WHO CARES? SCOTLAND

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Children's Hearings System Redesign

Who Cares? Scotland's response to the Scottish Government's Children's Hearings System Redesign consultation

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Who We Are

Who Cares? Scotland is Scotland's national independent advocacy and membership organisation for Care Experienced people. We provide professional, high quality and relationship based independent advocacy for children and young people across Scotland who have experience of the Children's Hearings System. For over 45 years our independent advocacy workers have supported Care Experienced children and young people to have their views heard and their human rights upheld. Our response to this consultation reflects the views of our advocacy workers and the children and young people they support through the Children's Hearings System every day.

Summary

We welcome the Scottish Government's commitment to redesign the Children's Hearings System to ensure to ensure that it becomes a truly child-centred and rights respecting process, in line with the UNCRC (Scotland) (Act) 2024 and The Promise.

We know from our work as Scotland's largest independent advocacy provider for Care Experienced people that many children and young people in care today are experiencing barriers to realising their rights and fully participating in formal processes. We must ensure that Care Experienced children and young people are recognised as rights-holders in the Children's Hearings System and can access vital independent advocacy support as and when they need it, in order to fully enjoy their rights. The current levels of provision of independent advocacy are insufficient to allow for this.

Who Cares? Scotland is calling for:

- a statutory right to independent advocacy at the earliest possible opportunity to be written into law.
- Independent advocacy provision to be sufficiently proportionate to be available to every child or young person who requests it.

- Rights to be upheld for every child, including Article 12 and the Public Sector Equality Duty. Non instructed advocacy must be available for very young children, and children and young people with complex communication needs.

These key calls are detailed more fully in our responses to questions 12, 17, 19, 20, 22, 53, 69 and 71.

Our response has been developed by drawing on evidence from our advocacy service, participation work and by consultation focus groups held with a range of our advocacy and participation workers and managers from across Scotland.

To supplement this evidence, we have also included evidence relating to advocacy and rights from a large participation exercise called the 'Summer of Participation' we carried out between June and August 2023 which engaged over 200 Care Experienced people across a diverse range of ages, backgrounds and protected characteristics.

The Principles of a Redesigned CHS

1. What principles should underpin a redesigned CHS and why?

The Children's Hearings System is under significant overhaul to ensure that it becomes a truly child-centred and rights respecting process, in line with the UNCRC (Scotland) (Act) 2024. The key principles of the UNCRC, are Articles 2, 3, 6 and 12 – the rights to non-discrimination, to act in the best interests of the child, the right to life, survival and development, and the right to have their views heard and respected. These must be the principles underpinning a redesigned CHS, alongside the PANEL principles which define a human rights based approach. These are the principles of participation, accountability, non-discrimination and equality, empowerment, and legality.

Who Cares? Scotland advocacy workers attend around 2,700 formal processes each year, of which around 1000 are children's hearings, to represent the views and protect the rights of Care Experienced infants, children and young people. However, we know that we are not reaching all who need advocacy, and are limited by: the scope of our contracts; referrals not being made for independent advocacy; and a lack of understanding of how advocacy and non-instructed advocacy can be invaluable for under 5s and people with complex communication needs. To truly uphold the PANEL principles and each and every child's right to UNCRC Article 12, Who Cares? Scotland believes that the right to independent advocacy must be enshrined in legislation.

Together, these principles will form a strong foundation for the Panel to take action to ensure each and every child's SHANARRI indicators are being met and that the child feels loved and has those relationships most important to them protected. For many years, Care Experienced people have told us that a feeling of love, safety and belonging was missing from their childhood in the care system. Rectifying this must be the goal of any Children's Hearing panel.

2. What would be the advantages and disadvantages of setting out overarching principles in legislation?

We believe that setting out these overarching principles is essential for the legislation. There has been significant investment of time, expertise, and resource in bringing together this collection of proposals to redesign the Children's Hearing System into a new system that meets the rights and needs of children. Including the overarching principles that underpin this work in the legislation ensures that implementation and due processes must be followed and people have the right to challenge any failures. The system would be accountable to the aims and purpose of this overhaul.

We do not see any disadvantage in ensuring that wherever a child lives, the same policies and procedures will be followed and they can be certain of equal treatment.

Scotland frequently makes ambitious policy that then falls short at the implementation stage. Ensuring that implementation is carried out in line with the spirit of the legislation is a strong safeguard against the CHS redesign falling victim to this.

Statutory Referral Criteria

The Scottish Government is supportive of the ongoing work to promote the common use of accessible and sensitive language across the children's hearings system. We are interested in respondents' views on whether the existing criteria need to be updated in the way suggested by the report, and why. (See section 5.1 of the consultation document)

Section 60 of the 2011 Act states:

Local authority's duty to provide information to Principal Reporter

- *(1) If a local authority considers that it is likely that subsection (2) applies in relation to a child in its area, it must make all necessary inquiries into the child's circumstances.*
- *(2) This subsection applies where the local authority considers— (a)that the child is in need of protection, guidance, treatment or control, and (b)that it might be necessary for a compulsory supervision order to be made in relation to the child.*
- *(3) Where subsection (2) applies in relation to a child the local authority must give any information that it has about the child to the Principal Reporter.*

The Mackie report proposes that this is changed to:

(a) The child or young person is in need of safety, protection, care, guidance or support (Clearly specify which is needed); and

(b) Compulsory intervention is likely to be needed (With clear rationale why necessary); and

(c) Only refer if proportionate and timely to do so (With clear rationale why now)

However, the Scottish Government have concerns that these proposed changes could have significant consequences across practice, case law and legislation, so it would be wrong to drive through change without a strong evidence base to indicate that particular changes are necessary.

3. What elements of language in the existing referral criteria need to be updated, if any? Control / treatment / any other elements of language needing to be updated.

We wholly support the proposal to remove the words ‘control’ and ‘treatment’ from the referral criteria. These words give a very controlling impression, creating feelings of apprehension, fear and defensiveness in the people they apply to. They create an idea of containment as opposed to an environment of love and nurturing. The criteria must be wholly reframed to avoid young people feeling as though something will be done to them, and instead prioritise their wellbeing and success, support and assistance.

We are also opposed to the language we know is used in practice of a young person having an order ‘put on them’. Our advocacy workers often try to reframe the order to young people to explain that it means that it will be set out what the local authority or social work will have to do to support them, for example, making sure that they get to see their mum twice a week. However, not all young people have an advocate to reframe this negative term for them and it would be more beneficial if this term was abolished.

4. Do you support the proposed referral criteria from the Hearings for Children report?

Y/N, please explain

No. Please refer to our answers to questions 3 and 5.

5. What are the advantages or disadvantages of the proposed draft referral criteria?

Who Cares? Scotland notes several concerns with the proposed draft referral criteria:

‘Likely to be needed’ is a very low threshold, and open to discussion and different interpretations across the country regarding what is ‘likely’. This variation across the country may also be influenced by the local resources available. Children’s care must

be held to a high and universal standard across the country and not be dependent on local resources and individuals' definitions of what is likely. This wording has potential for unintended discriminatory consequences. We would prefer that 'is in need of safety, protection, care, guidance or support' is the test by which children are brought into formal proceedings.

However, we are also concerned that 'is in need of safety, protection, care, guidance or support' blurs boundaries with child protection processes, as all children subject to child protection will also be in need of 'safety, protection, care, guidance or support.' There must be clearly established thresholds for each process, to ensure that child protection, as the first stage in supporting young people and their families, is allowed space to work and resolve issues for many children who will not need to enter the CHS. Processes doubling up is inefficient to the system and detrimental to the young person and the family.

6. Do you have any other comments about potential changes to the referral criteria?

Please refer to our answer to question 5.

7. Do you support the proposal to change the applicable referral test that compulsory supervision 'might be necessary' to it being 'likely to be needed?'

Who Cares? Scotland does not have a view on this.

Relevant Persons

Views are invited on where and how the current arrangements could be improved. In particular, we are interested in whether respondents' feel it is necessary to legislate for the participation and engagement of a broader range of people in the preparation for a hearing. We would particularly be interested in views on whether there would be advantages in creating an additional class of person with certain rights to provide their views at an early stage, and to participate appropriately as the case proceeds. (See section 5.2 of the consultation document).

8. What are the advantages and disadvantages of the current definition of "relevant person"?

The current definition of 'relevant person' is not child-friendly and many of the children we support struggle to understand the term and who it applies to in their life.

The current definition of 'relevant person' frequently also does not match the child's views about who is relevant, despite it being the child's hearing. A relevant person receives the paperwork and deeply personal information about the child and also has the right to appeal, however, someone who a child feels is important and wants to attend might not be found appropriate to receive the paperwork. This must be avoided where possible, with children having a say over who they can invite. When it is deemed necessary to invite someone a child does not want to attend, they must be provided with a clear explanation for this.

9. Should the legislation include a definition of "parent" and if so, what should it be?

We are in favour of not defining 'parent' in legislation and instead prioritising consulting a child or young person about who they believe is a relevant person. If the purpose of this proposal is to respect who a child considers to be a parent then this can be achieved via a child's powers over relevant persons.

We believe this legislation should also create powers to remove relevant person status from a parent without removing their parental rights. Many young people do not want their biological parent to receive the paperwork containing sensitive information about them or see them at a hearing, and often it is not in their bests interests for this to happen. The Hearing is for the child and must be designed around their needs – this must include the ability in some cases to stop a biological parent from attending or receiving paperwork without requiring a lengthy court process to remove parental rights.

10. Do you have any views on whether it would be appropriate for a hearing to have the power to remove relevant person status from any relevant person in certain circumstances and if so, please explain?

As set out in our response to Q9, yes we are in favour of this.

Many of the young people we support at Hearings are very clear that they do not want a parent at their Hearing as they do not want to see them or feel they are not involved or are a negative influence in their life. However, currently parents are automatically relevant people and so the panel gives them an automatic right to attend, at times at the detriment of the young person.

We have supported some young people to seek legal advice around this due to how strongly they felt their parent should not receive the papers about them and be able to attend their Hearing. The legal advice was that they would need to go to court to remove parental rights in order to do this. This is not an accessible route for children and young people to take and poses a significant barrier to many in being able to fully participate in their Hearing. There must be another route for young people to be able to have a say over who has access to information to them and a right to attend their Hearing, particularly for 16-18 year olds.

If legislation to allow for removing of relevant persons status from parents poses too many challenges, we would propose a route to be able to suspend relevant person status from people with parental rights – this would include suspending papers, the right to attend a hearing and to appeal a decision at a Hearing. Parental views could

be fed in via legal representation, a meeting with the Chair, or in writing before the Hearing. This would avoid delays to process caused by parents appealing losing their relevant person's status. These suspensions must be considered at a young person's request and take into account their circumstances and relationship with their parent, rather than only when poor behaviour at a Hearing is demonstrated.

