the child's participation, modified court practices are required, including:

- (i) Using child-friendly language and information,<sup>175</sup> including regarding the charges;<sup>176</sup>
- (ii) Adapting the design of the courtroom and clothing of lawyers and judges, to create a more informal environment;<sup>177</sup>
- (iii) Ensuring all professionals are trained and knowledgeable on child development, communicating with children and child wellbeing;<sup>178</sup>
- (iv) Adapting hearings to the child's "*pace and attention span*"<sup>179</sup> and ensuring decisions are made without delay.<sup>180</sup>

#### **4.3.2. Scots law and practice**

Where children under 16, or aged 16/17 under supervision, appear in summary proceedings, the sheriff is required to either sit in a different room or building, or on different days to those when the other courts in the building are engaged in criminal proceedings (1995 Act, s.142(1)). These arrangements, however, do not apply to

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<sup>172</sup> UN Committee on the Rights of the Child (CRC), 'Committee on the Rights of the Child, Report of the 2006 Day of General Discussion on The Right of the Child to be Heard, 29 September 2006', available at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx> [accessed 22.08.20].

<sup>173</sup> UN Committee on the Rights of the Child, GC No.24 (n 35).

<sup>174</sup> UN Committee on the Rights of the Child, General Day of Discussion 2006 (n 172); Barnes, K. & Wilson, J. (2008). 'Young People's Knowledge of the UK Criminal Justice System and Their Human Rights'. *International Journal of Police Science & Management*, 10(2), pp.214–221.

<sup>175</sup> COE Guidelines (para.56).

<sup>176</sup> UNCRC Article 40(b)(ii); UN Committee on the Rights of the Child, GC No.24 (n 35).

<sup>177</sup> UN Committee on the Rights of the Child, GC No.12 (n 164).

<sup>178</sup> *Ibid.*

<sup>179</sup> COE Guidelines (para.61).

<sup>180</sup> UNCRC Article 40(2)(b)(iii).

children aged 16/17 who are not under supervision, nor to any child who is co-accused with an adult<sup>181</sup> or subject to solemn proceedings. A child accused is nonetheless entitled to apply for certain special measures,<sup>182</sup> including assistance from a supporter or to give their evidence through live video link.<sup>183</sup> However, in contrast to child witnesses and victims, they are not entitled to apply for a screen, a closed court or to have their evidence pre-recorded.<sup>184</sup> Practitioners interviewed for this report have indicated that practice varies immensely throughout the country, depending upon the expertise and willingness of the defence team and judge.<sup>185</sup> This is exacerbated further by the fact that, contrary to the recommendations in GC No.24, such professionals are not required to undergo mandatory, child-specific training in Scotland.<sup>186</sup> Children's access to specialist legal representation has, moreover, been significantly curtailed by changes to the eligibility criteria for legal aid.<sup>187</sup>

Even where special measures are correctly utilised, this does not compensate for the fact that a criminal court is ultimately an adult setting, where Lynch advises "*opportunities for effective and meaningful participation are likely to be limited*".<sup>188</sup> As one young person, who was 16 when their case went to court, stated:

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<sup>181</sup> s.142(5), Criminal Procedure (Scotland) Act 1995; COPFS Book of Regulations, Chapter 16 – Children, para.16.24.

<sup>182</sup> Victims and Witnesses (Scotland) Act 2014, extending the definition of vulnerable witnesses to include any persons under 18 (s.10(1)(a)).

<sup>183</sup> COPFS, Scottish Courts and Tribunals Service, Police Scotland and Victim Support Scotland. (2017). 'Working Together for Victims and Witnesses Protocol' (2017), available: <https://www.scotcourts.gov.uk/docs/default-source/coming-to-court/working-together-for-victims-and-witnesses.pdf?sfvrsn=6> [accessed 22.08.20].

<sup>184</sup> Scottish Government. 'Assisting young people aged 16 and 17 in court' (n 101); Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 (entitling child witnesses and victims to give their evidence by pre-recorded statement).

<sup>185</sup> Including practitioners from the Children and Young People's Centre for Justice (n 160). Interview notes are held on file. See also: CYCJ. (2018). 'Child Accused Roundtable: September 6, 2018 – Key themes', available at <https://www.cycj.org.uk/wp-content/uploads/2018/11/Child-Accused-Roundtable-1.pdf> [accessed 22.08.20].

<sup>186</sup> Ibid.

<sup>187</sup> CRC Committee, COs 2016 (n 7), para.30(b), p.6; Together, 'State of Children's Rights' (n 17); Clan Childlaw (2017), 'Independent Strategic Review of Legal Aid, Call for evidence', available at: <https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=3a0091dd-20a7-4cb9-939a-d07e5c8a8ab7> [accessed 23.08.20]; See also Appendix V (p.67) (Table of key recommendations from the Universal Periodic Review Process, Cycle 3, Recommendation 134.154).

<sup>188</sup> Lynch, 'What is left in the 'Too Hard Basket'?', (n 53), p.99.

***“I don’t think I understood really...what I’d done or the seriousness of it or the process or not really anything about it”***

Young person with criminal justice experience,  
Interviewed by the writer July 2020

A comparative analysis of implementation of Article 12 throughout Europe, undertaken by Rap in 2014, noted how the atmosphere in Scottish courts is formal, with judges wearing wigs and gowns and sitting on a raised bench, and the child accused generally sitting in the dock. In the trials observed, the views of the child were noted to “*hardly play a role*” and they were frequently “*cut off*” by the judge, being allowed to speak only when giving formal evidence. Questions asked of the child were closed-ended, no explanation was provided by the judge of the legal aspects of the case and complex legal jargon was used (formal language even being actively encouraged by the Scottish Government’s Guidance Note on Assisting Young People Aged 16 and 17 at Court).<sup>189</sup> This stood in stark contrast to the more informal, and consequently participatory, settings that were examined, including Scotland’s CHS and the practice in France and Switzerland, where many cases involving children are heard in the judge’s office or ‘chamber’.<sup>190</sup>

Research into Scottish court practice, including by the Scottish Court Service, has also revealed that cross-examination of accused children can be lengthy, over-zealous and cause physical, psychological and mental harm.<sup>191</sup> This does not comply with the Committee’s clear instructions that questioning should take the form of a dialogue, not a “*one-sided examination*”.<sup>192</sup> The passive, as opposed to active, presence that many children have in criminal proceedings was exemplified by a response from one young person who was asked about their experience at court:

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<sup>189</sup> Scottish Government. ‘Assisting young people aged 16 and 17 in court’ (n 101), including at p.48.

<sup>190</sup> Rap, S. (2015). ‘The Implementation of the Right to be Heard in Juvenile Justice Proceedings in Europe’. In Iusmen, I. & Stalford, H. (Eds.), *The EU as a Global Children’s Rights Actor: Law, Policy and Structural Dimensions* (pp.133-163). London: Barbara Budrich Publishers, 2016, p.154.

<sup>191</sup> Scottish Court Service. (2015). ‘Evidence and Procedure Review Report’, available at: <https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2> [accessed 22.08.20].

<sup>192</sup> UN Committee on the Rights of the Child, GC No.12 (n 164), para.43, p.13.

***“Dunno mate...just go in front of him [the judge]...didn’t get to speak to me...can’t say nothing...you sit down stand up say have you done it yes sit back down...the sooner the better you get over it, just take it on the chin”***

Young person with criminal justice experience  
Interviewed by the writer July 2020

There is extensive domestic and international evidence on the difficulties faced by child defendants in criminal courts,<sup>193</sup> leading Grisso et al to conclude that children under 18 are significantly less likely to understand and effectively participate in court proceedings by comparison to (most) adults.<sup>194</sup> Crucially, it is the unfamiliarity and high-pressured nature of criminal proceedings that renders them particularly problematic for children accused, thus not in any way diminishing the clear decision-making competencies that children possess in other, more supportive environments.<sup>195</sup> It is of particular note here that children in Scotland are not considered competent to serve on a jury until 18, yet, when it comes to their own criminal trials, are apparently considered competent from as young as 12.

Given the significant number of CIJL with communication difficulties and additional support needs (‘ASN’), these findings are highly concerning and may in turn violate the non-discrimination principle.<sup>196</sup> Notably, the English courts have found that, even where children with ASN are tried in specialist Youth Courts, an intermediary may still be required to ensure their effective participation<sup>197</sup> (an option which is not currently available to children in Scotland).

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<sup>193</sup> See, for example, Crawford, E., & Bull, R. (2006). ‘Teenagers’ difficulties with key words regarding the criminal court process’. *Psychology, Crime & Law*, 12(6), pp.653–667; Plotnikoff, J. & Woolfson, R. (2003). ‘Young Defendants Pack: Scoping Study for the Youth Justice Board’. London: Home Office, available at: <http://lexiconlimited.co.uk/wp-content/uploads/2018/03/youngdefendantspack-finalreport.pdf> [accessed 22.08.20].

<sup>194</sup> Grisso, Thomas et al. (2003). ‘Juveniles’ Competence to Stand Trial’. *Law and Human Behavior*, 27(4), pp.333–363; Bryan-Hancock, ‘Young People and the Justice System’ (n 115).

<sup>195</sup> Lerner, R. & Galambos, N. (1998). ‘Adolescent Development: Challenges and Opportunities for Research, Programs, and Policies’. *Annual review of psychology*, 49(1), pp.413–446.

<sup>196</sup> UN Committee on the Rights of the Child, GC No.12 (n 164), para.75, p.18; Talbot, J. Prison Reform Trust. (2012). ‘Fair Access to Justice? Support for vulnerable defendants in the criminal courts. A PRT briefing paper’, available at: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/FairAccessstoJustice.pdf> [accessed 20.08.20].

<sup>197</sup> TI v Bromley Youth Court [2020] EWHC 1204 (Admin).

Beyond the clear participation issues, trial in adult courts can also raise difficulties for the presumption of innocence (Article 40(2)(b)(i) UNCRC). In GC No.24, the Committee warns against assuming a child's guilt where they are behaving in a 'suspicious manner' owing to their "*lack of understanding of the process, immaturity [or] fear*".<sup>198</sup> Indeed, in a mock juror study undertaken by Baerger et al in the United States, it was shown that jurors were more likely to impute criminal responsibility to older children where they were tried in adult courts, believing their age "*was close enough to adulthood to assume similar criminal culpability*".<sup>199</sup> In addition, the child's right to remain silent may be distorted by cultural expectations that children should answer adults, and the increased propensity of adolescents to make decisions that comply with authority figures.<sup>200</sup>

#### **4.3.3. Recommendations**

Routinely trying children in adult, criminal courts does not comply with Article 40(3) and is also likely to result in contraventions of Articles 12(2), 40(2)(b)(i), 40(2)(b)(iii) and 40(2)(b)(iv). The Scottish Government's current consultation on raising the age of referral to the Reporter, such that a greater number of children aged 16/17 would have the opportunity to come within the CHS, is strongly welcomed<sup>201</sup> (and a similar consultation in 2002 was also welcomed by the Committee).<sup>202</sup> However, as it is still contemplated that the most "serious cases" (a term which, significantly, is not defined) will be prosecuted in the adult courts, this amendment alone will not bring Scots law into compliance with the UNCRC. The following changes are therefore recommended:

- (i) All persons under 18 must be legally defined as children;**<sup>203</sup>

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<sup>198</sup> UN Committee on the Rights of the Child, GC No.24 (n 35), para.53, p.12.

<sup>199</sup> Bryan-Hancock, 'Young People and the Justice System' (n 115), p.71, citing Baerger, DR. et al. (2003). 'Competency to stand trial in preadjudicated and petitioned juvenile defendants'. *Journal of the American Academy of Psychiatry and the Law Online*, 31(3), pp.314–320.

<sup>200</sup> Grisso, 'Juveniles' Competence to Stand Trial' (n 194); UNICEF, 'Implementation Handbook' (n 30).

<sup>201</sup> Scottish Government. (June 2020). 'Raising the age of referral to the Reporter: consultation', available at: <https://www.gov.scot/publications/consultation-raising-age-referral-principal-reporter/pages/7/> [accessed 22.08.20].

<sup>202</sup> UN Committee on the Rights of the Child, COs 2002 (n 140).

<sup>203</sup> With consequent amendments to the: Children (Scotland) Act 1995 (s.93), Criminal Procedure (Scotland) Act 1995 (s.307) and the Children's Hearings (Scotland) Act 2011 (s.199).

- (ii) A statutory presumption in favour of diversion for all under 18s must be introduced, with prosecution only permitted in the most serious cases (clearly defined);**
- (iii) Where prosecution is required, a statutory presumption that the child will be dealt with in the CHS is required;**
- (iv) In exceptional cases where the CHS cannot effectively manage a child’s needs, they must not be tried in an adult court, irrespective of the gravity of their offending;**
- (v) Whatever setting the child is tried in, their “best interests” (language supplanted directly from Article 3(1) UNCRC) must always be the paramount consideration;<sup>204</sup>**
- (vi) Children should not be treated any differently because they are co-accused with adults; provisions (i) to (v) must be of equal application to them.**

In order to implement these recommendations, systemic changes will also be required, an analysis of which lies outside the scope of this report. In the first instance, however, the range of disposals available to the CHS will need to be extended to ensure it is able to meet the needs of a wider range of children. In cases falling into category (iv) above, consideration will also need to be given to the development of specialist, child-centred tribunals.<sup>205</sup>

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<sup>204</sup> With consequent amendments to the Criminal Procedure (Scotland) Act (s.50(6)) and the Children’s Hearings (Scotland) Act 2011 (s.26).

<sup>205</sup> An analysis of the systemic changes is outside the scope of this report. For potential options, see: Miller, J. (2019) ‘Evaluation of South Lanarkshire Structured Deferred Sentencing for Young People: Mid Way Report’. University of the West of Scotland, available at: <https://www.sastudyoffending.org.uk/attachments/article/334/South%20Lanarkshire%20Structured%20Deferred%20Sentencing%20Mid%20Report.pdf>; Booth, G. (2019) ‘Structured Deferred Sentence: Case Study Glasgow: Centre for Youth and Criminal Justice’, available at: <https://www.cycj.org.uk/wp-content/uploads/2019/05/6-Case-Study-South-Lanarkshire.pdf>; Inspectorate of Prosecution in Scotland, ‘Prosecution of young people’ (n 58) (regarding the Problem Solving Court and Structured Deferred Sentencing Court); Glasgow Evidence and Hearings Suite for children and vulnerable witnesses, details at: <https://www.judiciary.scot/>.

