

---

## REMOVAL OF UNDER-18s FROM PRISON

### PROPOSAL

#### Purpose

To provide a proposal for the Minister for Children and Young People and the Cabinet Secretary for Justice and Veterans on removing under-18s (children) from prison custody by the end of the current parliamentary term. This should be done as a matter of urgency within the first year of this parliament.

#### Background

As one of the 21 bodies that comprise the UK's National Preventive Mechanism (NPM), HMIPS has a duty to regularly monitor the treatment of detainees and the conditions in which they are held. COVID has seen restrictions imposed on the community to limit virus transmission. Within prison these restrictions have been notably harsh but effective in reducing the number of anticipated deaths. However a recent health and wellbeing survey conducted with under-18s in HMP YOI Polmont confirmed HMIPS concerns that children were suffering extreme restrictions very different to those held in secure care.

Legally, politically, and – most importantly – morally, it is now clear that removing children from the prison estate is the right thing to do and should be expedited. This proposal outlines these legal, political and moral imperatives and the steps to overcome the clear barriers.

### 1. Imperatives for removing under-18s from the prison estate

#### 1.1 Legal imperatives

Children in custody in Scotland are amongst the most vulnerable in our society. However, as children who are in conflict with the law, they are routinely neither recognised nor treated as 'children in need' of care and protection, under Scots law.

The way in which children are prosecuted and imprisoned in Scotland consistently breaches international human rights law and standards, including [The United Nations Convention on the Rights of the Child](#) (UNCRC) and is often not in line with

the [European Convention on Human Rights](#) (ECHR). UNCRC and ECHR rights are enhanced by additional safeguards from international legal instruments and policy.<sup>1</sup> It is therefore clearly imperative that children are removed from the prison system in order to meet Scotland's obligation to respect and uphold their human rights.

For those children and young people in conflict with the law, their rights to liberty and security of person (Article 5); protection from inhuman, degrading treatment or punishment (Article 3); privacy and family life (Article 8); fair trial and due process (Article 6) must all be respected in line with the international standards of child-friendly juvenile justice.<sup>2</sup>

Article 5 of the ECHR, is mirrored in Article 37(b) of the UNCRC (and explained by the Committee on the Rights of the Child in its general comments Number 10, and Number 24<sup>3</sup>). The deprivation of liberty of a child should be a last resort measure, to be used only for the shortest possible period of time. Similarly, the [Havana Rules](#) require that deprivation of liberty be limited to 'exceptional' cases. Both the [Beijing Rules](#) and the [Riyadh Guidelines](#) emphasize this principle.

In addition, the best interests of the child must be a primary consideration in every decision on initiating or continuing the deprivation of liberty of a child. Scots law does not currently require a court, in remanding or sentencing a 16 or 17 year old to custody, to have as a primary consideration the 'best interests' of the child, in fulfilling their rights to liberty, under Articles 3(1), and 37, of the UNCRC.

When the Scottish Parliament unanimously passed the UNCRC (Incorporation)(Scotland) Bill, in March this year, it heralded Scotland's commitment to ensure all children's human rights are respected, protected and fulfilled, in law, policy and practice. This includes those children who are most at risk, deprived of their rights to liberty and fundamental freedoms, in the criminal justice system. Implementing the UNCRC and fulfilling Scotland's human rights obligations to these children is not optional.

There is a legal imperative that to ensure all Scottish public authorities act compatibly with the UNCRC and human rights law, Scotland must urgently legislate to prohibit any child under-18 being detained in a prison or YOI.

### **1.1.1 The right of children not to be deprived of their liberty**

There are widespread, global concerns about the detention of children,<sup>4</sup> including the UN Special Rapporteur on Torture, stating that even "very short periods of detention can undermine the child's psychological and physical wellbeing and compromise

---

<sup>1</sup> Including, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) and the Standard Minimum Rules for the Treatment of Prisoners.

