

Child Care and Justice

Consultation on Raising The Age of Referral to The Principal Reporter

June 2020



Scottish Government
Riaghaltas na h-Alba
gov.scot

Responding to this Consultation

We are inviting responses to this consultation by 7 October 2020.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/children-and-families/age-of-referral-to-the-principal-reporter>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 7 October 2020.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to CareandJusticeConsultation@gov.scot.

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://beta.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the email address above.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.



Title

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

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Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

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

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

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

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

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

Child Care And Justice – Consultation On Raising The Age Of Referral To The Principal Reporter

About the Consultation

The 2019-20 Programme for Government¹ made a commitment to consult on enabling joint reporting to the Crown Office and Procurator Fiscal Service (COPFS) and the Principal Reporter (“the Reporter”) of all 16 and 17 year olds’ offence cases. This consultation goes further and seeks views on the Scottish Government’s proposals for legislative change to allow 16 and 17 year olds to be referred to the Reporter on care, protection and offence grounds.

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, unless by the court following guilt being accepted or established. A child subject to conditions of a CSO or open referral can be referred until their 18th birthday. Removing these conditions for 16 and 17 year olds would enable agencies to provide child protection and Whole System Approach² (WSA) responses for all under 18s.

Introduction

This consultation aims to seek views on the principle of increasing the age at which children can be referred to the Reporter for care, protection and offence grounds. This includes those who come to the attention of agencies for vulnerability such as those at risk of exploitation, abuse or harm due to their own behaviour or the behaviour of others. Any potential change as a result of this consultation will preserve the current protections, meaning that the most serious cases can still be dealt with by the criminal justice system. This consultation also seeks views on the structural, resourcing, service design and practice implications of the proposed changes.

Whilst the focus of this consultation is on proposals for a legislative change to allow 16 and 17 year olds to be referred to the Reporter, consideration will also be given to whether additional protections are necessary to facilitate information for victims, safeguarding and access to supports.

Getting it Right for Every Child (GIRFEC) policy recognises all under 18s as children. The term ‘child’/‘children’ has therefore been used for the purposes of this consultation document.

Scotland’s unique approach to child care and youth justice builds on Lord Kilbrandon’s report (1964)³ by responding to deeds in the context of needs. The view of Lord Kilbrandon’s Committee, which led to the Social Work (Scotland) Act

¹ [Protecting Scotland’s Future – The Governments Programme for Scotland 2019 -20](#)

² [Youth Justice - Whole System Approach to Youth Offending](#)

³ [The Kilbrandon Report](#)

1968⁴ and the creation of the Children's Hearings System, was that it was not useful to categorise children based on their offending alone. Instead, effective state responses obliged decision makers and service providers to look behind the presenting problems to find the underlying causes and 'failures of upbringing' in order to help the child and family. The Committee concluded that children who offend and children in need of care and protection both require a welfare based approach.

In 2011 the Whole System Approach (WSA) to offending behaviour by children and young people, was rolled out across Scotland. WSA is the Scottish Government's programme for addressing the needs of under 18s involved in, or at risk of becoming involved in offending. Based on the principles of GIRFEC, WSA supports a prevention and early intervention approach to ensure children and young people get the right support at the right time, providing better outcomes for children, young people, victims and safer communities.

All children in Scotland have the right to be protected from abuse or neglect. The Scottish approach to child protection is based upon children's rights and sits within the wider context of GIRFEC – our national approach to improving outcomes and supporting the wellbeing of children and young people.

Child care and justice is a complex area. This document aims to cover some of the key points and considerations to facilitate a meaningful consultation and engagement process which will help initiate consideration of 16 and 17 year olds who may benefit from the support of the children's hearings system.

Why are we consulting?

In March 2017 the independently chaired Child Protection Systems Review submitted their report, entitled 'Protecting Scotland's Children and Young People: It is Still Everyone's Job'⁵, to the Scottish Government. This report recommended the Scottish Government review both the measures available to protect 16 and 17 year olds and whether the Children's Hearings (Scotland) Act 2011 should be amended to allow any 16 or 17 year old to be referred to the Reporter where it might be necessary for a compulsory supervision order (CSO) to be considered.

The Children's Hearings Improvement Partnership (CHIP) was identified as the appropriate group to develop this work on behalf of the Child Protection Improvement Programme (CPIP). A short life working group was formed to examine the proposal further, consider the justifications for making such a change, and to review both the benefits and potential barriers to implementation.

The short life working group subsequently reported to the CHIP and Youth Justice Improvement Board (YJIB).

⁴ [Social Work \(Scotland\) Act 1968](#)

⁵ [Protecting Scotland's children and young people: it's still everyone's job \(2017\)](#)

Some of the key points included:-

- The current situation in Scotland does not always appear consistent with our understanding of child and adolescent social, emotional and psychological development. Each child is developmentally unique. Our current approach of arranging treatment by chronological age is not consistent with our GIRFEC aspiration of seeing each child as a separate unique individual. Those aged between 16 and 18 present with similar if not the same risks and vulnerabilities as younger children and are arguably not being adequately protected by the current legal provisions or in a way that is consistent with prevailing policy in Scotland.
- There are a number of vulnerable 16 and 17 year olds who currently fall out with the Children's Hearings System who need its protection and/or guidance to address significant issues in their lives. Child Protection, Adult Support and Protection and the Criminal Justice system can be complex systems to transition through and can result in vulnerable children falling between the legislative and service gaps.