#### 4.4. The child's right to privacy

***“Take urgent measures to address the “intolerance of childhood” and general negative public attitude towards children, especially adolescents, within society, including in the media”***

Committee on the Rights of the Child, Concluding Observations on the UK, 2016

206

The child's right to privacy is contained principally in Article 16 UNCRC but receives special protection for CICL. Pursuant to Rule 8(1) Beijing Rules and Article 40(2)(b)(vii) UNCRC, any person who is under 18 at the time of the commission of an alleged offence is entitled to have their privacy *“fully respected at all stages of the proceedings”*, including following conviction and sentence.<sup>207</sup> In GC No.24, the Committee reminds state parties to refrain from action which may hamper the child's reintegration, including negative publicity and stigmatisation. It has repeatedly expressed concern about privacy violations for children involved in criminal proceedings, noting the detrimental impact this can have on a child's life, survival and development.<sup>208</sup> As one participant stated to the writer:

***“I thought I wanted to be a social worker at the time...and I was going ‘oh no’ obviously people are going to see that for my whole life...I definitely felt like that was like a massive thing that would stop me from ever being able to do what I wanted to do”***

Young person with criminal justice experience,  
Interviewed by the writer July 2020

The media in Scotland are prohibited from publishing the identity of an accused who is under 18 at the time of the proceedings (1995 Act, s.47(1)). However, an exception to this is permitted where the court is satisfied that this *“is in the public interest”* (s.47(3)(b)). This is a highly malleable and subjective standard.<sup>209</sup>

<sup>206</sup> CRC Committee, COs 2016 (n 7), para.23, p.5.

<sup>207</sup> UNCRC, Article 40(2)(b)(vii); UN Committee on the Rights of the Child, GC No.24 (n 35).

<sup>208</sup> UN Committee on the Rights of the Child, GC No.20 (n 55); UNICEF. 'Implementation Handbook' (n 30), pp.203-211.

<sup>209</sup> McInnes, R. (2019). 'Naming Aaron Campbell'. Scots Law Times, 22, pp.67–77.

The Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights,<sup>210</sup> has stated that, irrespective of the individual's age, only information relating to their private life that "*is essential in the interests of society*" should be released into the public domain.<sup>211</sup> Due to the special status of children, and the primacy that is attached to privacy in the context of child justice, it is clear that an even higher standard should apply to them.

Additionally, the protection in s.47 only applies whilst the child is still under 18. Although the UNCRC itself does not expressly state that anonymity must continue after a child accused or convicted of a crime turns 18, the Committee nonetheless recommends this in GC No.24, with exceptions permitted only where a court determines this to be "*in the interests of justice*".<sup>212</sup> The UK's four Children's Commissioners have recommended that lifelong anonymity should be granted to anyone who commits an offence prior to turning 18<sup>213</sup> - a position that has obtained some support in England and Wales.<sup>214</sup>

The Committee also strongly recommends that all hearings involving a child accused be conducted in a closed court, with exceptions to this rule "*very limited and clearly stated in the law*".<sup>215</sup> Under s.142 of the 1995 Act, only members of court staff; those directly involved in the case (the parties, their legal representatives and witnesses); bona fide reporting organisations; and such other persons as specifically authorised by the court, may be present in summary proceedings. However, this provision again does not apply to children aged 16/17 who are not on a CSO.

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<sup>210</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed 22.08.20].

<sup>211</sup> UN Human Rights Committee (HRC), CCPR General Comment No.16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, para.7, p.2, available at: <https://www.refworld.org/docid/453883f922.html> [accessed 14.09.20].

<sup>212</sup> UN Committee on the Rights of the Child, GC No.24 (n 35), para.79, p.16.

<sup>213</sup> UK's Children's Commissioners, Recommendations on the Fifth Periodic Report of the United Kingdom (n 137).

<sup>214</sup> Taylor, C. (December 2016). 'Review of the Youth Justice System in England and Wales', available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/577103/youth-justice-review-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577103/youth-justice-review-final-report.pdf) [accessed 14.09.20]. See also: Stone, N. (2015) 'Naming child defendants: In the public interest?' Youth Justice 15: 93-103.

<sup>215</sup> UN Committee on the Rights of the Child, GC No.24 (n 35), para.81, p.16.

In all solemn proceedings, furthermore, the judge may, "*if he thinks fit*", exclude all bar the accused and legal representatives from the courtroom (1995 Act, s.92(3)). However, this is not a child specific provision and is not mandatory, in contrast to hearings before the CHS which are always held in private.<sup>216</sup> Such a provision also leaves considerable discretion to the judge and does not comply with the Committee's criteria.

#### **4.4.1. Recommendations**

In order to comply with the UNCRC, the following sections of the 1995 Act must be amended:

- (i) s.47(1): all persons who are under 18 at the time of the offence must be granted lifelong anonymity, with any exceptions to this extremely limited and clearly stated in law;**
- (ii) s.92: there must be a strong presumption that all cases (whether summary or solemn) involving an accused under 18 will be heard in a closed court, with any exceptions to this extremely limited and clearly stated in law;**
- (iii) s.142: these provisions must extend to all children under 18 (a position that will follow once the definition of a child is amended in s.307).**

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<sup>216</sup> s.78(2), Children's Hearings (Scotland) Act 2011.

## 5. Penal detention

***“Establish the statutory principle that detention should be used as a measure of last resort and for the shortest possible period of time”***

Committee on the Rights of the Child, Concluding observations on the UK, 2016

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Children aged 16/17 who are prosecuted in the CJS may also be sentenced to a Young Offender Institution (‘YOI’). This disposal is not available to the CHS which, in the most serious cases where a child is considered to pose a high risk to themselves or others, may instead make a secure care authorisation. Secure care is a child-centred, therapeutic setting which provides children aged 12-17 with trauma-informed support, aimed at enabling them to move forward positively in society.<sup>218</sup> YOIs, in contrast, are large-scale custodial institutions for people aged 16-21, described by the Howard League as “*the most punitive and basic provision available*”<sup>219</sup> and the UK’s four Children’s Commissioners as “*comparable in many ways to adult prisons*”.<sup>220</sup> The Scottish Government’s contribution to the Global Study (obtained by the writer in June 2020) notably refers only to secure care and not to YOIs.<sup>221</sup>

In its 2016 COs, the Committee expressed concern at the high number of children in custody throughout the UK. There have been significant reductions in Scotland since this time, but the remaining numbers are still too high (and indeed Scotland has one of the highest general imprisonment rates in Europe):<sup>222</sup>

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<sup>217</sup> CRC Committee, COs 2016 (n 7), para.79(d), p.22. Similar recommendations were made by the UN Human Rights Committee, ‘Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, 17 August 2015’, CCPR/C/GBR/CO/7, para.23(c), p.10, available at: <https://www.refworld.org/docid/5645a59c4.html> [accessed 22.08.20].

<sup>218</sup> Scottish Government. Youth Justice: secure care, available at: <https://www.gov.scot/policies/youth-justice/secure-care/> [accessed 22.08.20].

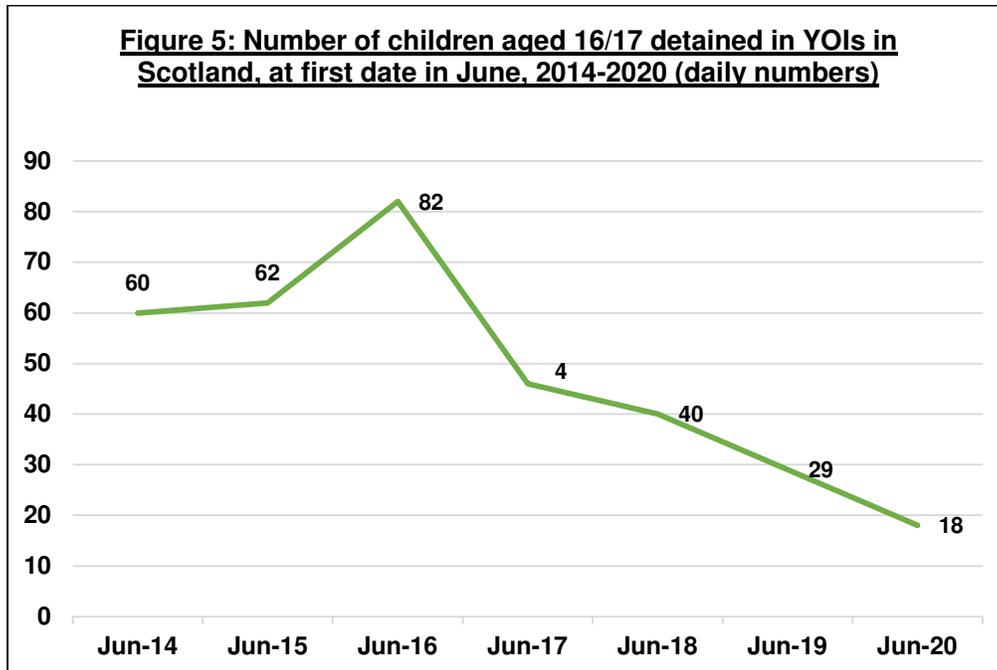
<sup>219</sup> The Howard League for Penal Reform. (October 2011). ‘United Kingdom Universal Periodic Review, Submission by the Howard League for Penal Reform’, p.2, available at: [https://lib.ohchr.org/HRBodies/UPR/Documents/Session13/GB/HLPR\\_UPR\\_GBR\\_S13\\_2012\\_HowardLeaguePenalReform.pdf](https://lib.ohchr.org/HRBodies/UPR/Documents/Session13/GB/HLPR_UPR_GBR_S13_2012_HowardLeaguePenalReform.pdf) [accessed 23.08.20].

<sup>220</sup> UK Children’s Commissioners. (April 2016). ‘Response to the Replies of the United Kingdom of Great Britain and Northern Ireland to the List of Issues of the UN Committee on the Rights of the Child’, p.22, available at: [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/GBR/INT\\_CRC\\_IFN\\_GBR\\_23797\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/GBR/INT_CRC_IFN_GBR_23797_E.pdf) [accessed 22.08.20].

<sup>221</sup> Scottish Government. (2018). ‘Scottish Government contribution to UK Government response to UN Global Study on Children Deprived of Liberty’, obtained by the writer June 2020 (copy held on file).

<sup>222</sup> Inspectorate of Prosecution in Scotland, ‘Prosecution of young people’ (n 58); World Prison Brief, accessed at <https://www.prisonstudies.org/world-prison-brief-data> (as at 22.08.20, Scotland is ranked 115<sup>th</sup> out of 223 countries worldwide for its prison population rate (ranked highest to lowest), with a

**Figure 5: Number of children aged 16/17 detained in YOIs in Scotland, at first date in June, 2014-2020 (daily numbers)**



In 2018/19, 161 children aged 16/17\* were sentenced to a YOI, amounting to 12% of those convicted (**Figure 6, p.47**).<sup>223</sup> Disaggregated data on these children is not retained by the Scottish Prison Service<sup>224</sup> (lack of disaggregated data across UK custodial settings also being a concern raised in the 2016 COs)<sup>225</sup> but independent research has revealed that care-experienced children and boys are disproportionately overrepresented in this group.<sup>226</sup> Currently, 24 children are detained in Scotland's YOIs, 15 of whom have not been convicted and are awaiting trial.<sup>227</sup>

rate of 132 per 100,000 of the national population. In Europe, it is ranked 21<sup>st</sup> out of 57 countries). See also Appendix V (pp.67-69) (Table of key recommendations from the Universal Periodic Review Process, Cycle 2, Recommendation 110.94, Cycle 1 No.18).

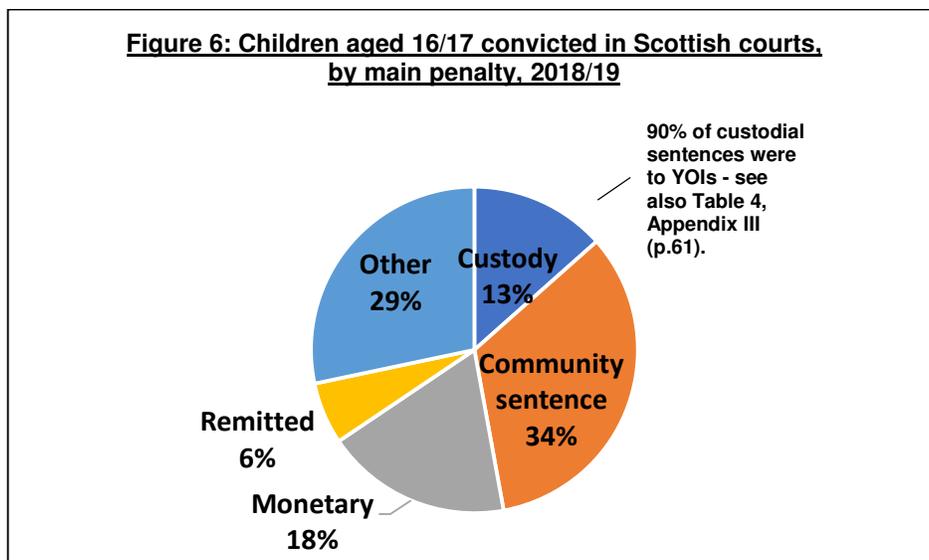
<sup>223</sup> See also Table 4 (Appendix III, p.61). **\*Note: these numbers do not correlate with the number of children currently detained in YOIs. This is because the figures at (n 222) and (n 227) are based on the daily population. Further, some children will be serving part of their sentence in the community and some will already have served their sentence during the period they were held on remand. Further data on this was not available from SPS.**

<sup>224</sup> Requested by the writer June 2020, response received 07.07.20: "the SPS does not track and retain historical data on race, gender etc".

<sup>225</sup> UN Committee on the Rights of the Child, COs 2016 (n 7). Also noted in UN Human Rights Council, *Human rights in the administration of justice, including juvenile justice: resolution / adopted by the Human Rights Council*, 26 September 2019, A/HRC/RES/42/11, p.2, available at: <https://digitallibrary.un.org/record/3837296?ln=en> [accessed 22.08.20].

<sup>226</sup> Armour, 'Reducing the overcriminalisation of care-experienced young people' (n 53); Inspectorate of Prosecution in Scotland, 'Prosecution of young people: report' (n 58).

<sup>227</sup> Last available data as at 14.08.20, available from the Scottish Prison Service, 'SPS Prison Population: Prison Population', available at: <https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx> [accessed 23.08.20]. Note: the data shows that no under 16s have been detained since the first available date (April 2014).



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### 5.1. IHRL standards

Every person has the right to liberty under Article 9 of the International Covenant on Civil and Political Rights.<sup>229</sup> However, as the impact of institutionalisation is acknowledged to be more acute for children than adults due to their stage of development,<sup>230</sup> children enjoy additional protections. These protections should be viewed through the lens of the Preamble to the UNCRC, which provides that the family environment is most conducive to “*the full and harmonious development*” of the child’s personality, and the child’s right not be separated from their parents against their will unless “*necessary for [their] best interests*” (Article 9).

