

Rights Respecting?

Scotland's approach to children in
conflict with the law

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Summary

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.

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, 2018b), 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, 2018b). 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), 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:

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

Part One of the 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 as follows.

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 they 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 (United Nations, 1989: 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 HMP & YOI 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.

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, 2019a: 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, 2018c: 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.

[View the summary online.](#)

#RightsRespecting

Introduction

Committing low-level offences is a normal part of childhood in Scotland. Nearly all of us did something that is illegal when we were a child and, whether we like it or not, this is no different for children today. For most children low-level offending behaviour is about testing boundaries, requiring a response by families and communities but not an issue requiring a formal justice response. Some children are more likely to come into contact with the justice system for their low-level offending behaviours, which can lead to exclusion, anger and stigma, exacerbate offending and any underlying issues. Poorer children, children with an autism spectrum disorder, children with a learning difficulty and children who experience the 'care system' are significantly more likely to face the formal justice system, even when their behaviour is the same as children who are wealthier, face less significant challenges or have strong supports in place. To Scotland's great shame evidence shows that despite the stated intentions of policy and practice, our justice system overwhelmingly criminalises excluded and disadvantaged children for behaviours that are ignored or accepted from our better off children.

This report presents, in Part One, an approach, detailed framework and action plan which could help Scotland deliver a rights respecting response to children in conflict with the law. This proposed plan is drawn from reflections about children's rights, found in Part Two of the report, and analysing the evidence about the rights of children in conflict with the law in Scotland, presented in Part Three. This report has been produced because at CYCJ we identified the importance of doing so, it has not been requested or commissioned by anyone. Therefore, whilst the report sets out what a rights respecting approach, framework and action plan for Scotland could look like, this is offered as a starting point for dialogue and development. Whether the ideas are developed further depends on the actions and commitment from a range of people, and there is a need for considerable dialogue and engagement about the issues raised. A rights respecting approach will require extensive and genuine participation with all those affected, including the most marginalised children, families and communities.

Achieving a rights respecting youth justice approach requires a focus on holistic changes across policy and practice, a focus which may require us at times to hold back from reactive piecemeal reforms attempting to address individual concerns or legal challenges. What is proposed is a five-year process of improvement which initially focuses on establishing genuine co-production and participation mechanisms. If we are to succeed, then children, families, communities, front-line practitioners, managers, policy-makers, researchers must all be involved and have real power to shape direction and take decisions. It is only when governance mechanisms are in place that major decisions can be made, but this report suggests early actions are likely to involve supporting engagement with the core principles of rights for children in conflict with the law; to support a culture change and lay the foundations for future policy, practice and legislative changes. Time needs to be dedicated to undertake baseline data collection before embarking on this programme of change, and putting infrastructure in place to support evidence collation and analysis, dialogue and reflection on an on-going basis.

It has sometimes been heartbreaking to write about how the rights of children in Scotland continue to be violated and to document just how vulnerable children in conflict with law can sometimes be. However, there are important changes related to children's rights underway and we can build on our strengths to develop something better with and for children in conflict with the law in Scotland.

PART ONE: Improving children's rights

Part One of this report presents the conclusions, and is the section to focus on if you are most interested in what can be done to improve the rights of children in conflict with the law in Scotland. It provides a detailed plan about how we can improve, which is divided into two main components. The first component proposes an approach to make progress towards a rights respecting response to children in conflict with the law, setting out specific steps which could be introduced over the next five years to put in place appropriate infrastructure and arrangements to achieve a step-change. The second component is a framework detailing what a rights respecting response to children in conflict with the law looks like, and the identification of specific actions to achieve this.

1.1 A proposed approach for Scotland

Based on an analysis of evidence about the rights of children in Scotland, lessons from elsewhere, and the guidance offered by children's rights instruments, an approach for improving children's rights in Scotland is proposed which is based around the production, implementation and monitoring of a rights-based framework and action plan for children in conflict with the law. This represents an attempt to take potentially quite abstract, conceptual or sometimes general evidence, and translate it into a concrete action plan. There is a bit of a leap taken from what the evidence is telling us, to what can be done about it, with actions also drawing on experience of working to support improvement across the youth justice system in Scotland. One of the key elements of the proposed approach is the participation and involvement of all stakeholders (children, young people, families and communities, practitioners, managers, policy-makers, inspectorates, commissioners, politicians and researchers) across the production, implementation and monitoring of the rights-based framework, taking care to involve all those who are involved in the lives of children in conflict with the law. The proposed approach would require time, commitment and resourcing, and details of the different stages of this approach are provided below.

Year 1: Engagement and Preparation (2020/21)

- Consult and engage widely and deeply with all stakeholders about a proposed rights-based framework for children in conflict with the law, to involve a programme of activities to last around 10 months.
- Publish baseline data in 2020 about key rights issues for children in conflict with the law. The final dataset to be agreed, but potential indicators should include:
 - Number, percentage and proportion of children prosecuted in adult courts (compared to number of children referred to the Children's Hearing System on offence grounds)
 - Number and percentage of children going through Early and Effective Intervention measures and experiencing police direct measures
 - Number and percentage of children in secure care and custody due to being in conflict with the law
 - Number of children and young people who die in secure care and in custody
 - Number and percentage of children strip searched and intimately searched in police custody, and number of positive searches

- Number of uses of control and restraint measures in YOI and prison, and of seclusion and solitary confinement for children and young people in YOI, prison and secure care settings
- Number of sexual abuse allegations made by children and young people across the youth justice sector (YOI and prison, police)
- Make changes to governance structures - most notably the Youth Justice Improvement Board, youth justice implementation groups, potentially also the Scottish Government Youth Justice team and the Centre for Youth & Criminal Justice to more clearly align purpose and activity to improving the rights of children in conflict with the law. Such groups/bodies change names accordingly.
- Ensure that children in conflict with the law and their families have a formal role in the governance mechanisms. This is to include representation on the 'Rights of children in conflict with the law' implementation group for both children and families, with a broader range of children and families supported to engage, challenge and hold to account through various mechanisms, informed by their respective needs and interests. This important and resource intensive work requires support by specialist and dedicated participation workers.
- In 2021 publish a rights-based framework for children in conflict with the law in Scotland and a five-year action plan which sets out priorities and concrete actions to be taken each year from 2021-26. This document would replace the regular publication of a Youth Justice Strategy, given that the strategic direction is already set out in international rights.
- Organise a formal launch and celebration of the rights-based framework
- Put in place appropriate governance mechanisms. This should include: Quarterly meetings of the 'Rights of children in conflict with the law' implementation group to focus on discussing and taking action on rights issues being raised by partners, discussing action plan progress, reporting any concerns about progress, identifying improvements and agreeing actions.
- Each year agree specific improvement initiatives, based on actions in the year action plan but also the annual reports highlighting progress, with agreed resourcing to deliver and implement the respective change from partners clearly stated (this may also involve establishing short-life implementation/working groups).
- Interested children and young people to be supported to engage with UNCRC, supported through peer education and opportunities such as rights champions in justice organisations, to report on the state of rights each year from 2021/22 onwards.

Year 2: Awareness raising, building capacity (2021/22)

- Production of an annual report based on agreed data indicators and the experience of children and their families, with further evidence about the implementation of the action plan from practitioners and policy-makers. This will be published alongside the annual report/output from children's rights champions. A young person friendly version of the report/other output will also be produced, and produced each year.
- Formal response to the annual report/s provided by the Scottish Government and reports lodged with the Scottish Parliament by Ministers
- Support provided to professionals who work with children in conflict with the law to identify areas of improvement and make changes, supporting the inclusion of actions in Children's Service Plans and helping organisations monitor and track change.
- Rights auditing tools to be developed, building on Children's Rights Impact Assessments, to support organisations to improve policy and practice

- General public, media and community level engagement programmes put in place to raise awareness of rights and how to challenge right breaches, and to support wider dialogue about rights.
- Professional awareness raising events and learning opportunities provided to support practitioners to improve their practice, uphold children’s rights and support children to access their rights.
- Recruit champions for the rights of children in conflict with the law for each local authority and key partner organisation, connecting this network and working closely with these representatives to deliver changes on an organisational level.

Years 3 to 5: Practice and Policy Changes (2022/23 to 2024/25)

- Some funding from the Scottish Government and other strategic partners to be made available to support local areas and youth justice organisations to make significant improvements to children’s rights where significant resourcing is required to make a step-change. A total annual budget to be agreed, and an annual call for implementation projects to be organised, with entries assessed by representatives from the Scottish Government with support from the ‘Rights of children in conflict with the law’ implementation group. Other supports/resourcing also to be offered from partners as part of this process (staff time, data, advice etc.)
- Support provided to organisations who have completed rights audits to make improvements identified through this process.

Year 5: Evaluation, Reflection and Action Planning (2024/25)

Produce an evaluation of the outcomes achieved and the mechanisms employed, identifying areas for improvement in relation to the rights of children in conflict with the law. Then develop and plan the next phase of improvement.

1.2 Rights respecting framework and action plan

Taking together the body of rights articulated by UNCRC; the Beijing, Havana and Riyadh rules; UNCRC General Comments; European Convention on Human Rights (ECHR) and the European Council’s publications about child friendly justice, the core components of a rights respecting approach for children in conflict with the law in Scotland are identified (for further information on these rights instruments see Part Two). The framework articulates what a rights respecting youth justice system would look like in Scotland. The discussion about children’s rights, in Part Two, along with the review of the evidence about children’s rights in Scotland, discussed in Part Three, informs the specific actions identified here. The actions are not intended to be read as a final, or complete action plan, but an attempt to identify very specific policy, practice and legislative actions that would be required by Scotland to achieve a rights respecting approach to children in conflict with the law. The intention is to then use this framework and action plan as the basis for consultation with children and young people, families, practitioners, policy-makers, politicians and academics. It is a starting point, which could be developed via the approach set out in the section above, and would require stakeholders collectively agreeing priorities for action each year. The actions sometimes draw on several strands of discussion throughout the report, and the relevant sections are indicated. The actions also draw on children’s rights guidelines, articles and rules, and the main ones of relevance are provided for each area for action, though in reality many more apply and this is not intended as a comprehensive mapping exercise.

1. Defining children as under 18 and better responding to issues of child development

Actions:

1.1 Legislative change to ensure childhood defined as under 18 in relation to protection rights (with participation rights enabled earlier in childhood as appropriate), paying particular attention to age definitions and children's rights in relation to custody, deprivation and restriction of liberty, courts and police powers.

1.2 Examine what is needed to improve advice and disposal rates from the Courts to the Children's Hearing System¹.

1.3 Support a shift in legislation, policy and practice to ensure that the Children's Hearing System takes on responsibility for the wellbeing of all children up to the age of 18, regardless of the nature of their offence or their supervision status.

1.4 Support and closely monitor the implementation of the Management of Offenders (Scotland) Act 2019 which strengthens the presumption that the Children's Hearing System takes on responsibility for the wellbeing of all children up to the age of 18. Provide training, advice and guidance for professionals, particularly judiciary, social workers, children's reporters and panel members.

These actions primarily draw on sections 2.3 and 3.8 of this report and the following key children's rights guidelines: UNCRC (Article 1), Riyadh Guidelines (3), General Comment 24.

2. Social inclusion and social justice as prevention

Actions:

2.1 Coordinate investment in community and social resources to ensure a more strategic approach is taken to developing infrastructure to prevent children from offending in the first place, working with local authorities and community partners to help them disinvest in the 'managing offending' approach to release resources to improve inclusion and prevent offending (building on the [inclusion as prevention model](#) being developed in South Lanarkshire).

2.2 Develop a practice development initiative which focuses on social pedagogy and supporting the inclusion of children displaying harmful behaviours (working in and with: families, nurseries, schools, social work, health visitors, GPs, colleges, youth workers).

2.3 Support those working with children to prioritise the inclusion of children in education, social and community activities where the behaviour of children is challenging.

¹ A Children's Hearing is a space in which legally binding decisions are made about children who may require care and support. Decisions are made by a panel consisting of three members of the community, trained to undertake this function.

2.4 Support those working with children in conflict with the law to critically evaluate their approach to children experiencing poverty; being alert to unintended consequences of individual bias as well as policy and practice that discriminates on the basis of economic disadvantage.

2.5 Publish a clear statement about the entitlements that all children can expect, emphasising how we will ensure they are upheld for children in conflict with the law (building on ideas in the Welsh Government's approach).

These actions primarily draw on sections 2.5, 3.1, 3.2 and 3.3 of this report and the following children's rights guidelines: UNCRC (articles 2, 3, 27, 28, 29, 31), Beijing Rules (1, 25), Riyadh Guidelines (I, III, IV, V).

3. Strengthening the participation of children in conflict with the law

Actions:

3.1 Ensure policy and practice guidelines and expectations build on the Children and Young People's Commissioner Scotland's 7 golden rules of participation² and emerging infrastructure to support participation, to strengthen the participation of children in conflict with the law.

3.2 Raise awareness about the particular importance of participation for children in conflict with the law, the barriers and enablers of participation.

3.3 Implement a participation improvement programme to develop the skills and confidence of professionals who come into contact with children in conflict with the law.

3.4 Develop a three-year programme of work to improve the participation of children in conflict with the law (building on existing work), and consider progressing the development of a specific participation strategy for children in conflict with the law.

3.5 Implement a specific participation project focused on improving the participation and agency of children who are deprived of their liberty, developing proposals about legislative change and appropriate resourcing to enable more fundamental change.

These actions primarily draw on section 3.4 of this report and the following children's rights guidelines: UNCRC (Articles 12, 15, 16), ECHR (Articles 6), Riyadh Guideline (50), Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

4. Upholding the rights of victims, paying particular attention to child victims

Actions:

4.1 Explore current provision for child victims, particularly where they are harmed by a child, and investigate areas for improvement, perceived benefits and costs.

² For further information see <https://www.cypcs.org.uk/education/golden-rules>

4.2 Investigate the potential for improving the participation of victims in Early and Effective Intervention (EEI)³ and the Children's Hearing System, exploring opportunities and potential positive and negative consequences for both the victim and the child in conflict with the law.

4.3 Support restorative processes within schools and for young people who are involved in offending; providing a youth justice coordination role, highlighting areas of good practice and supporting areas to develop restorative justice services, building on the [Restorative Justice: action plan](#).

4.4 Support the Scottish Children's Reporters Administration (SCRA)⁴, Crown Office and Procurator Fiscal Service (COPFS)⁵ and victim organisations to develop policies that promote links with victims of crime, within the Children's Hearing System and courts.

These actions primarily draw on section 3.5 of this report and the following children's rights guidelines: UNCRC (Articles 3, 39), ECHR (Articles 6, 8)

5. Strengthening early intervention and diversion

Actions:

5.1 Challenge and develop alternative ways of working to the 'eligibility criteria' model which is based on a high level of need being reached before intervention. Design and cost an alternative vision, developing pilots and approaches based on meeting need first time it is identified, modelling costs and long-term savings for such an approach.

5.2 Design and implement changes to current EEI processes to ensure it only takes place where there is a need for further action and implement improvements to ensure improved participation of the child, family and victim.

5.3 Support partners to offer diversion to all children and young people as an alternative to prosecution.

These actions primarily draw on sections 2.5, 3.4, 3.5, 3.7 and 3.8 of this report and the following children's rights guidelines: UNCRC (Articles 3,9,37,39,40), Beijing Rules (11), Riyadh Guidelines (I, III, IV, V), United Nations Committee on the Rights of the Child - General Comment 24.

6. Taking a shared responsibility approach: strengthening community and family support

Actions:

³ Early and Effective Intervention (EEI) is a multi-agency process where decisions are made about how best to respond to the needs of a child and is triggered by a police referral following a formal charge for an offence or anti-social behaviour.

⁴ The Scottish Children's Reporters Administration (SCRA) supports the effective running of the Children's Hearing System, supporting due process and making decisions about whether referrals to a Children's Hearing should be accepted.

⁵ The Crown Office and Procurator Fiscal Service (COPFS) receives reports about crimes and takes decisions about what action to take, including whether to prosecute someone.

6.1 Strengthen our responses to older children in conflict with the law aged 15-18, and young people in conflict with the law aged 18-25. Paying particular attention to approaches which support inclusion, improve integration, focusing on restoring and building relationships, building on the Whole System Approach⁶.

6.2 Support local partners to prioritise the needs and wellbeing of families, and assist families in providing care and protection and in ensuring the physical and mental wellbeing of children.

6.3 Support agencies that support children in conflict with the law to fulfil their responsibilities as corporate parents, by providing advice, guidance, training and raising awareness.

6.4 Encourage the development and improvement of community-based services and programmes which respond to the special needs, problems, interests and concerns of children in conflict with the law.

6.5 Ensure support and training is in place to support the change of the age of criminal responsibility to ensure this represents a real change for children, not a technical change which does not change experiences.

6.6 Undertake a review to understand the practice and policy implications of increasing the age of criminal responsibility further, and develop proposals about how these can be addressed, with the intention of at least adopting age 14, as recommended as the minimum acceptable age by the United Nation's Committee on the Rights of the Child in General Comment 24, but looking at age 15 or 16 as commended.

These actions primarily draw on sections 2.3, 3.1, 3.2, 3.3 and 3.7 of this report and the following children's rights guidelines: UNCRC (Article 40), Beijing Rules (1,4,5), Riyadh Guidelines (I, IV A), United Nations Committee on the Rights of the Child - General Comment 24.

7. Supporting the specific needs of children in conflict with the law

Actions:

7.1 Coordinate a workforce capacity review to meet the identified need of greater staff therapeutic interaction with young people.

7.2 Support the implementation of [Early and Effective Intervention \(EEI\)](#)⁷ core elements, [Youth Justice Standards](#)⁸, [Common Core of Skills, Knowledge & Understanding and Values for the "Children's Workforce" in Scotland](#),

⁶ The Whole System Approach (WSA) is a Scottish Government led programme for addressing the needs of children and young people involved in offending, focused on a set of principles around early and effective intervention, diversion, court support, community based care and support, managing risk, reintegration and transitions.

⁷ Currently being revised

⁸ Currently being revised

7.3 Ensure that a Coordinated Support Plan or a Child's Plan⁹ accompanies all children entering alternative care placements in residential children's houses, secure care and custody, to ensure relevant history and information accompanies all young people electronically.

7.4 If a young person is 'at risk' of a custodial sentence, consider their hearing being listed as early as possible in the Court day, to support their transition into custody and ability to access appropriate support, and for liberations to be arranged for times when those with complex support needs can receive appropriate support.

7.5 Provide specialist support, training and research on the different needs of boys, girls, LGBTI children, children with disabilities, children from different racial and ethnic backgrounds, children with different religious beliefs, and other specific needs, focusing on emotional health and wellbeing, resilience and help-seeking.

7.6 Support local areas to improve current provision in relation to speech, language and communication needs of young people in the care, protection and justice system.

These actions primarily draw on sections 3.2, 3.3, 3.6, 3.7, 3.8, 3.9 and 3.10 of this report and the following children's rights guidelines: UNCRC (Articles 2,3,12,39,40), ECHR (Article 6), Riyadh Guidelines (58), Beijing Rules (5, 6).

8. Implementing an appropriate approach to children's criminal records

Actions:

8.1 Assess and monitor the implementation of the recent and forthcoming changes to disclosure law through the Disclosure (Scotland) Bill and Management of Offenders (Scotland) Act 2019, against a detailed model of what a proportionate, individualised, developmental, needs led approach which takes account of journey travelled would look like. Ensuring such an assessment pays particular attention to any unintended consequences and inequality issues (including in relation to care experienced young people).

8.2 Work with authorities to implement practice improvements to ensure that if the 'disposal' after charge is diversion, or EEI, any information relating to that charge can only be disclosed or shared in limited circumstances which protect the rights of the child.

8.3 Ensure that offending behaviours by children do not result in a criminal record as default but only where: information relates to a sufficiently serious offence which it is reasonably certain was committed by the individual, that is currently relevant to the purpose for requiring an enhanced criminal record check or for the purpose of public protection, and which the individual concerned has had an opportunity to comment meaningfully upon; this may also be subject to changes via the Disclosure (Scotland) Act 2019. Further, no 'Other Relevant Information' should be recorded for those under the age of criminal responsibility.

⁹ Personalised support plans for children who require additional supports

8.4 Publish resources which help children, young people, families and professionals to understand criminal records and their implications.

8.5 Explore the need and appetite for the development of an independent support service to ensure that children, young people, families and professionals get the help they need to understand the criminal records system, know the implications for them given their specific circumstances, and are made aware of how they can challenge the records held about them (based on [Unlock](#) in England and Wales). Support the establishment of such a service should there be need and appetite.

These actions primarily draw on section 3.6 of this report and the following children's rights guidelines: Key children's rights guidelines: UNCRC (Articles 16, 39, 40), ECHR (Articles 6, 8), Beijing Rules (8, 20).

9. Ensuring due process for all children

Actions:

9.1 Ensure rights training occurs on a systematic and ongoing basis for the police, judiciary, lawyers, social workers, children's reporters, panel members, lay advocates, appropriate adults, and that there are specially trained professionals available to support children to exercise their rights across the youth justice system. Developing and supporting training where this is not currently in place.

9.2 Raise awareness, improve training and support professionals to deliver the practical steps in the Council of Europe Guidelines on child-friendly justice (Council of Europe, 2010), including familiarising the child with their rights as well as the courtroom/children's panel room in advance of proceedings, minimising disruption and ensuring specially trained professionals are available.

