

# The 19th Kilbrandon Lecture (University of Strathclyde, 27 January 2022): A rights-respecting approach for children who offend: Building on Kilbrandon's vision

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## **Abstract**

This lecture was the second to be live-streamed as a webinar during COVID-19 restrictions. Dr Lightowler argued that the experiences of children in conflict with the law demonstrates that we need urgent action of a scale not seen since the Kilbrandon Report (1964). Children in conflict with the law are exposed to significant trauma, adversity, stigma, and injustice. These issues are often exacerbated by contact with the very systems and services intended to support them. Dr Lightowler will demonstrate the transformative change that could be achieved if Scotland viewed children in conflict with the law as rights-holders and devoted greater attention to upholding their rights. The lecture was followed by commentaries by Professor Ursula Kilkelly and Ms Ruth Kerracher, and a vote of thanks by Minister for Children and Early Years in the Scottish Government, Ms Claire Haughey MSP.

## **Keywords**

Children's rights, youth justice, Children's Hearing system, children in custody

It's an absolute honour to be delivering the 19<sup>th</sup> Kilbrandon lecture; to follow on from the inspirational lecturers that have gone before me. And we all of course build on the incredible work of Lord Kilbrandon. I'm delighted, and feel a great sense of responsibility, to have this opportunity to talk about children involved in offending. These children tend to be misunderstood, can be hidden from view, and we often fail to hear their voices, and discussions about them can be highly emotive and simplistic. I'll attempt to share what we know about children involved in offending in Scotland, bring these children into clearer view for you and to amplify their voices and experiences. It's important that you're here, wherever you are, because these children desperately need change from us all.

Last week I had a brilliant discussion with members of Youth Just Us, the steering group for the Youth Justice Voices project which seeks to amplify the voices of young people with care and justice experience. I asked them what it was most important for you to hear about and their views determined the focus of the lecture, and many of the points within it. You'll hear more from Youth Justice Voices later.

The issues I'll talk about are complex and emotive. They're close to many of you listening today and can be difficult to face, particularly as we sit in our rooms alone listening. So please do step back if it gets too much. My former colleagues at the [Children and Young People's Centre for Justice](#) (CYCJ) offer support, guidance, training and produce a range of resources which you may find useful if you want to learn more and take action following the lecture. Fiona Dyer, the Director of CYCJ, would be delighted to hear from you. Please do also reach out to me if you'd appreciate it.

So, let's start, by reflecting on the work of the Kilbrandon Committee and how this has set the foundations for where we go next.

## **Kilbrandon: The foundation for where we go next**

For me, what was, and continues to be, ground-breaking about the work of Kilbrandon is the underpinning ethos and principles of the Children's Hearing

system it recommended, which was created as a result. Kilbrandon recognised that offending behaviours by children were to be seen as an indicator of concern for the child, that the offending demonstrated a need for care, protection, and education. Kilbrandon advocated a focus on needs not deeds; arguing that like children in need of protection from others, children involved in offending should be responded to in the same way and by the same system. Both groups were in 'rouble', 'the normal upbringing processes having, for whatever reason, fallen short' (Kilbrandon Committee, 1964, para 15). Kilbrandon argued that it is not helpful to separate out, or treat any differently, children who come to our attention with the label of 'offender' from those labelled 'victim', because the needs are the same, and of course children who offend, are almost always victims too. This principle is so fundamental to our Children's Hearing System which seeks to support the child and respond to their needs based on what the needs are, regardless of the deeds.

The principles Kilbrandon articulated in 1964 continue to inform and often guide decision making by practitioners and policy makers. There can't be many examples of committee reports which are still referenced in day-to-day policy and practice 60 years later. The foundations Kilbrandon laid means there is a common approach, understanding and set of principles shared amongst professionals and volunteers across Scotland on which we can build.

Kilbrandon came before concepts of children's rights and notions of participation were understood and established but was ahead of his time in creating an approach which saw offending as indicating need and in emphasising the focus should be on the best interests of the child. However, given the strength of this legacy and the vision of Kilbrandon, how come we so often fail children who offend in Scotland?

I'm going to argue that Scotland could do better for children involved in offending. That it is within our reach to do so. We have strong foundations to build on, but we need to pay attention to these foundations, reflecting on what we are trying to achieve, what we're doing and why. We need a scale of change that we've not seen since Kilbrandon, and there is a need for strong and brave

advocates to speak up and think about these children; to make the case for why they need support and resources devoted to them if we are to improve their lives and the lives of all of us. I hope to convince you to become such an advocate, if you're not already, to speak more loudly and clearly if you already are, and to give you all greater insight and understanding. In short that's the destination I'm hoping we reach this evening, and now I'm going to talk through the evidence which takes us there.

## **Who are the children who offend?**

I've focused this lecture specifically on children, meaning those up to 18 years old, because there are specific issues associated with the legal and social status of being a child. There is considerable complexity about the circumstances in which 16 and 17 year-olds are considered children in Scotland and when they're not.<sup>1</sup> Whilst my focus tonight is on children there is also a need to consider the specific needs of young people involved in offending as a separate group too, and encouragingly there are developments such as new sentencing guidelines which recognise the need for a different approach for those up to age 25.

So, I'm going to focus on children, those under 18 years old. If we think about children who offend who are we talking about? Well, we're talking about children. Nearly all children commit a low-level offence at some point in their childhood. Based on self-reported data, the Edinburgh Study of Youth Transitions and Crime found that over 90% children offended at some point in their childhood.<sup>2</sup>

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<sup>1</sup> It's important to acknowledge legal complexity about the status of 16 and 17 year-olds in Scotland, meaning that in some contexts and in some legislation they have specific protections due to their status as a child, whilst in others they do not. Also, some 16 and 17 year-olds are regarded as children while others are not in respect of whether they can be referred to the Children's Hearing System. The deciding factor is whether children have previously had contact with the CHS, not their needs or maturity. In practice this means that a 16 year-old might end up in court rather than the CHS simply because the system missed identifying them as in need of support when they were younger.

