

Raising the age of referral to the Principal Reporter: consultation Response from Children's Hearings Scotland (CHS)

A children's hearing is a legal tribunal comprising trained lay Children's Panel members who volunteer their time and skills, to decide whether compulsory measures of supervision should be put in place for children and young people in need of care and protection, or whose behaviour puts themselves, or others, at risk of harm.

The children's hearings system is founded on principles and objectives established by the Kilbrandon Committee in its review of youth justice, published in 1964. The Committee looked at the effectiveness of arrangements for tackling delinquency and made proposals for reform. Kilbrandon recognised that, in many cases, the children and young people appearing in the courts charged with offences were themselves vulnerable and in need of care and protection. The children's hearings system was set up to provide a forum in which families, professionals and Children's Panel Members work together to identify what help children and young people need to reduce offending and risk and to achieve their full potential. Panel Members decide whether compulsory measures of supervision are needed to address risks to children and young people's welfare and ensure that their needs are properly met.

The Children's Hearings (Scotland) Act 2011 introduced the role of National Convener of the children's hearings system to oversee appointment of the Children's Panel members who make decisions at children's hearings. Children's Hearings Scotland (CHS) was established in July 2011 as a public body to support the National Convener to deliver his statutory functions. These functions include the recruitment, selection, training of and support for Children's Panel members. CHS is governed by a Board of non-executive members, accountable to Scottish Ministers and the Scottish Parliament. Our vision is of a children's hearings system where everyone works together, making sure that all children and young people are cared for and protected, and their views are heard, respected and valued. Our mission is to improve outcomes for vulnerable children and young people in Scotland by enabling Children's Panel members to make high quality decisions about their future.

CHS is absolutely committed to keeping The Promise to Scotland's children, by working with all our partners to make the changes called for by the Independent Review of Care. The review said that:

- actively listening to children must be at the heart of the children's hearings system;
- that the hearings system must protect and uphold children's rights, decriminalise children and destigmatise care;
- that the whole care system must protect relationships important to children;

- that every participant in the children's hearing system must be trained to be trauma informed and aware; and
- help must be delivered much earlier and the hearing system must plan to shrink and specialise.

Consultation questions

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

- a) Yes – All cases

Please provide reason(s) for your answer.

Children's Hearings Scotland welcomes the policy intention to widen access to the children's hearings system to young people aged sixteen and seventeen years who are not currently eligible for referral to the Reporter. The development of the children's hearings system is rooted in a recognition that young people who are convicted of offences or engage in high risk behaviours have experienced adversity or have themselves been victims of offences, are often vulnerable and have unmet needs for care and protection. Effective responses to damaging, destructive or risk-taking behaviour that impacts on the young person, their family and community must address their welfare and developmental needs. The main aim of state intervention in a young person's life should, in every case, be to provide support to realise and enhance every young person's potential, rather than punitive in response to their behaviour.

There is a strong body of evidence that indicates that young people remain developmentally immature until well into their twenties.¹ Raising the age of referral to the Reporter is consistent with the shift in national sentencing policy marked in the Scottish Sentencing Council's draft guideline for sentencing young people. That, too, refers to the developmental immaturity of young people as justifying a different threshold of culpability for harmful behaviour and the need to prioritise rehabilitation, rather than retribution.

It is unjust that critical decisions about how best to tackle the needs and behaviour of some young people are taken with their welfare as the paramount consideration whilst others, whose behaviour and needs may be identical, are treated as adults in the criminal justice system or subject to legislation governing compulsory intervention affecting adults, where

¹ Suzanne O'Rourke; Heather Whalley; Sarah Janes; Niamh MacSweeney; Asaly Skrenes; Suzy Crowson; Laura MacLean; Matthias Schwannauer (February 2020) The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts: Literature Review The Scottish Sentencing Council, accessed at:

<https://www.scottishsentencingcouncil.org.uk/publications/>

the main reason for intervention is to reduce risk rather than the safeguarding and promotion of welfare.

