



The Scottish Parliament
Pàrlamaid na h-Alba

EDUCATION AND SKILLS COMMITTEE

AGENDA

30th Meeting, 2019 (Session 5)

Wednesday 13 November 2019

The Committee will meet at 10.00 am in the Robert Burns Room (CR1).

1. **Disclosure (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Alistair Hogg, Head of Practice and Policy, Scottish Children's Reporter Administration;

Lindsay Law, Convener, Connect;

Debbie Nolan, Practice Development Advisor, Centre for Youth and Criminal Justice;

Amy Woodhouse, Joint Acting Chief Executive, Children in Scotland;

Brian Houston, Director of Operations, and Robert Dorrian, Member, Who Cares? Scotland.

2. **Review of Evidence (in private):** The Committee will consider the evidence it heard earlier.
3. **Work Programme (in private):** The Committee will consider its work programme.

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The papers for this meeting are as follows—

Agenda item 1

SPICe briefing paper

ES/S5/19/30/1

Submissions pack

ES/S5/19/30/2

Agenda item 3

PRIVATE PAPER

ES/S5/19/30/3 (P)

**Education and Skills Committee
Disclosure (Scotland) Bill
Wednesday 13 November 2019****INTRODUCTION**

The purpose of this briefing is to support the Committee's consideration of the [Disclosure \(Scotland\) Bill](#). This week is the final panel of witnesses before the Committee is due to take evidence from the Minister on 20 November. The Committee plans to undertake some informal evidence gathering on Tuesday 12 and Wednesday 13 November from people who work in the third sector and young people.

The Committee took evidence from [Scottish Government officials on 4 September 2019](#) and heard from panels of witnesses on [8 October 2019](#) and 6 November 2019. This week, the Committee will take evidence from:

- Brian Houston, Director of Operations, and Robert Dorrian, Member, Who Cares? Scotland (WCS)
- Alistair Hogg, Head of Practice and Policy, Scottish Children's Reporter Administration (SCRA)
- Debbie Nolan, Practice Development Advisor, Centre for Youth & Criminal Justice (CYCJ)
- Amy Woodhouse, Joint Acting Chief Executive, Children in Scotland
- Lindsay Law, Convener, Connect

Submissions from the organisations appearing this week are included in Paper 2. A summary of themes of written evidence was included in Annexe A of the [SPICe paper](#) prepared for the Committee's evidence session on 8 October 2019.

This panel has a focus on young people and the focus of this paper will be on the aspects of the Bill which affect young people in respect of, moving on from childhood offending, volunteering opportunities for young people, and child protection afforded through the disclosure schemes. The suggested themes for discussion follow this structure.

The paper assumes readers are familiar with the content of the Bill. The [SPICe Bill briefing was published in August 2019](#) and the [Bill and its accompanying documents can be found on the Scottish Parliament's website](#).

THEME 1: CHILDHOOD OFFENDING

The Bill seeks to reform how offences committed by young people aged between 12 and 17 years are disclosed. This may be seen as a part of a package of recent legislation addressing childhood offending behaviour.

The Age of Criminal Responsibility (Scotland) Act 2019 raises the age of criminal responsibility from 8 to 12 years of age. This Act provides that existing record of criminal offences of children under 12 can only be included as Other Relevant Information on a higher-level disclosure certificate and only after the information has been approved for inclusion by the independent reviewer, a role which the Act establishes.

The Management of Offenders (Scotland) Act 2019 provides that any offence ground established or accepted through the Children's Hearing System, which can be treated like a conviction, becomes spent immediately. That Act will also reduce the disclosure periods for young people who have been dealt with by a criminal court.

One of the policy goals of the Bill is to recognise “adolescence as a unique phase of life by ending the automatic disclosure of convictions accrued while aged between 12 and 17 years and introducing an assessment by Disclosure Scotland, acting on behalf of Ministers, as to whether convictions ought to be disclosed” (Policy Memo, para 36).

