

# 'Not cut out for prison': Depriving children of their childhood

**Claire Lightowler, Bruce Adamson and Maria J Galli**

## **Abstract**

Children in Scotland continue to be deprived of their liberty in prison like settings. The majority of these children have not been convicted or sentenced, known as being on remand. In 2020 the proportion of children in a young offenders' institution or prison has further increased, with additional concerns for those experiencing remand during the COVID-19 pandemic. This article explores the data about remand and the human rights experiences of children on remand. We also reflect on why such a high proportion of children who have not been tried or have not been convicted are deprived of their liberty in Scotland.

## **Keywords**

COVID-19, remand, deprivation of liberty, young offenders' institutions, youth justice, human rights

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## **Introduction: Human rights context**

Taking away someone's liberty, locking them up...away from home, away from family and friends. It is one of the most serious decisions a state can impose and raises profound ethical questions. It has deep and long-lasting consequences. For a child, it is particularly damaging because they miss out on critical stages of their emotional and social development; 'depriving a child of liberty, is to deprive that child of his/her childhood' (Nowak, 2019, p. 168).

For children who have been traumatised already, from experiences of abuse or neglect, the impacts of being deprived of their liberty can be devastating and irreparable. In prison settings, however well managed, there is a risk of bullying, abuse and violence which compounds existing trauma and adversity and potentially introduces new traumatic experiences. Scotland has known this for some time, documented in the HMIPS Inspection Report (2019) [of HMP YOI Polmont which offers](#) an expert review of the provision of mental health services, for young people entering and in custody. It is well illustrated by 'Oscar' quoted below:

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 (Nolan, Dyer & Vaswani, 2017).

The United Nations Convention on the Rights of the Child (UNCRC) and the associated international guidelines on child justice, *the United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (often referred to as the 'Beijing Rules'), and the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (often referred to as the 'JDL Rules' or the 'Havana Rules'), recognise that children accused of breaching the criminal law, have the rights to be treated in a manner consistent with their sense of dignity and worth and are entitled to a higher standard of care and protection when they find themselves in conflict with the law. This is especially true in relation to detention. Articles 40 and 37 specifically outline the child's rights to liberty where detention must only ever be used as a measure of last resort and for the shortest possible period of time (UNCRC, 1989). Children's rights to a

presumption of innocence, to protection, to a fair hearing, to privacy and family life, to legal representation, to not be separated from their parents, to non-discrimination, to have their best interests considered, and to participate in decision-making must be taken into account before any child is deprived of their liberty.

The United Nations Committee on the Rights of the Child has repeatedly criticised the UK and warned countries that allow children to languish in pre-trial detention, that this can constitute a grave violation of article 37 (b) of the UNCRC. The Committee stressed that pre-trial detention or remand should not be used except in the most serious cases for instance where the child is an immediate danger to themselves, or to others, and even then, only after a community placement has been carefully considered (United Nations Committee on the Rights of the Child, 2019, para 86). The Committee has been clear about the obligation on the state to put in place an effective package of alternatives to ensure that deprivation of liberty is only used as a measure of last resort. The state must also take adequate legislative and other measures to reduce the use of pre-trial detention (United Nations Committee on the Rights of the Child, 2019, para 97). This requires using all available resources to the maximum extent possible when making decisions about bail and remand (UNCRC, 1989, Article 4).

## **The proportion of children on remand**

It may surprise some people to know that Scotland locks up children (aged sixteen and seventeen) in prison-like settings who have not been found guilty of an offence. Young offenders' institutions (YOI) (and occasionally prisons) detain these children alongside those who have been found guilty but have not yet been sentenced to custody. Over time, the proportion of children who are locked up but have not been tried or sentenced has been increasing and now most children in prison settings are in this situation, known as being 'on remand'.

On the 1st January 2021, 25 of the most vulnerable children in Scotland were locked up in Polmont Young Offenders' Institution (Scottish Prison Service, 2020b). These were all boys aged sixteen or seventeen years old. Fifteen of