<sup>2</sup> [Council of Europe Guidelines on Child-Friendly Justice \(2010\); article 40 UNCRC](#)

<sup>3</sup> [CRC General Comments | CRIN](#)

<sup>4</sup> Hammarberg, T. (2008). A Juvenile Justice Approach Built on Human Rights Principles. Youth Justice 8: 193-196, p196.

cognitive development”.<sup>5</sup> Deprivation of liberty of children is also recognised as a form of structural violence in violation of Goal 16.2 of the Sustainable Development Goals<sup>6</sup> (SDGs), and described by UN expert for the Global Study of Children Deprived of their Liberty, Professor Manfred Nowak, as a, ‘deprivation of childhood.’<sup>7</sup>

UNCRC Article 37 requires that children must not be deprived of their liberty, unless they pose a serious and imminent risk of harm to themselves or others. However, in Scotland children are known to be incarcerated in YOIs, either on remand or after sentencing, where this is not the case.<sup>8</sup> For example, [research](#) shows that in some cases, sheriffs remand children for low-level offences, lack of suitable accommodation, or minor breaches of bail, rather than because of serious risks posed by (or to) the child. This both breaches the UNCRC and does not constitute a proportionate and necessary limitation on the child’s right to freedom under [ECHR Article 5](#). The ECHR has made the particular point that pre-trial detention of children should only be used in the most exceptional cases, stating that, “...a very important factor... is the defendant’s age: thus pre-trial detention of minors should be used only as a measure of last resort and for the shortest possible period.”<sup>9</sup>

[The UN Committee on the Rights of the Child, in its Concluding Observations to the UK](#), criticised the use of penal institutions for children, calling on the UK and devolved governments to

*“[e]nsure that children in conflict with the law are always dealt with within the juvenile justice system up to the age of 18...[and]...establish the statutory principle that detention should be used as a measure of last resort and for the shortest possible period of time and ensure that detention is not used discriminatorily against certain groups of children...that child detainees are separated from adults in all detention settings.”*

### **1.1.2 The right of children to be treated as children and in an age-appropriate manner**

UNCRC Article 1 states that all humans under the age of 18 must be treated as children, and Articles 37 and 40, require that they must be treated in an age-appropriate manner. However, in Scotland large numbers (2,200 in 2017-18) of children as young as 12 are prosecuted, tried, remanded and imprisoned through the adult court system.<sup>10</sup>

This denies them their right be treated in an age-appropriate manner, and to access the particular rights afforded to all children, regardless of their offences or alleged offences, under the UNCRC. Contrary to Article 1, under [The Criminal Justice \(Scotland\) Act 1995](#), as amended by the [Children’s Hearings \(Scotland\) Act 2011](#),

---

<sup>5</sup> Mendez, JE. (2015). Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Geneva: UNHRC. <http://bit.ly/36li08x>.

<sup>6</sup> UNGA Resolution 70/1 “Transforming our world: the 2030 Agenda for Sustainable Development”, UN Doc A/RES/70/1 of 21 October 2015.

<sup>7</sup> Manfred Nowak, The United Nations Global Study on Children Deprived of Liberty, Geneva, November 2019 (hereinafter referred to as the “Global Study”), available at <http://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562>.

<sup>8</sup> [SCCYP-CentreForYouth.pdf \(parliament.scot\)](#)

<sup>9</sup> [CASE-OF-KORNEYKOVA-v.-UKRAINE.pdf \(lachild.eu\)](#)

<sup>10</sup> [SCCYP-CentreForYouth.pdf \(parliament.scot\)](#)

Scotland continues to define certain 16 and 17 year olds as adults, rather than children. [For example](#), 16 and 17 year olds who are not currently subject to compulsory supervision orders (CSO) through the children's hearings system (CHS) or in an open case to the Scottish Children's Reporter Administration (SCRA) are not defined as children in this legislation, and legislation currently prohibits them from being referred to the CHS, rather than the adult courts.<sup>11</sup> Thus, although the Children and Young People (Scotland) Act 2014 has gone some way to defining a child as any individual under the age of 18, it has not been applied to all settings.<sup>12</sup> The UK has been specifically [criticised](#) regarding the treatment of children in adult systems<sup>13</sup> and contemporary research and evidence<sup>14</sup> suggests that much greater consideration of childhood and adolescent maturation and developmental factors is necessary to ensure rights compliance in the criminal justice system.

Children's additional rights under the UNCRC, for example, under Articles 28 and 29 to education, 'directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential', and to the highest attainable standard of health, (under Article 24), and to services for recovery and social integration (under Article 39), complement existing Scots law provisions for children in the care and protection system. However, children who are prosecuted in the adult criminal justice system are not provided with their rights as 'children', to be treated in a manner consistent with their sense of dignity and worth, in a 'child-friendly' justice system, and to promote children 'assuming a constructive role in society', under Article 40.