Detaining CICL (including arrest, detention and imprisonment) is not a violation of the UNCRC *per se* but must always be a disposition of **last resort** and for the **shortest appropriate period of time** (Article 37(b) UNCRC, Rule 19 Beijing Rules and the COE Guidelines),<sup>231</sup> particularly pre-trial detention.<sup>232</sup> Alternative dispositions, including care, guidance and supervision orders, should be considered at every stage of proceedings (Article 40(4)) and the child’s **best interests** must always be a primary

<sup>228</sup> Data provided by Scottish Government Justice Analytical Services (‘JAS’) to the writer, July 2020 (n 154).

<sup>229</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed 22.08.20].

<sup>230</sup> Beijing Rules, Commentary to Rule 19 (‘least possible use of institutionalization’).

<sup>231</sup> COE Guidelines (Guideline 19). See also UN Human Rights Council, ‘Human rights in the administration of justice’ (n 225).

<sup>232</sup> UN Committee on the Rights of the Child, GC No.24 (n 35), para.28, p.9.

consideration (Article 3(1)). This, as noted in the Global Study, means that CICL should be supported, not punished, so that they can re-assume a “*constructive role in society*” (Article (40(1))).<sup>233</sup>

The commentary to the Beijing Rules clearly states that children “*should not be incarcerated unless there is no other appropriate response*” and that “*any facility should be of a correctional or educational rather than of a prison type*”.<sup>234</sup> Where detention is absolutely required, the child must be treated with **humanity and dignity**, in a manner that takes account of their needs and age (Article 37(c) UNCRC). Detention must, furthermore, continue only for so long as it is absolutely justified and the priority must always be ensuring the child’s **effective reintegration** into their community as soon as possible.<sup>235</sup>

Depriving children of their liberty, in any setting, places them in a situation of enhanced vulnerability, with the Global Study finding that children detained in the administration of justice “*frequently suffer from systemic abuse, violence and ill-treatment*”.<sup>236</sup> Whilst the Study thus calls for detention *in general* to be radically reduced, it is *penal* environments that consistently generate the most concern. The damaging and indeed ineffective nature of these settings for children has been highlighted by the following recent reports:

- (i) Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health (April 2018): “*the scale and magnitude of children’s suffering in detention...calls for a global commitment to the abolition of child prisons...*”;<sup>237</sup>

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<sup>233</sup> United Nations, Study on Children Deprived of Liberty (n 87).

<sup>234</sup> Beijing Rules, Commentary to Rule 19 (n.220), p.12.

<sup>235</sup> UN Committee on the Rights of the Child, GC No.24 (n 35), paras.29 & 92; Ratledge, L. (2017). ‘End Detention of Children as Punishment’, in Protecting children against torture in detention: Global solutions for a global problem, Washington College of Law, p.184, available at:

[http://antitorture.org/wp-content/uploads/2017/03/Protecting\\_Children\\_From\\_Torture\\_in\\_Detention.pdf](http://antitorture.org/wp-content/uploads/2017/03/Protecting_Children_From_Torture_in_Detention.pdf) [accessed 23.08.20].

<sup>236</sup> United Nations, Study on Children Deprived of Liberty (n 87), p.263.

<sup>237</sup> UN Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Note by the Secretariat, 10 April 2018, A/HRC/38/36, para.53, p.11, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/101/42/pdf/G1810142.pdf?OpenElement> [accessed 23.08.20].

- (ii) The Global Study: “*the detention of children as a punishment is often widely ineffective in relation to...the preservation of safety of societies and preventing crime*” and has a “*serious negative impact*” on children’s health and development;<sup>238</sup>
- (iii) The Promise: YOIs “*are not appropriate places for children and only serve to perpetuate the pain that many of them have experienced*”.<sup>239</sup>

Grave concerns about physical restraint (including pain-inducing techniques); segregation (including solitary confinement); and poor mental health provision in YOIs throughout the UK were also raised by the Committee in its 2016 COs. These issues, along with concerns about inter-juvenile bullying, were echoed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment during its visit to Scotland’s YOIs in October 2018.<sup>240</sup> Such conditions are clearly incompatible with the child’s best interests (Article 3); their survival and development (Article 6); and their right to be free from violence (Article 19). They have, furthermore, been exacerbated further by the COVID-19 pandemic, including reports of children being detained in their cells for up to 23 hours a day,<sup>241</sup> causing the Committee to urge states to “*release children in all forms of detention, whenever possible*”.<sup>242</sup>

In GC No.24, the Committee recommends that no child under 16 be detained (in any setting) and that, beyond this age, detention is always a last resort. This should, however, be regarded as the starting point and it is clear on a holistic reading of the

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<sup>238</sup> United Nations, Study on Children Deprived of Liberty (n 87), p.249.

<sup>239</sup> Independent Care Review, The Promise (n 88), p.91.

<sup>240</sup> Council of Europe: Committee for the Prevention of Torture, ‘Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 25 October 2018’, 11 October 2019, CPT/Inf (2019) 29, available at: <https://rm.coe.int/1680982a3e> [accessed 22.08.20].

<sup>241</sup> Howard League for Penal Reform. (May 2020). ‘Children in prison during the Covid-19 pandemic: A briefing from the Howard League for Penal Reform’, available at: <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf> [accessed 22.08.20]. For more details on how the COVID-19 pandemic has impacted CICL in Scotland, see: Nolan, D. CYCJ. (June 2020). ‘Spend time with me’: Children and young people’s experiences of COVID-19 and the justice system’, available at: <https://www.cycj.org.uk/wp-content/uploads/2020/06/COVID-19-and-justice-report-final.pdf> [accessed 22.08.20]; CYPSC & Observatory of Children’s Human Rights Scotland. (August 2020). ‘Independent Children’s Rights Impact Assessment on the Response to Covid-19 in Scotland’, Appendix 9: Children in Conflict with the Law and Children in Secure Care: CRIA, available at: <https://cypsc.org.uk/wp-content/uploads/2020/07/independent-cria.pdf> [accessed 22.08.20].

<sup>242</sup> UN Committee on the Rights of the Child. (April 2020). ‘CRC COVID-19 Statement’, para.8, p.2, available at: <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx> [accessed 22.08.20].

UNCRC (including the above-mentioned rights) that all children under 18 should be protected from penal detention.<sup>243</sup> The former COE Commissioner for Human Rights<sup>244</sup> and the Special Rapporteur on the rights of the child for the Inter-American Commission on Human Rights<sup>245</sup> advise that detention can only be justified where the child poses a serious and continuing risk to public safety or themselves, which cannot be reduced to an acceptable level in the community.<sup>246</sup> Even here, moreover, it should be in a therapeutic, not punitive, environment, such as secure care.<sup>247</sup>

## **5.2. Domestic framework**

### **5.2.1. Pre-trial detention**

The criminal procedure relating to detention is set out in the 1995 Act (as updated). There is a presumption in favour of bail for any accused person unless the court considers there to be “*good reason*” for refusing it, having regard to any substantial risks posed by that person and the public interest (s.23B). Although the court is required under 23C(2)(d) to have regard to the “*character and antecedents*” of the accused, age is not an expressly identified factor, despite the increased protections which should, as advised above, apply to children’s liberty.

A child under 16 who is remanded in custody pending trial or sentence must be committed to their local authority, to be placed in secure care (where necessary) or in a “*suitable place of safety*” (s.51(a)).<sup>248</sup> This option, or alternatively committal to a YOI (s.51(1)(aa)), is also available for children aged 16/17 under supervision. Children aged 16/17 who are not under supervision, however, may only be committed to a YOI or prison in these circumstances (s.51(1)(b)).

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<sup>243</sup> See, for example, comments submitted on draft General Comment No.24 of the UN Committee on the Rights of the Child, all available at:

<https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx>, including from CRIN, Together Scotland and Article 39 NAYJ UK.

<sup>244</sup> Hammarberg, T. Council of Europe: Commissioner for Human Rights. (Feb 2009), ‘Children should not be treated as criminals’, available at: <https://www.refworld.org/docid/4a701d542.html> [accessed 22.08.20].

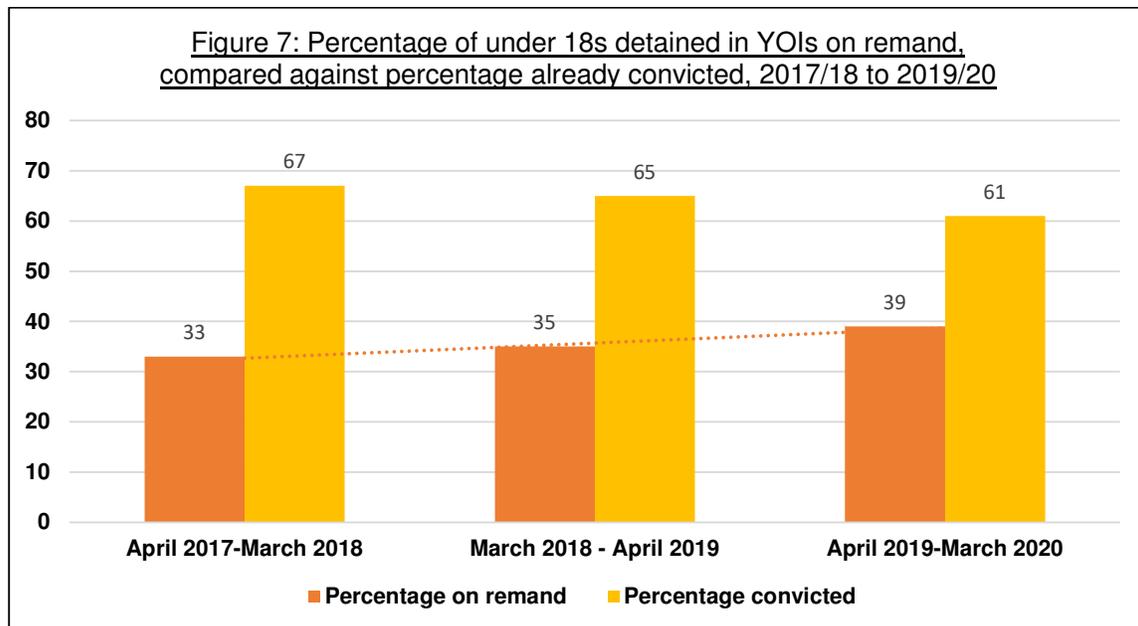
<sup>245</sup> Pinheiro, P. (2011). ‘Juvenile Justice and Human Rights in the Americas’, available at: <http://www.cidh.org/countryrep/JusticiaJuvenileng/jitoc.eng.htm> [accessed 22.08.20].

<sup>246</sup> Noted by CRIN, ‘Stop Making Children Criminals’ (n 132).

<sup>247</sup> Lightowler, ‘Rights Respecting?’ (n 1); Together, ‘State of Children’s Rights’ (n 17).

<sup>248</sup> As a result of the Criminal Justice and Licensing Act 2011, children aged 15/16 can no longer be remanded in prison.

Although the total number of under 18s detained in Scotland's YOIs has fallen, the proportion held on remand has simultaneously increased (**Figure 7**)<sup>249</sup> and is higher than in the adult prison population.<sup>250</sup> Practitioners interviewed for this report also expressed concern that some remanded children do not ultimately receive a custodial sentence or may even be acquitted.<sup>251</sup> This data was not held by the Scottish Prison Service.<sup>252</sup>



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The overuse of pre-trial detention was identified as a significant global concern in the Global Study and the Committee also notes how such practices may constitute a “grave violation” of Article 37(b).<sup>254</sup> Concerns regarding the overuse of pre-trial detention throughout the UK have also been raised by other states during the First and Second cycles of the Universal Periodic Review process (**Appendix V, pp.67-**

<sup>249</sup> For the most recent figures from 2020, see Tables 5 and 6 (Appendix III, pp.61-62).

<sup>250</sup> Lightowler, ‘Rights Respecting?’ (n 1).

<sup>251</sup> This includes practitioners at a Scottish secure care unit (name withheld for anonymity purposes) (n 160) and practitioners at the Children and Young People’s Centre for Justice (n 160). Interview notes are held on file.

<sup>252</sup> Requested by the writer June 2020, response received 07.07.20: “the SPS does not track outcomes of the court judicial process other than warrants with a custodial sentence. The SPS does not track historical untried individuals only those convicted and sentenced.”

<sup>253</sup> Data provided to the writer by the Children and Young People’s Centre for Justice, August 2020.

See also Tables 5 and 6 (Appendix II, pp.61-62).

<sup>254</sup> UN Committee on the Rights of the Child, GC No.24 (n 35), para.97, p.18.

69).<sup>255</sup> For some children, this can be a matter of life and death, with the Polmont Review finding that “*being traumatised, being young, being held on remand and being in the first three months of custody increases the risk of suicide*”.<sup>256</sup> Although, furthermore, the 1995 Act imposes remand time limits (110 days for sheriff court cases and 140 days for high court cases),<sup>257</sup> these are the same for children as for adults, thus failing to account for children’s different sense of time and the disproportionate impact remand can have on them.<sup>258</sup>

### 5.2.2. Sentencing stage

A sentence of “imprisonment” (i.e. in a prison) cannot be imposed on anyone under 21 (1995 Act, s.207(1)). Where, however, a child commits an offence for which imprisonment could otherwise be imposed, the following provisions apply:

#### 1. Children under 16 or aged 16/17 under supervision:

- (i) Summary proceedings: may be detained by the sheriff in local authority residential accommodation (including secure care) for a maximum period of 1 year (s.44(1));
- (ii) Solemn proceedings (‘on indictment’):<sup>259</sup> may be detained “*in such place...as the Secretary of State may direct*” where the court considers that “*no other method of dealing with [them] is appropriate*” (s.208(1)). The stated policy in such circumstances is secure care until 18 and then transfer to a YOI.<sup>260</sup>

#### 2. Children aged 16/17 not under supervision:

- (i) Summary and solemn proceedings: may be sentenced to detention in a YOI where the court considers that “*no other method of dealing with [them] is appropriate*” (s.207(3)).

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<sup>255</sup> Appendix V (pp.67-68) (Table of key recommendations from the Universal Periodic Review Process, Cycle 2, Recommendation 110.81, Cycle 1 No.25).

<sup>256</sup> Polmont Review (n 86), p.4.

<sup>257</sup> s.65, Criminal Procedure (Scotland) Act 1995.

<sup>258</sup> Lynch, ‘What is left in the ‘Too Hard Basket’?’ (n 53).