Raising the age of referral is consistent with UNCRC Article 40 which requires justice systems to provide, alongside other human rights, additional protections afforded to children by the Convention to all children and young people under the age of 18. It reflects the call in The Promise to decriminalise young people. UNCRC Article 12 requires that young people be given a meaningful opportunity to participate in decisions made about them. Raising the age of referral to the Reporter ensures that, if referred to a children's hearing, the young person's views will be sought and taken into account by the decision-maker when reaching a decision about state intervention. Incorporation of UNCRC into domestic law provides a rapid mechanism to make this change. Change should fully involve young people, including those with lived experience of referral to the children's hearings system, in redesign of the state's response when young people get into trouble.

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)?

b) No

Please provide reason(s) for your answer.

In 2019/20, the most common ground for referral to the Reporter was 'lack of parental care'. Thereafter the most common grounds were close connection with a person who has carried out domestic abuse, followed by offence grounds.

Referral to the Reporter requires that the person or agency making the referral considers that a child is in need of protection, guidance, treatment or control and that it might be necessary for a compulsory supervision order to be made in relation to the child. The Reporter may arrange a children's hearing only if he or she considers that a compulsory supervision order is necessary.

In Scotland a child is defined as under 18 years for the purposes of provision of support and welfare services and in relation to certain educational duties. However a young person aged 16 acquires full legal capacity, is able in most situations to act for themselves, and can make their own decisions. The parental responsibilities and rights of parents and carers also change at this point. For these reasons, careful thought needs to be given to the role, nature and extent of compulsory intervention in the lives of 16 and 17 year olds and their families. Extending the application of compulsion must be justified and proportionate.

Where the ground of referral would relate to a young person's vulnerability and need for care and protection, consideration should be given to introducing **specific grounds** for proportionate intervention in a young person's life which **reflect the age and stage of development of 16 and 17 year olds and their evolving and increasing agency**. 16 and 17

year olds should not be subject to compulsory measures of supervision without good reason where their circumstances would not justify compulsory state intervention if the young person were over 18 years with legal capacity. That would amount to an erosion of their existing rights under ECHR, and would be inconsistent with UNCRC article 16. For example someone over 18 who was acting in ways that endangered their safety would not be subject to restriction of their liberty unless they lacked legal capacity or had been convicted of an offence which justified such restriction.

Parental responsibilities, other than the responsibility to provide guidance to a young person, come to an end when the child reaches the age of 16 years. All parental rights cease to apply. State intervention to compel any other person with full legal capacity to comply with requirements imposed by the state against their will is presently justified either by conviction of an offence or an assessment that their capacity is impaired, for example by mental disorder or learning disability. A young person aged 16 or 17 years may experience a lack of parental care which renders them vulnerable. But the role, responsibilities and rights of family members or carers who are relevant persons in a hearing change significantly. This means that the focus of the discussion in the hearing will also change.

Where the referral relates to an alleged offence committed by the young person there is a clear basis for referral to the hearings system, as an alternative to prosecution. In some cases other existing grounds may apply to older young people to warrant referral to the Reporter, such as concern about misuse of alcohol or drugs. However young people over 16 not currently eligible for referral would not be subject to compulsory measures of supervision on this basis without proof beyond reasonable doubt demonstrated by evidence and conviction in court. By simply extending existing grounds to older young people agencies risk lowering the threshold for compulsory state intervention and drawing many more young people into the net of compulsion.

Other existing grounds may not be applied for differing reasons. For example some of the grounds relating to Schedule 1 offences apply only to offences which can be committed against children under 16, or children under 17 years.

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?