### 1.1.3 The primacy of the child's best interests

UNCRC Article 3 states that in all actions by the state concerning children, "the best interests of the child shall be a primary consideration". [The Committee of Ministers to Member States on the European Rules for Juvenile Offenders](#) adds detail to this, recommending that:

*"The imposition and implementation of sanctions or measure shall be based on the best interests of the juvenile offenders, limited by the gravity of the offences committed (principle of proportionality) and take into account their age, physical and mental well-being, development, capacities and personal circumstances (principle of individualisation)..."*

In both remanding and sentencing under-18s to YOIs rather than providing community-based interventions or, where necessary, secure care, this provision is not adhered to in Scotland.

It is well known that a large proportion of children who find themselves in custody tend to be from poor, complex and vulnerable backgrounds, have educational challenges, have suffered from traumatic events, neglect or abuse, and are

---

<sup>11</sup> [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#): Section 49(1))

<sup>12</sup> [Use and impact of bail and remand with children in Scotland \(cycj.org.uk\)](#)

<sup>13</sup> [CRC/GBR/CO/5 UNCRC Concluding Observation \(2016\)](#) para 79

<sup>14</sup> [The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts Literature Review \(2020\)](#) Suzanne O'Rourke; Heather Whalley; Sarah Janes; Niamh MacSweeney; Asaly Skrenes; Suzy Crowson; Laura MacLean; Matthias Schwannauer University of Edinburgh

care-experienced.<sup>15</sup> Secure care is a much more appropriate setting to provide therapeutic support for children with such complex needs than YOIs. Secure care accommodation has greater staff-to-child ratios, operates as a child-care rather than a punishment setting, and has more child-centred designs and environments, with therapeutic support central to the care they provide. Children in secure care also tend to be able to maintain better family contact, as well as better educational opportunities and preparation for release.<sup>16</sup> The development of the new human rights based [pathway and standards](#) reflects an ongoing commitment of all secure services to ‘drive forward the transformational change to improve the experiences and outcomes for children who are experiencing extreme vulnerabilities’.

Arrangements for ensuring staff have the training and support they need appear favourable in secure care. Staff working in secure services must be registered with the Scottish Social Services Council, or General Teaching Council for Scotland, which means they have completed a relevant qualification and must provide evidence of ongoing learning and development to maintain their registration. Services are inspected every year by the Care Inspectorate with reference to [codes of practice](#) and person centred [national standards](#). Currently, staffing is rated as good in all services with one service given the highest rating of “excellent”. This reflects an overall position where, at a minimum, professional supervision and other support is in place in all services and staff have good access to extensive training.

On the other hand, YOIs are primarily punitive institutions, ill-equipped to help rehabilitate these children, and with a lack of capacity and support for staff to provide the type of care that the children need.<sup>17</sup><sup>18</sup><sup>19</sup> [For example](#), evidence on YOIs in Scotland suggests that children spend long periods of time alone in their cells with little or nothing to do, and with limited access to support, educational opportunities or job opportunities. In the most recent HMIPS inspection report for HMP YOI Polmont, where under-18s accommodated in the prison estate are held, HMIPS noted that the setting is inappropriate for children, with staffing and architectural structure more appropriate for an adult prison.<sup>20</sup> Concerns have also been raised about the over-use of strip-searching in YOIs,<sup>21</sup> as well as segregation and pain-inducing restraint techniques for children in YOIs. For example, an HMIPS survey of children in [HMP YOI Polmont](#) survey found that 83% of children in HMP YOI Polmont had been strip-searched, 42% had been isolated for punishment, and 27% had been physically restrained. These mechanisms are not used in secure care.<sup>22</sup><sup>23</sup>

---

<sup>15</sup> [A Guide to Youth Justice in Scotland: policy, practice and legislation \(cycj.org.uk\)](#)

<sup>16</sup> [A Guide to Youth Justice in Scotland: policy, practice and legislation \(cycj.org.uk\)](#)

<sup>17</sup> [\\*Scotland’s approach to children in conflict with the law \(cycj.org.uk\)](#)

<sup>18</sup> [SCCYP-CentreForYouth.pdf \(parliament.scot\)](#)

<sup>19</sup> [‘It’s Knowing the Right Things to Say and Do’: Challenges and Opportunities for Trauma-informed Practice in the Prison Context - VASWANI - 2019 - The Howard Journal of Crime and Justice - Wiley Online Library](#)

<sup>20</sup> [Report on Full Inspection of HMP YOI Polmont - 29 October to 2 November 2018 | HMIPS \(prisonsinspectoratescotland.gov.uk\)](#)

<sup>21</sup> [SCCYP-CentreForYouth.pdf \(parliament.scot\)](#)