In November 2018, the Inspectorate of Prosecution in Scotland published a Thematic Report⁶ on the Prosecution of Young People. The purpose of the inspection was to review and assess the effectiveness of COPFS processes and procedures for prosecuting children up to the age of 18 in the Justice of the Peace and Sheriff Courts and the use of alternative actions. The inspection identified a high success rate (80%) for 16 and 17 year olds diverted as an alternative to prosecution, where almost two thirds who successfully completed did not re-offend. The report recommended COPFS prioritise review of the presumption that those aged 16 and 17 subject to a CSO are to be dealt with by the prosecutor.

In March 2019 the Lord Advocate amended policy to include a presumption that all children who are jointly reported to COPFS and the Reporter, including 16 and 17 year olds subject to a CSO will be referred to the Reporter. In addition, for those 16 and 17 year olds who are not subject to a CSO, there will be a presumption against prosecution in court with consideration given to diversion from prosecution, where possible. Guidance⁷ supporting this was published in June 2019.

The aim of this change was to enable referral of 16 and 17 year olds to the Reporter where that is appropriate and in the public interest. The decision as to whether or not a case will be retained in the criminal justice system or referred to the Reporter is always a matter for the Procurator Fiscal. This results from the Lord Advocate's constitutional position as head of the system of prosecution. In practice, that decision is made by professional prosecutors in accordance with guidelines set by the Lord Advocate. The guidelines require engagement between the Procurator Fiscal and the Reporter, and the application of appropriate, rebuttable presumptions as to when a case will be retained by the Procurator Fiscal.

⁶ [Thematic Report on the Prosecution of Young People \(2018\)](#)

⁷ [Decision making in cases of children jointly report to the Procurator Fiscal and Children's Reporter \(2019\)](#)

This consultation is a key part of ensuring that the needs of our most vulnerable children are considered and that they have the opportunity to be supported in a child centred system which can address identified needs and risks. It will help us consider the processes required to support these changes and any potential limitations.

Current supports for vulnerable 16 and 17 year olds

Where a child between the ages of 16 and 18 requires protection, services need to consider which legislation or policy, if any, can be applied. The Adult Support and Protection (Scotland) Act 2007⁸ applies to children over the age of 16. The local authority has a duty to make enquiries about an adult who they believe is at risk because the adult meets each element within a three point test. Due to the nature of this test, children often do not meet the criteria for statutory intervention. The National Guidance for Child Protection in Scotland (2014)⁹ is designed to include children up to the age of 18. However, the protective interventions that can be taken depend on the circumstances and legislation relevant to that child. At present, a child aged 16 identified as being at risk due to human trafficking or sexual exploitation could not be referred to the Reporter.

The following examples illustrate the anomalies and limitations of the current legal position:

1. A 16 or 17 year who is very vulnerable and needy to the point that they are already looked after by the local authority, will not be eligible to be jointly reported or dealt with by the children's hearings system if they commit an offence - if they are looked after on a voluntary basis rather than under the authority of a CSO.
2. A 16 or 17 year old who remains vulnerable due to a learning disability discloses earlier sexual abuse by a parent or carer. The opportunity for additional support and protection via the children's hearings system could help reduce vulnerability and ensure adequate supports for that child - such as a measure of no contact, particularly where there is limited family support. Currently that child could not be referred to a children's hearing.
3. A 16 or 17 year old with a long and serious offending history that has led them to be subject to a CSO would have the opportunity of being jointly reported to the Reporter and COPFS and potentially have their case dealt with by the Reporter.
4. A 16 or 17 year old not subject to a CSO and charged with a first offence would have to be referred to COPFS.

⁸ [Adult Support and Protection \(Scotland\) Act 2007](#)

⁹ [National Guidance for Child Protection in Scotland \(2014\)](#)

Risk, Need and Vulnerability

There is a wealth of evidence about children who display harmful behaviours highlighting the links between vulnerability, victimisation and offending¹⁰. Many children who display harmful behaviours are highly vulnerable and have experienced trauma and crime in their own lives. Negative early life experiences can leave some children more vulnerable to environmental pressures¹¹. In turn, this can contribute to the emergence of violence and/or other forms of harmful or antisocial behaviours in childhood. An assessment of their vulnerability as well as the risk of harm they may present to others needs to be taken into account. Work with children who display harmful behaviours must be child centred. This means having regard both for the needs of those harmed and those who cause harm.

McAra and McVie (2010)¹² highlight the need for youth justice policy to be holistic, with any required intervention being proportionate, based on identified need and which maximises diversion from criminal justice systems. The findings from their Edinburgh Study of Youth Transitions and Crime support the Kilbrandon principles, the links between needs and deeds and the importance of a holistic approach to children who offend.

