



SUMMARY: RIGHTS RESPECTING? SCOTLAND'S APPROACH TO CHILDREN IN CONFLICT WITH THE LAW

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THE FULL REPORT ON WHICH THIS SUMMARY DRAWS CAN BE FOUND AT: WWW.CYCJ.ORG.UK/NEWS/RIGHTS-RESPECTING

What the report 'Rights Respecting? Scotland's approach to children in conflict with the law' shows is that many children who are in conflict with the law in Scotland do not experience 'justice' in the true meaning of the word. There is no justice in taking traumatised children; holding them solely responsible for their actions; putting them through processes they don't understand, and are unable to participate in; blaming and stigmatising them whilst failing to give them what they need; putting barriers in the way of loving and caring relationships; and taking existing supports and opportunities away from them.

The report concludes that Scotland would benefit from thinking about children in conflict with the law from the perspective of rights. This represents a shift from focusing on children as troubled, challenged, vulnerable and challenging, which whilst often well-meaning and containing a partial truth, can encourage negative unintended consequences which disproportionately affect and stigmatise the most disadvantaged children. Children in conflict with the law, like all children, are rights holders. They are entitled to their rights and should have their rights upheld. The UK

and Scottish Governments have signed up to a range of international agreements to guide how we will treat our children in conflict with the law. Further, the Scottish Government has committed to incorporating the main children's rights instrument, the United Nations Convention on the Rights of the Child (UNCRC), into domestic law in Scotland, recognising that change is required if we are to progress children's rights, as other jurisdictions have done. Rights are for all children and there is something particularly troubling when we fail to fulfil our legal and moral obligations to the very children we are holding to account through our justice system.

Across all jurisdictions there are significant concerns about the rights of children in conflict with the law, and so it is important that there is specific attention on how we uphold their rights. If we do not pay particular attention to the rights of children who are the most excluded, marginalised and difficult to sympathise with, there is a danger that we improve the rights of children in general but we leave some groups of children behind, and by doing so, further compound the challenges they face. There continues to be an underlying attitude in some quarters that children in the justice system do not deserve to have their rights respected, with questions asked about why we should respect the rights of children who cause harm when we fail to respect the rights of those they harm, usually also children. Children's rights are not optional. Regardless of any ethical arguments about how upholding rights is the 'right' thing to do, or any evidence-based arguments about how comprehensively upholding children's rights is more likely to ensure children go on to lead positive lives, unless we withdraw from UNCRC and the European Convention on Human Rights (ECHR) we must honour our legal obligations. To do otherwise questions our legitimacy and leaves us open to legal challenge.

"MANY CHILDREN WHO ARE IN CONFLICT WITH THE LAW IN SCOTLAND DO NOT EXPERIENCE 'JUSTICE' IN THE TRUE MEANING OF THE WORD."

There are, of course, complex, emotive and challenging issues when respecting the rights of children who harm other people, particularly when they cause serious harm. Sometimes there are competing rights and a need to balance these, navigating some painful and uncomfortable challenges in doing so. However, often it is not about competing rights but instead about looking to uphold the rights of both the child who caused harm **and** those they harmed. In the vast majority of cases everyone's interests are best served in providing support, care and compassion to all those involved in an attempt to promote healing, address the underpinning issues, prevent future harm and restore relationships wherever this is possible.

Achieving a rights-respecting approach to children in conflict with the law is a legal duty, so both an outcome in itself, 'We respect, protect and fulfil human rights' (Scottish Government, 2018), and also a method of achieving outcomes such as 'We grow up loved, safe and respected so that we realise our full potential; We live in communities that are inclusive, empowered, resilient and safe; We are well educated, skilled and able to contribute to society' (Scottish Government, 2018). As we approach the end date of Scotland's current children and young people's justice strategy, 'Preventing Offending: Getting it Right for Children and Young People' (Scottish Government, 2015) <https://www.gov.scot/publications/preventing-offending-getting-right-children-young-people/>, it is an important time to reflect on where we collectively want to go next and how we best get there. This report suggests that a strategic approach is offered to us via the international rights frameworks we have signed. Therefore, rather than developing a completely separate Scottish justice strategy for children and young people, what is needed is focused energy and a clear plan to implement this internationally agreed strategic direction into Scottish specific actions to improve policy, practice and experience. A rights and entitlements-based approach is not in conflict with previous strategies around 'preventing offending' because respecting rights is an important mechanism to prevent offending and to maximise the positive experiences and outcomes of children in conflict with the law. Instead a focus on rights involves reframing the issues, which can be seen as the next phase of development for a

preventative approach, encouraging even greater engagement with the deeper causes of offending and reoffending. It could also be argued that it is the logical next step to achieve better outcomes for our children, building on the Kilbrandon principles established over 50 years ago (Kilbrandon Committee, 1964; Vaswani et al., 2018).

