REPRESENTING CARE EXPERIENCED CHILDREN & YOUNG PEOPLE IN POLICE CUSTODY: A GOOD PRACTICE GUIDE

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"THIS IS AN INTERESTING, EXPERIENTIAL AND CONSTRUCTIVE GOOD PRACTICE GUIDE DEVELOPED BY THE CHILDREN AND YOUNG PERSON'S CENTRE FOR JUSTICE AND SCOTTISH CHILD LAW CENTRE BASED ON THEIR ACADEMIC EXPERTISE ON HOW BEST TO DEAL WITH CHILDREN THAT ARE INVOLVED IN OUR CRIMINAL JUSTICE SYSTEM. WE ARE INCREASINGLY AWARE OF THE NEED TO RESPECT CHILDREN'S RIGHTS, INCLUDING THOSE WHEN THEY INVOLVED IN CRIMINAL JUSTICE.

"I WELCOME THE DEVELOPMENT OF SUCH GUIDANCE AS IT IS HELPFUL FOR CRIMINAL PRACTITIONERS WHEREVER THEY ARE BASED IN SCOTLAND FROM TRAINEE TO PARTNER TO ASSIST THEM IN EFFECTIVE PRESENTATION OF THEIR CLIENTS."

DEBBIE WILSON, CONVENOR OF THE CRIMINAL LAW COMMITTEE

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This paper is part of a collection of good practice guide resources which can be accessed here.

INTRODUCTION

Children with care experience are more likely than their peers to experience police contact and criminalisation, despite no evidence that they commit greater offences than other children. They are less likely to receive support at the police station from family or a responsible adult which can affect both their experience of police custody and the criminal justice outcome (CYCJ, 2016). For the purposes of this paper, a child is referred to as an individual under the age 18. Many of the principles highlighted should also be applied to care leavers up to age 26 and arguably beyond. As defined by the Independent Care Review (2020) a child who is legally defined as 'looked after' will be referred to as a child with care experience.

In 2018-19, there were 14,015 children currently experiencing care in Scotland, with 10% of these children cared for in residential child care (RCC) (Scottish Government, 2020). The number of children detained in police custody in Scotland on any given day is not known, but estimated to be about 14 from the information available (HM Inspectorate of Constabulary in Scotland, 2018).

Statistics show that care leavers are overrepresented in the criminal justice system in Scotland, with over one quarter of those surveyed in HMYOI Polmont in 2017 self-reporting as care experienced (Scottish Prison Service, 2018) and one in seven (14%) had been in care at the age of sixteen. Just under a half of young people in

custody (46% n=82) reported being in care as a child and over a quarter (27% n=48) were in care at the age of sixteen. Although those who have been in care only make up an estimated 0.5% of the general population, they make up 33% of Scotland's youth offender population and 31% of Scottish adult prisons (Scottish Prison Service, 2018).

> "SCOTLAND MUST ENSURE THAT GOING INTO CARE DOES NOT MEAN YOU HAVE A HIGHER CHANCE OF BECOMING CRIMINALISED AND THEREFORE, HAVE POORER OUTCOMES"
>
> (WHO CARES? SCOTLAND, 2018, P. 3)

Being held in police custody, particularly in a police cell, can be extremely disturbing and damaging for any child. Children's emotional and physical responses to trauma and fear can exacerbate their distress and their criminal justice outcomes, for example if they resist arrest or injure a police officer. Children may be subjected to distressing procedures such as strip searching, restraint or the taking of intimate samples; often they do not understand the letter of rights or know what their rights are. The experience of being arrested and held in police custody can be particularly acute for children with care experience who may have histories of trauma and/or additional support needs. Recent research has shown that children who have experienced care tend to have harsher and longer experiences in police custody (Bevan, 2018). **Solicitors do and can challenge detention and improve children's custody conditions**.

> "YOU NEED TO HAVE A GOOD SOLICITOR TO SET THE SCENE. THERE SHOULD BE SOMEONE OR SOLICITOR TO EXPLAIN THINGS AND TO MAKE SURE THEY HAVE YOUR BEST INTERESTS"
>
> (YOUNG PERSON)

Detaining children can have very negative consequences for their health and development and seriously hamper their reintegration in society.

The Global Study on Children Deprived of Liberty found that children experience "…fear, isolation, trauma and harm in addition to discrimination, stigma and disempowerment" (UNCRC, 2019, p. 8). The negative impacts of detention contributes to poor physical and mental health, lack of access to education, a high rate of recidivism, family breakdown and unemployment, resulting in higher costs for the State in the long term (Justice for All, 2019). It is also recognised that the removal of children from their families and communities to secure care or custody interferes with processes and factors generally thought to promote desistance, including developmental processes, positive links with the community, family ties, employment and housing (Rutherford, 2002). This has lead the UNCRC (2019, p. 23) to conclude "deprivation of liberty constitutes a form of structural violence against children" and the treatment of children during these times may amount to torture.

Even very short periods of detention can have a disproportionate and negative impact on children's physical, emotional and cognitive wellbeing and development due to their developmental stage (Mendez, 2015). In recognition of this, Article 37(b) of the United Nations Convention on the Rights of the Child (UNCRC (1989)) states that "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". Children deprived of their liberty must also be treated with humanity, in a manner that respects their individual needs and their age. This means separating them from adults in custody unless it is not in their best interests to do so. Every child who is detained must have prompt access to legal and other assistance and has a right to challenge their detention before a court or other authority (CYCJ, 2020c; Scottish Government, 2016). It is also important that these considerations apply to all children as opposed to being determined by the type of offence committed. This is particularly important given the particular scope for rights violations in our approaches to children who commit the most serious harms, as detailed by Lightowler (2020).