9.3 Improve understanding about how a child's rights under Article 6 of the European Convention on Human Rights (ECHR) may be breached if a State does not take sufficient positive steps in order to guarantee that the child understands the nature and significance of Court and Children's Hearing proceedings, and reduce the possibility of fear and intimidation accompanying the proceedings.

9.4 Explore and support improvements to Court processes to ensure appropriate adaptations are made as required to enable the participation of a child, and reduce the potential to traumatise/re-traumatise.

9.5 Investigate strengthening legal protections for children, reflecting on the New Zealand, Oranga Tamariki Act 1989, which introduced inadmissibility of evidence as the sanction for police non-compliance with protections for children being questioned and investigated by the police, subject to an assessment of 'reasonable compliance' (Lynch, 2016: 139).

9.6 Implement the actions identified in the 'better hearings' programme and continue to identify improvements based on strong engagement with professional stakeholders and children and young people with experience of Children's Hearings.

9.7 Provide improved information and training for Children's Hearing panel members about the rights and needs of children in conflict with the law, ensuring that support and legal advice is available in individual cases should they need specific advice or have queries about children in conflict with the law.

9.8 Support the commitment for all children in the Children's Hearing System to have access to an advocacy worker and independent legal advice, to ensure that all children in conflict with the law have access to legal representation to ensure they know their rights and have a mechanism to realise them.

9.8 Consider how to ensure free legal aid for all children in conflict with the law, regardless of age and family income, as recommended by the *Global Study on Children Deprived of their Liberty* (Nowak, 2019: para 107).

These actions primarily draw on sections 3.8, 3.9 and 3.10 of this report and the following children's rights guidelines: UNCRC (Articles 3, 12, 37, 39, 40), ECHR (Articles 6, 8), Beijing Rules (7, 10, 14), Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, United Nations Committee on the Rights of the Child - General Comment 24.

10. Improving our approach to the deprivation of children's liberty

Actions:

10.1 Explore the potential, implications and pathway to abolish the deprivation of liberty for breach only infringements for those under 18 years old (and potentially to 25 years old).

10.2 Work to ensure that where there is a recommendation or decision about deprivation of a child's liberty (by the judiciary, Children's Hearing panel members or Chief Social Work Officers) it is clearly evidenced why this is a necessary measure of last resort as the only approach which can protect the public, or the child from significant harm and meet the child's needs making reference to considerations of community-based supports and explaining why community based supports and places of safety have been rejected.

10.3 Ensure alternatives to secure care and custody that meet the needs of children are available for all children, promoting the use of Intensive Support and Monitoring as an alternative to secure care.

10.4 Explore the use of orders for detention on remand for children and young people, examining mechanisms to reduce the use of remand orders wherever possible. Consider the publication of a joint action plan to reduce the number of children subjected to remand orders and reporting on progress on an annual basis.

10.5 Amend legislation to ensure that all children under 18 years old cannot be placed or detained in a Young Offender's Institution (YOI) or an adult prison.

10.6 Develop creative new ideas about models and approaches, and improve appropriate child-centred care settings, for children, who as a measure of last resort, need to be deprived of their liberty. Ensuring the successful implementation of secure care national standards, the vision for secure care set out by the Secure Care

Strategic Board, the forthcoming recommendations of the Independent Care Review and the recommendations of the Expert Review of Provision of Mental Health Services at HMP & YOI Polmont.

10.7 Consider legislative change to ensure that courts can only authorise a short maximum period of detention for children (and potentially young people up to age 25) after which the presumption of release from detention would place the onus on the state to *prove* that considerations of public safety and the individual's human rights justify a further period of detention (based on the Child Rights International Network's recommendation).

10.8 Support practice in secure care, based on the national standards, to ensure that professionals operate on the basis of hope and positivity, and have the skills, knowledge and confidence to be able support and care for children displaying the highest levels of distress and violence, and improve best practices and rights respecting approaches in relation to:

- Personal searches
- Restraint
- Segregation
- Mental health and wellbeing
- Education
- Friend and family contact whilst detained or of liberty
- Developing and maintaining relationships whilst deprived of liberty, transitioning back to the community and when back in the community

10.9 Ensure that whilst deprived of their liberty specialist and evidence-based supports/assessment/interventions that are age and stage appropriate are available to all children (and young people up to age 26) regardless of where they are staying and ensure these supports move with them when they return to communities. Also, that any supports in place prior to their liberty being restricted should be continued regardless of where they are staying.

10.10 Support more effective risk management, to improve the lawful sharing and transmission of information for young people entering and leaving custody and detention.

10.11 Support multi-disciplinary team approaches for management plans specifically for those considered at risk or vulnerable.

10.12 Take immediate steps to abolish the use of any technique or intervention designed to induce or inflict pain on children, and for young people up to the age of 25.

10.13 Ensure that children are never subject to solitary confinement.

10.14 Where not already done, systematically collect and regularly publish annual data on the use of control and restraint techniques, strip searching, seclusion and segregation or confinement and other restrictive interventions on children in all justice settings, including where children are being deprived of their liberty in residential

children's houses. Consider the best approach of collating and publishing on annual basis the number of child sexual abuse allegations across all justice settings.

10.15 Ensure inter-agency review arrangements are undertaken for all children being deprived of their liberty, focused on ensuring their readiness for release.

10.16 Support and where there are gaps provide training and support to embed trauma informed and rights respecting practice, knowledge of child development and age, and gender specific training for all staff working with children and young people in the Scottish Prison Service. Ensure that good practice is shared between secure care centres and the Scottish Prison Service.

10.17 Support partners to review policy and practice for risk alerts, to consider including information on identified needs and vulnerabilities (including wellbeing and welfare assessments e.g. risk of harm to self or others and health and wellbeing matters) and ways to best ensure information is shared, including with whoever is transporting the young person.

10.18 Consider strengthening the requirements for support post-release. A clearer rationale is needed that if a child is to be deprived of their liberty, there is a legal obligation to provide a significant support package post-release to ensure re-integration and look to get young people back to the place where they would have been if their liberty had not been deprived. Rather than a 'nice to do' option, explore the implementation of a contractually and legally agreed package of support (such as: additional education, skills and training support; therapeutic intervention in the community as well as whilst deprived of liberty; mental health support; accommodation in place on release).

10.19 Contribute to a national action plan aimed at an overall reduction in the numbers of children in detention/the elimination of detention for children, as recommended by the *Global Study on Children Deprived of their Liberty* (Nowak, 2019: para 146).

These actions primarily draw on sections 3.9 and 3.10 of this report and the following children's rights guidelines: UNCRC (Articles 3, 12, 37, 39, 40), ECHR (Articles 5, 6, 8), Havana Rules (I-V), Beijing Rules (13,14,19,26,27,28), United Nations Committee on the Rights of the Child - General Comment 24.

11. Respecting the rights of children who commit the most serious harms and wrongs

Actions:

11.1 Establish an advisory group to consider, and if appropriate, develop proposals for the removal of mandatory, or presumptive sentencing provisions for children.

11.2 Explore what a rights respecting court process would look like for children accused of committing the most serious harms and wrongs, and what steps can be taken to achieve this.

11.3 Raise awareness of the impact of childhood trauma, adversity and distress responses and how these are linked to the behaviour of children who commit the most serious harms.

11.4 Implement a risk practice improvement programme which focuses on the successful implementation of Care and Risk Management (CARM) processes¹⁰, monitoring and victim safety planning, all within the Getting it Right for Every Child (GIRFEC)¹¹ framework.

11.5 Improve knowledge, awareness and access to interventions and supports for children who are displaying extreme distress.

11.6 Support specialist multi-disciplinary services providing specialist support for children who are displaying extreme distress and pose a serious risk of harm to others.

These actions primarily draw on section 3.11 of this report and the following children's rights guidelines: UNCRC (Articles 3, 37, 39, 40), ECHR (Articles 6, 8).

¹⁰ CARM is a [multi-agency framework](#) for child-centred practice in the risk assessment and risk management of the small group of children who present a serious risk of harm to others

¹¹ Getting it Right for Every Child (GIRFEC) is a Scottish Government policy and practice model to supporting children in Scotland, for further information see <https://www.gov.scot/policies/girfec/>

PART TWO: Reflecting on children's rights

Part Two reflects on children's rights, providing some background to international children's rights instruments and critically examining rights, and their limitations. It is important not to position rights as a panacea sufficient alone to improve outcomes and experiences. This section also explores the status of children's rights, considering childhood and age appropriate accountability. Part Two ends by providing an update on efforts to improve children's rights in Scotland and reflecting on the journey being undertaken in Wales, considering whether there are lessons for Scotland.

2.1 Background to children's rights

There are a wide range of international instruments from the United Nations and the Council of Europe which prescribe the rights of children who are in conflict with the law, some of which are binding and others non-binding, statements of best practice (Kilkelly, 2008a). Universal human rights were consolidated with the creation of the United Nations and the adoption of the Universal Declaration of Human Rights in 1948. The United Nations General Assembly adopted five further human rights treaties: International Convention on the Elimination of All forms of Racial Discrimination (1965); International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966); the Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Whilst all these treaties applied to children, the specific United Nations Convention on the Rights of the Child (UNCRC) was adopted by the United Nations General Assembly in 1989, coming into force in 1990. As Goldson and Muncie highlight, it was at this point that a universal human rights instrument focussed exclusively and comprehensively on protecting children's specific interests (Goldson and Muncie, 2012).

a. United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC consists of 54 articles setting out the rights of all human beings under 18 years old (defined in Article 1). General rights include the right to non-discrimination (Article 2); the primacy of the child's best interests (Article 3); the right to life and maximum development (Article 6); and the right of children and young people to have their views given due weight in all matters affecting them (Article 12). The UNCRC also provides a range of 'civil rights' including: the child's right to freedom of expression (Article 13) and association (Article 15); the right to receive information (Article 13); and the right to protection from all forms of violence, abuse, neglect and mistreatment (Articles 19 and 37). The Convention further provides for every child's right to an adequate standard of living (Article 27) and the right to the best possible health care (Article 24) and educational services (Article 28).

The Articles of the Convention that have most direct bearing on children's contact with the justice system include

- In all actions concerning children...the best interests of the child shall be a primary consideration (Article 3).
- State parties to ensure that a child shall not be separated from their parents against their will, except where authorities subject to judicial review determine this is in the best interests of the child. Where the child is separated from their parents they have

- a right to maintain personal relations and direct contact with both parents on a regular basis, unless this is not in the child's best interests (Article 9).
- State Parties should recognise the rights of the child to freedom of association and to freedom of peaceful assembly (Article 15).
 - No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence (Article 16).
 - 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. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so (Article 37c).
 - Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action (Article 37d).
 - State Parties 'shall take all appropriate measures to promote physical and psychological recovery and social integration of a child victim' (Article 39)
 - States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society (Article 40(1)).
 - States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected (Article 40(3))

(United Nations, 1989; Goldson and Muncie, 2012)

It is also important to acknowledge that children are part of families and communities, therefore, whilst UNCRC primarily focuses on the rights of children, in reality upholding their rights cannot be separated from upholding everyone's rights, particularly their parents and guardians. The UNCRC, therefore, also includes requirements for State parties to 'respect the responsibilities, rights and duties of parents or...the extended family or community' (Article 5), ensure parents or legal guardians have the 'primary responsibility for the upbringing and development of the child' (Article 18) and render 'appropriate assistance to parents and legal guardians in the performance of their child-rearing duties' (Article 18).

The UNCRC is supplemented by a range of non-binding soft-law measures, guidelines and interpretation from the UN Committee on the Rights of the Child. There are three key

instruments establishing the rights of children who are in conflict with the law: Beijing Rules, Havana Rules and Riyadh guidelines.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (often referred to as the 'Beijing Rules') provides guidelines about how children in contact with the justice system should be treated at each stage in the process, establishing that 'juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles' (United Nations, 1985). The *United Nations Guidelines on the Prevention of Delinquency* (also known as the 'Riyadh Guidelines') as the name suggests focuses on preventative measures, underpinned by diversionary and non-punitive responses. The guidelines set out that 'Formal agencies of social control should only be utilized as a means of last resort' (para. 5) and that 'no child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions' (para. 54) (United Nations, 1990a). The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (often referred to as the 'JDL Rules' or the 'Havana Rules') establishes a number of core principles including: deprivation of liberty should be a disposition of 'last resort' and used only 'for the minimum necessary period' and, that in cases where children are deprived of their liberty, the principles, procedures and safeguards provided by international human rights standards, treaties, rules and conventions must be seen to apply (United Nations, 1990b).

The United Nations Committee on the Rights of the Child monitors and supports the implementation of UNCRC. Adopted in 2007¹², and revised in 2019, General Comment 24 by the United Nations Committee on the Rights of the Child is a detailed and comprehensive statement of the relevant principles and provisions of the Committee on the Rights of the Child in juvenile justice, and offers guidance on ensuring that youth justice is administered in line with a children's rights approach (United Nations Committee on the Rights of the Child, 2019). General Comment 24 sets out key principles around prevention, an appropriate age of criminal responsibility, deprivation of liberty, organisation of youth justice, diversion and related issues.

b. European Convention on Human Rights (ECHR)

The United Nations, and the global human rights instruments it established, have been given further weight within the European context by the European Convention on Human Rights (ECHR), which has a stronger legal status compared to the UNCRC through the ability of individuals to complain about breaches of the Convention to the European Court of Human Rights (ECtHR) (Kilkelly, 2008b)¹³. Hollingsworth argues that in the UK it is the ECHR, enforced by the ECtHR and given domestic legal effect by the Human Rights Act 1998, that has provided the primary vehicle for the development of child-specific rights informed by other non-enforceable measures (Hollingsworth, 2017: 194). In Scotland, the Scotland Act 1998, which established the Scottish Parliament, ensured that laws passed by the Scottish

¹² In 2007 it was named General Comment 10 and when it was revised in 2019 it became General Comment 24.

¹³ The UK will remain signed up to the European Convention on Human Rights when/if it leaves the European Union (EU). The European Convention on Human Rights protects the human rights of people in countries that belong to the Council of Europe, which is a different organisation to the EU. The UK's membership of the Council of Europe would be unaffected by leaving the EU.

Parliament can be challenged and overturned by the courts if they are not compatible with rights identified in the ECHR. Scottish Government Ministers have 'no power to act' in a way that breaches these ECHR rights.

The ECtHR has considered complaints relating to various aspects of the youth justice system in England about the age of criminal responsibility (*V v United Kingdom*, 1999), trial procedures in the Crown court (*V v United Kingdom*, 1999; *SC v United Kingdom*, 2004), sentencing (*Hussain v United Kingdom*, 1996; *V v United Kingdom*, 1999; *Bailey v United Kingdom*, 2010), procedural protections for out of court disposals (*R v United Kingdom*, 1987), retention of DNA samples and fingerprints following acquittal (*S and Marper v United Kingdom*, 2008), and the placement of vulnerable children in young offender institutions (*Bailey v United Kingdom*, 2010). In most, though not all, of these cases the court drew on UN standards (Hollingsworth, 2017: 194). However, where children in conflict with the law have been successful in their claims before the ECtHR, the UK Government's response has been generally considered by observers to be just sufficient to comply with the court's decision, falling short of full compliance with international standards (Hollingsworth, 2017). Therefore, whilst Kilkelly suggests the 'best of both worlds' may be achieved by combining the child-specific provisions of the UNCRC with the ECHR's system of individual petition (Kilkelly, 2015), it would be an overgeneralisation to present the ECtHR as *the* vehicle to ensuring children's rights (Van Bueren, 2007). It has perhaps encouraged a culture of ad-hoc compliance, rather than a pro-active adoption of a rights respecting approach.

c. Council of Europe - Child friendly justice

There is a movement towards 'child friendly justice' being driven by the Council of Europe (Goldson and Muncie, 2012), which in 2010 adopted specific 'Guidelines for Child Friendly Justice' (Council of Europe, 2010) and in 2012 published its strategy for the rights of the child, which was designed to achieve 'effective implementation of existing children's rights standards' (Committee of Ministers of the Council of Europe, 2012). The guidelines on Child Friendly Justice do not create new standards, but collate international rights to provide practical guidance for member states to design their justice systems in a child-specific way (Hollingsworth, 2017). Kilkelly argues that whilst these guidelines broadly replicate UN measures, due to the involvement of children and young people in the drafting process there was a greater emphasis on confidentiality, the importance of family and friends, provision of feedback on decisions, the right to access independent support and complaint mechanisms, and the right to be informed and heard (Kilkelly, 2010). The EU has committed to taking the Guidelines into account in future legal instruments but it has been suggested that lack of awareness amongst professionals in the UK diminishes their utility (European Union Agency for Fundamental Rights, 2015). Whilst the guidelines could potentially acquire indirect legal effect through their use by the ECtHR, 'this hasn't happened in any significant way to date' (Hollingsworth, 2017: 194). Therefore, as a non-binding instrument, Hollingsworth suggests that in a similar vein to UNCRC, 'the effectiveness of the Guidelines depends on political commitment, professional awareness, and their value as a judicial interpretative tool' (Hollingsworth, 2017: 193).

The body of international law, treaties, rules and guidelines outlined above collectively 'defines the treatment of children in conflict with the law and prescribes the rights to which they are entitled' (Kilkelly, 2008b: 188). There is notable consistency across these instruments particularly regarding age-appropriate treatment, the importance of diversion and the imperative of rehabilitation (Kilkelly, 2008b). Goldson and Hughes argue that together they provide what is now a well-established 'unifying framework' for modelling

juvenile justice statute, formulating policy and developing practice in all nation states to which they apply (Goldson and Hughes, 2010).

2.2 Critically examining children's rights

A rights-based framework can be a useful tool because it sets out a common language for youth justice, representing an effective benchmark 'against which law, policy and practice can be measured in a whole range of areas, and in the system as a whole' (Kilkelly, 2008b: 191). Given that rights build on international evidence, there is perhaps a robustness to the framework beyond what is possible within any single jurisdiction. A rights-based framework can assist as an auditing tool, highlighting breaches of children's rights and providing a structure through which such breaches can be publicly documented and highlighted (Kilkelly, 2008b: 191). King suggests that the UNCRC also provides a 'powerful moral force' without use of direct legal coercion (King, 1994: 388). Much of the strength of children's rights has come from soft power rather than legal powers, raising standards through persuasive force, advocacy and campaigning and using guidelines and secondary sources from the UN Committee on the Rights of the Child to aid the interpretation of the convention (Hollingsworth, 2017: 192). A rights-based framework can offer us a set of principles, providing a clear direction and objectives to work towards for policy makers and practitioners. However, there have been some concerns expressed about adopting a rights-based approach, particularly in a youth justice context.

As Kilkelly points out, the breadth and reach of the UNCRC underlies its strengths and its weaknesses. Securing almost universal agreement from vastly different states for a legally binding treaty that contains over 40 substantive provisions meant that in order to be politically feasible the rights were widely and sometimes vaguely drafted, and the enforcement mechanisms were weak (Kilkelly, 1996). As international rights standards are negotiated between a range of jurisdictions, they are frequently positioned around a 'minimum tolerable standard' rather than a more aspirational standard of excellence, as is explained in the commentary to the 'Beijing Rules':

'The Standard Minimum Rules are deliberately formulated so as to be applicable within different legal systems and, at the same time, to set some minimum standards for the handling of juvenile offenders under any definition of a juvenile and under any system of dealing with juvenile offenders'

(United Nations, 1985: Commentary n.2)

Consequently, international children's rights can be weak on specific issues, for instance, Kilkelly suggests they are 'too vague on detention as a last resort; too weak on the age of criminal responsibility and they are incomplete on the trial process, sentencing and serious crime' (Kilkelly, 2008b: 191).

One of the major critiques of the children's rights is the lack of enforcement mechanisms (Hollingsworth, 2017; Kilkelly, 2008b; Goldson and Kilkelly, 2013). Goldson and Muncie highlight that any breaches of UNCRC attract no formal sanctions, and so as they aptly explain, UNCRC 'may be the most ratified of all international human rights instruments but it also appears to be the most violated, particularly with regard to juvenile justice' (Goldson

and Muncie, 2012: 51). Enforcement mechanisms are weak and compliance is dependent in 'diplomacy and political pressure rather than legal sanction' (Hollingsworth, 2017: 191).

However, within jurisdictions, courts can play an important role here. Hollingsworth notes that in England courts have, albeit rarely, given 'indirect legal effect to concluding observations with which the government had previously failed to comply' (2017: 191).

Whilst the UN has a historically weak method of enforcement, the Council of Europe has the European Court of Human Rights (ECtHR) that individuals can bring complaints to about breaches of the European Convention on Human Rights (ECHR). However, as Hollingsworth points out the ECHR is a 'general rights treaty, the substantive content of which is not tailored to children's interests' (Hollingsworth, 2017: 190). Both regimes have sought to address these weaknesses, at the UN a system of individual complaint was adopted in 2014 (the third optional protocol) and in 2010 the Council of Europe published child-friendly justice guidelines. However, weaknesses around enforcement still remain and the implementation of UNCRC has been observed to be piecemeal with obligations on state parties in relation to youth justice frequently appearing as 'little more than afterthoughts' (Goldson and Muncie, 2012: 51). Rather than guiding developments in youth justice then, obligations about children's rights sometimes appear to be something to be 'got around', avoiding resource implications, political ramifications, professional tensions and challenge. It is particularly concerning that the most serious breaches of children's rights appear to occur when children are at their most vulnerable, particularly around children in detention (Kilkelly, 2008b: 191).