The approach of differentiating offending behaviour in the disclosure system has been welcomed by stakeholders. The SCRA's submission stated—

“In the Children's Hearing System all of the adversity faced by young people who behave in a way contrary to the criminal law is assessed and a plan to address the adversity is developed ... This holistic approach does not differentiate between offending behaviour or neglect / abuse (for example) as a presenting adversity – and we have always believed that the outcome of involvement in the Children's Hearing should, for the vast majority of children, not ‘come back’ to a young person later in life. We also recognise that there are some children and young people whose behaviour during childhood and adolescence is such that, given certain circumstances, they may continue to pose a risk – and this ongoing risk requires to be assessed and determined in order to keep the public, other children and the individual safe.”

The Bill sets out the tests against which Scottish Ministers (in practice, Disclosure Scotland) must determine whether to disclose conviction information. The tests differ for Level 1 and Level 2 disclosures. For Level 1, the test is "whether information about the conviction ought to be included" (s.5). For Level 2, the test is two-fold: "whether the childhood conviction is relevant for the purposes of the disclosure" and "whether information about the conviction ought to be included" (s.25).

Under the Bill, similar two-part tests will be applied in determining reviews and whether the police will include other relevant information ("ORI"). The Minister for Children and Young People, Maree Todd MSP [wrote to the Committee in October 2019](#) to provide more detail on the two part test in which she referred to a Supreme Court judgment on the provision of non-conviction information, *R(L) v Commissioner of Police of the Metropolis*. The SPICe Bill briefing refers to that judgement ([p22 of pdf version](#)) and a short extract of that briefing is included in the Annexe to this paper. It is intended that there will be statutory guidance for the independent reviewer and the police in relation to considering reviews and the inclusion of ORI and non-statutory guidance for Disclosure Scotland in considering whether to include childhood convictions and reviews.

CELCIS stated that it was its understanding that the policy position was to be a “default position ... against the disclosure of childhood information” but that this is not set out in the Bill. The SCRA's submission also suggested that the presumption should be that childhood convictions should not be included, unless justified to do so.

Witnesses on the second panel on 6 November all agreed that a set of principles guiding decision-making should be explicitly set out. Children in Scotland’s submission suggests that this idea should be explored and CLAN Childlaw said in its submission—

“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 ... 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.”

A theme of policy discussions in this area is how care-experienced young people are particularly susceptible to becoming involved with criminal justice agencies. CELCIS’ submission stated—

“The disclosure of childhood information disproportionately affects young people and adults with care experience, who are more likely to have had contact with the police, and to have been involved in formal processes which lead to recording of behaviour. They are more likely to be criminalised, and accrue convictions for minor matters which, in other circumstances, would more likely be dealt with by parental sanctions.”

WCS’s submission stated—

“We know from speaking to our Care Experienced members, that a criminal history can prevent Care Experienced people from moving on from their past and making the most of their potential.”

The Bill proposes that provisions in relation to childhood convictions should apply to the point at which the offending behaviour takes place, i.e. before the individual’s 18th birthday. Whether this is the appropriate age at which these provisions should apply was consulted on and attracted differing views. The table below shows the responses to the consultation which led to the Bill on the age range for which any specific provisions reducing the possibility of the state disclosure of criminal convictions.

12-14	12-15	12-16	12-17	12-18	12-21	no answer
7	17	27	16	43	30	212

[Scottish Government, Summary report on consultation](#) (p49)

The CYCJ’s submission suggested that Disclosure Scotland should monitor the number of disclosures with childhood convictions included. It said—

“We would like to see provisions built into the Bill (or associated documents) for monitoring and evaluation of the frequency of childhood convictions being disclosed and for this information to be made publicly available. This could provide valuable information for considering the further extension of the approach adopted to childhood conviction information to (for example) young adults and adults.”

Under enhanced and PVG disclosures, a third party may be provided with other relevant information ("ORI"). ORI is information that the police have provided on an individual that can include information about behaviour which may not have been tested at trial or led to a

conviction. The Bill provides for Ministers to produce guidance for the chief constable and for ORI to be included in all Level 2 disclosures.

Children in Scotland's submission stated that a high threshold should be set for the disclosure of ORI. It said—

“We have concerns that the provision of ORI ... could undermine the new system of discounting convictions between the age of 12-17. Provision of ORI could allow employers to access information that relates to convictions without giving access to the convictions themselves.”