If the decision is made that a child is to be kept in detention, this should be in a Place of Safety as detailed in section 22 of the Criminal Justice (Scotland) Act 2016. Only in exceptional circumstances can children be held in a police station. Solicitors need to ensure that all alternatives are explored by the police.

CRIMINALISATION OF CHILDREN WITH CARE EXPERIENCE: CONTRIBUTING FACTORS

Children with care experience are disproportionately criminalised compared to their non-care experienced peers. Children in residential care are most at risk, being around ten times more likely to be criminalised than other children (The Howard League for Penal Reform, 2019).

> "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"
>
> (WHO CARES? SCOTLAND, 2018, P. 3)

Understanding the factors that contribute to the criminalisation of children who are care experienced can help solicitors to provide the best support and advocacy at the police station:

"(A child being care experienced)…it does alert me to the fact that actually, this might indicate that this child has had difficulties in the past rather than thinking they are bad - that something has gone on" (solicitor).

GOOD PRACTICE PRINCIPLES

This paper highlights key legal and good practice principles that are particularly relevant to children with care experience in Scotland. There are examples of good practice from across Scotland, however, we know that not all children in all circumstances experience this.

"Lawyers should tell you all your rights, that they are here to help and that, so things are done fairly" (young person)

PRINCIPLE 1: GATHER KNOWLEDGE

Under Criminal Justice (Scotland) Act 2016, if a child is arrested, they should be advised of their right to have a "duty solicitor". If a child does want a solicitor this should be arranged as soon as possible. Solicitors should make enquires as to the reason and necessity of the child's arrest and ensure that the matter is dealt with expeditiously. Ideally, the solicitor will attend as soon as possible to speak to the child. It is vitally important to ensure everything is done to speed up the process for a child in police custody.

"I was so clueless as a wee guy I should have had (a solicitor) or someone to coach me. Tell me about pleas, how serious it was, that there was a possibility I would get a life sentence. I felt so in the dark with the legal stuff. Told not to give evidence and not to say anything" (young person)

Information should be obtained about the child that can:

- Help you to communicate effectively with the child
- Ensure the child's immediate needs are being met, for example, do they need any medication?
- Allow meaningful consideration of the child's fitness for interview
- Provide relevant evidence and background information about the child to inform representations to divert the child from the criminal justice system
- Enable referrals to meet any additional support needs

The starting point for gathering information will be the child themselves. They will be best placed to tell you who knows them well and who they trust to provide you with supportive and accurate information.

"Get to know us first" (young person)

If possible, speak to the child's responsible adult, social worker or carers prior to going to the police station so you are able to let the Police Officer know about any vulnerabilities or needs. A family member should also be contacted, with the child's consent if over 16 and not on a Compulsory Supervision Order, and informed of their arrest (2016 Act). This may include a parent or a guardian or any person who has the care of the child.

The Council of Europe directions on Child Friendly Justice stresses the importance of a multi-disciplinary approach to working with children involved in offending behaviour. It highlights that there is often a lack of sharing of knowledge and expertise in relation to the child's psychology, behaviour and development needs. Gathering as much information as possible to aid the defence and support to the child should be every solicitor's first priority. Such support is not one size fits all - "and the proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding which will allow the juvenile to participate therein and to express himself or herself freely" (United Nations Committee on the Rights of the Child, 2007, p. 14). Flexibility is necessary to respond proportionately and appropriately to the needs and risks presented by aspects of the behaviour of individual children (CYCJ, 2020d).

Be alert to the possibility that children may not have a good relationship with carers or social worker which may affect the information you are being given and that professionals may not know the child well. If obtaining documents, such as social work records or reports, be aware that the 'paper child' (i.e. the picture of the child that appears on the records) can misrepresent the child and affect understanding and judgements about that child by other professionals (The Howard League for Penal Reform, 2018). Be prepared to challenge any misrepresentations which can profoundly affect a child's criminal justice and social care outcomes.

Consider whether it would be appropriate to ask the child to grant you a mandate authorising release documentation by health and social work professionals, in relation to the child to you as the child's legal representative.

If the child has recently been assessed by a psychologist or psychiatrist a mandate for such a report may help the child's case. In cases where the child has already been charged but there are concerns that they may suffer from poor mental health or learning difficulties, such reports can help determine whether an appropriate expert should be instructed to assess the child or an appropriate adult to support the child.

> "MY SOLICITOR SPOKE TO ME ALL THE TIME AND WAS REALLY HELPFUL AT MY MEETINGS AND COURT. I ALSO HAD A GUARDIAN WHO WOULD SIT WITH ME AND EXPLAIN THINGS TO ME THAT I MAYBE DIDN'T UNDERSTAND. THIS WAS SO HELPFUL AND MADE ME FEEL A PART OF MY MEETINGS"
>
> (YOUNG PERSON)

Corporate Parents

Corporate parenting: "...refers to an organisation's performance of actions necessary to uphold the rights and secure the wellbeing of a looked after child or care leaver, and through which their physical, emotional, spiritual, social and educational development is promoted" (Scottish Government, 2015, p. 4). Part 9 of the Children & Young People's (Scotland) Act 2014 establishes a framework of duties and responsibilities for relevant public bodies, including Police Scotland and local authorities, requiring them to be proactive in their efforts to meet the needs of all children who have experienced care. Children might not recognise themselves as care experienced or volunteer this information. It is therefore important to ask and enquire to ensure support/services are offered and the rights of the child upheld.

PRINCIPLE 2: REVIEW THE DECISION TO HOLD THE CHILD IN CUSTODY

Children should only be kept in custody as a last resort (UNCRC). Seek to prevent any child being held in custody longer than assessed as necessary.

When taking any decision, the Constable must treat the need to safeguard and promote the wellbeing of the child as a primary consideration in relation to the following (Criminal Justice (Scotland) Act 2016):

- arrest a child
- hold a child in police custody
- interview a child about an offence which the Constable has reasonable grounds to suspect the child of committing or
- charge a child with committing an offence.