A regular feature of the UNCRC's monitoring has been condemnation of the UK for its failure to ensure that the principle of the best interests of the child is adequately integrated into all legislation and policies impacting on children in conflict with the law. The nebulous concept of 'best interests' is difficult for state agencies to implement when children do not share the same level of concern for their personal well-being as that identified by those responsible for their care (Haydon, 2018: 36). In their five-yearly State reviews, The Committee on the Rights of the Child, has frequently criticised the UK about children's procedural rights, measures for dealing with children without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort (United Nations Committee on the Rights of the Child, 2007: para. 1). Hollingsworth argues that children's rights standards have also been less successful in addressing some serious and frequently identified shortcomings in England, such as the age of criminal responsibility, over-use of adult like detention and inadequate resettlement provision (Hollingsworth, 2013: 1047). There have also been criticisms across the board about how jurisdictions look to prevent children from coming into conflict with the law in the first place. Concerns have been raised about particularly vulnerable children, for instance, the overrepresentation of children from Roma and traveller communities have been highlighted as a concern for Scotland, and other jurisdictions (Muncie, 2008). Gauci notes there is an insidious double-victimisation here, with on the one hand criminal justice agencies offering a lack of meaningful protection for minoritised communities enduring hate crime and racist violence, and on the other hand those most vulnerable being most likely to be criminalised for their behaviour and punished (Gauci, 2009: 6). There are also specific concerns about the rights of children in conflict with the law, with respect for the human rights of child 'offenders' barely extending much beyond polite lip-service (Goldson and Muncie, 2012: 59), and as discussed in section 3.11 this is an even greater concern when we consider children who commit the most serious offences. Goldson and Kilkelly also 'challenge the legitimacy' of rights-based approaches in certain contexts, for instance, questioning the legitimacy of a rights-based approach to the

imprisonment of young people, something which they suggest is not possible to be 'rights-based' (Goldson and Kilkelly, 2013: 345). Whilst this does not question the legitimacy of a rights-based approach overall, it highlights the need for caution when designing and implementing it.

There are also significant challenges and tensions between different rights, particularly between 'participation' and 'best interests', with the potential for us to get this balance wrong and contribute to worse outcomes for children in the name of rights. For instance, we may ignore children's views about what is in their best interests because we wrongly assume we know what is in their best interests; alternatively, we might fail to do what is objectively in their best interests because we implement their views entirely. A potential example of this could be where children indicate at the time a preference to be sent to a Young Offenders Institution rather than secure care (potentially because they no longer want to be treated as a child, for instance, by being required to attend education), whereas when as adults they reflect back on their experience they conclude that this was not in their best interest (Nolan et al., 2018). There is a tricky balance here if we are to avoid the worst of both worlds, though as Haydon helpfully articulates, rather than being two opposites, 'children have a right to be protected and...this will be most effectively secured if their views are taken into account about how matters of care and control should be addressed' (Haydon, 2018: 46).

Given major gaps in data collection about children's outcomes and experiences it is difficult, if not impossible, to definitively conclude whether international children's rights have improved the lives of children. Gray highlights that most of the data collection through inspections focuses on 'processes' rather than 'outcomes' and critically, when they do measure outcomes these are largely focused on reducing risk of offending, rather than alleviating young people's social welfare difficulties (Gray, 2016: 60). Despite these data challenges, Gray concludes that the 'apparent commitment to protecting the child's best interest of welfare through the provision of 'child-friendly' youth justice measures has not led to improved welfare outcomes for young people who offend' (Gray, 2016: 60). In contrast Forowicz suggests that in the field of youth justice, standards deriving from UNCRC have been the most influential, because of both its specificity and the almost universal consensus (Forowicz, 2010). However, Hollingsworth argues that apart from the four general principles (best interests, right to be heard, non-discrimination, right to life) the utility of UNCRC 'remains largely under-explored in the criminal justice context' (Hollingsworth, 2017: 191).

Gray suggests there has been a mixing of 'need' with 'risk of offending', which has been encouraged by the 'best interest' principle, and that whilst this means attention is drawn to the welfare difficulties facing young people who offend, 'because these problems are constituted somewhat restrictively around criminogenic and dynamic factors their causes tend to be individualised or blamed on personal shortcomings' (Gray, 2016: 67). As Kemshall explains the 'broader societal limitations imposed by excessive levels of socio-economic disadvantage that aggravate young people's personal and social difficulties...are seldom considered achievable targets for change' (Kemshall, 2008). Therefore, to truly improve the outcomes and experiences of children in conflict with the law a meaningful rights-based framework needs to focus on addressing social and economic exclusion, otherwise it runs the risk of exacerbating the disadvantages that the most excluded children face. There are fundamental questions here about whether 'rights discourses and implementation have the potential to address structural inequalities rooted in the determining context of class, gender, sexuality, age, ethnicity, culture, and abilities' (Haydon, 2018: 32). Further, as Stanley points out the broader context in which rights operate cannot be

disregarded because specific groups may have neither the knowledge nor the finances to progress legal proceedings, this being particularly true for children (Stanley, 2007). There is a power dynamic at play and thus it is not surprising that King questions whether demands for legal remedies for children might lead to nothing more than formalistic responses from governments, as they can simply declare their policies legal within the terms of UNCRC free from any serious challenge (King, 1994).

Abramson argues that whilst the UNCRC has been positive in transforming life for children overall, juvenile justice is essentially peripheralised or disregarded, to the point of being 'unwanted' (Abramson, 2006). Goldson and Muncie highlight how the United Nations Committee on the Rights of the Child have consistently raised concerns about Articles 37, 39 and 40 of the UNCRC (which are focused on youth justice matters) and note that 'despite having had over 20 years to move towards full implementation, most states appear to have failed to integrate and embed the Convention within juvenile justice law, policy and practice' (Goldson and Muncie, 2012: 52). In Lundy et al's important study of UNCRC implementation in 12 countries (Australia, Belgium, Canada, Denmark, Germany, Iceland, Ireland, New Zealand, Norway, South Africa, Spain and Sweden), in which they compare and reflect on lessons for the UK, they found that in each country examined, 'the most vulnerable groups of children (separated children, asylum seekers, indigenous children, and children in conflict with the law) continued to fare less well compared to their peers' (Lundy et al., 2012: 106). They explain this is in part due to the higher levels of poverty and social exclusion experienced by these children, but also that some children were not seen as rights holders in the same way as others. In Lundy et al's study this was highlighted as a particular issue for separated children and child asylum seekers, but is also likely to be an issue for children in conflict with the law. So, there is a danger that, ironically, an approach designed to be rights respecting could increase the difference between the position of different children, compounding the disadvantage experienced by some of the most vulnerable children.

There is also the potential that a rights-based approach can actually make things worse for some children in some situations. Armstrong argues that rights-led prison reform 'contributes to prison bureaucratisation and through this, transforms, extends, and legitimates, forms of penal control' (Armstrong, 2018: 1). She demonstrates a process by which human rights principles are technically and institutionally specified as procedures and processes of bureaucracy, so rights become just another thing the prison has to 'manage'. This process tends to help shore up power on the side of the powerful, who have the resources to understand and navigate the bureaucratic and technical processes put in place to comply with 'rights' (Armstrong, 2018: 22). Consequently she argues that human rights efforts have produced major infrastructures of compliance and enforcement 'without generally altering the basic situation of prisoners' (Armstrong, 2018: 16). This is a powerful reminder of how unintended consequences can flow if rights-based change is concerned with technical compliance and bureaucratic box ticking, rather than deep soul searching and improvement based on grappling with first principles. Armstrong's work helpfully also highlights that rights alone are not enough.

The discussion above suggests that there is no certainty that technical compliance with international rights will improve the outcomes and experiences of children in conflict with the law. The evidence highlights the need for the implementation of rights to include a focus on, and to engage with principles, for outcomes to be monitored, for the sector to be held to account for breaches of children's rights, and for the need for unintended consequences to be closely monitored and highlighted. It is not enough to design a rights respecting

framework and action plan in and of itself, and significant commitment and resources will be required if we are to ensure that there is a rights respecting response that actually improves the lives of children in conflict with the law in Scotland.

2.3 Children, childhood and age appropriate accountability

It is worth highlighting the specific status of children's rights, in addition to their 'human rights'. Of course, children are human, so all human rights apply to children, however, there are also 'children's rights' which focus on the specific status and position of children. Children's rights are, therefore, in addition to their human rights. Ferguson helpfully distinguishes between 'rights for children', which are rights that extend to children not because of their identity as a child per se but because they apply to everyone, and uses the term 'children's rights' to refer to specific rights associated with being a child (Ferguson, 2013).

There is an important conceptual difficulty when we consider the rights of children in contact with the justice system because some rights are based on arguments about how the child has agency and requires the same rights as adults (such as due process rights) and others stem from her status and rights as a child, and being a not-yet fully autonomous agent (Hollingsworth, 2013). Hollingsworth helpfully reconciles this issue by identifying two components of 'autonomy', firstly, 'agency' or choice, which children can possess at very young ages, and 'full autonomy' which refers to 'a person's capacity to live autonomously' (Hollingsworth, 2013). Although children can acquire basic agency at an early age, Hollingsworth argues that 'the capacities required to be 'fully' autonomous are more numerous and complex and are developed and acquired throughout childhood and adolescence' (Hollingsworth, 2013: 1052). Full autonomy is defined as 'the freedom to exercise real choice in a way that reflects one's subjective preferences, values and morals' (Hollingsworth, 2013: 1052) and a person is autonomous where 'she also has an adequate number of options to choose from' (Hollingsworth, 2013: 1054).

Hollingsworth suggests that 'childhood is a time for gathering and developing 'assets' which are considered essential (in the particular polity in question) for all to enjoy equally a fully (relational and capabilities based) autonomous adulthood' (Hollingsworth, 2013: 1049), and that the ability to develop assets in this way should be protected by a category of rights that are deemed 'foundational'. Foundational rights place a responsibility on the state to protect and nurture children's assets so that they can successfully mature into adulthood. The implication of this is that the youth justice system must operate in a way that supports, and certainly does not harm, the development of 'assets' (Hollingsworth, 2013: 1048). A youth justice system that permanently restricts the child's ability to gather the assets necessary for full autonomy is illegitimate because the state has a responsibility for ensuring the child is in a position to 'step up to the mark' and to act as a fully autonomous rights-holder at the point the child's special status as 'child' is removed (Hollingsworth, 2013). A rights-consistent youth justice system then 'must not only be consistent with the child's current agency...but also her future capacity for full autonomy, as protected by her foundational rights. Accordingly, there should be an obligation placed on the state to ensure that the youth justice system is not structured in such a way that children's foundational rights are not permanently or irreparably harmed' (Hollingsworth, 2013: 1049). An advantage of this conceptualisation is that it focuses on looking forward at the impact of punishment on what the child might become, rather than backwards at what capacities she has. Hollingsworth

argues that foundational rights should also be used in a rights-based youth justice system ‘to impose a reparatory duty on the state to restore the child to the position she would have been in had she not been punished’ (Hollingsworth, 2013: 1068). In this way a reparatory duty is the basis for a rights-based system of resettlement, rather than being, as at present, ‘underpinned by the instrumentalist goal of preventing future offending’ (Hollingsworth, 2013: 1068).

Age-appropriate accountability is an important consideration for children in conflict with the law. Children should be viewed as ‘less culpable than a comparable adult offender, but not as an actor who is without any responsibility for the crime’ (Steinberg and Scott, 2003: 1110). As discussed above, children lack ‘full autonomy’ but they do have some agency and choice. However, there are developmental issues with children less culpable than adults because often their ‘criminal conduct is driven by transitory influences that are constitutive of this developmental stage’ (Steinberg and Scott, 2003: 1011). Characteristics such as susceptibility to peer influence, finding short-term consequences easier to understand than long-term consequences, weighing of risk and reward, and impulsivity are intrinsic to children (Steinberg et al., 2009). There is a growing evidence base about how the brain is not fully developed until a young person’s early 20s, with the frontal lobe, responsible for functioning such as cognitive flexibility, inhibitory control and working memory, being the last to develop (McEwan, 2017). While the normal functioning of the child’s brain is of itself not comparable with an adults in terms of assessing consequences and risks, it is also increasingly understood that neuro-disabilities such as foetal alcohol syndrome spectrum disorders, and other brain damage caused by accidents or assault, can have detrimental effects on children’s capacity, and that there is an over-representation of these needs amongst children in conflict with the law (Lynch, 2016) with emerging evidence in Scotland about children in custody (Robinson et al., 2018). Steinberg and Scott note that children ‘may have diminished decision-making capacity compared with adults because of differences in psychosocial capacities that are likely biological in origin (and most)...will mature out of their tendency to make unwise choices that are driven by the psychosocial influences’ (Steinberg and Scott, 2003: 1013-1014). As discussed above, there are also social factors which mean we require a different level of accountability for children compared to adults related to their inability to exercise full autonomy; being reliant on others for their basic needs means they do not have full choice over what they do and how they act. Depending on their socialisation they also potentially do not understand what is legal, or what is ‘right or wrong’. For instance, growing up in an abusive or criminal household makes it difficult or impossible for a child to understand what is acceptable in other contexts. Further, as Yaffe argues, children are not considered full citizens, for instance, they are not entitled to contribute to the development of the law through voting, and, therefore, they should be treated more leniently than adults (Yaffe, 2018).

In Scotland, there is a long-tradition of shared responsibility for children’s behaviour, with responsibility shared between the state, the community, parents and the child, though often with such responsibility primarily falling on children rather than the adults around them (Kilbrandon Committee, 1964). Though a principled approach to children who pose a serious risk to others may then be likened to how adults without mental capacity may still be subject to controls while they are considered to pose a risk to public safety (Brown, 2016). However, ‘children do knowingly commit serious offences causing serious harm, and some are mature and capable of appreciating consequences’ (Lynch, 2018c: 226), so our approach to children in conflict with the law needs to also address public safety and accountability, the concerns of victims and the public too. The key here though is a clearer expression of the

public interest and a focus on the fact that ‘the best protection for society is a child who has been reintegrated successfully into society and where the causes of the offending have been addressed’ (Lynch, 2018c: 226).

It is also important to keep in mind that the ‘pain of punishment’ felt by children is greater than that experienced by adults so what may be considered ‘necessary for the sentence to be proportionate and to restore the system of right is less for children than for adults’ (Hollingsworth, 2013: 1067). This is in part due to the biological, physiological and social milestones that occur for children, but there are also disproportionate effects, for instance a sentence of the same length for an adult and child will be a larger proportion of a child’s life, meaning the effect will be greater. An eight year sentence for a 40 year old will be experienced differently as an eight year sentence for a 16 year old, representing respectively a fifth and half their life at the time of sentencing. As Hollingsworth explains there is something contradictory and concerning about how the law views all children or young persons as vulnerable, deserving of protection and largely incompetent to make decisions until he or she comes in conflict with the criminal law (Hollingsworth, 2007) and so children may be considered ‘most competent when they are most delinquent’ (Cuncannan, 1997: 291). Guggenheim (2005) believes that the changing image of children and young people from vulnerable to competent and autonomous, which ironically is linked to greater awareness of children’s rights, has actually worsened the lot of the child in conflict with the law as society increasingly views such children as sophisticated and culpable, an important issue to consider as we explore the rights of children in conflict with the law in Scotland.

2.4 Implementing children’s rights in Scotland

The discussion above highlighted well documented concerns about the enforcement of children’s rights. In relation to UNCRC there is clear evidence that incorporating UNCRC into domestic law is one important way of strengthening implementation (Lundy et al., 2012). At present the UK has not incorporated UNCRC into domestic law, which means it is not directly justiciable in UK courts. However, the situation is more complicated than this, because whilst an individual cannot go to a UK court to complain about a breach of any of the rights in the Convention, the conclusions and recommendations of the UN Committee provide an authoritative interpretation of the individual treaty obligations, which are themselves legally binding on the UK. Therefore, by using the UNCRC and associated documents as an aid to interpretation, there are examples, although infrequent, of domestic courts giving legal effect to concluding observations by the UN Committee on the Right of the Child which the government has previously failed to comply with (Hollingsworth, 2017: 192). Across the UK the UNCRC has a complex status, which potentially delivers through its softer powers of influence and encouraging change rather than through legal challenge. In other jurisdictions enforcement of UNCRC has also been strengthened by optional protocol 3 (Hollingsworth, 2017: 192). This introduces a system of individual complaints for alleged infringements of children’s rights, but has been criticised for not including a collective complaints process (Grover, 2015), and for not being child-friendly as a process (Egan, 2014). Complaints can only be made against states that have ratified the protocol, however, and the UK has not ratified, and is unlikely to do so soon (Hollingsworth, 2017: 193).

In Scotland, efforts have been made to strengthen the rights of children made in international agreements on a UK wide basis. Part 1 of the Children and Young People (Scotland) Act 2014 places specific duties on Scottish Ministers to keep under consideration whether there

are any steps they could take to advance the implementation of UNCRC and to take steps identified by that consideration. Child Rights and Wellbeing Impact Assessments have also been introduced in an attempt to ensure that all parts of the Scottish Government consider the impact of proposed policies and legislation on the rights and wellbeing of children and young people. The 2014 Act also requires Ministers to promote public awareness and understanding of the rights of children, and to report to the Scottish Parliament every three years on progress made in meeting these duties and their plans for the following three years.

The commitment to implementing UNCRC was furthered by the Scottish Government's intention to incorporate the principles of UNCRC into domestic law, which was included in its programme for Government 2018-2019 (Scottish Government, 2018a: 83). As part of their work towards this, the Scottish Government also committed to consider where Scots law can go further than the Convention requires, 'where this is demonstrably beneficial for children and young people' (Scottish Government, 2018a: 83). The incorporation of UNCRC into domestic law is considered highly significant in and of itself and incorporation in other jurisdictions has raised awareness of children's rights, helped ensure children were more likely to be perceived as rights holders and create a culture of respect for children's rights (Lundy et al. 2012: 4). Incorporation of UNCRC also provides opportunities for strategic litigation, but its main value is thought to be in the strong message it sent and the 'knock-on effects for implementation of children's rights principles into domestic law and policy' (Lundy et al. 2012: 4). The Scottish Government has committed to legislating before the end of the current parliamentary session in 2021, and the Incorporation Advisory Group, established by the Children and Young People's Commissioner Scotland and Together Scotland, has drafted a [Children's Rights \(Scotland\) Bill](#) which shows how the UNCRC could be incorporated into Scots law. Whilst the incorporation of UNCRC is likely to involve a complex mix of binding and non-binding elements, it will almost certainly increase pressure and strengthen the potential for legal challenge to ensure that children's rights principles encapsulated in the UNCRC are consistently applied across law, policy and practice. It is also notable that the First Minister of Scotland has established an [advisory group](#) to make recommendations about how Scotland can lead the way in the field of human rights, both the establishment of this group and its report demonstrating an aspiration not only to comply with rights requirements but to go beyond when appropriate and to embrace human rights (First Minister's Advisory Group on Human Rights, 2018)

A rights respecting approach requires building the capacity of duty-bearers to fulfil their obligations and of rights-holders to claim their rights, and so an approach needs to be developed which does this, paying particular attention to children who are the most vulnerable, isolated and excluded. The intentions to incorporate UNCRC into Scots law, the aspirations and proposals for advancing human rights and human right leadership by the First Minister's Advisory Group on Human Rights, and the forthcoming UNCRC state report due in 2022, present an opportunity and a challenge to strengthen the rights of children in conflict with the law.

2.5 Positive Youth Justice in Wales

In their work *Positive Youth Justice: Children First, Offenders Second*, Haines and Case make a powerful case for an approach to reconnect with the purpose of 'youth justice', arguing for a philosophy which focuses on enabling children to access and actualise their rights and entitlements, and to achieve social inclusion through participation and

engagement (Case and Haines, 2015). This offers us a useful depiction of what a rights respecting approach for children in conflict with the law looks like. The Children First, Offender Second approach (CFOS) offers a distinct approach to the welfare, justice or risk paradigms, instead positioning the youth justice system's purpose as being to help children become responsible for their behaviour as adults, rather than making them (fully) responsible for their behaviour as children (Case and Haines, 2015). In welfare models, children's rights in respect of due process tend to be neglected, through the lens of 'best interest, ignoring the stigmatising effects of system-contact because often well-meaning people are doing what appears to help'. In contrast, justice-based systems are based on the idea that children should receive punishment for the offence of which they have been found guilty, often holding them accountable beyond their capacity or control, and paying limited attention to the reasons for their behaviour, or addressing their underpinning needs. The CFOS model focuses on the 'future positive outcomes' for children based on fulfilling their rights and maximising their capabilities. It represents a different approach to the welfare-justice dichotomy in youth justice and gives responsibility to the adults around the child to ensure that the child's rights and needs, as identified by UNCRC, are met, 'rather than locating the weight of the responsibility with the child' (Byrne and Case, 2016: 71).