The report argues that to uphold the rights of children in conflict with the law in Scotland there is a need to make improvements in the following areas:

-  **Defining children as under 18 and better responding to issues of child development**
-  **Social inclusion and social justice as prevention**
-  **Strengthening the participation of children in conflict with the law**
-  **Upholding the rights of victims, paying particular attention to child victims**
-  **Strengthening early intervention and diversion**
-  **Taking a shared responsibility approach: strengthening community and family support**
-  **Supporting the specific needs of children in conflict with the law**
-  **Implementing an appropriate approach to children's criminal records**
-  **Ensuring due process for all children**
-  **Improving our approach to the deprivation of children's liberty**
-  **Respecting the rights of children who commit the most serious harms and wrongs**

Part One of the full report sets out a detailed action plan and timescales for how these areas of improvement could be progressed, taking international children's rights instruments and interpreting them into very specific actions for a Scottish context. The detail is likely to be of interest to a Scottish policy and practice audience. The approach taken, to develop such a detailed context specific action plan based on international children's rights instruments, may also be of interest to an international audience.

The report evidences that despite some significant improvements in respecting the rights of children in conflict with the law in Scotland, how common it still is for these children not to have their rights respected, as detailed in Part Three of the full report. Significant improvements are needed to ensure rights are upheld and for us to be compliant with our international legal commitments, particularly given imminent UNCRC incorporation. Some of the key concerns about children's rights are:

○ There is a policy focus on the individual child, their wellbeing and behaviour, which creates gaps around family and community responses. It also means that our response to children in conflict with the law can fail to respond to major social and structural issues in relation to rights, poverty and power. There is a well-established body of evidence which highlights that the children who pose a serious risk to others are usually, but not always, our most traumatised children who have experienced complex and disrupted relationships and significant adversity. When they begin to display violent behaviour there can be a tendency to seek to exclude such children further, compounding their issues and disrupting any positive relationships they do have. If we are to achieve a rights-respecting approach, policies and guidelines about children in conflict with the law need to engage with these complex and challenging issues, focusing on inclusion (at the societal, community, family and individual level).

○ Poverty has a significant and direct effect on children who come into conflict with the law. Our approach to children in conflict with

the law should grapple with responding to poverty and redressing economic inequalities; as well as paying attention to how agencies, professionals and organisations respond to poorer children, families and communities. It is particularly concerning that children who experience poverty are more likely than more affluent children to be charged by the police for identical behaviours. This raises questions about discrimination, fairness and the ability of certain children to exercise their rights.

○ Much of our policy and practice is confused about the legal definitions of 'children' which is a particular difficulty for 16 and 17 year olds. Scotland has a very complex policy and practice landscape which means that some 16 and 17 year olds are treated as children in some contexts, while some are not. Children who experience victimisation and adversity, and children in the care system, can be criminalised for distress related behaviours, which is a particular issue as children become older and we potentially stop seeing them as children. There is a need to unambiguously comply with UNCRC's definition of children as all under 18 year olds (UNCRC, Article 1). This acknowledges that our society does not offer full citizen rights to children, and that children require additional supports due to their developmental stage. It is important to note that these additional protections should not be a barrier to children being able to participate and exercise agency where they have the capacity to do so. This also does not mean that on reaching 18, young people are immediately able to operate autonomously, so particular attention should also be paid to the specific care and support for young people aged 18-26.

○ Children are often unable to participate meaningfully in justice related settings, where they struggle to understand what is happening, let alone feel confident enough and able to express themselves. Being accused of criminal behaviour makes participation in justice settings an inevitably challenging and potentially traumatic experience for children. Furthermore, the high proportion of children in conflict

with the law who have a speech, language or communication difficulty, means there is a need for highly trained professionals and child-friendly settings in which to support participation. In addition to compliance with participation rights, there are major issues for children's access to justice if children are not able to understand and participate in the processes they are subject to.