11. What are the advantages and disadvantages of an earlier process for deeming other people to be relevant persons?

This normally happens at a pre-hearing panel which we find helpful as it allows people time to understand what the purpose of the Hearing is and ensures there is adequate time for paperwork to be sent and read by relevant persons. This prevents Hearings being deferred due to a delay in receiving paperwork. We do not foresee any potential disadvantages in naming people as relevant persons earlier in the process, providing that there is still an option at every stage of the process to allow someone to become a relevant person.

12. What changes could be made to legislation to enable more effective gathering of information prior to a hearing and to support proper opportunities to participate for other people in the child's life?

Who Cares? Scotland calls for the right to independent advocacy at the earliest possible opportunity to be written into legislation.

We also believe that the Chair should meet with young people in advance of hearings in an environment wholly separate to the Hearing venue. This would allow the Chair an opportunity to get to know the young person as an individual outwith the formal process. The young person would have the opportunity here to discuss their story with the Chair in advance of the meeting and share their views about their care and what they like and dislike. Young people should have the opportunity to have an independent advocacy worker help them to express their views at this pre-meeting.

14. What are the advantages and disadvantages of the creation of an additional class of person whose views and participation are essential to the business of the hearing, but do not require the full rights and obligations of a relevant person?

An advantage is that this could help to capture the views of someone like a Support for Learning Assistant or another important person who the young person spends a lot of time with but might not be appropriate to share all paperwork with.

From our experience, panels used to be more open to this, but we recognise that a disadvantage is having too many professionals in the Hearing space.

This should be an option available to young people who would benefit from someone attending who does not need to receive full rights and obligations as a relevant person, while being able to limit numbers in the room for other young people who would find a large hearing to be more stressful.

Participation and attendance

Views are sought on how to enable children to have a clear choice of how to participate in their hearing and alternative options for capturing their views. (See section 5.3 of the consultation document)

15. Do you agree with the recommendation to remove the child's obligation to attend their hearing, to be replaced with a presumption that the child will attend?

Yes.

Despite the current obligation, young people are sometimes excused at present. While a Hearing is a legal process, we believe that as long as the young person has some sort of independent representation to share their views, such as an independent advocate or a lawyer, then they should not be required to attend an often very stressful meeting. We would ask what benefit there is in forcing a young person who does not want to attend to be in the space, and what harm doing so may cause to their psychological wellbeing and relationships with professionals and carers.

Replacing the obligation with a presumption would make it clearer for parents and carers what options there are in the process. If a carer feels that the young person must attend, they may feel that they cannot object to this and raise concerns about the impact attending would likely have on the young person.

Y/N, If yes, what limitations would need to be applied to this presumption?

There must be a safeguard to ensure that young people not attending the hearing remain a part of the process and have their views considered and respected. We would recommend independent advocacy as the best method of this. There is a risk that decisions may be made to exclude a young person if the panel feels they would be too upset to attend the hearing, causing further distress and anxiety to a young person who wanted to attend and hear the decisions being made about them.

16. Does the hearing need a power to overrule the child's preference not to attend their hearing in certain circumstances?

No. Who Cares? Scotland strongly opposes this proposal.

We cannot think of a circumstance where this would be necessary. As independent advocates, we would strongly encourage a young person at risk of deprivation of liberty to attend their hearing to direct their lawyer and share their views with their advocate, explain to them the potentially huge consequences of not attending and passing up the opportunity to convince their panel that they do not need to move to secure care. However, encouraging a young person is as far as we believe anyone can go without infringing on a young person's rights and creating a traumatic experience for them.

We have serious concerns about this option to absolutely force a young person to attend. For a young person who is very clear that they do not want to attend, this would only be possible by involving police to forcibly remove them from their home. Bringing a young person in handcuffs to their hearing is at complete odds with the principles and aim of the redesigned Children's Hearings System to be child-focussed and child-friendly, and would significantly hinder then from being able to engage in the process and damage their trust in the system and professionals around them.

Nothing more than encouraging a young person to attend and explaining the benefits of attending can be done. Young people who do not want to attend their hearing are generally making this choice due to the level of emotional distress and trauma they feel it would cause, and their choice should be respected.

The Hearings System must ensure that safeguards are there to ensure children and young people's right to have their views heard and considered, under Article 12 of the UNCRC. These safeguards include independent advocacy, child friendly legal representation, the option to attend online from a different building, the chair going to the young person's home or preferred setting to meet with them in advance of the Hearing, and other creative measures. The system must work to accommodate the child's needs and wishes for their Hearing, rather than have the option available to

use physical force against a child to drag them into a process they do not want to take part in.

Our independent advocacy workers report continuing to hear from some panel members that they need to physically see the child, despite the independent advocate being there with their views. This is poor practice that needs to be addressed with panel members via training on the role and purpose of a professional independent advocate. If a panel is insistent to see a child who does not want to attend, then the obligation must be on the panel to go the child's preferred setting with preferred adults in attendance.

We would also recommend that a child's choice to attend their Hearing defaults to an assumption that they will attend each time unless they say that they don't want to. This would add a safeguard to ensure that someone checks with the child what their views are each time, offers independent advocacy, and ensures that there is no presumption made in future that they will not want to go or have nothing to say again.

17. What steps could be taken to support the child's participation and protect their rights, if they choose not to attend their hearing?

Duty to provide a proportionately sufficient level of independent advocacy provision:

One of the strongest protections against and remedy for rights infringements is independent advocacy. Who Cares? Scotland calls for a legislative duty on local authorities to provide a proportionately sufficient level of independent advocacy provision, in order to ensure all children and young people can access this support at the point of need. This is essential to uphold the Scottish Government and local authorities' responsibilities to implement article 12 under the UNCRC (Incorporation) (Scotland) Act 2024.

Who Cares? Scotland is currently commissioned to provide independent advocacy in multiple local authorities. These contracts vary widely in the level of provision that is

funded and as a result, many local teams are forced to operate waiting lists or prioritise representing young people in formal processes. Some local authorities fund as little as five hours per week to cover all children and young people in their care. Statutory guidance should accompany a legislative duty to ensure all children and young people are able to access advocacy in practice.

Duty to provide specialist advocacy to groups with particular needs:

The legislation should be clear that independent advocacy must be promoted to groups whose rights are most at risk, available to all who request it, and specialist advocates must be able to groups with particular needs, such as: Care Experienced people; unaccompanied asylum-seeking young people and migrant young people; mental health inpatients and victims of crime.

Duty to promote and refer for independent advocacy and non-instructed independent advocacy:

We also call for a legislative duty on reporters to ensure that:

a. The role of advocacy has been explained and offered to children and young people aged 5 to 18;

b. Children under 5 and those with complex communication needs are referred for independent advocacy, given their particular vulnerabilities and evolving capacities.

For example, suggested legislative wording could be as follows, expanding on the current requirements in the Children's Hearings (Scotland) Act 2011:

(1) Every child or young person up to the age of 18 shall have a right of access to independent advocacy; and accordingly it is the duty of Scottish Ministers to secure the availability of independent advocacy services and to take appropriate steps to ensure that those persons have the opportunity of making use of those services.

(2) The Scottish Ministers may by regulations make provision for, or in connection with—

(a)the provision of independent advocacy services,

(b) identify and address any situation where a child's rights are (or at a significant risk of) not being fulfilled,

(b) qualifications to be held by persons providing independent advocacy services,

(c) the training of persons providing independent advocacy services,

(d) the payment of expenses, fees and allowances by the Scottish Ministers to persons providing independent advocacy services.

(3) The Scottish Ministers may enter into arrangements (contractual or otherwise) with any person other than a local authority, CHS or SCRA for the provision of independent advocacy services.

"It is extremely important that an advocate is made available and is completely impartial with no agenda dependent on the outcome. An advocate is there for the individual and their benefits regardless of age. A social worker will have the values and training and ethos of that social work department/authority or just feel like they do which creates mistrust and a disconnect. This applies to other services and panel members etc. It is important to have that person in the middle that is only for you to make you feel comfortable throughout the process and explain things in terms that you understand." – Care Experienced person, Summer of Participation, 2023.

Understanding the role of a professional independent advocate:

Who Cares? Scotland is concerned by policy which assumes that a young person will have a 'trusted adult' who is fully informed of their rights and entitlements and is able to explain them clearly and advocate for them without any conflicts of interest or their own personal views clouding the information or opinions that they share with a young person. If we were to rely on a 'trusted adult' to communicate and uphold rights for a young person, we would need to ensure they had quality controlled training, support and guidance to be able to do this well. However, a 'trusted adult' could include a wide

range of roles such as a teacher, counsellor, family member, religious leader or parents of friends.

"I know my advocate is there for me not SW [social work] or school etc. And my advocate says what I want her to say." Care Experienced person, Summer of Participation, 2023.

The Scottish Independent Advocacy Alliance (SIAA) describes independent advocacy as *"speaking up for, and standing alongside individuals or groups, and not being influenced by the views of others. Fundamentally it is about everyone having the right to a voice: addressing barriers and imbalances of power, and ensuring that an individual's human rights are recognised, respected, and secured. Independent advocacy supports people to navigate systems and acts as a catalyst for change in a situation. Independent advocacy can have a preventative role and stop situations from escalating, and it can help individuals and groups being supported to develop the skills, confidence and understanding to advocate for themselves."* This is a particular job and skillset, and it is imperative that anyone taking up this role truly understands that their work must not be influenced by their own or other's view of a situation.

"We should always have our voice heard! And not just from social workers, they don't always know us well enough. It's good to be someone independent." – Care Experienced person, Summer of Participation 2023.

The SIAA explains that *"independent advocacy is especially important when individuals or groups are not heard, are vulnerable or are discriminated against. This can happen where support networks are limited or if there are barriers to communication. Independent advocacy also enables people to stay engaged with services that are struggling to meet their needs".* It is well evidenced that Care Experienced young people consistently face these challenges. Their right to have this specialist type of support must not be watered down.

"[When I left care] I felt there was no one there to listen to me or advocate for my rights, I was overwhelmed already trying to manage independent life in lieu of any support and I simply didn't have the time, strength or experience to articulate myself in a way that would be listened to." – Care Experienced person, Summer of Participation, 2023.

These supports must also be available across all local authorities, ensuring that young people in rural areas have the same opportunities as those in more connected locations.

"Every residential house should have an advocate to explain their rights." – Care Experienced person, Summer of Participation, 2023.

Creative approaches to sharing views with the Chair:

We would also like to see young people being able to meet with the chair and share their views in advance of their Hearing and outwith the formal process. A Hearing can be an intimidating, emotional and confusing environment for most children and young people, but should be centred on the child and their wellbeing. All efforts must be made to ensure the views of the child are heard by those making life altering decisions about them. This is likely to require a chair to meet with a young person outside of the environment of the Hearing.

Children and young people who want to share their views at their Hearing via a voice note, picture, poem, model or letter should also be supported to do so. An independent advocacy worker would be able to support a child to share their views in this way without requiring the child to go through the stressful experience of attending a Hearing they do not want to.

Non-instructed advocacy should also be available for children and young people with complex health needs and those under 5. Please refer to our answer to question 19 for more detail on the importance of non-instructed advocacy.

