

## **CELCIS Response to the Scottish Government Consultation 'Raising the Age of Referral to the Children's Reporter'**

### **Key messages**

- CELCIS supports raising the age of referral to the Children's Reporter to 18 in all cases.
- This change will ensure that eligibility criteria for support from the Children's Hearing System is in line with the UNCRC definition of children as 'all people under the age of 18', and enable children of all ages who are involved in the Hearings System to be treated as such.
- 16-17 year olds should enjoy the rights of being a child with the protections that brings. Ensuring children aged 16 and 17 access child-friendly justice systems recognises the distinct developmental needs of this age group and will support the rights of all children in need of support to be upheld and their needs met.
- Raising the age of referral to the Reporter must go hand-in-hand with a focussed effort on the full implementation of Getting it Right for Every Child (GIRFEC) and The Promise.
- Support offered for all children in the Children's Hearing System must be trauma-informed and appropriate to developmental needs of their individual age and stage.
- This includes transitional support when a child turns 18, where appropriate, which will be especially important for the most vulnerable children whose developmental needs have been affected by experiences of trauma.
- Ensuring all children who are involved with the Children's Hearing System access this transitional support will require deep-rooted systemic change, to ensure that the needs and views of older children are understood and acted on.
- Resourcing of this change must go beyond simply a change in eligibility for referral. Referral into the Children's Hearing System is just one part of a much wider network of support required for these children.
- Cultural change is required across agencies, and understanding enhanced across the wider population, around how we view child development and the vulnerability of all children.

### **Introduction**

We welcome the opportunity to respond to the Scottish Government's consultation 'Raising the Age of Referral to The Principal Reporter'. The origins of Scotland's Children's Hearings System stem from the recommendations of the 1964 Kilbrandon report, to respond to children's 'needs not deeds'. Recognising that it is not possible to separate the life experiences of children who engage in offending behaviour from those requiring care and protection, its purpose was to put in place supports to address unmet needs. This remains its

purpose today and retains significant value in supporting the best possible outcomes for potentially vulnerable children.<sup>i</sup>

CELCIS takes an evidence-informed policy approach, utilising a wide range of information sources, including statutory and practice guidance, policy statements, project reports, academic research, statistical publications, frontline practice and legal knowledge and expertise. To further develop and inform our response to this consultation, in partnership with Children and Young People's Centre for Justice (CYCJ) and the Scottish Throughcare and Aftercare Forum (Staf) we convened a focus group of young people with experience of the Children's Hearings System, to listen to their experiences and understand their views. Four young people attended, aged between 19 and 24, along with several support staff. We also participated in a roundtable discussion on this consultation, hosted by CYCJ and attended by a range of statutory agencies, including Scottish Government, Police Scotland, SCRA and Children's Hearings Scotland (CHS), as well as third sector representative organisations including Victim Support and Who Cares? Scotland.

The majority of children who are referred via the Scottish Children's Reporters Administration (SCRA) (the Reporter) to the Children's Hearings System are referred due to concerns that they are at risk of or experiencing harm. In 2019/20, 12,849 children were referred to the Reporter. Of these children, 78% (10,823) were referred on care and protection grounds. 22% (2840) of children were referred on offence grounds, and of these, 814 children were referred on both care and protection *and* offence grounds.<sup>ii</sup> CYCJ research has found that nearly all children who are referred to the Reporter due to committing an offence have also been the victim of harm.<sup>iii</sup>

Scotland's national approach to improving outcomes and supporting children's wellbeing, Getting It Right for Every Child (GIRFEC), recognises children as all those under the age of 18. The United Nations Convention on the Rights of the Child (UNCRC) is clear that childhood does not end before the age of 18. Scotland's commitment to upholding children's rights and furthering the implementation of the UNCRC is demonstrated by the current progression of the UNCRC (Incorporation) (Scotland) Bill in the Scottish Parliament.

Currently, a child turning 16 who is not already subject to a compulsory supervision order (CSO) or an open referral to the Reporter cannot be referred to the Children's Hearings System. This means that some 16 and 17 year olds not previously known to statutory agencies may require compulsory levels of care and protection, but are not eligible to be referred to the Reporter. Given this, raising the age of referral is a necessary step to protect the rights of all children in Scotland.

While the current system is based on the welfare of the child as the paramount consideration, data from the Scottish Children's Reporter Administration (SCRA) indicates that in practice, there may be a different focus dependent on the child's age.<sup>iv</sup> Older children are more likely to be referred on the grounds of,

'beyond control of a relevant person', 'child's conduct harmful to self or others', 'misuse of alcohol' and 'misuse of a drug'. The most common ages for referral on these grounds are 14 and 15 years.<sup>v</sup> Whilst infants and younger children are recognised as 'children in need', by contrast, older children may be more likely to be viewed through the prism of their behaviours, particularly when their distress is manifested in anti-social and offending behaviours. SCRA data shows notable differences in the ages of children referred to the Reporter on care and protection grounds. Behind each referral to the Reporter is a child who must be listened to, with their own complex and unique circumstances, which must be carefully understood.

Trauma-informed practice to support the needs of all children who have experienced harm are integral to Scotland's GIRFEC approach, with referrals to the Reporter being one part of a range of multi-agency approaches to support children. No one single policy, measure or approach can be used in isolation. Raising the age of referral to the Reporter must go hand-in-hand with ensuring every effort remains focussed on the full implementation of GIRFEC across Scotland, so that the right support is available at the right time to help children and their families and prevent the escalation of difficulties they may face.