The CFOS model also addresses a major critique of the preventative paradigm, which is struggling to demonstrate effectiveness 'as it is wedded to measuring the absence or reduction of negative behaviours and outcomes' (Case and Haines, 2015: 227). Prevention in a youth justice context is intrinsically problematic because it focuses on identifying children who may go on to offend, and is thus by its nature labelling, stigmatising and discriminatory, encouraging, for instance, over representation of the most excluded children, such as, in Scotland, care experienced young people and members of the Roma community. Such issues are remedied by focusing on an alternative 'prevention' model which focuses on rights, inclusion, the promotion of positive behaviours and on 'outcomes for children within and outside the Youth Justice System' (Case and Haines, 2015: 227). What this involves then is 'a positive, participatory and entitlements-based CFOS approach that prioritises promotion (rather than prevention) is possible and desirable with all children' (Case and Haines, 2015: 228). Such an approach is 'more realistic and meaningful, in policy, management and practice terms (for both practitioners and children), to establish targets founded on the promotion of positive behaviours (e.g. school achievement, prosocial behaviour, engagement, participation) and positive outcomes (e.g. social inclusion, employment, qualifications, access to rights and entitlements' (Case and Haines, 2015: 228).

We do not have to look far from Scotland to see how a right-respecting approach has informed policy and practice. The Welsh Government offers a useful example to Scotland about how this can work. Both building on, and informing, the CFOS approach, the Welsh strategy for shaping and delivering youth justice services for children is called Children and Young People First and its focus is on ensuring that 'children and young people at risk of entering, or who are in, the youth justice system must be treated as children first and offenders second in all interactions with services' (Welsh Government and Youth Justice Board, 2014: 3). The Children and Young People First strategy identifies three priorities:

- Children first, offender second: Supporting a cultural and attitudinal shift in how children in conflict with the law are considered
- Children in the youth justice system have the same access to their rights and entitlements as any other child
- The voice of the child is actively sought and listened to.

The Welsh Government (previously the Welsh Assembly Government) makes it explicit that 'Children in conflict with the law are entitled to the same rights as all other children and young people in Wales, and these entitlements are clearly set out in, Extending Entitlement support for 11 to 25 year olds in Wales: Direction and Guidance' (Welsh Assembly Government, 2002). The 'Universal Entitlement' for every child and young person in Wales sets out 'unconditional access to opportunities, services, support and guidance relating to: education, training and employment; basic skills; volunteering and citizenship; personal life; health and housing; recreation and social life; sport, art and music; consultation and participation regarding decision-making that affects them' (Welsh Assembly Government, 2002: 10). It also specifies that these entitlements should be delivered in an environment where there is:

"a positive focus on achievement overall and what young people have to contribute;

a focus on building young people's capacity to become independent, make choices, and participate in the democratic process; and

celebration of young people's successes"

(Welsh Assembly Government, 2002: 10)

In 2004 the Welsh Government formally adopted the UNCRC as the basis for all its policy making for children and young people up to the age of 25 (Lundy et al, 2012: 123). Drakeford explains the Welsh approach as:

'When things go wrong in the lives of children and young people the Welsh focus has been on trying to put right flaws in the systems on which they depend, rather than on focusing on the 'deficits' in young people themselves'

(Drakeford, 2010: 141)

Note here how the focus is on the systems and people around the child, and addressing them rather than the child *per se*. This entitlement-based approach provides us with an example of a governmental attempt to protect the foundational rights of young people, as described by Hollingsworth, discussed in section 2.3. There is also some evidence to support the 'Welsh approach' amongst the general public too; whilst research into public attitudes towards youth crime indicates limited support for some punitive positions in Wales there was a preference for: the principle of sentencing children differently from adults; individual sentencing that takes account of individual circumstances - rather than sentencing by rote; community sentences as distinct from custodial disposals; and normalising approaches rather than responsabilising responses to individual young people in trouble (Haines and Case, 2007: 347).

The Welsh youth justice policy approach is part of a wider set of policies built around the advantages of universal services, rather than more narrowly targeted means tested services, and then providing this alongside extra services for those with the greatest needs (Drakeford, 2010: 142). Interestingly, Drakeford explains that such an approach is based on a relationship between the individual and the state, 'based around citizenship rather than consumption and a belief in the equality of outcome, not simply of opportunity, and that this should be the unifying objective of public policy' (Drakeford, 2010: 142). Gray predicts that

conceptualising social needs in terms of universal entitlements should lead to the decriminalisation of children and young people by placing responsibility for their fulfilment on policy-makers and practitioners rather than blaming their existence on the perceived personal deficits of young people who offend and their families (Gray, 2016: 71). There is a clarity of thinking running through the Welsh policies here which are characterised by an emphasis on citizenship, entitlements and rights. Governance-wise, Wales's approach to children in conflict with the law is overseen by the Youth Justice Committee for Wales, which is jointly chaired by the most senior civil servant in this area and the Welsh representative on the Youth Justice Board for England and Wales (Drakeford, 2010: 140). There is a Wales Observatory on Human Rights of Children and Young People based at Swansea University which is a collaborative project committed to building capacity to support children and young people's access to their rights, conducting research, and advocating for change in law and practice¹⁴. These structures have some similarities to Scotland's Youth Justice Improvement Board and the Centre for Youth & Criminal Justice infrastructure.

The potential benefits of this approach are highlighted by the evaluation of the 'Extending Entitlement' strategy between 2005-08. Here self-report questionnaires were used with over 3,000 secondary school children across Wales to identify their perceived levels of access to universal entitlements as set out under the strategy (Case et al., 2005). The evaluation identified:

'significant statistical differences between children who reported higher 'perceived levels of access to entitlements' (PLATE) and those who reported lower levels. Children reporting lower PLATE were statistically more likely to also report negative behaviours and outcomes, both actively (in the past year) and over their lifetime (ever): offending, illegal drug use, underage alcohol use, impulsivity, risk taking, negative thoughts and acceptance of and exposure to antisocial behaviour. In contrast, children reporting higher PLATE were more likely to have never offended, never used substances and, most importantly, to report positive behaviour
(Case et al, 2005: 229).

This highlights how an approach based on citizenship, rights and entitlements can make a significant contribution to improving the lives, experiences and outcomes of children who, without intervention, are likely to come into contact with the justice system, but crucially, offers a mechanism to achieve this at an early stage without labelling, stigmatising or drawing children into a youth justice system.

¹⁴ <https://www.swansea.ac.uk/law/wales-observatory/>

PART THREE: The rights of children in conflict with the law in Scotland

Part Three examines the rights of children in conflict with the law in Scotland, providing an assessment of how rights respecting Scotland currently is, and identifying areas where improvements can be made. It focuses on some of the major issues for children in conflict with the law, however, there are inevitably gaps, in part due to a lack of evidence and also because of the wide-ranging issues facing children. Where possible, evidence from Scotland has been provided, but on occasions a wider evidence base is drawn on, where it is reasonable to expect similar experiences and issues will be replicated within a Scottish context. This section explores: the policy context; poverty and social exclusion; victimisation and adversity; the experiences of victims; criminal records; supporting children in the community; children's experiences at Court and Children's Hearings, children in custodial settings, depriving children of their liberty; and children who cause the most serious harms and wrongs.

3.1 Policy context

The Scottish Government's current youth justice strategy, '*Preventing Offending: Getting it right for children and young people*' sets out priorities for the period 2016-20, identifying three key priorities: Advancing the Whole System Approach, Improving Life Chances; and, Developing Capacity and Improvement (Scottish Government, 2015). The title, and the introductory text, clearly positions the strategy within the context of the Scottish Government's wider aspiration to ensure that Scotland is the best place to grow up for all children, and there is a clear link to the wider Scottish Government's strategy and approach for children, [Getting it Right for Every Child \(GIRFEC\)](#). The *Preventing Offending* strategy is consistent with the Scottish Government's wider GIRFEC policy and UNCRC in defining a child as 'someone under the age of 18' (Scottish Government, 2008). *Preventing Offending* directly references that the vision for children involved in offending, or at risk of being involved in offending, is the same as for all children and has a wide societal lens, concerning itself with all children involved in offending, or at risk of being so, rather than exclusively focused on those supported by youth justice specific services. This approach is essential if the strategy is to truly grapple with the preventative aspirations it sets out. There is then a balancing act throughout the strategy between a broad, universal, preventative approach alongside meeting the needs of the children and young people currently in contact with the youth justice system. Unlike the previous strategy, '*Preventing Offending by Young People: A framework for action*' (Scottish Government, 2008), the more recent variant specifically references 'children' as well as 'young people' and gives a nod to the UNCRC, more clearly placing the strategy in the context of wider children's policy and children's rights.

In order to get it right for every child, the *Preventing Offending* strategy expresses the importance of responding to the needs and the deeds of children involved in offending (Scottish Government, 2015: 1). In echoing the words of Kilbrandon (1964) the 2015 strategy clearly aspires to modernise and advance the principles set out in that important report. The strategy is clear that responding to children's needs is part of the responsibility of the youth justice system. However, unlike wider GIRFEC guidance there is not a direct reference to putting the child at the centre of services and support (Scottish Government, 2012). The

Preventing Offending strategy also avoids discussion of the ‘best interests’ of the child involved in offending, a clear omission given that Article 3 of the UNCRC explicitly requires that ‘In all actions concerning children...the best interests of the child shall be a primary consideration’ (United Nations, 1989).

There is limited explicit discussion about children’s rights throughout the *Preventing Offending* strategy, though victims’ rights are referred to in passing, as is the fact that many of the children involved in offending behaviour are also victims of offending. The rights of previously looked after children are also mentioned, but there is no broader reference to the rights of all children who are in conflict with the law. There is perhaps something underpinning the thinking about children’s rights here around responsabilisation which has major implications for youth justice: that is to say that rights come with responsibilities and so ‘children can enjoy their rights as long as they behave as responsible citizens’ (Reynaert et al., 2009: 524). It is interesting to compare this with the Welsh Government’s *Children and Young People First* strategy, discussed previously in more depth in section 2.5, which clearly states that ‘Young people in the youth justice system have the same access to their rights and entitlements as any other young person’ (Welsh Government and Youth Justice Board, 2014: 5).

The *Preventing Offending* strategy contains one reference to social justice, one reference to welfare (which is actually a reference to the secure care criteria), and thirteen references to wellbeing. The tone and emphasis of how children’s needs are to be met is heavily focused on their own wellbeing, and the supports required to better meet these needs. Included are sections on mental health, employment and education, so the *Preventing Offending* strategy indicates an attempt to engage with a more holistic vision of the supports required than previous strategies. However, there are obvious gaps around social and structural issues beyond the individual circumstance: issues such as poverty, housing and social inclusion. Although the *Preventing Offending* strategy positions youth justice approaches within a ‘broader approach to tackling inequalities and promoting social justice’ (Scottish Government, 2015: 2) it does not articulate that one of the purposes of youth justice is to redress some of the social injustices which contribute to children’s involvement in offending, to achieve social justice. As has been noted by others in relation to other Scottish Government initiatives, there is perhaps a tendency to focus on individual wellbeing, rather than rights, poverty and power (Davis et al., 2014) and a failure to address ‘the wider political context of wellbeing such as children’s status in society’ (Davis et al., 2014: 2).

A key policy decision for any state to make is to determine the age at which children’s behaviour will be interpreted as ‘criminal’. Despite the fact that a toddler can pick an item up from a shelf and remove it from a shop it is acknowledged that in such circumstances the child is not acting with criminal intent and, therefore, to hold them to be criminally responsible would be inappropriate. The debate tends to get more complex and divided as we talk about older children, potentially able to exercise greater intent and autonomy, and able to cause more serious harm to other people. In June 2019 Scotland raised its age of criminal responsibility from eight to 12, which had previously remain unchanged since 1928, enacted through the [Age of Criminal Responsibility \(Scotland\) Act 2019](#). This had been raised as a serious issue for the Scottish Parliament to respond to since the Parliament was first established, 20 years ago. In 2000 the Advisory Group on Youth Crime, set up by the Scottish Executive to review youth justice policy and practice recommended raising the age of criminal responsibility to 12 (Advisory Group on Youth Crime, 2000). These were the early days of devolution when media coverage and much of the political party decision-making

was heavily determined by developments south of the border, and it was the era of ‘tough on crime’. New Scottish policy-making networks were yet to emerge and establish their own agendas, cultures and tone. That said, the advisory group applied enough pressure that something needed to be done, ensuring the matter was referred to the Scottish Law Commission for their consideration. The Scottish Law Commission’s report drew a distinction between holding a child responsible and what should happen (Scottish Law Commission, 2000) and, therefore, shifted the focus from capacity to process (Sutherland, 2016). This focus on process eventually led to a change in the age of prosecution, which was raised to 12 in 2010 via the Criminal Justice and Licensing (Scotland) Act, a change which occurred largely without comment, significant media coverage or interest (albeit some 10 years after the Scottish Law Commission recommended it). There were some stakeholders that then felt the job was done, that this change in the age of prosecution was the more significant change, with the age of criminal responsibility now more of a symbolic than a significant issue (despite the fact that accepting offence grounds at a Children’s Hearings means that you have a criminal record). In 2017 at her [Kilbrandon lecture](#) when the First Minister was asked about why it has taken so long to change the age of criminal responsibility, she confirmed that by changing the age of prosecution there was a sense that this issue had been dealt with, but that this perception had been wrong.

Lobbying for reform of the minimum age of criminal responsibility continued during the passage of various relevant pieces of legislation, such as the Children’s Hearings (Scotland) Act 2011 and the Children and Young People (Scotland) Act 2014, all to no effect. Then in 2015 Alison McInnes MSP (Liberal Democrat) submitted an amendment to the Criminal Justice (Scotland) Bill seeking to raise the minimum age of criminal responsibility from eight to 12. The amendment failed, but won a commitment in September 2015 to establish an Advisory Group to examine ‘the potential implications of raising the age of criminal responsibility from eight to 12 years of age’ (Scottish Government, 2016).

The Advisory Group reported in 2016, compiling a report which focused on how to change the age of criminal responsibility to 12, with little consideration about whether or not the age should be changed, or what the age should be (Scottish Government, 2016). In the public consultation that followed 95% of respondents were in favour of increasing the age of criminal responsibility to 12, or higher (74 responses). The press coverage was largely positive, with cross party support to examining the evidence. For instance, Scottish Tory Justice Spokesman Liam Kerr said he ‘looks forward to analysing the evidence...There’s no question that Scotland does have a lower-than-normal age of criminal responsibility’ (Martin, 2018). The history of this significant policy development highlights that progress has been slow, and that in some quarters there has been a reluctance to change, despite apparent political and professional agreement. This suggests that whilst the [Age of Criminal Responsibility \(Scotland\) Act 2019](#) is now in place, there are likely to be pockets of resistance to the cultural and attitudinal change this represents. There will be a particular need to support the implementation of the legislation to ensure that children under 12 are not criminalised in all but name. Without such attention there is a danger that behaviours by children under the age of 12 may continue to attract a labelling, a stigmatising response resulting in the child being excluded from a range of settings and records of such behaviour being kept, thus treated as ‘criminal’ despite no longer formally being held ‘criminally responsible’. There are dangers here of poor implementation and unintended consequences, ‘how these powers operate in practice will be key, and would benefit from close scrutiny and accountability’ (Centre for Youth & Criminal Justice, 2018a: 5).

Having an age of criminal responsibility is a requirement of the UNCRC¹⁵, but in only raising the age of criminal responsibility to 12, Scotland is already out of step with emergent children's rights thinking. In 2019 the United Nations Committee on the Rights of the Child revised their guidance around the age of criminal responsibility, in General Comment 24, arguing that 'states parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age' (United Nations Committee on the Rights of the Child, 2019: para 22). Further, 'the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age' (United Nations Committee on the Rights of the Child, 2019: para 22). The Age of Criminal Responsibility (Scotland) Act contains a requirement to review the first three years of operation of the legislation and consider the future age of criminal responsibility (s.78). Therefore, written into the legislation is an expectation that the age of criminal responsibility could change again. However, given that it took 20 years since the Advisory Group on Youth Justice first recommended increasing the age to 12 to enact this change, there will be a need to keep this under close scrutiny if we are to have an age of criminal responsibility which is rights respecting.

3.2 Poverty and social exclusion

In Scotland, we have clear and compelling evidence from the Edinburgh Study of Youth Transitions and Crime about the links between poverty, social exclusion, disadvantage, and both offending and victimisation (McAra and McVie, 2010; McAra and McVie, 2017; McAra and McVie, 2015; McAra and McVie, 2016). The Edinburgh Study as a longitudinal study follows 4,300 children at secondary school age into their early adulthood, comparing the experiences of children who came into contact with the justice system with those who did not. McAra and McVie found that poverty 'has a significant and direct effect on young people's likelihood to engage in violence at age 15' (McAra and McVie, 2015: 4). McAra and McVie explain this by the concept of negotiated order, whereby for young people from the most impoverished backgrounds, violence provides an identity, 'empowers and is a means of attaining and sustaining status amongst peers' (McAra and McVie, 2015: 5). More recently a report commissioned by the Lankelly Chase and the Robertson Trust, has highlighted the 'pervasive role that violence continues to play throughout the life course of people experiencing severe and multiple disadvantage' (Bramley et al., 2019: 11), leading the authors to recommend a whole system approach to severe and multiple disadvantage (Bramley et al., 2019: 12).

A key finding of the Edinburgh study also highlighted how agencies respond to children from different socio-economic backgrounds, with children from deprived backgrounds who hang around in public spaces 2.7 times more likely to face adversarial police action than more affluent children, and children from less affluent backgrounds more likely to be charged by the Police (McAra and McVie, 2005: 25). Interestingly, McAra and McVie also found that the difference in police behaviour relates to individual level deprivation, not neighbourhood deprivation, suggesting that there is something about the interaction with the individual child that disproportionately impacts on those from more deprived backgrounds (there is no evidence to indicate what this may be, but the authors wonder about factors such as deference, indications of respect, clothing and indicators of respectability).

¹⁵ UNCRC: State parties shall establish 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law' (Article 40 (3a))

Disturbingly, McAra and McVie's findings suggest that, whilst probably unintentionally, the police unfairly target certain categories of children and appear to make distinctions about the 'respectable' and the 'unrespectable', and thus those who can be accorded leniency and those who cannot (McAra and McVie, 2005). Their more recent work highlights how the system continues to create and maintain a focus on a small group of 'usual suspects' who are drawn from the most vulnerable and challenging backgrounds, and highlighting that attention on this group has become increasingly concentrated as we see reduced numbers of entrants into the youth justice system (McAra and McVie, 2017). These findings echo Houchin's 2005 study of social exclusion and imprisonment amongst adults in Scotland, which found that 28% of the prisoner population came from the poorest council estates, and that 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).

Professionals have been given greater autonomy to exercise discretion in how they respond to children, taking a child-centred approach, so given the evidence about how children can be treated differently, it is likely that the youth justice system's focus on poorer children has been exacerbated. Potentially then the decline in the number of children coming into contact with the justice system in Scotland has disproportionately been due to agencies avoiding further system contact for better-off children. The exacerbation of inequalities in our response to children in conflict with the law and the increasingly negative impacts for the poorest and the most vulnerable children in Scotland is also a concern identified in respect of Early and Effective Intervention as the system expands in order to address wellbeing through the lens of justice (Gillon and Lightowler, forthcoming). These findings suggest that the most fundamental rights of children in respect of a fair trial and discrimination are not being upheld¹⁶, and questions compliance with guidelines around a rights respecting youth justice system¹⁷. In a youth justice context, like in many other circumstances, poverty and economic inequality are the biggest deniers of human rights in Scotland (First Minister's Advisory Group on Human Rights, 2018). Therefore, it is essential that we develop an approach which supports the youth justice system and the professionals who work in it, to understand and challenge itself as to how it responds to children experiencing poverty, and how its footprint on children's lives may be disproportionately affecting those who experience poverty. The evidence suggests a need to be particularly cautious of interventions which disproportionately affect those experiencing economic hardship, even when such measures are well-intentioned and focused on improving wellbeing, due to well documented unintended consequences in relation to labelling, stigma, up-tariffing and escalating problematic system contact (Cohen, 1985; Peeters, 2015; Richards, 2014; Schur, 1973).

¹⁶ ECHR: Right to a Fair Hearing (Article 6), Discrimination (Article 14); UNCRC: Discrimination (article 2), best interests (Article 3); right of every child to a standard of living adequate for the child's mental, spiritual, moral and social development (Article 27), right of every child accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth (Article 40).

¹⁷ They specifically call into question compliance with the Beijing Rules (rule 6) which requires that efforts are made to ensure sufficient accountability at all stages and levels in the exercise of any discretion exercised in the youth justice system (rule 6.2) and questions the degree to which 'those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates' (rule 6.3).

3.3 Victimization and adversity

The research evidence clearly shows that children in conflict with the law are some of the most vulnerable members of any society, with high levels of trauma, adversity and victimisation. The Edinburgh study found that early victimisation, rather than early involvement in violence, was one of the most significant predictors of later involvement in violence, leading McAra and McVie to argue that there is a need to treat children involved in violence first and foremost as vulnerable children rather than as offenders (McAra and McVie, 2010). In work with children from across Scotland who pose a very serious risk to others, the IVY project found there were significantly higher levels of abuse and neglect than the general population¹⁸. Seventy one percent of children referred to the IVY project were care experienced children and at least 61% had experienced domestic violence (based on where this is reported) (Vaswani, 2018). Children under the age of 12 who display a pattern of offending behaviour and are reported to the Children's Hearing System, tend to be from families which experience poverty, social exclusion and disadvantage, though this type of demographic data is not routinely collected or published. A startling 81% have parents who are 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).