At present significant resources are expended by police, COPFS and the criminal courts, local authority criminal justice services and adult mental health services in responding to offending or risk-taking behaviour by young people who are not currently eligible for referral to the Reporter. When a young person is alleged to have committed an offence, these agencies, separately and together, focus on the investigation of crime, processing cases and diversion from prosecution and the conduct of criminal proceedings and, in

criminal justice services, assessment and preparation of reports for the courts regarding risk and recidivism and, if the young person is convicted, supervision and community payback schemes. The focus of these agencies concern is the appropriate response to the offence, the determination of innocence or guilt and the management of the offender with a view to reducing risk and recidivism. The children's hearings system has as its paramount concern the welfare of the young person. Whilst that must include responding to and managing the risk from offending behaviour, by definition that focus is much wider and encompasses the young person's home and family circumstances, education and health and well-being.

Some of the processes, skills and interventions for determining what has occurred when an offence is alleged determining the appropriate response, and assessing and managing risk will require to be available to, and exercised by the Reporter, and to the children's hearing considering the need for compulsory measures of supervision. Similarly new responses and approaches will be needed to address vulnerability outwith the context of lack of parental care.

This will require more than transfer of some staff or resources from the criminal justice system to the children's hearings system, or from adult services or criminal justice and mental health social work to children's services. Decision makers in the children's hearings system will require assurance that there are credible and effective supports available in all circumstances. Many young people are themselves victims of their peers' damaging, destructive or high risk behaviour and they too need to receive appropriate support. Meeting the needs of young people not currently eligible for referral will require a wholesale redesign of existing services, to ensure that tackling damaging, destructive or high risk behaviour, including self-harm, is part and parcel of supervision and support for these young people and their families and carers and that investment is directed to early intervention, as well as intervention post referral.

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)?

There will be an increase in the numbers of referrals to the Reporter on offence grounds. Most children aged 16 or 17 who are jointly referred to the Reporter and the Procurator Fiscal under the current legislation are dealt with by the Reporter and the majority of these do not result in new referrals to children's hearings or new compulsory supervision orders, either because the Reporter decides to take no further action, they are diverted to alternative services or they are already subject to compulsory measures of supervision. Over the last four years the numbers of referrals has remained relatively stable.

Current case levels in the courts suggests there may be a significant rise in the number of referrals to the Reporter on offence grounds. Where young people aged 16 and 17 are

charged and prosecuted in the criminal courts just over half of charges result in a conviction. The consultation paper notes that in 2017-18, 1,765 16 and 17 year olds were proceeded against in Scottish Courts. 282 received a custodial sentence and 563 received a community sentence. Over two fifths of prosecutions of young people in the sheriff summary and Justice of the peace courts could have been addressed via an alternative to prosecution. Of those young people convicted most receive community penalties, often admonishment or fines. All of those young people may now be referred to the Reporter. This should mean a recalibration of options for disposal by the Reporter short of referral to a children's hearing and additional investment in Reporters to process larger numbers of referrals.

We have no data about 16 and 17 year olds who may be in need of protection, guidance, treatment or control who are either presently dealt with under other adult legislation or who may not presently receive social work services from the local authority. We are aware that adult support and protection committees and CAMHS and adult mental health services report significant challenges in supporting this group. So we can anticipate significant numbers of additional referrals to the Reporter on both offence and care and protection grounds. However referral to the hearings system should not be a response where the problem is primarily one of poor access to services.

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)?

The potential implications centre firstly around the measures of supervision available to Panel Members in responding to the needs of a new group of older young people referred to hearings. Around three quarters of referrals to the Reporter do not presently result in referral to a children's hearings. Nevertheless it is likely that there will be increasing demand for children's hearings. Children's Hearings Scotland will require to undertake modelling to assess the potential additional requirements for hearings and the number of Panel Members needed to sit on larger numbers of hearings.

Children's hearings will require assurance that there are credible and effective supports available to young people charged with offences. They will need to become familiar with a different range of problems presented by an older group of young people, including the risks presented from child sexual exploitation, involvement of young people in organised crime, mental health problems, suicide and self-harm. CHS Learning Academy will require to develop bespoke additional training for Panel Members to help them make appropriate decisions about the need for compulsory measures of supervision for young people who are older, who have not previously, or recently, been subject to supervision by the local authority and for whom relevant persons no longer have parental responsibilities and rights.