Members may wish to explore with the panel:

- **Whether the Bill complements the Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019 and provides for a cohesive approach to childhood offending behaviour.**
- **Views on the tests for disclosing childhood information.**
- **Whether Disclosure Scotland is best placed to determine whether a childhood offence should be disclosed. How else might this be undertaken.**
- **Whether there should be a set of principles which govern the inclusion of childhood conviction information. If the guidance supporting Disclosure Scotland's decisions applying these tests should be subject to consultation and be statutory.**
- **The panel's views on ORI relating to behaviour when the individual was a child.**
- **Whether the provisions for childhood conviction information adequately reflects the needs of care-experienced people.**
- **Views on the age at which convictions should cease to be treated as childhood convictions.**

THEME 2: LISTS AND REVIEWS

For Level 2 disclosures, convictions will be disclosed in certain circumstances after they have become spent; these offences are currently listed in schedules 8a and 8b of the Police Act 1997. List A and List B of the Bill will replace the lists of offences included in schedules 8a and 8b of the Police Act 1997. List A is of offences for which a conviction would always be disclosed even if spent, unless that information is removed through a review process. List B contains offences for which spent convictions would be disclosed for a period of time. The Bill proposes shorter periods of time for when a spent conviction of a List A offence can be reviewed from 15 to 11 years for adults and childhood convictions would be able to be reviewed immediately, rather than after 7.5 years currently. The period a spent conviction on List B would be disclosed has also been reduced from 15 to 11 years for an adult conviction and from 7.5 years to 5.5 years for a childhood conviction.

The Committee has heard differing views on whether lists should continue to be used more generally. In relation to whether these should be applied to childhood convictions, the Commissioner for Children and Young People Scotland's submission said that—

“The disclosure of information should be proportionate, relevant and justifiable. Therefore, we suggest the Bill to adopt a similar approach to the one adopted for retention of DNA and other forensic information in the Criminal Justice and Licensing (Scotland) Act 2010, where a separate list of offences for children is available.”

On 9 October, the Law Society of Scotland commented on this suggestion. Andrew Alexander said—

“When we considered [whether there should be different lists based on whether the person is a young person or an adult], we thought that we would need to see evidence for making a distinction between lists.” ([OR 9 October 2019](#), Col 24)

A number of witnesses have suggested changes to the lists. CYCJ raised a concern that wilful fire-raising is a List A offence. The SCRA’s submission reiterated that there should be a high threshold for disclosing childhood convictions as Schedule 2 includes “many offences ‘commonly’ committed by young people” and this “may increase the likelihood of childhood conviction information being disclosed (any assault, any theft, breach of the peace).”

The disclosure system is complex. The Committee has heard that the impact of a conviction or accepting offence grounds at a children’s hearing can be difficult to predict or explain to a child in that situation; Clan Childlaw argued that the law needs to be foreseeable. Children in Scotland’s submission stated—

“Partners across the children’s sector [have highlighted] that the present system makes it very hard to explain to children and young people involved in Children’s Hearings what the impact of behaviour may be on a PVG or Disclosure check in the future, and the impact this may have on their employment. Simplification of the system to clarify what information can be passed on about a child or young person (and what offences will be considered) will help to rectify this issue.”

Review processes

The Bill provides the following types of review:

- *Review for accuracy:* Disclosure Scotland reviews, no further review mechanism. This could be to determine whether an offence was committed when the individual was under 18, if the conviction date was after the individual turned 18, i.e. that the conviction should be treated as a childhood conviction when the conviction date does not make this clear.
- *Review seeking to remove a removable conviction:* Disclosure Scotland reviews, second review by independent reviewer, final appeal to a sheriff on a point of law.
- *Review seeking to remove a childhood conviction:* Independent reviewer, final appeal to a sheriff on a point of law.
- *Review seeking to remove ORI:* Police review, second review by independent reviewer, final appeal to a sheriff on a point of law.

The intention of the Bill is to simplify the system of reviews. The Policy Memorandum (para 156) stated—

“The policy intention is that in unifying the appeal mechanisms, so that the independent reviewer is responsible for all types of appeal (for Level 2 disclosures in particular), it will make the system as simple and coherent as possible for applicants and stakeholders.”

Several respondents have suggested that all reviews should go in the first instance to the independent reviewer.