International evidence has highlighted that the responses to stress caused by Adverse Childhood Experiences (ACEs) can lead to physical changes in the way that the brain develops, often referred to as 'toxic stress', which is thought to have an effect on how someone adapts to future adverse experiences and the chance of developing health harming behaviours (Couper and Mackie, 2016). Children who experience multiple adverse childhood experiences are also more likely to engage in risk taking behaviour, which can sometimes be associated with criminal behaviour (Vaswani, 2018). Trauma-related behaviours can also be misunderstood as wilful and deliberate offending. The behaviours of care experienced children, in particular, are more likely to be reported to police and to attract a criminalising state response, even when trauma related or involving minor offending (Scottish Parliament, 2018). Research has highlighted that 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 and Moodie, 2016; Who Cares? Scotland, 2018). Therefore, we need to be very careful to see the distress and context behind behaviour if we want to ensure we do not punish or criminalise need and vulnerability. If we wish to achieve a rights respecting response to children in conflict with the law there is a need to be careful to avoid labelling children who are experiencing distress as 'offenders' or 'criminals', which has the potential to further traumatise, blame and exclude these children. The levels of adversity, trauma and victimisation experienced by children in the youth justice system in Scotland highlight that children will often have experienced significant rights violations prior to any contact with the justice system. There is thus a need to avoid re-traumatising children, but also to seek to address the issues in respect of their rights, be that responding to their distress, supporting them to manage any anger about what has happened to them, supporting them to acknowledge the harm done to them and potentially to seek recognition or redress for this.

¹⁸ For further details about the IVY project see, <https://www.cycj.org.uk/what-we-do/interventions-for-vulnerable-youth-ivy-project>

What often happens is that as children grow older they continue to display distress and begin to cause real harm to others, usually to other children. At this point children may feel particularly misunderstood and angry as they are potentially blamed without understanding (Gough, 2016; Vaswani, 2014a). They may then be excluded from school, from friendships and social activities (Vaswani, 2019), often without understanding or acknowledgement of what is motivating their behaviour and little offered to help them address their issues. Vaswani's research about the links between offending and bullying highlights that children who are involved in bullying (either as bully, victim or both as a bully and victim) are at increased risk of being involved in later offending and violent behaviours (Vaswani, 2019: 16). The Edinburgh Study highlights the impact of school exclusion as the second highest predictor of continued offending, even when the severity and frequency of offending is taken into account (prior contact with the youth justice system being the highest predictor) (McAra and McVie, 2010). To, in effect then, exclude and blame children for behaviour resulting from the trauma, adversity and victimisation they have experienced, and fail to support them to deal with this, is a major violation of their rights. Not only does this indicate that our society has failed to uphold their rights in the first place, but that when we have become aware of the wrongs done to them we have both failed to act and then compounded their issues by labelling and blaming them¹⁹.

It is also well evidenced, and deeply troubling, that in coming into contact with the justice system there are significant issues in terms of re-traumatisation as well as repeat victimisation, with serious breaches of children's rights occurring when children are in detention, and/or at their most vulnerable. This is shockingly illustrated in the important work by the Independent Inquiry into Child Sexual Abuse which identified 1,070 alleged incidents of child sexual abuse in custodial institutions in England and Wales between 2009-2017, of which 578 were described in terms equating to sexual assault or rape (Independent Inquiry Child Sexual Abuse, 2019: 30). These allegations were mostly against staff and were often associated with restraint or body searches. Further, the numbers do not show any signs of reducing over time with allegations across the years studied running at just over 200 each year (Independent Inquiry Child Sexual Abuse, 2019). Similar analysis has not been undertaken specifically about custodial settings in Scotland, though the similarities in the contexts and issues suggest a need to be informed by this work and take action to mitigate the risks identified in the report in Scotland; the National Confidential Forum has also documented children's experiences in other care settings in Scotland (National Confidential Forum, 2016). The Independent Inquiry into Child Sexual Abuse suggest that the sexual abuse of children in custodial institutions is linked to the culture in such institutions, which is discussed further in section 3.9. Another disturbing example of how the justice system itself can victimise, and even in extreme cases sanction the abuse of children, is provided in the use of children as covert human intelligence sources (CHIS). Whilst admittedly rare, since 2015, 17 children have been used throughout the UK as covert human intelligence sources, asked to maintain contact with criminals to provide information (Staton, 2019). The charity, Just for Kids, unsuccessfully took the Home Office to court arguing the practice violated

¹⁹ In this context we need to pay particular attention to whether we are taking 'all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment' (UNCRC, Article 39), whether the 'best interests of the child' are a primary consideration (UNCRC, Article 3) and whether we are taking 'all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation' (UNCRC, Article 19).

Article 8 of the European Convention on Human Rights, citing the example of a 17 year old girl recruited as a covert source by the police to inform on a man who had been sexually exploiting her, eventually witnessing a murder and possibly becoming an accessory to the crime (Staton, 2019)²⁰.

Of course, children do not arrive into the world as autonomous beings and it is important to acknowledge the impacts of inter-generational trauma and the cycle of family offending. There is a growing evidence base about how parental and grandparental trauma affects children at an early stage of their development, both through socialisation processes but also through pregnancy and potentially also pre-conception via impacting on DNA (Yehuda and Lehrner, 2018). There is also a significant evidence base about the impact of parental, and some evidence about wider family, imprisonment (for a helpful review of the evidence see Weaver and Nolan, 2015).

Across various research studies imprisonment is identified as potentially having a significant and enduring effect on the emotional, social, psychological, developmental and financial wellbeing of children (Travis et al., 2005). Research by Murray and Farrington (2005) specifically found that boys whose parents were imprisoned in the first 10 years of their lives were at higher risk of both anti-social behaviour and criminality, poor school attainment and mental health issues, compared to their peers. Hames and Pedreira highlight that frequently children who experience parental imprisonment 'like children whose parents have died, are disenfranchised grievers coping with compounded losses' (Hames and Pedreira, 2003: 377). Yet, there is not often support and sympathy, and the ambiguity, uncertainty and confusion surrounding the nature and extent of their loss can disrupt children and young people's effective coping strategies (Vaswani, 2015). Children's experience of this loss is complicated by the stigma associated with it and a lack of understanding and support that distinguishes this loss from other forms. The effects on children of the stigma, lack of understanding and support associated with having family members in prison in Scotland have been powerfully documented by those it has affected, see '[The Forgotten Children](#)', '[I was fifteen when my big brother went to prison](#)', '[From Survival to Strength](#)'²¹.

3.4 Participation

Across a range of settings and jurisdictions the evidence suggests that overall children in conflict with the law do not feel respected, listened to, or that they have any influence in shaping decisions about their lives. It is also common for them not to understand what is happening and for them to receive limited information about how they can seek to influence, challenge or complain (Gough, 2017; Nolan et al., 2018; Kilkelly, 2010; Hart and Thompson, 2009). More positively there appears to be an increasing recognition of the importance of

²⁰ There may also be questions about compliance with UNCRC: best interests (Article 3); right of every child to a standard of living adequate for the child's mental, spiritual, moral and social development (Article 27), right of every child accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth (Article 40).

²¹ This raises questions about how compliant we are relation to UNCRC: 'A child temporarily or permanently deprived of his or her family environment, or in whose best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state' (Article 20).

addressing this across multiple jurisdictions, but ‘despite the increasingly fashionable use of terms such as ‘agency’ and ‘empowerment’ to describe the resistance of individuals or specific groups to these dynamics, children’s actions are invariably mediated by adult control of time, space, access to resources, and decision-making’ (Haydon, 2018: 43)²².

Participation and agency is a particular issue for children in conflict with the law given that they often already feel isolated and marginalised from society (Cook, 2015) and the inherent conflicted nature of the justice system (Birnbaum and Saini, 2012). So when their contact with justice processes is characterised by limited communication, let alone engagement and participation, this compounds feelings of marginalisation and lack of control. Critically, there is also some evidence from England to suggest the criminal justice organisations are particularly poor in their advancement of children and young people’s participation when compared to other sectors (Oldfield and Fowler, 2004). At CYCJ our experience of supporting youth-led participation in youth justice has also highlighted that some people working in the sector still believe that with rights there must be responsibilities, resulting in children in conflict with the law often being seen as less deserving. Further, the voluntary nature and purpose of participation is often not understood, for example, with suggestions that participation could be part of a Community Payback Order, thus undermining the nature and purpose of participation (reflections from *Youth Justice Voices*, project described below).

In Scotland, children in contact with the justice system who participated in the Centre for Youth & Criminal Justice’s 2018 stakeholder survey reported feeling disrespected, not listened to and powerless (Vaswani and Gillon, 2018). Research with boys in HMP & YOI Polmont also highlighted how common it was that children did not understand what had happened to them during the justice process and why they had been sent to a YOI (Nolan et al, 2018). Children within secure care centres in Scotland have also commented on feeling excluded from meaningful participation in the decisions that are made about their lives, though reported mixed experiences at an individual level with the professionals who support them (Gough, 2017). Similarly, children and young people from across the spectrum of youth justice reported the possibility of positive individual interactions with people who cared, listened and believed in them. But overwhelmingly what shaped children’s interaction across different components of the justice system was a feeling of being judged and people not taking the time to find out who they are and why they are acting as they are (Cook, 2015).

Research into the Early and Effective Intervention process in Scotland has also highlighted major questions about more ‘informal’ justice processes, when children can be involved in processes they do not always know about and have limited ability to participate in or to challenge (Gillon, 2018). Parents and carers of children in the justice system in Scotland have also highlighted that they often feel excluded, confused and stigmatised by the process (Vaswani and Gillon, 2018). They report finding contact with the justice systems to be a very distressing experience, depicting their experiences as frightening, overwhelming, disempowering and at times discriminatory (Vaswani and Gillon, 2018). However, they also indicate a desire to work with professionals and an understanding that, as parents and carers, they are often the first and most important point of support and guidance for a child in conflict with the law (Vaswani and Gillon, 2018).

²² This is a significant issues in relation to compliance with Article 12 of the UNCRC, which specifies the right of a child to form and express their own views, and for these to be given due weight in accordance with the age and maturity of the child. UNCRC also specifically highlights the importance of the child being heard in ‘any judicial and administrative proceedings affecting the child’ (Article 12 (2)).

Scotland has some powerful examples of mechanisms to support the participation of children and young people, with both the Children’s Parliament and the Scottish Youth Parliament (SYP) providing important opportunities for children and young people to participate, and to develop their thinking and ideas in a structured and systematic way. However, whilst the Scottish Youth Parliament allows a channel for young people to engage in politics and participate in decision-making, concerns are raised as to whether the current demographic composition of the Scottish Youth Parliament represents the population of Scotland, and that it is not ‘eliminating the disadvantage of certain groups in associational life’ (Patrikios and Shephard, 2014: 251). There is, therefore, a case for the development of specific strategies and mechanisms to support the participation of excluded children and particularly children in conflict with the law. [Article 12](#) in Scotland is an example of a young person-led network of individuals and organisations that work to promote young people’s participation and information rights as set out in international human rights charters, specifically focusing on some of the most excluded groups of children. Article 12 explain that their work is ‘underpinned by the principle of free participation: the right to participate as equal citizens at all levels of society without fear or favour and a process that facilitates the participation of all young people on their own terms and according to their own realities’ (Article 12, 2015).

To try to support the participation of children who have already been deemed in need of care, control, guidance or protection, *Our Hearings, Our Voice*²³, has been established as a young people’s board to involve young people in strategic decision-making within the Children’s Hearings System. The young people’s board aims to operate independently, but also to feed into the Children’s Hearing Improvement Partnership (CHIP), consisting of professionals from various organisations involved in supporting children in contact with the Children’s Hearing System. The [STARR](#) group was established in 2018 by and for young people with experience of being in and/or on the edges of secure care to ensure that people with lived experience advise, influence, inform and challenge professionals and decision makers, and that children and young people are fully included within the national, local and daily decisions that affect them, supported by the Independent Care Review and the Centre for Youth & Criminal Justice. Also in 2018, in recognition that there are further specific barriers to participation for children in conflict with the law there has also been investment by the Life Changes Trust in a youth justice participation project, called [Youth Justice Voices](#) (with a steering group of care and justice experienced young people called *Youth Just Us*), to encourage and support participation policy and practice work specifically for children in conflict with the law across Scotland²⁴. This work builds on learning from a previous Glasgow based pilot - *Positive Young Voices, Positive Future*, which was developed for justice experienced young people aged 16-26 to have their views, ambitions and dreams for the future of the system and services they have encountered heard and acted upon²⁵. A participation network has also been established in Scotland to support all those wanting to improve participation opportunities, with a focus on participation with children and young people, known as the *Participation*²⁶ network. Further, the forthcoming establishment of the National Independent Advocacy Service for children in contact with the Children’s Hearing System is an exciting development which involves the creation of national infrastructure and resource to support advocacy. It is early days in terms of the work of these initiatives, but it is

²³ <https://www.chip-partnership.co.uk/our-hearings-our-voice/>

²⁴ For further information see <https://www.lifechangestrust.org.uk/projects/staf-youth-justice-participation-project-cycj> and <https://www.cycj.org.uk/putting-young-people-in-the-driving-seat/>

²⁵ <https://www.cycj.org.uk/positive-young-voices-positive-futures/>

²⁶ <https://www.celcis.org/knowledge-bank/search-bank/participation-network-resources/>

encouraging to see attention, energy and investment in supporting the participation of children in conflict with the law and in need of care, control, guidance or protection.

3.5 Victims

Children's rights are for all children, not for a subset of children. However, interestingly, 'Children's rights scholarship and guidance from human rights bodies has largely ignored the child victim, particularly where the perpetrator of the offence is also a child' (Lynch, 2018b: 228). There is a need to improve how we uphold the rights of children in conflict with the law and of children who are victims. That we could do more to strengthen the rights of children who are victims does not also detract from the fact that we could do more to strengthen the rights of children who are in conflict with the law (both children who are accused and those who have been found to have caused harm). Further, as Lynch reminds us, it is important to remember that 'some children have dual status as a victim in one proceeding and perpetrator in another' (Lynch, 2018b: 241).

In 81% of cases where children aged 8-11 years old were referred to the Children's Hearing System and victims were identified, the victims unsurprisingly were other children, with the children being harmed usually of similar age to the child causing the harm (Henderson et al, 2016: 5). Of course, children can also pose a risk to adults too, but given the likelihood of the victims of children to be other children, there is a strong argument for paying attention to our response to child victims, especially where the harm has been caused by another child (Vaswani, 2019). Overall, there is a lack of information about children who are victims of crime in Scotland. In England and Wales the annual crime survey collects data directly from a sample of children and, based on self-reported data, estimates that between 10 to 15 in every 100 children aged 10-15 years old were victims of at least one crime in 2018, most commonly of violence (estimates vary depending on which measure used) (Office for National Statistics, 2019: appendix tables A11).

Lynch highlights that 'Most offending by children against children involves less serious offences where there is no significant threat to the safety or interests of the other child' (Lynch, 2018b: 238)²⁷. Strengthening the rights of victims can involve responding to different categories of rights. Fenwick identifies service rights; which are generally non-controversial and focus on protective rights and the provision of services/support; and procedural rights, which may be more controversial and involve influencing decisions (Fenwick, 1997). Therefore, it would be fairly uncontentious to suggest that child victims would benefit from improved services and supports to allow them to process the harm they have experienced; and develop coping mechanisms to help them deal with any associated emotions and difficulties.

In Scotland, there is a lack of specific support for children who are victims, and particularly a lack of support and attention for children who are both victims and perpetrators, and investment in this area is likely to make significant difference to children (Improving Life Chances Implementation Group, 2017). Initiatives such as the introduction of the Barnahus

²⁷ It is important to uphold the rights of child (and adult) victims, particularly paying attention to UNCRC: 'State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim' (Article 39).

model²⁸, a child-friendly centre for child victims and witnesses where children can be interviewed, examined and receive therapeutic services, is an exciting and positive development. However, there are concerns that at present the proposals in Scotland focus exclusively on child victims and witnesses, when there is a real opportunity to develop an approach for both the child who has caused harm and the child harmed, and also providing a better response when children fall into both categories (Centre for Youth & Criminal Justice and Scottish Government, 2018).

An area which has been identified internationally as requiring significant improvement is around the effective and meaningful participation for child victims in youth justice processes (Lynch, 2018b: 229). The right to express their views, for these to be given due weight and to be heard in the process²⁹ is something which, depending on the specifics of the case, could have significant benefits for the child victim. However, models of restorative justice are not necessarily appropriate for children given that such a process depends on the acknowledgement of harm caused which is potentially inappropriate given a child's lack of full autonomy; capacity; speech, language and communication needs; and their level of responsibility. There can also be a conflict between meeting the needs of the victim and the best interests of the child causing harm, with also a risk that some children who are unable to express remorse and empathy being penalised for this (Lynch, 2018b: 236). The key issue here is that a system with the primary purpose to respond to children who are found to have offended will almost inevitably struggle to find appropriate ways of involving other interests, especially those of victims (Smith, 2014). The potential concern is that an undue emphasis on the victim could change the purpose and nature of the youth justice process (Haines and Drakeford, 1998). However, whilst restorative justice models may not always be appropriate, the restorative principles of listening to victims, looking to restore relationships where possible and acknowledging harm caused could form the basis of improvements to how we respond to child victims in Scotland.

3.6 Criminal records

The wide-ranging and particularly destructive effect of childhood criminal records has been well evidenced and adversely affects access to employment, education, training, volunteering opportunities, housing, insurance and visas for travel (House of Commons Justice Committee, 2017; Independent Parliamentarians, 2014; Sands, 2016). Many of these factors are recognised as being critical in reducing re-offending and supporting re-integration, which should be promoted in accordance with the UNCRC to promote desistance and support children's development into adulthood. These are areas where children in conflict with the law often already face disadvantages, for example, by virtue of the common prevalence of school exclusion, poorer educational outcomes, lack of networks and lack of previous employment, training or experience, which are then exacerbated by having to disclose their previous convictions for lengthy time periods (Smith et al, 2014; Centre for Youth & Criminal Justice, 2016; Nolan and Moodie, 2016).

²⁸ For further information about Barnahus see <https://childhub.org/en/promising-child-protection-practices/what-barnahus-and-how-it-works>.

²⁹ UNCRC: 'State 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)), 'the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child' (Article 12 (2)).

It is also recognised that conviction disclosure is inherently anxiety-provoking for individuals with convictions, often being experienced as traumatic, stigmatising and embarrassing, which can result in the limiting of horizons, avoidance of accessing opportunities such as volunteering, education and employment or a mismatch between attainment and abilities, as well as detrimentally impacting on an individual's wellbeing and identity (Thomson et al, 2016). The above factors combine to bring real and psychological barriers to improving life chances and outcomes, causing significant issues for children at key transition points and just when they are trying to change and turn their lives around (Children's Commissioner for England, cited in: House of Commons Justice Committee, 2017; Sands, 2016).

It is also important to consider when it is appropriate to record offending by children to help identify and respond to a pattern of concerning behaviour, whilst at the same time allowing children to move on from offending as a child without a permanent record of low-level misdemeanours or behaviours unlikely to be repeated as the child matures. To achieve this it is important to adopt a proportionate and individualised, developmental and needs led approach, which takes into account the context of behaviour and the journey travelled since the offence (Nolan, 2018). The Information Commissioner's Office has argued that approaches which do not permit the use of discretion and consider the factors which ensure disclosure is proportionate and necessary, cannot be compliant with Article 8 of the ECHR³⁰ (House of Commons Justice Committee, 2017: 21).

The research suggests that, in general (across all offence types and frequencies of offending) after 7-10 years without a new arrest or conviction, a person's criminal record essentially loses its predictive value (Weaver, 2018: 4). This means that someone who was arrested or convicted 7-10 years ago is no more likely to offend than someone who was not. It is, therefore, a particular concern that some convictions can never be considered spent³¹. Weaver argues that convictions that can never be spent is unduly punitive in respect of Article 8 of the ECHR (Weaver, 2018: 13), and for children, the associated Article 16 of UNCRC³². This raises concerns about the disclosure regime in Scotland for adults as well as for children, but there are additional factors to consider in respect of how we treat offending by children, given that behaviour as a child is so linked to the context of their childhood and their stage of development. There are, therefore, particular additional risks that mean our approach to disclosure disproportionately affects children, and disproportionately affects some children from particular backgrounds³³.

³⁰ ECHR: 'Everyone has the right to respect for his private and family life, his home and his correspondence' (Article 8 (1)), 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others' (Article 8 (2)).

³¹ For a helpful discussion of the evidence see (Weaver, 2018).

³² UNCRC: 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family home or correspondence' (Article 16 (1)).

³³ UNCRC: best interests (Article 3); arbitrary or unlawful interference with his or her privacy (Article 16); cruel, inhuman or degrading punishment (Article 37a); promote physical and psychological recovery and social integration of a child victim (Article 39); treated in a manner which takes into account the child's age and the desirability of promoting the child's reintegration (Article 40(1)).