18. Should a child still be obliged to attend hearings held in consequence of offence referrals, or in consequence of the 2011 Act section 6(m) 'conduct' ground

As set out in our answer to question 16, Who Cares? Scotland strongly opposes any proposal to force a child or young person to attend a hearing they do not want to and

believe this poses a breach to their rights. Whether or not a young person attends the hearing, their right to defend themselves should be upheld and the panel should not be prejudiced by their decision not to attend.

We believe that a child referred on offence grounds should have an automatic right to a lawyer and access to legal advice, which does not currently happen. By the time an advocacy worker is meeting with a young person, it is often too late into the process. This legal support should be opt out, rather than opt in. This solicitor should go through the statement of fact with the young person and clearly explain to the young person what the consequences would be of accepting the grounds.

Young people, and often panel members too, generally do not know enough about the consequences of accepting offence grounds. We feel that the seriousness and impact of offence grounds is often understated and must be given more respect and consideration.

As set out in our answer to Q36, there should not be a lower burden of proof for children than adults who are accused of a crime. The burden of proof for Hearings is ‘more likely than not’ rather than ‘beyond reasonable doubt’, subjecting our children to a lower threshold than adults which is unjust.

Going to a Hearing and accepting support from our children’s services should also not be detrimental to a young person, regardless of why they were brought to the hearing. Hearings should be about support for the young person.

Voices of Very Young Children

Where the hearing relates to babies and infants who are too young to express a preference regarding their participation, the Hearings for Children report recommends: **"**The voices and experiences of babies and infants must be captured and shared with the [hearing]."

19. Do you agree that particular arrangements should be made to capture and share the voices and experiences of very young children in a redesigned children's hearings system? Y/N. If so, what should those arrangements be?

Yes.

As set out in response to earlier questions, access to independent advocacy is a fundamental aspect of promoting and protecting the rights of children and young people.

Independent Advocacy and Non-Instructed Advocacy to uphold the 2024 UNCRC (Incorporation) (Scotland) Act and the Equality Act 2010:

The Equality and Human Rights Commission's response to the Independent Review of Mental Health Law (2020) stated that in order to fulfil the requirements of the Public Sector Equality Duty, the review of the 2000 Adults with Incapacity (Scotland) Act must make recommendations to advance equality of opportunity for people with disabilities. This includes the sufficient provision of independent advocacy to be able to exercise their legal capacity on an equal basis to people without disabilities. This principle holds for the Children's Hearings System – all children and young people, regardless of any disability, must be provided with the necessary support to exercise their rights in a formal process. Infants and very young children hold the same rights, but need specialist support to ensure these rights are upheld.

To overlook these groups with particular additional challenges in the redesign of the hearings system risks creating a system that indirectly discriminates against very young children and those with complex communication needs. Sufficient provision of

non-instructed advocacy is the most robust tool to prevent the CHS from infringing upon children and infant's rights and advance equality of opportunity under the 2010 Equality Act.

Non-Instructed Advocacy for complex communication needs:

For those who are unable to express their wishes due to complex communication difficulties, lack of understanding and capacity due to age or an assessed lack of capacity (where no instruction or views can be obtained), these children and young people should be able to access a model of non-instructed advocacy to ensure their rights are promoted and protected throughout their time in care and aftercare.

Non-instructed advocacy aims to support children who are not able to request an advocate or to say what they want for reasons of communication difficulties, lack of understanding or severe learning disability. Our non-instructed advocacy workers have specialist training to use tools such as talking mats, and seeks to uphold the young person's rights, ensure fair and equal access to support/services, and that decisions are taken with due consideration for all relevant factors, including the young person's preferences and perspectives.

A Non-Instructed Advocacy Approach:

A non-instructed advocacy approach should be based on the presenting issue, the person's rights, observations of them in a range of settings where possible, trialling methods of nonverbal communication with the person, and discussions with those who know them best. The Principles and Standards for Independent Advocacy apply to non-instructed advocacy in the same way as they do to instructed advocacy.

A non-instructed advocacy worker will not express a view about what decisions should be made but will analyse the information they have gathered and comment during a hearing where statements by others contradict or raise questions about what they have observed or been told by others who know the infant or child well, in addition to any view expressed by the child.

Non-Instructed Advocacy for infants and very young children:

Ensuring that an infant or child's rights are promoted, protected and upheld in a hearing is the focus of a non-instructed advocacy approach. It is imperative that children and infants of all ages in the most vulnerable situations have someone independent involved in their care journey to speak up for their rights and needs.

NSPCC research highlights that one of the most significant issues with the current Children's Hearings System for babies is the drift and delay they face in reaching settled decisions. Timely decision making has significant positive implications for their recovery, development and lifelong outcomes. Appointing an advocacy worker to an infant who is experiencing significant procedural delays would be a reliable method to having such delays challenged and ensuring that a satisfactory conclusion is reached for the infant in good time.

Who Cares? Scotland has provided non-instructed advocacy and instructed advocacy for children under the age of five. Whilst being very young, most children of this age have clear likes and dislikes and opinions about things. For very young children, an advocacy worker may need more time to build a relationship with them and gather their views but their views and right for these to be considered under UNCRC Article 12 are no less valid due to their age. The Hearings System must adapt to ensure it always respects and accommodates the views of young children, and ensure there is adequate provision of instructed and non-instructed advocacy available for this age group, and those with complex communication needs, who are in particularly vulnerable circumstances.

Challenges delivering Non-Instructed Advocacy:

Some of our advocacy workers who deliver non-instructed advocacy work have reported facing challenges in being able to represent a young person from the panel or Reporter themselves in some regions or in receiving referrals from the Reporter. In other areas, we receive a large number of non-instructed advocacy referrals and referrals for children under 5. Despite non-instructed advocacy being a clear tool available to young people via the CHS advocacy contract, some professionals and panel members do not have a good knowledge of what this is or that a young person

has a right to have a non-instructed advocacy worker at their hearing. This is a key area for panel members to receive training on to ensure that non-instructed advocacy is allowed consistently in all areas and referrals for infants, children and young people who would benefit from this form of rights protection are made.

The offer of advocacy to the child

It is important that, in advance of a hearing, children and young people of all ages are involved in the consideration of how they can appropriately give their views. Where necessary, this should involve the support of a children's advocacy worker, and the Hearings for Children report also recommends **"***there should be an immediate offer of advocacy at the point of referral to the Reporter for all children"* and *"the offer of advocacy should be repeated to children and to their families at different stages of the process."*

The current section 122 of the 2011 Act states that the chairing member of a hearing must inform the child of the availability of children's advocacy services. In practice, the offer of advocacy does happen before the children's hearing.

20. Should the focus and wording of s122 be reformed to reflect an earlier, more agile and flexible approach to the offer of advocacy to the child?

Yes. Who Cares? Scotland disagrees with the statement that 'in practice, the offer of advocacy does happen before the children's hearing' as our experience is that this is not always the case. We also find that even when a referral for advocacy is made before the hearing, it is often at very short notice and leaves little time for the advocacy worker to meet with the child to build a relationship and gather their views. Revising s122 to require a child to be offered independent advocacy at the point when the reporter decides that a Hearing is needed would be more effective in upholding Article 12 for children and young people and guaranteeing meaningful participation.

We also call for training on what independent advocacy is for the professionals making the offer to the child, to ensure that its role is explained correctly. We find that when

explained by an advocacy worker what advocacy is, the uptake rate is extremely high. Between October 2023 and September 2024, 98% of eligible referrals took up the offer of advocacy from Who Cares? Scotland.

21. How should the rights and views of children and young people of all ages, including very young children, be better represented in the children's hearing decision making?

Hearing the child's views first:

Most importantly, our advocacy workers highlighted that usually in a hearing, the child is spoken with last. Ensuring that the child is spoken with first and given space to share their views is a small change that would have a significant impact on how confident that child feels to share their honest thoughts. It is the child's hearing. Their voice should be heard first and then all contributions from professionals can reflect on what they have said and build on it in a sensitive manner. It is much harder for a young person to speak up after a professional has shared something they disagree with. This can create feelings of defensiveness and disheartens many young people from contributing after numerous professionals have shared a view that they do not hold.

Giving choice and control to the young person:

We have also heard from young people that when panel members use terms in an order for an intervention to be available for examples 'if and when the young person asks for it', which young people appreciate. This creates options for the young person and gives them control over their care without the need for them to go back to a hearing, this helps them feel better listened to and more in control of their life.

Consistency within panel members:

We know young people would also value more consistency in their panel, to enable them to start to form a relationship of trust with a panel member and reduce feelings that many strangers are reading about personal details of their life.

Support to receive papers:

Finally, young people have highlighted the negative impact the surprise of having their hearing papers arrive in the post, and often being alone to read them. Ensuring that young people are not alone when they receive this and that the information is conveyed at an appropriate time would be beneficial. This may be easier to arrange for young people in accommodative care. For others, a professional, either from CHS, SCRA or social work, visiting the young person to convey this information would be helpful. Feedback loops, relationship-based practice and having a more agile and flexible approach to fit each child or young person's needs are key to establishing trust and reducing stress in such a serious process.

22. Should there be a statutory obligation to support the sharing of information to advocacy workers, and other people who can help children and families to understand their rights?

Yes.

If a young person has consented to work with an advocacy worker, the advocacy worker should receive the same papers being received by the young person they support. It can be very difficult for an advocate to help a young person challenge what has been said or protect their rights when the worker cannot see the papers. Advocacy is a vital profession to the Children's Hearing System operating in a rights-based approach and must be respected and included in the circulation of papers.

Sharing papers with others who support the child directly where the child has consented would also be beneficial to prevent so many young people from receiving their papers without warning and having no support whilst reading them.

Amplifying children's voices throughout the process

The Scottish Government is interested in the views of respondents on how changes to participation might operate in practice, to ensure children's rights and best interests are upheld, and their views and wishes reflected to decisionmakers. (See section 5.6 of the consultation document)

The Scottish Government considers that there may be value in the creation of a statutory process, undertaken by the children's reporter, which:

1. records what has been done up to the point of referral to gather the child's views, including confirming that they have been offered advocacy
2. applies a "best interests" test regarding appropriate participation prior to a hearing being arranged. This would account for the child's views on how they wish to attend/participate, their age and stage of development, and the nature of the matters due to be considered by the hearing
3. make any necessary further arrangements to gather the child's views and support their ongoing participation. This would include additional offers of advocacy and bespoke and enhanced forms of participation depending on the age and stage of the child, or any other needs they may have.

23. Do you support the creation of a statutory process, undertaken by the children's reporter, to record the capturing of children's views and participation preferences?

Yes, we strongly support this proposal as it strengthens Article 12 UNCRC in the process. It would normalise taking the child's views and preferences and it would ensure children's views being sought as part of the 'best interests' test is required by law. Additional offers of advocacy and bespoke participation to the age, stage and needs of the child would ensure high quality participation in the process, adapting to what suits the child best.