Solicitors have a role in ensuring the police have followed the duties in the 2016 Act when arresting a child. Arresting and detaining a child is a significant decision, a step only taken when it is entirely necessary to do so (Police Scotland, 2019b).

Children with care experience can often spend longer in police custody because of the difficulties in appointing an adult able to act as a parent as described in section 23 of the Criminal Justice (Scotland) Act 2016 or uncertainty over where they will be released to. Solicitors can assist in reducing the length of time spent in custody by making early enquiries with the child's social worker, carer or RCC.

"I got messed about. I don't remember my solicitor being there it was just my mum" (young person)

Police Scotland (2019a) guidance states: "It is essential that both investigating and custody officers explore all options in relation to the care of a younger child and possible alternatives to detention in police custody prior to appearance at court. The detention of a younger child in a place of safety or police custody should always be viewed as a measure of last resort."

As there is no specific criteria set out in legislation when a child will be kept in custody to appear at court, it is essential that you express your views if you do not agree with a child being detained and believe they could be released on police bail or investigative liberation.

PRINCIPLE 3: EFFECTIVE COMMUNICATION WITH YOUR CLIENT

"Everyone involved in the Children's Hearings System must be properly trained in the impact of trauma, childhood development, neuro-diversity and children's rights. That training must be comprehensive and regularly reviewed. Those training requirements must also be required for all the different and various professionals who appear at Hearings, including legal representatives" (Independent Care Review, 2020, p. 42)

It is essential that solicitors communicate effectively with children so that children are able to understand what is happening to them. This will allow them the best opportunity to put their case across, to prepare them for the police interview and address any issues and needs. You should use clear and simple language, not legal jargon, and give space for children to process and respond. Check their understanding throughout as children need to understand and feel that they are central in all proceedings about them to be able to fully participate.

> "IT'S VERY IMPORTANT WE EXPLAIN TO THEM THE PROCESS BECAUSE THEY DON'T HAVE A CLUE OF THE PROCESS THAT THEY'RE GOING THROUGH, THEY JUST DON'T UNDERSTAND IT AT ALL, IF YOU'VE GOT A 16, 17 YEAR OLD KID IN YOU'RE GOING TO SPEND A BIT LONGER WITH THEM THAT YOU WILL WITH A 35 YEAR OLD..."
>
> (SOLICITOR)

The Howard League for Penal Reform (2018) sets out some practice points that can help solicitors:

- Be up-front about your role, tell the child: who you are;
- what your role is;
- how you will be working with the child and how the child can complain about you if they need to;
- why you need to know the information you are asking them for, and that they can ask you questions too;
- when the child should hear from you;
- Establish a positive relationship;
- Check yourself for bias and be cognisant of particular biases within the criminal justice system against looked-after and Black and Minority Ethnic (BAME) children;
- Be aware of the power imbalance.

"They need to learn how to talk to you. Talk about your situation and risks. They need to explain what their job is in child friendly terms" (young person)

Solicitors also have a duty to inform/encourage the child to express their views freely in all matters affecting them. This should be fully respected and implemented throughout every stage of the process of the youth justice system (rticle 12, (United Nations Committee on the Rights of the Child, 1989)). The UN Committee recognises that experiences of children involved in the youth justice system are a powerful force for improvements and reform and for the fulfilment of their rights (CYCJ, 2020c).

"WE WANT THEM TO SPEAK NORMALLY TO US TO BEGIN WITH LIKE A FRIEND BUT TO BE PROFESSIONAL IN MEETINGS"

(YOUNG PERSON)

Advocating for a child with care experience requires excellent communication skills and a knowledge of the factors that may affect the child's ability to communicate and/or participate effectively. The following principles provide an overview of key considerations and practical guidance drawing on the latest research:

Be aware of language and communication difficulties

About 60% of children in the youth justice system have significant speech, language or communication needs (SLCN); around a quarter have a learning disability. Whilst SLCN are relatively common in all youth justice populations, they are particularly common amongst more high risk and violent offending (Snow & Powell, 2011). As part of SLCN many children with care experience in the justice system may have had disrupted placements, missed school or a diagnosed learning difficulty that has contributed to their literacy problems, or inability to read. It is important that assumptions that children can read are not made. Solicitors should also to try to modify their language and modes of communication used, to meet the child's needs. Avoid jargon and use clear, simple words. Children may have learned to mask or hide their disabilities. Try to sensitively ask relevant questions to ascertain levels of understanding (Aubrey-Johnson, LAmbe, & Twite, 2019).

"Just talk to us, like normal talk" (young person)

Many children are either unaware that they have difficulties, or are uncomfortable disclosing them. There are, however, a number of signs, symptoms and indicators which should give rise to suspicion that an underlying communication problem may be present, or err on the side of caution and presume all children you are representing have a SLCN to ensure no one is missed. Reference to these can help to proactively identify individuals who are likely to have communication needs and plan for appropriate support accordingly (CYCJ, 2020b).

Brain Development

Adolescence is now recognised as a critical period in brain development and an opportunity for new learning. Advances in research have evidenced that adolescent risk-taking behaviours and poor decision making may not be intrinsically motivated, but instead may be due to the increased activation or underdevelopment of specific brain regions (O'Rourke et al., 2020).

"During adolescence and within normal individual development, an imbalanced growth pattern is observed between the brain regions governing emotion and mood…Converging findings suggest that this latter brain region is the last to reach maturity, leaving adolescents with immature and compromised core cognitive abilities for much of this developmental period…In addition…cognitive maturation may be hindered or compromised by several factors including traumatic brain injury, alcohol and substance use, psychiatric and neurodevelopmental disorders and adverse childhood experiences, all of which have the potential to inhibit and disrupt typical development." (O'Rourke et al., 2020, p. 5)().