## **Consultation Questions**

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

- a) **Yes – All cases**
- b) Yes - Care and protection cases only
- c) Yes - Offence cases only
- d) No change – The existing age criteria should remain

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

Yes – all cases.

### **Scotland's rights-based approach**

Raising the age of referral to the Reporter to 18 in all cases is a key step in realising children's rights and aligning legal mechanisms which support and protect children in Scotland with the UNCRC. Article 1 of the UNCRC is unequivocal in defining a child as all those under the age of 18.<sup>vi</sup> Moreover, raising the age of referral has positive implications for the realisation of specific UNCRC articles, including Article 3 (best interests of the child), Article 19 (protection from violence, abuse and neglect), Article 20 (children unable to live with their family), Article 25 (review of treatment in care), and Article 39 (recovery from trauma and reintegration); as well as other specific and general provisions. As the Scottish Government progresses to incorporate the UNCRC into domestic law in Scotland, the need to raise the age of referral is clear, in

order to realise children's rights and provide equality of access to justice for all children.

### **GIRFEC alignment**

Raising the age of referral also aligns clearly with GIRFEC<sup>vii</sup>, Scotland's national approach to improving outcomes and supporting children's wellbeing, which is designed for all children up to the age of 18. The full, properly resourced implementation of GIRFEC, is crucial in supporting families at an early stage before the need for any high-level formal interventions (for example, through the courts or Children's Hearings). For every child, referral to the Reporter should be considered as a single element of a much bigger process of support, including early and effective intervention and whole family support, as well as the range of decisions that can be made once a child has been referred into the Children's Hearings System.

The Children's Hearings System is built upon the principle of integration, taking a holistic approach to the best interests of each and every child. All children are potentially vulnerable, and regardless of the grounds of referral to the Reporter, should be considered 'children in need'. Ensuring 16 and 17 year olds are, in all cases, referred to the Reporter when their needs require it will help to ensure their entitlement to a sensitive, trauma-informed response to their needs can be met. Ensuring children aged 16 and 17 access child-friendly justice systems recognises the distinct developmental needs of this age group. Research demonstrates that the brain does not fully develop until the age of 24, and that the effect of criminal justice systems on children and young people is disproportionate due to these developmental differences.<sup>viii</sup> The Independent Care Review reported that professionals and those with lived experience alike, feel the criminal justice system should consider each person's individual level of maturity, as opposed to their age. There was general agreement that the adult justice system should not be involved with anyone younger than 18, and that even at the age of 18 the 'system' needed to recognise the complexities of care experiences, individual backgrounds and the circumstances leading up to their offence.<sup>ix</sup>

### **Responding to the needs, not deeds, of all 16 and 17 year olds**

In our focus group, young people spoke to the need for extra support at the age of 16 and 17. One young person highlighted that many 16 and 17 years olds have the support of family members, whereas some of those who might be eligible for support under the proposed changes do not. They believed the Children's Hearings System should have a role here and the ability to step in to provide that support. One said:

*"Everyone's story is different and at that age you are still developing - It will also protect the young person to make sure that their rights are being upheld and protect the individual from their rights not being met".*

Offending behaviour is often an expression of an unmet need, a sign, or even a desperate demonstration to adults that a child needs help. In cases of child

criminal exploitation, this often goes unrecognised which can mean children are prosecuted for offending behaviour rather than recognised as victims of exploitation by organised networks or others.<sup>x</sup> Regardless of the grounds for referral, in all cases, care should be taken to fully understand every child's unique past and current experiences holistically, both to make sense of the context of current concerns and to shape effective multi-agency responses. This includes understanding the cumulative impact of trauma and adversity on a child's development, and their consequent needs for attuned and responsive care.

This need to recognise and respond to 16 and 17 year olds who are in need of protection as 'children first' is recognised in the Scottish Government's Child Protection Improvement Programme's (CPIP) 2017 report.<sup>xi</sup> Older children are often as equally vulnerable as younger children, and require equal protection from abuse, neglect and harm. Neglect in older children may go unseen or may manifest in behaviours seen by adults as 'challenging'. While such behaviours might initially elicit some response from agencies, without fully understanding and addressing the underpinning impacts of neglect, any support will fall short. Older children still require support and care, and both child and adult services must work together to identify neglect and develop whole system responses to improve young people's outcomes. There is compelling evidence around the mental health needs of adolescents, especially young females, which needs to be considered when allocating resources.<sup>xii</sup> Raising the age of referral to the Reporter to 18 is an important step in ensuring older children in need of protection are able to access appropriate responses in every case.

### **Care experience and age thresholds**

In recognition of the additional needs and vulnerabilities faced by children and young people with care experience, and the responsibility of the state to safeguard their rights and promote their wellbeing, Part 9: Corporate Parenting of the Children and Young People (Scotland) Act 2014 (the 2014 Act), requires Scottish Ministers, SCRA, Children's Hearings Scotland and a range of other public sector bodies to pay particular attention to meeting the needs and listening to the views of these children and young people in all areas of their services. Young people to whom the state is a corporate parent are entitled to additional support up to the age of 26. Fulfilling the State's corporate parenting responsibilities should be a key consideration in plans to raise the age of referral.