<sup>22</sup> [SCCYP-CentreForYouth.pdf \(parliament.scot\)](#)

<sup>23</sup> [A Guide to Youth Justice in Scotland: policy, practice and legislation \(cycj.org.uk\)](#)

As [CYCJ](#) have noted:

*“Although HMP YOI Polmont will offer these children the best possible care they can, they are not designed to be therapeutic environments, cannot offer the same level of trauma and attachment informed support, nor the high staff to child ratio, necessary to meet the needs of these children and may compound the impact of previous traumatic experiences or retraumatise them”.*

## 1.2 Political and economic imperatives

The Scottish Government acknowledges the damaging effect that imprisonment has on children, and is committed to removing children under the age of 18 from the prison estate. However, there is a need to expedite this process to immediately restore the human rights of those children currently held in YOIs.

### 1.2.1 Scottish Government Commitments

The Scottish Government already acknowledges in the [Programme for Government 2021-22](#) that the way imprisonment is used needs to change, given its “often inherently damaging” nature for both adults and children. It has already committed to legislation to reflect the fact that prison should only be used for those “who pose a risk of serious harm”.<sup>24</sup>

The Scottish Government has also already committed, in [A Rights-Respecting Approach to Justice for Children and Young People: Scotland’s Vision and Priorities](#), to ensuring that as far as possible, “no under-18s are detained in young offenders institutions, including those on remand, with secure care and intensive residential and community-based alternatives being used, where trauma-informed approaches are required for the safety of the child or those around them”. Its [2021-22 action plan](#) also contains a plan to explore electronic monitoring options to reduce the use of remand and/or secure care for under-18s.

Similarly, the Independent Care Review’s [The Promise \(2020\)](#) committed to removing all 16 and 17 year olds from Young Offender Institutions (YOIs) and the prison estate by 2030, and instead, if necessary, accommodating them in secure care where they would receive greater support than in a prison environment. [Plan 21-24](#) of The Promise, commits to ending “the disproportionate criminalisation of care experienced children and young people”, ceasing placing 16 and 17 year olds in YOIs, and ensuring “sufficient community-based alternatives so that detention is a last resort” by 2024. It also commits to ensuring that children who do not need their liberty restricted will be cared for in small, secure, safe, trauma-informed environments that uphold their rights, concluding that, “under-18s are children – there should be no 16 or 17 year olds in YOIs. Being placed in prison like settings is deeply inappropriate for children.”<sup>25</sup>

---

<sup>24</sup> [fairer-greener-scotland-programme-government-2021-22.pdf](#)

<sup>25</sup> [#KeepThe Promise : Youth Justice p2](#)

However, the present proposal argues that these measures must be implemented imminently in order to quickly restore the age-appropriate human rights as defined by the UNCRC, to those children currently held in YOIs in Scotland.

### **1.2.2 Reduce overcrowding in the prison estate**

Given the overcrowding of the adult prison estate in Scotland, there is an economic imperative for removing under-18s – who must be kept separate from adults in custody – from the prison estate. Unlike the adult prisons, HMP YOI Polmont currently operates significantly under-capacity, and the removal of children would create the potential to ease the burden on the rest of the estate by expanding the adult population into HMP YOI Polmont.

### **1.2.3 Reduction of recidivism**

Therapeutic environments and interventions, such as those offered in secure care settings, have been shown to reduce reoffending among children and young people in a number of European contexts, particularly where children and young people are assessed by their needs rather than their potential risks. In particular, building strong, therapeutic relationships between staff and children – something secure care units specialise in – are central to preventing reoffending.<sup>26</sup>

[As argued by CYCJ](#), while YOIs will seek to offer the best support possible for children and young people, they are not designed as therapeutic environments, and cannot offer the same level of trauma-informed support which is necessary to promote children’s physical and psychological development and recovery from trauma, neglect and exploitation. Nor can YOIs offer the high staff-to-child ratio needed to meet the needs of children in custody, and fulfil their rights to recovery from trauma, under Article 39 of the UNCRC.

## **1.3 Moral imperatives**

Alongside the imperatives to remove children from the prison estate based on international human rights law, there are also moral imperatives to remove these children from YOIs as soon as possible. These relate to the way in which Scotland treats some of its most vulnerable and disadvantaged children.