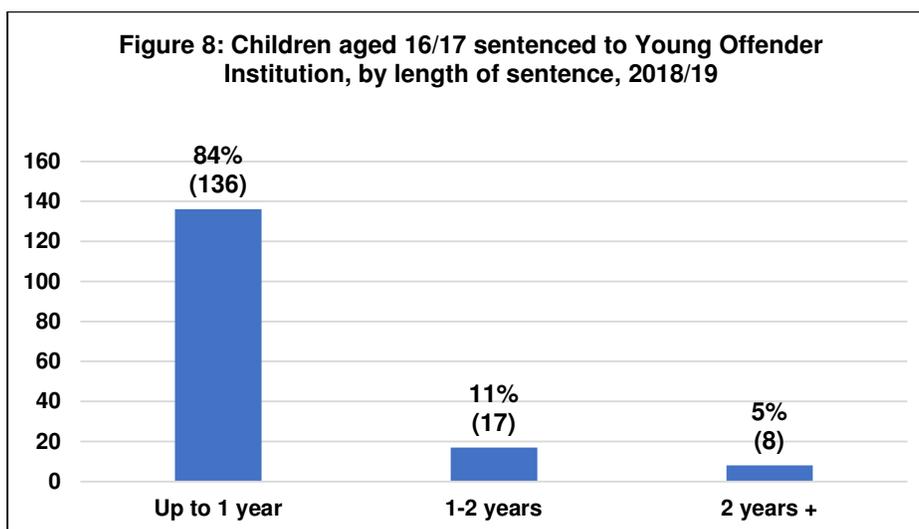
<sup>259</sup> Examples of offences that can be brought on indictment are set out in Lord Advocate’s Guidelines (n 145).

<sup>260</sup> Scottish Government. (2018). ‘Progressing the human rights of children in Scotland: 2018 report’, available at: <https://www.gov.scot/publications/progressing-human-rights-children-scotland-report-2015-2018/> [accessed 22.08.20].

### 3. All children (aged 12-18) convicted of murder:

- (i) Shall be detained “*without limit of time...in such place...as the Secretary of State may direct*” (s.205(2)).<sup>261</sup> (Secure care is still an option here for children under 16 or 16/17 under supervision).

In all cases, there is now a presumption against prison sentences of 12 months or less (s.204(3A)),<sup>262</sup> it being noted that such sentences can undermine the factors (such as housing, employment and family relationships) that are key to desistance.<sup>263</sup> Data for 2019/20, since this change was introduced, was not available.<sup>264</sup> In 2018/19, however, 84% of 16 and 17 year olds sentenced to a YOI received a sentence of less than 1 year:



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<sup>261</sup> **A critique of the ‘detention without limit of time’ sentence falls outside the scope of this report, but urgent consideration must be given to this.** In the meantime, refer to: Child Rights International Network, ‘Inhuman Sentencing’, available at: <https://archive.crin.org/en/home/campaigns/inhuman-sentencing.html> [accessed 14.09.20].

<sup>262</sup> s.204(3A), Criminal Procedure (Scotland) Act 1995, updated on 04.07.19 by the Presumption Against Short Periods of Imprisonment (Scotland) Order 2019.

<sup>263</sup> Scottish Government, ‘Progressing the human rights of children in Scotland’ (n 260).

<sup>264</sup> Data requested from Scottish Government Justice Analytical Services, May 2020. Response received July 2020: “Information for 2019-20 will not be available until publication of the ‘Criminal Proceedings in Scotland, 2019-20’ statistical bulletin. This is expected to be published towards the end of 2020”.

<sup>265</sup> Data provided by Scottish Government Justice Analytical Services (‘JAS’) to the writer, July 2020 (n 154).

The WSA clearly advocates that, wherever possible, children should be placed in secure care and not YOIs and this is now Scottish Minister policy for all under 16s.<sup>266</sup> However, because 16 and 17 year olds not under supervision are not legally recognised as children,<sup>267</sup> secure care is not an option for them (s.207(3)). Staff members interviewed at a secure care unit expressed frustration at this legal anomaly (“even if they are classed as an ‘adult’, their needs don’t stop”) and were also clear that all children should at least be given the opportunity to benefit from a secure care environment, irrespective of their age or the severity of their offending:

***“There is a very small minority of young people that this setting wouldn’t suit...but the question is, where else is there for them? They still have trauma and needs. It is possible that if Polmont was taken away as an option, it would be ok, as secure care would be the only option, and this may change the way some young people feel about it”***

Member of staff at secure care unit  
Interviewed by the writer July 2020

In addition to the legislative barriers, research undertaken by Gough and Lightowler has revealed that, even in cases where secure care is a legal option, children have instead been detained in YOIs.<sup>268</sup> Cross-border placements, potentially resulting in a lack of available beds,<sup>269</sup> as well as the perverse incentive that local authorities are financially responsible for children in secure care but not in YOIs,<sup>270</sup> may partly explain these difficulties.

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<sup>266</sup> Scottish Government. (April 2018). ‘Custody of convicted children and young people: practice guidance’, available at: <https://www.gov.scot/publications/practice-guidance-custody-children-young-people-convicted-under-section-205/pages/2/> [accessed 23.08.20].

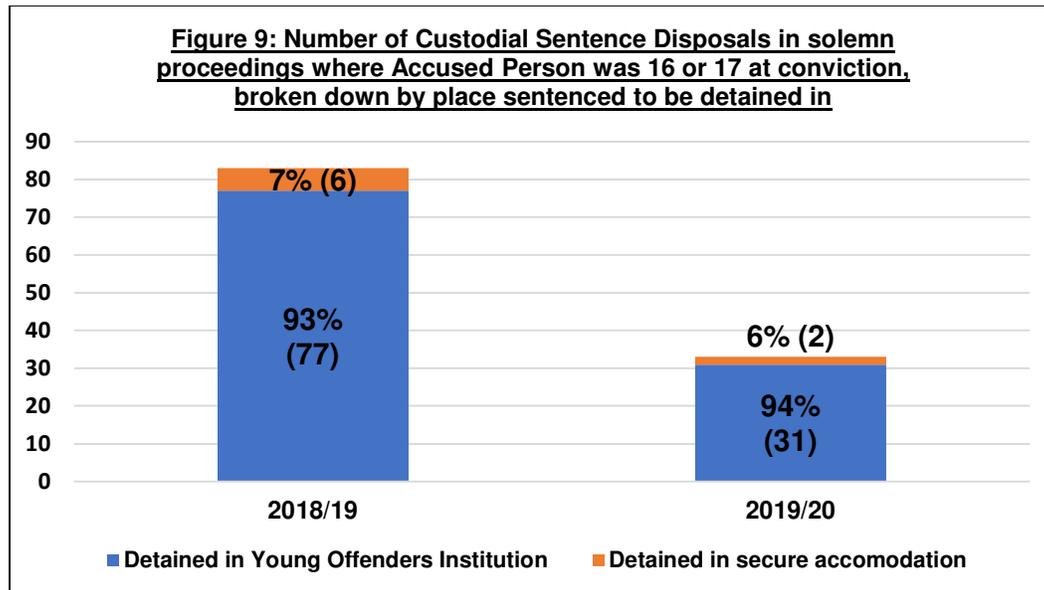
<sup>267</sup> s.307, Criminal Procedure (Scotland) Act 1995.

<sup>268</sup> Gough, A. & Lightowler, C. (2018). ‘Children’s Lives, Education and Secure Care in Scotland’. In Gallard, D., Evans, K. and Millington, J. (eds.) Children and Their Education in Secure Accommodation: Interdisciplinary Perspectives of Education, Health and Youth Justice. London: Routledge.

<sup>269</sup> Together, ‘State of Children’s Rights’ (n 17). See also: Scottish Government. (March 2020). ‘Children’s Social Work Statistics Scotland, 2018-19’, available at: <https://www.gov.scot/publications/childrens-social-work-statistics-scotland-2018-2019/> [accessed 23.08.20], recording an 18% increase in the average number of residents in secure care from within Scotland and an decrease of 26% in the average number of residents from outside Scotland between 2017/18 and 2018/19.

<sup>270</sup> Whyte, ‘Young People in Conflict with the Law in Scotland’ (n 91).

Of the 16 and 17 year olds who were convicted in solemn proceedings in 2019/20 and received a custodial disposition, secure care was only used in 6% of cases (**Figure 9**). The vast majority of children (of any age) placed in secure care are not, furthermore, placed there on offence-related grounds.<sup>271</sup>



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### 5.3. Recommendations

YOIs are punitive environments, which are modelled on, and governed by the same rules<sup>273</sup> as, adult prisons. Such environments can never be compatible with the UNCRC’s aims of supporting children to reassume a constructive role in society (Article 40(1)). If Scotland wishes to respect the rights of all children, therefore, it must stop the practice of detaining children under 18 in YOIs altogether and ensure that detention in other settings is always a last resort. The following legislative amendments are required to the 1995 Act:

<sup>271</sup> See Table 7 (Appendix III, p.63).

<sup>272</sup> Source: Scottish Courts and Tribunals Service (‘SCTS’), provided to the writer August 2020. Note from SCTS: “The SCTS uses a live operational case management system for the processing of court business. The information held on the system is structured for these operational needs, rather than for statistical reporting or research purposes. The information provided is based on the best information available from the case management system as at 28 July 2020. This figure is based on the age of the individuals at the date of their conviction”. [Note this data just relates to children charged on indictment (i.e. in solemn proceedings) and not for other offences].

<sup>273</sup> The Prisons and Young Offender Institutions (Scotland) Rules 2011 (as updated by The Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020).

1. **s.307: the definition of a child must include all children aged 16/17.**
2. **Bail: the current test of “*good reason*” is not sufficient.**
  - (i) **s.23B and 23C: for anyone under 18, there must be a presumption against pre-trial detention, rebuttable only if the child presents a serious and continuing risk to public safety or themselves, which cannot be reduced to an acceptable level in the community;**
  - (ii) **s.51(1)(aa) and s.51(1)(b): committal to a YOI or prison must not be an option for anyone under 18;**
  - (iii) **In cases where bail is refused, the child should be placed in secure care.**
3. **Sentencing: the current test of whether “*no other method of dealing with [them] is appropriate*” is again insufficient.**
  - (i) **s.207(3) and s.208(1): there must be a statutory presumption against any form of detention for anyone under 18 (with the same criteria as noted at 2(i) above);**
  - (ii) **In cases where detention cannot be avoided, this must be in secure care. Furthermore, the court must only be able to authorise a short maximum period of detention, following which a presumption of release should apply.<sup>274</sup>**

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<sup>274</sup> As supported by: Lightowler, ‘Rights Respecting?’ (n 1); and CRIN, ‘Stop Making Children Criminals’ (n 132).

### **Concluding remarks**

With the weakening of rights protections caused by the UK's departure from the European Union, and the current global pandemic continuing to shine a stark and concerning light on the inequalities faced by children in society,<sup>275</sup> this could not be a more critical time for Scotland's children and young people. By incorporating the UNCRC into Scots law, the Scottish Government hopes to deliver on its promise of making "*Scotland the best place in the world to grow up*".<sup>276</sup> Scottish incorporation presents an exciting opportunity for this. However, as this report has sought to highlight, the current position in Scotland, whereby 16 and 17 year olds are routinely treated as adults and dealt with in the criminal justice system, is fundamentally at odds with these aspirations, amounts to a clear contravention of the UNCRC and is not in the public interest. Significant legislative amendments, as recommended throughout this report, must therefore be made as a matter of urgency. Only once these changes have been made, and there has been a robust commitment to respecting, protecting and fulfilling the rights of *all children under 18*, will Scotland truly deserve the reputation it has for so long enjoyed as a rights respecting nation.

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<sup>275</sup> See CYPSC & Observatory of Children's Human Rights Scotland, 'Independent Children's Rights Impact Assessment' (n 241).

<sup>276</sup> Scottish Government. (Nov 2019). 'United Nations on the Rights of the Child: consultation analysis', p.3, available at: <https://www.gov.scot/publications/uncrc-consultation-analysis-report/> [accessed 22.08.20].

## **Appendix I: Statement from Bruce Adamson, CYPCS, 27<sup>th</sup> August 2020**

“This important research report provides a clear and insightful legal analysis of Scots law compliance with the UNCRC in relation to 16 and 17 year old children in conflict with the law. The report finds that Scotland’s approach to children in conflict with the law is not rights respecting, as it is not compliant with the clear human rights standards set out in Article 40 of the UNCRC. In particular, the Scots law definition of a child in certain statutes as a person under the age of 16 years, or aged 16 / 17 subject to a compulsory supervision order, means that many 16 and 17 year olds are excluded from scope of the welfare-based Children's Hearings System and are instead treated as 'adults' in the criminal justice system.

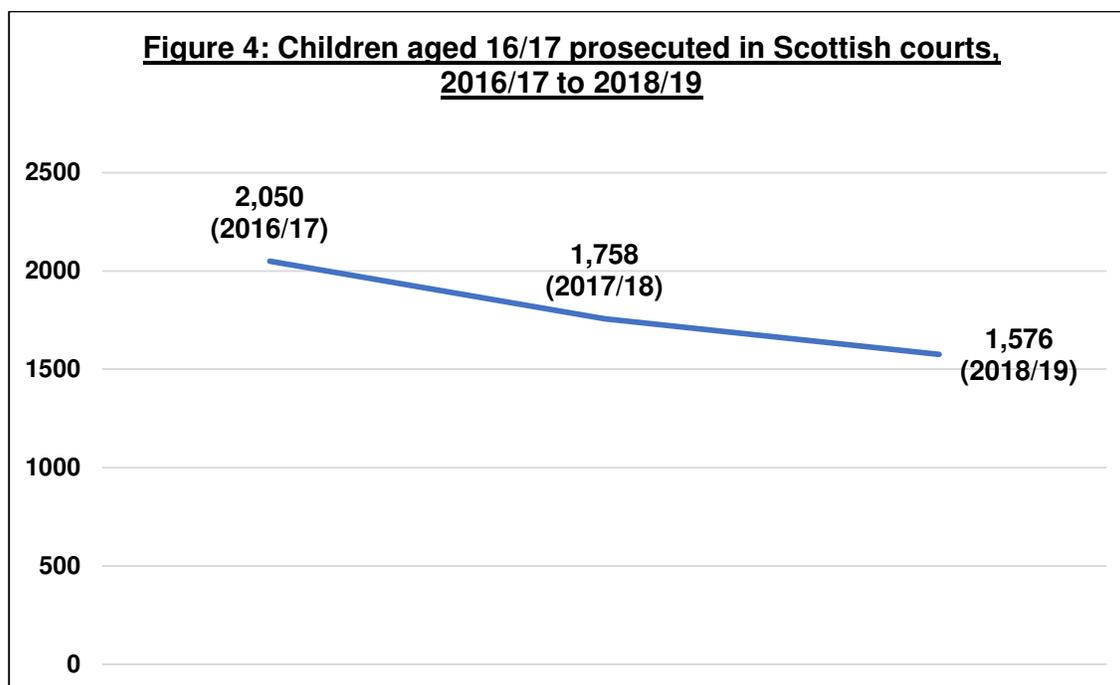
Scotland’s low age of criminal responsibility and its treatment of older children as adults undermines its commitment to children’s rights. Many children aged 16/17 are tried in adult courts and, in some cases, sentenced to detention in a Young Offender Institution (YOI). These can never be appropriate settings for children and the UN Committee on the Rights of the Child points out in its General Comment No.10 on Children’s Rights in Juvenile Justice that *“there is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate”*.