A growing body of research on the concept of 'emerging adulthood' recognises a significant shift in the age at which young people enter adult roles, which increasingly does not happen until mid to late-20s.<sup>xiii</sup> While this might be obvious in the context of a young person living in a supportive family environment, young people with care experience can find the system pressuring them to take a step into adulthood before they are ready; and without an obvious return if something does not work out. This arises, in part, because systems and legislation tend to be based on arbitrary definitions, or chronological triggers and thresholds, which do not reflect the reality of the way in which young people's

needs evolve and emerge<sup>xiv</sup>. The current parameters of the Children's Hearings System, along with some statutory support and systems (for example, some social work processes) at times reinforce these arbitrary limits and thresholds, rather than considering the gradual and transitional nature of emerging adulthood and the individual needs and issues of young people with care experience.

Whilst the Scottish legal system allows for differing chronological or legal thresholds (e.g. exercising the right to leave school, leave home and get married), the State still retains a responsibility to ensure that appropriate levels of protection are in place for all children under the age of 18 (e.g. corporate parenting). The State must ensure equitable access for all children to child-based protective legislative mechanisms. Raising the age of referral is crucial to ensuring Scotland's unique Children's Hearing system continues to protect and uphold the rights of all children.

Despite the legal provisions of the Children and Young People (Scotland) Act 2014 Act, which allow for continuing care and aftercare for eligible young people, in practice implementation to date is highly inconsistent.<sup>xv</sup> Conflicting societal and systems expectations, interlaced with children's own experiences of the care system, can often see them accelerated out of care aged 16-17 years, and no longer protected by the same legislative safeguards<sup>xvi</sup>. This can create great risk for children who can be caught in a 'no-man's land' between child and adult services<sup>xvii</sup>. Many individuals are still left without adequate support and little or no legal recourse should their situation be unsafe. Referral, or re-referral where applicable to the Reporter for this cohort of young people, if appropriate to safeguard and promote their wellbeing, would be a welcome consequence of raising the age of referral to 18. Many young people may not have the confidence nor the knowledge to be able to approach a solicitor or self-refer to legal aid, so support to access such services would be required.

The 'Youth Homelessness Prevention Pathway: Improving Care Leavers Housing Pathways' (2019), commissioned and endorsed by the Scottish Government, makes explicit reference to the challenges and complexities of care leavers moving on between the age of 16-18 and the need to ensure appropriate use of existing legal safeguards via the Children's Hearings System. The recommendations in the report are wholly aligned with raising the age of referral to the Reporter<sup>xviii</sup>

Despite the positive and progressive provisions available in the 2014 Act, a child leaving care and/or removal of Compulsory Supervision Order (CSO) just prior to a child's 16<sup>th</sup> birthday still occurs, and can effectively disenfranchise these children from access to key supports they might need as they transition into adulthood. There is a potential practice and ethical conflict here. The Children (Scotland) Act (the 1995 Act) requires courts and children's hearings to consider whether the making of an order or supervision requirement is likely to bring about a better outcome for the child than making no order. The need to be mindful of applying a 'minimum intervention' approach is one of the over-arching

principles of the 1995 Act; however, raising the age of referral is not incongruous with adopting a 'no order' or 'minimum intervention' approach.

Many of the practice narratives that have been used to justify removing a CSO from a child on or around the age of 16 do not reflect the potential ongoing vulnerabilities of the child. Such phrases as, 'outgrown the system/placement' or 'not buying into their care plan' do not reflect the reality of children's complex and often-contradictory psychological and emotional journey to adulthood. It can be the case that a traumatised child at 16 sees themselves as a young person who is now able to choose to leave care and become able to do so by social workers and Children's Hearings on the grounds of their 'non-engagement'.<sup>xix</sup> Once young people have left their care placement and had a CSO terminated, then, despite existing legal provisions, access to post-care support and provisions can be highly inconsistent and subject to a so-called 'postcode lottery'<sup>xx</sup>. This means that currently this group of children *can* find themselves propelled into the adult justice system if they commit an offence. They are no longer viewed as a children and are not given the same protection they would receive had their CSOs not been terminated. A more consistent approach to defining a child as anyone under the age of 18 within the Scottish legal system would be welcome, and would align with the intent and principles of the UNCRC Incorporation Bill currently being scrutinised by the Scottish Parliament. Notwithstanding other provisions which may be available, it recognises the vulnerabilities of young people transitioning from care and conveys a message that the state's responsibilities regarding child-centred legal safeguards should be in place and available to the full extent of the legal definition of childhood.

### **Avoiding unintended consequences**

While we fully support raising the age of referral, we would caution that care is taken to avoid any unintended consequences of such a change.

Should the age of referral be raised to 18, and a child was made subject to a CSO (whether on offence, or care and protection grounds) just before they turned 18, that order would terminate on their 18<sup>th</sup> birthday. This would provide little time to progress a care plan, and ultimately to meet the needs of the child. To avoid this, consideration could be given to extending the time that a child could remain on a CSO within the Children's Hearings System. Currently if a child is placed on a CSO at 16, it is possible to remain subject to this CSO until age 18. In raising the age of referral, consideration could be given for some young people who arrive in the system towards the age of 18 to be offered the support provided by a CSO until they are 20 or 21. This could help ease their path into adult services. One young person who took part in the focus group had a clear message in how to do so:

*"Make sure the young person is involved where appropriate"*

## **2. If the age of referral is increased to 18, are the existing grounds of referral to a Children's Hearing sufficient (see pages 11-12 for existing grounds)?**

a) **Yes**

b) No

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

We have approached this question by considering whether 16 and 17 year olds require different protections from those under 16 and have concluded that they do not.