A rights respecting disclosure system should distinguish between child and adulthood records and a useful way of achieving compliance with both UNCRC and ECHR would be to not record minor offences in the first place and/or expunge childhood records (Sands, 2016: 5). In Canada, Ohio, Poland, New South Wales, New Mexico and New Zealand all but the most serious offences committed by children do not attract a criminal record. In Ohio, Texas and New Mexico childhood records can be ‘sealed’ so they are no longer disclosed, though they do still exist physically or digitally (Sands, 2016: 5). Expunging records could be done as a child reaches adulthood, automatically for all but the most serious offences (as is done in Poland and Italy), or based on the time since the offence (as in France). There could also be a requirement for an application for expungements (as in Texas) or use a mixture of these approaches (Germany) (Sands, 2016: 6). As a minimum once convictions become spent, the responsibility to evidence and argue for why the conviction should continue to be disclosed should fall to the state (with processes for representations and appeals built into the system and legal aid provided).

The disclosure process in Scotland is under review, with the Disclosure (Scotland) Bill currently going through its consultation phase in the Scottish Parliament. The proposed bill aims to end the automatic disclosure of childhood convictions, with an active decision being required by Disclosure Scotland that childhood conviction information should be disclosed and a right of appeal to an independent reviewer prior to information being shared. There are variants to the approach based on the type of offence and the route at which children come into contact with the system³⁴. This principled approach represents a significant improvement, enabling the implementation of a disclosure approach more likely to be compliant with international children’s rights instruments.

As always, the implementation of these policy and legislative aspirations will be the critical factor in determining whether the experience of those with childhood convictions actually changes. There are some indications that the information to be used to determine disclosure by Disclosure Scotland will be based on factors relating to offending behaviours (such as numbers of offences, time elapsed since offending). There is a strong argument that such information should be complemented with information about the context of offending (trauma, mental health issues, and progress in relation to risk and rehabilitation) (Nolan, 2019). Without taking such issues into account there is a danger that a proposed, more individualised, system fails to really see the individual and the specific circumstances and risks involved. It will also be important to understand in detail the positioning and the criteria for decision making developed for/by the independent reviewer as their role will be crucial for the successful implementation of the revised disclosure system. At present the criteria for decision-making by both Disclosure Scotland and the independent reviewer is unclear, and if not appropriately positioned there are dangers of either over or under disclosure, each of which bring equally damaging consequences.

Further, there is an issue relating to behaviours which should never be recorded as offending in the first place. This particularly relates to children who are referred to the Children’s Hearing System because of their offending behaviours. The Children’s Hearing System is not a criminal justice setting; rather, it is a welfare based system, focusing simultaneously on individual needs and deeds, as it does not convict children the requirement to disclose conviction information is considered incompatible (SCRA, 2018). The Management of Offenders (Scotland) Act 2019 significantly altered the situation for

³⁴ For a very helpful summary of the differences see (Clan Childlaw, 2019).

children in this position, meaning that disposals from a Children's Hearing on offence grounds have a disclosure period of zero and so become spent immediately (s.29), but there is an issue here about the fact that it is deemed to be a conviction at all.

Of particular concern in Scotland has been the disclosure of 'Other Relevant Information' (ORI), as this allows for the disclosure to employers of non-conviction information (including unsubstantiated claims, cases that proceeded to court but did not result in conviction or allegations) and can include information beyond the individual concerned (for example in respect of family members). This practice of disclosing soft information has been widely criticised and challenged in the courts in respect of Article 8 of ECHR³⁵ (Weaver, 2018: 11). It also raised fundamental questions about an individual's right to a fair trial³⁶ and the best interests of the child being a primary consideration³⁷. It is a particular concern that given the child's inability to exercise full autonomy, information about the criminal activity of their household/family members can be recorded, shared, and inform future decisions and judgements made (even where the child concerned has not been found guilty of an offence). This was particularly concerning when we consider Appleton's estimate, based on survey information by MORI, that 37% of job offers were withdrawn on the basis of soft information of this type (Appleton, 2014: 27). The proposed Disclosure (Scotland) Bill 2019 makes some improvements to the operation of ORI, in relation to the onus being on the state to evidence and explain why such information should be retained, the ability to appeal the information held, and strengthening transparency of the system. However, there are still concerns about the principle of retaining ORI related to behaviours in childhood, particularly given the disproportionate impacts on certain children, particularly looked after children.

What is particularly challenging for children's rights in respect of criminal records is the complexity of the system. The further policy, practice and legislation is explored the more confused it seems, and so what hope does anyone, particularly a child or young person, have of understanding what will be disclosed, in which circumstances and for how long? People often do not know what information is held about them or how this is or may be used, and currently have nowhere to turn to for support, with professionals also unable to understand and advise. Without this information children and young people are unable to make informed decisions about education, training and employment opportunities, and the likely impact of their criminal records. The proposals currently being consulted on mean that it will be down to the decision-making by Disclosure Scotland whether an offence is to be disclosed or not in the future, making it impossible to advise a child at the time of an accusation on the potential implications of admitting to an offence.

³⁵ ECHR: 'Everyone has the right to respect for his private and family life, his home and his correspondence' (Article 8 (1)), 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others' (Article 8 (2)).

³⁶ ECHR: 'Everyone is entitled to a fair and public hearing' within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice' (Article 6)

³⁷ UNCRC: 'The best interests of the child shall be a primary consideration' (Article 3).

There is a strong argument for simplifying the system to make it clearer for everyone and for direct support and advice to be easily available particularly for children and young people (building on developments by [Scotland Works for You](#) and learning from Unlock, a charity for people with convictions based in England and Wales). Without simplification and support to help people navigate the system there are concerns that the disclosure system may be at risk of being incompatible with Article 8 ECHR³⁸ (Clan Childlaw, 2019). This is an area which would also benefit from closer monitoring and information being made publicly available, with particularly close scrutiny in the coming years to ensure that what appear to be significant legislative and policy changes deliver their stated intentions in practice.

3.7 Children in the community

The [Whole System Approach](#) (WSA) is a Scottish Government supported model for policy and practice which provides guidance about what a good response to children in conflict with the law in the community looks like. The WSA consists of the following priorities:

- Early and effective interventions for low level offences
- Offering support and advice to young people in order to address need and change behaviour
- Diversion from prosecution, where the needs and risks of the young person are addressed
- Robust alternatives to secure care and custody where young people's risks and needs can be managed in the community
- Consistent approach to risk assessment and risk management
- Supporting young people in Court to help their understanding of the processes and to advise decision makers of community options
- Supporting reintegration and transition back to the community from secure care and custody

The focus of the WSA is consistent with children's rights instruments, which are supportive of multi-agency, welfare-focused intervention in children's lives, advising that professionals should 'use, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system' (United Nations, 1990a: para 58), that 'agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings' (United Nations, 1985: para 11.2), and that:

Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources ... for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

(United Nations, 1985: para 1.3)

³⁸ ECHR: Everyone has the right to respect for his private and family life, his home and his correspondence' (Article 8 (1)), 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others' (Article 8 (2));

However, concerns have been expressed about early intervention and the potential lowering of the standard of proof required, the increasing sanctions such measures can introduce for some children, about the lack of checks on anonymity associated with less formal justice measures and how early intervention processes can draw some children into contact with justice agencies who would otherwise avoid the negative system contact this involves (Staines, 2015: 37; Gillon, 2018). There have also been broader issues raised about informal justice processes which involve children accepting responsibility and/or adopt reductionist and over simplified conceptualisations of 'victims' or offenders, when the reality is that most children in conflict with the law are themselves 'victims' (Goldson and Muncie, 2012: 58). This highlights the potential for unintended consequences despite benevolent intentions, and highlights the difficulties in taking individual steps to improve compatibility with UNCRC without a full grasp of all rights and clear evaluation and monitoring.

Social work in Scotland will usually be the lead agency providing offending specific support for children in conflict with the law, so it is also of particular importance that social work guidance and practice is compliant with children's rights, that these issues are considered and kept under review. There are issues for the social work profession, in particular, to attend to around the best interest of children being the primary concern, participation rights (including the rights of children to be given information about decisions and future plans), protection rights, and for these rights to be afforded to all children, regardless of their race, religion, abilities, gender, beliefs or any other factor (Kosher et al., 2016). Ensuring that all children have their individual needs met and their rights upheld requires attention to be paid to each individual child but also the specific characteristics and requirements of groups of children. For instance, there is evidence about how the needs of girls can go unrecognised and poorly supported, because the system is designed and built around evidence from the experiences and offending of boys (Centre for Youth & Criminal Justice, 2019). There are also concerns that the needs of boys can go unrecognised, particularly in respect of specific issues related to masculinity, help-seeking behaviours, and developing positive coping mechanisms (Vaswani, 2014b). Consideration of children who are lesbian, gay, bisexual, transgender or intersex (LBGTI) is also a relatively under developed area of youth justice practice which has been highlighted as a significant issue for practice and for children's rights, given issues around complex identities, bullying and appropriate risk assessment, particularly for sexual offending given the 'lingering stigma of sexual deviancy' (Woods, 2014; Knight and Wilson, 2016). There are also specific rights issues for children in conflict with the law with disabilities and for children who are black or from certain minority ethnic groups, with particular attention required around participation rights, protection rights and rights to all appropriate measures to support recovery (Together Scotland, 2017). There are additional issues to pay attention to about the potential for prejudice and implications of this for children's rights. Research by SCRA has also highlighted issues when working with families from ethnic minority communities around language and communication, lack of knowledge about services, attitudes about child welfare being the concern of the family, rather than the state, perceptions that services are racist or culturally insensitive, and a fear or distrust of services (Henderson et al., 2017). However, there are gaps in our current evidence about the specific rights issues for children who are in conflict with the law in Scotland who also identify as LBGTI, have disabilities, are black or from an ethnic minority community.

One of the major concerns that marginalised children in public spaces, particularly those in conflict with the law, tell us about is their interaction with the police (Article 12, 2015; Elsley et al., 2013; Cook, 2015; Deuchar, 2010). Negative interaction with the police, or not feeling

safe and supported by the police, particularly affects certain groups, those who are economically deprived; lesbian, gay, bisexual, transgender or intersex (LGBTI) and, black, Asian and minority ethnic children³⁹ (McAra and McVie, 2005; Lough Dennell et al, 2018; Norris et al, 1992; Smith and Gray, 1985; Reid Howie Associates, 2002). In Scotland we have seen specific concerns about 'stop and search' practice, where an individual is searched for the purpose of obtaining evidence, with concerns about practice not being compliant with the law and children being unaware of their rights (Murray, 2014). Despite a significant rise of 'stop and search' practice between 1992 and 2013, the practice was not politically challenged and operated without close scrutiny and with little media critique (Murray and Harkin, 2016). During this time it appears that most searches were done without reasonable suspicion or legal authority, and had a significant impact on young people, with the practice becoming part of everyday life for some young people living in urban areas (Reid Howie Associates, 2002). Unlike in England, specifically London, there is no evidence in Scotland about 'stop and search' practice disproportionately affecting black and minority ethnic communities, but there was evidence of young people, and specific young people, being targeted and of feelings of alienation, a lack of trust and harassment experienced by children and young people (Reid Howie Associates, 2002).

The scale of 'stop and search' practice in Scotland was extremely high, with work in the Strathclyde region highlighting that 'every young person who attended the drop-in centre had been stopped and search' (Waiton, 2006). By 2010 Scottish police forces represented three of the four highest users of 'stop and search' in Britain (before the amalgamation of the eight regional Scottish police forces), and the rate of 'stop and search' in Scotland outstripped frisk rates in New York City (Murray, 2015). What is particularly concerning is that despite the illegal basis of the majority of searches the practice went unchallenged for so long, as one of Murray's interviewees explains:

Stop and search was never in my years at HMIC Scotland raised as an issue. And that in itself is curious. Given the fact that it is still continually raised south of the Border. The Scottish Human Rights Commission didn't raise it, the Scottish Government didn't raise it. There was no clarion call from the media for it. The police services themselves, perhaps understandably because nobody's asking them, didn't raise it. So it was a non-issue

(Senior Officer, research interview in 2011, cited in Murray, 2014)

In 2015 the Scottish Government established an Independent Advisory group which recommended the abolishment of non-statutory 'stop and search'. Their recommendations were accepted in full by the Scottish Government and enacted via the Criminal Justice (Scotland) Bill, which passed into law December 2015. The example of 'stop and search' shows the importance of continual scrutiny of justice practice, particularly police practice, and it will continue to be important to monitor stop and search and more broadly keep an eye on interactions between the police and children in conflict with the law. Murray and Harkin's work about 'stop and search' powerfully highlights how a climate of low scrutiny and minimal political engagement with youth justice issues can mean that policies and practices negatively impacting upon children's rights can go unnoticed (Murray and Harkin, 2016).

³⁹ Some of the evidence here is drawn from work about England and specifically London.

3.8 Children at Court and Children's Hearings

In the financial year 2017/18, 1,776 children aged 13-18 were prosecuted in adult Courts (Scottish Government data, shared with the author in August 2019), compared to 3,060 referrals made to the Children's Hearing System due to offending behaviours (Scottish Children's Reporter Administration, 2019). This means that 37% of children coming into contact with the formal justice system in Scotland in 2017/18 came into contact with the courts and not the hearing system⁴⁰ (Scottish Children's Reporter Administration, 2019; Scottish Government data, shared with the author). There has been a lack of attention on the courts and when it comes to compliance with children's rights, Scotland has perhaps rested on the reputation of the Children's Hearing System, regarded by some as one of the most pure examples of a welfare approach in youth justice (Doob and Tonry, 2004).

It is important to note that the vast majority of children in Scotland who come into contact with the courts are not there because they have committed the most serious types of crimes. In 2017-18 of the 1,776 offences by children proceeded against through the courts, the majority, 689, were miscellaneous offences (includes breach of the peace, common assault, drunkenness), 206 were motor vehicle offences, 437 were 'other crimes', 195 were crimes of dishonesty, 115 were non-sexual crimes of violence, 91 were fire-raising or vandalism, and 43 were sexual crimes (Scottish Government data, shared with the author). The most frequent outcomes from children going through the courts in 2017-18 were: Community Payback Order (459), admonition (371), found not guilty (285), fine (283) and Young Offenders Institution (124). A total of 95 of these 1,776 cases in 2017-18 were remitted to the Children's Hearing System (just 5% of cases), and there are important questions to be asked about why this is so low and whether improvements can be made here.

There are also questions about how it is possible for children in a court room setting, designed for adults, to have a fair trial, given the ability to comprehend proceedings, let alone to feel able to participate⁴¹,

'I was in court the day after my 16th birthday and didn't know what was happening [...] I just didn't have a clue'

(*'Greg'* quoted in: Nolan et al., 2018: 538)

This issue is further compromised by the fact that the majority of children who come into contact with the justice system have a known speech, language and communication issue, estimated at between 50-70% (Centre for Youth & Criminal Justice, 2018b), and the levels of trauma experienced by children who come into conflict with the law, mean that a court appearance has the potential to be additionally distressing and re-traumatising. The effect on child defendants is stark, including trauma from the process itself and a lack of effective and meaningful participation (Royal College of Psychiatrists, 2006) and evidence is also clear

⁴⁰ These figures exclude children who are dealt with 'informally', through early and effective intervention, police direct measures or diversion.

⁴¹ ECHR: Everyone arrested 'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him' (Article 6 (3a)), 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court' (Article 6 (3e)); UNCRC: Every child 'To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians' (Article 40 (b (ii))), 'To have the free assistance of an interpreter if the child cannot understand or speak the language used' (Article 40 (vi)).

that notoriety has a particular impact on children (Stone, 2015). These issues are further exacerbated by the over-representation of those with autism spectrum disorder in the justice system, specifically the prison population, despite limited evidence to suggest higher rates of violent offending than the general population (Allely, 2016). We now know that traumatic brain injury which affects neurodevelopment is an issue for a large proportion of children involved in offending (rates differ across jurisdictions and aspects of the justice system), and an important issue for the courts to grapple with to ensure comprehension, participation and in terms of determining what is just (Williams, 2012: 20). There are also issues for the courts in supporting children with a learning disability through the system. For example, research by Hackett and colleagues revealed that 38% of children in the UK displaying harmful sexual behaviour had a diagnosed or undiagnosed learning disability (Hackett et al., 2013), a finding replicated in other research (Allardyce and Yates, 2018: 111). Ensuring children with a learning disability can understand and be understood in a court setting is a significant challenge, particularly in complex areas such as sexual offending when distinguishing 'normal' developmental behaviour and problematic behaviours can be difficult to establish⁴².

The effect of adult trial procedures and long sentences of imprisonment on children is severe, and they can suffer additional consequences, such as ongoing notoriety and the trauma of the process itself, compared to an adult in the same situation (Haydon and Scraton, 2000). The Royal College of Psychiatrists argue that 'The trial of children and young people within a full adult court context is inappropriate in relation to their developmental immaturity and cognitive limitations...a more appropriate youth court context should be sought in all cases to ensure that the child's human rights are not contravened and that the child is able to participate effectively in the trial process' (Royal College of Psychiatrists, 2006). Without a more appropriate setting where children feel able to express themselves there is a considerable risk that trauma or communication related behaviours may be misunderstood or misinterpreted, for instance avoiding eye contact, inability to present a coherent narrative, providing monosyllabic answers, each of which can give the impression of guilt. Additionally, children with an autism spectrum condition may struggle to feel or display empathy, which without context and understanding can encourage a harsher response or punishment, this is before considering the level of accountability that should be imposed in such cases (Centre for Youth & Criminal Justice et al., 2018). Further, it is important to recognise that of the children who experience the courts a high proportion are found not guilty or receive an admonition, meaning they have unnecessarily potentially experienced the significant distress associated with going through the courts at a key developmental stage for them. For instance, in 2017-18, 16% of children (n= 285) going through the courts were found not guilty and 20% (n=371) received an admonition.

To ensure that children understand their rights and have mechanisms to realise their rights it is important that they have access to excellent and specially trained legal representation and/or advocates. The *Global Study on Children Deprived of their Liberty* also recommends that states offer 'free legal aid to all children regardless of age and family income' to ensure that where required children can access legal representation to uphold their rights (Nowak, 2019: para 107). The delivery of a fair trial for children, given the complexity of their needs and circumstances, will potentially require adaptations to procedures and importantly, specialist trained professionals who understand and can support children, specifically children experiencing trauma and requiring specific communication support.

⁴² For a useful discussion of these issues see: Allardyce S and Yates P. (2018) Working with children and young people who have displayed harmful sexual behaviour, Edinburgh: Dunedin.

There are of course legitimate reasons to hold a public trial, as a mechanism for encouraging witnesses to come forward, to satisfy legitimate public interest in finding out about what has occurred and to encourage confidence that a fair process will be pursued. However, as Lynch highlights, 'The societal interest in resolving a charge against a child also includes aspects like the child offering the best possible evidence and being able to participate effectively (to ensure that the correct perpetrator is identified and that the level of culpability is assessed accurately) and the child taking an age-appropriate level of responsibility for the harm and wrong, where culpability is proved' (Lynch, 2018c: 223). It is, of course, also important, that this desire for public trial is balanced with the child's right to privacy⁴³, the harm that notoriety causes children in particular and the difficulties this poses for rehabilitation.

The children who were prosecuted in the courts in Scotland in 2017-18 were aged 13-17; there was one 13 year old, one 14 year old, nine 15 year olds, 384 16 year olds and 1,381 17 year olds (Scottish Government data, shared with the author August 2019). There appears to be a particular issue here about ensuring our response to 16 and 17 year olds acknowledges their status as children, questioning compliance with Article 1 of UNCRC⁴⁴.

We may expect to see some changes to the number of children in court given recent revisions to prosecutorial guidance, published in June 2019, indicating that 'No child under 16 years will be prosecuted in summary proceedings unless the Lord Advocate has instructed the prosecution' (Crown Office and Procurator Fiscal Service and Scottish Children's Reporter Administration, 2019: para 31). If a child is 16 or 17 and subject to a Compulsory Supervision Order they will be jointly reported to SCRA and COPFS, the latter of whom may deal with the offence (through prosecution or an alternative to prosecution, such as a fiscal fine or warning letter). There is a presumption in this revised guidance that 16 and 17 years old should either go through the Children's Hearing System, or an alternative to prosecution will be in the public interest unless there are specific reasons to prosecute (such as public interest due to seriousness of the offence or the matter is a category 2 offence which requires the Court to order a disqualification from driving). This represents a strengthening of the expectation that children aged 16-17 should avoid court unless there are particular circumstances requiring it. However, 16 and 17 year olds are not given the status of 'children' unless they meet certain criteria (such as subject to a Compulsory Supervision Order). It will be important to monitor these recent changes and pay particular attention to the treatment of 16 and 17 year olds. For those 16 and 17 year olds who are not subject to a Compulsory Supervision Order, yet still defined as a child under Article 1 of UNCRC, there remains the anomaly that they do not have access to the Children's Hearing System. Whilst the aforementioned changes to prosecutorial procedure now state the rebuttable presumption that all 16 and 17 year olds in such a situation are offered Diversion from Prosecution, there remains a two tier response to supporting children

⁴³ UNCRC: 'Every child alleged as or accused 'To have his or her privacy fully respected at all stages of the proceedings' (Article 40 (2b)(vii)). ECHR: 'Everyone has the right to respect for his private and family life, his home and correspondence' (Article 8 (1), 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others' (Article 8 (2)).