Provision of papers

We are interested in would be interested in respondents' opinions on the timeframe requirements in the current 2013 Rules of Procedure. (See section 5.7 of the consultation document)

24. Should the timeframes for the provision of papers in advance of a children's hearing to the child and relevant persons as set out in the 2013 Rules of Procedure be altered? (no later than 7 days).

Yes.

We believe that the earlier this could happen the better, particularly to allow the child to meet with their advocacy worker and discuss the process, rights and views. Who Cares? Scotland offers high quality, independent and relationship – based advocacy where the worker and the young person have time to build trust, discuss sensitive issues and take time to ensure the young person is fully aware of their rights and options. The advocacy worker needs to be able to have time for form a relationship with the young person in order for this to work best and this can take time. The timeframe should be a minimum of 7 days before the pre-hearing.

25. Should the timeframes for the provision of papers in advance of a children's hearing to the panel members as set out in the 2013 Rules of Procedure be altered? (wherever practicable 7 days before and no later than 3 days before the Hearing)

Yes. Panel members need sufficient time to read the papers thoroughly and give the individual's circumstances due consideration. There should also be adequate time for the Chair to meet with the young person to hear their views and feelings about the process and what they would like to happen at their Hearing.

Grounds of referral: concept and language

Hearings for Children recommended that: The drafting of grounds and the Statement of Facts should be reframed to take a rights-based approach to help families to better understand why grounds are being established and recognise themselves in the drafting. (See section 6.1 of the consultation document)

Hearings for Children recommended at 5.1 that the "process of establishing grounds must change" and specifically:

"5.1.3 Grounds must be established in a separate process before a child and their family attend a Children's Hearing. There must be no more Grounds Hearings.

"5.1.4 A more relational way of working to agree grounds and confirm the Statement of Facts should be encouraged, where the Reporter exercises professional judgement to determine when children and families might be able to discuss grounds.

26. Do you consider the current scheme of stating the grounds of referral sufficiently promotes the understanding of children and families as to why they are in the children's hearings system?

No.

Accepting the grounds of referral can have life altering consequences for some young people.

We have knowledge of past practice where children who have been referred to the Reporter on offence grounds have not understood that decisions made via the CHS can result in a criminal record. All children and young people must have an understanding that convictions received at a children's hearing can result in a long-term criminal record that could appear on a Disclosure check. All professionals involved in the CHS must also be aware of the consequences of dealing with offences via the CHS instead of a criminal court.

We believe the grounds of referral must be given the same gravitas as an adult criminal process, as some of the consequences are the same. Legal representation should be opt-out and continually offered throughout the grounds hearing.

27. Do you agree that there should be changes to the current approach to grounds of referral?

Yes.

This must be done separately and with full independent advocacy and legal support around the child or young person.

28. Do you agree with the proposal to set grounds positively as a range of wellbeing-orientated entitlements, before clarifying how the child's experience or conduct falls short of expectations – to the point that compulsory care is needed?

We agree with the first part of this proposal.

All reframing possible must be carried out to ensure the focus is on what wellbeing support and scaffolding will help the young person, as opposed to what they have done or what has gone wrong. The CHS must be child centred and focussed on upholding their rights and SHANARRI indicators.

However, the clarification should not stop short at clarifying how the child's experience or conduct falls short of expectations, and include any other contributory factors as to why compulsory care is needed eg. to guarantee the safety of the child.

29. If a new scheme of grounds based on unmet expectations around wellbeing indicators were to be introduced, are any safeguards needed (statutory or operational)?

Statutory safeguards are needed to ensure that the grounds being taken forward are not dependent on resources. The responsible authority must be compelled to

implement the decision. This will also prevent this policy from indirectly discriminating against children and young people in deprived areas, where resources are likely to be more stretched. The wellbeing indicators must be set out in legislation and applied universally.

Children's views within Reporter investigation and decision making – a post-referral discussion?

30. Do you support the introduction of the offer of a post-referral discussion between the children's reporter and the child and family? Y/N, who else, if anyone, should attend?

Yes.

Every opportunity to engage directly with the Reporter in person should be offered. This should be separate discussions for the child and then the family, unless the child wants the discussion to happen with everyone together. Children should always have the right and offer to also have an independent advocate attend too, to help them understand the decision and their rights and options.

Establishing grounds of referral

The Scottish Government invites views on the proposal that grounds hearings be replaced with fact finding hearings to be presided over by a new, legally qualified member operating within the environment of the children's hearings system (the "legal member").

See 6.5 - The Hearings for Children report proposes a bold new approach to the establishment of grounds. It recommends: "Grounds must be established in a separate process before a child and their family attend a Children's Hearing. There must be no more Grounds Hearings."

Currently, the children's reporter, having decided that a section 67 ground(s) applies in relation to the child and that compulsory measures of care are necessary, must arrange a children's hearing (a "grounds hearing"). The children's reporter prepares a statement of grounds for the grounds hearing, and the child and relevant persons are obliged to attend.

At the outset of a grounds hearing, the chairing member must explain the statement of grounds (alleged facts and relevance to statutory grounds for referral) to the child and relevant persons, and to ask whether each element of the statement of grounds is accepted. This process can be a disproportionate use of volunteer panel member time, where their principal role is to make substantive decisions in the best interests of the child.

The Hearings for Children report and the Scottish Government recognise that, in order to safeguard the rights of the child and relevant persons, there must be a process whereby a recognised decision maker considers whether the grounds of referral have been established.

Views are invited on a proposal that grounds hearings be replaced with 'fact finding hearings' to be presided over by a new, legally qualified member operating within the environment of the children's hearings system (the "legal member"). A fuller description of the potential role and function of the legal member, and the purpose of the fact finding hearings is outlined below.

The Legal Member:

The Scottish Government invites views on the proposal that the role in determining grounds for referral currently performed by a sheriff be reformed, with the sheriff's current functions and powers being assigned to a new role - the 'legal member.' The legally qualified legal member would operate in the existing children's hearings centres but would not be a children's panel member.

The Scottish Government considers this proposal has the potential to proportionately fulfil the intent of the recommendations and narrative in Hearings for Children which proposed specialist Sheriffs27 by providing for a specialist decision maker (of fact and interim decisions) while also minimising the exposure of children and families to the court environment.

The Scottish Government does not propose that the legal member replaces the decision-making role of the children's hearing relating to dispositive decisions around the child's welfare, but rather replaces the roles currently carried out by:

- grounds hearings (relating to procedural and interim decisions) and
- Sheriffs in determining statements of grounds.

If their introduction is supported, it is proposed that the 'legal member' may receive written and oral evidence with similar powers with which the Sheriff currently operates, and would then determine whether there should be findings made in relation to the statement of grounds.

Rules of procedure would need to be developed to support flexibility in the proceedings – making them adaptable to each child's particular circumstances (including age and stage of development). These proceedings should be handled as fairly, expeditiously and efficiently as possible, having regard to the age and stage of each child. The legal member, when determining statements of grounds could be given statutory powers (within new rules of procedure) to direct matters, including:

- any issues on which they require evidence.

1. the nature of the evidence.

- the way in which the evidence is to be presented; and
- the exclusion of any evidence which is irrelevant or unnecessary.

If this approach were to be adopted, it is envisaged the legal member would operate the fact-finding function from children's hearings centres - with parties, representatives, witnesses and all others required for the proceedings of proof also attending, or participating to an appropriate extent remotely in accordance with rules of procedure.

The Scottish Government considers that where a legal member makes a determination relating to grounds of referral, there would still be a right of appeal to court, adopting similar procedures to existing arrangements.

The proposed legal members would be legally qualified, competency-based and fee-paid, consistent with legal members of other Scottish tribunals. They would be provided with induction and ongoing education on their functions and would be subject to rigorous performance monitoring.

These proposals have potential to make the redesigned children's hearings system less dependent on competing demands within sheriff courts, and also better able to explore ways of identifying and eliminating sources of delay in establishing grounds. The proposals could also bring the realisation of the concept of continuity of decision-maker (expressed at recommendation 11.2228) within the direct control of the appropriate and discrete mechanisms integral to the redesigned children's hearings system, and potentially relieving the courts system of the burden of this demand.

31. What would be the advantages and disadvantages of passing the fact-finding function from sheriffs to a new cohort of legal members within the redesigned children's hearings system?

This would likely speed up the system. This could also enhance independent decisions being made, as the current system means that when child protection orders are appealed for example, due to geographical factors it is likely to be the same Sherriff reviewing the appeal of their own decision.

However, this new cohort of legal members would require specific training on human rights, children and teenagers, the care system and the impact of trauma and adverse

childhood experiences, among other topics. This could not be a pool of any legal member, they must have a specific interest in this topic and continued learning.

This proposal also increases risk by having a decision being made by only one person. We believe that a set up similar to that of a mental health tribunal panel which has a lawyer, psychiatrist and person with lived experience is more preferable.

Another disadvantage is the move away from the Kilbrandon principles where The Social Work Services Group, responsible for implementing the new system in 1971 stated that the Panel members would be selected by their "knowledge and experience of dealing with families", their representativeness of the community in which the family lived in terms of age and income group, but the most significant qualification would be their ability to fulfil Kilbrandon's mission through their personal characteristics of open-mindedness, interest in children, and their ability to communicate with children within the Hearing setting (Social Work Services Group, 1969).'

32. Do you consider that this proposal fulfils the intention of the recommendation from the Hearings for Children report that there should be a consistent specialist sheriff throughout the process?

Yes.

We are in favour of consistency for children and young people at their Hearings, and do not believe that removing the fact-finding process from the Sheriff negates this benefit.

33. Do you have any views on the proposed retention of the appeal arrangements within a redesigned children's hearings system?

Who Cares? Scotland believes that the current time window to appeal is too short for a child to process and fully understand a decision that has been made, and for an

advocate to have time to raise a child's awareness of the ability to appeal a decision they are unhappy with and to gather the child's views, prepare and submit an appeal. We believe this must be extended in order to be able to be a child-centred and child-led process.

34. Other than a legal member or sheriff is there another person or body who could:

- **present the statement of grounds to the child and family and receive responses?**

Yes. We would oppose proposals for this to fall to an advocacy worker as it is not the appropriate role to be relaying decisions made by the care system to the child, however, we believe the statement of grounds could be presented by a Children's Reporter, with an independent advocacy worker present.

- **Make interim orders?**

No. We do not believe there is another profession qualified to impose orders on a child and potentially deprive them of their liberty. Serious rights infringements could occur if this power was delegated, including but not limited to the right to a fair trial under Article 6 ECHR and Article 40 UNCRC.

35. What would be the advantages and disadvantages to replacing grounds hearings with a fact finding hearing where the process would be undertaken by a single 'legal member'?

As per our answer to Q31, this could be more efficient and likely to result in something agreeable to all parties being produced rather than the current arrangements which often result in grounds not being agreed and requiring a process to resolve this.

We believe that the statutory powers relating to evidence could ensure a better rounded and more accurate report than the referral direct from the agency is produced.