In 2018/19, the vast majority (83%) of the 1,906 children aged 16/17 who came into contact with the justice system were dealt with in the courts rather than at a children’s hearing. In the same year, 161 children aged 16/17 were sentenced to detention in a YOI. A significant number of the children who are currently detained in Scotland's YOIs have never been convicted, and are held on remand, awaiting trial.

The findings and recommendations from this report will provide an evidence base for the ongoing work in my office as we promote and safeguard the rights of children and will be a valuable tool for all of those looking to uphold the human rights of children in conflict with the law. We agree with the recommendations in this report that Scots law must be amended to ensure a child is universally defined as a person under the age of 18 years and that no child should be prosecuted or tried in an adult court or deprived of their liberty in a YOI or other adult place of detention.”

## **Appendix II:**

### **Data: children at court**



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**Table 1: Children aged 16/17 prosecuted in Scottish courts, by result, 2016/17 to 2018/19**<sup>278</sup>

Year	Guilty	Not guilty	Total	Percentage Not guilty
2016/17	1,713	337	2,050	16%
2017/18	1,478	280	1,758	16%
2018/19	1,324	252	1,576	16%

Note: for children aged 16/17 who were convicted in 2018/19: 1,168 were male (88%) and 156 were female (12%).  
Of those convicted in 2018/19, this amounts to 12 children aged 16/17 per 1,000 of the Scottish population by age\*.

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<sup>277</sup> Data provided by Scottish Government Justice Analytical Services ('JAS') to the writer, July 2020 (n 154).

<sup>278</sup> Ibid.

<sup>279</sup> \*Scottish Government. 'Criminal Proceedings in Scotland, 2018-19', p.62, available at: <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/> [accessed 23.08.20].

**Table 2: Number of children under 16 convicted in Scottish Courts, compared against children aged 16/17 convicted in Scottish Courts, 2016/17 to 2018/19**<sup>280</sup>

<b>Year</b>	<b>Number under 16</b>	<b>Number 16/17</b>	<b>Percentage 16/17</b>
<b>2016/17</b>	17	1,713	<b>99%</b>
<b>2017/18</b>	11	1,478	<b>99%</b>
<b>2018/19</b>	12	1,324	<b>99%</b>

**Table 3: Children aged 16/17 prosecuted in Scottish courts, by main crime / offence and court type, 2018-19**<sup>281</sup>

<b><u>Main crime / offence</u></b>	<b><u>High Court</u></b>	<b><u>Sheriff Solemn</u></b>	<b><u>Sheriff Summary</u></b>	<b><u>Justice of the Peace</u></b>	<b><u>Total</u></b>
<b>Total</b>	<b>28</b>	<b>105</b>	<b>1,243</b>	<b>200</b>	<b>1,576</b>
<b>Non-sexual crimes of violence</b>	9	50	48	0	<b>107</b>
<b>Sexual crimes</b>	16	4	20	0	<b>40</b>
<b>Crimes of dishonesty</b>	0	19	176	25	<b>220</b>
<b>Fire-raising, vandalism, etc</b>	0	8	121	14	<b>143</b>
<b>Other crimes*</b>	2	9	332	24	<b>367</b>
<b>Miscellaneous offences**</b>	1	15	501	27	<b>544</b>
<b>Motor vehicle offences</b>	0	0	55	110	<b>165</b>

<sup>280</sup> Ibid.

<sup>281</sup> Data provided by Scottish Government Justice Analytical Services ('JAS') to the writer, July 2020 (n 154). Note age is calculated at the date of trial.

## **Appendix III**

### **Data: penal detention**

**Table 4: Children aged 16/17 convicted in Scottish courts, by main penalty, 2016/17 to 2018/19**<sup>282</sup>

<b>Main penalty</b>	<b>2016/17</b>	<b>2017/18</b>	<b>2018/19</b>
<b>Number convicted</b>	<b>1,713</b>	<b>1,478</b>	<b>1,324</b>
<b>Custody</b>	<b>196</b>	<b>130</b>	<b>178</b>
Imprisonment	0	0	1
Detention Indeterminate	0	0	2
Young Offender Institution	179	122	161
Extended sentence	5	3	5
Supervised release order	12	5	9
<b>Community sentence</b>	<b>677</b>	<b>568</b>	<b>446</b>
Community Payback Order	563	463	334
Restriction of Liberty Order	114	104	112
Drug & Treatment Testing Order	0	1	0
<b>Monetary</b>	<b>334</b>	<b>298</b>	<b>244</b>
Fine	315	283	228
Compensation Order	19	15	16
<b>Other</b>	<b>506</b>	<b>482</b>	<b>456</b>
Absolute discharge	23	27	24
Remit to Children's Hearing	89	82	81
Admonished	391	370	349
No order made	2	3	1
Dog disposals	0	0	1
Insane (No Conv)	1	0	0

**Table 5: Average daily figures for children detained in Young Offender Institutions in Scotland, by whether convicted / convicted awaiting sentence or on remand April 2017 – March 2020**<sup>283</sup>

	<b>April 2017- March 2018</b>	<b>March 2018- April 2019</b>	<b>April 2019- March 2020</b>
<b>Under 18 male convicted</b>	23	23	13
<b>Under 18 female convicted</b>	1	1	0
<b>Under 18 male untried</b>	15	16	11

<sup>282</sup> Ibid.

<sup>283</sup> Data provided by the Children and Young People's Centre for Justice to the writer, August 2020. Note: data needs to be verified before relying on for official purposes.

<b>Under 18 female untried</b>	0	1	0
<b>Convicted awaiting sentence (male / female)</b>	6	6	4
<b>Total</b>	45	48	28
<b>Percentage (%) on remand</b>	33%	35%	39%

**Table 6: Average daily figures for children detained in Young Offender Institutions in Scotland, by whether convicted / convicted awaiting sentence or on remand, January - June 2020<sup>284</sup>**

	Jan 2020	Feb 2020	March 2020	April 2020	May 2020	June 2020
<b>Under 18 male convicted</b>	6	9	11	10	8	6
<b>Under 18 male untried</b>	11	8	9	4	6	11
<b>Under 18 female convicted and untried</b>	1	0	0	0	0	0
<b>Under 18 convicted awaiting sentence</b>	4	4	1	3	1	2
<b>Total</b>	22	21	21	17	15	19
<b>% on remand</b>	54%	36%	42%	23%	40%	58%

Note: the remand levels will be impacted by the Coronavirus COVID-19 pandemic, due to delays in holding trials.

<sup>284</sup> Ibid.

**Table 7: Total number of children under 18 admitted to secure care accommodation by legal reason for admission, 2018/19<sup>285</sup>**

<b>Ground</b>	<b>Total no.</b>
<b><i>Offence related ground</i></b>	
Order made under section 44(1) of the Criminal Procedure (Scotland) Act 1995.	7
Order made under section 205 of the Criminal Procedure (Scotland) Act 1995 (murder)	*
Order made under section 208 of the Criminal Procedure (Scotland) Act 1995 (children convicted on indictment)	*
Committal to secure accommodation, a place of safety or other temporary detention is made under sect. 51 of the Criminal Procedure (Scotland) Act 1995	*
<b><i>Other ground</i></b>	
Transferred to the unit under section 143 Children's Hearings (Scotland) Act 2011 (transfers into secure care out of urgent necessity)	21
Compulsory Supervision Order made under Children's Hearings (Scotland) Act 2011, to which a secure accommodation authorisation is attached.	*
An interim compulsory supervision order made under the Children's Hearings (Scotland) Act 2011 with a secure accommodation authorisation attached.	34
Committal to secure accommodation, a place of safety or other temporary detention is made under sect. 51 of the Criminal Procedure (Scotland) Act 1995.	19
Placement pending a decision by the Reporter that a Children's Hearing does not require to be arranged or the convening of a Hearing to consider the case.	74
Other	52
<b>Total children admitted on all grounds</b>	<b>217</b>
*Numbers suppressed to maintain confidentiality (this value is more than 0). Note children can be admitted more than once during the year.	

<sup>285</sup> Scottish Government. (March 2020). 'Children's Social Work Statistics Scotland, 2018-19' (n 271), (Table 5.6: Young people admitted to secure care accommodation: legal reason for admission by gender, 2018-19).

## **Appendix IV**

### **Glossary of key terms**<sup>286</sup>

Children in conflict with the law	A person under the age of 18 years who comes into contact with the justice system as a consequence of being accused or suspected of committing a criminal offence.
Children’s Reporter	Acts as the ‘gateway’ to the Children’s Hearings System. Responsible for receiving referrals for children believed to be in need of compulsory measures of supervision and for deciding whether they need to be referred to a Children’s Hearing. Note: anyone can make referrals to the Reporter (including family members, members of the public, social workers, the police).
Compulsory Supervision Order	A formal order, made by a Children’s Hearing, for children in need of protection, guidance, treatment or control, that places responsibilities on a named local authority to support the child and requires the child to comply with specified conditions in the interests of their welfare.
Diversion from prosecution	A formal decision by a Prosecutor to refer a child to a local authority to receive support and treatment aimed at addressing the underlying causes of their behaviour, as an alternative to prosecution. <sup>287</sup>

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<sup>286</sup> For further definitions and terms, see also Scottish Sentencing Council, ‘Jargon Buster’, at: <https://www.scottishsentencingcouncil.org.uk/about-sentencing/jargon-buster/#:~:text=Accused%20people%20are%20said%20to,brought%20'on%20summary%20complaint'>.

<sup>287</sup> For further information, see Inspectorate of Prosecution in Scotland, ‘Prosecution of young people: report’ (n 58) (Chapter 3: Diversion).

Early and Effective Intervention	Ensuring children who offend, and children at risk of offending, receive appropriate, timely and proportionate support to prevent offending / reoffending. <sup>288</sup>
High Court of Justiciary	Scotland's supreme criminal court, which hears the most serious offences (including rape and murder). Trial takes place by jury with a single judge.
Justice of the Peace Court	Deals with the least serious summary offences (for example, breach of the peace and careless driving). Trials take place before Justices of the Peace, who are lay person magistrates, sitting alone or as a bench of three.
Lord Advocate	Scotland's senior law officer, responsible for the prosecution of crime.
Procurator Fiscal	Independent prosecutors, responsible to the Lord Advocate, who decide whether or not raise criminal proceedings against an individual.
Remand	Detaining a person in custody pending their trial.
Secure care	A form of residential care for children under the age of 18 who are believed to present a significant risk to themselves or others. Children in secure care receive therapeutic support aimed at assisting them to reintegrate into their communities. <sup>289</sup>

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<sup>288</sup> For further information see CYCJ, 'A Guide to Youth Justice in Scotland: policy, practice and legislation: Early and Effective Intervention', available at: <https://cycj.org.uk/wp-content/uploads/2015/06/Section-4-EEI.pdf>.

<sup>289</sup> For more information see: Scottish Government. 'Youth Justice: secure care', at: <https://www.gov.scot/policies/youth-justice/secure-care/#:~:text=Secure%20accommodation%20is%20a%20form,in%20secure%20care's%20controlled%20settings> and CYCJ. 'Secure care', at <https://www.cycj.org.uk/what-we-do/secure-care/>.

Sheriff Court	Deals with the majority of criminal cases, including both summary procedure (one sheriff alone, for the less serious criminal offences) and solemn procedure (a sheriff and a jury, for the more serious offences).
Solemn proceedings	Proceedings involving the most serious criminal offences, which take place before a judge and jury. Each case is assessed on an individual basis but this could include, for example, attempted murder and sexual offences. The maximum sentence in solemn proceedings is 5 years imprisonment or an unlimited fine.
Summary procedure	Proceedings involving the less serious criminal offences, which take place either in the Justice of the Peace Court or in the Sheriff Court (without a jury). Each case is assessed on an individual basis but this could include, for example, drunkenness and other disorderly conduct. The maximum sentence is 12 months imprisonment or a fine of £10,000.

## Appendix V

### Table of key recommendations from the Universal Periodic Review Process<sup>290</sup>

#### 1. Recommendations relating to the United Kingdom:

State and paragraph no.	Recommendation	Response
<b>Cycle 3 (2017-2021), Session: 27 May 2017</b>		
Chile (134.64)	Speed up the <b>adjustment of national legislation to the Convention on the Rights of the Child</b> , both at State and autonomous regions levels.	Noted (meaning no commitment has been made).
Slovakia (134.6)	<b>Integrate fully the principles and provisions of the Convention on the Rights of the Child into its domestic law.</b>	Noted.
Netherlands (134.154)	Ensure the accessibility of appropriate <b>legal aid</b> to safeguard access to justice for all, particularly for the most marginalized groups in society.	Noted.
Serbia (134.158)	Take concrete measures to <b>reduce the current and future prison population</b> , as well as to improve prisoner safety.	Supported: <i>'...The Scottish Government is committed to reducing the use of short-term imprisonment through the greater use of robust community sentences. Community sentences have accounted for a greater proportion of all penalties handed down by Scottish Courts every year since 2011-12...'</i>
Egypt (134.137)	Adherence to <b>international standards</b> for respect for detainees' rights and the conditions of detention.	Supported: <i>'...The UK remains fully committed to the ECHR, ECPT, ICCPR, CAT and OPCAT...'</i>
<b>Cycle 2 (2012-16), Session: 13 May 2012</b>		
Belarus (110.94)	Consider the possibility of raising the minimum criminal age and <b>refrain from the practice of keeping children in custody.</b>	Noted: <i>'...The recommendation does not enjoy the support of the United Kingdom...On the issue of custody, the Criminal Justice and Licensing (Scotland) Act 2011 introduced provisions to end the very rare practice of remanding 14 and 15 year olds in prison. Accordingly, no legal mechanism exists for the courts to either remand or sentence a young</i>

<sup>290</sup> Data accessed from: United Nations Human Rights Council, Universal Periodic Review – United Kingdom of Great Britain and Northern Ireland, available at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/GBindex.aspx> [accessed 20.08.20].