<sup>2</sup> Source: <https://www.edinstudy.law.ed.ac.uk>

## WHO OFFENDS? – ALMOST ALL CHILDREN...

At age 12:

Over **half of children** reported causing physical harm to another (usually a sibling)

Around a **quarter of children** reported engaging in:

- graffiti
- shoplifting
- fare dodging

Around **10%** reported being involved in:

- theft at school
- carrying weapons
- damaging property

A **small minority** reported being involved in:

- breaking into cars
- joyriding
- house breaking
- fire-setting

*References: Edinburgh Study of Youth Transitions and Crime 1997-2001: Dataset; Smith et al. (2001) The Edinburgh Study of Youth Transitions and Crime: Key Findings at ages 12 and 13*

Over half of children when they were aged 12 reported causing physical harm to another (usually a sibling); around a quarter reported engaging in graffiti, shoplifting and fare dodging. Whether we like it or not offending is a majority experience for children as they test boundaries, develop, and grow. This is important because there are consequences of othering and labelling a child as an 'offender' when nearly all children are. Low-level offending may result in intervention by parents, teachers, peers and so on, but the offending most children are involved in does not normally lead to, or need, a formal justice response.

When reference is made then to 'children who offend' in policy documents, practice guidance, in the press, we usually mean children in contact with agencies and organisations because of their offending, or because they are accused of offending. Given that nearly all children offend, I use the term 'children in conflict with the law' which more clearly identifies that we're talking about children who structurally have a conflictual relationship with the law, be that as accused, charged, sentenced etc. Children can of course be 'in conflict with the law' but be innocent of any offence. When talking with children and young people we've found the term 'children in trouble with the police' can be more understandable and relatable. But it is not just children's contact with the

police that we're interested in, let's look at this first though, as the police are usually the first point of contact for children in conflict with the law.

Since the creation of Police Scotland, we no longer have data about the number of children charged with committing an offence, so this is now a bit old, but in 2012-2013, 5% of children were charged by the police with committing an offence, so about 24,000 children (Scottish Government, 2013). The 5% of children who are charged are not always committing more serious offences or engaging in a more significant pattern of offending than the other children who are also offending. The Edinburgh Study found that only 32% of who self-reported as serious offenders when they were aged 17 were ever known to social work or the children's hearing system (McAra & McVie, 2010, p. 189). Instead, certain children are more likely to come into conflict with the law.

- Children who are economically-deprived are 2.7 times more likely to face adversarial police action than more affluent children who commit the same frequency and severity of offence (McAra & McVie, 2005, p. 25).
- One in nine young men from the most deprived communities have spent time in prison by the time they are 23 years old (Houchin, 2005).
- 81% of children under the age of 12 who were reported to the Children's Hearing System displaying a pattern of offending behaviour had parents who were deemed to pose a risk to them (either due to domestic violence, substance misuse, mental health issues, criminal behaviours, abuse, or neglect) (Henderson et al., 2016).
- The behaviours of care experienced children are more likely to be reported to police and to attract a criminalising response, even when trauma related or involving minor offending (Scottish Parliament, 2018).
- Children in residential childcare in Scotland continue to be criminalised for vandalism or very low-level behaviours which include trashing rooms or throwing things at people, that in other family settings would not be met with a formal justice response (Nolan & Moodie, 2016).

Children in conflict with the law in Scotland are the most vulnerable children. There's a lot going on here, but one of the things that appears to happen is that people see a child in need and are understandably concerned, they feel the need to do something and respond primarily to the vulnerabilities or due to concerns about managing risk, but where offending is part of the picture, our responses draw children ever further into conflict with the law. For example, whilst half of all children at age 12 have caused physical harm to another person, and this is usually a sibling, in most family settings this is likely to be dealt with within the family. There may be punishment and consequences but very rarely would this lead to a criminal record. For children in care, though, such incidents are more likely to be viewed through a lens of assault, with the police called. So, the same actions have different long-term consequences, with the more vulnerable children being more likely to be drawn into a justice process.

If offending by children was truly understood and entirely responded to an indicator of need and contact with justice focused organisations and professionals helped them, this wouldn't be a major issue. However, the flaw is that once a child becomes known as engaging in offending behaviour then their behaviour is seen through this lens, it becomes increasingly difficult for them to escape this label and it leads to all kinds of negative consequences. Parents might want their child to avoid the labelled child, teachers might be more likely to see school exclusion as an appropriate response to behaviours, the child may be excluded from activities and things they love as a punishment or as an attempt to manage risk. We might start to see a child's behaviour in a certain frame – risky, frightening, threatening – meaning we miss the fact that the child is in distress or that they are being exploited, with issues of child criminal exploitation, where children are exploited and manipulated to commit criminal acts, a well-documented and often missed underlying issue. We might also stop seeing the whole child, with the focus on offending behaviours encouraging us to miss that a child is also fun, is interested in art, drama, football, has all kinds of strengths, skills, and good qualities. We can miss the child, and we can all do this in our personal and professional lives- often for understandable reasons and concerns.

This process of labelling and excluding takes away the very things that can help a child develop good and positive interests and relationships with others. The more we exclude a child who is beginning to become known for offending behaviours the more we can push them into further offending as the only way of finding meaning, relationship, things to do; and if they're going to be seen as an offender anyway sometimes it can become easier to just go with it – 'what's the point?'

After I got excluded from school, I started robbing houses, stealing cars, drinking every day, smashing stuff up (Nolan et al., 2018).

## **Responding to children in conflict with the law**

One of the most profound findings of the Edinburgh study is that the key determinant of whether a child will continue offending or not is whether they have had contact with the Children's Hearing System. Children who don't come to the attention of the Children's Hearing System are more likely to stop offending, compared to children committing the same offences, at the same frequency, and from similar backgrounds. There are also indications that even more informal channels, such as Early and Effective Intervention (EEI), which is a multi-agency response to low-level offending, has the same effect, in this case acting to escalate children on to the Children's Hearing System that may have otherwise stepped away from offending (Gillon, 2018). These are horrifying findings because they indicate that despite the best of intentions where we intervene in response to offending it often makes things worse, at least in relation to future offending behaviours. This suggests we need to be extremely cautious about unintended consequences in relation to labelling, stigma, 'up-tariffing' and escalating system contact (Cohen, 1985; Peeters, 2015; Richards, 2014; Schur, 1973).