However, we are concerned that having only one member carry out the fact-finding (relating to procedural and interim decisions) and decide what evidence is relevant or necessary, without review by another person, could impact the child's right to have a fair hearing by an independent and impartial tribunal (under Article 6 ECHR and Article 40 UNCRC).

Furthermore, if the burden of proof for Hearings is 'more likely than not' rather than 'beyond reasonable doubt' then we are also subjecting our children to a lower threshold than adults, which is unjust and risks interfering with the presumption of innocence (Article 6 ECHR).

36. Is it proportionate and necessary for there to be a fact finding hearing in every case?

It would be irresponsible to make any decision about a child's life without establishing the facts. Any state intervention must be justified and so a fact finding hearing will always be necessary, although to different extents for each child.

Babies, infants, very young children and the grounds of referral

The Scottish Government is interested in respondents' views on whether any additional safeguards would be needed for very young children in a redesigned grounds process. (See section 6.6 of the consultation document)

37. In order to safeguard the interests of very young children, should the legal member or sheriff have discretion to convene a fact finding hearing, even if all relevant persons accept the statement of grounds?

Yes. We agree with NSPCC and support the Sheriff or legal member being able to exercise discretion and convene a fact finding hearing even when grounds have been accepted in order to review a case and ensure the best interests and rights of babies and very young children are safeguarded. Babies and very young children prior to starting school are less visible to professionals and have extremely limited ability to alert someone that something is wrong at home. In homes where domestic abuse is occurring, it can be particularly challenging for professionals to ascertain what is happening in the home. There is also a risk that in the process of achieving acceptance of grounds, the statement of facts are adjusted and key information may be lost. As babies rely on the adults around them to assess their situation and ensure their safety, we are supportive of this additional safeguard to ensure all are satisfied that their experiences have been well understood and they can be appropriately protected.

However, given babies and young children's rapid developmental timescales, we emphasise the need to ensure this process is undertaken swiftly to avoid delay to an infant reaching a settled resolution.

38. Do you have any other views about how the youngest children should be supported in this part of the process to establish grounds of referral?

We agree with NSPCC that it is critical those involved in the fact finding process take full account of the lived experience of the infant or young child by hearing from a wide range of practitioners involved in the child and family's life, and via independent representation of the infants to ensure their rights are upheld.

As set out in our answer to question 19, Who Cares? Scotland believes it is essential for children of all ages to have access to independent advocacy or independent non-instructed advocacy. Who Cares? Scotland provides professional, independent and relationship-based advocacy, and our non-instructed advocates are trained to use tools such as talking mats, pictorial information, and observing non-verbal communication. Our advocacy workers also work with very young children who are able to verbalise their likes and dislikes, where they want to live, and who they feel safe with. Ensuring that children of all ages, and particularly those with additional barriers to communicating, are referred for advocacy support is key to upholding their rights under the UNCRC and PSED.

Statutory time limits in establishing grounds of referral

The Scottish Government is interested in respondents' views around introducing a procedural rule whereby if the grounds of referral have not been established by a specified time, that situation should trigger a review by the decision maker (be that a sheriff or legal member). (See section 6.7 of the consultation document)

39. A period of three months has been suggested as a time limit for triggering a review where an application to determine grounds of referral has not been dealt with. Please give us your views.

Yes we would support this, except for in the case of babies where we would call for a time limit of 28 days.

There needs to be a time limit to force a review in cases that have stalled. This timeframe seems appropriate to us, except for in the cases of infants who require an expedited process due to their particular developmental needs and the benefit of having a settled carer.

40. Do you support a defined time period for triggering a review of the progress of the case?

Y/N. If you support defining a time period but not the suggested 3 months, should another time period be considered?

As set out above, yes we do support this and 3 months seems reasonable.

Potential involvement of safeguarder in grounds establishment proceedings

40. Do you agree that there should be earlier consideration of the appointment of a safeguarder in a redesigned system?

Who Cares? Scotland does not have a view on this.

42. Should the proposed legal member have discretion to appoint a safeguarder to assist them with establishing the grounds of referral?

Who Cares? Scotland does not have a view on this.

43. Do you support the suggestion that a safeguarder's early appointment to a child (before grounds have been established) should be presumed to end once grounds have been established?

Who Cares? Scotland does not have a view on this.

Pre-birth activity by the children's reporter

To further inform the Scottish Government's considerations, respondents' views are sought on proposals for expanding the children's reporter's role to pre-birth situations. (See section 7.2 of the consultation document)

The Scottish Government have conditionally accepted the terms of recommendation 3.6.1 within the Hearings for Children report, and seeks respondents' views on the following recommendation: "When it is considered that compulsory measures may be required immediately upon a child's birth, the Reporter must be engaged in multiagency processes and decision making and must be empowered to undertake an investigation and prepare draft grounds for referral before a baby is born."

The Scottish Government recognise the important benefits of pre-birth planning by health and social service professionals, and of adhering to the well-established concept of effective early intervention approaches. It is important for local services to plan interventions in an inclusive manner with expectant parents, at as early a stage as possible.

Health and social services often work collaboratively to identify pregnancies where there are significant potential child welfare risks and concerns, and to develop child plans which include support for the expectant parents in developing parental skills for the benefit of the entire family unit, not least the wellbeing of the child if/when subsequently born. Engagement with specialist pre-birth support services is undertaken by families on a voluntary basis. There is no current involvement for the children's hearings system before a child is born. A children's reporter currently has no role in a child's case until a referral is received by them. Referrals to the children's reporter can only be made after a child's birth, as this is the point at which the child becomes a legal person who can be the subject of a referral.

The Scottish Government understand that agencies working with expectant parents consider they are not permitted to share information with the children's reporter ahead of a child's birth on this basis. Similarly, it is not currently possible to apply for a Child Protection Order until after a child is born. There are no proposals from the Scottish

Government in this consultation, or contained within the Hearings for Children recommendations, to change that position.

In terms of the specific recommendation highlighted above, the Scottish Government considers there are both benefits and risks in involving the children's reporter prior to a child's birth. Where compulsory interventions are anticipated immediately or shortly after a child's birth, if professionals working with expectant parents were empowered to share information with the children's reporter, that may support efficient and expeditious children's reporter investigation and decision making at the point when the child is born.

However, the Scottish Government is alert to the risk that obliging professionals to consider sharing information with the children's reporter ahead of a child's birth could risk damaging trust in an already delicate relationship between some expectant parents and professionals (including social workers, family nurses and health visitors). This may hinder or prevent work in developing child plans intended to support expectant parents in developing parental skills for the benefit of the child after their birth. In these circumstances, it is also possible that the involvement of the children's reporter may unintendedly place additional stress on the expectant parents which could be detrimental in particular to the health of the expectant mother and unborn child.

The Scottish Government is carefully considering the potential implications of this proposal, including from all the relevant rights holders' perspectives, and it intends to engage with the Information Commissioner's Office directly on the connected data protection issues.

44. How could a redesigned CHS better protect babies shortly after their birth?

Prioritising Support to Keep Families Together:

In line with the Promise and the Scottish Government's commitment to early intervention and keeping families together, the CHS could mandate support and

scaffolding to be in place for parents to support them to keep their child at home if possible.

NSPCC highlight that some local authorities have specialist social work teams dedicated to working with families in the pre and post birth period, however, this is not available across the country.

We support NSPCC's calls that there is urgent need for an advanced understanding of a) the kinds of evidence-based therapeutic support that may most benefit parents in the pre-birth period and b) the current landscape of pre-birth provision in Scotland. This is a pre-requisite to successful strategic planning for the pre-birth period.

We also consider it to be in line with both the infant's and parent's right to a family life under Article 8 ECHR and Article 8 UNCRC, and Article 18 UNCRC (governments must recognise parental responsibilities and provide resources and support to help them fulfil these) that parents receive significant levels of support at this period, to maximise their chances of beginning the journey towards being able to safely parent their child.

Specialism in the Hearings System:

Who Cares? Scotland also supports NSPCC's calls for the CHS to recruit specialist panel members to ensure the distinct needs of infants and very young children are met:

The Promise notably demands that the care system is equipped to hear the "quieter voices" of babies and very young children and that the hearing system shrinks and specialises, to better serve the needs of those using it. Advanced knowledge of child development is considered by experts to be critical within a more specialised hearing system, if it is to reflect its modern function in Scotland today. The legal system making needs and rights-based decisions about the safe care of infants necessarily must contain expertise on infant mental health, including early child development, the impact of trauma within infant's relationships with primary caregivers and a consistent

awareness of the fundamental importance of decisions being made within an infant's developmental timescales.

The panel or team making decisions about infants and very young children must include these crucial areas of expertise. The balance of decision makers with appropriate knowledge and experience and a chairperson with suitable gravitas would best match the profound and life changing significance of the decisions being made and create the most safe and effective context for these decisions being developmentally informed, evidence-based and leading to improved outcomes.

45. What can be done to improve interagency pre-birth preparatory work?

Who Cares? Scotland has heard from Care Experienced parents that practical support is greatly needed, and would be much more beneficial than an additional layer of stress and bureaucracy on parents already heavily subject to processes and anxious about future.

'Having professionals or volunteers who have life experience in parenting is helpful, if they are sensitive and good at helping parents to build confidence in their style of parenting.' – Care Experienced parent, Believe in Us report, 2022.

'Referral to perinatal health team was life saving for me and should be something Care Experienced parents should have access to if needed.' – Care Experienced parent, Believe is Us report, 2022.

Many Care Experienced parents who contributed to our *Believe in Us* report in 2022 (which examined the experiences of Care Experienced parents in Scotland) spoke about their determination to provide the best life they can for their children and that their experiences of care can be viewed as a strength by professionals. They also spoke about wanting professionals and supportive adults to believe in them, build their confidence, encourage them, and ultimately see their strengths, rather than taking a deficit-approach.

'For me it was the little things, like I just needed someone to tell me I was doing a good job. I just needed someone to tell me that I wasn't going to turn out like my parents. I just needed someone to tell me I could be a good parent.' – Care Experienced parent, Believe in Us report, 2022.

'It's not their fault they were in care and they're doubting their ability, so support them to see they're good enough and they deserve to be happy.' – Care Experienced parent, Believe in Us report, 2022.

For many Care Experienced parents, it can be very hard to trust in a system that they had a negative experience of as a child. This coupled with fear about the prejudice and stigma they are subject to from professionals due to their own care experience, prevents many parents from being able to ask for help. Only around 1/3 of Care Experienced parents responding to our *Believe in Us* survey told us that they felt comfortable asking for help from services / professionals. Only 37% felt able to get the support they needed.

'As parents we want the best for our children and we are working so hard to get out of the cycle of generational care. You are corporate grandparents and if it's not good enough for your own children it's not going to be good enough for us or ours either. The other parents I know who are Care Experienced are giving parenting their all whilst coping with life challenges that others don't necessarily have. Support us to be the best parents we can be and don't automatically judge us.' – Care Experienced parent, Believe in Us report, 2022.