One young person who took part in the focus group said that, *"It shouldn't be about age it should be about stage – where you're at in life. Base it around that"*, with another explaining the contrast in experiences between them and their sister and the different level of support they needed at the age of 18:

*"We need to get rid of the assumption that everyone by age 18 is able to make good decisions about their life. Some people don't have that capacity due to past trauma or drugs or alcohol or things. My older sister is 21 and is supposed to be taking care of herself, but because she was in the system for so long, she is now institutionalised. If the age of referral was older, she might have had more support. At 18 everyone is at different stages of life and maturity and still need support. I was ready to live, myself at 18 but my sister wasn't. Everyone is different and needs different support."*

Our review of the evidence indicates that any alteration or addition to the existing grounds of referral should be considered for the full population, rather than considering new grounds for 16-17 year olds. It is imperative that there is widespread practice-based support around the current grounds, and a cultural change around how we view the vulnerability of all children.

16-17 year olds should enjoy the rights of being a child with the protection that brings; but with cognisance of their developmental needs, alongside addressing specific vulnerabilities that can arise with increased capacity/independence. As children grow they develop more agency and ability to define how and to what degree they engage with any plans which are drawn up to support them. 16 and 17 year olds', for example, are able to fully engage with discussion on their needs and choices. There are often situations where children of this age group either do not agree that they require support at all, or are unwilling to countenance the type of support on offer. Managing such situations requires particular skills and persistence from trauma-informed practitioners so that presenting issues can be successfully addressed, supported and managed.

The UNCRC General Comment 20 recognises the increased responsibility of adolescence but stresses that this should not come at the expense of a child's rights:

*"The Committee emphasizes that the right to exercise increasing levels of responsibility does not obviate States' obligations to guarantee protection. Gradual emergence from the protection of the family or another care*



*environment, together with relative inexperience and lack of power, can render adolescents vulnerable to violations of their rights.”<sup>xxi</sup>*

Rather than introducing new grounds, a focus is required on a change in practice about how we view vulnerability and neglect for older children. Lack of parental care is the most common ground of referral for children and young people of all ages, however the numbers of such referrals generally decrease with age and this may indicate a concerning reluctance to refer an older child under these grounds. SCRA data does show that many teenagers under 16 are referred to the Reporter on care and protection grounds. The number of children and young people referred on care and protection grounds peaks at age 14 and falls dramatically from age 15 to 16. The risk to a young person may well remain, but the perceived care and protection needs from both society and professionals appears to change, perhaps because of the young person’s autonomy to make choices at this older age. Where a child is clearly vulnerable and at risk of exploitation, the route to support is likely to be clearer than for those that do not exceed particular thresholds. For example, practitioners may find it easier to consider making a referral if a young person is vulnerable and at risk of exploitation, but might find it harder to do so for older children exhibiting challenging behaviours that may in fact indicate they are suffering from fear, neglect or abuse.

We have also given particular consideration whether specific new grounds are necessary in relation to children at risk of sexual abuse, child sexual exploitation and child trafficking, as well as to harmful or problematic sexual behaviour in children and young people. We do not feel that new grounds are required here for 16-17 year olds; however, would urge that this be monitored and that practice development be provided to agencies to deepen understanding of this area.

Two separate but not unconnected issues also have been considered in relation to identifying, assessing and managing the risks faced by children affected by mental ill health: children and young people who are experiencing mental ill health themselves; and children and young people whose lives are affected by the mental ill health of a parent/carer. Presently, such referrals could be dealt with under the section 67(2) (m) ground of the Children's Hearings (Scotland) Act 2011: “the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person”. This is problematic as it assumes capacity and choice, which may be impaired if a child is unwell. On balance however, we do not feel a new ground is required specifically for 16-17 year olds, but that consideration should be given to agencies developing a greater understanding of the issues faced by children experiencing mental ill health.

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

We envisage there will be some resource implications for a number of services supporting children, which should be robustly assessed, analysed, and planned for.

Any implications for resource, as well as the impact on the workforce surrounding a child, should be considered here in the wider context of further changes anticipated around the care 'system' and full incorporation of the UNCRC. In addition to changes that will be brought into effect as a result of implementation activity following the Independent Care Review 'Promise' report. The Promise called for significant changes to the care 'system', as well as to family support, youth justice and education. Investment is required in a number of areas to implement the recommendations of The Promise.

While ambition and determination to act are absolutely necessary, careful planning and consideration should be exercised when attempting to manage a number of complex change efforts concurrently. Raising the age of referral is only one part of this complex change effort. Plans and resources should be structured to reflect this. Supporting complex change in this context requires local areas to have access to intentional, purposeful and structured external facilitation to explore how the system currently works, what particular aspects of this system need to change, and to provide the support for a staged based implementation approach to develop a new system that reliably produces new results/new practices. The level of implementation support for practitioners should reflect the level of new skills required and complexity of the practice, and be commensurate with its scale.<sup>xxii</sup>

Where additional support to children and families is placed on a statutory footing through the Children's Hearings System, further resources for local authorities may be required. This should account for a potential increased in the need for advocacy services under section 122 of the Children's Hearings (Scotland) Act 2011. In line with GIRFEC, multi-agency partnerships should already be seeking to assist vulnerable 16-18 year olds via existing processes including Child and Adult Protection processes; Vulnerable Young People Procedures; the Framework for Risk Assessment, Management and Evaluation (FRAME); and Aftercare and Continuing Care. Fulfilment of these processes requires resource and attention.