We have a major problem then. Scotland's approach to children in conflict with the law often makes things worse, and the more we try to focus on 'preventing offending' by individual children the more likely we are to unhelpfully label,

stigmatise and draw children ever further into conflict with the law. But, of course, we absolutely want to, and should be, doing all we can to prevent children coming into conflict with the law in the first place. So, how do we do this, without the negative consequences.

## **Children's Rights**

What I came to realise is that we need a new way of thinking, new foundations to underpin our approach. In the Rights Respecting? report I explore whether Children's Rights offer us a way to re-think and re-frame, to strengthen our foundations (Lightowler, 2020). I concluded that Scotland would benefit from making the focus of our approach with children in conflict with the law, about upholding their rights- wherever they are and whichever organisation or agency they are interacting or supported by.

The response to children in conflict with the law since Kilbrandon can be seen as a balancing act between welfare and control, with sometimes the balance tipping more in one direction and some-time the other, but both approaches contribute to the problems I've described. Instead, then what if we focus on upholding rights and ensuring children have right-respecting pathways, journeys, experiences, interactions, relationships?

Something happens when we focus on children as rights-holders and on the role of others to defend their rights; rather than thinking about children as troubled, challenged, vulnerable or challenging. It can be a powerful re-labelling, a new non-offending identity, which has the potential to help a child and those around them think differently about who they are. They are a rights holder and those around them have responsibilities to defend their rights. Of course, a child may still be vulnerable and challenging, all these things may still be true, but a focus on rights can help to put the onus on the 'system', agencies, organisations, professionals, politicians and so on to ensure rights are upheld rather focus on the deficits of a child or family – which these vulnerable or challenging type labels can do. However, well meaning.

We stigmatise people to get money to deliver services to destigmatise them. (Paul Gilroy, Crossreach)

Making upholding rights our purpose means we don't have to label children as 'vulnerable' or a 'risk of offending' and so on to provide care, services, and support. Instead, the State is required to ensure all children have access to the education, health care, good quality standard of living and so on which they are entitled to, paying particular attention to those least likely to have their rights upheld.

## UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC)

- The best interests of the child shall be a primary consideration (Article 3.1)
- Ensure to the maximum extent possible the survival and development of the child (Article 6.1)
- Recognise the right of the child to the enjoyment of the highest attainable standard of health (Article 24.1)
- Recognise for every child the right to benefit from social security (Article 26)
- Recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27.1)
- Recognise the right of the child to education (Article 28)

Of course, the evidence is clear these things – education, health care, decent standard of living etc- rights set out in the United Nations Convention on the Rights of the Child (UNCRC), all contribute to preventing future offending, but at an individual level we do not need to stigmatise children, families, or communities. Instead, we focus on ensuring rights are upheld. We prevent offending by respecting the rights of children.

Reframing our purpose as upholding rights is not a panacea though, obviously if rights are not respected, then simply saying someone has rights it not just meaningless but painful and potentially traumatising. I'm reminded of the incredible rights-respecting primary school I visited in Wales, which reported

that when their empowered, rights aware children moved on to secondary school the children struggled as they met a culture which did not acknowledge or respect their rights (Lightowler & Gillon, 2019). It's not enough to re-frame what we do around rights, we need to make rights real.



In the Rights Respecting? report I explored how Scotland was doing at respecting the rights of children in conflict with the law, and specifically whether we were compliant with UNCRC. UNCRC is an international agreement the UK has already committed to, but the Scottish Government is also planning to incorporate it into Scots law, strengthening the opportunity for legal challenge when rights are not upheld. I identified 11 areas where improvements were needed if we are to respect the rights of children in conflict with the law and comply with UNCRC. The report details what could be done to make progress on each of these. They're all important and none more so than others.

I am going to focus on two issues which were identified by Youth Just Us<sup>3</sup> the most important that you hear about tonight - children in prison and children's participation.

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<sup>3</sup> See <https://www.cycj.org.uk/tag/youth-just-us/>

## Children in prison

There are many areas where our approach is going badly wrong, but one of the clearest is for our children in a Young Offenders Institution or a prison. It is nearly always the case now that those under 18 in custody will be in Polmont Young Offenders' Institution, but they can and at times are placed in other prisons. For shorthand I'm going to talk about children in prison to mean both things. Children aged 16 and 17 can be placed in prison in Scotland, with younger children considered to require deprivation of liberty for their safety and/or the safety of others - placed in secure care.

We've seen a significant and welcome reduction in the number of children in prison, for instance in 2010-11 there were 658 children who left prison that year, and in 2019-20 there were 136 children who left prison, a reduction of 79% (Scottish Government, 2020).

### UNCRC RIGHTS- DEPRIVATION OF LIBERTY

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Article 37a)

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of *last* resort and for the shortest appropriate period of time (Article 37b)

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age (Article 37c)

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance (Article 37d)

But there's still over 100 children or so a year who leave prison and there are serious concerns about the children who go to prison and their experiences – their rights are not respected throughout.

Taking one day - 7 January 2022 - there were 15 children in prison. Of these, 11 were untried, one was awaiting sentence and three were sentenced.<sup>4</sup> This means 11 children were in prison who had not been found guilty of an offence, and one child had been found guilty, but hadn't yet been given a sentence, which might involve custody, but which might not. This status of being in prison before being sentenced is known as being 'on remand'; 80% of the children in prison were on remand on 7 January 2022.