One issue that has not been explored thus far by witnesses or in submissions is that an individual is not able to review the same information twice that would appear on a Level 2 disclosure for the same purpose (s34(5)). The time elapsed between for example a List A offence being committed and the disclosure may be critical to whether the review is successful. Under the Bill, if the review was unsuccessful, the individual would not be able to seek another review of a disclosure for the same purpose at any time in the future and a List A offence would be disclosed for the remainder of the individual’s life. This would also happen currently if a sheriff determined a List A offence should be disclosed following a referral.

Members may wish to explore with the panel:

- **Whether Lists A and B should apply to both adult and childhood convictions.**
- **Whether there are offences included on these lists that young people may be more likely to commit and if there should be changes to the offences on List A or B.**
- **Whether the review processes provided for in the Bill could be improved.**

THEME 3: DISCLOSURES FOR YOUNG PEOPLE

Non-PVG disclosures

Level 1 disclosures and Level 2 disclosure which are not in relation the PVG scheme would not normally be open to children under 16. The Bill provides for a disclosure to be provided by Disclosure Scotland for an individual between 12 and 15 years of age where appropriate (see s2(2) and 15(2)). There is no current lower age limit for Basic Disclosures. The kinds of exceptional circumstances envisaged are, for example, for a young person taking up a place at college at 15 on a course that requires a criminal record check.

PVG Scheme

The key difference between PVG scheme membership and other parts of the disclosure system is that scheme members are subject to ongoing monitoring. Ongoing monitoring allows Disclosure Scotland to assess any new information about harmful behaviour of an individual as and when this is brought to its attention. If appropriate, the scheme member can then be placed under consideration for listing, and, if listed, removed from regulated work. Without ongoing monitoring, this information would come to the attention of Disclosure Scotland if an update was carried out on that scheme member, or if there was a referral.

Young people under 16 will not be able to join the PVG scheme. The offences under the Bill which make PVG scheme membership mandatory for individuals doing regulated roles

do not apply where the individual is under 16, either to the individual or the organisation. However, the existing offence of allowing an individual who is barred from doing regulated work to do so will remain. The Committee has explored the impact of this and during the evidence session on 9 October 2019, Nicola Dickie from COSLA stated—

“GIRFEC means that many young people who are troublesome or have behavioural issues are already well known to support services such as social work, teaching staff and Police Scotland, depending on the level of the behavioural difficulties. Many of those young people are also involved in the children’s hearings system. We are comfortable that the Bill strikes the right balance between the risk of having those young people outwith the system and having them in the system and continually monitoring their behaviour for a significant time.” (OR [9 October 2019 Col 5](#))

It is important to distinguish between individuals under 16 who have been listed (i.e. where their past behaviour has led Ministers to decide that they should not be allowed to do regulated work) and others whose behaviour falls short of this but nonetheless may have information disclosed if they were 16 or over. The former group is very small, the latter is likely to be larger.

The RYA Scotland’s submission stated that the Bill’s proposals would most likely “be interpreted to mean, young people under 16 cannot undertake regulated roles”. Sarah Latto from the Scottish Volunteering Forum told the Committee on 6 November that there could be a risk of reducing volunteering opportunities and that it is important for an organisation to know whether an individual is barred from working with a vulnerable group.

Young people navigating the system

A key aim of the Scottish Government’s reforms to the disclosure system is to make it easier to understand and to simplify the system for users. The Scottish Government’s consultation found that the current system is confusing.

A number of witnesses have suggested that efforts be made to provide guidance on how the new system will work for individuals and organisations. Children in Scotland’s submission stated that “more must be done to support children and young people to understand the system and employers to understand the changes”.

WCS’s submission stated—

“Our members have told us how difficult it is to experience the disclosure process on their own, when they have criminal convictions that they need to declare. Currently, disclosure processes depend on individuals being aware of and using legal processes, for example when having to make representation when under consideration for listing ... Care Experienced people are often deprived of information and control over their own lives in the care system, and these processes add yet another barrier which they must navigate. We would urge Disclosure Scotland to continue to consider how vulnerable people or those who experience disadvantage in Scotland are able to navigate any processes or systems they put in place.”

[The Scottish Government’s response to the consultation](#) which led to the Bill noted that Disclosure Scotland intends to increase training and guidance “to ensure that customers get the best out of the system” (p7).

WCS also argued that the Bill should explicitly set out how the Scottish Government will meet its corporate parenting duties. WCS set out 7 points in this regard in its submission, including waiving fees for care experienced people and providing funding for care experienced people to access legal advice on matters relating to disclosures.