		<i>person under <b>age 16</b> to custody in prison...'</i>
Iran (110.81)	Strengthen guarantees for detained persons, and not to extend but to <b>shorten the length of time of pre-trial detention.</b>	Noted: ' <i>...strict limitations on pre-trial detention have been a long-standing feature of the law of Scotland...the importance of bringing fully prepared cases to court as quickly as possible has been a guiding principle in previous and ongoing reforms to the criminal justice system in Scotland...'</i>
<b><u>Cycle 1 (2008-2012), Session: 1 April 2008</u></b>		
Switzerland (Recommendation No.25)	Strengthen guarantees for detained persons, and not to extend but to <b>shorten the length of time of pretrial detention.</b>	Noted.
Algeria (No.18)	Address the <b>high incarceration rate of children.</b>	Noted: ' <i>The United Kingdom accepts the recommendation with regard to the high incarceration rate of children, and undertakes to work towards its implementation...'</i>

2. Recommendations made by the United Kingdom regarding other states:

<b>State</b>	<b>Recommendation</b>	<b>Cycle</b>	<b>Response</b>
Sweden	Introduce <b>alternative measures to pretrial detention for minors wherever possible</b> , develop clear rules for the treatment of minors in police custody, and monitor their effective implementation in practice.	2	Noted
Bolivia.	Take steps to improve prison conditions by reducing overcrowding in line with the United Nations Standard Minimum Rules for the Treatment of Prisoners, implement alternatives to detention, <b>ensure access to a timely trial for those on remand</b> , and address the issue of children living with parents in prison.	2.	Supported.
Denmark.	Introduce <b>alternative measures to pre-trial detention for minors wherever possible</b> and develop clear rules for the treatment of minors in police custody and monitor their effective implementation in practice.	2.	Supported.
St Vincent & the Grenadines.	Establish a Juvenile Rehabilitation Centre to ensure detention separate from adults and the safety of juvenile offenders whilst in detention and to <b>equip them to be productive citizens on release into society.</b>	2.	Supported.

St Vincent & the Grenadines.	Provide suitable, dedicated secure facilities for serious juvenile offenders, with greater training for personnel involved in their supervision, and <b>meaningful alternatives to imprisonment for minor juvenile offenders.</b>	1.	Noted.
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## Appendix VI

### Complete List of Recommendations

#### Children's Hearings (Scotland) Act 2011:

- (i) s.26: whatever setting the child is tried in, their "best interests" must always be the paramount consideration;
- (ii) s.199: all persons under 18 must be legally defined as children.

#### Criminal Procedure (Scotland) Act 1995:

- (i) s.307: all persons under 18 must be legally defined as children;
- (ii) s.50(6): whatever setting the child is tried in, their "best interests" must always be the paramount consideration;
- (iii) Privacy: the current tests set out in s.47(1), s.92 and s.142 do not provide sufficient protection.
  - a) s.47(1): all persons who are under 18 at the time of the offence must be granted lifelong anonymity, with any exceptions to this extremely limited and clearly stated in law;
  - b) s.92: there must be a strong presumption that all cases (whether summary or solemn) involving an accused under 18 will be heard in a closed court, with any exceptions to this extremely limited and clearly stated in law;
  - c) s.142: the s.142 provisions must extend to all children under 18 (a position that will follow once the definition of a child is amended in s.307).
- (iv) Bail: the current test of "*good reason*" is not sufficient.
  - a) s.23B and 23C: for anyone under 18, there must be a presumption against pre-trial detention, rebuttable only if the child presents a serious and continuing risk to public safety or themselves, which cannot be reduced to an acceptable level in the community;
  - b) s.51(1)(aa) and s.51(1)(b): committal to a YOI or prison must not be an option for anyone under 18;

- c) In cases where bail is refused, the child should be placed in secure care.
- (v) Sentencing: the current test of whether “*no other method of dealing with [them] is appropriate*” is again insufficient.
  - a) s.207(3) and s.208(1): there must be a statutory presumption against any form of detention for anyone under 18, rebuttable only if the child presents a serious and continuing risk to public safety or themselves, which cannot be reduced to an acceptable level in the community;
  - b) In cases where detention cannot be avoided, this must be in secure care. Furthermore, the court must only be able to authorise a short maximum period of detention, following which a presumption of release should apply;
  - c) s.205(2): detention without limit of time for murder must be abolished altogether.

**General amendments:**

- (i) A statutory presumption in favour of diversion for all under 18s must be introduced, with prosecution only permitted in the most serious cases (clearly defined);
- (ii) Where prosecution is required, a statutory presumption that the child will be dealt with in the CHS is required;
- (iii) In exceptional cases where the CHS cannot effectively manage a child’s needs, they must not be tried in an adult court, irrespective of the gravity of their offending;
- (iv) Children should not be treated any differently because they are co-accused with adults.

## **Bibliography**

### ***Primary sources***

#### **1. Domestic**

##### **(i) Legislation**

Social Work (Scotland) Act 1968.

Age of Legal Capacity (Scotland) Act 1991.

Criminal Procedure (Scotland) Act 1995.

Scotland Act 1998.

Children's Hearings (Scotland) Act 2011.

Criminal Justice and Licensing Act 2011.

Prisons and Young Offender Institutions (Scotland) Rules 2011.

Victims and Witnesses (Scotland) Act 2014.

Criminal Justice (Scotland) Act 2016.

Age of Criminal Responsibility (Scotland) Act 2019.

Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.

Presumption Against Short Periods of Imprisonment (Scotland) Order 2019.

Coronavirus (Scotland) (No. 2) Bill (May 2020), available at:  
<https://beta.parliament.scot/bills/coronavirus-scotland-no2-bill> [accessed 20.08.20].

Coronavirus Act 2020.

The Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020.

Draft Children's Rights (Scotland) Bill 2019, available at: <https://cypcs.org.uk/wp-content/uploads/2020/02/Childrens-Rights-Scotland-Bill.pdf> [accessed 10.08.20].

Disclosure (Scotland) Bill, details available at:  
<https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/112286.aspx> [accessed 22.08.20].

##### **(ii) Caselaw**

Re S (A Minor) (Independent Representation) [1993] Fam 263.

Kane v HMA [2003] S.C.C.R. 749.

Roddy (A Child) (Identification: Restriction on Publication), Re, [2004] E.M.L.R. 8 (2003).

R (S) v Waltham Forest Youth Court & Ors [2004] EWHC 715 (Admin).

Mabon v Mabon [2005] 3 WLR 460.

R (D) v Camberwell Green Youth Court [2005] UKHL 4 [2005] 1WLR 393.

McGowan (Procurator Fiscal, Edinburgh) v B [2011] UKSC 54.

The Queen on the Application of HC (A child, by his litigation friend CC) -v- The Secretary of State for the Home Department [2013] EWHC 982 (Admin).

HMA v Smith [2013] HCJAC 137.

Mathieson v. Secretary of State for Work and Pensions [2015] UKSC 47.

McCormick v HMA [2016] HCJAC 50.

O'Hara v HM Advocate [2016] HCJAC 107.

R (on the application of AB) v. the Secretary of State for Justice [2017].

R (DA) v. Secretary of State for Work and Pensions [2019] UKSC 21.

The Queen on the application of Just for Kids Law v Secretary of State for the Home Department [2019] EWHC 1772 (Admin).

TI v Bromley Youth Court [2020] EWHC 1204 (Admin).

HM Advocate v Campbell (Aaron) unreported 21 February 2019 (HCJ).

### **(iii) Government Reports / Policy Documents**

Lord Kilbrandon, et al. (1964). 'Report of The Committee On Children And Young Persons, Scotland'. Edinburgh: HMSO, available at: <https://www.gov.scot/publications/kilbrandon-report/pages/4/> [accessed 23.08.20].

The Crown Office and Procurator Fiscal Service. 'Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children', available at: [https://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Lord\\_Advocates\\_Guidelines/Lord%20Advocates%20Guidelines%20offences%20committed%20by%20children.pdf](https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Lord_Advocates_Guidelines/Lord%20Advocates%20Guidelines%20offences%20committed%20by%20children.pdf) [accessed 22.08.20].

The Crown Office and Procurator Fiscal Service, Book of Regulations, available at: <https://www.copfs.gov.uk/publications> [accessed 23.08.20].

Scottish Government. (2011). 'Assisting young people aged 16 and 17 in court', available at: <https://www.gov.scot/publications/assisting-young-people-aged-16-17-court/pages/7/> [accessed 13.08.20].

Scottish Government. (June 2015). 'Preventing offending: getting it right for children and young people, Our Youth Justice Strategy for 2015 to 2020', available at: <https://www.gov.scot/publications/preventing-offending-getting-right-children-young-people/pages/3/> [accessed 23.08.20].

COPFS, Scottish Courts and Tribunals Service, Police Scotland and Victim Support Scotland. (2017). 'Working Together for Victims and Witnesses Protocol' (2017), available: <https://www.scotcourts.gov.uk/docs/default-source/coming-to-court/working-together-for-victims-and-witnesses.pdf?sfvrsn=6> [accessed 22.08.20].

Scottish Government. (2017). 'Youth justice strategy: progress report', available at <https://www.gov.scot/publications/youth-justice-strategy-preventing-offending-getting-right-children-young-people/> [accessed 23.08.20].

Scottish Government. (2018). 'Progressing the human rights of children in Scotland: 2018 report', available at: <https://www.gov.scot/publications/progressing-human-rights-children-scotland-report-2015-2018/> [accessed 22.08.20].

Scottish Government. (April 2018). 'Custody of convicted children and young people: practice guidance', available at: <https://www.gov.scot/publications/practice-guidance-custody-children-young-people-convicted-under-section-205/pages/2/> [accessed 23.08.20].

Scottish Government. (2018). 'Scottish Government contribution to UK Government response to UN Global Study on Children Deprived of Liberty', obtained by the writer June 2020 (copy held on file).

Scottish Government. (May 2019). 'Incorporating the UN Convention on the Rights of the Child into Scots law: consultation', available at: <https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/pages/2/> [accessed 23.08.20].

Scottish Government. (June 2019). 'Ministerial Statement: Response to the Expert Review of Mental Health Services for Young People Entering and in Custody at HMP and YOI Polmont', available at: <https://news.gov.scot/speeches-and-briefings/ministerial-statement-response-to-the-expert-review-of-mental-health-services-for-young-people-entering-and-in-custody-at-hmp-and-yoi-polmont> [accessed 13.08.20].

COPFS and Scottish Children's Reporter Administration ('SCRA'). (June 2019). 'Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter', available at: <https://www.copfs.gov.uk/images/2019%2006%2013%20Joint%20Agreement%20COPFS%20and%20SCRA%20Decision%20Making%20in%20Jointly%20Reported%20Cases.pdf> [accessed 22.08.20].

Scottish Government. (Nov 2019). 'United Nations on the Rights of the Child: consultation analysis', p.3, available at: <https://www.gov.scot/publications/uncrc-consultation-analysis-report/> [accessed 22.08.20].

The Scottish Parliament, The Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney. Meeting of the Parliament 20 November 2019, United Nations Convention on the Rights of the Child, available at: [http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12376&mode=html#iob\\_111834](http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12376&mode=html#iob_111834) [accessed 10.08.20].

Scottish Government. (Feb 2020). 'Report of Independent Care Review: First Ministers speech', available at: <https://www.gov.scot/publications/statement-report-independent-care-review/> [accessed 13.08.20].

Scottish Government. (June 2020). 'Raising the age of referral to the Reporter: consultation', available at: <https://www.gov.scot/publications/consultation-raising-age-referral-principal-reporter/pages/7/> [accessed 22.08.20].

#### *Online materials*

Scottish Government. Child Protection Policy: Children's hearings, at <https://www.gov.scot/policies/child-protection/childrens-hearings/> [accessed 04.08.20].

Scottish Government. Children and families, at: <https://www.gov.scot/children-and-families/> [accessed 04.08.20].

Scottish Government. 'Getting it right for every child (GIRFEC)', at <https://www.gov.scot/policies/girfec/> [accessed 04.08.20].

Scottish Government. Youth Justice: secure care, at: <https://www.gov.scot/policies/youth-justice/secure-care/> [accessed 22.08.20].

Scottish Government. Youth Justice Policy: Whole system approach to young offending, at <https://www.gov.scot/policies/youth-justice/whole-system-approach/> [accessed 23.08.20].

Scottish Government. 'Criminal Proceedings in Scotland, 2018-19', p.62, available at: <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/> [accessed 23.08.20].

Scottish Government. (March 2020). 'Children's Social Work Statistics Scotland, 2018-19', available at: <https://www.gov.scot/publications/childrens-social-work-statistics-scotland-2018-2019/> [accessed 23.08.20].

## **2. Regional**

### **(i) Treaties**

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

Council of Europe, European Convention on the Exercise of Children's Rights, 25 January 1996, ETS 160, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160> [accessed 23.08.20].

### **(ii) Rules / Standards**

Council of Europe. (2010). 'Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice' (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th Meeting of the Ministers' Deputies) Council of Europe, Strasbourg, available at: <https://rm.coe.int/16804b2cf3> [accessed 22.08.20].

Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, available at: <http://data.europa.eu/eli/dir/2016/800/oj> [accessed 22.08.20].

### **(iii) State reports**

Council of Europe: Committee for the Prevention of Torture, 'Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 25 October 2018', 11 October 2019, CPT/Inf (2019) 29, available at: <https://rm.coe.int/1680982a3e> [accessed 22.08.20].

### **(iv) Caselaw**

Delcourt v Belgium [1971] EHRR 355.

T v UK ECtHR (GC), 16 December 1999, appl.no, 24724/94.

V v United Kingdom [1999] 30 EHRR 121, 179.

Osman v the United Kingdom (Application 23452/94) ECHR 1998-VIII 3124.

A v United Kingdom (Application 35373/97) (2002) 36 EHRR 917, ECtHR.

## **3. International**

### **(i) Treaties**

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20660/v660.pdf> [accessed 22.08.20].

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed 22.08.20].

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: [https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch\\_IV\\_03.pdf](https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf) [accessed 22.08.20].

United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> [accessed 23.08.20].

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3, available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [accessed 23.08.20].

Rome Statute of the International Criminal Court, adopted 1998, entered into force July 1 2002.

UN General Assembly, *Convention on the Rights of Persons with Disabilities* : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: <https://www.refworld.org/docid/45f973632.html> [accessed 23.08.20].

## **(ii) Rules / Standards**

UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')*: resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/33.

UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines')*: resolution / adopted by the General Assembly, 14 December 1990, A/RES/45/112.

UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty ('the Havana Rules')*: resolution / adopted by the General Assembly, 2 April 1991, A/RES/45/113.

UN Human Rights Council, *Human rights in the administration of justice, including juvenile justice: resolution / adopted by the Human Rights Council*, 26 September 2019, A/HRC/RES/42/11, p.2.