This is not an unusual day, since January 2021 between 76-94% of children in prison were on remand (compared with about 40% of adults).<sup>5</sup>

#### Sheriffs and Procurator Fiscal considerations in bail and remand decisions:

- The existence of a fixed abode from which the child could be bailed to
- History of (re)offending and whether there has been an escalation
- History of complying with/breaching court orders
- Likelihood of interfering with witnesses
- The needs and background of the child
- Risk the child poses to public safety/a victim
- Nature and seriousness of offence
- The support social work/third sector could offer the child if bailed
- For the Sheriffs, whether the child had made progress since the time of the offence

McEwan et al., 2020. [www.cycj.org.uk/resource/use-and-impact-of-bail-and-remand-in-scotland-with-children/](http://www.cycj.org.uk/resource/use-and-impact-of-bail-and-remand-in-scotland-with-children/)

Research with sheriffs and procurators fiscal about the decision to use remand rather than release a child on bail shows that the decision is not always about the risk a child poses to others. Sometimes the decision is based on the child's needs and the lack of services and supports in the community. Specifically, a response to a child being homeless or a lack of supervised bail being available in

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<sup>4</sup> Source: Scottish Prison Service, <https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>

<sup>5</sup> Source: CYCJ: <https://www.cycj.org.uk/what-we-do/children-in-remand-in-scotland/>

their local authority (McEwan et al., 2020). So, like the pattern we saw earlier, those who are most vulnerable are more likely to go to prison: suggesting a major breach of Article 37b of the UNCRC that deprivation of liberty should be a measure of last resort.

The experience of being in prison is horrific but being on remand is additionally so because you don't know how long you're going to be there and potentially you don't know whether you're going to be found guilty.

Aye, see when you're waiting to get sentenced its torture cos you don't know what's going to happen and you just want sentenced to get it over and done with but when you get sentenced it's 'oh fuck,' then you get used to it (child in prison on remand) (McEwan et al., 2020).

When you're on remand, because you are not guilty of any offence, no specific offence focused work can be undertaken, and there's a range of prison activities and supports you are not able to access. It's often referred to as wasted time.

When I was on remand I was locked up 23 hours a day it's not good...then when I got convicted I'm out all the time, I'm never in my room, only at night... remand's boring, you only get the gym and rec and that's it, or a visit, there's no work parties, there's no nothing (child in prison on remand) (ibid.).

Time on remand is and can feel long for a child, which has psychological consequences as well as practical ones.

[They can be] in custody for 110, 140 days so that person's liberty is at stake for quite a period of time...and of course a remand for a young person might be particularly...because a week's a long time in politics but three months is a desperately long time if you're a young person (sheriff) (ibid.).

Remand is a disaster, all the stuff we know about remand - first it's the seven-day lie down which is enough to scupper a lot of

stuff or sow the seeds, anything more than seven days you start to like lose tenancies, benefits claims screwed up, education - the course you fought to get them on is gone because of heavy demand. It just has knock on effects, they're taken out of society you know (social worker) (ibid.).

The bail and remand research these quotes are from was conducted before the pandemic, but obviously there are significant consequences of this which has compounded an already serious issue.

Her Majesty's Inspectorate of Prisons for Scotland worked with others to conduct a survey in 2021 of the children in Polmont YOI. It found some distressing statistics about children's experience in prison. 67% of the children had less than 2hrs a day out of their cell, suggesting cruel, inhumane, and degrading treatment, if not meeting the international definition of torture (HMIPS, CYCJ, C&YPCS, 2021). Eighty-three percent of children reported not having enough to do and just under half felt stressed or anxious *all* of the time. These experiences would be difficult to cope with for anyone, but these children entered prison with already significant challenges, for instance, nearly one in four had previously attempted suicide, 85% had been excluded from school (one at age 5!) and 42% were care experienced (HMIPS, CYCJ, C&YPCS, 2021). There are also hidden stories of children who've ended up in prison because they have been trafficked into the country, or because they've been exploited by criminal gangs, there's a powerful article by Karen Goodwin from *The Ferret* about children from Vietnam who were trafficked in this way and ended up in prison, but these stories are hard to find and sometimes because 16 and 17 year-olds can look like tough, strong, aggressive, scary men, we miss what's happened to them (Goodwin, 2021).

Covid-19 has compounded the issues because we have considerable court delays meaning children are likely to be on remand for longer periods, through various lockdowns children in prison were unable to have face to face contact with family, friends or legal representatives, access to education and activities were reduced. In such circumstances young people tell us that those in prison

increasingly resort to using substances to self-medicate, pass the time and psychologically at least, escape. With the use of spice rife, even amongst children and young people who never used it before prison. There are also concerns about how children already hidden from view have been further isolated from us all. Most of the children we lock up in prison have not been found guilty, most are not accused of committing the most serious offences. On average the children in prison in 2019-20 were there for two months (Scottish Government, 2020, data table D3).

What are we doing taking such traumatised children, exposing them to extreme additional trauma, giving them new issues to deal with, and then returning them to the community, with no or little support. There are of course children who don't return to the community.

Since 2009, two children and 25 young people aged 18-25, 56% of whom were on remand, have died in prison.<sup>6</sup>

**27 under 25 yr olds have died in prison since 2009**

Jack Mackenzie (aged 20) [2021]  
Rease Fairgreave (aged 23) [2020]  
Steven Alexander Dickie (aged 24) [2019]  
William Lindsey (aged 16), Katie Allan (aged 21), Zach Banner (aged 22),  
Gary Williamson (aged 22) [2018]  
Robert Wagstaff (aged 18), Liam Kerr (aged 19), Ryan Forbes (aged 23) [2017]  
Kevin John Gartland (aged 24) [2016]  
Mark John Andrew Smith (aged 23), John William Monteith (aged 24) [2015]  
Raygen Malcolm Josep Merchant (aged 17), Jordan Barron (aged 19),  
Dionee Kayleigh Kennedy (aged 19), Colin Penrose (aged 22) [2014]  
John Perry (aged 24), James Summer Barr (aged 24) [2013]  
Ross McColm (aged 18), Ryan Jamie McNeil (aged 19), Sarah Mitchell (aged 19) [2012]  
Ross James Drummond (aged 21), Dale Mulholland (aged 22) [2011]  
Andrew Adam Stone (aged 19), Paul James Murdoch (aged 24) [2010]  
Matthew Kirk (aged 22) [2009]

Scottish Prison Service, Prisoner Deaths, <https://www.sps.gov.uk/Corporate/Information/PrisonerDeaths.aspx>

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<sup>6</sup> Source: Scottish Prison Service, <https://www.sps.gov.uk/Corporate/Information/PrisonerDeaths.aspx>

Deprivation of liberty is not always used as a measure of last resort, as the only option to keep others safe when we'd considered every other thing we could do to manage, what are sometimes risks needing to be managed. There are very few children for whom deprivation of liberty is the only way we could keep others safe. If we respected children's rights throughout their lives, there would be fewer still. However, where this really is the only option Scotland has secure care centres, which are more clearly child-centred, educational focused spaces capable of delivering a trauma-informed approach.