Pre-birth preparatory work that aims to establish good relationships with an expectant parent where they feel respected and able to ask for help without unfair prejudice would be most useful to this group. This can include building a relationship with their family nurse, classes to develop parenting skills, and increase coping strategies, connection with other expectant parents, and making parents aware of what supports there are and how they are beneficial, to remove the fear and stigma.

'Myself and my partner didn't take antenatal classes, but to be fair we never got offered them because we had social work involvement very early into the pregnancy. I would have taken it as well, but because we had social work involvement, they were more interested in sorting out the care plan because there were a lot of serious concerns

about how I would cope as a dad. I wasn't experienced, and they had concerns about that.' – Care Experienced parent, Believe in Us report, 2022.

(Know) that Care Experienced young people have been judged and discriminated their whole life. Don't put them through that as a parent as it can be mentally damaging and just because a person is a single parent or doesn't have any family support doesn't mean they can't be a parent.' – Care Experienced parent, Believe in Us report, 2022.

46. Do you agree that non-statutory action (practice improvements and guidance updates) is sufficient to deliver an enhanced pre-referral role for the reporter in a redesigned CHS?

No. We don't think there should be any pre-referral role for the reporter in a redesigned CHS.

Care Experienced parents need to feel that they have support around them to help them keep their child, rather than having professionals around them waiting to remove the child.

Removal should be a last resort, as opposed to having a reporter involved before the baby is born and they have had a chance to have that practical support and chance to show that they are a good parent. This will worsen relationships between the parent and the system and further prevent Care Experienced parents from asking for help.

This poses a serious risk to the rights of parents, and will make no difference other than creating additional stress and trauma for the expectant parents.

Social workers supporting parents in vulnerable situations can coordinate better support around the parent as early intervention.

The distress caused to the parents outweighs any administrative benefits to this proposal. If the only benefit is that an order would be able to be signed at any hour of the day, seven days a week, then people could be employed to offer this rather than involve a parent at a prebirth stage. This proposal seems to be system based, rather than child based.

Children's reporter's ability to call a review hearing

The Scottish Government wishes to consult on whether the current three month period within which a CSO cannot be reviewed - at the request of a child, relevant person or other entitled person - should be abolished or shortened. (See section 7.4 of the consultation document)

47. Do you think it would be appropriate for the reporter to be able to initiate a review hearing before the expiry of the relevant period?

Yes.

Lots can change for a young person in three months and it can feel like a long time to wait. Many young people we support want a review before 3 months.

However, other young people don't want the review as they're settled and then their parent can constantly bring them back to a hearing. Young people are sometimes forced to go back to hearings they don't want to go to, and this power is abused by relevant people.

We are also mindful of the repercussions of increasing demand on a struggling system. Therefore, we propose that there should be a short period of embedding, during which time no change can be made unless there is an urgent development. Then young people and potentially relevant persons should be able to request a review take place sooner than 3 months. Reporters should approve this on a case-by-case basis to prevent abuse of this right and ensure it is appropriate.

48. Do you think the statutory three month period should be revised so that individuals who are entitled to request a review of a child's compulsory supervision order (CSO) can do so within a shorter time period?

Please refer to our answer to question 47.

49. Do you consider that a child being re-referred to the children's reporter within a certain timeframe should result in that 're-referral' being treated as forming part of the pre-existing referral?

Y/N. If yes, what is an appropriate timeframe from the original referral for re-referrals to be treated in this way?

We cannot answer yes or no to this question as we believe it depends on the grounds of referral. If the grounds are different, then we would say no this should not form part of the pre-existing referral. The same child within the same family could be referred for a completely different reasons from the original referral. If the situation was the same as the pre-existing referral, then yes we would support it forming part of that referral. It is already standard practice that if a child is already on a CSO and something else happens, that the reporter considers the referral holistically. We believe this decision is best left to the referring agencies and reporter to review with all other contextual information.

A redesigned children's panel

50. Do you believe the children's panel element of the CHS should retain the unpaid lay volunteer model in whole or in part?

Who Cares? Scotland does not have a position on this. We support proposals for consistency on panels, panels which operate outside of school hours, and to establish panel members with specialist knowledge, particularly for infants and very young children. We believe it is for the Scottish Government to determine whether or not they will need to pay panel members to secure a Hearings System that meets these objectives and the principles of the redesigned system.

Regardless of whether panel members become paid positions or remain voluntary, Who Cares? Scotland calls for CHS to implement a feedback tool for young people and professionals to regularly share feedback on individual panel members. Our advocacy workers have described some panel members as having a reputation among social workers and other professionals for having very negative views of young people which are shared via inappropriate and stigmatising comments and body language, or coming across as quite disconnected from young people and the challenges they are facing today. Who Cares? Scotland calls for panel member training to have an increased focus on trauma informed approaches and the impact of trauma, and ensuring that panel members have a good understanding of care experience and hear from those with lived experience, via methods such as composite case studies.

They have also raised that a number of panel members take a well – intentioned but inappropriate and outdated methods such as trying to scare a young person or being harsh with a young person who is there on offence grounds. This is not trauma informed and damages young people's relationships with the panel and the professionals around them. We know that often it feels difficult to raise a complaint against a panel member given the shortages, their volunteer status, and young people's concerns for consequences or acceptance that they can be treated in such a way. Asking for regular feedback from the young person, advocacy worker, social

worker and other professionals would help CHS to identify panel members who are not suitable or who need more training without the need for young people to raise a formal complaint.

51. Would you support some measure of payment for panel members, over and above the current system of expenses, in return for the introduction of new and updated expectations?

Please refer to our answer to question 50.

52. Do you have any views on the introduction of new roles into the panel?

a) Paid chair

b) Paid specialist panel member – possibly including care-experience

c) Paid panel member

d) Volunteer panel member

Please refer to our answer to question 50.

53. Recognising that payment of panel members/chairing members would represent a significant new national investment in decision making, do you have views on priority resourcing for other parts of the system?

As set out in our answers to questions 1, 17 and 19, Who Cares? Scotland believes that the redesigned CHS must be founded in upholding children's rights and taking a human rights based approach. We believe that access to independent advocacy and non instructed advocacy is essential to fulfil the UNCRC and duties under the Public Sector Equality Duty for all infants, children and young people who come into contact with the hearings system. Ensuring that there is adequate provision of independent advocacy and non instructed advocacy services and training for professionals involved in the CHS to understand the purpose of these roles and their responsibilities in referring infants, children and young people must be a priority for resource.

54. Each hearing currently consists of 3 panel members, with one chairing.

	Yes	No
Should the number of panel members required for each hearing be reduced?		X
Should all panel members, on completion of appropriate training, still be required to chair hearings?		X
Should some panel members be paid for 'specialist' knowledge, whiole others' involvement remains voluntary? Eg a specialist member may have a particular qualification or expertise in childhood development, ACEs, or be a professional with prior experience of working with children in some other capacity.		
Should CE members be considered 'specialist' given their experiences of the system?	X	

Engagement with the Chairing member before the Children's Hearing

The Hearings for Children report asks that: In advance of a hearing taking place, the child or young person and their family should be offered an opportunity to meet the Chair outwith the formal setting of a hearing. Consideration should be given to the production of a note of the meeting shared, with the permission of the child and their family with everyone who has a right to receive information relating to the children's hearing by the Chair.

This proposal potentially could foster a more relaxed, informal atmosphere for the child to meet the chairing member of the hearing, reducing uncertainty about the hearing room, the panel members and process. The Scottish Government considers that many of the desired benefits could be achieved without the need for a full-time salaried chair, and there is much to recommend in the mainstream of existing good practice. However, careful consideration needs to be given to whether what is actually required is a dedicated further meeting, or just a more informal opportunity for the Chair and panel members to greet the child and family and introduce themselves just before the hearing on the given day.

Clear boundaries would need to be set around any introductory meeting to ensure there was no discussion of the substance or focus of the pending children's hearing. Discussions of that type would then have to form part of the formal record, thereby removing the benefits sought under a more informal approach.

The Scottish Government would instead support more informal measures – for example, through practice guidance – which would allow a chairing member to make introductions, offer any appropriate reassurance and explain to the referred child and family what will happen next (should it be appropriate to the particular circumstances of the case.

55. Should the chairing member of the hearing meet the referred child, their family or representatives to welcome them to the centre and offer any appropriate explanations and reassurances before the actual children's hearing?

Yes.

We support the proposals in the Mackie report. The Chair should have more of a role in supporting young people to feel comfortable to speak up and share their views and challenge decisions, as well as putting children and family at ease in very a formal and alien environment. We have seen this work well on ad hoc cases across country, and young people have fed back that his is useful.

56. If a meeting is held in the hearings centre with the chairing member, would you support this being an informal meeting?

Yes this should be an informal meeting.

Ideally we believe this pre-meeting should not be held in the Hearings centre, as this meeting should be psychologically separate from the process. At the minimum, this meeting must be held on a different day.

Children's hearings decision making in a redesigned children's hearings system

The Scottish Government would welcome respondents' views on whether the majority decision approach should be maintained, or whether in light of potential changes to the decision-making model, there should be consideration given to alternative approaches. (See section 8.4 of the consultation document)

57. Do you support the proposal that the children's hearing should have a brief period of recess/adjournment before reaching their decision and sharing it with those present?

No.

This currently happens in secure care reviews in England and the adjournment period can be extremely stressful for the child and family – sometimes to the point that it is too much for them to be in the room anymore and be fully present to hear and understand the decision. When the conversation is taken out of the room, children and their families lose out on the opportunity to understand a key part of the logic behind the decision and to feed in or challenge incorrect conclusions.

58. Do you agree that the majority decision-making approach should be maintained?

Yes.

We believe that changing the number of panel members to 2 or 4 would increase challenges to make a decision, Keeping 3 allows for different views and solutions in a meeting. It is important to balance this benefit with the need for less people to be in the room for the child. If the meeting is contentious and the panel are struggling to

make decisions, they have the option to involve a safeguarder. The safeguarder can help to instruct the panel and prevent mistakes in tricky cases.

59. Should the children's hearings be asked to reach a unanimous decision during adjournment, in order to minimise repetition and potential retraumatisation?

Please refer to our answer to question 57.

60. If a majority decision approach remains, would you agree that any dissenting decision should be noted and explained?

Yes.

It is important that the detail of the discussion is captured in a true and considerate reflection in a person's records for their own understanding at the time, and in the future of their journey through the care system and why decisions were made. If they were not in favour of a decision made by a panel, it is beneficial for them to see that nothing was overlooked and understand why alternatives were decided against.

This can also be useful in terms of preparing grounds for appeal.

Decision-making and specificity of measures in a Compulsory Supervision Order

The Scottish Government has heard, in response to a previous consultation on policy proposals for the recent Children (Care and Justice) (Scotland) Act, that it would be desirable to introduce more clarity and specificity in CSO decisions, particularly those placing children away from home with kinship or foster carers, or in recognised regulated childcare institutional settings like residential schools. Such a move would be to assist children to challenge interventions and restrictions that had not been explicitly authorised by a Sheriff or hearing. This engages questions of restriction up to the level of restraint.