### **1.3.1 Inequality and the need to support Scotland’s most vulnerable children**

Children from particularly disadvantaged backgrounds are far more likely to find themselves incarcerated than their less disadvantaged peers. Children in prison often have complex histories, including experiencing: sexual, physical or emotional abuse; physical or emotional neglect; familial/parental substance abuse, domestic violence, mental illness or incarceration; community violence; and other trauma.<sup>27</sup> They also often have educational difficulties, including speech, language and communication issues,<sup>28</sup> and a large proportion are care experienced. In a recent survey of children in [HMP YOI Polmont](#), 85% of children held in HMP YOI Polmont had suffered a close bereavement, 85% had experience parental separation, 46%

---

<sup>26</sup> [\\*SCCYP-CentreForYouth.pdf \(parliament.scot\)](#)

<sup>27</sup> [A Guide to Youth Justice in Scotland: policy, practice and legislation \(cycj.org.uk\)](#)

<sup>28</sup> [SCCYP-CentreForYouth.pdf \(parliament.scot\)](#)

had suffered physical abuse, 46% had suffered emotional abuse, 46% had mental health issues in their families, 42% were care experienced, 31% had experienced violence in the home, and 31% had family members who had been incarcerated.

Children in prison also suffer from poor mental health, with the [HMP YOI Polmont survey](#) finding that 46% of children had had suicidal thoughts, 31% had self-harmed, and 23% had attempted suicide.

It is clear from this evidence that most children in custody have had extremely difficult starts in life, and their complex needs and traumatic backgrounds highlight their need for intensive, therapeutic support rather than the more adult environment of a YOI. As the [Independent Care Review](#) concluded, “young offenders institutions are not appropriate places for children, and only serve to perpetuate the pain that many of them have experienced”.

### **1.3.2 The overuse of remand for children in Scotland**

[CYCJ research](#) suggests the overuse of remand for children in Scotland. In September 2021, 82% of children in the Scottish prison estate were detained on remand.<sup>29</sup> As discussed above, in contravention of [UNCRC Article 37](#) and [ECHR Article 5](#), children on remand are often detained not because they pose a serious risk to themselves or others, but for minor infractions, and are entitled to a presumption of innocence<sup>30</sup>.

[Children on remand](#) spend long periods alone in their cells, with fewer opportunities for activities, education or support than their convicted peers. They also live with much greater uncertainty as they do not know how long they can expect to be in custody. This situation was exacerbated when the Covid-19 pandemic broke out, with pandemic restrictions inside YOIs and HMP YOI Polmont leading to increased periods of isolation, and a lack of contact with friends, family, lawyers and social workers for remanded children and young people.<sup>31</sup> This poses a significant mental health risk for children and young people on remand, many of whom are among the most vulnerable children in Scotland and often have complex social, health and psychological needs.<sup>32</sup> No efforts have been made to ensure that children in custody were protected from the disproportionate impact of these restrictions on their human rights as children.

## **2. Barriers and their solutions**

### **2.1 Legal barriers and solutions**

There are currently a number of legislative barriers to removing all under-18s from the prison estate, and ensuring that in future under-18s are not detained in YOIs. It is therefore proposed that the legislation is changed to ensure the following principles apply:

---

<sup>29</sup> [CYCJ Newsletter, October 2021](#)

<sup>30</sup> UNCRC article 40 (2)(b)(i).

<sup>31</sup> [CRJA-appendix-conflict-law.pdf \(cypcs.org.uk\)](#)

<sup>32</sup> [Lightowler et al. Not Cut out for Prison.pdf \(scotland.gov.uk\)](#)

- All people under the age of 18 should be defined in law as children, and treated and respected as such;
- All children should have the legal right not to be deprived of their liberty, unless they pose a significant and imminent risk of harm to themselves or others, and all other avenues for mitigating this risk have been exhausted;
- Courts should be prohibited from sending children under the age of 18 to YOIs, with secure care used when deprivation of liberty is the only proportionate and necessary option to meet their rights and needs;
- All cases involving children under the age of 18, who are alleged to have committed offences, should be referred to the Scottish Children’s Reporter’s Administration (SCRA), and if deemed appropriate, processed in the children’s hearings system (CHS). In exceptional circumstances where trial by jury, under Solemn procedure is deemed a necessity (e.g. in the case of alleged, exceptionally serious crimes, such as murder, attempted murder or serious sexual offences) a child may be jointly reported to SCRA and the Crown Office and Procurator Fiscal Service (COPFS) and a decision taken as to the process and procedure for trial, ensuring the child’s human rights to ‘child friendly justice’<sup>33</sup> are respected;
- The child’s best interests should be a primary consideration in these exceptional circumstances, when a child is prosecuted, tried and sentenced in the adult criminal justice system.