Where a referral to the Reporter is made as a result of raising the age, further cost may be incurred in holding a Hearing and commissioning specialist services both community based and, in some cases, foster care, residential and secure care settings. Raising the age of referral could also have a considerable impact on youth and adult justice services in social work. However, CELCIS analysis indicates this change could result in further reductions in requirements for social work to produce court reports for 16-17 year olds (already falling to 740 in 2018-19 from 926 in 2014-15), and the number of diversion from prosecution cases commenced (560 in 2018-19).<sup>xxiii</sup>

For Health and Social Care Partnerships, and social workers in particular, there is likely to be an increase in the number of assessments and reports required, as

Reporters investigate the child's circumstances before deciding if compulsory measures are necessary in each case. Additionally it is likely that some children who are referred at 16/17 may be those whose need for support has not been identified (or sufficiently met) earlier in their lives. For children who need support and assistance at age of 16 years or over – but have not previously had support - there are significant vulnerabilities. For example, if a child experiences a breakdown in family relationships and/or bereavement at this stage in development and need a safe place to stay, they are often offered 'adult' accommodation of their own tenancy via housing services. Alternatively, they could be asked to consent to their own 'section 25' (voluntary agreement) in order to access entitlements of continuing care and aftercare support. Both of these approaches are huge asks to make of a young person at this stage of development as they are often making 'choices' with limited options at a vulnerable time. Working with young people and their families in such cases, where there may be established patterns of concerning behaviour and unmet need, is likely to require a significant input of resources across multiple agencies if it is to be effective. There is no 'quick fix' in these cases. There is an opportunity to gather data from this new group of children, and trace back any history of involvement with services to ascertain if a particular intervention at an earlier stage might have benefitted the child and their family. From such learning, we can plan for improvement in our systems and processes.

Based on much higher rates of referral from police for 16-17 year olds, as shown in SCRA teenage cohort data, we would expect there to be a resource impact for Police Scotland.<sup>xxiv</sup> Improving links between Further Education providers or bodies such as Skills Development Scotland would also be of additional benefit. Briefings and training will be required for multi-agency partners to highlight and raise awareness of changes to legislation, and, for Police Scotland in particular, to ensure that officers are not only aware of changes but understand the principles and messages behind these changes from a children's rights perspective. Public bodies across Scotland, including Police Scotland have made huge steps in their awareness of trauma-informed practice in recent years. An understanding of child development and the impacts of trauma, past abuse and neglect will support an empathetic response from all agencies in these circumstances and contribute to a wider cultural shift.

A communications strategy with a strong rationale for the change in legislation should support key messages about the underpinning values for this change and its ambitions for the young people impacted by it. As one young person who took part in the focus group said:

*"It shouldn't be a systemic approach it should be a relationship-based approach"*

### **Preventative investment and child friendly justice**

There are currently discrepancies in how children aged 16 and 17 access the justice system in Scotland. As argued for by the Independent Care Review, children aged 16 and 17 should only access child-friendly justice. This should

include avoiding any disruption to a child's education or employment. This extends to holding hearings on days and times that are most appropriate for the child, including evening or weekends, or in some cases through virtual technology.

Where children under 16 are referred to the Children's Hearings System, or are otherwise the subject of a CSO, and are deprived of their liberty, they must be accommodated in suitable accommodation which includes secure care but excludes a Young Offenders Institute (YOI).

However, currently any child aged 16 and 17 who is not the subject of a CSO will instead be detained in a YOI. This difference highlights an anomaly in any intended rights-based approach. Scotland must ensure that any child deprived of their liberty is placed in a child-friendly setting. Additionally, we support calls (including those from the Independent Care Review) for flexibility when considering to age limits and moving children from secure care to custody within a YOI.

The cost savings which can be achieved through preventative investment are also important to consider. For example, the Side Step Intervention Service by Action for Children, a multi-agency partnership initiative to target and divert young people away from serious organised crime in two areas of Glasgow, found that effective partnership working, robust risk management, peer mentoring provided by those with lived experience, prosocial activities and providing progression pathways are just some of the ways in which to support young people to find alternatives to criminal activity. In 2017 – 2018, Glasgow City Council reported that 71% of the participants were kept out of secure care as a result, with an estimated saving of one million pounds in these six months alone.<sup>xxv</sup>

### **The benefits of diversion from prosecution**

Diversion from prosecution is a process by which the Crown Office and Procurator Fiscal Service are able to refer a young person to social work – and their partners – as a means of addressing the underlying causes of alleged offending when this is deemed the most appropriate course of action. If the age of referral to the Reporter is to be raised to 18, then this would be an option for the majority of any 16 and 17 year olds who are charged with a criminal offence.

