

Alternatives to Young Offender Institutions for children under 18

On March 16, 2021, by a unanimous decision of the Scottish Parliament, Scotland passed the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, (the UNCRC Incorporation Bill) to incorporate the rights of all children under the age of 18 into Scots law. Despite there having been technical challenges to the full extent of the devolved powers, Scotland has continued to pursue implementation of the rights under the UNCRC in law, policy and practice.

Human right duties in the criminal justice system fall under the devolved responsibilities of all public authorities in Scotland, where implementation of criminal law and procedure must be compatible with international law and standards, including the UNCRC. It is accepted that there a number of areas of law, policy and practice which do not provide sufficient protection for children and young people who are in conflict with the law and whose rights are at risk of being breached.

Following the passing of the UNCRC Incorporation Bill, the Scottish Government also committed to implement the findings of the landmark Independent Care Review, The Promise.

[The Promise Plan](#) states that '16- and 17-year-olds will no longer be placed in YOI for sentence or on remand'. This is to be achieved by 2024. In March 2022 the Scottish Government published [Keeping the Promise](#) which made a commitment that "we will end the placement of 16 and 17 year olds in Young Offenders Institutions "without delay". We will fund care-based alternatives to custody and consult on new legislation in Spring 2022. This will provide the support children need in very difficult circumstances, shifting the approach from one of punishment to one of love and support" (p6).

To meet these aims, and fulfil Scotland's duties under the UNCRC through The Promise Plan, steps have been taken to reduce the number of children under 18 being detained in YOI prior to a legislative change as part of the Children's Care and Justice Bill, and the Bail and Release Bill. There are several examples of good practice across Scotland that we can share and learn from.

Secure Care

There are two sets of regulations which apply to secure care depending on the mechanism of placement – the [Secure Accommodation \(Scotland\) Regulations 2013](#) (secure regulations) and the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) Regulations 2013. Children often find themselves subject to each set of regulations at different points during their stay in secure care.

The ability to place a child in secure care who is not subject to a Compulsory Supervision Orders (CSO) with secure accommodation authorisations attached is governed by the secure regulation. The Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisations)(Scotland) Regulations 2013 apply to those where a CSO with a secure accommodation authorisation is in place.

Where a child is not subject to a relevant order (including Permanence Orders or CSOs without a secure accommodation authorisation attached), the means by which they can be placed in secure care are limited. A Court can detain a child in residential accommodation (in terms of section 44 of the Criminal Procedure (Scotland) Act 1995), or the police under regulation 12 of the secure regulations where the police have kept the child in a place of safety under section 22 or 53 of the Criminal Justice (Scotland) Act 2016. Otherwise they can only be placed in secure care if they are "looked after" and specifically if they are being provided with accommodation in terms of section 25 of the Children (Scotland) Act 1995.

A local authority can provide accommodation for any child within their area if they consider that to do so would safeguard or promote the welfare of the child. The definition of "child" for the purposes of section 25 would cover any child under 18. If accommodation was to be provided under section 25 to a child aged 16 or over then this could only be done with their agreement.

Placing of a child in secure care by a local authority may trigger Children's Hearing involvement as the Children's Reporter is required to be notified as soon as the child is placed. The reporter will make the decision if a Children's Hearing is to be convened and on what grounds (this cannot be on offence grounds for the offence in which the child is appearing at Court as the PF is dealing with that case), within 96 hours. The Children's Hearing can make a decision to make the child subject to an interim CSO with a secure accommodation authorisation attached. If the Chief Social Work Officer (CSWO) makes a decision to implement the secure accommodation authorisation then the child is required to remain in secure care. The Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation)(Scotland) Regulation 2013 comes into play and the review requirements contained will apply. If an authorisation is attached and implemented then the child's continuing presence in secure care would be subject to the review requirements in the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation)(Scotland) Regulation 2013. The review requirements contained will apply and if the CSWO and head of secure centre is satisfied that the secure accommodation criteria is no longer being met then they should make the decision to remove the child.

Court notes

Several Local Authorities in Scotland use 'Court notes' for all children under 18 to advise the Sheriff/Judge what alternatives to remand/custody are available and what support the child will be offered by social work and other Children's Services. Under the Whole System Approach (WSA) and the Getting It Right for Every Child (GIRFEC) policy frameworks, alternatives to depriving children of their liberty whether in secure care or custody in a YOI including for example where available, supervised bail should always be offered to decision makers. Any form of [deprivation of liberty](#) of a child, should only ever be used as a protective measure of last resort. It is really important that all children are supported by social work services to ensure that their rights, risks and wellbeing needs are properly assessed and the child has legal advice, advocacy and representation at Court. All involved in the child's case should be aware of their rights and of any plan/available alternatives to secure care/custody. It is essential that the child's views and parents where appropriate, are taken into account and reflected in the plan, and that the social worker ensures the child's parents/representatives (if appropriate) are aware of the proposed Child's Plan.

It is well recorded that the main reason that many children breach bail conditions is because they do not fully understand the adult criminal justice processes, the conditions of order or the consequences of breaches, or what their human rights are, as evidenced in the [Bail and Remand](#) research. Developments in neuroscience is aiding our understanding as to why this may be the case and influencing changes across not just work with children but also in the adult justice system, as evidenced by the [new sentencing guidelines](#). In addition, many children are subject to bail conditions over considerable periods of time, which create barriers to opportunities for learning and development and increasing the likelihood of their breaching the conditions. All children under 18 are entitled to the broad rights under the UNCRC including to education, to additional supports, to family life, health, protection and recovery. Yet, at no point in the adult criminal justice system, are the child's UNCRC rights routinely assessed to ensure the child's needs and rights are met in determining decisions in their 'best interests'. Intensive additional support and respect for the child's rights, should always be offered to children under 18, and their families, as part of any periods on bail as many children who breach bail automatically end up deprived of their liberty as a result, without any assessment of their rights and wellbeing needs.

