

CLAN CHIDLAW

Clan Childlaw is a unique legal outreach service for children and young people. Our dedicated child-centred legal service gives practical effect to Article 12 of the United Nations Convention on the Rights of the Child, enabling children to participate in decision-making processes which affect them and allowing their voices to be heard.

We believe that:

- every child and young person should have the opportunity to express their views freely in all matters affecting them and that their views should be listened to and taken account of;
- every child and young person should have the opportunity to be heard and represented in any judicial and administrative proceedings affecting them. We believe that children and young people who need legal advice and legal representation should be able to have their own lawyer;
- children and young people and those who work with them should know their rights and should be able to access information and guidance about their rights and how to exercise them;
- people should be able to move away from childhood mistakes and not be prejudiced later in life by disproportionate disclosure of childhood offending behaviour designated as criminal convictions; a rights and welfare-based disclosure system recognises and accounts for the very different nature of childhood offending and the circumstances in which ‘convictions’ can be accrued. Offending behaviour being addressed within the Children’s Hearings System should not be disclosable.

We improve children and young people’s life chances by using our legal skills and expert knowledge to help young people take part in decisions that affect them and by making sure that children’s rights are realised in Scots Law.

Our evidence is informed by our practice representing children and young people, often within the Children’s Hearings System. We represent children who are the subject of a referral to a children’s hearing on offence-based grounds and who are asking what the consequence will be for them in later life, in relation to disclosure. We are also consulted by young people who are about to apply for a job and are asking if anything will appear on their disclosure. Because of this experience, in 2018 we intervened as a third party in the public interest in Supreme Court cases on the treatment of childhood convictions in England and Wales.¹

We support the Scottish Government in their policy objective to safeguard children and vulnerable adults whilst achieving a better balance between disclosures in the

¹ In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland), R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants), R (on the application of P) (Appellant) v Secretary of State for the Home Department and others (Respondents) [2019] UKSC 3. Our intervention assisted the court with details of the Scottish system and is published [here](#).

public interest and protecting an individual's right to move on with their lives. The Scottish Government recognises involvement in offending behaviour in childhood constitutes a form of adversity that young people have the right to move on from in adulthood. We welcome its commitment to a distinct disclosure system for childhood behaviour and its recognition that care experienced people are disproportionately affected by disclosure (the evidence submitted by Who Cares? Scotland details the far-reaching and lasting effects of this). The particularly destructive effect of disclosing childhood criminal records and the evidence base for distinguishing between child and adulthood records are well documented (the evidence submitted by the Centre for Youth and Criminal Justice summarises this). Our youth justice system is designed to address childhood difficulties through a whole system approach to children's welfare and a children's rights-centred disclosure system is a key element of this.

We welcome the opportunity to simplify, modernise and rebalance the disclosure regime the Disclosure (Scotland) Bill ("the Bill") presents. Together with the recently enacted Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019, the Bill is a significant milestone in the development of a distinctive disclosure regime for childhood offending.

In recent years, reforms to the disclosure regime have been piecemeal and largely in response to court judgments on article 8 privacy rights² - finding automatic indiscriminate disclosure, which does not take into account individual circumstances, incompatible with article 8 rights - and it is right that the whole system is now under review to ensure it is accessible, joined-up and respects those rights, allowing people to move on from past mistakes.

In [our response to the 2018 Scottish Government consultation on PVG and the Disclosure of Criminal Information](#) we set out our concerns about the current system and its treatment of childhood offending and our evidence here is confined to the aspects of the Bill relating to childhood offences. Whilst welcoming the progressive nature of the Bill, particularly the proposed regime for treating childhood (aged 12-17 years) convictions separately from adult convictions, ending automatic disclosure of childhood conviction information, we have a number of concerns about the proposals and how they will work in practice.

Before setting out these concerns, and due to the complexity of the proposed scheme read along with current legislation, we have attempted to summarise the implications of childhood offending in the table below:

² P v Scottish Ministers [2017] CSOH 33; R (T) v Chief Constable of Greater Manchester Police [2014] UKSC 35.

Level 1 Disclosures

| Under 18s | Unspent | Spent | Other Relevant Information |
|---|--|--------------|-----------------------------------|
| "Convictions" in Children's Hearings System | Not Applicable, as under the Management of Offenders (Sc) Act 2019 these are spent immediately. | NO | NO |
| Conviction in adult court for under 18 | YES – Included if Disclosure Scotland think ought to be; have right to independent reviewer process and then appeal to sheriff on point of law | NO | NO |