The Council of Europe guidelines on child friendly justice¹³ were created to ensure that justice is always friendly towards children regardless of who they are or what they have done. They apply to all circumstances where children are likely to be in contact with criminal, civil or administrative justice systems. The guidelines are underpinned by 5 fundamental principles – participation, best interests of the child, dignity, protection from discrimination and rule of law. The guidelines define a child as any person under the age of 18 years.

Removing the conditions and restrictions affecting the current permissible age range of referral to the Reporter would help ensure more children have access to support, guidance and protection. This would be particularly beneficial to children encountering acute levels of risk who have not previously come to the attention of the local authority or Reporter. For example, someone aged 16 at risk of sexual exploitation who had not previously come to the attention of agencies could be offered additional protection via an increase in age of referral. Appendix A offers some illustrative examples where children aged 16 and 17 could benefit from the opportunity to be referred to the Reporter.

The Scottish Government, having heard clear representations from practitioners and the children's rights sector, is concerned that children may be denied access to appropriate legal protection by virtue of their 'order status' at their 16th birthday. That

¹⁰ [The Howard League for Penal Reform – Children as Victims](#)
[Edinburgh Study of Youth Transitions and Crime](#)
[Children and Young People in Custody in Scotland – Looking Behind the Data \(Revised June 2018\)](#)
[The Links Between Victimization and Offending \(2004\)](#)

¹¹ [Polishing the Diamonds – Addressing Adverse Childhood Experiences in Scotland \(May 2016\)](#)

¹² [Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime](#)

¹³ [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#)

status may be more clearly referable to their personal circumstances and the arrangements put in place with them and their family by the local authority. The welfare of the child who is subject of the proceedings is the paramount consideration when their needs are considered by courts and children's hearings. The Children's Hearings (Scotland) Act 2011 emphasises this test can be overridden for the purpose of protecting members of the public from serious harm (whether or not physical harm), but even in those circumstances the subject child's welfare remains a 'primary consideration'¹⁴.

Importantly, extending the age of referral to the Reporter will not remove the ability of the Procurator Fiscal to retain serious cases for prosecution in the criminal justice system.

Who can refer a child to the Reporter?

The definition of a child in terms of the Children's Hearings (Scotland) Act 2011 is under the age of 16 (or, if over 16, subject to a referral to Children's Hearings proceedings already under consideration, or subject to a CSO).

The Children's Hearings (Scotland) Act 2011 allows for a child to be referred to the Reporter. The statutory criteria for referral are:

- a) The child is in need of protection, guidance, treatment or control; and
- b) It might be necessary for a CSO to be made in relation to the child.

The Local Authority and Police must refer a child when the criteria apply. Any other person may do so.

What is joint reporting?

The prosecution provisions in respect of children are outlined in the Criminal Procedure (Scotland) Act 1995¹⁵. The Lord Advocate has issued guidelines to the Chief Constable regarding the reporting to Procurators Fiscal of offences alleged to have been committed by children¹⁶. Children aged between 12 and 15 years should only be jointly reported to the Reporter and COPFS for the most serious offences that give rise to solemn proceedings or in cases that may result in disqualification from driving (for 15 year olds and above).

16 and 17 year olds are jointly reported:

- a) Where they are subject to a CSO or
- b) Where they were referred to the Reporter before their 16th birthday, but where a decision has not yet been made either to make them subject to a CSO, not to refer them to a children's hearing or to discharge the referral.

¹⁴ [Section 26 Children's Hearings \(Scotland\) Act 2011](#)

¹⁵ [Criminal Procedure \(Scotland\) Act 1995](#)

¹⁶ [Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children](#)

It is the responsibility of the police, following the Lord Advocate's Guidelines, to identify which cases need to be jointly reported. Cases which are jointly reported should be discussed by the Reporter and Procurator Fiscal, sharing relevant information to assist with decision making. The final decision on prosecution is always made by the Procurator Fiscal and based on a discussion with the Reporter. Decision making is supported by guidance¹⁷.

What are the grounds of referral to a children's hearing?

Section 67(2) of the Children's Hearings (Scotland) Act 2011 lists the grounds in which a child can be referred to a children's hearing:

- a) the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care,
- b) a Schedule 1 offence has been committed in respect of the child,
- c) the child has, or is likely to have, a close connection with a person who has committed a Schedule 1 offence,
- d) the child is, or is likely to become, a member of the same household as a child in respect of whom a Schedule 1 offence has been committed,
- e) the child is being, or is likely to be, exposed to persons whose conduct is (or has been) such that it is likely that—
 - (i) the child will be abused or harmed, or,
 - (ii) the child's health, safety or development will be seriously adversely affected,
- f) the child has, or is likely to have, a close connection with a person who has carried out domestic abuse,
- g) the child has, or is likely to have, a close connection with a person who has committed an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009,
- h) the child is being provided with accommodation by a local authority under section 25 of the 1995 Act and special measures are needed to support the child,
- i) a permanence order is in force in respect of the child and special measures are needed to support the child,
- j) the child has committed an offence,
- k) the child has misused alcohol,
- l) the child has misused a drug (whether or not a controlled drug),
- m) 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.
- n) the child is beyond the control of a relevant person,

¹⁷ [Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter \(June 2019\)](#)

- o) the child has failed without reasonable excuse to attend regularly at school,
- p) the child—
 - (i) has been, is being, or is likely to be, subjected to physical, emotional or other pressure to enter into a civil partnership, or,
 - (ii) is, or is likely to become, a member of the same household as such a child,
- q) the child—
 - (i) has been, is being or is likely to be forced into a marriage (that expression being construed in accordance with section 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (asp 15)) or,
 - (ii) is, or is likely to become, a member of the same household as such a child.