Research tells us that the brain is not full developed until our mid-20s, and experiences can also impact upon this development. This evidence needs to be taken into account when representing a child who has experienced care.

Be alert to additional support needs and mental health problems

Common conditions that affect children in the criminal justice system are attention deficit hyperactivity disorder, autism spectrum disorder and conduct disorder. Children may also be suffering from mental health problems such as depression and post-traumatic stress disorder (Aubrey-Johnson et al., 2019). Be mindful as to whether the child may have any relevant additional needs or mental illnesses. These should be taken into account when taking instructions, when making representations and when assessing if the child is fit to be interviewed.

A history of neurological trauma is not uncommon in youth justice populations. Children involved in offending are at higher risk of brain injury sustained through violence, falls, overdose or accidents (Kennedy, Heron, & Munafò, 2017).

Providing updates and reassurance

Not knowing what is being done about your case and what will happen to you whilst in police custody can be worrying and even frightening. Keeping children posted about the process and providing reassurances can be particularly important for children with care experience and who are lacking other support. Check in with the child at regular intervals throughout the period of arrest to make sure they understand what is happening, to answer questions and concerns and to make sure they are alright.

PRINCIPLE 4: ESTABLISH RAPPORT AND TRUST

It is essential to establish rapport with the child and to gain their trust. This can be very difficult to do quickly at the police station and it may be particularly challenging with a child with care experience who could have a history of having been let down and/or rejected by adults. Let children know you are on their side. Do not be put off if children appear unfriendly or do not seem to care. Children with care experience, in particular, may be adept at hiding emotions such as anxiety or fear under a front of bravado.

To ensure procedural fairness, children have advised that they want their solicitors to:

- show some understanding
- allow them to have a voice
- respect them and their views
- develop a trusting relationship

(Centre for Justice Innovation, 2020)

"TRY TO GET CRAIC, GET TO KNOW MORE ABOUT MY LIFE, WHY I DO THE THINGS I DO AND UNDERSTAND ME"

(YOUNG PERSON)

Recent research (Bevan, 2019) with children being held at the police station highlights the following:

- Children may not appreciate that solicitors, especially duty solicitors, are independent from the police. It is important to stress to the child the fact that you are not connected to the police in any way and that you are on their side.
- Children do not usually understand legal professional privilege. Solicitors who reassured children, subject to the usual caveats, "I won't tell the police anything you say unless you say that I can" were really appreciated and likely to receive fuller instructions.
- It is critical that solicitors understand the power of peer relationships and carefully navigate how much that may influence what a child chooses to say
- Solicitors should impress on children that they will give advice but that the decision is theirs. Children should be made aware of the seriousness of the situation and the implications of the decisions they take.

"WHEN I WAS UNDERAGE ON COMPULSORY SUPERVISION. THE SOLICITOR DIDN'T EXPLAIN THINGS SO I SAID I DIDN'T WANT ONE. IT WAS FOR SOMETHING I DIDN'T EVEN DO"

(YOUNG PERSON)

Children with care experience have reported that they are not listened to or believed, particularly where incidents have involved care workers who children claim have lied about what happened, assaulted them, or incited the incident (perhaps leading to the child biting or lashing out in self-defence), exacerbated an already fraught situation or called the police out unnecessarily (The Howard League for Penal Reform, 2017). Give children the chance to tell their side of the story, let them know that they are believed and challenge unfair and unnecessary criminalisation. If the child reveals an injury that they say was caused by someone else, take a photograph and consider what further action needs to be taken. Where children have been harmed in the home and may be at risk if they return, alert the child's social worker to the issue and ensure that they are not released to an unsafe environment.

"Don't say you can trust me or promise things that you can't give, tell us straight up and don't sugar coat things"

Gaining children's trust is essential, as is a knowledge of the kinds of difficulties children may be facing, so that the right questions can be sensitively asked to encourage disclosure.

"I SOMETIMES REALISE THAT THERE ARE THINGS GOING ON IN THE YOUNG PEOPLE'S LIVES THAT THEY DON'T SHARE WITH YOU SO YOU DON'T HAVE THAT KNOWLEDGE. I AM ALERT TO THAT BUT I DON'T NECESSARILY HAVE THE SKILLS OR TRAINING TO OVERCOME THAT AND MAYBE AS LAWYERS WE SHOULD BE TRAINED IN RECOGNISING SIGNS OF CHILDREN HAVING A LEARNING ISSUE OR HAVING HAD A TRAUMATIC PAST OR MENTAL HEALTH PROBLEMS - THINGS YOU DON'T NORMALLY ASSOCIATE WITH CHILDREN" TECHNOLOGY"

(SOLICITOR)

PRINCIPLE 5: ADVOCATING FOR CHILDREN'S BASIC RIGHTS AND ENTITLEMENTS

Children sometimes commit the most serious and harmful offences, but as difficult as it can be, it is important to remember that they are still children who most likely have experienced abuse and neglect themselves and are still rights-holders (Lightowler, 2020).

It is often incorrectly assumed that children who have experienced care are familiar with their rights. Research suggests that even children with considerable criminal justice contact and care histories frequently do not know their basic rights and entitlements (Bevan, 2019; Nolan, Dyer, & Vaswani, 2017). Check that children are aware of their rights and advocate on their behalf where necessary to ensure that rights are respected and needs are met. In particular, check the child knows that they are entitled to ask for adequate food and drink as well as access to toilets and washing facilities, clothing, medical attention, and exercise when practicable.

Make sure the child is aware of their right to complain about their treatment both at point of arrest and whilst in custody. Raise any complaints with the Constable in the first instance and support the child to access complaints procedures if necessary.