Level 2 Disclosures

| Under 18s | Unspent | Spent | Other Relevant Information |
|---|---|---|---|
| "Convictions" in Children's Hearings System | Spent immediately under Management of Offenders (Sc) Act 2019 | <p><u>List A</u></p> <p>YES – Included if Disclosure Scotland think ought to be and if relevant; have right to Independent Reviewer process and then appeal to sheriff on point of law</p> <p><u>List B</u></p> <p>NO – If admonished or discharged, or happened more than 5 ½ years ago</p> <p>YES - if not been admonished or discharged and happened within the last 5 ½ years and Disclosure Scotland assess it is relevant and ought to be disclosed; have right to apply to Independent Reviewer and appeal on point of law</p> <p><u>Not in List A or B</u></p> | YES – if Chief Constable thinks relevant and ought to be disclosed; applicant can ask for review: first review is by Chief Constable (reviews if still thinks relevant and ought to be disclosed); then can apply for review of that decision by Independent Reviewer, with right of appeal to sheriff of Independent Reviewer's decision on point of law |

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|--|---|--|---|
| | | NO – unless appears as Other Relevant Information | |
| Conviction in adult court for under 18 | YES – Included if Disclosure Scotland think ought to be and if relevant; have right to independent reviewer process and appeal to sheriff on point of law | <p><u>List A</u></p> <p>YES – Included if Disclosure Scotland think ought to be and if relevant; have right to independent reviewer process and appeal on point of law</p> <p><u>List B</u></p> <p>NO – If admonished or discharged, or happened more than 5 ½ years ago</p> <p>YES - if not been admonished or discharged and happened within the last 5 ½ years and Disclosure Scotland assess it ought to be disclosed and if relevant; have right to apply to Independent Reviewer and appeal on point of law</p> <p><u>Not in List A or B</u></p> <p>NO – unless appears as Other Relevant Information</p> | YES – if Chief Constable thinks relevant and ought to be disclosed; applicant can ask for review: first review is by Chief Constable (reviews if still thinks relevant and ought to be disclosed); then can apply for review of that decision by independent reviewer, with right of appeal to sheriff of Independent Reviewer’s decision on point of law |

The proposed system for disclosing childhood behaviour builds in the following notable welcome safeguards:

- An active decision must be taken by Disclosure Scotland that childhood conviction information ought to be disclosed. Childhood convictions cannot be automatically disclosed.
- Applicants have the right to seek review of that decision by an Independent Reviewer and then a Sheriff on a point of law.
- Applicants have the right to know the reasons for a decision to disclose and must be informed of their right to apply for independent review. They have the right to give their representations to the Independent Reviewer and must be notified of that right.
- No disclosure will be given to a third party until all the review processes are complete and the individual had requested disclosure to a third party.

- Information on childhood convictions will be listed separately on a disclosure certificate.
- In relation to List A convictions, there is no longer an initial period during which Disclosure Scotland cannot consider whether a conviction ought to be disclosed. A List A childhood conviction will be subject to the review procedure for childhood convictions rather than the removable convictions process applicable to adults (who must wait 11 years to seek removal).
- Other Relevant Information will be regulated and decisions by Police Scotland to disclose are subject to review. We have long been concerned about Other Relevant Information, which currently creates huge difficulties in advising children and young people, because in a Children's Hearing even if offence grounds are not established, there is a risk that the behaviour could appear on a higher level disclosure. The proposal in the Bill to place duties on the Scottish Ministers to issue guidance to Police Scotland and for them to have regard to such guidance is therefore welcome. Very significantly, the applicant now will see any Other Relevant Information before it goes to an employer or other third party.
- The relevant date for classification as a childhood conviction is the date of offence rather than the date of conviction, meaning individuals who committed an offence aged 17 but who were convicted after their 18th birthday will not be penalised. We note in contrast that in the Management of Offenders (Scotland) Act 2019 the relevant date is the date of conviction.

We have the following significant concerns however:

Complexity

The way the Bill is presented and its place as just one of several relevant pieces of legislation, makes the system complex to understand. Clear information and guidance will be imperative to allow applicants for disclosure to access their rights. Because there are different consequences for children depending on whether the conviction is from a children's hearing or a court, whether non-conviction information is retained by police as Other Relevant Information, or whether the offence is a List A, List B or an unlisted offence, continues to make it impossible to advise a child with any certainty as to the long-term consequences of offending behaviour. A system so complex as to mean there is the lack of foreseeability, is at risk of being incompatible with Article 8 ECHR.

Offending Behaviour addressed within the welfare-based Children's Hearings System should never be disclosed

Offending behaviour within the Children's Hearings System can be disclosed in Level 2 disclosures which is not in-keeping with the ethos of the welfare-based system. Children who are charged with offending behaviour are considered having regard to their welfare and best interests and not on a punitive basis. Allegations of offending

behaviour, including the most serious offending, are addressed in the context of the *whole circumstances* of the child, and often there are wider family issues that are best addressed at the same time, being considered simultaneously under a number of the grounds listed in section 67 of the Children's Hearings (Scotland) Act 2011. On this basis, we consider it completely inappropriate that any offences established in the Children's Hearings System are disclosable. We would indeed argue that referring at all to the term "conviction" is inappropriate within this system given the focus on the needs of the child rather than the alleged offending behaviour.

