



Title

RESPONDENT INFORMATION FORM

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Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Who Cares? Scotland

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The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
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Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again

in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

Consultation Questions

Based on our engagement with stakeholders there is evidence of support for the age of referral to the Reporter to be increased for those 16 and 17 year olds who might require a compulsory supervision order, including the joint reporting of those who offend.

We would welcome your views on increasing the maximum age of referral to the Children's Reporter.

1. Do you agree that the maximum age of referral to the Reporter should be increased to 18?

a) Yes – All cases

Please provide reason(s) for your answer (free text).

We strongly agree with extending the maximum age of referral to the Reporter to 18, for all potential grounds. Who Cares? Scotland have provided Independent Advocacy to Care Experienced people for over 40 years, with much of that work being situated in the Children's Hearing System. Based on our organisational experience, we believe it would be beneficial for children to be given more flexibility to access the support the CHS can provide.

Age and rights

We recognise the current age cut-off of 16 years old to be arbitrary and inconsistent with how a 'child' is viewed across the law in Scotland and internationally. For the Children's Hearing System to be compliant under the United Nations Convention of the Rights of the Child, all children must be defined as aged under 18 – as reflected in Article 1 of the UNCRC which defines a 'child'. This is particularly important in the context of current UNCRC Incorporation (Scotland) Bill progressing through the Scottish Parliament, as the Bill intends to create provisions for existing law to be amended in order to become compliant with the UNCRC articles. Therefore, it is vital that the Scottish Government is pro-active in preparing for UNCRC incorporation, where possible.

We agree with the Children and Young People's Centre for Justice (CYCJ) that it is unclear whether the consultation asks if the age of referral should also be extended to those aged 18 – rather than individuals aged *under* 18. We would welcome clarification from the Scottish Government on this issue – as the UNCRC definition of a 'child' does not cover those who are 18 years old.

Ultimately, if the age of referral for all cases is raised to cover 16 and 17 year-olds, this will better protect the rights of all children at any age and stage. Age itself being used as a universal indicator of childhood and adulthood has always been problematic, due to the very varied experiences of individual children. For example, the impact of disabilities or trauma on

an individual's developmental journey is not considered, if their access to a service such as the CHS is based solely on whether they have had their 16th birthday. We strongly believe that access to services should be based on need and not on universalised cut-offs, so raising the age of referral means there is flexibility for older vulnerable children to receive the support the CHS can provide.

In February of this year, we also saw the publication of [The Promise](#) as the culmination of the Independent Care Review commissioned by the Scottish Government. In addition to realising Article 1 of the UNCRC, raising the age for all cases will also be an important step forward in realising the Promise – which also recognises a 'child' as a person aged under 18 (page 10.)

Many of the arguments around the use of age to define an individual as able to access a service have been explored in the debate around the Age of Criminal Responsibility. We would ask that the Scottish Government reference [the work done by ourselves](#) and many other organisations such as Clan Childlaw and CYCJ, examining the utility of age cut-offs as an accurate marker of childhood development and in understanding the needs of children.

A need for referral and re-referral for 16- and 17-year olds

The age of 16 is an incredibly important point for any child, yet those entitled to statutory support due to life circumstance can be faced with the potential of having their statutory supports removed, if they are deemed not to be in need of this level of state intervention. Life for Care Experienced people, however, can continue to be uncertain and challenging through care and beyond, as a result of the complex trauma many will have faced. The ability to allow for new and re-referrals to the reporter is more in keeping with the widely acknowledged challenges that many Care Experienced people face after they leave care. Scotland has responded with compassion to this issue in recent years with the emergence of more age-flexible policy initiatives, such as the Care Experienced bursary.

It can also lead to professionals around the child encouraging the extension or introduction of compulsory measures, to ensure access to services for the child. This is also reflected in CYCJ's response to this consultation:

'In the knowledge that a child cannot be referred to the Principal Reporter after their 16th birthday, there is the potential for practitioners and panel members to impose a CSO 'just in case'; as a means of extending the potential access to the Children's Hearing System and the supports associated with it.'

This issue makes clear the reliance of young people on the CHS to access vital services and support in their own lives. The Scottish Government has made it clear that interaction with the CHS should not be necessary for a child to access vital services and resources, yet we know that this is often the case.