When the youth justice system in Scotland is discussed much of the focus tends to be on the Children's Hearing System. However, 37% of children who come into contact with the 'formal justice system' for their offending behaviour (either going through the Children's Hearing System or the Courts), go to Court. In 2017/18 one 13 year old, one 14 year old, nine 15 year olds, 384 16 year olds and 1,381 17 year olds went to Court. This is particularly concerning given the lack of amendments made to the Court processes for children, meaning the process is more likely to be traumatising and difficult to participate in, raising questions about whether children are able to have a fair trial.

Where children cause harm to other people those harmed are usually other children. However, the child victim is largely ignored in our justice systems in terms of both their participation in justice processes and in ensuring they receive appropriate care and support. Scotland would benefit from specifically considering child victims and what could be done to improve their experience, particularly where they have been harmed by another child.

Criminal records for children are extremely complex and forthcoming legislative changes will potentially further add to this complexity, making it very difficult to fully inform children of the future implications of accepting an offence. The practice around 'Other Relevant Information', whereby the police can retain and disclose information even when children have not been charged with an offence, is very concerning for children's rights in relation to privacy.

Children in Young Offender Institutions can be subject to pain inducing restraint, which involves the deliberate application of pain in an attempt to control children. There is a lack of publicly available data about this practice, as it is largely hidden from view and discussion. The data we have from 2006/07 indicates that there were 87 instances of what is known as 'control and restraint' in Polmont Young Offenders Institution (YOI). The use of pain inducing restraint in England and Wales has been linked to a habitually violent culture and to sexual abuse within institutions. It is not clear how this practice is legally compliant with children's and human rights standards around torture, cruel, inhuman and degrading treatment (UNCRC, Article 37; ECHR, Article 3).

The use of strip searching across justice settings is a complex and concerning area of practice. Again there is a lack of clear, regularly published data to help us understand how strip searching is being used and consider where the practice is not rights compliant. Strip searching can be driven by a desire to protect and establish safety in institutions. However, the consequences of such an invasive practice can be devastating. It was particularly concerning to find that in just one year, 788 children were strip searched in police custody in Scotland, and that in 96% of cases nothing was found, questioning whether such practice is really 'intelligence led' and in the child's best interest.

"IF WE ARE TO ACHIEVE A RIGHTS-RESPECTING APPROACH, POLICIES AND GUIDELINES ABOUT CHILDREN IN CONFLICT WITH THE LAW NEED TO ENGAGE WITH THESE COMPLEX AND CHALLENGING ISSUES"

○ In the 10 years since 2009, two children have tragically taken their own lives in a YOI; Raygen Malcolm Josep Merchant in 2014, who was 17 years old, and William Lindsey (also known as William Brown) in 2018, who was 16 years old. Over a similar period in England and Wales (2008-18) five children have died in custody. Since 2009, 24 young people under the age of 25 have died whilst in a prison or YOI. Twelve of the 24 young people under the age of 25 who died were in prison or a YOI on remand (awaiting a trial or sentencing) rather than being convicted. The HM Inspectorate of Prisons led review into mental health services in custody highlighted that the majority of deaths occur at the early stages of being in custody, and identified improvements that could be made in custody (HM Inspectorate of Prisons for Scotland, 2019). In addition, and more fundamentally, it is not clear that children and young people need to be in a YOI or prison to keep others safe, with intensive community-based supports not always tried first, or available across Scotland. The number of children and young people in custody on remand has increased over time and is a much higher proportion than the adult prison population, and so there are also questions about whether appropriate supports are available in the community to avoid the detention of children where possible.

○ If the deprivation of liberty is really the only option to keep the child and other people safe then secure care may be a more appropriate setting than a YOI, as it is more clearly a child-care setting with less traumatising physical spaces and child-care trained staff. However, there are a range of concerns about compliance with rights in secure care, with measures that are designed to 'protect' children regularly leading to breaches of their rights in relation to interactions and intervention which do not prioritise the child's participation or best interests (Haydon, 2018). It is deeply concerning that in 2018 44% of children in secure care in Scotland were from outside Scotland, and that from 2017 to 2018 the number of children in secure care

in Scotland from outside Scotland increased by 89% (Scottish Government, 2019: 25). To have children so far away from their family, friends, culture, school system and place of belonging is extremely worrying. There are also concerns about how the system encourages children to be placed in certain settings, and how cost rather than the 'best interests' of the child is driving decision-making.

