

CRWIA – Stage 3

CRWIA for a non-legislative policy/measure

CRWIA title: Publication date:	
Summary of policy aims and desired outcomes	<p>The Protect Scotland app (the app) from Scottish Government Test and Protect is a free, mobile phone app designed to help break the chains of infection, speeding up the process of identifying people at risk of catching coronavirus and reducing its ability to spread. The app is currently aimed at those aged 16 years of age and over however it is widely acknowledged that children under the age of 16 will have access to the app and may download it.</p> <p>The Scottish Government is assessing the impact of lowering the target age group of the app to ‘post-primary’ age children. The term ‘post-primary’ will be used for this assessment as a widely recognised term in education. Lowering the age of access will enable more of the population to use the app to stay safe and to support the work of the contact tracing programme. In doing so the Scottish Government will ensure it meets legal and data requirements concerning children and young people.</p> <p>There is sufficient evidence emerging in relation to COVID-19 to support the reduction in age to 11 or ‘post-primary’ age. This is as follows:</p> <ul style="list-style-type: none">• Children 10 years and younger are less likely to transmit COVID-19.• Transmission of COVID-19 in ‘post-primary’ schools could contribute to increased community transmission.• Increased community transmission of COVID-19, and outbreaks in schools, are likely to be disruptive to the education of young people.• Disruption to the education of younger people is likely to harm their life choices, potential socio-economic opportunities, and wellbeing.

**Executive
summary**

This Children's Rights and Wellbeing Impact Assessment (the assessment or CRWIA) applies a Human Rights Based approach to consider the impacts to children's rights and wellbeing as a result of lowering the minimum age for the Protect Scotland app from aged 16 to those in 'post primary' education.

Following consultation with stakeholders representing children and young people, the case for extending access to the app to 'post-primary' age is accepted as legitimate and in the best interests of children.

Stakeholders who have taken part in the assessment include:

- Scottish Commission of Learning Disability
- Children's Parliament
- Scottish Youth Parliament
- Young Scot
- Parenting across Scotland
- National Parenting Forum
- Connect
- Together Scotland
- SG Education Policy
- Information Commissioner's Office
- Children from Children's Parliament (10-15-year olds)

The assessment specifically considers children and young people who may be more adversely affected by the information provided by the app and the actions taken as part of the contact tracing programme. Careful consideration has been given to the impact on vulnerable children as part of this assessment particularly acknowledging the impact peer pressure plays amongst children of 'post-primary' age.

The assessment's recommendation is to lower the age of access from 16 to 'post primary' education level with the core purpose of improving Scotland's ability to limit community transmission and improve outbreak management in schools. Children in Scotland

	<p>commonly begin ‘post primary’ education at age 11 or 12.</p> <p>Lowering the age of access will be done in line with the Age of Legal Capacity (Scotland) Act 1991 (the Act), the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (GDPR).</p>
<p>Background</p>	<p>As part of the Scottish Government’s response to the COVID-19 pandemic the Protect Scotland app was released to Google and Apple stores on 11 September 2020. The app has initially been launched to people aged 16 and older.</p> <p>The app is an extra tool that complements existing person-to-person contact tracing. Contact tracing remains the main component of the NHS Scotland Test and Protect system.</p> <p>Individual privacy is protected as the app uses Bluetooth technology to anonymously alert users if they have been in close contact with someone who has tested positive for COVID-19 and advises them to self-isolate via a notification.</p> <p>The app does not hold personal information, it does not know who the individual is, or know where they have been. It cannot identify individuals or track movements. It uses encrypted, anonymised codes exchanged between smartphones to determine all close contacts. Close contacts are defined as people who have been within two metres of someone who has tested positive for 15 minutes.</p> <p>Users of the app who test positive will still get a call from a contact tracer to confirm their details and who they have been in close contact with.</p> <p>Northern Ireland, on whose code the Protect Scotland app is based, have already taken the decision to lower the age of access from 16 to include all secondary age children in light of scientific research on how the virus</p>