Drawing primarily on the CYPCS, legal analysis of Scots law compliance with the UNCRC, for children aged 16 and 17 years ([Whiting \(2020\)](#)) the specific legislative changes proposed, which would bring domestic legislation in line with existing international law, are as follows:

### **2.1.1 Children’s Hearings (Scotland) Act 2011:**

- i. s.26: Whatever setting the child is referred to, or prosecuted in, their “best interests” must always be the paramount consideration.
- ii. s.199: All persons under the age of 18 must be legally defined as children.

### **2.1.2 Criminal Procedure (Scotland) Act 1995:**

- i. s.307: All persons under the age of 18 must be legally defined as children;
- ii. s.49(1): All children under the age of 18 who are alleged to have committed serious offences and are likely to be in need of compulsory supervision, must be referred to the CHS
- iii.a. s50(4): In any proceedings where a child under-18 is a witness, victim or accused person, the Court must consider taking the evidence of the child *in camera* and in the best interests of the child;

---

<sup>33</sup> In accordance with the [Council of Europe Guidelines on Child Friendly Justice \(2010\)](#)

iii.b. s.50(6): Whatever setting the child's case is being heard in, their "best interests" must always be a primary consideration, and their views must be taken into account, in determination of the disposal.

iv. Bail: the current test of "good reason" is not sufficient.

iv. a. s.23B and 23C: For anyone under the age of 18, there must be a presumption against pre-trial detention, except in exceptional circumstances in which the child poses a serious and imminent risk of harm to others or themselves, which cannot be reduced to a manageable level in the community

iv.b. s.51(1)(aa) and S.51(1)(b): Amend from 16 to 18 throughout so that committal to YOI and prison, must not be an option for anyone aged under-18

iv.c. In cases where bail is refused, and deprivation of a child's liberty is necessary and proportionate as a matter of last resort in their best interests, any child under age of 18, must be placed in secure care accommodation, or in the care of the local authority, in a place of safety, rather than a YOI.

iv.d. Amendment of s.30 to introduce mandatory bail review periods for people under-18<sup>34</sup>; with an additional, requirement that the child's age, best interests and views must be primary considerations in any decision to grant or refuse bail, (or review an earlier grant or refusal) and to remand to secure accommodation.

v. Sentencing: The current test of whether "no other method of dealing with them is appropriate" is insufficient.

v. a. s.207(3) and s.208(1): the existing statutory presumption against any form of detention or deprivation of a child's liberty, for anyone under-18, be extended to ensure it is rebuttable only if the child presents an imminent risk of significant harm to public safety or themselves, which cannot be reduced to a manageable level in the community.

v.b. In cases where detention or deprivation of liberty of a child under-18, cannot be avoided, and is necessary and proportionate in the best interests of the child, this must only be permitted in secure care. Furthermore, the court must only be able to authorise a short maximum period of detention, following which a presumption of release should apply.

### 2.1.3 Emergency provisions:

i. **The Coronavirus (Scotland)(No.2) Act 2020**, s.3, Schedule 2<sup>35</sup>, provides for modifications to the law in response to coronavirus, in relation to the operation of the justice system. Given the increased, public health risks for people detained in institutions during the pandemic, urgent consideration must be given to using the section 7 power, to amend existing law, and release all 16 and 17 year olds from

---

<sup>34</sup> Timeframes could be aligned to the secure accommodation authorisation regulations and interim Compulsory Supervision Order requirements for mandatory reviews, to assess necessity of the order within 22 days.

<sup>35</sup> <https://www.legislation.gov.uk/asp/2020/10/schedule/2>

YOI, and to prevent under-18s being remained or detained in custody in YOIs, as outlined above.

ii. **The Release of Prisoners (Coronavirus) (Scotland) Regulations 2020**, and the **Coronavirus (Scotland) Act 2020**: consider urgently, using emergency provisions to provide for the immediate release of all children currently detained in YOI, to introduce new provisions:

ii.a. Regulation 2: amend the category of prisoner eligible for early release to all children under the age of 18, with no 'governor's veto'; and

ii.b. to require that a best interests, risk and needs, welfare assessment is undertaken<sup>36</sup>, by the supervising local authority; and

ii.c. to ensure the child is committed to the care of the local authority and placed in alternative care, in a place of safety in the community, or in secure care, as an immediate alternative to custody in YOI, within 72 hours of the regulations coming into force.