Secure is more likely to help me if I was in there for a long period of time. I've been in and out, in and out of prison...This place doesn't help me. I'd be better in secure (child in prison).

A wee boy tried to kill himself the other day... He [judge] sent him here for seven days when he should be in secure. He's just a wee boy not cut out for prison (child in prison) (Nolan et al., 2018).

Of course, children do not always experience secure care in a positive way, but from what we know of the experience and outcomes, they are significantly better than for those who go to prison instead. Secure care is not always considered as an option, and there have been issues before about the availability of secure care places, or a perception that they're not.

During the pandemic, when there was grave concern for the health and wellbeing of all those in prison, some people were able to be released early. Over 340 adults were, but just one child was – largely because such a high proportion of children in prison are on remand, and those on remand were not able to be released early under this scheme.<sup>7</sup> I think it's telling that as far as I can tell, there was no specific consideration paid to the children in prison and what could be possible for those on remand in terms of transferring them to supported community settings or to secure care – which during the pandemic

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<sup>7</sup> Source: Scottish Prison Service, <https://www.sps.gov.uk/Corporate/Information/covid19/covid-19-information-hub.aspx>

was better able to support access to leisure facilities, education and contact with family and professional supports. We are talking about a small group of children, so it was, and still is, do-able to look at each individual child, considering on a case-by-case basis whether children as a minimum be transferred to secure care. There is nothing in the public record to suggest it was given serious consideration, that these children were really thought about when developing responses to the pandemic. One example of why strong and brave advocates are needed.

The Scottish Government has committed to deliver the recommendation of the Independent Care Review that no child should be in a YOI or prison by 2024, but given the impacts of Covid-19, the additional mental health issues, the court delays, the disruptions in relationships, there is a real urgency to address this immediately.

This was one of the two issues identified by Youth Just Us as being most important to them. The final issue I'll address is that of participation.

## **Children's participation**

Article 12 of the UNCRC sets out that children should be given the right to express their views in matters affecting them, and that their views should be given due weight in accordance with their age and maturity; and in particular they should be given the opportunity to be heard in any judicial or administrative proceedings affecting them.

## UNCRC RIGHTS- PARTICIPATION

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12.1)

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (Article 12.2)

The conversation I had with Youth Just Us members highlighted how important relationships were to them, they wanted people to spend time with them to build a relationship. They referenced a huge range of people as being important to them – their peers, mentors, panel members, social workers, safeguarders, Action for Children workers – and what they want from you is for you to give them time, listen to them, challenge where their best interests are not being served, and to fight their corner. Their comments echoed research done with children and young people in the justice system at the early stages of the pandemic.

Spend time with me...Encourage me to do things even though I mostly say no, but I really like it when a few staff come in & sit with me, make me laugh & even discuss my past (child with previous experience of the youth justice system) (Nolan, 2020).

There is no doubt that many children and young people, particularly those in conflict with the law, have been even more isolated and had relationships disrupted during the pandemic. There have obviously been some amazing and creative work to maintain connections, the Youth Justice Voices project itself being valued as hugely important to the young people I spoke with as it moved

online quickly, ensured members had what they needed to communicate, developed creative activities, and responded in an individual way to each person involved in the group.

The group explained to me how they want to be involved in decisions which affect them and which they have expertise on. They mentioned how even now Scottish Government consultations like the bail and remand consultation (Scottish Government, 2021) out just now involves a process designed for professionals with no meaningful opportunities provided for children and young people to have their say, despite how important the issue of bail and remand is for them. They also shared how they want to ensure children currently in care and justice settings can have their voices heard too, for instance, to be asked what activities they want to do, given opportunities to do classes in drama, art, music, whatever is important to them, and not have their opportunities limited when they are the only one who wants to do these things – citing the example of being in residential care and having to do what the majority wanted, often football.

What is also important is that children can participate in justice processes – particularly in children's hearings and in court. It's estimated that over 60% of children in conflict with the law have a speech, language, or communication need. You can perhaps imagine how children who offer monosyllabic answers, avoid eye contact, struggle to find the right words and potentially going to be perceived if their needs are not understood, and often they aren't. Even without a specific need, children at a children's hearing or at court for offence reasons are almost certainly likely to be experiencing stress, making it challenging for them to process what is happening, especially when you consider the language being used in these settings.

Whilst a couple of areas of Scotland have youth courts, most children who go to court will experience a standard adult court setting, with little, if any, accommodation made to recognise that they're a child. In 2019-20, 1,208 children were prosecuted in the courts, a fact often hidden by the focus on the Children's Hearing System, with 2,840 children referred to CHS on offence

grounds in the same year.<sup>8</sup> Not surprisingly children report they didn't understand what happened at court.

I was in court the day after my 16th birthday and didn't know what was happening...I just didn't have a clue (child in prison) (Nolan et al., 2018).

We're not even ensuring children understand the justice processes they experience, but we need to do more than that, they are to have opportunities to speak, to have their voice heard, to feel able to explain their point of view. We're a million miles away from this in the courts, and in many of our interactions with children in conflict with the law.