Members may wish to explore with the panel:

- **Whether the panel is concerned that a mandatory PVG scheme that is not available to people under the age of 16 poses a risk to volunteering opportunities for young people.**
- **Whether the panel considers the ongoing monitoring as a PVG scheme member is acceptable for a young person undertaking a regulated role.**
- **The extent to which young people are likely to be able to navigate the Disclosure System and how best to communicate with young people about the system and, for example, review processes.**
- **Whether and how the Bill can make the disclosure system easier to navigate for care experienced people.**

THEME 4: PROTECTION

In her statement on the introduction of the Bill, the Minister for Children and Young People, Maree Todd MSP, told Parliament—

“The Scottish Government is committed to policies that balance public protection with the right to move on from past offences. Those are not contradictory aims; both can be achieved.” ([OR, 13 June 2019, Col 62](#))

The Bill strengthens certain aspects of the disclosure system in terms of public protection. The Bill could also reduce the amount of conviction information available on some disclosures, potentially allowing people to move on from previous behaviour more quickly.

A key change in the Bill that the Scottish Government considers will improve public protection is the introduction of mandatory PVG membership when individuals undertake regulated roles.

Currently it is not compulsory for individuals undertaking regulated work to be members of the PVG Scheme. However, it is an offence to offer a role doing regulated work (including voluntary work) to an individual who has been barred from that type of work. In most cases, the only practical way to be sure that an individual is not barred from regulated work is to undertake a PVG check. The Bill provides for a number of additional offences in regard to PVG membership and carrying out regulated roles, essentially making it an offence to offer or undertake work in a regulated role to an individual who is not a member of the scheme. As noted above, these offences would not apply if the individual is under 16 years.

The Bill proposes a change from the current concept of regulated work to a set of regulated roles which, if undertaken, would require the individual to be a member of the PVG scheme. The Policy Memorandum states that the current definition of regulated work is considered confusing. Disclosure Scotland sifts applications and rejects approximately

1,700 ineligible PVG applications per year. The Bill provides for a three-stage test to determine whether an individual is undertaking a regulated role:

- that the individual undertakes one or more of a list of activities (contained in Schedules 3 and 4 of the Bill);
- that the activities are "a necessary part of the role"; and
- that the activities include the opportunity to have contact with protected adults or children¹.

Some issues have been raised in written evidence and during the Committee's evidence sessions about whether the criminal sanctions for undertaking regulated work without being a member of the PVG scheme are proportionate. For example, on 6 November 2019 Rose McConnachie of Community Justice Scotland said to the Committee that the sentences are disproportionate for, potentially, making an administrative error.

The Bill provides for the PVG scheme to change from a lifetime to a 5-year membership. The potential for additional fees and administration for organisations was a concern for some. East Lothian Council stated—

“Whilst this may not be an issue for those within higher paid roles, this will be a significant impact on those within the part time workforce and / or those on the lower salary / national minimum wage, who will predominately be female workers.”

Coalition of Care & Support Providers in Scotland and Connect were both concerned that, despite the change from regulated work to regulated roles, organisations may still require PVG membership in inappropriate situations. Connect's submission stated—

“We are concerned the concept of Regulated Roles and the corresponding legal test could be as confusing as Regulated Work has proven to be ... with the Scheme to become mandatory, this could cause an increase in the current trend where parent groups decide, or are pressured by the school, to have their members join the PVG scheme just in case. While these would be caught by the new application process as unsuitable for PVG if the new system works as intended, this would still result in time being wasted by parent groups.”

The committee heard evidence on 6 November 2019 from a number of witnesses that disclosure products should form only part of an organisation's safeguarding processes, rather than the “be-all and end-all”. Some concerns were raised that smaller organisations may place too much weight on information included in a disclosure. WCS's submission stated—

“We would like to see a mandatory, standardised framework created for all employers to use when making recruitment decisions based on disclosure [to] ensure employers look beyond the conviction and realistically consider the risks posed ... there is recruitment practice which exists that automatically rules out applicants with convictions, rather than trying to understand the relevance of their criminal history to the related job role

¹ For roles in certain settings (e.g. a school) and which are not covered elsewhere in the list of activities, the test for regulated work for children is "unsupervised contact" (sch 3, para 1(2)(b)(i)).