## **(iii) General Comments**

UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, available at: <https://www.refworld.org/docid/453883f922.html> [accessed 14.09.20].

UN Human Rights Committee (HRC), CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989, available at: <https://www.refworld.org/docid/45139b464.html> [accessed 22.08.20].

UN Committee on the Rights of the Child (CRC), 'General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child', 1 July 2003, CRC/GC/2003/4, p.1.

UN Committee on the Rights of the Child (CRC), 'General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child', 27 November 2003, CRC/GC/2003/5  
UN Committee on the Rights of the Child (CRC), 'General comment No.10 (2007): Children's Rights in Juvenile Justice', 25 April 2007, CRC/C/GC/10.

UN Committee on the Rights of the Child (CRC), 'General comment No.12 (2009): The right of the child to be heard', 20 July 2009, CRC/C/GC/12.

UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20.

UN Committee on the Rights of the Child (CRC), 'General comment No. 24 (2019): Children's Rights in the child justice system', 18 September 2019, CRC/C/GC/24.

#### **(iv) Concluding observations**

UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding observations: Ethiopia, 21 February 2001, CRC/C/15/Add.144, available at: <https://www.refworld.org/docid/3cb436204.html> [accessed 23.08.20].

UN Committee on the Rights of the Child (CRC), 'UN Committee on the Rights of the Child: Concluding observations: United Kingdom of Great Britain and Northern Ireland, 9 October 2002', CRC/C/15/Add.188, available at: <https://www.refworld.org/docid/3df58f087.html> [accessed 22.08.20].

UN Committee on the Rights of the Child (CRC), Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child: Concluding observations : Sri Lanka, 2 July 2003, CRC/C/15/Add.207, available at: <https://www.refworld.org/docid/48abd53f5.html> [accessed 23.08.20].

UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding observations: Canada, 27 October 2003, CRC/C/15/Add.215, available at: <https://www.refworld.org/docid/403a22804.html> [accessed 23.08.20].

UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding observations: Dominica, 30 June 2004, CRC/C/15/Add.238, available at: <https://www.refworld.org/docid/42d3bfe94.html> [accessed 23.08.20].

UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding observations, Saudi Arabia, 17 March 2006, CRC/C/SAU/CO/2, available at: <https://www.refworld.org/docid/45377ed70.html> [accessed 23.08.20].

UN Committee on the Rights of the Child (CRC), 'Concluding observations: United Kingdom of Great Britain and Northern Ireland, 20 October 2008', CRC/C/GBR/CO/4, available at: <https://www.refworld.org/docid/4906d1d72.html> [accessed 22.08.20].

UN Human Rights Committee, 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, 17 August 2015', CCPR/C/GBR/CO/7, available at: <https://www.refworld.org/docid/5645a59c4.html> [accessed 22.08.20].

UN Committee on the Rights of the Child (CRC), 'UN Committee on the Rights of the Child: Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland', 12 July 2016, CRC/C/GBR/CO/5, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En) [accessed 23.08.20].

#### **(v) Reports**

UN Committee on the Rights of the Child (CRC), 'Committee on the Rights of the Child, Report of the 2006 Day of General Discussion on The Right of the Child to be Heard, 29 September 2006', available at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx> [accessed 22.08.20].

UN Human Rights Council. (2012). 'Joint Report of the High Commissioner for Human Rights, The United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence Against Children on prevention of and responses to violence against children within the juvenile justice system', 27 June 2012, A/HRC/21/25, available at: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-25\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-25_en.pdf) [accessed 22.08.20].

UN Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Note by the Secretariat, 10 April 2018, A/HRC/38/36, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/101/42/pdf/G1810142.pdf?OpenElement> [accessed 23.08.20].

United Nations. (October 2019). 'The United Nations Study on Children Deprived of Liberty' ('the Global Study'), available at: <https://www.refworld.org/docid/5ee761384.html> [accessed 13.20.20].

UN Committee on the Rights of the Child. (April 2020). 'CRC COVID-19 Statement', para.8, p.2, available at: <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx> [accessed 22.08.20].

United Nations Human Rights Council, Universal Periodic Review – United Kingdom of Great Britain and Northern Ireland, available at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/GBindex.aspx> [accessed 20.08.20].

## **Secondary sources**

### **(i) Articles**

Armour, A. (2020). 'Reducing the overcriminalisation of care-experienced young people in Scotland: towards a model of best practice', available at: <https://www.iriss.org.uk/resources/student-research/reducing-overcriminalisation-care-experienced-young-people-scotland> [accessed 23.08.20].

Arthur, R. (2010). 'Protecting the Best Interests of the Child: A Comparative Analysis of the Youth Justice Systems in Ireland, England and Scotland'. *The International Journal of Children's Rights*, 18(2), pp.217–231.

Baerger, DR. et al. (2003). 'Competency to stand trial in preadjudicated and petitioned juvenile defendants'. *Journal of the American Academy of Psychiatry and the Law Online*, 31(3), pp.314–320.

Barnes, K. & Wilson, J. (2008). 'Young People's Knowledge of the UK Criminal Justice System and Their Human Rights'. *International Journal of Police Science & Management*, 10(2), pp.214–221.

Bateman, T. (2012). 'Who Pulled the Plug? Towards an Explanation of the Fall in Child Imprisonment in England and Wales'. *Youth justice*, 12(1), pp.36–52.

Bernburg, J. & Krohn, M. (2003) 'Labelling, life chances, and adult crime: The direct and indirect effects of official intervention in adolescence on crime in early adulthood', *Criminology* (Beverly Hills), 41(4), pp.1287–1318.

Bryan-Hancock, C. (2011). 'Young People and the Justice System: Consideration of Maturity in Criminal Responsibility'. *Psychiatry, Psychology and Law*, 18(1), pp.69–78.

Cleland, A. (2016). 'Portrait of the Accused as a Young Man: New Zealand's Harsh Treatment of Young People who Commit Serious Crimes'. *The Round Table: Youth and the Commonwealth*, 105(4), pp.377–387.

Crawford, E., & Bull, R. (2006). 'Teenagers' difficulties with key words regarding the criminal court process'. *Psychology, Crime & Law*, 12(6), pp.653–667.

Cuncannan, J. 1997. 'Only when they're bad: the rights and responsibilities of our children'. *Washington University Journal of Urban and Contemporary Law*, 51, p.301.

- Delmage, E. (2013). 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective'. *Youth justice*, 13(2), pp.102–110.
- Doob, A. & Tonry, M. (2004). 'Varieties of youth justice. Youth Crime And Youth Justice: Comparative And Cross-National Perspectives', 31, pp.293-347.
- Dünkel, F. (2014). 'Juvenile Justice Systems in Europe – Reform developments between justice, welfare and 'new punitiveness''. *Criminology Studies* 1(1), 2014–01-01, Vol.1(1).
- Goldson, B. & Muncie, J. (2012). 'Towards a global 'child friendly' juvenile justice?', *International Journal of Law, Crime and Justice* 40: 47-64.
- Goldson, B. (2013). 'Unsafe, Unjust and Harmful to Wider Society': Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales. *Youth justice*, 13(2), pp.111–130.
- Goldson, B. & Kilkelly, U. (2013). 'International human rights standards and child imprisonment: Potentialities and limitations'. *The International Journal of Children's Rights*, 21(2), pp.345–371.
- Gough, A. & Lightowler, C. (2018). 'Children's Lives, Education and Secure Care in Scotland'. In Gallard, D., Evans, K. and Millington, J. (eds.) *Children and Their Education in Secure Accommodation: Interdisciplinary Perspectives of Education, Health and Youth Justice*. London: Routledge.
- Green, D. (2007). 'Comparing Penal Cultures: Child on Child Homicide in England and Norway'. *Crime and Justice*, 36(1), pp.591–643.
- Grisso, T. et al. (2003). 'Juveniles' Competence to Stand Trial'. *Law and Human Behavior*, 27(4), pp.333–363.
- Haydon, D., & Scraton, P. (2000). "Condemn a little more, understand a little less": the political context and rights implications of the domestic and European rulings in the Venables-Thompson case'. (United Kingdom). *Journal of Law and Society*, 27(3), pp.416–448.
- Holligan, C., 2015. "The Cake and Custard is Good!" A Qualitative Study of Teenage Childrens' Experience of being in Prison. *Children & Society*, 29(5), pp.366–376.
- Hollingsworth, K. (2007). 'Responsibility and Rights: Children and Their Parents in the Youth Justice System'. *International Journal of Law, Policy and the Family*, 21(2), pp.190–219.
- Kanetake, M. (2018). 'UN Human Rights Treaty Monitoring Bodies before Domestic Courts', *The International and comparative law quarterly*, 67(1), pp.201–232.
- Kilkelly, U. (2008). 'Youth Courts and Children's Rights: The Irish Experience'. *Youth Justice*, 8(1), pp.39–56.
- Lansdown, G. (2005). 'The evolving capacities of the child' (Florence: UNICEF Innocenti Research Centre), p.24, available at: <https://www.unicef-irc.org/publications/384-the-evolving-capacities-of-the-child.html> [accessed 22.08.20].
- Lerner, R. & Galambos, N. (1998). 'Adolescent Development: Challenges and Opportunities for Research, Programs, and Policies'. *Annual review of psychology*, 49(1), pp.413–446.
- Lundy, L. (2019). 'A Lexicon for Research on International Children's Rights in Troubled Times'. *The International Journal of Children's Rights*, 2019(4), pp.595–601, p.596.
- Lynch, N. (2018). "'The Other Child" - The Rights of the Child Victim in the Youth Justice System'. *The International Journal of Children's Rights*, 26(2), pp.228–250.
- Lynch, N. (2018). 'Towards a Principled Legal Response to Children Who Kill'. *Youth Justice*, 18(3), pp.211–229.

Lynch, N., & Liefwaard, T. (2020). 'What is Left in the "Too Hard Basket"?' Developments and Challenges for the Rights of Children in Conflict with the Law. *The International Journal of Children's Rights*, 28(1), pp.89–110.

Maruna, S., & Mann, R. (2019). 'Reconciling "Desistance" and "What Works"', HM Inspectorate of Probation, Academic Insights 2019/1, London: HMI Probation.

McDiarmid, C. (2000). 'Children who murder: what is Her Majesty's pleasure?' *Criminal Law Review*, Jul, pp.547–563.

McDiarmid, C. (2016). 'Making best interests significant for children who offend: a Scottish perspective'. In: Sutherland, E. & Macfarlane, L-A.B. (2016). *Implementing Article 3 of the United Nations Convention on the Rights of the Child: best interests, welfare and well-being*, Cambridge, United Kingdom: Cambridge University Press.

McDiarmid, C. (2016). 'After the age of criminal responsibility: a defence for children who offend'. *Northern Ireland legal quarterly*, 67(3), p.327.

McGhee, J. & Waterhouse, L. (2002). 'Family support and the Scottish children's hearings system'. *Child & Family Social Work*, 7(4), pp.273–283.

McInnes, R. (2019). 'Naming Aaron Campbell'. *Scots Law Times*, 22, pp.67–77.

Nolan, D., Dyer, F. & Vaswani, N. (2018). 'Just a wee boy not cut out for prison': Policy and reality in children and young people's journeys through justice in Scotland. *Criminology & criminal justice*, 18(5), pp.533–547.

Nolan, D. CYCJ. (June 2020). "Spend time with me": Children and young people's experiences of COVID-19 and the justice system", available at: <https://www.cycj.org.uk/wp-content/uploads/2020/06/COVID-19-and-justice-report-final.pdf> [accessed 22.08.20].

Piacentini, L. & Walters, R. (2006). 'The Politicization of Youth Crime in Scotland and the Rise of the 'Burberry Court'', *Youth Justice*, 6(1), pp.43–59.

Rap, S. (2015). 'The Implementation of the Right to be Heard in Juvenile Justice Proceedings in Europe'. In Iusmen, I. & Stalford, H. (Eds.), *The EU as a Global Children's Rights Actor: Law, Policy and Structural Dimensions* (pp.133-163). London: Barbara Budrich Publishers, 2016, p.154.

Rap, S. (2016). 'A Children's Rights Perspective on the Participation of Juvenile Defendants in the Youth Court'. *The International Journal of Children's Rights*, 24(1), pp.93–112.

Ramoutar, K., & Farrington, P. (2006). 'Are the same factors related to participation and frequency of offending by male and female prisoners?' *Psychology, Crime & Law*, 12(5), pp.557–572.

Ratledge, L. (2017). 'End Detention of Children as Punishment', in *Protecting children against torture in detention: Global solutions for a global problem*, Washington College of Law, p.184, available at: [http://antitorture.org/wp-content/uploads/2017/03/Protecting\\_Children\\_From\\_Torture\\_in\\_Detention.pdf](http://antitorture.org/wp-content/uploads/2017/03/Protecting_Children_From_Torture_in_Detention.pdf) [accessed 23.08.20].

Tisdall, K. (1998). 'Children's best interests versus public safety: How are they balanced?' *The International Journal of Children's Rights*, 6(4), pp.395–405.

Walsh, C. (2010). 'Youth Justice And Neuroscience: A Dual-Use Dilemma'. *British journal of criminology*, 51(1), pp.21–39.

Whyte, B. (May 2014). 'Young People in Conflict with the Law in Scotland - 50 Years after the Kilbrandon report. What does contemporary policy and practice tell us about our progress since and about the legacy of Kilbrandon?', Sutherland Trust Lecture Spring (May) 2014, available at:

<https://pdfs.semanticscholar.org/5ba4/af8c8764fd3e6848b8cf0c741aab88612fe7.pdf%20-> [accessed 13.08.20].

Young, S., Greer, B. & Church, R. (2017). Juvenile delinquency, welfare, justice and therapeutic interventions: a global perspective. *BJPsych bulletin*, 41(1), pp.21–29.

## **(ii) Reports / Guidance**

Plotnikoff, J. & Woolfson, R. (2003). 'Young Defendants Pack: Scoping Study for the Youth Justice Board'. London: Home Office, available at: <http://lexiconlimited.co.uk/wp-content/uploads/2018/03/youngdefendantspack-finalreport.pdf> [accessed 22.08.20].

Mclvor, G., Barnsdale, L., & MacRae, R et al. (2006). 'Review of the Hamilton and Airdrie Youth Courts' – Report, Scottish Government Crime, Law, Justice and Rights, 2010.

Scottish Prisons Commission. (2008). 'Scotland's Choice', available at: <https://www2.gov.scot/Publications/2008/06/30162955/0> [accessed 22.08.20].

Hammarberg, T. Council of Europe: Commissioner for Human Rights. (Feb 2009), 'Children should not be treated as criminals, available at: <https://www.refworld.org/docid/4a701d542.html> [accessed 22.08.20].