The disproportionate negative effects of disclosure on care experienced people, who are more likely to have contact with police and accrue convictions particularly whilst being part of the Children's Hearings System which is making decisions about their wellbeing and has corporate parenting duties, could at least partially be addressed by rendering all Children's Hearings 'convictions' as non-disclosable.

In our response to the 2018 consultation (Q.94), we supported applying the same disclosure system the Age of Criminal Responsibility (Scotland) Act 2019 has created for children under 12 to childhood offending by those over 12. We proposed this system should apply to all convictions accrued up to the age of 25. This would be accessible and understandable to children and young people and, in line with the principle that the welfare of the child is paramount, would stop the behaviour being treated as a conviction.

Unpredictability of long-term implications of Childhood Behaviour

Within the proposed scheme, it is impossible to advise a young person of the long-term implications of accepting statement of grounds referring to offending behaviour, apart from to say that there may be implications. This is because it could appear on any Level 2 disclosure or as Other Relevant Information. In our current practice, we often make the argument to the Reporter to the Children's Hearings that behaviour be addressed under conduct grounds rather than offence grounds, in order to minimise any potential future disclosure. This difficulty remains within the proposed scheme.

The Need for Legal Advice and Legal Aid

Within the proposed scheme, as conviction and non-conviction information could be disclosed, children being presented with a Statement of Grounds relating to offending behaviour in the Children's Hearings System will still, given the potentially serious implications of future disclosure as a result of accepting offences, require access to legal advice and representation from a solicitor and legal aid. Currently the legal aid duty scheme does not extend to statements of grounds in relation to offending behaviour. This means that a young person may not have a solicitor to explain the system to them.

Onus on Applicant to seek Review

The onus will be on the applicant to seek review of a Disclosure Scotland decision or of the Chief Constable's decision that information ought to be disclosed. This contrasts with the Age of Criminal Responsibility (Scotland) Act 2019, where pre-12 behaviour Other Relevant Information is automatically reviewed by the Independent Reviewer before it can be disclosed. The onus is not on the applicant to apply for review. We understand that Disclosure Scotland will make the application process as seamless as possible, but our view is that this burden should not rest with the applicant.

No framework for Decision-making by Disclosure Scotland or Independent Reviewer

The Policy Memorandum sets out the intention that factors to be taken into account will include "the amount of time elapsed, the number of offences, whether a pattern of offending behaviour has continued into adulthood, and the seriousness of any childhood convictions." Disclosure Scotland can gather information from relevant persons to assist them to determine whether a childhood "conviction" ought to be disclosed.

However, there is no framework for decision-making on the face of the Bill beyond the 'ought to be disclosed' and 'relevant' tests. This limits transparency and the basis for legal challenge to decisions. Decisions by the Independent Reviewer can only be appealed on a point of law. It would be more appropriate to further define the basis on which decisions will be made in the Bill itself. These should include the *context* of the childhood offending, in keeping with the approach of the Children's Hearings System which looks at the whole circumstances of the child. We understand guidance will be drafted by Disclosure Scotland, but this would not be legally binding. The Guidance issued by the Scottish Ministers about the exercise of the Independent Reviewer's functions pursuant to section 17 of the Age of Criminal Responsibility (Scotland) Act 2019 will also be of relevance.

It is imperative that clear, accessible information on processes and rights are made available and accessible. Applicants for review may well need access to legal advice, given the implications of such decisions. Their representations to the independent reviewer are likely to be strengthened through the advice of a solicitor.

Offences Lists

As already explained, our view is that there should be no need for "Lists" at all, in relation to Childhood Offending behaviour as these should not be disclosed. However, if the "Lists" are to remain applicable to children, there should be separate offence lists for children and young people than from those for adults. The issue is highlighted in relation to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening or abusive behaviour) which has now been moved from List A to List B. This is welcomed in relation to children as convictions under this section can often be accrued by young people within the care system, particularly for example within residential units for relatively minor offending behaviour. We also note that fire-raising,

an offence which when committed in childhood should be distinguished from adult offending, is to now be a List A offence. This emphasises the need for a different approach to childhood offending and would be resolved by our already outlined position of non-disclosure.

Protection against Self-disclosure

The Bill does not include provisions equivalent to those in the Age of Criminal Responsibility (Scotland) Act 2019 to protect individuals against self-disclosure. There is a risk under current proposals that there may be situations whereby a person is required to self-disclose something which within the provisions of the Bill, the State may in fact decide not to disclose.

Review of the Police “Weeding” System

Although we understand that this issue is out with the scope of this legislation, it is important to acknowledge that the system for deciding what information is or is not retained on police records also needs urgent review.