WCS' submission argues that any conviction information should be provided in the context of how it came about. Witnesses on 6 November 2019 suggested that the individual could be given the opportunity to provide such context before agreeing to share the disclosure information with a potential employer (for example).

Members may wish to explore with the panel:

- **Would the Bill's provisions support better safeguarding for children in care or in other situations. What role does the disclosure system support individual organisations' safeguarding policies.**
- **Whether panel supports the PVG scheme becoming mandatory and if the associated offences are proportionate.**
- **The panel's views on the proposed 5-year membership of the PVG scheme.**
- **The panel's views on whether the proposed change to regulated roles provide clarity. If the panel has any suggested changes to the approach or the lists of regulated roles.**
- **The panel's view on whether greater contextual information should be included in disclosure products. How this might be practically achieved while ensuring a balance between public protection and allowing individuals to move on from previous offending.**

**Ned Sharratt
SPICe Research
8 November 2019**

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot

Relevance and public interest test Extract from Disclosure (Scotland) Bill SPICe Briefing

The provision of non-conviction information has been subject to some debate and judicial consideration. In October 2009, the Supreme Court held that police should consider two questions when deciding whether to disclose non-conviction information: first, whether the information is reliable and relevant; and second, in light of the public interest and the likely impact on the applicant, whether it is proportionate to disclose the information. The Supreme Court also held that the factors to be considered in assessing proportionality include:

- the gravity of the information; its reliability and relevance;
- the applicant's opportunity to rebut the information;
- the period that has elapsed since the relevant events; and
- the adverse effect of the disclosure.²

The Supreme Court also held that "if disclosure may be: (i) irrelevant; (ii) unreliable; or (iii) out-of-date, the applicant should be given the opportunity to make representations prior to the decision to disclose".³

² The Supreme Court. (2009). R (L) v Commissioner of Police of the Metropolis [2009] UKSC 3. Retrieved from <https://www.supremecourt.uk/cases/uksc-2009-0104.html>

³ The Supreme Court. (2009). R (L) v Commissioner of Police of the Metropolis [2009] UKSC 3, press summary. Retrieved from <https://www.supremecourt.uk/cases/uksc-2009-0104.html>

Education and Skills Committee

30th Meeting, 2019 (Session 5), Wednesday, 13 November 2019

Disclosure (Scotland) Bill – submissions pack

This pack contains the submissions from this week's witnesses.

- [Children in Scotland](#)
- [Connect](#)
- [Centre for Youth and Criminal Justice \(CYCJ\)](#)
- [Scottish Children's Reporter Administration \(SCRA\)](#)
- [Who Cares? Scotland](#)

The Committee has received a letter from the Minister for Parliamentary Business and Veterans regarding whether any provision in the Bill relates to a protected subject-matter.

- [Letter from the Minister for Parliamentary Business and Veterans](#)

The Committee received a late submission from Scottish Throughcare and Aftercare Forum (STAF).

- [Scottish Throughcare and Aftercare Forum \(STAF\)](#)

Children in Scotland

Children in Scotland is the national network for improving children's lives. Giving all children in Scotland an equal chance to flourish is at the heart of everything we do. By bringing together a network of people working with and for children, alongside children and young people themselves, we offer a broad, balanced and independent voice. We create solutions, provide support and develop positive change across all areas affecting children in Scotland. We do this by listening, gathering evidence, and applying and sharing our learning, while always working to uphold children's rights. Our range of knowledge and expertise means we can provide trusted support on issues as diverse as the people we work with and the varied lives of children and families in Scotland.

Children in Scotland is pleased to be able to respond to the call for evidence on the Disclosure (Scotland) Bill by the Education and Skills Committee. Children in Scotland is interested in the Bill from two perspectives. We believe that the Disclosure system is essential for safeguarding purposes and the Bill will be a key piece of legislation in defining how we support and protect children and young people. The way the system operates also has a key role in the justice system for many children and young people. The Bill will also impact on Children in Scotland in a practical sense as all of our staff are subject to a Disclosure Scotland check.

Our response will be focused on high level issues and will not address the technicalities of the Disclosure (Scotland) Bill. We will focus on the proposed simplifications to the system and also how the proposed new scheme can ensure that experience with the criminal justice system in childhood and adolescence does not disproportionately impact on job opportunities later in life.