Seeking Advice and/or Remittal for Disposal

Where a person (over the age of 16 and not within six months of attaining the age of 18, who is not subject to a CSO or interim CSO) pleads guilty to, or has been found guilty of, a summary offence, s49(6) of the Criminal Procedure (Scotland) Act 1995 allows the court to refer them to the Reporter for a children's hearing to be arranged for the purpose of obtaining advice. On consideration of the advice obtained the court may dispose of the case or remit the case to the Reporter for disposal by a children's hearing¹⁸.

Children can remain subject to a CSO until their 18th birthday. The Social Work Scotland¹⁹ position is clear - children aged 16 and 17 should remain subject to a CSO where it is in their best interests. Orders should not be terminated solely based on non-engagement, the child having outstanding offences or matters being dealt with in the criminal justice system.

Support, Guidance and Protection

A child being assessed as in need of a CSO often has needs and faces risks that are significant, entrenched and complex. Local authorities have a range of obligations to provide voluntary supports to children who are identified as being in need²⁰. However, where those concerns escalate or are more complex and require consideration of protections or interventions with legal force, then 16 and 17 year olds generally have no exposure or access to such protections.

The Children's Hearings (Scotland) Act 2011 provides that a children's hearing may make, vary or continue an order or interim variation or grant a warrant if it would be

¹⁸ [Section 49 Criminal Procedure \(Scotland\) Act 1995](#)

¹⁹ [Position Statement by Social Work Scotland: Children aged between 15 and 17 in the Children's Hearings System](#)

²⁰ [Section 22 Children \(Scotland\) Act 1995](#)

Section 33 Children and Young People (Scotland) Act 2014

better for the child than no order being in place. This is often referred to as the ‘no order principle’. If all children aged 16 and 17 were eligible for referral to the Reporter, this principle would remain a core feature of any decision by a children’s hearing. Extending the age range of referral to the Reporter to 16 and 17 year olds would not change the obligation to support children on a voluntary basis. Instead it would enhance the support and protections available to those whose vulnerabilities cannot be met via voluntary supports.

When a child becomes ‘looked after’ the state assumes duties and responsibilities to safeguard and promote their welfare and wellbeing. A wide range of legislation, regulation and guidance provides the framework within which actions take place, but the end-purpose of all of them is the same: to secure nurturing, positive childhoods, from which vulnerable children can develop into successful learners, confident individuals, responsible citizens and effective contributors.

The definition of a ‘looked after child’ is set out in legislation²¹. Most children who are looked after fall into two categories. The first category is children looked after ‘at home’ – where the child is subject to a CSO or interim CSO with no residence measure. The second category is children who are looked after ‘away from home’. These are children who have been subject to a CSO or interim CSO with a residence measure; or children who are provided with accommodation under Section 25 (a voluntary agreement); or placed by a local authority which has been granted a permanence order²².

Any child or young person who stops being looked after on or after their 16th birthday and is less than 26 years of age may be eligible for Aftercare. Between the ages of 16 and 19, a young person must be provided with Aftercare support unless an assessment has evidenced that their welfare does not require it. If the young person is aged between 19 and 26, their application for Aftercare support is subject to a pathway assessment. All care leavers may be eligible for Aftercare support, regardless of their placement type while they were looked after.

The Children and Young People (Scotland) Act 2014²³ inserted a new section into the Children (Scotland) Act 1995²⁴ to create a duty to provide Continuing Care. A young person born after 1 April 1999 who is looked after in foster, kinship or residential care is eligible to remain in their current care placement until they turn 21. Any eligible young person ceasing to be looked after on or after they turn 16 can request Continuing Care. A young person receiving Continuing Care is no longer defined as ‘looked after’ but continues to receive the same support. When Continuing Care ends the young person is then eligible for Aftercare support until they turn 26.