#### **2.1.4 General amendments:**

i. A statutory presumption in favour of diversion away from the criminal justice system and the CHS, for all under-18s must be introduced, with prosecution only permitted in the most serious cases (clearly defined, and where in the public interests and the best interests of the accused child);

ii. Where prosecution, or criminal proceedings are required, and proportionate in the public interest and in the best interests of the accused child, a statutory presumption that the child will be dealt within the CHS is required.

iii. Children should not be treated any differently because they are co-accused with adults.

## **2.2 Financial and practical barriers and solutions**

The financial and practical barriers suggest a need to reorganise the funding model for secure care to ensure that places are always available for Scotland-based children who need them.

### **2.2.1 Financial constraints for local authorities on funding secure placements for remanded children and young people**

**Barrier:** Although the Scottish Government is responsible for the costs of a child serving a custodial sentence when detained in secure care, if a child is remanded in secure care awaiting trial or sentencing, the cost falls on the local authority. This includes costs such as secure transport to and from court. Due to funding constraints, local authority children's services are currently under exceptional

---

<sup>36</sup> In accordance with the Getting It Right for Every Child policy and statutory duties, as public authorities, and Corporate Parents.

levels of financial pressure. Spending on secure care remands – where the local authority has no control over the length of the placement, and is unable to provide a community-based support even where this is available – therefore represents a significant budgetary burden for local authorities.

**Solution:** The solution is two-fold. Firstly, reducing the use of remand to only those who pose serious and imminent risk of significant harm to themselves, or others would reduce the overall number of children being accommodated in secure care on remand. Secondly, centralising the cost of secure care for remand detentions – as is currently the case for custodial sentences – so that the cost is met by the Scottish Government rather than local authorities.

### **2.2.2 Lack of capacity in secure care accommodation**

**Barrier:** A potential risk to transferring children currently in YOI accommodation to secure care is a lack of space in secure care accommodation. This lack of space is to some extent caused by the fact that secure care providers are independent charities whose financial model depends on operating at 90% capacity to maintain their business.<sup>37</sup> Because of this, they have increasingly relied on cross-border placements to remain operational.

**Solution:** While in the short term there may be constraints on space, removing children from YOIs and into secure care would reduce the current dependency on cross-border placements, rather than resulting in too few beds to accommodate all Scotland-based children in need of secure care. The Scottish Government should also centrally fund at least 15 secure beds for emergency use to ensure that the risk of shortages is extremely minimal.

As above, if the proposed legislative changes were implemented, this would also see a reduction in the number of those currently remanded to YOIs being held in custody, as remand would be limited to use in extreme circumstances only.

## **2.3 Societal/cultural barriers and solutions**

A number of the barriers to removing under-18s from the prison estate derive from societal perceptions of the nature and role of secure care centres, YOIs, and the children and young people who find themselves in the prison estate. In most cases, these perceptions are not borne out by the available evidence, and it is important that this is clearly communicated.

### **2.3.1 Perception that secure care cannot cope well with violent children and young people, and that they would present a risk to those placed in secure care on welfare grounds**

There is a perception that secure care providers cannot cope with extremely violent children and young people and those who have committed serious offences.

---

<sup>37</sup> [Scotland Excel web.pdf \(parliament.scot\)](#)

However, this perception is wrong and should not be a barrier to moving children from YOI to secure care. Secure care is already an established care-provider for some children who have been remanded or sentenced having been alleged to have committed or been found guilty of serious offences.<sup>38</sup>

[Research](#) published by the UK Department for Education (DfE) in 2021 found that within secure care in England, the level of risk posed by individual children and young people did not appear to be related to whether the child had entered secure care via the “welfare” route (through a social work referral) or the “justice” route (from the criminal justice system). Rather, children tended to have similar backgrounds, challenges and needs, regardless of the route they had come through. As the authors state:

*“Respondents noted that children placed [in secure care] on welfare grounds are often just as violent, or more violent [than those placed in [secure care] as a result of criminal proceedings]... some respondents said that the number of welfare children whose behaviour they struggle to manage is higher than the justice children...”*

### **2.3.2 Perception that secure care homes do not offer the same level of risk and needs assessment for children and young people transferring in and out of the establishment as YOIs.**

Risk assessments are carried out by all secure care providers, although it is acknowledged that there is some concern that secure care providers do not offer the same level of risk and needs assessment as YOIs for children transferring in and out of the establishment.