General Comments

Children in Scotland is pleased to see thought being given to the Disclosure system to ensure it fulfils its role in safeguarding. However, it is important to remember that this is only one part of safeguarding for vulnerable groups. It is essential that employers working with vulnerable groups have a clear safeguarding system within their organisation that includes, but is not limited to, undertaking disclosure checks. This system must begin before potential employees undergo a disclosure check by confirming identification and following up on all references.

Children in Scotland is pleased to see that a range of engagement work has been carried out with groups who access services that are covered under the Disclosure scheme. It is important that their views are reflected within the system. However, we are disappointed to see there does not appear to have been any direct engagement with children and young people. This would have provided valuable insight into the views and perspectives of children and young people on what they want from the workforce. We would encourage the Education and Skills Committee to explore findings from our Children and Young People's Evidence Bank for their reports to identify the views of children and young people in this area (1).

¹ <https://evidencebank.org.uk/>

Scheme Simplification

Children in Scotland believes that proposed changes to the scheme to simplify the system are welcome. We agree that the current system can be too complex and can cause confusion around what prior issues may appear on a disclosure check.

Partners across the children's sector such as Clan Childlaw have highlighted in previous consultations on changes to the Disclosure system that the present system makes it very hard to explain to children and young people involved in Children's Hearings what the impact of behavior may be on a PVG or Disclosure check in the future, and the impact this may have on their employment. Simplification of the system to clarify what information can be passed on about a child or young person (and what offences will be considered) will help to rectify this issue.

We also agree with the assessment made by CELCIS that reforms to the system in and of themselves will not go far enough. More must be done to support children and young people to understand the system and employers to understand the changes. We would refer the committee to CELCIS's response to the pre-legislative consultation for further information.

Children in Scotland believes that replacing the current definition of 'doing regulated work' with a list of core activities or 'regulated roles' is helpful. This will allow employers in sectors that do not work with vulnerable groups as part of their core work to understand when a disclosure or PVG is required.

We also agree with the assessment from the Scottish Children's Reporter Association and the NSPCC in the pre-legislative consultation that making the Disclosure scheme mandatory for all carrying out 'regulated roles' is an appropriate change that will support the safeguarding of children and young people. In their response to the pre-legislative consultation the NSPCC also provided a list of roles that should be considered as 'regulated work'. We believe this list presents a valuable starting point from which the new Disclosure system should work. We appreciate it may not be possible to prepare an exhaustive list of 'regulated roles' and it is therefore important that clear guidance is provided to employers and potential employees about what other roles may fall under this list.

In response to the pre-legislative consultation the Scottish Children's Reporter Association highlighted that they would like to see the Disclosure system underpinned by a set of principles. We would be interested to see how such a system would work and would encourage consideration of this as the Disclosure (Scotland) Bill passes through the Scottish Parliament.

Children in Scotland is a member of the Independent Care Review workforce strand. As part of this strand of work the importance of relationships has been identified, as has the need for a value-based workforce in the children's sector. Consideration of a widely implemented values-based recruitment framework could be helpful for assessing whether people are suitable to work with children and young people, and indeed other vulnerable groups. An example of this could be the SSSC 'Right values, right people: recruitment toolkit'

We also agree with the proposals to maintain free disclosure checks for volunteers from qualifying voluntary organisations. Volunteers are a vital part of the workforce in

the children and young people's sector and must be supported to continue to engage in volunteering with no financial restrictions in this area.

Criminal Record Checks

Children in Scotland agrees with partners across the sector who have clearly and consistently argued for the need to ensure that the disclosure system does not disproportionately disadvantage children and young people who have been involved in childhood offending. The current system makes it difficult for people with a conviction in childhood or adolescence to gain employment with vulnerable groups, despite the fact that offences may not be reflective of current behaviour.

Children in Scotland believes it is unjust for minor offences in childhood to continue to have a long-term effect on the life changes and opportunities in adulthood. We are pleased to see that the Disclosure (Scotland) Bill aims to take steps to rectify this.

Evidence clearly shows that childhood offending is socially patterned. As CELCIS argued in their response to the pre-legislative consultation, care experienced young people are more likely to be formally involved with the police and have behaviour recorded in relation to this. They are also more likely to be criminalised than their peers (2 & 3). Evidence has also shown that children and young people living in residential care are also more likely to receive a criminal record for minor issues (4).