	<p>is transmitted and also how technology is used amongst children 11 and older.</p>
<p>Scope of the CRWIA, identifying the children and young people affected by the policy, and summarising the evidence base</p>	<p>The CRWIA has considered all children and young people in Scotland who are under the age of 18 as all are covered by the United Nations Convention on the Rights of the Child (UNCRC) but focuses in particular on children aged under 16.</p> <p>There is significant evidence to support the app being made available to children of ‘post primary’ education age. It is widely acknowledged that younger children may still download it without consent, but this would not go against the primary aim of enhanced tracking and transmission control.</p> <p>The assessment acknowledges that accessibility to the app will vary but not in a way that is different to the rest of the population. As the app is a supporting feature of the established contact tracing programme, any lack of access is mitigated by the existing process. Inability to access the app therefore does not discriminate against any individual as they are still protected by the contact tracing process.</p> <p><u>Research</u> undertaken by Northern Ireland reflects the advantages of empowering children aged 11 and over to support their peers and take an active role in the community. It is also in line with <u>World Health Organisation (WHO) research</u> around the appropriate age for effectively breaking transmission of COVID-19.</p> <p>The app is an information society service (ISS) for the purposes of the GDPR. Article 8 GDPR provides for a minimum age when a controller can process a child’s personal data in connection with an information society service (ISS) on the basis of consent given directly by the child. Below this age, consent must be given by someone with parental responsibility. Normally this would mean that consent for automated decision making would be required for children aged younger than 16. The DPA, however, contains a derogation</p>

which states that, in the UK, the relevant age for the purposes of Art. 8 is 13 (s. 9(a) DPA).

It should also be noted that these age provisions only apply to consent under Article 6(1)(a) GDPR and therefore would not apply to consent to process health and other special category data – whereas the app relies on consent to use automated decision-making with respect to health data (i.e. the exposure notifications).

There is, however, a derogation in s 9(b) of the DPA which expressly carves out “preventative or counselling services” from the scope of an ISS. The Scottish Government has deemed the app to be an online preventive service. As the app is considered a preventative service, GDPR Article 8 and DPA s.9(a) are not applicable to the app and that age 13 does not have a specific significance when it comes to consent. Section 208 of the DPA further provides that in Scotland, a person is to be taken to have capacity to give consent where the person has a general understanding of what it means to give such consent. That section also provides that a person aged 12 or over is to be presumed to be of sufficient age and maturity to have such understanding, unless the contrary is shown.

For data protection purposes, reliance can be placed on the s.208 DPA presumption when it comes to processing of personal data relating to children aged 12 and over.

It is worth noting that there is a strong argument that children aged 11 who have finished primary school have the same level of understanding than children aged 12 who have finished primary school – indeed those children aged 11 will likely be in the same year (i.e. S1) than the children aged 12. It would not make sense to ask 11 year old children in S1 to get parental consent where this is not required for children aged 12 who are in the same year. However to provide reassurance to parents and carers we have under

	<p>taken to apply some safeguards and ask for 11 year old users to get consent when using the app.</p> <p>In Scotland legal capacity is regulated by the Age of Legal Capacity Act (Scotland) 1991 which is concerned with children entering into ‘transactions.’ This would apply to the app terms and conditions and the giving of associated permissions.</p> <p>Whilst s1 of the Act stipulates that a child under the age of 16 has no capacity to enter a transaction, s2 has a relevant exception. It sets out that a person under the age of 16 could have capacity to enter a transaction if it is the kind commonly entered into by persons of the child’s age and circumstances and on not unreasonable terms.</p> <p>The assessment takes a two-tier approach to determine what age of legal capacity would apply.</p> <ol style="list-style-type: none"> 1) Access to technology. If similar transactions were being undertaken by children younger than 16 via other apps as set out by s2 (1) Age of Legal Capacity (Scotland) Act 1991. 2) Access to health service. The age of consent for the app could be likened to similar health service transactions for example gaming apps where similar Bluetooth technology uses and where capacity can be given to persons aged under 16 providing, they have sufficient understanding. S2 (4) Age of Legal Capacity (Scotland) Act 1991. <p>Legal capacity for the app can reasonably be determined for under 16 year olds., for the app to be used by an 11-year-old safeguards would need to be included in the app’s interface to allow consent to be gained for use of automated decisions</p>
<p>Children and young people’s views and experiences</p>	<p>Children’s focus group</p>

Focus groups of 10-15-year olds were shown the Northern Ireland app interface for their age group. All the children had their own mobile phones and only 50% knew just one person in their age group without access to their own mobile phone. The group found that overall, the app was straightforward and easy to understand.