Additional money will be needed for the resources to recruit, train and support a larger number of Panel Members, and to design and develop further specialist training for Panel Members in partnership with expert organisations in the public and third sectors.

We consulted Panel Members about what they thought the impact of the proposed change might be. A summary of what they told us is appended to this response to the consultation.

6. If the age of referral to the Reporter was increased, are amendments required to ensure sufficient access to information and support for victims harmed by children?

a) Yes

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

It is essential that irrespective of the decision-making system in which young people find themselves, those who are adversely affected by a young person's harmful behaviour receive an empathetic and healing response, and that the public are confident that that decision-making system will be effective in reducing the risk that the victim or anyone else will be harmed again.

There are a number of routine controls employed in the criminal justice to protect victims including standard and special bail conditions designed to ensure that they are not at risk of re-victimisation whilst an accused person is awaiting trial, and options to restrict a convicted person's behaviour, such as a non-harassment order. The children's hearing can attach measures in a compulsory supervision order or interim orders which may have similar effects. There is provision in the 2011 Act for the hearing to make decisions which dilute the welfare test so that the referred child's welfare is a primary, rather than a paramount, consideration where otherwise their behaviour may put members of the public at risk. That is generally applied to Panel Members' consideration of authorisation of secure accommodation. This provision might have wider application in relation to particular victims; if not, we need to put in place specific measures to enable restriction of a young person's movement and access to particular areas or perhaps specific people, beyond what is currently available, such as movement restriction orders and contact directions.

There are well established mechanisms in the criminal justice system to prepare and support victims – and witnesses where necessary – for any legal proceedings arising from offences committed against them, with services utilising skilled and experienced professionals. These are not available to victims of children who are subsequently referred to children's hearings. Options for victims of serious personal crimes to inform decision-making in the criminal courts, such as providing Victim Impact Statements and requesting review of decisions not to prosecute are not available to victims of children who are referred to the Reporter. The Reporter is empowered to provide limited information about

disposal. What is appropriate by way of information and support to victims needs careful consideration. As we know many young people are themselves victims of other young people. The hearing system should not, as a result of the proposed reforms, dilute its focus on the welfare of the referred young person and the need for decisions to have their welfare as their paramount consideration. But within that context there is no reason why support, information – short of identifying personal information – and, where necessary, ongoing protection should not be given to victims of any child or young person.

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

Children's Hearings Scotland welcome this policy development and the opportunity to ensure that Scotland's vulnerable young people who are in trouble or at risk receive a nurturing, effective and proportionate response by way of referral to a welfare-focused decision-making body which considers their needs as well as their deeds. That is in line with the foundational principles of the hearing system established by Kilbrandon. It reflects the call in The Promise for decision-making to be responsive and child-focused.

Any changes to how the courts and children's hearings make decisions about how to deal with offences and vulnerability of 16 and 17 year olds should take account of the calls in The Promise and the conclusions and recommendations in other system reviews, including the Review of Learning Disability and Autism, the Review of Implementation of Additional Support for Learning legislation, the national review of Mental Health Law (yet to report) and the consideration being given to raising the minimum age of criminal responsibility beyond the current age of 12 years. All of these affect decision-making and services and support for young people. No one system should be seen in isolation.

CHS thinks it is right to make referral to the hearings system an option for 16 and 17 year olds who are not currently eligible. That should not simply amount to a procedural shift, to replace prosecution, or to compensate for responses from services or systems designed for adults which may be perceived to be ineffective in meeting the needs of this group. However benign the intention, enabling young people who are not currently eligible for referral may bring unanticipated consequences for them. A rights' focused perspective must be applied to the extension of state intervention to additional groups of young people. To properly meet the needs of all those affected by this change will require proactive review and changes in practice across all parts of the children's hearings and justice systems and in services for both children and adults.

Annex 1

Thoughts from Panel Members

We consulted a group of CHS staff and volunteers on raising the age of referral at two open online consultation events on 5 and 6 October 2020. Approximately 40 CHS volunteers and staff took part and their responses are summarised below.