This discussion brings into question the very purpose of the CHS as an arbiter of the surrounding care system, as the formal status of a CSO can give a young person better legal standing to access the support they need – yet, it also places restrictive conditions on the individual child that they must comply with, highlighting an important balance of rights and power. Raising the age of referral will be beneficial in allowing children to have the option later to re-engage with the CHS if vulnerabilities arise again or new challenges emerge in their lives, however, referral to the CHS should not be driven by a need to access services and resources.

The role of the CHS and others in determining which individuals may be able to access continued supports from the care system is significant. This is especially true in cases where a Compulsory Supervision Order is terminated at the age of 16. The complexities of the surrounding system influencing this decision is apparent in the [statement released by Social Work Scotland](#) in September 2019, who felt it necessary to state clearly why 15-17-year olds should be encouraged to stay on their orders when appropriate: *'Children should continue to be supported on a compulsory supervision order between the ages of 16 and 18 years, when this is in their best interests: Social Work Scotland is committed to the principle of ensuring that children remain subject to a CSO beyond aged 16 (and up to age 18) when this is appropriate and justified.'*

If a child is no longer defined as legally 'looked after' before they turn 16, then they lose access to many vital entitlements. For example, their ability to access aftercare, continuing care and many specific entitlements such as the council tax exemption. Even though the policy intention is for such criteria to be used flexibly, we know that the age a young person was when their CSO ended can be used to deny them access to vital services. For example, one WC?S advocacy worker described how they received a new referral for a young person looking for aftercare support. They sent all the information they had to the throughcare manager, only to be told that the young person came off of their CSO one month before their 16th birthday, therefore, they did not meet the criteria for support.

This proposed change to the age of referral has the potential to shift culture and practice increasingly towards one which recognises the importance of providing support, guidance and legal protection for as long as possible in a child's life.

Criminalisation of Care Experienced people: 'offence cases'

We would like to echo the detailed points made in the CYCJ response to this consultation, in regard to the role of the CHS in the lives of 16- and 17-year olds who are in conflict with the law. For children who may currently have to go through the adult court process, the extended age of referral to the reporter will have the potential to better uphold the Kilbrandon principle. This was also a recommendation detailed explicitly within [The Promise](#) (p.41):

'Despite the principles of Kilbrandon that aimed to ensure a welfare-based approach to offending, a significant number of children involved in offending behaviour are dealt with in Criminal Courts rather than through The Children's Hearing System. To ensure that all children benefit from the Kilbrandon approach to youth justice, there must more efforts to ensure children stay within The Children's Hearing system.'

As noted in CYCJ's response, research has found that the outcomes for children who appear in court are not particularly positive – showing the need for different interventions to support children aged 16 and 17 who come into conflict with the law. We agree that the court process can be intimidating and potentially traumatising for young people, and that CHS provides an opportunity for a far more restorative approach to justice. It would also recognise that offending behaviour is a reflection of unmet need and must be viewed through a care and protection lens, in order for the root cause of that behaviour to be understood and for the child to be supported to achieve positive outcomes.

Again, there is extensive evidence and research submitted through the Age of Criminal Responsibility Act process about the need for fundamental reform to the youth justice approach in Scotland, in line with the Kilbrandon principles. Our work on this area also

emphasises the increased interaction with the justice system for many Care Experienced children and young people, compared to the rest of the population. We have submitted extensive evidence on this issue previously, [an overview of which can be accessed here](#). Raising the age of referral for 'offence' cases, may support the decriminalisation of Care Experienced children and young people and lead to interventions that better prioritise their welfare.

We see many benefits to a child-centred approach to supporting children in conflict with the law, however this change must come with robust support which will help individuals understand their rights and options within this formal process. The less formalised, quasi-legal status of the hearing system could lead children to not necessarily understand how offence grounds may impact their criminal record or how they can access Independent Advocacy and/or legal representation to support them through this process. For example, in the past we have highlighted through [our work on the Disclosure \(Scotland\) Act 2020](#), that some Care Experienced people do not realise that being referred to the reporter on offence grounds could result in a criminal conviction and that this would be potentially affect their disclosure in future.