Wellbeing and conditions of custody

The kinds of issues children have reported are particularly upsetting to them include: strip-searching, restraint, use of the toilet (children often do not know that this part of the cell image is pixelated), menstruation, being on constant watch, lack of food/drink, loneliness, and boredom. Children can find it difficult to raise these sorts of problems with representatives.

- Children have reported that their resulting hunger, exhaustion, and desperation to go home can seriously undermine their ability to cope with questioning and lead to no comment responses or even false confessions in interview (Bevan, 2019).
- Children who have experienced care are much less likely than other children to have a trusted adult at the police station to advocate for their needs or to whom they might disclose particular fears or problems to. Consultation time is likely to be pressured but solicitors acting for these children must consider their wellbeing and the conditions of detention. Ask the child about their conditions in custody and ask to see the detention log. Raise concerns with the Custody Officer about the child's wellbeing. Solicitors who show concern for children in this way are more likely to gain trust and they can help reduce the distress and long-term harm of being in custody for their vulnerable clients.

Strip searches

- Some children may have acquired 'markers' on their police record for self-harm or carrying weapons/drugs which can lead to them being strip searched at the police station, something that is extremely distressing for children, and which may be particularly so for children who have experienced care.
- Challenge Constables to conduct proper risk assessment before resorting to strip and/or intimate searches. Unless there is risk of serious harm to the child or another, a relevant person (e.g. member of family/friend/social worker) could be present when a strip search is carried out.
- If you are present before a strip search, ensure that the child is given the option to have someone with them during any strip search or after to offer support.
- If the strip search occurred before you reached the police station, discuss the process with the child to ensure they are aware of their rights
- Do not underestimate the impact/re-trauma this may cause; and be especially mindful of any additional support required for girls or transgender children
- If a child is stripped and searched inappropriately, the child should be referred to a solicitor specialising in actions against the police

PRINCIPLE 6: INTERVIEW CONSIDERATIONS

Fitness for interview

Fitness for interview can be an important issue for children with care experience because of the prevalence of additional support needs and poor mental health and also because of the length of time some children are detained. Consider discussing with the Custody Officer whether the child has been assessed as fit for interview. Medics in police custody suites often do not have expertise with children with care experience. When they are considering whether a child is fit to be interviewed, they are likely to assess whether they are intoxicated or under the influence of drugs, psychotic or presenting with mental health concerns. They are likely to have very limited information about the child and to be reliant on the child telling them about pre-existing medical conditions. With the child's consent, any relevant information about their health should be passed to the Custody Officer to assist any decisions they make, and to assist medics when they assess the child's fitness.

Children may have concerns about seeing the healthcare professional, perhaps because of lack of trust of professionals or because they are concerned about confidentiality and/or partiality.

They may need reassurance or for you to explain to them the potential benefits.

If the child is deemed to be fit for interview, consideration of whether they need additional support to participate effectively should be undertaken. Bear in mind that appropriate adults will not usually be equipped to support significant participation issues. Solicitors can request the Officer in Charge to consider releasing the child so that specialist supports can be sourced. If you are unable to obtain specialist support for the child, make sure that any concerns about the child's ability to participate are stated at the beginning of the interview on tape.

Interviews

Children always want to know how long something is going to take. Talking to the officer to ask if they have a sense about how long the interview will be can reduce stress and stop the child from getting frustrated or giving up. Before the interview starts, suggest the child goes to the toilet, as children are often too shy or embarrassed to make this request. If they haven't eaten, try to get them to eat something before they are interviewed. These kinds of considerations can have huge bearing on how children 'perform' in the interview.

"Offer us something to eat and drink and to go for a fag" (young person)

Children may not always fully comprehend the long-term consequences of police interviews or may struggle to apply their full attention to the process. It may be worth asking the child if there is anything on their mind that will stop them giving the interview their 100% attention. Children get tired, frustrated and overwhelmed. Regular breaks may assist. If a child is struggling with the interview process, it may be useful to consider a pre-prepared statement where the child can get the key points across (see Codona v HMA).

"Give an option to write things down" (young person)

PRINCIPLE 7: CONSIDER WHETHER THE CHILD IS A VICTIM OF EXPLOITATION

Always consider if the child who has been suspected of committing a crime may themselves have been subject to exploitation or manipulation by adults or other children. Be mindful of the safest and most appropriate way of the child being interviewed by the police (Scottish Government, 2011).

Children with care experience are at increased risk of child exploitation including child criminal exploitation and child sexual exploitation. Children who have gone missing from their care placement are particularly in danger of involvement in drugs running, trafficking, sexual exploitation and violence. They may be suffering or at risk of more than one type of abuse and exploitation. There is growing awareness of the sexual abuse of boys who are being criminally exploited, for example, through rape (as a form of control or punishment) or being forced to carry drugs in their body. Unfortunately, these children are more likely to be criminalised than recognised as victims and helped (The Howard League for Penal Reform, 2020).

> "CHILD CRIMINAL EXPLOITATION... OCCURS WHERE AN INDIVIDUAL OR GROUP TAKES ADVANTAGE OF AN IMBALANCE OF POWER TO COERCE, CONTROL, MANIPULATE OR DECEIVE A CHILD OR YOUNG PERSON UNDER THE AGE OF 18. THE VICTIM MAY HAVE BEEN CRIMINALLY EXPLOITED EVEN IF THE ACTIVITY APPEARS CONSENSUAL. CHILD CRIMINAL EXPLOITATION DOES NOT ALWAYS INVOLVE PHYSICAL CONTACT; IT CAN ALSO OCCUR THROUGH THE USE OF TECHNOLOGY"
>
> (THE HOME OFFICE, 2017)

If there are any concerns that the child is being exploited they should be interviewed as a victim rather than a suspected perpetrator and a Vulnerable Person Database (VPD) referral should be made.