While there is no uniform approach to risk assessment across the five secure care providers, they do nevertheless all conduct risk assessments. All children in secure care should have a “child’s plan” in line with GIRFEC, as children in care who are looked after. They should also have a statutory, Co-ordinated Support Plan under the [Education \(Additional Support for Learning\) \(Scotland\) Act 2004](#). Where formal risk management is appropriate, children in secure care will also have an assessment of risk completed by the local authority in line with the updated [national guidelines](#). Individual secure care providers also operate their own specific risk assessment services. For example, most secure care home operate a [Specialist Intervention Services \(SIS\)](#) team which conducts a first-level psychological assessment (FLPA) of each young person on arrival, screening for risks such as mental health difficulties, adverse childhood experiences, drug misuse, suicidal ideation and self-harm.

It is important that relevant professionals and key stakeholders working in secure care, health, social work, and education are engaged to understand what greater training and support they think is necessary both for staff working with children in secure care, and for the children themselves, and to ensure that this is provided.

---

<sup>38</sup> [Info-sheet-85.pdf \(cycj.org.uk\)](#)

### **2.3.3 Perception that under-18s who have committed the most serious crimes should be treated as adults**

Finally, there is a perception that under-18s who have committed particularly serious crimes deserve to be dealt with as adults, going through the adult court system and, if found guilty, serving a prison sentence.

This fails to take account of what we know through developments in the study of the brain, namely that it can continue to develop until the age of 25. This has been considered recently and contributed to the development of the Scottish Sentencing Council's Guideline on Sentencing Young People<sup>39</sup> which emphasised the importance of, and opportunity for, rehabilitation in young people as well as impacting on the determination of blame when assessing the seriousness of a crime.

In addition to the change in sentencing guidelines, the perception can be overcome by the legislative changes in domestic Scots law, outlined above, to ensure that it is in line and compatible with the UNCRC, all children are treated as such, regardless of their crimes or alleged crimes<sup>40</sup>. In conjunction with changes to the legislation, it is recommended that updated guidance and training is provided to relevant professionals.

## **3. Proposal**

Given these legal, political, and moral imperatives, it is critical that Scotland fulfils its human rights obligations for all children and young people within the shortest time frame. Whilst being aware of the anticipated Care and Justice Bill in 2022 HMIPS believe that immediate steps are required to bring forward legislative amendments<sup>41</sup>, as necessary, within the justice systems, to ensure that Scots law is compatible with international, human rights law and standards, including the requirements of the UNCRC to:

1. as a matter of urgency, and no later than 31 March 2022, introduce specific, legislative amendments under the Coronavirus provisions, to ensure that no further children, under-18 years of age can be lawfully remanded, or detained in prison or YOI, and that all children are removed from custody and provided with suitable alternative accommodation to meet their rights and needs, in their best interests.<sup>42</sup>
2. define 'a child' as a person under the age of 18 years;
3. prevent the detention and deprivation of liberty, of any child under the age of 18 years, in a prison, or YOI;
4. expedite the current work underway to meet the requirements of the UNCRC, the Youth Justice Vision, Programme for Government, and the Promise, within the first parliamentary year, and not allow further delays until 2024, as suggested;

---

<sup>39</sup> In force from 26 January 2022.

<sup>40</sup> Articles 1 and 40 of the [UNCRC](#)

<sup>41</sup> As outlined in paragraphs 2.1.1, 2.1.2 and 2.1.3

<sup>42</sup> as suggested in paragraph 2.1.3, or by other means.

5. develop a guidance, training and awareness package in the human rights compliance for children in conflict with the law, and cascade it to all stakeholders, as part of the ongoing UNCRC, Justice, and the Promise implementation strategies.

6. urgently review the funding model and adopt and implement the proposal for Scottish Government funding to ensure that all necessary custody or remand placements are provided in secure care.

## Conclusion

You are invited to note the contents of the proposal in the imperatives and proposed solutions to the real and perceived barriers, to ensure that Scottish Government fulfils its promise, and commitment to a maximalist approach to respecting, protecting, and fulfilling the human rights of all children under-18 in Scotland.

*Wendy Sinclair-Gieben*

### **Wendy Sinclair-Gieben**

HM Chief Inspector of Prisons, Scotland  
HM Inspectorate of Prisons  
Saughton House  
Broomhouse Drive  
Edinburgh  
EH11 3XD

Tel: 0131 244 8482 | Mob: 07964 382254

Email: [Wendy.Sinclair@gov.scot](mailto:Wendy.Sinclair@gov.scot)

Web Site: [Click on the logo below](#)



**HMIPS**  
HM Inspectorate of Prisons for  
Scotland  
INSPECTING AND MONITORING