²¹ [Children \(Scotland\) Act 1995](#)
[Adoption and Children \(Scotland\) Act 2007](#)
[Children’s Hearings \(Scotland\) Act 2011](#)

²² [Section 80 Adoption and Children \(Scotland\) Act 2007](#)

²³ [Section 67 Children and Young People \(Scotland\) Act 2014](#)

²⁴ [Section 26 Children \(Scotland\) Act 1995](#)

Corporate parents must identify and implement actions it considers appropriate to help looked after children and care leavers overcome any barriers, so that they can benefit from the opportunities, services and support available to them. This includes practical and financial support. Corporate parenting duties end at a young person's 26th birthday. The Children and Young People (Scotland) Act 2014 sets out the six duties corporate parents must fulfil:

- (1) Be alert to matters which might adversely affect the wellbeing of care experienced children and young people,
- (2) Assess the needs of care experienced children and young people for services and support it provides,
- (3) Promote the interests of care experienced children and young people,
- (4) Provide care experienced children and young people with opportunities to participate in activities designed to promote their wellbeing,
- (5) Take action to help care experienced children and young people to (a) access opportunities (b) make use of services and access the supports available,
- (6) Take any other appropriate action to improve the way the service works with care experienced young people.

The aim of the legislation outlined above is to ensure support for children and young people who are looked after during the period they are being cared for, and beyond, in order to support their wellbeing, and to assist them to realise their potential.

Victims and Community Confidence

Victims should have confidence that their voices will be heard. Victims need access to the right help, information and support. They should feel supported and informed at every stage of the process. The Victims Code for Scotland²⁵ clearly and simply sets out these rights and the standards of service of criminal justice agencies and relevant authorities.

The impact of crime can be significant for victims, regardless of the age of the person responsible. Children who offend can be supported through Early and Effective Intervention (EEI) processes, the children's hearings system or criminal justice system. The level of information shared with victims varies depending on the system in which the crime is being addressed. Regardless of the system used to address the crime all systems acknowledge the imperative of keeping communities safe.

SCRA has a Victim Information Service. This is for people who are victims of a crime where a child is responsible and has been referred to the Reporter. Victims and parents of child victims can access the following:

- Information about the Children's Hearings System
- The outcome of the referral
- Details about how Scotland treats children who do things which are against the law

²⁵ [Victims Code for Scotland](#)

- Help to access victim organisations which can offer practical and emotional support.

Formal support is not offered by the SCRA Victim Information Service - their role is to provide information. SCRA cannot inform victims of:

- The name of the child responsible
- When/where a Children's Hearing is taking place
- Any more information about the child responsible for the harm.

COPFS also have a Victim Information and Advice (VIA) Service which offers help to child victims and victims of crime in cases of domestic abuse, hate crime, sexual crime or where it is likely that a trial will involve a jury. VIA staff can help by:

- Providing information about the criminal justice system
- Assisting in a case where a victim appears to be vulnerable for any reason, or where the prosecutor believes the victim will benefit from VIA involvement
- Keeping the victim up-to-date on key developments in the case that affects them – such as, dates of hearings, decisions about bail, verdicts and sentences – or why no proceedings are taken
- Helping victims get in touch with organisations that can offer practical and emotional support
- Discussing any additional support that might help victims, for example, if they have to give evidence
- Providing information to victims if they are the next of kin in a death enquiry.

During criminal proceedings, COPFS can also help victims by telling the judge about the impact of the crime on the victim and any injury, loss or damage they have suffered, which could result in payment of compensation. In some cases, COPFS can ask for victim's views if the judge is considering making a non-harassment order, which protects the victim from behaviour they find alarming or distressing.

Victims can access support from Victim Support Scotland whether the case is dealt with in the Children's Hearings or Criminal Justice systems.

Variations between the two systems exist to ensure the interference is proportionate by balancing the interests of the victim in the disclosure of information against the interests of the child. Most of the responses to the consultation on raising the age of criminal responsibility in Scotland in 2016 highlighted the importance of balancing the rights and support needs of the victim with those of the child thought to have caused harm²⁶.

The powers available to the children's hearings system and criminal justice system differ. For cases managed via the children's hearings system there is no power to impose bail conditions. The Children's Hearings (Scotland) Act 2011²⁷ allows for children placed on a CSO or interim CSO to be made subject to specific measures,

²⁶ [Age of Criminal Responsibility \(Scotland\) Bill – Policy Memorandum](#)

²⁷ [Section 83 Children's Hearings \(Scotland\) Act 2011](#)

this can include - where the child resides, allowing a person the child is living with to restrict their liberty as appropriate, put in place a movement restriction condition using electronic monitoring, secure accommodation, medical treatment, regulate contact between the child and a specified person or class of person, requirement that the child complies with any specific condition.

Victims Code

The Victims Code for Scotland aims to ensure victims' interests remain at the heart of the criminal justice system and that victims feel supported and informed at every stage of the process. This consultation offers an opportunity to consider the potential for a similar code or set of principles, where children who cause harm are supported via the children's hearings system or via voluntary measures such as Early and Effective Intervention (EEI). The development of principles would require careful consideration to ensure a rights based approach which is underpinned by the Kilbrandon principles, UNCRC and does not increase the risk of harm to any child.

Detailed below are the rights set out in the Victims Code and some considerations for potential principles:

Right to Minimum Standards of Service - Agencies and relevant authorities and victim and witnesses support organisations will work together to provide the best service possible, with fair and equal access throughout. This includes victims being treated in a respectful, sensitive, tailored, professional and non-discriminatory manner.