PRINCIPLE 8: MAKE REPRESENTATIONS TO THE PF AND/OR POLICE

Consider making representations both orally and in writing to the police/PF to take into account the welfare and 'best interests' of the child in their decision making (Article 3(1) (United Nations Committee on the Rights of the Child, 1989)). Welfare based arguments will be particularly compelling for children who have experienced care.

Prosecution of children with care experience should be avoided wherever possible.

Given that children with care experience are often especially vulnerable as a result of their experiences, it will be vital for their solicitor to set out the child's background and the context to the alleged offence to argue it would not be in the public interest to prosecute or that informal diversion would be more proportionate. The police and COPFS' attention should be drawn to the relevance of trauma and adverse life experiences on a child's behaviour, including the impact of failure of authorities to properly support the child. It should also include information in relation to any learning or communication difficulties, poor mental health and any other relevant information the solicitor has gained from the child's social worker/ carer that could help.

Diverting

The best way to reduce the unnecessary criminalisation of a child who has experienced care is for no charges to be brought or for the cases to be discontinued or diverted.

The police have in their power the ability to do the following:

For under 16s (or 16/17 and subject to a CSO):

- Police direct measures - warnings can be verbal or written and can include restorative justice
- Referral to partner agencies to consider Early and Effective Intervention
- Report to SCRA or jointly to SCRA/COPFS

For older children (16/17 and not subject to CSO) the options are:

- Recorded Police Warnings (RPW). RPWs are a written notice in the form of a Ticket. They can be issued at the time of the offence, on release from custody or retrospectively
- Referral to partner agencies to consider Early & Effective Intervention
- Report to COPFS

In all occasions and for any disposal for any child under the age of 18, a concern report must be submitted to the Vulnerable Person Database to consider the needs of the child and sharing with partners.

In November 2018, the Inspectorate of Prosecution in Scotland (2018) published a Thematic Report on the Prosecution of Young People. This report highlights a high success rate (80%) for 16 and 17 year olds diverted as an alternative to prosecution, where almost two thirds who successfully completed did not re-offend. The report recommended COPFS prioritise review of the presumption that those aged 16 and 17, and who are subject to a CSO, are to be dealt with by the Procurator Fiscal.

In March 2019 the Lord Advocate amended policy to include a presumption that all children who are jointly reported to COPFS and the Reporter, including 16 and 17 year olds subject to a CSO, will be referred to the Reporter. In addition, for those 16 and 17 year olds who are not subject to a CSO, there will be a presumption against prosecution in court with consideration given to diversion from prosecution, where possible (COPFS & SCRA, 2019; Gibson, 2019).

Children's Hearing System

Scotland has legislative measures to enable children aged under 18 years who appear in court to be remitted to the CHS for advice or disposal. However, while significant progress has been made in respect of youth offending, there has been little change in the proportion of requests for advice from criminal courts to the CHS and criminal proceedings where the outcome was to remit to a Children's Hearing, which remains extremely low

(Dyer, 2016; Henderson, 2017). When representing a child under the age 17.5 on summary matters, good practice dictates that advice from the CHS should ALWAYS be considered.

The Scottish Government is currently consulting on proposed legislative changes to extend the CHS for children under the age of 18. This would allow all children up to age 18 to be referred to the children's reporter at the point of arrest instead of automatically being referred to the PF.

All local authorities in Scotland should offer an Early & Effective Intervention and diversion from prosecution scheme. Both should be priorities as an alternative to bringing children into formal adult justice systems. If the offence warrants formal intervention, and where legally possible, the presumption should be for a referral to the SCRA.

PRINCIPLE 9: MAKING SURE CHILDREN'S COMMUNITY CARE NEEDS ARE MET

Children with care experience who come into contact with the criminal justice system are likely to have a range of additional needs. If you become aware of specific issues that the child requires support with (for example, if there are concerns that they are suffering exploitation or that their current placement is unsuitable) solicitors should, in the first instance, alert the child's social worker/home local authority to their concerns. If the child's social worker and/or local authority are not contactable or they do not appear to be supporting the child appropriately, solicitors should discuss with the child the option of the matter being referred to a solicitor who specialises in this area of work.

Referral to another solicitor
Be alert to other needs of the child that may require assistance from a solicitor specialising in other areas of law, such as children's hearing proceedings, medical negligence, personal injury, family disputes or criminal injury compensation authority.

Adversity
Children accused of offending behaviour have often experienced adversity, victimisation and trauma, presenting with a range of needs, vulnerabilities and complexities and lacking positive support and role models. These children are often the most vulnerable in our society. It is therefore critical that solicitors consider these issues, both within and separately to the criminal matter if outcomes for children are to be improved and repeated contact with the criminal justice system is to be avoided (CYCJ, 2020a).

Diversity
Children from diverse backgrounds face particular needs, vulnerabilities and prejudices associated with their identities, which may include membership of more than one group. Solicitors need to be mindful of these when representing children from these groups.

Girls and young women involved in the criminal justice system "often have a range of unmet needs related to drug/alcohol usage, poverty, abuse, self-esteem issues, complex family circumstances and physical and mental health problems" (Warwick-Booth & Cross, 2018, p. 645). Many girls who are placed in residential or secure care have histories of being sexually abused (Ellis, 2018) and have encountered significant levels of adversity, including child sexual exploitation (Creegan, Scott, & Smith, 2005; Walker et al., 2006). The residual effects of trauma can often manifest in high risk behaviours including sexual exploitation and perceived promiscuity (Ellis, 2018). Understanding the relationship that exists between both is imperative when representing girls.