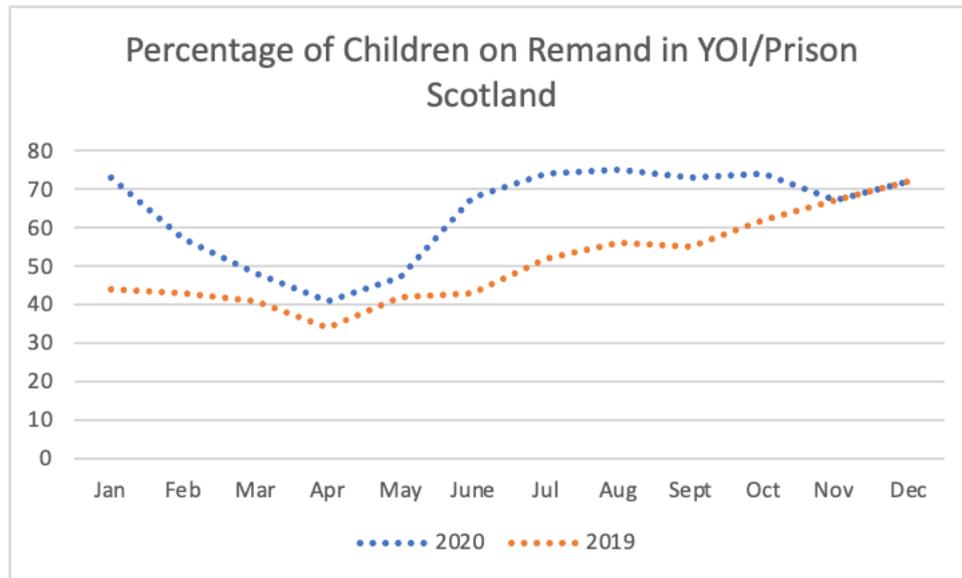
these children had not been tried and five had been tried but had not yet been sentenced. Only five children have been tried and sentenced to custody. So, 80% of the children in a prison setting in Scotland are on remand (twenty children). This contrasts with children in England and Wales, for the year ending March 2019 where children remanded in youth custody accounted for 28% of the average custody population (See UK Parliament – Justice Committee (2020), [12th Report: Children and Young People in Custody \(Part 1\): Entry into the youth justice system](#)). Some of the children on remand at YOI HMP Polmont may be found not guilty when they eventually go to court, in which case they will have been detained for committing no crime. Others may be found guilty but will not be sentenced to prison by the court (Data in Scotland is not available about how many children on remand then go on to receive a custodial sentence or not).

In 2020, the proportion of children in a YOI/prison on remand in Scotland each month has been above 50% most months, and has been so consistently since June 2020. Across the year 2020 the average proportion of children on remand over the year was 66%. In the previous year, 2019, the proportion of children on remand was above 50% for six months of the year, from July until December 2019, with the average proportion of children on remand across the year being 47%. Before this, between 2016 to 2018 the average proportion of children on remand in a YOI or prison each year was between 45-52% (45% in 2016, 45% in 2017 and 52% in 2018).

**Table 1: Percentage of Children on remand in a YOI/Prison in Scotland (Data provided by the Scottish Government Youth Justice Team)**

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec
2020	73	57	48	41	47	68	74	75	73	74	67	72
2019	44	43	41	34	42	43	52	56	55	62	67	72

**Figure 1: Percentage of Children on Remand in YOI/Prison (Data provided by the Scottish Government Youth Justice Team)**



The data presented in Figure 1 show that a high proportion of children deprived of their liberty in YOI/prison are on remand and have been for some time. The proportion of children on remand in 2020 is significantly higher than in previous years and there is a clear pandemic effect, due to a range of issues caused by COVID-19, such as court delays. However, the data also suggests that remand levels for children were high and rising before the pandemic impacted. It also hints that a complex story lies behind this data, one which is likely to require other forms of research to understand. One important element to note is that there has been a significant reduction in the total number of children who are deprived of their liberty in YOI/prison in Scotland over the past five years. In 2016 an average of 67 children each month were deprived of their liberty in a YOI or prison, compared to 21 children in 2020 (see Table 2). The high proportion of children in YOI/prison on remand may, therefore, reflect a failure to manage complex needs and risks in the community or perceptions that custody is the only way to manage such risks. It might also indicate legal, financial, and system issues around access to, and use of, secure care in Scotland, when the deprivation of liberty is truly the only way to ensure safety. These smaller numbers of children in YOI or prison also means we need to take care when interpreting the data, as one child's experience can lead to a dramatic percentage change.

**Table 2: Average Number of Children in YOI/Prison each month**

<b>Year</b>	<b>Average Number of Children each Month</b>
2016	67
2017	49
2018	46
2019	34
2020	21

(Scottish Prison Service, 2020b)

## **Reasons for the high use of remand**

The decision to grant a child bail or to deprive them of their liberty on remand in Scotland is a complex issue, which was highlighted in research undertaken with children and a range of professionals, including sheriffs, procurators fiscal and social workers (McEwan, Maclean, Dyer, Vaswani & Moodie, 2020). The research revealed a strong awareness about the negative effects of remand for children, the trauma this specific status causes and the impact on children's future opportunities. McEwan et al. found that there was consensus that children should only be remanded in the most extreme circumstances. However, there were complexities in relation to the status of those aged sixteen and seventeen years old, whether they were legally defined as a 'child' in all contexts, and whether professionals around them saw them as a child in terms of their policy and practice responses. There are questions here, therefore, about whether human rights obligations are being fulfilled, as well as having implications, for instance, about whether children are remanded to a YOI rather than secure care.