○ The rights of children who commit the most serious harms and wrongs receive relatively little attention in the human rights literature, and this is where it can be most difficult to remain rights-respecting. Children sometimes commit the most serious and horrendous offences, but as difficult as it can be, it is important to remember that they are still children and rights-holders. Internationally the prevailing approach to children who have killed 'is removal from the youth jurisdiction to the adult court system' (Lynch, 2018: 212). It is interesting to consider this, as from a rights-respecting standpoint, an accusation of committing a serious offence such as homicide is a situation when it is particularly important to ensure the child's status as a child is taken into account to ensure a fair trial and due process, as well as ensuring age appropriate accountability and risk assessment. There is an argument for, and examples of, specialist and separate procedures in the most serious cases, such as specialist youth courts. The adult-focused nature of criminal trials and the naming of children who, despite their horrendous actions, are in an incredibly vulnerable position has been, and continues to be, open to legal challenge on the basis of their rights. The Taylor Review into youth justice in England and Wales recommended a presumption that 'all cases involving children should be heard in the Youth Court, with suitably qualified judges being brought in to oversee the most complex or serious cases in suitably modified proceedings' (Taylor, 2016: 105). The Taylor Review also recommended that children should have lifetime anonymity (Taylor, 2016: 107).



Internationally, despite the development of children's rights, sentencing for violent offences such as homicide has become more punitive overtime, with less scope for judicial discretion. For a child sentenced of homicide in Scotland the sentence is mandatory life imprisonment, where it is discretionary for manslaughter. This sentence is regardless of circumstances, the child's stage of development or level of comprehension, thus in itself raising issues around fair trial, let alone requirements to consider the child's 'best interest'. It is well evidenced that long sentences have a disproportionate effect on children, given the child's lifespan to date, development stage and limited opportunities to demonstrate the life skills needed for parole. The Global Study on Children Deprived of Liberty has also highlighted how some children have been sentenced to 25 years imprisonment and suggested this violates the legal requirement of the 'shortest appropriate period of time' under Article 37 (b) of UNCRC (Nowak, 2019: para 44).

These key findings highlight how the rights of children in conflict with the law need to be significantly improved if Scotland is to be compliant with its international commitments and avoid facing significant legal challenges in the future. With the forthcoming incorporation of UNCRC in Scotland there is an exciting possibility to build a culture of pro-actively embracing and engaging with rights; to build confidence that a rights-respecting response to children in conflict with the law is possible, appropriate and achievable. If we are to genuinely achieve this, it requires a scale of change and a shift in mindset that perhaps we've not seen in Scotland since Kilbrandon (1968). With collective commitment to respecting the rights of children in conflict with the law, and action which builds on the evidence and analysis presented in the longer accompanying report, there is a real opportunity to help our children and young people flourish and contribute to a healthier, happier and safer Scotland for us all.

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REFERENCES

- Council of Europe. (1950) European Convention on Human Rights. Strasbourg: Council of Europe.
- Haydon D. (2018) Children Deprived of Their Liberty on 'Welfare' Grounds: A Critical Perspective: Critical Explorations. In: Stanley E (ed) *Human Rights and Incarceration: Critical Explorations*. Cham: Palgrave Macmillan, 25-52.
- HM Inspectorate of Prisons for Scotland. (2019) Report on an expert review of the provision of mental health service for young people entering and in custody at HMP YOI Polmont. Edinburgh: HM Inspectorate of Prisons for Scotland.
- Kilbrandon Committee. (1964) Children and Young Persons Scotland. Edinburgh: HMSO.
- Lynch N. (2018) Towards a Principled Legal Response to a Children Who Kill. *Youth Justice* 18 (3).
- Nowak. M. (2019) Report of the Independent Expert leading the United Nations global study on children deprived of liberty. United Nations General Assembly (Seventy-fourth session, item 68a).
- Scottish Government. (2015) Preventing Offending: Getting it right for children and young people. Edinburgh: Scottish Government.
- Scottish Government. (2018) Scotland's National Performance Framework: Our Purpose, Values and National Outcomes. Edinburgh: Scottish Government.
- Scottish Government. (2019) Children's Social Work Statistics Scotland, 2017-18. Edinburgh: Scottish Government.
- Taylor C. (2016) Review of the Youth Justice System in England and Wales. London: Ministry of Justice.
- United Nations. (1989) The United Nations Convention on the Rights of the Child. New York: United Nations.
- Vaswani N, Dyer F and Lightowler C. (2018) What is Youth Justice? Reflections on the 1968 Act. Edinburgh: Social Work Scotland.

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