I've covered a lot of ground here. I hope it's made you think and better understand our children in conflict with the law. But most importantly I hope you do something with what you've heard today to ensure these children have their rights respected, and wherever possible, that you include them in your relationships, in your schools, in your communities. Kilbrandon gave us such strong foundations, an approach built around the best interests of the child, a focus on responding to offending as an indicator of need, and a system which doesn't separate children who offend out from other children in need of care, protection, and support. We've lived with these principles for 60 years so there's a depth of understanding about what this means and why it matters. But we need to tend to the foundations and extend them to ensure children's rights, participation and inclusion are truly embedded throughout every stage of every child's journey. This needs more than just thinking and understanding. As a young person said to me last week, 'Stop talking about it and do something about it'. This is just a lecture. These are just words. But you are a listener, whoever you are, whatever job you do, whatever community you live in. You can

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<sup>8</sup> Source: SCRA, Online Statistical Dashboard, <https://www.scra.gov.uk/stats/?=undefined&areas%5B%5D=Aberdeen%20City&areas%5B%5D=Aberdeenshire&areas%5B%5D=Angus>

do something with these words. These children really need you to be brave for their rights.

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## **Response by Ursula Kilkelly**

Thank you, Claire, for such a powerful address this evening. I think it is really fitting that your lecture tonight has focused on an area where I think we have seen less than the usual ambition from Scotland and what I would like to do in my response is to build on what you told us this evening from the perspective of the international human rights and children's rights framework.

International law makes clear that rights-respecting youth justice and detention requires consideration to be given to the rights of the child. I would like, in my remarks, to give you a flavour of the work that I have been doing in this field that I think very much complements the philosophy that Claire has set out. The starting point of this is that the children's rights approach is fundamentally about rights for *all* children in *all* circumstances. It is a non-judgemental and universal approach to all children under 18 years, as defined by the UNCRC, regardless of their needs and complexity, regardless of their behaviour. This is a universal approach that puts children first. It is a fundamental, child-centred approach and it speaks to the specific circumstances and characteristics and needs of children *as* children. So, these are fundamental building blocks on which the rights-based approach can be built.

Research that I have undertaken recently in relation to detention has helped to inform my thinking around five areas where rights can be brought to bear on youth justice. While I developed this model in relation to detention it has resonance in the wider youth justice context and draws on some of the existing principles of children's rights.

The first area of rights focus is Provision: this idea is that whether through early intervention or through diversion, children have a right to have their basic needs met, whether that's their rights to care, health, education, development, play,

leisure, these are basic, fundamental rights to which all children are entitled. So, children's right to have their basic needs be met must be fulfilled.

The second is in relation to Protection insofar as children have a right to be protected from harm. They also have a right to be protected from other risks to their own welfare, to recovery when they have suffered harm whether that's self-harm, or harm from others. And this looks to divert children through prevention and early intervention to spaces that are safe for them to be able to fulfil their rights.

The third area of rights is Participation, whether we're talking about due process rights in court, whether we're talking about children with a right to a say about decisions made about them individually, or whether we're talking about involving them, giving them a voice, hearing what they have to say and acting on it in policy matters. The development of new approaches to empower and build children's capacity to engage and participate in decisions about matters that affect them is absolutely key to rights-based youth justice.

The fourth, and possibly a new area of rights in youth justice is Partnership. In this respect, we need to work with young people, as partners in the youth justice process, but we also need to partner with families, with communities to secure the implementation of rights-based youth justice. In this respect, we need to network, to co-ordinate and to collaborate right across the children's sector, the criminal justice sector, health, education, all of these areas, working together. This makes partnership a really fundamental aspect of rights-based youth justice.

And the final area of rights in youth justice is Preparation. I refer to this mostly with regard to the importance of preparing children for leaving care and custody, but also for leaving the justice system. This is crucially important for children, who have a right to be supported and enabled to transition safely back into their communities and families, where possible, in a safe way and in a way that will allow them to fulfil their potential. So Preparation really speaks to that goal.

Looking at the implementation of these five P's, my research has identified how best to advance these rights in youth justice. What we know, for instance, is that we need explicit commitments to a rights-based approach in law and policy at a national level. In that sense, we need clear direction, clear ambition, from government so that the foundation is set in law and policy: this must be a whole system approach. We also need resources of course and frequently these follow the direction set by law and policy.

But we also need people. And that's where I think this evening's lecture is so critically important where over 200 people have taken the time to listen to what you have to say, Claire. Together, we need to use our ambition, and fundamentally, our collective leadership to put children's rights at the heart of youth justice.

## **Response by Ruth Kerracher**

Thank you, Claire, for such an important lecture. You've really highlighted how we need to reframe not only how we support children in conflict with the law but also how we perceive children and young people more widely. I hope your words spark action so that as a nation we start to realise *all* of our children are active rights holders.

As Claire mentioned she had the pleasure of meeting Youth Just Us, a steering group of phenomenal young people. Young people involved in this project have experience of both the care and justice systems in Scotland and a real desire to not only be heard but to have their views acted on. Young people aged 16-25 have been involved in the project since 2019, influencing change and steering what Staf and CYCJ's national participation project Youth Justice Voices has become today.

Before I go on to provide a more formal response to the lecture, which includes the views of Youth Just Us members, I wanted to highlight a few things which struck myself and the group. Upon meeting Claire many of the young people shared that they had never heard of Kilbrandon. They also wondered why they

had not been asked to contribute to and influence a lecture like this before, which is ultimately talking about their experiences and what needs to change in Scotland. They believe that young people's voices should be at the heart of all future lectures, and they too should be able to lead responses and direct questions to everyone here today. So, again, I want to thank Claire for not just taking the time to listen to Youth Just Us but also ensuring that their views were represented and influenced the content of the lecture we've heard today.

It is clear that what you set out in your rights-respecting approach is based on years of learning, research and evidence. You build upon the ground-breaking work of the Kilbrandon committee, recognising that offending behaviour is an indicator of concern for the child - demonstrating the need for care and protection - and with the focus on needs, not deeds, there is the opportunity to respond from the same children's hearing system.

