FACULTY OF ADVOCATES

19 November 2019

Clare Adamson MSP
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The Scottish Parliament
Edinburgh
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By E-Mail: es.committee@parliament.scot

Dear Ms Adamson,

We refer to your letter to the Law Society of Scotland, copied to us on 31 October 2019 by email, in respect of the Scottish Parliament's Education and Skills Committee current work on the Disclosure (Scotland) Bill and the tests of "relevant for the purpose of the disclosure" and "ought to be included in the disclosure".

We have had an opportunity also to consider the terms of the letter by the Minister for Children and Young People, Maree Todd MSP, dated 21 October 2019.

We agree with the general terms of the Minister's letter and provide the following comments which we hope may assist the Committee's work. We regret that these were not available earlier, as you had requested.

It is important to remember that disclosure is likely to engage an individual's article 8 rights in nearly every case. The two-part test mentioned in *R(L) v Commissioner of Police of the Metropolis* ([2009] UKSC 3) means that disclosure should only occur if (i) the disclosure is relevant; and (ii) it ought to be disclosed.

The second part of the test requires that proper consideration is given to the impact on the individual of the disclosure. As stated by Lord Hope, this means "that in every case he [the chief police officer] must consider whether there is likely to be an interference

with the applicant's private life, and if so whether that interference can be justified" (para. 40). Accordingly, a failure to do so would mean that there were too many cases where the disclosure would "represent an unwarranted invasion" of an individual's article 8 rights.

The proportionality of the disclosure will inevitably require balancing the rights of individuals with the potential risk to members of society (para. 42). In the words of the Court, this balancing act is "of the greatest public importance" (Ibid). Ultimately, in order for the interference to be considered proportionate, proper weight must have been given to the question of whether or not the information ought to be included in the disclosure.

We support the Minister's comments that the test will be informed by case law from the Courts and reflected in guidance. Of particular interest is the recent case of *R (on the application of P) (Appellant) v Secretary of State for the Home Department and others* [2019] UKSC 3. Lord Sumption, in the majority judgment, stated that the inclusion of a certificate of a conviction or a caution which was not a "relevant matter" on the basis that it "ought to be included" did not fail the illegality test given that the function would be required to be exercised having regard to statutory guidance. Such a requirement means that the decision maker is subjected to carefully drawn constraints that themselves have the quality of law (para. 43) and the underlying system of disclosure does not allow for "indiscriminate" disclosure (para. 44). In this respect, we refer to the terms of our prior response of October 2017.

In terms of proportionality, Lord Sumption confirmed that legislation can legitimately require disclosure by reference to pre-defined categories (para. 50) and that to do so for the disclosure of criminal records may be justified on the basis of (i) the final decision on relevancy being for the employer; (ii) the value of certainty; and, (iii) practicality (para. 51 to 54). While the majority view of the Supreme Court is that it would not be practical for a scheme to assess the relevance of the data to the employment in question in every case (para. 76), we consider that any guidance should inform decision makers as to the potential risk of an automatic bar or "killer blow" to employment prospects arising from the disclosure of minor or unrelated offences (para. 168 per Lord Kerr, dissenting).

Given the challenge involved in weighing up whether information ought to be disclosed or not, we believe that there must be full and wide-ranging consultation with interested stakeholders prior to developing and issuing any guidance.

Yours sincerely,

pp. **LAURA J DUNLOP QC**
Convener, Law Reform Committee