Across the UK, children of BAME heritage have faced significant discrimination, disadvantage and prejudice. This has included within the criminal justice system (Adams & McCarthy, 2020; Lammy, 2017; Qasim, 2018). The labelling of some BAME children as a risk to the public and to the state may also contribute to more severe treatment by police and courts (Qasim, 2018). Be aware to these sensitivities and any additional needs like SLCN, the need for an interpreter or additional support if English is not their first language.

LGBTI children within the justice system can also face additional issues that need to be taken into account when representing them. Children who identify as LGBTI often encounter discrimination and prejudice, resulting in them experiencing isolation and marginalisation (Knight & Wilson, 2016). Homophobia, Biphobia, Transphobia and other forms of bigotry can prove significant challenges. Their experiences, identity, and levels of support should not be underestimated in relation to the impact on their behaviour. Additional considerations/provisions may also need to be put in place if these children were to be strip searched.

Through the provision of more effective supports children will have a greater chance of having their needs met, their rights upheld, and a greater chance of flourishing and reaching their full potential. This in turn will result in reducing future offending (CYCJ, 2016).

REFERENCES

Adams, M., & McCarthy, D. (2020). Race and parenting in the context of youth incarceration. *Ethnic and Racial Studies*, 43(16), 175-192. doi:10.1080/01419870.2019.1686161

Aubrey-Johnson, K., LAmbe, S., & Twite, J. (2019). *Youth Justice Law and Practice*. London: Legal Action Group.

Bevan, M. (2018). Views from the cells. Retrieved from **https://howardleague.org/blog/views-from-the-cells/**

Bevan, M. (2019). *Children and young people in police custody: an exploration of the experience of children and young people detained in policy custody following arrest, from the perspective of the young suspect. PhD Thesis*. London School of Economics and Political Science. London. Retrieved from **http://etheses.lse.ac.uk/3951/**

Centre for Justice Innovation. (2020). *Young people's voices on youth court*. Retrieved from **https://justiceinnovation.org/sites/default/files/media/documents/2020-05/20200512_young_peoples_voices_on_youth_court_final.pdf**

COPFS, & SCRA. (2019). *Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter - 2nd Revision*. Retrieved from **https://www.copfs.gov.uk/images/2019%2006%2013%20Joint%20Agreement%20COPFS%20and%20SCRA%20Decision%20Making%20in%20Jointly%20Reported%20Cases.pdf**

Creegan, C., Scott, S., & Smith, R. (2005). *The use of secure accommodation and alternative provisions for sexually exploited young people in Scotland*. Retrieved from **https://www.togetherscotland.org.uk/resources-and-networks/resources-library/2005/02/the-use-of-secure-accommodation-and-alternative-provisions-for-sexually-exploited-young-people-in-scotland/**

CYCJ. (2016). *Key Messages*. Retrieved from CYCJ, University of Strathclyde: **https://cycj.org.uk/wp-content/uploads/2016/12/CYCJ-Key-Messages.pdf**

CYCJ. (2020a). A Guide to Youth Justice in Scotland: Section 7 - Diversity. Retrieved from **https://www.cycj.org.uk/resource/youth-justice-in-scotland-guide/**

CYCJ. (2020b). A Guide to Youth Justice in Scotland: Section 9 - Speech, Language and Communication Needs in Youth Justice. Retrieved from **https://www.cycj.org.uk/resource/youth-justice-in-scotland-guide/**

CYCJ. (2020c). A Guide to Youth Justice in Scotland: Section 11 - Children's Rights, Our Responsibilities. Retrieved from **https://www.cycj.org.uk/resource/youth-justice-in-scotland-guide/**

CYCJ. (2020d). A Guide to Youth Justice in Scotland: Section 12 - Support all under 18 year olds in the Court System. Retrieved from **https://www.cycj.org.uk/resource/youth-justice-in-scotland-guide/**

Dyer, F. (2016). Young People at Court in Scotland. Retrieved from **https://cycj.org.uk/wp-content/uploads/2016/02/YoungPeopleAtCourtFINAL.pdf**

Ellis, K. (2018). Contested Vulnerability: A Case Study of Girls in secure care. *Children and Youth Services Review, 88*, 156-163.

Gibson, R. (2019). Policy Refocus at COPFS. Retrieved from **https://www.cycj.org.uk/wp-content/uploads/2019/12/Info-Sheet-86-1.pdf**

Henderson, G. (2017). 16 and 17 year olds in the Children's Hearings System. Retrieved from **http://www.scra.gov.uk/wp-content/uploads/2017/08/16-and-17-year-olds-in-the-Children%E2%80%99s-Hearings-System.pdf**

HM Inspectorate of Constabulary in Scotland. (2018). *Inspection of custody centres across Scotland*. Retrieved from **https://www.hmics.scot/sites/default/files/publications/HMICS20181019PUB.pdf**

Independent Care Review. (2020). *The Promise*. Retrieved from **https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf**

Inspectorate of Proescution in Scotland. (2018). *Thematic Report on the Prosecution of Young People*. Retrieved from Edinburgh: **https://www.copfs.gov.uk/images/Documents/News%20from%20COPFS/Thematic%20Report%20on%20the%20Prosecution%20of%20Young%20People.pdf**

Justice for All. (2019). *The report of the Task Force on Justice*. Retrieved from New York: **https://reliefweb.int/report/world/justice-all-report-task-force-justice-april-2019**

Kennedy, E., Heron, J., & Munafò, M. (2017). Substance use, criminal behaviour and psychiatric symptoms following childhood traumatic brain injury: findings from the ALSPAC cohort. 26. doi:10.1007/s00787-017-0975-1

Knight, C., & Wilson, K. (2016). *Lesbian, gay, bisexual and trans people (LGBT) and the criminal justice system*. London: Palgrave Macmillan.