Because it was my first time up in court my social worker said a bed was available in secure...but because obviously of how

serious it was the judge just overruled it and said look he's 16 now man just get treated as an adult so I got took up. Got treated like an adult now innit (child quoted in McEwan et al, 2020, p.17).

The research by McEwan et al. (2020, p. 17) revealed that sheriffs and procurators fiscal identified a similar range of factors that they would take into consideration when considering bail and remand, including:

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

The nature and range of issues outlined above suggests that children who have the most complex needs and vulnerabilities will be more likely to experience being deprived of the liberty on remand. The absence of any consideration of the child's rights in the decision-making processes, raises concerns about compliance with international human rights law and principles.

McEwan et al. (2020) found wide variations in practice and attitudes in respect of remand, specifically for children who breached bail conditions. For some sheriffs and procurators fiscal if a child was repeatedly offending (even low-level offending) and breaching court orders then remand was considered to be necessary. For others, the risk to public safety was the overriding factor, and where public safety was not a concern then they believed that the child should be bailed — even if the child was struggling to comply (McEwan, 2020, p. 18). At every stage of the decision-making, the child's views and best interests must

be taken into account alongside the overarching protections of international human rights law. The use of custody for low-level breaches of bail, and the lack of consistently good quality support for children on bail across Scotland, clearly contributes to the high proportion of children on remand.

## **Experiences of remand**

Children on remand are treated differently in YOIs because they are not necessarily guilty. They have the right to be presumed innocent, and to not mix with adults, or those who have been sentenced. However, as evidenced in the most recent inspection of Polmont YOI, in practice this means other rights are not respected and certain supports and opportunities are not available to children on remand (HM Inspectorate of Prisons for Scotland, 2019b). As a result, children on remand tend to spend longer periods of time isolated in their cells than those who have been sentenced. They have not had a trial, or been found guilty, but experience the least amount of support and activities. A key frustration shared by social workers and children in the research by McEwan et al. (2020) was the difference between the activities and opportunities available when children were on remand compared to being sentenced.

CH3: I can get one job [on remand] the cooks but once am sentenced I can get a good job. [On remand it's] 23hrs a day, 45 mins out to go for a shower, shot of the phone and game of pool an that...brutal...

CH9: When I was on remand I was locked up 23 hours a day it's not good...then when I got convicted I'm oot all the time, I'm never in my room, only at night... remand's boring, you only get the gym and rec and that's it, or a visit, there's no work parties, there's no nothing.

(McEwan, 2020, p. 14).

The lack of focus and structure on remand can, and does, have significant impact on children's mental health and can have profound and long-lasting consequences for them and ultimately for society. The risk of self-harm, suicide and serious mental health deterioration for these children is acute, as evidenced

in the expert review of the provision of mental health services for young people entering custody (HM Inspectorate of Prisons for Scotland, 2019a). The combination of the specific status of 'remand' and the issues of not having the same access to opportunities means that children are often spending significant amounts of time in their cells worrying about what is going to happen at their court case and what is happening outside. The waiting and not knowing inherent in a period of remand is an additional form of stress, in addition to the already significant trauma associated with being deprived of your liberty as a child.

CH6: I'm not expecting to get out, I know I'm getting a sentence; I just want to get it over and done with innit. Like sitting on remand I don't have a lib date, I'd rather have a lib date...then I know am not in here for ever. With that lib date I know that my days are numbered in here.

CH4: Aye, see when you're waiting to get sentenced its torture cos you don't know what's going to happen and you just want sentenced to get it over and done with but when you get sentenced it's "oh fuck", then you get used to it (McEwan, 2020, p. 12).

Beyond this, time on remand is 'lost time' where the child is not yet able to access support or interventions which reduce the risk they pose to others, but at the same time loses positive elements of their life (relationships, education, training, their home, placements, income etc). Despite the most recent inspection of Polmont and the expert review of mental health for children in custody highlighting significant concerns about the impact of detention on young people's mental health and calling for Scottish Government to review the appropriateness of YOI as a location to detain children, this review does not yet appear to have happened (HM Inspectorate of Prisons for Scotland, 2019a; HM Inspectorate of Prisons for Scotland, 2019b).

## **Remand and COVID-19**

During the COVID-19 pandemic many of these impacts are increased, with children experiencing extended periods without face-to-face contact with their

families, their children, friends, social workers, or lawyers, and it is likely that some children will experience long periods in their cells with nothing to do. The Special Rapporteur on Torture states that the imposition of solitary confinement of any length on children constitutes a cruel, inhuman or degrading treatment which violates Article 7 of the International Covenant on Civil and Political Rights and Article 16 of the Convention Against Torture, and should be completely prohibited.