⁴⁴ UNCRC: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years' (Article 1)

in conflict with the law, a clear breach of General Comment 24 that ‘the child justice system should apply to all children above the minimum age of criminal responsibility but below the age of 18’ (United Nations Committee on the Rights of the Child, 2019: para 29).

The forthcoming sentencing guideline for children and young people, due for publication by the Scottish Sentencing Council, highlights the increasing recognition of the need for a tailored approach for children and young people. Structured deferred sentencing may have a role to play for young people here, and a promising example of such a scheme is now available as an interim disposal option to Hamilton and Lanark Sheriff Courts for all 16-21 year olds who meet the relevant criteria and who are not suitable for remittance back to the Children’s Hearing System (Booth, 2019). This enables an individually tailored action plan to address offending behaviours and social inclusion, with the hope that if the young person engages and makes progress during the deferred period the Sheriff will take this into consideration when making their final disposal (Booth, 2019). An interim evaluation found promising results in terms of down-tariffing young people and supporting 90% of those who engaged with the project to not re-offend during their engagement, with an 86% completion rate (Miller, 2018). However, it will be important to observe any unintended consequences particularly for those unable and/or unwilling to engage. What is clear is that despite promising changes likely to reduce the number of children coming into contact with the courts, and examples of how to improve support following a court appearance, the courts will continue to have a role for accused children.

Given the ethos and approach of the Children’s Hearing System there is a strong argument for this being the appropriate space through which to respond to the child and their offending, in a manner which is more able to focus on the child, enable their participation and minimise the trauma of the process. However, it must be acknowledged that children tell us that they are not always heard; can find panels traumatic, judgemental and disrespectful, and strikingly some young people have indicated that they would actually prefer to be dealt with by the courts because at least then their ‘sentence’ has an end date (Vaswani and Gillon, 2018).

Children also have frequently expressed concerns about having to tell their story to numerous panel members, as they may need to have frequent panels and ensuring the same people are available is a challenge for a system based on volunteers (Kurlus et al, 2016). There is an important programme of work called ‘[Better Hearings](#)’ focused on these issues being lead by the Children’s Hearing’s Improvement Partnership (consisting of key agency and professional representatives) and ‘*Our Hearings Our Voice*’ (a group of children and young people with direct experience of Children’s Hearings).

There are tensions inherent though in a system reliant on volunteers, about the appropriate expectations around training and performance reviews, and the inevitable challenges of the make-up of those that are able and choose to volunteer. There is also no requirement for any legally qualified person to be part of the Children’s Hearing Process, potentially risking violating children’s rights in relation to a fair trial⁴⁵. McGhee and Waterhouse also highlight

⁴⁵ ECHR: ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’ (Article 6 (1)), everyone charged has the right ‘to defend himself in person or through legal assistance of his own choosing...to examine or have examined witnesses against him...to have the free assistance of an interpreter if he cannot understand’ (Article (6.3)); UNCRC: ‘To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate

how only some children receive services following engagement with the Children's Hearing System, even when there is an imposition of a supervision requirement or registration on the child protection register (McGhee and Waterhouse, 2002). In many cases they suggest that vulnerable children are drawn into a system without this resulting in support, arguing for greater consideration of voluntary family support (McGhee and Waterhouse, 2002).

Therefore, whilst the ethos and underpinning principles of the Children's Hearing System may be more appropriate for children in conflict with the law, there is a serious need for reforming Children's Hearings to improve the experience of children and their ability to influence decisions and exercise greater agency over their lives. These critiques may be the reason why the recent *'Kilbrandon Again'* inquiry recommended that a separate system be established for children who are referred to a Children's Hearing due to their offending behaviour (Holloway et al, 2018), a concern being that cases due to offending are relatively rare so that panel members are not experienced, lack understanding and potentially have not received the level of training required. Concerns have also been expressed about feeling judged by panel members, not perceiving panel members to be genuinely concerned, and a lack of understanding, often in part appearing connected to the very different socio-economic and age profile of panel members compared to the majority of children they see (Kurlus et al., 2016). Additionally for children with speech, language and communication needs, there are concerns about a lack of recognition of the role these issues can play in anti-social or offending behaviour, and impact on the young person's ability to benefit from supports (Clark and Fitzsimons, 2018).

3.9 Children in custodial settings

The European Committee for the Prevention of Torture has expressed its concern about the imprisonment of children and their conditions (Hammarberg, 2008: 196), and the special rapporteur on torture has raised concerns about how even 'very short periods of detention can undermine the child's psychological and physical well-being and compromise cognitive development' (Mendez, 2015: para 33). Several reports of the European Committee for the Prevention of Torture have also documented serious ill-treatment of children while in police custody (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2015: para 97). The United Nations has recognised these issues as a major concern, commissioning a *'Global Study on Children Deprived of their Liberty'*, a summary of its findings were published in July 2019 (Nowak, 2019)⁴⁶.

The 'Global Study on Children Deprived of their Liberty' argues that in and of itself 'deprivation of liberty constitutes a form of structural violence against children' (Nowak, 2019: para 147). In addition, a significant issue for children deprived of their liberty is violence by

assistance in the preparation and presentation of his or her defence' (Article 40 (2bii), 'to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance' (Article 40 (2biii), 'If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law' (Article 40 (2bv), State parties shall promote 'measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected' (Article 40 (3b)).

⁴⁶ For further information see,

www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx)

staff, which is particularly an issue where staff are attempting to restrain a child, or intervene in an incident (Children's Rights Alliance for England, 2013). Children who have experienced restraining techniques have reported feeling terror and panic, as though their breathing was constricted, and vomiting as a result (Willow, 2015: 103). The use of separation, or segregation, as a disciplinary measure was also highlighted as an issue for children in the context of the administration of justice (Willow, 2015: 103). The *'Global Study on Children Deprived of their Liberty'* is clear that 'children should never be subject to solitary confinement' (Nowak, 2019: para 112). The *'Independent Inquiry into Child Sexual Abuse'* argued that the sexual abuse of children in custodial institutions is linked to a habitually violent culture which 'has been made worse by the approach of these institutions to restraint, strip searching and pain compliance techniques. The latter includes such methods as bending of a child's thumbs and wrists, which are permitted by Ministry of Justice guidance' (Independent Inquiry Child Sexual Abuse, 2019: vi). In England and Wales from March 2016 to March 2017, there were 119 recorded incidents of pain compliance being used on children in custodial institutions, which the review team argue 'is particularly intimidating to children who have been sexually abused (and)...In itself, this use of pain compliance should be seen as a form of child abuse and must cease' (Independent Inquiry Child Sexual Abuse, 2019: vi). In Scotland, data is not routinely published on this issue but in 2006/7 it was reported in the Inspection Report about HMP & YOI Polmont that 87 instances of 'control and restraint' were recorded.

The deliberate infliction of pain is central to control and restraint, which was first introduced in child and adult prisons in the UK in 1983. It is important to be clear that in Scotland pain inducing restraint can be used in YOIs and prisons but not care settings, including secure care. However, it is widely reported that any form of restraint can cause pain and there is no such thing as entirely safe restraint (Smallridge and Williamson, 2008). The Committee on the Rights of the Child has interpreted Article 37a of the UNCRC as meaning that restraints must 'not involve the deliberate infliction of pain as a form of control' (United Nations Committee on the Rights of the Child, 2006).

An important review of solitary confinement and restraint for young people detained of their liberty has been conducted by the Joint Committee of the House of Commons and the House of Lords on Human Rights, finding that 'The deliberate infliction of pain in YOIs is unacceptable under any circumstances under rights legislation' (Joint Committee on Human Rights, 2019: 3)⁴⁷. As well as highlighting major issues about data collection and reporting, the Joint Committee's Report highlights a lack of awareness of their rights amongst children, and both the knowledge and confidence to appeal if their rights have been breached (Joint Committee on Human Rights, 2019). In response to the Joint Committee's Report, the Ministry of Justice has launched a review of pain-inducing techniques in YOIs in England and Wales. This requires urgent attention in Scotland given the clear evidence about how such practices breach children's rights and thus the calls for the deliberate infliction of pain to cease, for greater controls and monitoring, and ensuring the use of restraint and containment only as a last resort.

For children and young people in custodial settings in Scotland there have been major incidents and concerns relating to the inappropriate use of strip searching, tragically being

⁴⁷ ECHR: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment' (Article 3). UNCRC: 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment' Article 37(a).

named as a factor in the suicide of 21 year old Katie Allan whilst she was in HMP & YOI Polmont⁴⁸. Data about the number of times strip searching is used within the custodial estate is not routinely published, so we do not know how common the practice is. However, in England and Wales a Freedom of Information (Fol) enquiry by the charity [Article 39](#) revealed that 43,960 strip searches were conducted in a 21 month period, up to December 2012, but in only 275 searches were illicit items found, meaning that only in 0.6% of strip searches was anything problematic found (Allison, 2013). There is also a lack of information routinely published about strip searching in police custody, but in response to an Fol request by CYCJ, it was revealed that for the year July 31, 2017 to July 31, 2018, 788 strip searches of children took place, of which 753 were negative. Three intimate searches also took place, all of which were negative (Police Scotland, 2018). So, in 96% of cases nothing was found, questioning whether strip searching is taking place on a routine rather than on an intelligence-led basis.

These examples suggest breaches of children and young people's rights associated with inhuman or degrading treatment, the right to liberty, security, respect for private and family life, and the right to life itself⁴⁹. As the organisation, Article 12 explains, 'being treated with respect and dignity should be non-negotiable for all children and young people, regardless of whether or not they have committed an offence; there is a fine line between losing your freedom and losing your rights' (Article 12, 2015: 61). However, it is important to recognise why such practices take place, most notably the frequency and strength of concerns about items (usually illicit substances) found on children, young people and adults being named as a factor in fatal accident inquiries. This highlights the importance of working with children and young people, the police and prison service, to improve practice and build confidence in appropriate and proportionate rights respecting responses based on good quality evidence. Article 12 recommend that, 'Prison officers need better knowledge and understanding of the UNCRC, so that they can not only help young people to understand their rights but to further ensure young offenders rights within their decision-making. Training should be provided to support this' (Article 12, 2015: 63). A potential approach to addressing this is also offered by the Secure Care National Standards which were co-produced by children and young people with experience of secure care and professionals who work in or around secure care. The secure care standards highlight the importance of dignity and proportionality as the aspiration for good practice: 'I am only ever searched when this is justifiable and necessary to keep me and others safe. It is based on my individual circumstances at that time. The level of search is proportionate and least intrusive as possible' (Standard 19), 'If I have to be searched, I am treated with respect, dignity and compassion at all times. I understand my rights, the reasons for a search and how it will happen. My views are taken into account and I am given choice on how this might happen' (Standard 20) (Secure Care National Standards, Forthcoming).

In response to Katie Allan's death, the Justice Secretary Humza Yousaf announced that the Scottish Prison Service 'will stop the routine body searching of under 18s in custody ... (and) adopt a more trauma informed approach to its searching process for women' (Yousaf, 2019). He also announced that he had 'asked the Scottish Prison Service to explore the options for implementing a pilot of in-cell phones across HMP & YOI Polmont, with necessary controls, of course, in place' (Yousaf, 2019). Whilst welcome developments for reducing trauma and

⁴⁸ A Fatal Accident Inquiry has yet to officially determine the cause of Katie Allan's death.

⁴⁹ ECHR: the prohibition of inhuman or degrading treatment (Article 3), rights to liberty and security (Article 5) respect for private and family life (Article 8) and the right to life itself (Article 2). UNCRC: degrading treatment (Article 37a).

social isolation, identified as a major factor in relation to suicide in custody (Armstrong and McGhee, 2019; HM Inspectorate of Prisons for Scotland, 2019), it will be important to examine the implementation of this policy directive, and for this to be monitored by external agencies, including the HM Inspectorate of Prisons and the Children and Young People's Commissioner Scotland. What the example of searching children in police custody reveals is that the practice can impact many children, almost all of whom have nothing of danger to themselves or others.

Tragically in Scotland in the 10 years since 2009 two children under the age of 18 have taken their own lives whilst in a Young Offenders Institution (YOI), Raygen Malcolm Josep Merchant in 2014 (aged 17) and William Lindsey (also known as William Brown) in 2018 (aged 16)⁵⁰. In England and Wales over a similar period, between 2008-2018, five children died in youth custody (Youth Justice Board and Ministry of Justice, 2019). If we also look at young people, in Scotland from 2009 until 30 April 2019, 24 young people under the age of 25 have died whilst in a prison or YOI:

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),
Dione 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]

Of the 24 deaths of young people under the age of 25 in a prison or YOI in Scotland, 15 are formally recorded as being suicides, one is undetermined intent/overdose, one was a homicide and six are awaiting determination. Half of the young people under the age of 25 who died in prison or a YOI in Scotland since 2009 were there on remand, rather than being convicted (12 of the 24 young people who have died)⁵¹. There have also been significant concerns about adults dying in prison, leading to the Scottish Government [announcing a](#)

⁵⁰ The death of William Lindsey is currently technically recorded as 'Awaiting Determination' and a Fatal Accident Inquiry will formally determine the cause of his death.

⁵¹ For details on deaths in prison custody in Scotland see <http://www.sps.gov.uk/Corporate/Information/PrisonerDeaths.aspx> and <https://www.scotcourts.gov.uk/search-judgments/fatal-accident-inquiries>

[review in November 2019](#) into deaths in prison, to be led by the HM Chief Inspector of Prisons.

In the same period in secure care in Scotland one child has died since 2009:

Bryan Ross (age 13)⁵²

It is also important to acknowledge the deaths of Neve Frances Bysouth⁵³ (aged 15) and Georgia May Rowe⁵⁴ (age 14) who were resident in an open unit as part of a transition from spending time in secure care. Their deaths highlight the importance of not only paying attention to children who die whilst deprived of their liberty but also to the deaths of children and young people who have previously been deprived of their liberty. It is also important to better understand the early deaths of children, young people and adults who are/have been care experienced, as there are gaps in our knowledge, but we do know that in the four years between 2009-12, 38 looked after children died, and at this time, the total number of looked after children in Scotland each year was around 16,000 (Care Inspectorate, 2013).

It has been well documented that in YOIs throughout the UK children do not feel safe, with significant fears around bullying and violence from both staff and peers (Willow, 2015), high rates of self-harm and bullying being identified as a factor in nearly all deaths in custody (Gooch, 2016). A review of the provision of mental health service for young people entering and in custody at HMP & YOI Polmont found that 'being traumatised, being young, being held on remand and being in the first three months of custody increases the risk of suicide' (HM Inspectorate of Prisons for Scotland, 2019: 11). The review also found that in HMP & YOI Polmont 67% of deaths by apparent suicide occurred in the first three months of being in custody, with 91% occurring in the first year (HM Inspectorate of Prisons for Scotland, 2019: 13). In research with 16 and 17 year old boys in a YOI in Scotland it was particularly noticeable how they recognised the vulnerability of the other children in the environment they were in, as 'Oscar' highlights:

[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

('Oscar' quoted in: Nolan et al., 2018: 540)

A review of evidence about the mental health and wellbeing of young people in custody found that in Scotland information about a young person's risk of suicide was frequently known but sharing and crucially acting upon this information was problematic (Armstrong and McGhee, 2019). The importance of social isolation was highlighted as being of major importance for young people in custody, and the need to support engagement with family and friends, and enable access to belonging was identified as a key area for improvement (Armstrong and McGhee, 2019). What emerged from The Prison Reform Trust and INQUEST's review of the deaths of children and young people (up to age 24) in custody in

⁵² For Fatal Accident Inquiry reports see <http://www.scotcourts.gov.uk/search-judgments/judgment?id=f34786a6-8980-69d2-b500-ff0000d74aa7> (Niamh Frances Bysouth and Terrie Faye Oliver), <http://www.scotcourts.gov.uk/search-judgments/judgment?id=109f8aa6-8980-69d2-b500-ff0000d74aa7> (Bryan Ross)

⁵³ Neve expressed a preference for her name to be spelt in this form, though in many official documents her name is recorded as Niamh and she also known as Niamh Frances Lafferty

⁵⁴ Also known as Terrie Faye Oliver

England and Wales was that they were some of the most disadvantaged, socially isolated children and young people, often struggling with significant mental health, self-harm and alcohol/drug issues (Prison Reform Trust and INQUEST, 2012). However, despite their vulnerability and often long-standing concerns about these children they had not been diverted out of the criminal justice system, with entrance into the criminal justice system exacerbating the issues they were dealing with, and introducing new issues for children and young people (most notably the young people who died in custody often experienced bullying, segregation and restraint).

There is a complex interplay for children in custody around pre-existing vulnerabilities, re-traumatisation (noise, lights, strip searching, violence, separation) and context specific trauma related to the environment of prison (violence, witnessing self-harm and suicide, separation) (Vaswani and Paul, 2019). It is important to recognise that even with the best available training and programmes, prison cannot create safety and trusting relationships due to the purpose of prison, the inbuilt power balances, the restricted regime, a climate of fear, the building design and a lack of in-depth trauma related support, skills and qualifications for staff (Vaswani and Paul, 2019). This means that a 'truly trauma informed approach is not possible in an environment that is shaped by a criminal justice system that has punishment at its core' (Vaswani and Paul, 2019: 18), raising questions about the appropriateness of a prison environment for children and young people, with the inevitable additional vulnerabilities involved.

Concerns have also been identified in relation to access to services whilst in custody, specifically access to health care, with issues about access to GPs and dentists as well as mental health supports (Nolan, 2017: 1; Centre for Youth & Criminal Justice, 2017). In one example referenced in evidence to the Scottish Parliament's inquiry into Healthcare in prison:

'a young person with a history of brain injury reported he had on several occasions asked to see medical staff due to headaches and poor sleep. Although this request was finally granted, it took several emails from the community-based social worker to the personal officer to ensure that a referral had been made'

(Centre for Youth & Criminal Justice, 2017)

It also appeared that requests for mental health support for dealing with low mood, anxiety and lack of emotional control were not always responded to, with literacy identified as an issue in completing referral forms for support (HM Inspectorate of Prisons for Scotland, 2019). However, there have been recent improvements to access to psychological interventions, resolved through the employment of a clinical psychologist within NHS Forth Valley to address a significant inequality in health care provision for children in custody (HM Inspectorate of Prisons for Scotland, 2019).

There continues to be further concerns about support when children transition from custody to the community, with significant issues about prescribed medication not immediately being available on return to the community and difficulties accessing basic GP services, 'a significant problem is young people being liberated from prison with no arrangements made for follow up of psychiatric medication (including anti-psychotic medication) that has been prescribed whilst in custody' (Centre for Youth & Criminal Justice, 2017). Whilst children have previously been supported by Throughcare Support Officers (TSO) these have been

suspended from September 1, 2019; and whilst Community-Based Social Work, Prison-Based Social Work, and/or other throughcare organisations may be able to assist, the support required is not always in place and as highlighted in the Mental Health Review, 'sudden releases from court can make it difficult for health services to make appropriate arrangement' (HM Inspectorate of Prisons for Scotland, 2019).

These experiences represent a major breach of UNCRC article 24⁵⁵. Further, all 16 and 17 year olds should have a Child's Plan and if in school when detained, should be assessed for a Coordinated Support Plan, in accordance with the Education (Additional Support for Learning) (Scotland) Act 2004. As 16 and 17 year olds have a right to education⁵⁶ there ought to be an assessment undertaken upon detention, if not beforehand, and they should be made aware of their rights to receive a comprehensive support package for wider education including work skills and access to further education, and it is pivotal that there is robust needs led transition planning for when they leave the establishment. If we accept Hollingsworth's argument about foundational rights, which would mean there is a reparatory obligation to a rights-based system of resettlement (see Part 2), there is an urgent need to address these transitional and access issues (Hollingsworth, 2013: 1062).

3.10 Depriving children of their liberty

Whilst there is a need to ensure compliance with children's rights within detained settings, there is also a broader question about the appropriateness of depriving children of their liberty under any circumstances when they do not pose a significant risk of harm to other people. Lynch argues that, 'Custody should not be used purely as an accountability measure' (Lynch, 2018c: 225) and the Child Rights International Network (CRIN) has long argued that 'the only justification for the detention of a child should be that the child has been assessed as posing a serious risk to public safety' (CRIN, 2015: 2). The *Global Study on Children Deprived of their Liberty* found that 'detention in the context of the administration of justice is still widely overused' (Nowak, 2019: para 146), urging states 'to develop national action plans aimed at an overall reduction in the numbers of children in detention and/or the elimination of detention for children' (Nowak, 2019: para 146). The harms caused by depriving a child of their liberty are so significant it is argued that this should only be done where there is no other alternative, and even then CRIN argues that 'Courts should only be able to authorise a short maximum period of detention after which the presumption of release from detention would place the onus on the state to prove that considerations of public safety justify another short period of detention' (Child Rights International Network (CRIN), 2015: 2). This is an interesting suggestion for how to support the system to focus on only detaining children in custodial settings where there is a public safety risk and where deemed necessary for minimal periods. There are important questions to ask about whether high quality intensive community based supports are consistently available for children who require it, and whether in many cases these offer a more appropriate response for children (Gough, 2016). In research about secure care in Scotland, Chief Social Work Officers highlighted how 'there are young people in secure care because there are not appropriate supports for them in the community or other parts of the system' but that it was important that secure care was available for times of extreme crisis to keep children alive (Moodie and Gough, 2017: 28-30).