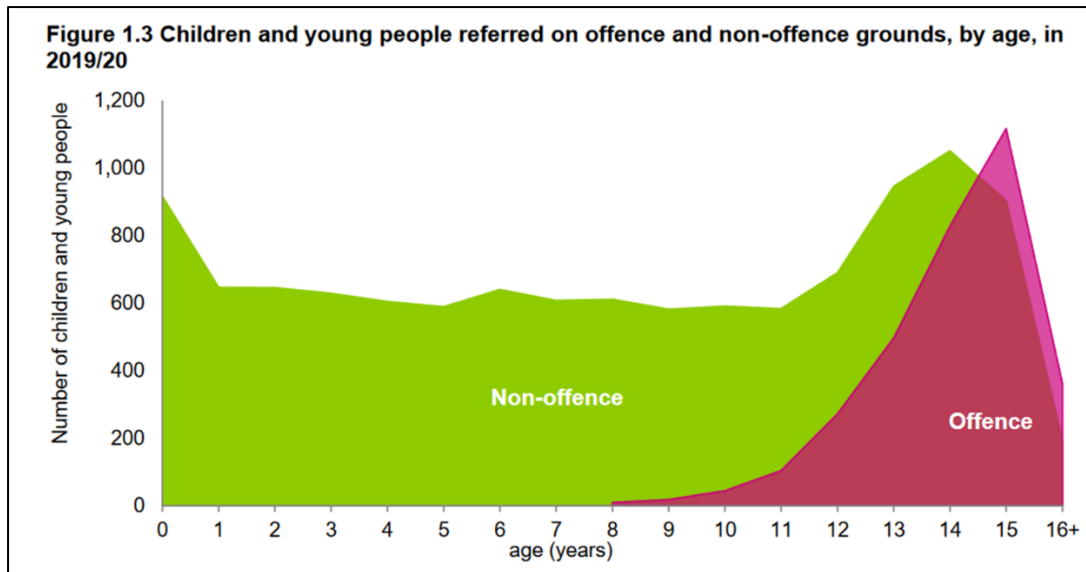
The latest National Guidelines on Diversion from Prosecution in Scotland, says that diversion from prosecution should always be considered in any case where the individual reported to Crown Office and Procurator Fiscal Service has an identifiable need.<sup>xxvi</sup> There must be a sufficiency of evidence before Crown Office and Procurator Fiscal Service can take action to refer an individual for diversion from prosecution. Diversion from prosecution support and intervention should be made available to all individuals assessed as appropriate, across the whole of Scotland, and should respond to the needs of the individual. Those providing interventions may employ generic responses to the alleged offence in addition to bespoke, tailored interventions that match the circumstances and needs of the

individual. For some people the duration of the intervention may be very short, but others may require an extended period of support. The benefits of a successful diversion from prosecution are three-fold. It allows the individual an opportunity for support to deal with the issues personal to them in the context of the alleged offence (from a desistance perspective); avoids unnecessary contact with the criminal justice system; and the individual does not receive a conviction for the alleged offence, which can impact on their longer-term employment opportunities.<sup>xxvii</sup>

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

From our understanding of the data and engagement with expert partners in this area (previously cited), including those who attended the roundtable discussion, we envisage this change having additional resource implications for SCRA. This is predominantly because an increase in referrals will require an increase in resource to initially assess, investigate, draft grounds and hold hearings where compulsory measures are considered to be necessary. Extra resourcing will also be needed to manage an anticipated rise in court activity around proofs, appeals, and potentially a greater number of vulnerable witness applications around these new entrants to the system

If we assume that almost all 16-17 year olds who commit an offence will be referred to the Reporter, this will include young people already involved in the Children's Hearings System; young people receiving services where compulsion is not necessary; and young people who haven't been in receipt of services. The data on 16-17 year olds committing offences is available, so the likely additional demand on the hearing system in respect of referral activity on 'offence' grounds can be determined. It is however much harder to attempt to quantify how many referrals are likely to be made for the 16/17 year age group on the other, much wider, 'care and protection' grounds. It is likely that a shift in culture across agencies in the hearing system will be required in order to alter how agencies view such referrals for older children. Currently, SCRA statistics show an overall pattern of steep decline in referral numbers on all grounds between children aged over 15 in comparison to children aged 15 or below.<sup>xxviii</sup>



Shown in the graph above, the number of children and young people referred on non-offence care and protection grounds peaks at age 14, and falls dramatically from age 15 to 16.<sup>xxix</sup> The risk to a young person may well remain, but the need for care and protection is perceived to change, because of the young person's right to make choices. Where a child is clearly vulnerable and at risk of exploitation, the route to support is likely to be clearer than for those that do not exceed particular thresholds. An example would be is a child who meets adult protection criteria.

It must also be understood that most referrals do not result in hearings being held.<sup>xxx</sup> Where a referral is made, the Reporter must determine whether they consider that, firstly, there is sufficient evidence of a ground, and if so, secondly, whether a Compulsory Supervision Order (CSO) is necessary. For children aged 16/17, who are free to make far greater choices than younger children, it may be that making a CSO would not be considered necessary. For example, a young person can choose where and who they live with once they turn 16, and although a condition could be made to compel an agency to provide a service, the young person can't be compelled to accept that service. This might then not lead to a large rise in the number of hearings or in court activity. However, there may be a number of more serious offence referrals that will require a much higher level of resource input by SCRA to manage successfully.