Some language was flagged as needing to be clearer, in particular, common terms such as *“random ID”* or *“exposure notifications”* needed explanation.

It was also fed back that simple videos to accompany the text on how to use the app would be beneficial to help improve understanding.

When asked if they would download the app, they all said they would. They also said that if they were advised to ask for a parent/carer’s consent they would get it. Many of the children were unable to download apps without their parent/carer’s consent as protection was in place on their mobile phones.

When asked if they would report a positive test comments included:

“No negatives about warning other people”

“Helps you do everything in one place”

“More than happy to submit my results”

When the children were asked how they would feel if they were advised to isolate via the app, they expressed some feelings of concern and worry but would unanimously seek guidance from parent/carer. Mitigations have been addressed through work on the Data Protection Impact Assessment and include signposting children to seek advice on anything they are unclear on within the app. Ensuring children receive the tailored support messaging in the app is also supported by two step age verification at the start of the onboarding process.

Once we had made a test version of the Protect Scotland app, we showed groups of young people and parents who all welcomed the changes, and many

acknowledged that their feedback had been taken onboard.

Further feedback

The Scottish Children's Parliament advised the app could be marketed to 'post-primary' age children as part of their *"increased responsibility, independence and autonomy as they become young adults"* and that this is something that is *"protective of their health and the health of others."*

Other stakeholders made it clear that online safety information needs to go hand in hand with the promotion of the app and this will continue to be considered when marketing the use of Protect Scotland to different age groups.

Stakeholders raised concerns over the impact of Bluetooth on device battery life. Due to the simple nature of the app the use of Bluetooth would have little impact on battery life, and this is set out as part of the onboarding process. This reassured stakeholders.

Individual school policies on mobile phone use has been considered. Scottish Government guidance on developing policies to promote the sale and responsible use of mobile phones in education is that it can be a positive tool to enhance learning and teaching, but acknowledges it is the responsibility of each establishment to implement their own policies.

The design of the app currently filters use by a question asking the age of the user, *"are you 16 or over?"*. Feedback from key stakeholders was that this could include a question to reflect targeting 'post-primary' education age at relevant points, ie. *"Are you in S1 or above?"* This shift could be seen as a progressive way to determine maturity rather than focusing on specific ages.

Stakeholders who have been contacted as part of the assessment:

	<ul style="list-style-type: none"> • Scottish Commission of Learning Disability • Children’s Parliament • Scottish Youth Parliament • Young Scot • Parenting across Scotland • National Parenting Forum • Connect • Together Scotland • SG Education Policy • Information Commissioner’s Office • Children from Children’s Parliament (10-15-year olds) • NASUWT • EIS • SLS • Education Scotland • Equality and Digital Inclusion Groups for Digital Health and Care • C-19 Education Recovery Group
<p>Key Findings, including an assessment of the impact on children’s rights, and how the measure will contribute to children’s wellbeing</p>	<p>Impact on children</p> <p>The app was found to have a positive impact on the following key areas within the UNCRC:</p> <ul style="list-style-type: none"> • Knowledge of rights and protection of rights • Preventing discrimination and respecting children’s interests and views • Protecting rights and freedoms • Parent/carer responsibilities • Health services <p>The assessment of the app’s impact on children’s rights and wellbeing found that it incorporated the rights in the UNCRC and supported the work of the Education and Healthcare sectors in their support of children and young people.</p> <p>In exploring the impact of the app on children and young people it was identified that it allows the same rights to health and wellbeing opportunities given to</p>

any other citizen in Scotland during the COVID-19 pandemic.

Impact on vulnerable groups

It is acknowledged that there is the potential for variance between the impact of the app on marginalised or vulnerable groups. However, this is not unique to children and young people and is relevant to the whole population. It is explored in its own [Equality Impact Assessment](#). Despite this, inequalities amongst children need to be supported by careful and supportive messaging even more than in the adult population. Stakeholders in the education sector all acknowledge that exclusion of any kind is often felt more acutely by children due to the element of peer pressure being a more prominent factor amongst children. To mitigate this the messaging around the app will need to be emphasised as an enhancement of the contact tracing process not as a substitute.