But Claire goes further to acknowledge that we need to do better - recognising that children and young people are in fact in conflict with a system. The members of Youth Just Us pointed out children are in conflict with many systems - particularly when they grow up in poverty. This is the first point that Youth Just Us wanted to highlight in the response - the impact that poverty has on many children and families' basic human rights and needs in Scotland. It is their belief that it is often the root cause of children and families coming into contact with multiple systems in the first place, whether that's care, justice, welfare or housing.

This is why the emphasis on changing how we regard and respond to children and young people is vital. We need to see children and young people as rights holders, and, like Claire has suggested, professionals', services' and ultimately the system's role should be to protect and uphold these rights - treating children as children - not by labelling and escalating their contact with the justice system or worse still locking traumatised children in adult systems and prisons which strip children of some of the most important relationships, experiences, and years of their lives.

At Youth Just Us we have had many discussions around the issues Claire has highlighted. Young people continually tell us that they are in a legal system they do not understand. To quote one young person: 'It diminishes your sense of self-worth and identity'. The language used, formal processes, jargon, legal terms, and complex systems, let alone scary settings like court, can feel alien and inhumane. To quote another: 'It's almost easy to forget someone is a person let alone a child'.

Claire has eloquently highlighted many of the concerns, but she has also pointed to community alternatives and more appropriate spaces and approaches which can manage risk and help people to overcome harm when required. Members of Youth Just Us have suggested that we need to make community alternatives more meaningful, so they enable children and young people to move on and strengthen skills and qualifications as opposed to punish. Their key ask is for adults and professionals to take the time to build positive relationships, to provide safe and creative spaces where they can express themselves and develop as a person. Which to me highlights the important role that universal youth work, community learning development and youth-led participation projects can have on people's lives.

Like Claire has highlighted along with the members of Youth Just Us we know a lot of the answers already. Children and young people have also told us time and time again what needs to change – which is evident when they complain of being asked the same questions in adult spaces with no feedback or payment for their expertise. Participation is greater than that.

Thank you once again to Claire for her emotive lecture – you've certainly inspired me. Hopefully if we reframe our thinking, we will see children and young people as assets to our communities and rights holders who should shape the supports, services and policies which affect them. Or in simpler terms as one of our young people said we don't need people to be brave...

We don't need superheroes. We just need people to respect our rights and uphold their responsibilities, ask us, 'what can I do to help?'

Thank you again to Claire and for this opportunity to respond. I have questions I would like to ask on behalf of Youth Just Us.

- What can we learn from other countries internationally? This is in reference to examples of where you value their approach to rights and justice.
- Secondly, and this is perhaps more rhetorical, but maybe you might have a response to this: 'Rights are on the walls across schools why are they not across all the walls of the justice system?'

## **Reply by Claire Lightowler**

Thank you, both of you for those fantastic contributions that have taken us to two very different places: the kind of international perspective and the children and young people's perspective. I think what's clear across all of it is that there's so much to draw on. So, in terms of the questions, where can we learn? Well sort of everywhere. And in other countries, but also good practice in Scotland, good practice locally, good interactions - there's some amazing work from everywhere, I think. And Ursula will know all about particular pockets in particular countries, but my experience is there isn't one country that has it all solved, that has something, a model and approach, that you can just take and apply. And, as I've tried to articulate, we have real strengths in Scotland that we can build on - so learn, yes, but don't try and replicate. Try and learn and grow and interact in a culture, in an ethos, that is Scottish, that is responsive to Scottish children, in Scottish communities. And I think that's a bit different from traditional models of taking an idea and a concept and applying it. Often negative things come from that because cultures are different, attitudes are different, approaches are different. So, whilst there is really good practice in individual countries, I think it's more reflecting, learning, growing, building and developing our practice, with openness and awareness of learning elsewhere.

I see that there's a question about that and about whether Scotland's approach makes things worse, and whether this is limited to Scotland. Well absolutely not - I can't think of an example of a country when it's responding to children's offending that doesn't involve some element of stigma and labelling and the system contact kind of issues I've talked about. But that doesn't mean that Scotland doesn't have that issue to address, and I think sometimes we don't face up to that in Scotland. I've focused on Scotland, because I am here, I am working here, I want to improve things here, but it's no reflection, it's no comparison with other jurisdictions. Hopefully that answers that question. What was your other question, Ruth?

[Ruth Kerracher: Young people are making the comment that if you see across schools as you see in Wales you've got rights all over the walls, why is it any different for children and young people in the justice system, why do we not know about their rights?]

Excellent point: I think that goes back to the kind of fundamental point I was trying to make: we don't think about these children as rights holders. That way of thinking is quite new, it's quite new across lots of settings: really embedding what that means is quite new for many people, many practitioners, on a day-to-day level, so it takes a bit of time to think through. My work has been about children in conflict with the law, but I needed to take a year's sabbatical to really give myself time to think about, what would a rights-respecting approach look like? I'm totally aware that I'm so lucky to be in that position - hardly anyone else is going to have that opportunity, and certainly not busy practitioners doing their day-to-day job of interacting with children and families, they're not going to have that time and space and luxury to think in that way, so it's a privileged position to be in. So it's totally understandable that that's not filtered through, that people are grappling with what that means, but I think it does go to the root of, we need a reframing that recognises these children as rights holders and in all these settings that the purpose is about upholding rights, and what that looks like. Unicef has done quite a lot of work about rights-respecting schools but I've not heard the same phraseology about justice settings. And I don't know how comfortable I am with that phraseology in certain justice settings. Could

you have a rights-respecting prison for children? I don't know - you can have rights-respecting practice, but there are some settings and some circumstances for which that doesn't necessarily sit easily and comfortably, so I think there's things to be really teased out there. But what's really important is that children know their rights, and that they understand their rights, and understand and are empowered to use their rights. What was impressive about the school was, they would say, 'I have a right to play', and they would navigate, 'Well what's your right?' And they were talking about how they needed to respect the teacher and the teacher had rights too, so it was a really complicated and sophisticated understanding of what that meant in their circumstances.

### **Vote of thanks by Claire Haughey MSP**

It's my absolute pleasure to thank Dr Lightowler for delivering this year's Kilbrandon lecture, and all those who have helped to make it happen.