⁵⁵ UNCRC: 'no child is deprived of his or her right of access to such health care services' (Article 24).

⁵⁶ UNCRC: 'State parties recognize the right of the child to education' (Article 28)

It is particularly concerning that when we consider the children and young people who have died in a YOI or prison over the past 10 years half were placed there on remand, so they have either not been convicted or sentenced for committing a crime (Scottish Prison Service, 2019b; HM Inspectorate of Prisons for Scotland, 2019)⁵⁷. The number of children who are on remand has also significantly increased as a proportion of those who are in custody (Robinson et al, 2018: 12), a pattern mirrored in the adult population, with some indications that younger age groups and young women are more likely to be held on remand, perhaps indicating an association between vulnerability, lack of support and likelihood of remand (Robinson et al, 2018: 15). As of May 3, 2019 there were 37 children aged 16 or 17 in custody, 22 who were sentenced and 15 who were on remand (12 were untried and three were convicted, but awaiting sentence); there were also 321 young people aged 18-20 in custody, of who 207 were sentenced and 114 on remand (78 were untried and 36 were convicted, but awaiting sentence) (Scottish Prison Service, 2019a). As a proportion then 41% of children in custody are on remand and 36% of young people aged 18-20 in custody are on remand. This compares with a population of 7,843 adult prisoners (over 21 years old) of whom 20% are on remand (Scottish Prison Service, 2019a). The proportion of children and young people on remand then is far greater than for adults, raising questions about why this is so and whether this is appropriate given the importance of receiving a fair trial and the damage that detention can do, particularly for a child, raising particular concerns about children's rights compliance⁵⁸.

It is worth reflecting on why bail is less likely to be used for children and young people, and the availability of intensive supervision in the community for children and young people, which the evidence makes clear would be much more effective at supporting children to transition to a more positive adulthood when any risks to self or others can be managed in the community. It is particularly pertinent here to consider the use of Movement Restriction Conditions (MRCs) which, as the name suggests, set certain restrictions about where a child can go and/or at what times, as part of an individualised plan, enforced through the use of electronic monitoring, through the use of electronic tagging. As McEwan argues, it is important to understand that in and of itself the 'MRC itself is not the answer nor is it a punishment but a tool to create opportunities' (McEwan, 2019: 1). Children can be subject to MRC through both the justice system (through a Home Detention Curfew, Restriction of Liberty Order or as part of licence conditions on release from detention/ custodial sentence) and through the Children's Hearing System, panel members must consider electronic monitoring before recommending a child is sent to secure care.

⁵⁷ Since 2009 of those who died in custody 50% of children (n=1) and 52% of young people under the age of 25 (n=12) were on remand.

⁵⁸ ECHR: Right to a Fair Hearing (Article 6); UNCRC: The arrest, detention or imprisonment of a child shall be...used only as a measure of last resort for the shortest appropriate period of time (Article 37b) , Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty (Article 37d), right of every child accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth (Article 40), State parties shall promote whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected (Article 40(3b)).

In the five years between 2014-18 MRCs have been imposed on children 638 times⁵⁹ (McEwan, 2019: 1). The use of MRCs through the Children's Hearing System has ranged between 20-31 times per year, averaging 27 times per year (McEwan, 2019: 1). Despite some examples of effective and creative use of MRCs to support individual children in their specific situations (Simpson and Dyer, 2016), the use of MRCs by the Children's Hearing System appears to be lower than we would expect given concerns about depriving children of their liberty, the policy preference for intensive community supports and the legal requirement that an MRC must be part of the assessment when children are being considered for secure care (Children's Hearing (Scotland) Act 2011 s.83 (5) (c)). Simpson and Dyer explored some of the possible reasons for the gap between the stated policy aspirations and practice reality (Simpson and Dyer, 2016), but suggest that children are being deprived of their liberty when intensive community based support, such as MRCs, are more appropriate for supporting and controlling children. Anecdotally it also appears that intensive fostering services, which provide contained care in the community, have been reduced over recent years.

It is curious that if deprivation of liberty is really the only option to keep other people safe, secure care is not being used more frequently for children on remand, which would be a more appropriate setting and is considered more effective at providing care and supporting children to change.

[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'

(Alex quoted in: Nolan et al, 2018: 540)

In Scotland, secure care is used primarily to detain children of their liberty because they pose a risk to themselves, or a risk is posed to them (for instance, due to sexual exploitation) and it is considered the only way of ensuring a child's safety. Findings from the 2018 secure care census found that in the year prior to admission alone, 34.9% of children had attempted to end their own life through suicide, 70.9% had engaged in self harm, 88.5% had absconded, 48.1% had been subjected to Child Sexual Exploitation, and 45.1% had experienced sexual health concerns (Gibson, publication forthcoming). In addition most children in secure care have been in conflict with the law, for instance, 44.7% of children in secure care had accrued at least one charge of assault in the year prior to admission to secure care (Gibson, publication forthcoming). These findings highlight how difficult it is to separate out the issues of offending and victimisation. Whilst secure care may be a more appropriate setting if a child's liberty needs to be restricted; due to its status as a care rather than a punishment setting, a higher ratio of staff compared to prisons, and a more child centred design and environment; there are rights issues associated with secure care. Where secure care can provide a safe haven to meet children's complex needs it may also be that rather than 'a last resort', it may be that secure care is an appropriate response. However, children and young people have highlighted concerns about the lack of knowledge about when they will get out of secure care, sometimes expressing a preference for a custodial sentence because at least then they know when it will end (Vaswani and Gillon, 2018: 6). There is a contradiction here in the aspirations of the secure care sector to offer a caring environment with deprivation of liberty allowed for three month periods on the basis of a child

⁵⁹ 134 times through the Children's Hearing System, 464 times through a Restriction of Liberty Order, 33 times as a Home Detention Curfew and 7 times as part of post release licence conditions

being a high risk to themselves and/or others, but the continual assessment of their risk meaning they have no idea when they will return to the community, and sometimes, for obvious reasons, experience this form of care and protection as punishment.

In research about Northern Ireland Haydon has also highlighted how basic civil rights are frequently violated in secure care, for instance, 'Freedom of association was undermined in a building where doors to every room were locked on entry and exit, despite rooms being off a locked corridor within a secure building' (Haydon, 2018: 40). Interestingly, it is argued that measures intended to 'protect' children regularly led to breaches of their rights 'not only through deprivation of liberty but also within interactions and interventions which did not prioritise their participation or best interests' (Haydon, 2018: 41). Children deprived of their liberty have the right to maintain contact with their family⁶⁰, which should be respected regardless of the form the deprivation of liberty takes. However, children frequently report difficulties maintaining relationships with family and friends, and highlight how practices discourage contact in various ways. For instance, in relation to secure care in Scotland children and young people have highlighted issues around a lack of access to landlines to make phone calls, and difficulty using these due to staff rotas and call rationing (Gough, 2017: 26).

There are additional issues with ensuring compliance with Article 37 (c) for children from England and Wales who are detained of their liberty and placed in Scottish secure care. For children so far away from family and friends, maintaining contact, as well as being placed in another legal jurisdiction, creates significant difficulties during a child's time in secure care and in supporting the transition as they return to their communities such a distance away. In 2014 the average number of children in secure care over the year was 74, with the average number of children from outside Scotland being seven, by 2018 the average number of children in secure care was 81 with 36 of these children from outside Scotland (Scottish Government, 2019a: 25). This means that in 2018 44% of children in secure care in Scotland were from outside Scotland, most from England. From 2017 to 2018 the number of children in secure care in Scotland from outside Scotland increased by 89% (Scottish Government, 2019a: 25).

3.11 Children who commit the most serious harms and wrongs

Children who commit the most serious harms and wrongs in criminal law receive relatively little attention in the human rights literature as Lynch points out, 'posing as they do conceptual challenges to norms of youth justice, such as the paramountcy of best interests' (Lynch, 2018a: 154). 'There has been little attempt by human rights bodies or scholars to take up the challenge to discuss what age-appropriate accountability for homicide and other serious violent offending might look like in practice' (Lynch, 2018c: 224-25). Yet serious offending by children is a significant issue in Scotland, whilst the number of children involved are low compared to other offending types, given the serious consequences of such offending. Recent estimates by the Scottish Government, based on a sample of case records, suggest that in 2017-18, 17% of serious assaults in Scotland involved at least one teenage perpetrator (aged between 13 and 19 years old) (Scottish Government, 2019b: 20). Sixty children under the age of 13 and 940 children aged 13-19 were involved in serious

⁶⁰ UNCRC: Every child deprived of liberty 'shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances' (Article 37 (C)).

assault. Whilst the number of under 13 year olds involved in serious assault may be low compared to the proportion of the population this age; 0.8 perpetrators per 100,000 population (the lowest of any age grouping) it is particularly concerning that children at such a young age are involved in such serious offending (Scottish Government, 2019b: 20).

There is limited evidence about children who pose a serious risk of harm to others in Scotland, but Murphy's examination of the case files of 63 children referred to the Intervention for Vulnerable Youth (IVY) project due to concern over their risk of serious harm to others provides some useful insights (Murphy, 2018). She found that two-fifths of these children had been engaging in violent behaviour prior to 11 years old (Murphy, 2018). The prevalence of adverse childhood experiences, psychological distress and mental health needs found in this sample were high and suggests a need to reframe how we conceptualise risk of violence in children to identifying violence at an early stage as a distress response (Murphy, 2018).

The review of evidence by the Scottish Expert Group on Preventing Sexual Offending Involving Children also provides some insight here, drawing on data from COPFS and SCRA (The Expert Group on Preventing Sexual Offending Involving Children and Young People, publication forthcoming). The Review found that there were 260 sexual offence cases reported to COPFS by the police over a two-year period. A random sample of 96 cases revealed there were 45 cases of children being charged with rape, attempted rape and/or sexual assault; 45 cases of young people charged with 'other sexual crimes'; the majority involving communicating indecently with a child, causing a child to look at a sexual image, and taking, making, possessing or distributing indecent photos of a child. There were six cases of young people charged with both categories of offences (The Expert Group on Preventing Sexual Offending Involving Children and Young People, publication forthcoming).

The analysis of the data from COPFS revealed that most of the contact offending cases occurred within the context of an intimate partner relationship, commonly involving 'boys persistently requesting or demanding sex from girls and ignoring their stated refusal... including ignoring requests to stop when girls were experiencing pain'. (The Expert Group on Preventing Sexual Offending Involving Children and Young People, publication forthcoming). As well as the children referred to COPFS there were also 216 children referred to SCRA for a sexual offence in 2016-17; 29 children for rape and attempted rape, 101 for sexual assault and 117 for other sexual crimes. Of the 216 children referred for sexual offences, 130 (60%) had previously been referred to SCRA at a younger age on care and protection grounds⁶¹ (The Expert Group on Preventing Sexual Offending Involving Children and Young People, publication forthcoming). Lack of parental care was the most common cause for the historic referrals; 91 of the children (70%) of those with a care and protection history had been referred to the Children's Hearing System on this ground (The Expert Group on Preventing Sexual Offending Involving Children and Young People, publication forthcoming). The second most common ground was being a child victim (48% of those with a care and protection history) (The Expert Group on Preventing Sexual Offending Involving Children and Young People, publication forthcoming).

⁶¹ It is important to note that some referrals may be missing as recording dates back only to 2003. This means that children aged 15 or 16 years of age in 2016-17 who were subject of referrals during infancy will be missed.

The evidence from Scotland highlights that risk practice often does not match the level of risk practice required to manage the violent behaviour displayed by these children and to reduce the risk of harm to others (Murphy, 2018). Murphy found, for instance, that use of structured professional judgment approaches, Care and Risk Management (CARM) processes⁶², monitoring and victim safety planning were limited, and it was unclear whether the children, and their parents/carers, had access to interventions that could best meet their needs (Murphy, 2018: 3). In terms of responses to sexual offending, the Expert Group on Sexual Offending also found that these were based on offending by adults, failing to take into account, understand or respond to the specific characteristics of children and the implications of their developmental stage, also recommending the CARM process for managing risks for young people (The Expert Group on Preventing Sexual Offending Involving Children and Young People, publication forthcoming).

Over time internationally, despite the development of international human and children's rights, sentencing for violent offences such as homicide has become more punitive and with less scope for judicial discretion (Tonry, 2009). In the children's rights literature the question of public safety is rarely addressed and there is little concrete guidance on what the law's response to children who kill should be (Lynch, 2018c: 220). Therefore, whilst we have seen some progress around diversion and detention of liberty for children involved in committing minor offences there has been 'little progress with abolition or even reduction of the use of imprisonment for young offenders who commit top-end violent offences such as murder. Three principal hurdles have resonance across jurisdictions: (i) the limits of guidance in human rights instruments; (ii) punitiveness; and (iii) societal expectations' (Lynch, 2018a: 154). As Lynch notes, a principled rights respecting approach requires a different lens, one based on 'age-appropriate accountability and on the temporality of risk factors for many in this age group' (Lynch, 2018c: 212). There is some evidence to suggest that for children who commit the most serious crimes the effect of how the system responds may be more punitive than in the past (Tanenhaus, 2000).

For a child sentenced of homicide in Scotland the sentence is mandatory life imprisonment, and this is discretionary for manslaughter. So, this sentence is regardless of circumstances, the child's stage of development or level of comprehension, thus in itself questioning issues around fair trial let alone requirements to consider the child's 'best interest'. Manslaughter means a broader range of sentences are available, but across jurisdictions a conviction is still likely to result in a sentence of imprisonment (Lynch, 2018c: 214). Life imprisonment is an indeterminate sentence; when released on licence, the offender may be recalled to prison where conditions of parole are breached, or further offending takes place (Lynch, 2018c: 215). Life without parole (whole life order) is prohibited for children across all jurisdictions examined by Lynch (Australian Capital Territory, Canada, England and Wales, Ireland, New South Wales, New Zealand, Northern Territory, Queensland, Scotland, South Australia, Tasmania, Victoria, Western Australia), except New South Wales, 'demonstrating a legislative acceptance that these sentences are grossly disproportionate for children' (Lynch, 2018c: 218). However, gaining, or even applying for parole, is a difficulty where children have spent long terms in prison, with little life experience before imprisonment, making it difficult to satisfy the Parole Board that detention is no longer necessary for the 'protection of the public' (s. 26, Crime (Sentences) Act 1997) (Lynch, 2018c: 214-218). Further, 'Children

⁶² CARM is a multi-agency framework for child-centred practice in the risk assessment and risk management of the small group of children who present a serious risk of harm to others, see <https://www.gov.scot/publications/framework-risk-assessment-management-evaluation-frame-local-authorities-partners-incorporating/pages/8/>

servicing a life sentence are subject to recall for life and are held to the requirements of 'being well-behaved' and 'not to commit a further criminal offence' (Lynch, 2018c: 218).

It is well evidenced that long sentences have a disproportionate effect on children, 'with minimum terms of imprisonment sometimes exceeding the child's lifespan to date' (Lynch, 2018c: 214). For instance, in England in 2017 two 15 year old children were 'handed sentences of life imprisonment with minimum terms of 17.5 years (Markham and Edwards v R, 2017), reduced from 20 years on appeal' (Lynch, 2018c: 214). In Scotland, in 2019, we saw a 16 year old boy receive a sentence of life imprisonment with a minimum prison term of 24 years (reduced from an initial sentence of 27 years), significantly greater than his lifespan to date. Such sentencing has been directly criticised in the 'Global Study on Children Deprived of Liberty', 'In some cases, children have been sentenced to imprisonment for up to 25 years. The Independent Expert considers such lengthy prison sentences to violate the legal requirement of the 'shortest appropriate period of time' under Article 37 (b) of the Convention' (Nowak, 2019: para 44). One action to enable proportionate sentencing in these most serious cases would be the removal of mandatory, or presumptive sentencing provisions for children, enabling the child's stage of development and the specific circumstances of the case to be taken into consideration (Lynch, 2018a: 167). CRIN found that 361 individuals were sentenced to life imprisonment between 1995 and 2013 for offences committed when aged less than 18 (CRIN, 2015).

Interestingly, in Lynch's analysis of responses to allegations of homicide against children across a range of jurisdictions, she found that the prevailing approach to children who have killed 'is removal from the youth jurisdiction to the adult court system' (Lynch, 2018c: 212). It is interesting to consider this, as it could be argued from a principled rights-based perspective, an accusation of committing a serious offence such as homicide is a situation when it is particularly important to respond to ensure the child's status as a child is taken into account to guarantee a fair trial and due process, as well as age appropriate accountability and risk assessments. Notable exceptions are found in Canada and Western Australia, where they do not try children accused of homicide through a formal adversarial criminal trial without the benefit of specialised and separate procedures (Lynch, 2018c: 213). Western Australia and Canada both have specialist youth courts, in Western Australia cases are usually heard by a magistrate, but serious offences such as homicide are heard by the President of the Children's Court. Specialist youth courts potentially allow for specialised judicial officers, closed courtrooms and specially trained lawyers and are more conducive to child-friendly justice (Lynch, 2018c: 223), though as courts they suffer from many of the same negative impacts as documented in section 3.7. Caution is required here, however, as for instance, when youth courts were piloted in Scotland they were found to have taken children in need of support and fast-tracked them through a criminal justice system, with the youth courts playing a role in up-tariffing them (McIvor et al., 2006). These consequences were largely explained by the approach to referrals to the youth court which encouraged the referral of children who would have previously avoided any court contact (McIvor et al., 2006), which potentially could be minimised in a future model, but this experience highlights the potential for unintended consequences in relation to initiatives designed to minimise contact with the formal justice system, and thus the need for well-intentioned developments to be closely evaluated.

The cases of the children 'V' and 'T' who were convicted of the murder of a child in England in the early 1990s were a catalyst for amendments to trial procedure for children who are tried in adult court. The European Court of Human Rights found that the children's right to a

fair trial had been breached due to the adult-focused nature of the trial and significant concerns about the public naming of vulnerable children (European Court of Human Rights, 1999a; European Court of Human Rights, 1999b). In 2000, guidelines for adapted trial procedure were established through a Practice Direction from the Lord Chief of Justice and subsequently updated and consolidated as guidance for vulnerable defendants (Royal Courts of Justice, 2015). However, the guidelines are recommendations only (Lynch, 2018c: 217). The Taylor report into youth justice in England and Wales recommended 'The Ministry of Justice should consider introducing 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 exception to this would be where there are adult co-defendants and it would not be in the interests of children to be tried separately, in which cases Taylor proposed cases should be held in the High Court (Taylor, 2016: 105). If the Children's Hearing System is not considered suitable as a forum for determining what is to be done in respect of the most serious of offences it may be worth considering the development of a youth court specifically for children accused of these most serious of offences.

In Scotland Section 47 of the Criminal Procedure (Scotland) Act 1995 prevents the identification of any under 18 year old either accused or acting as a witness in a criminal case, but allows for the judge to exercise discretion in unusual circumstances. The naming of a 16 year old boy in a horrific rape and murder case in Scotland in 2019 involved arguing that there was a public interest to reveal the name. Whilst the public may have an interest in knowing the name of a child found guilty of such serious offences, the public naming of children given their additional vulnerabilities raises serious questions for the ability to keep these children safe and support their rehabilitation. In this case the decision to name appeared to be informed by the opinion that rehabilitation and reintegration were only 'remote possibilities' ([HMA-v-Aaron Campbell](#)). However, the decision appears out of kilter with UNCRC and puts Scotland on a divergent path from England which is considering the Taylor Review's recommendation that children should have lifetime anonymity (Taylor, 2016: 107).

Conclusion

This report has highlighted how the rights of children in conflict with the law need to be significantly improved if Scotland is to be compliant with international commitments and avoid facing significant legal challenges. With the forthcoming incorporation of UNCRC in Scotland there is an exciting possibility for youth justice stakeholders 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. As Part 3 of this report highlights, if we are to genuinely achieve a rights respecting response, it requires a scale of change and a shift in mindset that perhaps we have not seen in Scotland since Kilbrandon.

A rights respecting and entitlements-based approach can be seen as the next phase of development for a preventative approach, building on recent youth justice strategies and their focus on 'preventing offending', and taking this emphasis to the next level by encouraging engagement with the deeper causes of offending and re-offending. It could also be argued that it is the logical next step in building on the Kilbrandon principles, established over 50 years ago (Vaswani et al., 2018). Framing the purpose of the next phase of youth justice improvement around upholding rights helps to avoid the negative labelling and stigmatising of children, which causes the youth justice community particular issues as they look to intervene early in children's lives. If rather than intervening to prevent future problems the focus is on enabling children to access the rights they are entitled to, we can more clearly and honestly support some of our most vulnerable children to get the things they need - relationships with people who like and love them, education, mental health supports, access to things to do - to help them develop into healthier, happier and safer adults. If we approach this in a genuine way, there is the potential that a focus on rights will assist Scotland's broader attempts to grapple with the inequalities and wider structural issues which are the major reasons why children engage in offending behaviours. Part 1 of this report set out what a rights respecting approach, framework and action plan for Scotland could look like, offering a starting point for stakeholders to develop this further. With collective commitment to advancing the rights of children in conflict with the law and action which builds on the evidence and analysis presented here, there is an exciting opportunity to help our children and young people flourish and contribute to a healthier, happier and safer Scotland for all.

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