Right to Information – Victims should be able to obtain information about what is happening in the investigation or proceedings, where it is appropriate and relevant. This includes information on the release of an individual from prison.

Right to Participation – Victims should be able to understand the information they are given and be understood. Where appropriate, victims should be able to participate effectively in the investigation and proceedings. For more serious crimes victims have the right to provide a victim statement to the court and give views on release decisions.

Right to Protection – Victims should be protected from further victimisation, intimidation and retaliation during and after the investigation and proceedings. This can include civil protection measures.

Right to Support – Victims should have access to support services and access to special measures (for vulnerable individuals) in court.

Right to Compensation and Expenses - Victims have the right to claim certain reasonable expenses when attending court to give evidence, access to compensation from the accused if a compensation order is made, access to criminal injuries compensation and return of property.

The code refers to information from Police Scotland, COPFS and Scottish Courts and Tribunals Service. The development of principles for children supported out of the criminal justice system would also need to consider information from these sources and include SCRA. Any code developed would need to recognise the important principles of the children's hearings system, including confidentiality and offer a distinctive approach which preserves the welfare based approach. The code has a victim notification scheme. This is a complex area and would require careful consideration of whether, in certain circumstances, information should be shared e.g. if a child responsible for causing harm was placed in secure care, any time out and release. The code refers to bail conditions, these are only available for cases addressed in the criminal justice system. The development of any principles could consider the use of specific measures as part of a CSO, how this could be monitored and how victims could be supported to understand their rights and who to contact if measures were not adhered to. The core of any principles must be victims having confidence that their voice will be heard and that they have access to information and support. Whilst also giving careful consideration to ensure a rights based approach which is underpinned by the Kilbrandon principles, UNCRC and does not increase the risk of harm to any child.

Data – What we know

In 2018/19 12,869 children in Scotland were referred to the Reporter. 10,881 on care and protection grounds and 2,824 on offence grounds. Of these children 836 were referred on both care and protection and offence grounds²⁸. Lack of parental care was the most common ground of referral followed by the offence, close connection with a person who has carried out domestic abuse and the child's contact harmful to self and others ground.

Where a child is alleged to have committed an offence described in the Lord Advocate's Guidelines²⁹, the police will jointly report to the Procurator Fiscal and the Reporter. Following discussion with the Reporter, the Procurator Fiscal will decide whether to deal with the case or refer to the Reporter. Children should only be joint reported where the offence is of a nature detailed in the Lord Advocate's Guidelines. In 2018/19, 409 16 and 17 year olds were jointly reported to the Reporter and the Procurator Fiscal³⁰. 180 children aged 16 and 17 were retained by the Procurator Fiscal and 311 were referred to the Reporter (several children had joint reports on more than one occasion). The table below details the nature of the offences joint reported and referred to the Reporter in the last 3 years, the most prevalent offences joint reported and retained include those of a violent nature and/or threatening behaviour, vandalism and theft.

²⁸ [Statistical Analysis 2018/19 – Ensuring Positive Futures for Children and Young People in Scotland](#)

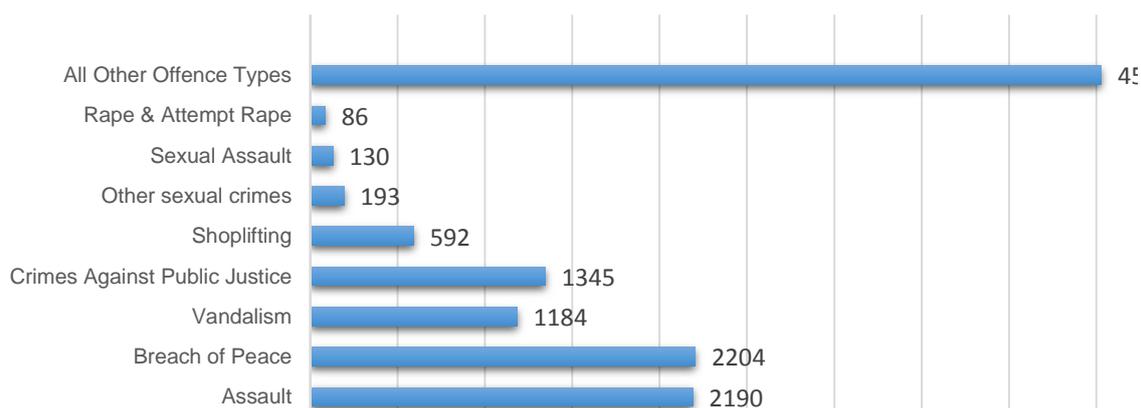
²⁹ [Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children](#)

³⁰ Data provided by SCRA January 2020 - This data is based on live operational data and as such may change over time and will not necessarily match data published as part of SCRA's Official Statistics. This data includes offence referrals marked as additional so will include some referrals which are filtered out from the official statistics due to being mis-recorded. Joint report retention is also calculated on the basis of whether a ground has been added or not which is slightly different than current official statistics methodology.