Claire, in delivering your lecture tonight you have demonstrated your deep knowledge and, more importantly, your passion when it comes to supporting children in conflict with the law. I don't think there is anyone who could fail to be moved – and motivated – by that lecture?

I am struck by your commitment to ensuring that children are seen and responded to, as children, first of all. That they have their rights respected, that they are really included, and their voices are amplified. You have illustrated the need for deeper reform so that we create the legal system that children and young people in Scotland need and deserve.

It is important to reflect on the journey Scotland's care and justice sector has been on in the past decade or so. Thanks to the tireless work of volunteers, professionals, and experts, we have seen the levels of harm and levels of offending by young people drop sharply. We have established programmes such as the Whole System Approach. These are preventative, rehabilitation-focused, and proven to make a difference.

Our work in this area will continue and intensify. As we set out in our latest Programme for Government, we are committed to safeguarding young people within the youth justice system. We support a presumption against under-18s in the Criminal Justice System, keeping them out of young offenders' institutions where possible and appropriate, while ensuring that victims receive the support they need. Last June we published a new Vision for youth justice. The priorities and actions have been hugely influenced by both Claire's own 'Rights-Respecting' report in 2020, and by The Promise. But critically, Scotland's priorities have been informed by children and young people with experience of the care and justice system.

I have had the privilege of meeting with members of Youth Justice Voices. It is important that we not only listen to those voices, but also act on what we are being told.

Within Government we are working with partners to address many of the issues highlighted in tonight's lecture, including the number of under 18s in young offenders' institutions, particularly those on remand. In doing so, we need to give close attention to the Children's Hearings System, to secure care access and to community alternatives provision in Scotland. Legislative reforms will be required alongside the much-needed policy and practice change.

I hear and respect those voices who urge us to go further and faster. I share many of those ambitions. As we continue to make progress, our focus naturally shifts to those young people whose circumstances and behaviour are the most complex and challenging. It is essential for their safety and wellbeing, and for the safety of their communities, that we get our approach right.

All of us attending this evening can be grateful to you, Claire, for the unique perspective you have brought to this year's lecture. You have challenged us all this evening and I thank you for that.

We must approach these issues with care but move at pace where we can. My colleagues and I will hold your vital insights and challenges in our minds as we take reforms forward.

You spoke about the need for strong and brave advocates to speak up. This is a role for all of us, and I for one support that ask and accept the role.

Turning now to those who have helped make tonight happen, I would like to thank the Principal, Sir Jim MacDonald, for his introduction, and Professor Jennifer Davidson for chairing this evening. I also very much appreciated the contributions of Professor Ursula Kilkelly and Ruth Kerracher, and I am very grateful to the young people who worked with Ruth to help her shape her response. Thanks also to Fiona Dyer and the Children and Young People's Centre for Justice for your crucial work with young people and professionals on the rights of children in conflict with the law.

On behalf of the Scottish Government, I would like to convey my gratitude for the continuing support given to this lecture series by the university's School of Social Work and Social Policy. Many thanks in particular to Raymond Taylor for organising tonight's lecture, Nadia Mitchell for the support from the University events team, and Alan McLeave for ensuring that things have run smoothly this evening. Finally, my sincere appreciation goes to all of you who have joined us for tonight's lecture. Particularly, those directly involved in the hearings system as panel members, reporters, social workers, teachers and in many other roles. You have made an enormous difference to the lives of thousands of children and their families. Our unique and valued Children's Hearings system will continue to evolve and thrive thanks to your dedication.

## **About the Kilbrandon lecturer**

Dr Claire Lightowler is an academic particularly known for her work in children's rights and youth justice. She was director of the Children and Young People's Centre for Justice (CYCJ) at the University of Strathclyde from 2013-2021. Among her publications is the report, *Rights Respecting? Scotland's Approach to Children in Conflict with the Law*, which explored whether Scotland was complying with the United Nations Convention on the Rights of the Child (UNCRC) and what it would look like if children's rights formed the basis of Scotland's approach to children in conflict with the law. Through this work Claire

became increasingly aware of the need for children and young people accused of offending to have specialist legal representation informed by knowledge about child development and trauma. Dr Lightowler is currently studying law at the University of Edinburgh.

## **About the respondents**

Ursula Kilkelly is a professor of law with an established profile in children's rights and youth justice. She is Head of the College of Business and Law at University College Cork, Ireland. Ursula's research expertise is in international children's rights law, with additional expertise in youth justice and detention. She is co-editor, with Professor Stefaan Pleysier of KU Leuven, of the journal *Youth Justice*. Ursula teaches International Children's Rights and Juvenile Justice on the LLM in Children's Rights and Family Law and supervises LLM and PhD students in these areas. In 2010, she founded the Child Law Clinic, which provides research services to those litigating children's rights. In June 2019, the Minister for Children and Youth Affairs re-appointed Ursula for a second term as Chairperson of the Board of Management of Oberstown Children Detention Campus, Ireland's national facility for the detention of children referred by the courts.

Ruth Kerracher has a degree in community education and is Youth Justice Participation Lead at Youth Justice Voices run in partnership by the Scottish Throughcare and Aftercare Forum (Staf) and the Children and Young People's Centre for Justice (CYCJ). Funded by the Life Changes Trust, this is a national participation project for young people aged 16-25 with experience of the care and justice systems in Scotland which aims to influence change by enabling young people to creatively amplify issues and recommendations for change with policymakers, managers, corporate parents, and the Scottish Government. Led by a steering group of young people called Youth Just Us in the community and Inside Out in HM Prison and Young Offenders' Institution Polmont, the project received a commendation award from the Howard League in 2020 and played a critical role in ensuring that the Scottish Government's most recent Youth Justice Vision and Action Plan was shaped and informed by young people.

Claire Haughey MSP has been the Member of the Scottish Parliament for Rutherglen since 2016. She was appointed Minister for Children and Young People in May 2021 and was previously Minister for Mental Health. A mental health nurse by profession, Ms Haughey was a clinical nurse manager before her election to Parliament.