Lammy, D. (2017). *The Lammy review: an independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*. Retrieved from London: **https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf**

Lightowler, C. (2020). *Rights Respecting? Scotland's approach to children in conflict with the law*. Retrieved from **https://cycj.org.uk/wp-content/uploads/2020/01/Rights-Respecting-Scotlands-approach-to-children-in-conflict-with-the-law.pdf**

Mendez, J. E. (2015). *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*. Retrieved from **https://www.refworld.org/docid/550824454.html**

Nolan, D., Dyer, F., & Vaswani, N. (2017). 'Just a wee boy not cut out for prison': Policy and reality in children and young people's journeys through justice in Scotland. *Criminology & Criminal Justice, 0*(0), 1748895817745347. doi:10.1177/1748895817745347

O'Rourke, S., Whalley, H., Janes, S., MacSweeney, N., Skrenes, A., Crowson, S., . . . Schwannauer, M. (2020). *The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts - Literature Review*. Retrieved from **https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf**

Police Scotland. (2019a). *Criminal Justice (Scotland) Act 2016 (Arrest Process) Standard Operating Procedure*. Retrieved from **https://www.scotland.police.uk/assets/pdf/151934/184779/criminal-justice-scotland-act-2016-arrest-process-sop**

Police Scotland. (2019b). *Offending by Children - Standard Operating Procedure*. Retrieved from Scotland: **https://www.scotland.police.uk/assets/pdf/151934/184779/offending-by-children-sop**

Qasim, M. (2018). *Young, Muslim and criminal: experiences, identities and pathways into crime*. Bristol: Polity Press.

Rutherford, A. (2002). *Growing out of crime: The new era*. Hook: Waterside Press.

Scottish Government. (2015). *Children and Young People (Scotland) Act 2014: Statutory Guidance on Part 9: Corporate Parenting*. Retrieved from **https://www.gov.scot/publications/statutory-guidance-part-9-corporate-parenting-children-young-people-scotland/**

Scottish Government. (2016). Criminal Justice (Scotland) Act. Retrieved from **http://www.legislation.gov.uk/asp/2016/1/contents/enacted**

Scottish Government. (2011). *Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland*. Edinburgh: Scottish Government Retrieved from **https://www2.gov.scot/Publications/2011/12/16102728/0**

Scottish Government. (2020). *Children's Social Work Statistics Scotland, 2018-19*. Edinburgh: Scottish Government Retrieved from **https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2020/03/childrens-social-work-statistics-scotland-2018-2019/documents/childrens-social-work-statistics-scotland-2018-19/childrens-social-work-statistics-scotland-2018-19/govscot%3Adocument/childrens-social-work-statistics-scotland-2018-19.pdf**

Scottish Prison Service. (2018). *Young People in Custody Survey - 2017*. Retrieved from **https://www.sps.gov.uk/Corporate/Publications/Publication-6075.aspx**

Snow, P. C., & Powell, M. B. (2011). Oral language competence in incarcerated young offenders: Links with offending severity. *International Journal of Speech-Language Pathology, 13*(6), 480-489.

The Home Office. (2017). *Criminal exploitation of children and vulnerable adults: county lines*. Retrieved from **https://www.gov.uk/government/publications/criminal-exploitation-of-children-and-vulnerable-adults-county-lines**

The Howard League for Penal Reform. (2017). *Ending the criminalisation of children in residential care. Briefing two: best practice in policing*. Retrieved from London: **https://howardleague.org/publications/ending-the-criminalisation-of-children-in-residential-care-briefing-two-best-practice-in-policing/**

The Howard League for Penal Reform. (2018). *Children and sentencing: a guide for adults supporting children facing sentence in the criminal courts in England and Wales*. Retrieved from **https://howardleague.org/wp-content/uploads/2018/03/D_ADULT_Guide.pdf**

The Howard League for Penal Reform. (2019). *Ending the criminalisation of children in residential care 'Know your numbers': Using data to monitor and address criminalisation*. Retrieved from London: **https://howardleague.org/wp-content/uploads/2019/07/Know-your-numbers.pdf**

The Howard League for Penal Reform. (2020). *Ending the criminalisation of children in residential care - Victims not criminals: protecting children living in residential care from criminal exploitation*. Retrieved from **https://howardleague.org/wp-content/uploads/2020/03/Victims-not-criminals.pdf**

UNCRC. (2019). *Global Study on Children Deprived of Liberty*. Retrieved from **https://digitallibrary.un.org/record/3813850?ln=en**

United Nations Committee on the Rights of the Child. (1989). United Nations Convention on the Rights of the Child. Retrieved from **https://www.unicef.org.uk/what-we-do/un-convention-child-rights/**

United Nations Committee on the Rights of the Child. (2007). *General comment No. 10: Children's rights in juvenile justice*. Retrieved from **https://www.refworld.org/docid/4670fca12.html**

Walker, M., Barclay, A., Hunter, L., Kendrick, A., Malloch, M., Hill, M., & McIvor, G. (2006). *Secure Accommodation in Scotland: Its Role and Relationship with'Alternative'Services*. Retrieved from **https://www.sccjr.ac.uk/publications/secure-accommodation-in-scotland-its-role-and-relationship-with-alternative-services/**

Warwick-Booth, L., & Cross, R. (2018). Evaluating a gender-specific intensive intervention programme: Young women's voices and experiences. *Health Education Journal*, 77, 644-655. doi:10.1177/0017896918759568

Who cares? Scotland. (2018). *Report on the Criminalisation of Care Experienced People*. Retrieved from **https://www.whocaresscotland.org/wp-content/uploads/2018/05/WCS-Report-on-the-Criminalisation-of-Care-Experience-April-2018.pdf**

CONTACT US

Children and Young People's Centre for Justice, University of Strathclyde,
Lord Hope Building, Level 6, 141 St. James Road Glasgow G4 0LT

T: (0141) 444 8622 **E:** cycj@strath.ac.uk
www.cycj.org.uk

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