The Howard League for Penal Reform. (October 2011). 'United Kingdom Universal Periodic Review, Submission by the Howard League for Penal Reform', available at: [https://lib.ohchr.org/HRBodies/UPR/Documents/Session13/GB/HLPR\\_UPR\\_GBR\\_S13\\_2012\\_HowardLeaguePenalReform.pdf](https://lib.ohchr.org/HRBodies/UPR/Documents/Session13/GB/HLPR_UPR_GBR_S13_2012_HowardLeaguePenalReform.pdf) [accessed 23.08.20].

Talbot, J. Prison Reform Trust. (2012). 'Fair Access to Justice? Support for vulnerable defendants in the criminal courts. A PRT briefing paper', available at: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/FairAccessToJustice.pdf> [accessed 20.08.20].

McAra, L & McVie, S. (2013). 'Delivering Justice for Children and Young People: Key Messages from the Edinburgh Study of Youth Transitions and Crime', p.3, in A Dockley (ed.), *Justice for Young People: Papers by Winners of the Research Medal 2013*. Howard League for Penal Reform.

Child Rights International Network ('CRIN'). (2013). 'Stop Making Children Criminals', available at: [https://archive.crin.org/sites/default/files/crin\\_policy\\_paper\\_-\\_stop\\_making\\_children\\_criminals.pdf](https://archive.crin.org/sites/default/files/crin_policy_paper_-_stop_making_children_criminals.pdf) [accessed 22.08.20].

Carlile, A. (2014) 'Independent parliamentarians' inquiry into the operation and effectiveness of the youth court'. London: National Children's Bureau, available at: [http://michaelsieff-foundation.org.uk/content/inquiry\\_into\\_the\\_operation\\_and\\_effectiveness\\_of\\_the\\_youth\\_court-uk-carlile-inquiry.pdf](http://michaelsieff-foundation.org.uk/content/inquiry_into_the_operation_and_effectiveness_of_the_youth_court-uk-carlile-inquiry.pdf) [accessed 22.08.20].

Scottish Court Service. (2015). 'Evidence and Procedure Review Report', available at: <https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2> [accessed 22.08.20].

Dyer, F. CYCJ. (Jan 2016). 'Young People at Court in Scotland', available at: <https://cycj.org.uk/wp-content/uploads/2016/02/YoungPeopleAtCourtFINAL.pdf> [accessed 13.08.20].

Child Rights International Network ('CRIN'). (2016). 'Age is Arbitrary: setting minimum ages', available at: [https://archive.crin.org/sites/default/files/discussion\\_paper\\_-\\_minimum\\_ages.pdf](https://archive.crin.org/sites/default/files/discussion_paper_-_minimum_ages.pdf) [accessed 22.08.20].

Centre for Youth & Criminal Justice (CYCJ). (March 2016). 'Minimum Age of Criminal Responsibility (MACR) International Profiles', available at: <https://cycj.org.uk/wp-content/uploads/2016/03/AllInternationalProfilesFINAL.pdf> [accessed 23.08.20].

- Bevan, M. (2016). 'Investigating young people's awareness and understanding of the criminal justice system: An exploratory study', available at: <https://howardleague.org/wp-content/uploads/2016/06/Investigating-young-people%E2%80%99s-awareness-and-understanding-of-the-criminal-justice-system.pdf> [accessed 22.08.20].
- UK Children's Commissioners. (April 2016). 'Response to the Replies of the United Kingdom of Great Britain and Northern Ireland to the List of Issues of the UN Committee on the Rights of the Child', p.22, available at: [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/GBR/INT\\_CRC\\_IFN\\_GBR\\_23797\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/GBR/INT_CRC_IFN_GBR_23797_E.pdf) [accessed 22.08.20].
- UK's Children's Commissioners' Recommendations. (May 2016). UN Committee on the Rights of the Child, Examination of the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, para.86, p.15, available at: <https://www.niccy.org/media/2461/uk-childrens-commissioners-final-recommendations-crc-examination-of-the-uk-2016.pdf> [accessed 22.08.20].
- Clan Childlaw (2017), 'Independent Strategic Review of Legal Aid, Call for evidence', available at: <https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=3a0091dd-20a7-4cb9-939a-d07e5cba8ab7> [accessed 23.08.20].
- Lightowler, C. & Nolan, D. CYCJ. (2017). 'The whole system approach: responding to complexity and lessons learned', available at: <https://cycj.org.uk/wp-content/uploads/2017/03/WSA-SASO-update-March-2017.pdf> [accessed 13.08.20].
- Inspectorate of Prosecution in Scotland. (2018). 'Prosecution of young people: report', available at: <https://www.gov.scot/publications/thematic-report-prosecution-young-people/> [accessed 22.08.20].
- Vaswani, N. & Gillon, F. CYCJ. (2018). 'CYCJ Stakeholder Consultation 2018', available at: <https://www.cycj.org.uk/wp-content/uploads/2019/01/CYCJ-Stakeholder-Survey-2018.pdf> [accessed 23.08.20].
- CYCJ. (2018). 'Child Accused Roundtable: September 6, 2018 – Key themes', available at <https://www.cycj.org.uk/wp-content/uploads/2018/11/Child-Accused-Roundtable-1.pdf> [accessed 22.08.20].
- Taylor, C. (December 2016). 'Review of the Youth Justice System in England and Wales', available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/577103/youth-justice-review-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577103/youth-justice-review-final-report.pdf) [accessed 14.09.20].
- CYPCS. (2019). 'Age of Criminal Responsibility (Scotland) Bill: Evidence to the Equalities and Human Rights Committee', available at: <https://cypcs.org.uk/wpcypcs/wp-content/uploads/2020/02/ACR-evidence-Jan-19.pdf> [accessed 24.08.20].
- Scottish Sentencing Council. (April 2019). 'Youth offending and sentencing in Scotland and other jurisdictions Literature review', available at: <https://www.scottishsentencingcouncil.org.uk/media/1961/youth-offending-and-sentencing-in-scotland-and-other-jurisdictions-literature-review-2.pdf> [accessed 23.08.20].
- HM Inspectorate of Prisons for Scotland. (May 2019). 'Report on an Expert Review of the Provision of Mental Health Services, for Young People Entering and in Custody at HMP YOI Polmont', available at: [https://www.prisonssentencing.scot.nhs.uk/sites/default/files/publication\\_files/Report%20on%20Expert%20Review%20of%20Provision%20of%20Mental%20Health%20Services%20at%20HMP%20YOI%20Polmont%20-%20Final%20Version.pdf](https://www.prisonssentencing.scot.nhs.uk/sites/default/files/publication_files/Report%20on%20Expert%20Review%20of%20Provision%20of%20Mental%20Health%20Services%20at%20HMP%20YOI%20Polmont%20-%20Final%20Version.pdf) [accessed 13.08.20].
- Centre for Youth & Criminal Justice. (September 2020). 'A Guide to Youth Justice in Scotland', available at: <https://www.cycj.org.uk/resource/youth-justice-in-scotland-guide/> [accessed 27.09.20].

CYPCS. (August 2019). 'Evidence for the Scottish Parliament's Education and Skills Committee on the Disclosure (Scotland) Bill', available at: <https://cypcs.org.uk/wp-content/uploads/2020/02/Disclosure-Bill.pdf> [accessed 24.08.20].

Together, Scottish Alliance for Children's Rights. (2019). 'State of Children's Rights in Scotland', available at [https://www.togetherscotland.org.uk/media/1436/socrr\\_online\\_version.pdf](https://www.togetherscotland.org.uk/media/1436/socrr_online_version.pdf) [accessed 23.08.20].

Goldson, B. (2019). 'International Human Rights Standards and Youth Justice' (2019/04). Manchester: Her Majesty's Inspectorate of Probation, available at: <https://www.justiceinspectorates.gov.uk/> [accessed 22.08.20].

Miller, J. (2019) 'Evaluation of South Lanarkshire Structured Deferred Sentencing for Young People: Mid Way Report'. University of the West of Scotland, available at: <https://www.sastudyoffending.org.uk/attachments/article/334/South%20Lanarkshire%20Structured%20Deferred%20Sentencing%20Mid%20Report.pdf> [accessed 23.08.20].

Booth, G. (2019) 'Structured Deferred Sentence: Case Study Glasgow: Centre for Youth and Criminal Justice', available at: <https://www.cycj.org.uk/wp-content/uploads/2019/05/6-Case-Study-South-Lanarkshire.pdf> [accessed 23.08.20].

Children and Young People's Commissioner Scotland ('CYPCS'). (2020). 'Commissioner: Stop and search research highlights need for human rights-based approach', available at: <https://cypcs.org.uk/news-and-stories/commissioner-stop-and-search-research-highlights-need-for-human-rights-based-approach/> [accessed 23.08.20].

Lightowler, C. (2020). 'Rights Respecting? Scotland's approach to children in conflict with the law', Centre for Youth and Criminal Justice, p.2, available at: <https://www.cycj.org.uk/wp-content/uploads/2020/01/Rights-Respecting-Scotlands-approach-to-children-in-conflict-with-the-law.pdf> [accessed 10.08.20].

Independent Care Review. (May 2020). 'The Promise', available at: <https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf> [accessed 13.08.20].

CYPCS. (May 2020). 'A new emergency Bill around Coronavirus is before the Scottish Parliament today. Here are two amendments that would protect young people's rights', available at: <https://cypcs.org.uk/news-and-stories/a-new-emergency-bill-around-coronavirus-is-before-the-scottish-parliament-today-here-are-two-amendments-that-would-protect-young-peoples-rights/> [accessed 23.08.20].

Howard League for Penal Reform. (May 2020). 'Children in prison during the Covid-19 pandemic: A briefing from the Howard League for Penal Reform', available at: <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf> [accessed 22.08.20].

CYPCS & Observatory of Children's Human Rights Scotland. (August 2020). 'Independent Children's Rights Impact Assessment on the Response to Covid-19 in Scotland', Appendix 9: Children in Conflict with the Law and Children in Secure Care: CRIA, available at: <https://cypcs.org.uk/wp-content/uploads/2020/07/independent-cria.pdf> [accessed 22.08.20].

### **(iii) Textbooks**

Cipriani, D. (2009). 'Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective', Routledge.

Goldson, B. (ed.) (2008). 'Juvenile Justice in Europe: Past, Present and Future'. London: Routledge.

Mahoney, J. (2007). 'The challenge of human rights: origin, development, and significance', Malden, Mass; Oxford: Blackwell.

Sutherland, E. & Macfarlane, L-A.B. (2016). *Implementing Article 3 of the United Nations Convention on the Rights of the Child: best interests, welfare and well-being*, Cambridge, United Kingdom: Cambridge University Press.

Van Bueren, G. & Alen, A. (2006). 'Article 40: child criminal justice', Leiden; Boston: Martinus Nijhoff Publishers.

**(iv) Websites / online materials**

Hodgkin, R., Newell, P. & UNICEF (2007). 'Implementation handbook for the Convention on the Rights of the Child'. Fully revised third., Geneva: UNICEF, available at: <https://www.refworld.org/pdfid/585150624.pdf> [accessed 22.08.20].

Pinheiro, P. (2011). 'Juvenile Justice and Human Rights in the Americas', available at: <http://www.cidh.org/countryrep/JusticiaJuvenileng/jjtoc.eng.htm> [accessed 22.08.20].

Independent UNCRC Incorporation Advisory Group, at <https://cypcs.org.uk/positions/incorporation-of-the-uncrc/> [accessed 23.08.20].

World Prison Brief, at <https://www.prisonstudies.org/world-prison-brief-data> [accessed 23.08.20].

Scottish Sentencing Council, 'Jargon Buster', at: <https://www.scottishsentencingcouncil.org.uk/about-sentencing/jargon-buster/#:~:text=Accused%20people%20are%20said%20to,brought%20'on%20summary%20complaint> [accessed 25.08.20].

United Nations Human Rights Council, Universal Periodic Review – United Kingdom of Great Britain and Northern Ireland, available at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/GBindex.aspx> [accessed 20.08.20].

Scottish Prison Service, 'SPS Prison Population: Prison Population', available at: <https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx> [accessed 23.08.20].

**(v) Miscellaneous**

Herweijer M. & Van der Laan, P. (2018), 'Applying juvenile criminal law to young adult offenders. A promising innovation of the justice system in the Netherlands?', presentation at the World Congress on Justice for Children 2018, UNESCO Paris; Perker, S., Chester, LEH., & Beyene, Y. (2018).

Defining the Age of Juvenile Justice Jurisdiction: Current Practices and the Need for Reform', presentation at the World Congress on Justice for Children 2018, UNESCO Paris, available at: <https://2018.justicewithchildren.org/en/home/> [accessed 22.08.20].

Child Rights International Network. (Jan 2019). Comments on the Draft revised General Comment No. 10 (2007) on children's rights in juvenile justice, available at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx> [accessed 23.08.20].

Together Scotland. (2019). Comments on the Draft revised General Comment No. 10 (2007) on children's rights in juvenile justice, available at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx> [accessed 23.08.20].

Article 39 and the NAYJ. (2019). Comments on the Draft revised General Comment No. 10 (2007) on children's rights in juvenile justice, available at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx> [accessed 23.08.20].

Skelton, A. (January 2019), Evidence to the Equalities and Human Rights Committee, 2<sup>nd</sup> Meeting 2019, Session 5, on the Age of Criminal Responsibility (Scotland) Bill 2019, available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11896&mode=pdf> [accessed 22.08.20].

Sandberg, K. (May 2020). Presentation at Moray House Annual Lecture, 'Making Children's Rights Real: the opportunities for incorporating the Convention on the Rights of the Child', available at: [https://www.ed.ac.uk/files/atoms/files/mh-observatory-annual-lecture-slides\\_0.pdf](https://www.ed.ac.uk/files/atoms/files/mh-observatory-annual-lecture-slides_0.pdf) [attended 27.05.20 and slides accessed 13.08.20].

**Data obtained by the writer through under the Freedom of Information (Scotland) Act 2002:**

<b>Source</b>	<b>Date requested</b>	<b>Date provided</b>	<b>Subject</b>	<b>Where referenced.</b>
Scottish Children's Reporter Administration	29.05.20	29.05.20	Referrals / numbers in the CHS	(n 149)
Scottish Government Justice Analytical Services	29.05.20	07.07.20	Information on offences / disposals in the courts	(n 154)
Scottish Government	02.06.20	30.06.20	Global Study	(n 221)
Scottish Prisons Service	03.06.20	07.07.20	Remand outcomes / disaggregated data	(n 223 & 224)
Scottish Courts and Tribunals Service	07.07.20	04.08.20	Remand / secure care numbers	(n 272)