Remand

When a child under 18 appears in a criminal Court, if their risk has been assessed as manageable within the community, an alternative to remand should always be offered to the Court when bail is being opposed, and a secure care placement should always be offered as an alternative to YOI. The child's social worker and legal representative should seek justification from the Crown on their reasons for opposing bail. The child should be afforded the opportunity to make specific representations of their views and best interests to the Court before the decision on bail or remand is made. Where the Court decides

that the child must be deprived of their liberty and remanded pending trial, or sentence, as per WSA guidance, there should be a presumption that no child be remanded to YOI.

For children under 18 who are not subject to a CSO, it is imperative that an alternative to YOI is offered to the Court. This could either be a robust community package as part of bail (or supervised/Electronic Monitoring bail where available) or an order to either bail or release the child to the care of the local authority (see below) where the decision can then be made to place the child in secure care.

If the decision is made to remand the child to YOI, [a bail review hearing](#) can also be arranged to review this decision. This could be once a secure care bed becomes available or an alternative package offered to the Court.

The role of the Chief Social Work Officer (CSWO)

The CSWO, with agreement from the child, can accommodate the child on a voluntary basis under section 25 of the Children (Scotland) Act 1995. Then, in agreement between the CSWO and Head of Secure Care Centre the child may be placed in secure care under regulation 9 of the secure regulations (see below). All steps in this process should be in place for presentation to the Court (an interim plan to allow more time) where the Sheriff may then release the child to the care of the local authority, without making a Court order or as part of bail conditions. Bail conditions could stipulate specific conditions to engage with social work, and could include the secure care centre named as the address. Having the secure centre named would result in any change of address having to be returned to the Court as part of a bail review hearing and not at the discretion of the CSWO.

The child still needs to meet [secure and MRC care criteria](#), before being accommodated in secure care or made subject to a MRC. This decision triggers a referral to the children's reporter with the potential for the child to be made subject to an Interim CSO with a secure accommodation authorisation or an MRC. When the child no longer meets secure care criteria, the CSWO can make the decision for them to leave secure care (as above, a Bail Hearing would be needed if the secure care centre is named). If the Children's Reporter does not believe there is grounds for a Hearing or CSO they can make the decision not to arrange a Hearing. A Children's Hearing could also decide not to make a secure accommodation authorisation. The Court must then be notified within 7 days of a change of address occurring (Criminal Procedure (Scotland) Act 1995 s25 (2B)). A further detailed plan of potential alternative should be provided to the Court to avoid remand where this is appropriate with credible management of potential risk of harm detailed.

This information/plan should be given to the Sheriff as part of a Court note or through the child's solicitor. In speaking to some Sheriffs, they would consider this option if highlighted to them and a place in secure care identified. Timing will be essential here, as if the child is appearing from police custody, social work will only have from the time from which it is identified that the child is in custody until they appear that day to put a Child's Plan in place, including arrangement to voluntarily accommodate the child, arrange a secure care placement and present it to the Court.

The CSWO and the child's legal representative, have an important role in offering the Court an alternative to YOI. Local Children's Services Planning Groups have statutory duties to every child under 18 to fulfil their rights under the UNCRC, The Promise, and to implement their Children's Services Plans. There have recently been some cases where intervention by a CSWO has resulted in children being removed from YOI and placed into secure care due to concerns regarding the child's mental health and wellbeing. Whilst this is a positive outcome, it would be advantageous that children do not require to experience YOIs and go through these double transitions.

Case Examples

Securing of Child not on a CSO

Recently a CSWO secured a 17 year old not subject to a CSO. The CSWO decision was competent under the Secure Accommodation (Scotland) Regulations 2013 using S.25 of the Children (Scotland) Act 1995. This was possible due to the Children's Hearing (Scotland) Act 2011 being construed consistently with the statutory definition of "child" in section 75 the Children (Scotland) Act 1995, that being a person under the age of 18 years. Therefore, as the child had been referred to SCRA as a result of regulation 10 of the Secure Regulations, the Reporter was legally obliged to treat child as a child and could therefore proceed to make a decision as normal. This case was appealed and upheld: [2021csih04.pdf \(scotCourts.gov.uk\)](#).

Alternative to Court Remand

A child on was placed on a CSO aged 17 year and 8 months after the local authority were able to get the case remitted to SCRA. The child was remanded for breaches of bail. At the committal hearing the local authority successfully argued for child to be "detained in a suitable place of safety chosen by the authority" under S.51(1)(a)(ii) of the Criminal Procedure (Scotland) Act 1995. The CSWO was then able to place the child in secure care under Regulation 12 of Secure Accommodation (Scotland) Regulations 2013. On that basis, the child remained in secure care for 2 months and then assessed and moved to residential care, without having to go back to Court for permission, or to the Children's Hearing for authorisation.

Non Competent Order

As many Sheriffs do not want children to go to YOI, mistakes can be made. Courts can make an order remanding a child to secure accommodation when the child is not subject to a CSO. In these cases the child could only legally go to YOI from Court unless the CSWO intervenes. Examples include, the child is subject to a Permanence Order and the CSWO used paragraph 9 of the Secure Accommodation (Scotland) Regulations 2013 to secure the placement in secure accommodation, or the above steps as outlines were followed.

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