Imagine being alone in a cell for over 20 hours a day with little to do and limited opportunity to talk to anyone. Imagine having no idea when your trial might be, due to the significant backlog of cases in court. Imagine not knowing when, or whether, you will be liberated. What if you don't feel safe? What if you are being bullied or abused? Who do you tell and how do you reach someone to speak confidentially? One young adult, over the age of eighteen, described the situation in prison (not a YOI) during the COVID-19 pandemic:

no contact with friends and family; locked up at 5pm, no information, nothing is getting done, no support, we don't know what's going on, no gym, only £2 been added as credit for phone calls for friends and family, lots of tension, prison politics, no video calls, visits or mobile phones in cells — said this was going to happen weeks ago (Nolan, 2020).

There are also obvious increased health risks to those in prison settings during a pandemic, with concerning numbers of people in prison in Scotland affected. On November 12, 719 individuals were self-isolating and there were 116 confirmed cases of COVID-19 across Scotland's prisons (Scottish Prison Service, 2020a). At the beginning of the pandemic, the UN High Commissioner highlighted the specific risks of COVID-19 in prisons (United Nations High Commissioner for Human Rights, 2020) and the UN Committee on the Rights of the Child warned of the 'grave physical, emotional and psychological effect of the COVID-19 pandemic on children' (UN Committee on the Rights of the Child, 2020, p. 1). The Committee urged all states 'to release children in all forms of detention, whenever possible' (UN Committee on the Rights of the Child, 2020, p. 2). They have also previously stressed that where decisions are taken to deprive children

of their liberty, the state must 'ensure by strict legal provisions that the legality of a pre-trial detention is reviewed regularly, preferably on a weekly basis', and that it is vital that contact is maintained with their family (UN Committee on the Rights of the Child, 2019, para 10. 4). Despite these warnings, Scotland has failed to assess the needs and risks of children who continue to be detained on remand. If children are deprived of their liberty in a YOI during a pandemic, this decision needs to be subject to the most rigorous of legal processes. There must be careful consideration of the child's best interests and detailed, recent assessment of the risks they pose to others.

The UNCRC sets out that the deprivation of liberty should be the 'last resort' meaning that all other ways to keep a child and/or those around them safe should be considered first. The wording of 'last resort' is potentially problematic because it implies that once a child has been deprived of their liberty there is nothing else we can do to help them and this is their only chance. Yet, since the onset of the pandemic, there has been no assessment of whether the children in Polmont YOI pose any risks that can only be managed by depriving them of their liberty. Courts assess whether there are grounds to oppose bail, which involves considering a child's risk of re-offending. But what is needed is a detailed assessment of the child's specific circumstances, their needs, human rights and best interests and how to mitigate any risks they pose. These risks can almost always be managed with high quality, intensive support in the community. This includes a range of approaches, such as, intensive fostering placements, electronic monitoring and supervised bail programmes.

The Scottish Government had an opportunity to make specific provisions for the early release of children in YOI/Prison via the emergency COVID-19 measures put in place, including the regulations for children and vulnerable adults and then the early release regulations, but chose not to make specific provision for children in detention. Children were treated as prisoners first and deemed to be not eligible for early release. There was no discussion or consideration of the fact that they were children and therefore entitled to special consideration, or protection. Given the ongoing threat to life and health in the global pandemic, Scotland must ensure that children's human rights are safeguarded, to prevent

pre-trial detention in prison-like settings and to release all detained children to safe, alternative care placements.

## Conclusion

The proportion of children on remand in Scotland is an indication that something is awry. There is the need for serious consideration, discussion and debate about Scotland's approach to children deprived of their liberty in a YOI/prison. The evidence presented in this article suggests that opportunities are still being missed and there continues to be children on remand who could be supported in the community whilst also ensuring that everyone is safe. This community-based provision needs to be prioritized, and appropriately funded if there is to be a significant change to the numbers and experiences of children currently on remand. There are sadly circumstances where the only way to keep other people safe is to deprive a child of their liberty. In these rare circumstances, however, it has been acknowledged that prison settings, including YOIs, are never appropriate places for children (Care Review, 2020, p. 82). More appropriate and sensitive child-focused and trauma-informed settings should be available. Ensuring that in Scotland children are not in prison-like settings or YOIs was a promise made by the Independent Care Review and accepted by the Scottish Government. Even when a child (after a rigorous risk assessment) needs to be deprived of their liberty for their own safety or that of others, Scotland must move quickly to make better use of secure care centres for these children and develop other, alternative provisions, to fulfil our international human rights obligations and to give these children a chance of going on to live positive, happy lives.

I would rather be outside. I don't like being in here. I would accept the tag and comply with conditions, provided the curfew times were ok, and would stay out of trouble so I didn't come back here ('Gary' quoted in Nolan et al., 2017).

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