Agreeing the appropriate age

Consultation with the education sector and parent groups widely endorsed the use of the app for 'post-primary' age children which in Scotland starts for children aged 11 or 12 years old.

Concern was expressed at giving access to children younger than 'post-primary' age as it was considered at odds with a parent/carer's prerogative not to allow their child access to a mobile device. Access to the app for those in 'post-primary' education was widely supported as an endorsement of that age group's transition to young adults and playing a more active role within the community. This is in line with developing international standard for children's rights which are moving away from age lines and instead towards age maturity. In this case we are using secondary school education to determine maturity.

In determining the appropriate age for allowing access to the app the following criteria was looked at:

Determining legal capacity

The general rule laid down by s1 of the Age of Legal Capacity (Scotland) Act 1991 is that a child under the age of 16 has no capacity to enter into any transaction however this is subject to wide-ranging exceptions set out in s2 of the Act.

To determine if the exception applies, consideration was given to whether accepting the terms and conditions of the Protect Scotland app was a similar transaction commonly undertaken by children aged under 16. It is widely acknowledged by representative groups that children as young as 9 have access to mobile devices and were downloading gaming apps that mirror the type of transaction used by Protect Scotland. Protect Scotland uses Bluetooth technology to connect with nearby phones, a technology used by many gaming apps.

It was also acknowledged that health transactions involving children aged 12 and over are regularly conducted within Health and Care services.

Determining age of data protection consent

For the reasons stated above, apps which are ISS would normally require consent for those aged under 13 in the UK. However, these rules do not apply to preventative services such as the app. The Scottish Government has deemed the app to be an online preventive service.

Section 208 of the DPA also provides that in Scotland, a person is to be taken to have capacity to give consent where the person has a general understanding of what it means to give such consent. That section also provides that a person aged 12 or over is to be

presumed to be of sufficient age and maturity to have such understanding, unless the contrary is shown.

For data protection purposes, reliance can be placed on the s.208 DPA presumption when it comes to processing of personal data relating to children aged 12 and over. Although no presumption exists for children aged 11, there is a strong argument that children aged 11 who have finished primary school have the same level of understanding than children aged 12 who have finished primary school – indeed those children aged 11 will likely be in the same year (i.e. S1) than the children aged 12. It would not make sense to ask 11 year old children in S1 to get parental consent where this is not required for children aged 12 who are in the same year

The [Data Protection Impact Assessment](#) examines this in more detail.

This assessment has revealed the significant benefit of allowing ‘post-primary’ age children access to the app (i.e. including children aged 11). It strengthens the purpose of the app, which is to support the contact tracing process, it helps improve outbreak management in schools and supports breaking the path of transmission amongst a younger demographic.

The benefit of children aged 11 years old using the app and supporting its core purpose of enhancing awareness of proximity tracing far outweighs the potential harm to them of using the app without a parent/carer’s involvement.

Consideration was also given to the Age Appropriate Design: A code for online services (AADC) issued by the Information Commissioner’s Office (ICO) on 12 August 2020.

The Scottish Government has deemed the app to be an online preventive service. This means that the AADC does not apply and, by virtue of Article 8 GDPR, parent/carer’s authorisation is not needed for any

	<p>consent-based processing in so far as processing is based on Article 6(1)(a) GDPR, (i.e. provided it is not health and other special category data). The app does, however, still rely on consent to use automated decision-making with respect to health data (i.e. exposure notifications).</p> <p>The Scottish Government will look to follow the code to guide the design of the children’s version of the app, applying best practice. This is in-line with the approach that the Northern Ireland Government took.</p> <p>User interfaces will need to be designed to support the need for consent for automated decision-making.</p>
Monitoring and review	<p>There will be continued monitoring of the app’s impact on children and young people as part of the Scottish Government’s COVID-19 response and management.</p>
CRWIA Declaration	
Authorisation	
<p>Imme Jones Policy Lead Digital Health and Care</p>	<p>Date 10/12/2020</p>
<p>Jonathan Cameron Deputy Director Digital Health and Care</p>	<p>Date 10/12/2020</p>