61. Do you agree that it is desirable or necessary to introduce clearer authorisation for particular interventions with children, or particular interferences with their liberty, on the face of measures included in an Interim Compulsory Supervision Order or Compulsory Supervision?

Yes.

Interfering with someone's right to liberty is an extreme measure not taken lightly and rules must be extremely clear for all involved. Clearer authorisation must ensure the necessary procedural safeguards to comply with Articles 5 and 6 of the European Convention on Human Rights and Article 37 of the UNCRC, regarding the right to liberty and the right to a fair trial.

The principles include: '(a) 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; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.' (General Comment 24 p.14).

A young person may not also agree with the intervention, and feel it is not needed, proportionate, or not the right measures. Clearly documenting what the measures are may help alleviate confusion and disagreements for young people and carers.

Clearer interventions to improve accountability:

Our advocacy workers have shared examples of young people being penalised when they did not follow a measure required of them, and highlighted the unfairness that local authorities not upholding measures, often due to staffing measures, is permitted. In one case as an example, a staffing issue caused an intervention to be failed and the young person was prohibited from leaving secure care as a result.

Clearer interventions and supports in the order could help to improve a local authority's accountability for fulfilling their obligations. This is particularly important for stipulating agreed family time, or 'contact', which can often be cancelled for young people due to staffing issues, at a severe detriment to them.

Clearer interventions to help keep the Promise:

These powers to create interventions in a child's life must be better used by panels to ensure the child before them feels safe, healthy, active, nurtured, achieving, respected, responsible and included. It is not for the panel to consider the local authority or carer's feelings about these measures or resources, but to fulfil The Promise for each and every child.

Who Cares? Scotland would also like to highlight the desire for panels to specify more holistic and creative measures in an order to meet a child or young person's needs and wishes. There is no limit on what a panel can order, yet we regularly see the same, blanket measures that are muted and bland, and focus on supervision as this is the only route for a local authority to take restrictive measures. However, the impact of these measures could be life changing and the difference between a positive and miserable time in care for a child, as well as altering their view of social workers, hearings, having an order, and being in care.

Many of the children and young people we support have mental health needs and are waiting for access to CAMHS or are dissatisfied with the treatment they are receiving. A panel could order that the local authority pay for an appointment with a private

counsellor of the young person's choosing once a week. If a young person is worried about moving and not being able to attend their football club, or a child shares that they feel better when they get to spend time with animals, a panel can specify arrangements for recreational activities.

62. If so, do you agree that a 'maximum authorised intervention' is an appropriate means of delivering that clarity to children and to professionals?

In theory, we believe that a 'maximum authorised intervention' could clarify to children and professionals the particular interventions or interferences with relation to the child. However, in practice, these would need to be specified in an age and stage appropriate language. We also believe it must be made clear to the young person that their circumstances can change before the maximum is reached if decision makers feel it is appropriate, while avoiding the need for a young person to attend frequent hearings.

A maximum authorised intervention must also be specific to the young person and their needs, and cannot be a blanket term. We have concerns about who will have the authority to make such an authorisation and the level of evidence that will be required in order to justify authorising a maximum intervention. If this decision is made by individuals, this is likely to lead to widely varying practice across the country and possible discrimination.

Furthermore, panels could also consider using a 'minimum authorised intervention' to specify a base level of supportive interventions (not particular interferences with their liberty), such as counselling sessions, recreational activities or visits with a friend. This ensures that the professionals around the child have a clear direction of how to support the effectiveness of that intervention.

Timely notification of children's hearings decisions

63. is the current time frames for written confirmation of the decision by the children's hearing (5 working days) still appropriate?

Yes.

We are not aware of significant frustrations with this, so long as decisions are communicated clearly at the time of the panel.

64. Should certain children's decisions (eg for an ICSO) have accelerated notification timeframes, relative to the urgency of the decision?

Yes. Especially for an interim CSO, as another hearing will occur in 21 days so the sooner a young person is notified, the more time they have to understand the decision and their rights, and seek advocacy for the next hearing if necessary.

65. Should consistency or continuity of chairing members be the default position for each child's hearing?

We can see the benefits of this, however, many young people we support request a new chair for many reasons. If a consistent chair becomes the default, young people must have the right to request a new chair.

66. Would you support one single children's panel member's consistent involvement as an alternative approach?

Yes. We support continuity on the panel but do not believe that it must be the chairing member who is consistent.

Substantive vs procedural decisions

The Scottish Government is supportive of the position adopted by Hearings for Children in regard to consideration of the types of decisions which do and don't require a full children's hearing: "In a redesigned children's hearings system there must be a separation between procedural decisions relating to the hearing itself and the decisions made by the hearing. There should be an assessment to understand which procedural decisions a Chair can take without the need to convene a full Panel [sic] in advance of a hearing. This should include scrutiny of whether anything needs to change in legislation or procedural rules to better facilitate decision-making and eliminate structural drift and delay in the system."

Currently, each children's panel member is assigned a number of 'sessions' per month (around two, on average), one session in the morning and one in an afternoon 47 in busier areas. Each hearings session will contain up to three separate cases, fewer if the children's reporter considers that an individual case is more complex and will have to take longer than the allocated slot.

Following analysis of the recommendations in the Hearings for Children report, the Scottish Government believes there may be scope to change which decisions require a full children's hearing of three children's panel members, in line with established expectations and with the 2011 Act.

It may be considered appropriate, subject to further full legal analysis, that some procedural decisions could be taken by an individual children's panel member (usually the assigned chairing member), or potentially a 'legal member' before the grounds are determined – see section 6.

This would free up capacity for other children's panel members to engage in substantive decision making, so that allotted sessions could be used more appropriately for substantive discussions and decisions in the best interests of a child - as opposed to procedural matters at which the child or their family may not be present.

This would also allow for increased capacity of the total panel member community, reducing the number needed by removing a significant number of hearings from the allotted sessions.

Examples of where 'procedural' decisions could be taken, and where there is no requirement for the referred child to be in attendance include:

- Pre-hearing panels covering:
  - Deem or un-deem a relevant person, subject to the existing routes of appeal.
  - Excusal of child or relevant person from attending.
  - Attendance by electronic means.
- Advice hearings.
- Review of a Child Protection Order.

67. should children's panel members or chairing members, for certain procedural decisions, be able to take decisions without recourse to a full three member children's hearing?

Yes. We would be in favour of a single panel member being able to take procedural decisions such as excusing a young person from a Hearing or allowing an online meeting etc. This currently happens and would improve efficiency and delays within the system.

However, there is a risk of young people's views not being considered in these decisions. This could affect the child's right to a fair trial under Article 6 ECHR and Article 40 UNCRC, as well as their participation rights under Article 12 UNCRC. Our advocacy workers in some regions have been invited to attend prehearing meetings and in other regions they have not. The child's views must remain central at all stages of the process.

68. Are there other areas you would consider appropriate for a single-member decision making approach?

No.

Having three members considering the views of all involved and the information in the paperwork and being able to challenge each other is a vital safeguard against rights infringements and upholds the child's right to a fair trial under Article 6 ECHR and Article 40 UNCRC, as well as their participation rights under Article 12 UNCRC.

From experience, if the young person we support to attend hearings does not like the chairing member, they can feel more reassured by having other panel members there who are listening to what they have to say and ensuring a correct and fair decision is made.

69. Would you propose additional safeguards to accompany these proceedings and decisions?

Please refer to our answers to questions 17 and 19. Advocacy representation must be available at every point of the hearings process, which includes prehearings.

A duty on CHS to notify a young person's advocacy worker if a prehearing meeting is taking place would be welcome to safeguard against any meeting happening the advocacy worker has not been informed of and able to represent views at.

The Powers of the Chair during a children's hearing

Views are welcomed on empowering the chairing member to take difficult decisions on participation and attendance.

The Hearings for Children report made several recommendations relating to the powers of the chairing member of a children's hearing. Particular emphasis is placed on those attending the children's hearing, and how the Rules of Procedure, along with training provided by the National Convener and the relevant CHS practice guidance should enable the chair to robustly and effectively manage attendance and participation.

The relevant recommendation states: "The existing Rules governing a Children's Hearing must be sufficiently robust to ensure that the Chair is able to manage the dynamics and conduct of an inquisitorial approach to a Children's Hearing. This includes determining who is present at each stage of a Children's Hearing, whilst effectively balancing rights of attendance and participation, and having the flexibility to change the speaking order and arrangements and the authority to ask contributors to the meeting to leave the room after they have spoken, if that is in the best interests of the child."

The report made it clear that this includes recognising the potentially challenging relationships between attendees which may affect participation, even when there are no outward signs of violence and disruption. There are existing powers to manage attendance at a children's hearing, including the exclusion of relevant persons, in both the 2011 Act and the 2013 Rules of Procedure. The chairing member also has a responsibility under section 78(4) of the 2011 Act to keep the number of people in attendance to a minimum.

However, the Scottish Government acknowledges that these are highly complex issues, and there could be benefits to creating a set of clearly stated statutory powers to enable more robust management of hearings. The Scottish Government also agrees that empowering the chairing member to take difficult decisions on participation

and attendance could help minimise hostility and promote inquisitorialism - by making these decisions clearer and backed by potential future primary legislation.

70. Would it be beneficial for the chairing member to have a robust and clearly stated set of powers to manage how and when people attend and participate in the different phases of a children's hearing?

These powers do already exist and are utilised. For example: the Chair asking education colleagues to leave after sharing their input; selecting only a few members of very large families to attend the hearing itself; splitting a room or making arrangements for attendees to participate online.

However, clearly stated powers are always welcome to improve understanding and transparency, and may increase the ability to keep the child at the centre of the process and enable a hearing to go ahead when disruptions are occurring, for example, a family member refusing to give space to other's opinions.

71. Are the existing powers of the chairing member and of the hearing sufficient to protect the rights of all involved?

The best form of rights protection is support from an advocacy worker who is independent from the system and able to ensure a child understands their rights and has their views considered. Unfortunately, we know that not every child across Scotland is made aware of independent advocacy or able to access it when they feel their rights are at risk due to resourcing issues. To this end, Who Cares? Scotland is calling for: a duty to provide a proportionately sufficient level of independent advocacy provision; duty to provide specialist advocacy to groups with particular needs; and a duty to promote and refer for independent advocacy and non-instructed independent advocacy.

We call for a legislative duty on reporters to ensure that:

a. The role of advocacy has been explained and offered to children and young people aged 5 to 18;

b. Children under 5 and those with complex communication needs are referred for independent advocacy, given their particular vulnerabilities and evolving capacities.

For example, suggested legislative wording could be as follows, expanding on the current requirements in the Children's Hearings (Scotland) Act 2011:

(1) Every child or young person up to the age of 18 shall have a right of access to independent advocacy; and accordingly it is the duty of Scottish Ministers to secure the availability of independent advocacy services and to take appropriate steps to ensure that those persons have the opportunity of making use of those services.