If there is such an increase in referrals and court activity for serious offences (young people that would normally be prosecuted in the High Court or be dealt with by a Sheriff and Jury) then extra resource would be needed to support this court activity. Development of trauma informed and developmental knowledge across legal and judicial workforces would be needed, as well as professionals involved in making grounds and decisions. This would be in addition to the extra resource required in order to deal with increased numbers of care and protection referrals as well as lower level offending behaviour.

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

Effectively supporting children in need of care and protection, and their families, encompasses more than the Children’s Hearings System alone; it must include preventative support in line with GIRFEC, as well as Early and Effective interventions (EEI), and a Whole Systems Approach that accounts for both short and long-term support needs.<sup>xxxii</sup> A holistic approach to supporting the needs of children at these times will mitigate the resource implications of the changes for referral criteria in this consultation. This said it is expected that ensuring 16 and 17 year olds in need of support from the Children’s Hearings System can be referred in the same way as a child of any other age and this will have some resource implications for CHS. This is most likely to be in terms of additional panel members, and the necessary resources to recruit, train, monitor and support them to make sound evidence-based decisions for children, regardless of age. One young person who took part in the focus group had a clear message around this:

*“Assessments should be made before Hearings to check if the young person has capacity”*

If Scotland can implement a Whole Systems Approach, one which incorporates early intervention, effective family support and the principles of GIRFEC, then the impact on CHS will be lessened, by reducing the risk of 16 and 17 year olds needing referrals to the Reporter. Early and Effective Intervention must be anchored in GIRFEC and fulfil the aspirations of the UNCRC.<sup>xxxiii</sup>

Article 40 of the UNCRC outlines that states shall promote and establish laws and procedures for measures for dealing with children who have infringed the penal law, without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. It is therefore imperative that practitioners in Scotland take a two-pronged approach in which steps are taken to prevent and reduce the adversity and inequality that children face wherever possible, while also ensuring that our society, systems and services are set up to promote optimal recovery and resilience in the face of adversity.

Panel members are lay people who receive regular training and whose performance in hearings is monitored, but the general public in Scotland may not see them as ‘professional’ in the way they view others with similar decision making powers such as Sheriffs. Children’s Hearings are unique in that they sit without a legally qualified chair, and this may call into question the skill-set needed to manage cases where more serious offending behaviour is concerned.

Consideration will need to be given to the training and support to equip panel members for this change. Similarly, it is important to ensure all current and future panel members have a robust understanding of the impact of trauma on

behaviour, and child and adolescent development. Trauma can have a profound impact on the developing brain, and can lead to an increased likelihood of offending behaviour and/or impaired decision making, as a result of evoking a 'fight or flight' response in particular young people.<sup>xxxiii</sup> When making decisions around 16 and 17 year olds, panel members require an awareness of the links between trauma, behaviour and decision-making, and must consider the circumstances of the child's life, and not just the offence or particular issue in question. Training in areas such as mental health, child trafficking, child sexual exploitation and child criminal exploitation would also be valuable. Panel members are a volunteer workforce and it is essential that they have appropriate support to mitigate their own risk of experiencing vicarious trauma. NHS Education for Scotland is already undertaking work to ensure initiatives that support a trauma-informed workforce are underway, but additional resource is needed to support this. <sup>xxxiv</sup>As one young person who took part in the focus group said:

*"The reporter and panel members should actively listen to the young people as to what they want and the reporter and panel members should be given adequate training to deal with the older young people. There needs to be a lot more training as you are making decisions about people's lives."*

## **6. Are amendments required to ensure sufficient access to information and support for victims harmed by children?**

- a) Yes
- b) **No**

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

On balance, we do not consider such amendments are required, however we acknowledge the sensitivity of raising the age of referral for victims harmed by children, especially for the small number of serious cases involving harm by a child.

The Children's Hearings System differs from the court system in that its purpose is to support the needs of children. Sentencing by the courts is public, meaning that anyone harmed by that person, as well as the general public, will be aware of the outcome, including the possibility of a custodial sentence.

By contrast, respect for the privacy of children involved in the Children's Hearings System is integral to upholding their rights, and to a supportive approach that is centred on their needs rather than a punishment. Information about Compulsory Supervision Orders (CSOs) given to children in Hearings cannot be disclosed to the general public, and in the rare circumstances where a child has harmed another child, the victim would not take part in, nor be given information about the outcome of Hearings. This differs to the court system, where a victim may give evidence and will be informed about the outcome.



Practices such as the Framework for Risk Assessment, Management and Evaluation (FRAME) with children aged 12-17 are critical to effective support for the small number of children who engage in behaviours that harm other children. It may be important to seek input from victims and their families on their experience of safety and wellbeing and how general information has been communicated to them to increase their confidence in the mechanisms in place in the Children's Hearings System to support, and where necessary manage the behaviour of, children.

When making a decision about a child, a Children's Hearing is to regard the need to safeguard and promote the welfare of the child throughout their childhood as the paramount consideration; however, if there is a need to protect the public from serious harm this can be considered as a primary rather than the paramount consideration. Raising the age of referral to the Reporter does not diminish victims' rights, but embraces the protection and safeguarding of all children's rights. The consideration of the cultural change required regarding how children are viewed in Scotland is imperative here. As one young person who took part in the focus group said:

*"The system needs to be more patient and understanding of teenagers in general"*

We have outlined evidence demonstrating that all children require specific, attuned and appropriate responses in line with their unique circumstances, physiology and their ongoing brain development. Behavioural control requires a high level of cognitive and executive functions of the brain, which continues to mature up until 24 years of age.<sup>xxxv</sup> For the small number of children who are involved in behaviour that harms other children, age/stage appropriate and trauma informed support to help them behave differently should be in place, regardless of whether that child is twelve or seventeen. Widespread communication allied to training across the workforce, will be necessary to assist with a greater understanding of brain development, trauma and the recognition of this behaviour as communication, prompting enquiry into the reasons behind this.