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

When asked about this some Panel Members were very supportive:

- The change is welcome and overdue; many young people may slip through the net, or get a 'raw deal' when instead sent into the adult criminal justice system.
- The hearings system offers young people more support and opportunities; we also know that criminalising young people is very damaging.
- Many young people (men often) mature more slowly, do not necessarily understand the consequences of their actions, and therefore need continued support from the hearings system (after the age of 16).
- While there may be challenges for the hearings system and other agencies these can be overcome and should not be used as an excuse not to raise the age of referral.
- For some it seemed fundamentally unfair that the support given to a 15 year old would be so different from that given to a 16 year old.
- Important to have a protective system in place for 16 – 17 year olds as they leave other supportive environments such as school and home. We are aware from experience that they get into difficult situations between the ages of 16-18, so this would be a welcomed support.

However, some of the Panel raised concerns about raising the age of referral:

- The system is not prepared for this group.
- When do we draw the line between child and adult? Could not cause issues to treat young people as 'children' in this system, where elsewhere they are considered adults (i.e. able to get married/join the army).
- We need to be able to offer them a different outcome to the criminal justice system, and what would that be?

2. If the age of referral is increased to 18, are the existing grounds of referral to a Children's Hearing sufficient?

- We need well and carefully thought out legislation. The grounds is obviously an area which does need some work.
- Compulsion really is needed, young people of 16 and 17 have minds of their own, and will not just do something because we say it is for their own good.
- Should we introduce grounds which focus on self-care, as parental care is no longer relevant at this age?
- If we have 16-17 year olds would we need to learn more about context for grounds of offence or welfare issue (e.g. domestic abuse)?

- Is it possible to introduce something around young people posing an unacceptable risk to themselves or others?
- Grounds are framed in terms of the "child". Would it be preferable to frame them in terms of "child or young person" to account for these changes?
- Should we be introducing a Ground that is very specifically for the young people of 16 - 17 years who have not had the support to ensure protection, guidance, control or treatment when younger?

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?

Not addressed in detail.

4. What are your views on the potential implications, including resource, of increasing the age of referral to the Reporter for Children's Hearings Scotland Some of the group felt more Panel Members would be needed, but others were not so sure, uncertain of how many additional hearings may be required.

- There was support for the idea of having some specialised or enhanced Panel Members, who were specifically trained to better support this group.
- Much more guidance and training (for the full Panel) would be needed to ensure a comprehensive understanding of any new grounds, and this age group specifically.
- However, there were also comments noting that the system does already deal with this age group at times, and so are not inexperienced, and that often the difference between a 15 year and a 17 year old may not be so great.
- Innovation was seen as important, to help the system adapt.
- There was also support for the idea that compulsion could be extended to cover the family, rather than the child.
- It will require more legal expertise, so this puts more pressure on Panel Members and the system is asking more and more of volunteers.

5. If the age of referral to the Reporter was increased, are amendments required to ensure sufficient access to information and support for victims harmed by children?

- The group discussed restorative justice with a few people saying they had worked in successful restorative justice programmes (some involving hearings) previously but that a lack of resources meant they had been shut down.
- Restorative justice seen as positive and worthy of more investment to extend and improve availability of provision.
- One person asked whether we should consider having victim statements in some hearings where there has been offending, or even invite the victim as a relevant person.

Further comments not addressed in the questions above.

- Perhaps we should look at a separate service, something out with both children's hearings and adult justice, something designed to support this particular group.
- Mentoring of these young people was also noted as a good support for this

group.

- Are “adolescent” measures needed? There is an age bracket where young people aren’t considered children and yet they are not quite adults yet. Maybe we need a separate system to work with 16-20 year olds for example?
- Is restorative justice needed as a measure? In the right circumstances it can be extremely successful.
- If young people are involved in the plan from the start, then it would be easier to get them to comply to measures. They should be involved and the centre of the plan.