Joint Report – Referred to Reporter - Offence Type	2016/17	2017/18	2018/19
Alcohol/drug/substance use	70	55	64
Assault/serious assault/assault to disfigurement	239	342	342
Breach of Peace/culpable and reckless conduct	31	22	26
Vandalism ³¹ /malicious damage/malicious mischief/reckless damage	165	222	218
Threatening or abusive behaviour ³²	309	359	322
Fire-raising/fireworks	13	17	13
Theft/attempt theft/reset	143	177	224
Housebreaking/shoplifting/fraud/robbery	44	39	44
Sexual offence/rape/indecent communication	10	7	18
Motor vehicle related	11	25	30
Weapon	19	27	38
Others	120	122	113
Total	1174	1414	1452

In 2018-19, 12,452 charges for 16 and 17 year olds were reported to the Procurator Fiscal, 5,852 were for 16 year olds and 6,600 for 17 year olds³³. The most common offence types referred for both age groups were common assault and breach of the peace.

16 and 17 Year Olds - Reported to Procurator Fiscal - Offence Type
2018-19



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 sentence³⁴. The table below summarises the disposals further. 'Other' refers to admonishments and remittals to the children's hearings system and 'Else' includes proceedings discontinued, pleas of not guilty accepted, acquitted not guilty and acquitted not

³¹ [Section 52 Criminal Law \(Consolidation\) \(Scotland\) Act 1995](#)

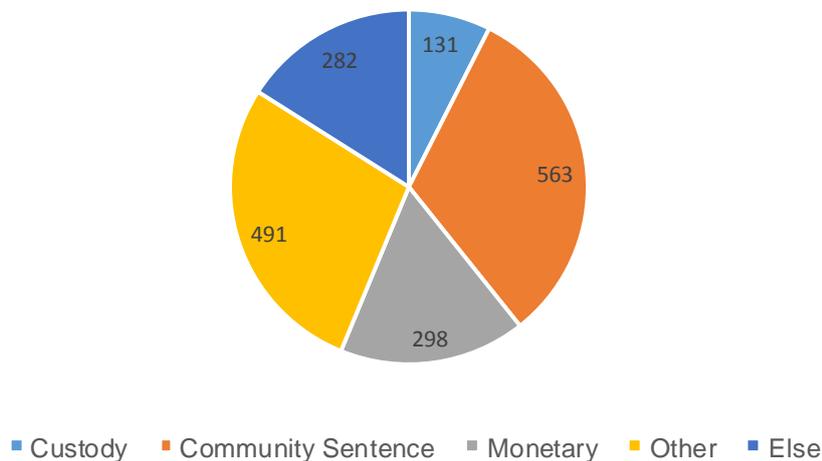
³² [Section 38 Criminal Justice and Licensing \(Scotland\) Act 2010](#)

³³ Data provided by COPFS February 2020 – This data does not provide statistical information for groups of fewer than five. The prosecution service can receive separate requests over a period of time for related but slightly different information e.g. by age, sex, location, crime, etc. and for overlapping time periods or geographies. These separate pieces of information taken together for numbers fewer than five could create the potential risk of identifying individuals.

³⁴ Data provided by Justice Analytical Services (JAS) January 2020 - Scottish Government Criminal Proceedings database.

proven. 18% (91) of the 'Other' cases were remitted to a children's hearing for disposal. 'Other' and 'else' accounted for 44% of disposals. 17% of 16 and 17 year olds received a financial penalty.

2017-18
16 and 17 Year Olds Proceeded Against in Scottish Courts
Disposals



The Thematic Report on the Prosecution of Young People³⁵ published in 2018 identified that from the significant sample of cases, 41% prosecuted in the sheriff summary and Justice of the peace courts could have been addressed via an alternative to prosecution. The data outlined above highlights the potential opportunity for lower level matters to be address by alternative measures.

Proposals for Change

In order to increase the age of referral to the Reporter an amendment would be required to the definition of a child in section 199 of the Children's Hearings (Scotland) Act 2011. This amendment would enable:

1. Any person, including Police Scotland and relevant local authority, to refer any person under the age of 18, in need of protection, guidance, treatment or control to the Reporter where it might be necessary for a CSO to be made.
2. Police to report to the Reporter - or jointly report to the Procurator Fiscal and Reporter – any person up to the age of 18 years who is charged with an offence, unless the Police decide that an option short of referral to the Reporter or joint reporting is appropriate, such as dealing with the matter through EEI arrangements.
3. The Reporter to refer any person up to the age of 18 to a children's hearing.

³⁵ [Thematic Report on the Prosecution of Young People \(2018\)](#)

Consultation Questions

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

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

1. Do you agree that the maximum age of referral to the Reporter should be increased to 18?
 - a) Yes – All cases
 - 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).

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).

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?
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)?
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)?

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

a) Yes

b) No

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

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

About you

1. What is your name? (free text)

2. What is your e-mail address? (free text)

3. Are you responding as a: (select relevant)

a) Public sector organisation

b) Private sector organisation

c) Non-government organisation (NGO)

d) Social enterprise

e) Membership organisation

f) Private individual

g) Other (please detail)

4. What is your organisation's name? (free text)

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

a) Yes

b) No

Please provide more details: (free text)

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

- a) Yes
- b) No

Please provide more details: (free text)

Impact Assessments

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

These include a Data Protection Impact Assessment, Child Rights and Wellbeing Impact Assessment, Equality Impact Assessment (related to the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation). We would be interested in your views on these areas to help us in developing these assessments.