We fully support the need to change how children are supported when they are in conflict with the law, with a move away from the adult court system. However, simply transferring such cases to the CHS, without resource to provide appropriate Independent Advocacy or legal representation for 16 and 17-year-olds, could potentially lead to an erosion of children's rights being respected, particularly regarding the right to a fair trial (Article 6, European Convention on Human Rights). The importance of recognising the spectrum of access to justice options – including Independent Advocacy and legal representation - for children and young people navigating CHS is paramount.

2. If the age of referral is increased to 18, are the existing grounds of referral to a Children's Hearing sufficient (see pages 7-8 for existing grounds)?
 - a) Yes
 - b) No

Please provide reason(s) for your answer (free text).

We do not hold a strong view about the current grounds given, however, we hope that the use of offence grounds become less commonly used by Reporters – as 'offending behaviour' is further understood as related to underlying care and protection issues for children and young people.

3. What are your views on the potential implications, including resource, of increasing the age of referral to the Reporter for local authorities, Police and other service providers/organisations?

As mentioned previously, the importance of access to justice options is incredibly important for anyone navigating complex formal processes but is even more crucial when power dynamics are at play, such as between a child and decision-making adults. The spectrum of options available to children navigating CHS must include suitable, available Independent

Advocacy provision. Where possible, children should not be expected to need legal representation (except where legally necessary) routinely in their lives; while the role of an Independent Advocacy worker is one which is vital in ensuring they understand their rights and can participate effectively in their Hearings, using relationship-based methods.

It is also important that legal provision is reviewed to ensure there are sufficient numbers of lawyers that can work within the CHS context, when supporting 16 and 17 year olds in the CHS, especially in relation to offence grounds cases. Additional training may be required to ensure there are sufficient trauma-informed legal services, with lawyers able to communicate effectively with children and young people, and work alongside Independent Advocacy workers.

4. What are your views on the potential implications, including resource, of increasing the age of referral to the Reporter for SCRA (the public body which operates the Reporter service)?

N/a

5. What are your views on the potential implications, including resource, of increasing the age of referral to the Reporter for Children's Hearings Scotland (the body which operates the national children's panel)?

N/a

6. If the age of referral to the Reporter was increased, are amendments required to ensure sufficient access to information and support for victims harmed by children?
 - a) Yes
 - b) No

Please provide further details for your answer, including any extensions or amendments you would wish to see (free text).

N/a

7. If there are any further comments you would like to make, which have not been addressed in the questions above, please use the space below to provide more detail.

About you

1. What is your name?

Lucy Hughes

2. What is your e-mail address?

lhughes@whocaresscotland.org

3. Are you responding as a:
- a) Public sector organisation
 - b) Private sector organisation
 - c) Non-government organisation (NGO)**
 - d) Social enterprise
 - e) Membership organisation
 - f) Private individual
 - g) Other (please detail)

4. What is your organisation's name?

Who Cares? Scotland

5. Do you or your organisation work directly with children who are in the children's hearings or criminal justice system?

a) Yes

Please provide more details:

Who Cares? Scotland provides Independent Advocacy to children and young people engaged with the Children's Hearing System and who may be involved in the criminal justice system.

6. Do you or your organisation work directly with victims?

a. Yes

Please provide more details:

Who Cares? Scotland provides independent advocacy and support to Care Experienced people, many of whom are victims of crime. It is important to acknowledge that perpetrators of crime are often victims too and so defining 'victim' is a complex area.

Impact Assessments

We propose to carry out impact assessments alongside the development of any new legislation which would be required to implement changes to the children's hearings system.

These include a Data Protection Impact Assessment, Child Rights and Wellbeing Impact Assessment, Equality Impact Assessment (related to the protected

characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation). We would be interested in your views on these areas to help us in developing these assessments.

1. Are there any data protection related issues that you feel could arise from the proposals set out in this paper?

N/a

2. Are there any children's rights and wellbeing issues that you feel could arise from the proposals set out in this paper?

Yes – many rights and wellbeing issues are highlighted in the response above.

3. Are there any equality related issues that you feel could arise from the proposals set out in this paper?

N/a