(2) The Scottish Ministers may by regulations make provision for, or in connection with—

(a) the provision of independent advocacy services,

(b) identify and address any situation where a child's rights are (or at a significant risk of) not being fulfilled,

(b) qualifications to be held by persons providing independent advocacy services,

(c) the training of persons providing independent advocacy services,

(d) the payment of expenses, fees and allowances by the Scottish Ministers to persons providing independent advocacy services.

(3) The Scottish Ministers may enter into arrangements (contractual or otherwise) with any person other than a local authority, CHS or SCRA for the provision of independent advocacy services.

"It is extremely important that an advocate is made available and is completely impartial with no agenda dependent on the outcome. An advocate is there for the individual and their benefits regardless of age. A social worker will have the values and training and ethos of that social work department/authority or just feel like they do which creates mistrust and a disconnect. This applies to other services and panel members etc. It is important to have that person in the middle that is only for you to

make you feel comfortable throughout the process and explain things in terms that you understand." – Care Experienced person, Summer of Participation, 2023.

These supports must also be available across all local authorities, ensuring that young people in rural areas have the same opportunities as those in more connected locations.

Non-instructed advocacy should also be available for children and young people with complex health needs and those under 5. Please refer to our answer to question 19 for more detail on non-instructed advocacy.

Furthermore, we would like to highlight that some powers already exist but which not all chairs seem confident to use. For example, the power to remove anybody acting in an adversarial manner from the process, which includes solicitors. Our advocacy workers report seeing this power being used sometimes against a parent but not with a solicitor, despite the same level of disruption caused. If chairs are not confident to use these powers, then we would propose changing the wording of the power from 'may be used in such a circumstance' to 'must be used in such a circumstance', to ensure the child receives a hearing chaired to the highest quality.

72. What enhancements could be made to the existing powers of the chairing member and the hearing to promote inquisitorial approaches?

Please refer to our answers to question 71 and 9.

Recording of children's hearings

73. In your view, should children's hearings be routinely recorded? If yes, which method should be routinely used? Written / audio / video / other.

No.

This could be an option a young person could request, however, we are opposed to this proposition due to the likely distressing content of the recording. We believe children and young people should receive age and stage appropriate material and receiving a recording of themselves or family members upset and distressed could be retraumatising. We believe there are also issues about who would be able to access this recording. Hearings are often the most distressing meetings a young person and their family will go to – we do not see the benefit of recording such a stressful event.

Young people already receive decisions in writing, which can be many pages. For an adult looking back to better understand their past and the decisions that were made, these documents and their social work records will be their best source of information.

74. What are the main benefits and risks of this method of recording hearings?

75. If only the decision element of a hearing were to be recorded, would this change your view?

No. Decisions and reasons are already detailed and given in writing.

Child friendly summaries of decisions

76. Should there be a statutory requirement for the production of age and stage appropriate summaries of CHS decisions?

Yes. Children have a right to understand decisions being made about their care. Producing a summary that is appropriate for them is an essential part of the CHS communicating their decision and upholding a child's rights under Articles 12 and 40 of the UNCRC and Article 6 of the ECHR.

77. Should the specific needs of other family members, especially other children, be taken into account when decisions and reasons are being prepared and issued?

The Children (Scotland) Act 2020 gave brothers and sisters the legal right to participate in their sibling's hearing where appropriate. Ensuring that children who do participate in a sibling's hearing can understand the decisions that were made, particularly about the time they will or will not get to spend with that brother or sister, is critical to this right.

Family group decision making and restorative justice

We are seeking views on the operation of Family Group Decision Making (FGDM) and restorative justice services, and how they may appropriately interact with children's hearings, require careful consideration.

78. Is it appropriate for hearings to defer their decision in order for FGDM or restorative justice processes to be offered, or to take place?

We would expect that all suitable and available options have been tried before a young person reaches a hearing, and support any intervention to support a young person and their family before they reach a point of needing compulsory measures.

If FGDM becomes an expected tool prior to a family reaching the CHS, then it must be appropriately resourced to avoid families waiting months for a settled conclusion. It also must only be utilised in suitable cases, as it will not be appropriate for many families and may create further trauma and stress for the young person and others involved. If a family member is not willing to engage, this must not be cause to defer a young person's hearing.

Restorative justice requires the person harmed to want to take part, which is outside of a young person's control. The feasibility of this must be explored beforehand so as not to draw out the process for the young person, and does not need to involve the CHS.

Restorative justice services do not exist in every local authority and so could create a postcode lottery of deferrals. Furthermore, our experience is that in local authorities that do offer this practice, they generally use this tool first before referring a young person to a Hearing and so would not need to defer a Hearing in order to try this method.

79. What other ways could consideration of these processes feature in the redesigned hearings system?

Most young people in the children's hearings system are victims of neglect, harm or abuse from a parent, relative, carer or the local authority. These young people are victims and deserve space to make peace themselves, and utilise restorative justice if this is something they feel would help them to move on from trauma.

We are not supportive of the CHS forcing the use of restorative justice. A child in front of a panel may be a perpetrator of a crime but are also likely a victim themselves. We believe that restorative justice must not be able to be imposed on either the victim or the perpetrator, and the child must be able to say no to the process. The power imbalance of a children's panel makes this very challenging.

The aims of restorative justice relate to the perpetrator understanding the impact of their actions and deepening their empathy, however, this may not match the age and stage of the child. Whilst it may be useful for specific cases with offence grounds, we do not support this becoming a regular tool in the Children's Hearing System. The hearing is a process to meet a child's wellbeing and needs – adding a punishment to this process is against the aims and principles of the redesigned system. If restorative measures are seen as particularly useful in specific cases, then this needs to be reframed as perhaps a 'restorative conversation' and developed into a child friendly process.

Family group decision making could increase ownership over the measures in an order rather than the measures being something that it 'done to' the child and family. It is essential to ensure that all members of a family caring for a child are involved in the ownership and understanding of what has happened and what must happen next. FGDM could improve this ownership and bring a family on a journey with social work. However, as set out in our answer to question 78, FGDM is not suitable for all families. It also needs to have power behind it, for example, a panel must be able to make an order on any member of the family, for example on a sibling who is bullying or a parent who is using alcohol excessively.

The length of interim orders

We are interested in respondents' views on how we can make positive changes with respect to the duration of interim orders, while safeguarding the rights of children and families. (See section 9.1 of the consultation document)

80. What are the advantages and disadvantages of increasing the statutory 22 day time limit for the duration of interim CSOs?

We believe this is very individual to different young people, and should be able to be extended in appropriate cases only.

If increased, some young people would benefit from needing to attend less panels – this is particularly beneficial for young people frequently on interim CSOs. Asking a young person to attend a hearing every 3 weeks can be traumatic and detrimental to their wellbeing, with many unclear about the reasons why a longer term decision can't be made.

However, increasing the timescales would also create less stability for other young people and families who are looking for substantive decisions to be made in a timely manner. Instead, their experiences and stress would be more drawn out.

Delays due to reasons, such as a parent not receiving papers, a professional not making the meeting, a social worker requesting extension due to other factors etc., must not be allowed to create procedural delays for the child at the centre of the process. This extension to the time limit must be for the child's benefit, and not to allow for these types of delays.

81. Do you feel that there should be more flexibility in the duration of these interim orders? Y/N, if so, in what circumstances and what maximum duration do you consider appropriate?

Yes. Please refer to our answer to question 80.

Interim orders are a necessary option but require flexibility so that professionals can tailor to best suit the needs of an individual young person, 22 days does not suit all children. This would be appropriate in circumstances for example where children are consistently being required to attend hearings.

Some young people on interim CSOs can have at least 3 hearings before grounds are established. For others, grounds can take much longer to establish and the process can go on for 6 months. We would propose a maximum duration of 2 months which we would estimate is an average length of time for grounds to be established. Any process taking longer than this should rightly raise questions about what is causing the delay and how this can be resolved to reduce stress and uncertainty for the child it concerns.

82. Could ICSO reviews be undertaken by lone children's panel members? See section 8.8. of consultation doc.

No. Please refer to our answers to questions 67 and 68.

83. Do you support the proposal to create a child's exit plan from the CHS?

We are not against the proposal in principle but cannot support this proposal as we are unclear how this exit plan would operate. There is a duty on panel members to examine if young people leaving care is the best decision. We support planning for young people leaving the hearings system, adding protection against young people coming off their orders before they are 16, and ensuring that families receive the support necessary, but are unsure what this proposal is. Elements of an overall child's plan already relate to exiting the CHS so we are unsure of the role of a separate document, which may create duplication.

We would like further information to understand the proposal: who would be accountable for following the plan, and who would monitor its progress. This could be a useful tool for a family or young person to ensure that they receive the support they need, but if they have left the CHS then who would they raise a complaint to that it is not being followed? If safeguards are still required then we believe that an order is still required. We would oppose plans that reduce the numbers of Care Experienced young people eligible for statutory throughcare and aftercare support.

84. What elements should be included in a child's exit plan?

Please refer to our answer to question 83.

System redesign overall

85. Do you have any other suggestions where you consider that new legislation is needed to deliver a successfully redesigned CHS?

We believe it may be useful to consider the way in which the Public Bodies (Joint Working) (Scotland) Act 2014 has created strong joint working in a uniform manner between multiple organisations. A piece of legislation with similar principles to instruct the CHS, SCRA, local authorities, and others involved in the hearings of a child, such as safeguarders, legal members and advocacy services may be beneficial here to ensure organisations work together efficiently and in a cohesive manner. All guidance, policy and standing orders created for the redesigned CHS could be included as Scottish Statutory Instruments.

This would likely resolve many of the GDPR barriers that currently prevent key information from being shared between SCRA, the local authorities, CHS, advocacy providers and other relevant professionals.

Secure accommodation timescales for review

86. Do you agree that the timescales for review of a child's placement in secure accommodation in Scotland, as laid out in legislation, are still appropriate?

The appropriate timescale depends on the child. Young people will be in secure care for different lengths of time but any deprivation of a child's liberty must be reviewed regularly. These reviews do not always require a Hearing to be called. Some young people will request a review earlier, and others don't want an interim CSO as they don't want to need to go to another panel. Once it has been explained clearly to a young person that a hearing isn't required to decide if they stay or leave secure care, they are generally not keen to be taken back to a hearing. Ensuring young people are aware that this review can happen without the need to return to a hearing is essential to them being able to participate in a regular review of their care arrangements.

Assessing Impact

87. What, if any, do you see as the data protection related issues that you feel could arise from the proposals set out in this consultation?

We do not have a position on this.

88. What, if any, do you see as the children's rights and wellbeing issues that you feel could arise from the proposals set out in this consultation?

We refer the Scottish Government to our answers throughout the consultation highlighting numerous risks to rights and potential remedies.

89. What, if any, do you see as the main equality related issues that you feel could arise from the proposals set out in this consultation?

Please refer to our answer to question 19.

90. Do you have any other suggestions where you consider that new legislation is needed to deliver a successfully redesigned children's hearings system?

Please refer to our answer to question 85.

If you would like to discuss the contents of this response, please contact policy@whocaresscotland.org.