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

Appendix A

Illustrative examples:

The following scenarios are not uncommon and are offered as a means of demonstrating the potential benefits of the proposed changes to allow 16 and 17 year olds access to the children's hearings system.

Jane

Jane has just turned 16 and lives with her parents and two sisters aged 14 and 12. She has a learning disability and rarely leaves her home. She confides in her sisters that she has been sexually abused by her father for the past three years. Police and social work are informed.

There is not sufficient evidence to prosecute her father and her mother does not believe that anything happened.

Currently Jane's younger sisters could be referred to a Children's Hearing on the basis that they may be in need of compulsory measures of supervision. The standard of proof is less than the criminal standard, and if proven the Hearing could then consider whether both girls should be looked after away from home or other measures put in place to protect them.

At present Jane could not be referred to the Reporter as she is over 16. It may be possible to carry out a Child Protection investigation, however the inability to refer Jane to the Reporter would limit the powers available to those seeking to protect her. She could be made subject to an Adult Support and Protection investigation however that would depend on her capacity and whether she meets the statutory tests.

If children aged 16 and 17 were eligible for referral to the Reporter the benefits to Jane and her siblings would be as follows:

- > All the girls would be within the same system with similar rights and access to supports.
- > Offer an opportunity for a wider assessment of Jane's needs and provide supports. For example a measure that Jane does not reside in the same house as her father or have contact with him
- > An advocate or legal representative could be appointed to ensure Jane's voice is heard during the proceedings if she is unable otherwise to participate effectively.
- > The Hearing could give full consideration to the facts of the case and decide how best to protect Jane and her siblings.
- > Validate Jane's allegations acknowledging her status as a victim.

Harry

Harry was previously subject to a Compulsory Supervision Order (CSO) because his relationship with his parents had deteriorated beyond repair and they were unable to impose parental control. He was placed with foster parents and got on well with them but at 16 the CSO was terminated. Several months later, and after an argument with his foster father he left home.

Harry is now homeless and using heroin. He met his ex-foster mother in the street and talked of ending his own life. He is vulnerable to involvement in offending, accidental overdose, the long term effects of his current situation and risks of self-harm. If not for his age he could be referred to the Reporter on the basis of s67(2)(i) misuse of drugs or s67(2)(m) conduct likely to harm himself. He would qualify for after care support but only if he seeks it voluntarily.

At present Harry could not be referred to the Reporter as he is over 16 years.

If he was eligible for a referral to the Reporter, a children's hearing could be arranged and result in him being made subject to a compulsory supervision order that could lead to stable accommodation, ongoing provision of advice and guidance with review, that would enable him to enjoy greater safety and co-ordination of the various supports that he requires.

Sabina

Sabina is 17 and lives at home with her mother and younger sister. She is in 6th year at school. Sabina's mum has physical and mental health difficulties which mean she cannot work, the family are dependent on benefits.

Sabina is found by the Police breaking into a house. When the police question her she explains that the family have been struggling financially since her father left last year and that she was breaking in to the house for money to buy food for the family. She is charged by the Police, due to the nature of the offence, the matter cannot be dealt with via Early and Effective Intervention. Police submit a report to the Crown Office and Procurator Fiscal Service (COPFS).

At present Sabina could not be referred to the Reporter. If the age of referral to the Reporter was raised Sabina could be jointly reported to the Reporter and COPFS. The judgement as to whether or not the case would be retained in the criminal justice system or referred to the Reporter would be a matter for the Procurator Fiscal.

Lewis

Lewis is 16 and lives with his parents. He is enrolled in an access to construction course at college but his attendance in recent months has been poor. He has been spending time with a new peer group, some of whom look a lot older than him and he has become more withdrawn and distant with his parents. Lewis often fails to return home and can be out of contact with his parents for a couple of days at a time, on occasions he has returned with unexplained injuries and has refused medical attention. Lewis has been open about his cannabis use with his parents but they suspect he may be using other drugs as they have found several small bags in his pockets and in his bedroom.

Police stop Lewis near the house of an adult known for involvement in criminal activity. As a result of him acting suspiciously and attempting to run he is searched and found to be in possession of £600 cash.

Following investigation it is established that Lewis has been subject to criminal exploitation by a serious organised crime group. The group is known to have used Lewis and other children to supply cocaine and heroin to neighbouring towns and cities. Since being found by the Police Lewis has received threats, the family home has been targeted and windows smashed.

At present Lewis could not be referred to the Reporter. It could be possible to carry out a Child Protection investigation, however the inability to refer Lewis to the Reporter would limit the powers available to those seeking to protect him. He is at risk of escalating into the criminal justice system. Referral to the Reporter could allow a children's hearing to take place for consideration to be given to the supports required to keep Lewis safe.



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