Improving the way in which children who have experienced harm experience the Children's Hearings System, as well as the Criminal Justice System, is integral to supporting the wellbeing and recovery of these children, as set out by Article 39 of the UNCRC (the right to recovery for children who are victims of any form of exploitation or abuse). We urge consideration of greater support for victims of harm, containing more focus on the use of restorative practices, including for those children who have been harmed by a 16 or 17 year old.

The young people who took part in the focus group discussed issues of access to information and support to victims. Many of the young people believed it *"depends on the case"*, but in any instance the safety of the young person charged with the offence should be protected. As one young person stated:

*“If it is going to put someone at risk then no. Regardless of what they have done they still need protecting. I don’t think we should put someone into danger by exposing their information. I think it’s putting them at risk. I understand a victim would want to know that justice has been served but it is just putting the offender more at risk. I think a victim should know that action has been taken but not the details - just brief information about what happened as a consequence of the young person actions. The information should be diluted into young person friendly language and accessed alongside a supportive adult”.*

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

**Implementation**

In order for any legislative change to be meaningful, proposed changes must be implemented in a sustainable way. This can prove equally challenging to securing changes to the law, particularly in complex areas regarding justice and protection. Reliance on enactment of high-level legal standards and top-down communication, with little attention to the support required by practitioners to understand how to change practice in their own service context, is insufficient to secure meaningful change.<sup>xxxvi</sup> Implementing and sustaining meaningful change requires full, national, multiagency awareness of legislative changes, mechanisms to support new practices, and evaluation of impact. A focus on developmental stages of adolescence and young adulthood within an informed practice culture and developed skill set will be integral. Successful implementation requires excellent leadership, and involves detailed consideration of context, and the use of the best strategies and tools in particular local contexts. Strategies and plans to enable successful implementation are required from the earliest possible stage. Systematic collection and monitoring of data is integral to effective implementation, and this too must be planned for from the outset. Earlier in this response we have identified the need for training, support and coaching for a number of different agencies whom this change will affect.

**Transitions beyond age 18**

Consideration should be given to 18 year olds transitioning out of the Children’s Hearings System. These transitions are often a particularly difficult time for young people, and appropriate safeguards will be required to support them through this transition, especially when an individual is moving into the realm of adult services. As these young people are likely to have been known to agencies for some time, there is no reason that this planning should not take place at a very early stage, ensuring that the young person is fully prepared for the changes ahead.

Any assessments and support plans must be based on the individual’s developmental stage as opposed to their chronological age, in order to meet their needs effectively. Ensuring continuing care, aftercare and pathway

planning/review processes are in place up to age 26 must be the default for all eligible care leavers. There is already legal provision for this, but the onus to request an eligible needs assessment is placed on care leavers themselves when they are over 18. Whilst some agencies and professionals act proactively to ensure care leaver's access their rights and entitlements, this is not the case with consistency. There is a need for all agencies to operate best practice and be proactive in supporting care leavers.

*"Not everyone has the capacity to make good decisions or advocate for themselves by age 16 and this really needs to be considered."*

### **Experiences of justice**

The Independent Care Review reported hearing from young people in prison settings, who highlighted a lack of support to guide them through the justice system and beyond. The Review also reported speaking to young people who felt stigmatised by police when they were known to be in care. Care experienced people described times when teachers, staff or carers had called the police in situations which they believed such actions were unjustified and unwarranted, and felt this would never happen to their non-care experienced peers. There is still a lot to be done around how care experienced young people are viewed and understood, and some policies and procedures continue to encourage escalation of situations to police involvement. For many, there was a sense of over-reaction or overprotection on the part of staff, carers, teachers and police, particularly in group settings like residential care.

Many young people felt that the processes and people involved in the justice system talked at them, rather than genuinely listening to them, and this contributed to a sense of having been unfairly accused and criminalised. Some adults with experience of both care and the criminal justice system reflected on their early experiences of the criminal justice system. Strong feelings of frustration were shared about the unfairness of overly punitive treatment, including prison sentences and the impact these had into their adult life. As this consultation progresses, we urge for further consideration of the views of children, young people and adults who are exposed to the justice system, so that we can continue to drive improvements in this area.

### **Impact Assessments**

8. **Are there any data protection related issues that you feel could arise from the proposals set out in this paper?** N/a
9. **Are there any children's rights and wellbeing issues that you feel could arise from the proposals set out in this paper?** We have outlined in our response the positive impact that raising the age of referral, if implemented sustainably, could have on children's rights.
10. **Are there any equality related issues that you feel could arise from the proposals set out in this paper?** N/a

## **About CELCIS**

CELCIS is a leading improvement and innovation centre in Scotland. We take an evidence-informed policy approach, utilising a wide range of information sources, including statutory and practice guidance, policy statements, project reports, academic research, statistical publications, frontline practice and legal knowledge and expertise. We improve children's lives by supporting people and organisations to drive long-lasting change in the services they need, and the practices used by people responsible for their care.

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