We agree with the assessment of partners across the sector that childhood offending must be treated as distinct from adult offending. As the brain develops through childhood and adolescence, children and young people can be more prone to risk taking behaviour, while having less capacity to assess such risk (5). A recent paper by Augusberger and Elbert highlights a range of reviews that have shown that exposure to trauma can be connected to increased levels of risk taking (6). It is important to have a wider system that supports children and young people to manage and regulate this behaviour rather than a justice and disclosure system that punishes them disproportionately for it.

The Disclosure system must reflect this and as such we are pleased to see that the Disclosure (Scotland) Bill proposes to exclude offences committed between 12-17 from disclosure records except in specific cases. We are pleased that this takes account of the recent increase to the age of criminal responsibility as laid out in the Age of Criminal Responsibility (Scotland) Bill. We agree with the assessment of partners such as Clan Childlaw that these changes will emphasise the best interests of the child and align the system more closely with the Children's Hearing system.

We would also encourage the Scottish Government to give deeper consideration to suggestions by CELCIS that convictions up till the age of 25 should be considered for a 5-year period before applications can be made to have these discounted. CELCIS has argued that brain development continues further into the twenties and as such people may still engage in risk taking behaviour that could end up on their record (7).

² <https://www2.gov.scot/Resource/0049/00497071.pdf>

³ The Howard League of Penal Reform, 2016, *Criminal Care*

⁴ <https://cyci.org.uk/wp-content/uploads/2016/10/Responses-to-Offending-in-Residential-Childcare.pdf>

⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3445337/>

⁶ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5428957/>

⁷ <https://cyci.org.uk/wp-content/uploads/2017/03/Extending-the-Whole-System-Approach-1.pdf>

Children in Scotland does not have a firm position on reducing the application time for removing convictions up to the age of 25 but believes it is worthy of consideration as the Bill passes through Parliament.

It is worth identifying here that Children in Scotland is supportive of increasing the age of criminal responsibility to at least 14 and believes consideration should be given to raising this to 16. This would have implications for proposals within the Disclosure (Scotland) Bill. This should be considered as the Bill is passing through the Scottish Parliament.

Children in Scotland believes that there are certain instances where it will be clear and obvious that there is a public safety issue related to previous offending and where this must be disclosed. We believe a proportional system should be used to define what sorts of offences may need to be passed on employers. A clear risk assessment process should be used that allows a decision to be made on a case by case basis.

It is also worth highlighting that employers currently have responsibilities to potential employees under The Police Act 1997 in relation to the recruitment of ex-offenders. Changes to the system for disclosure checks and the information that can be passed on from this should not impact on the action taken by employers to ensure that ex-offenders feel comfortable applying to a role and understand the process that will be taken to ensure their suitability for it.

We also agree with the assessments of partners across the sector in relation to the provision of "Other Relevant Information" (ORI's). The ORI system allows the police to provide information to employers that identifies behaviour that may influence an employer's view on the employability of a candidate.

We have concerns that the provision of ORI on these grounds could undermine the new system of discounting convictions between the age of 12-17. Provision of ORI could allow employers to access information that relates to convictions without giving access to the convictions themselves. Similarly, to discount convictions between the age of 12-17 we believe that ORI's should only be granted in situations that relate to public protections. We agree with Clan Childlaw's assessment that a high threshold should be set and risk assessments should be used to identify when it is appropriate to pass on information. We also share concerns raised by CELCIS that information about engagement with the police that could not result in criminal prosecution due to the increased age of criminal responsibility could be passed on by ORI. This is not in keeping with the Scottish Governments proposed approach to youth criminal justice.

We are pleased that the proposals contained within the Disclosure (Scotland) Bill will give applicants the right to make representations to the police about the provision of ORI's. However, we believe this could go further to entirely restrict the provision of ORI's except in a case of public protection based on a risk assessment. Such a system would be more in keeping with the rights-based approach to youth justice that the Scottish Government has articulated a commitment to.

Amy Woodhouse, Head of Policy, Projects and Participation

Connect

Connect (SPTC) is a long-standing independent parents' organisation and the only Scottish charity which is dedicated to supporting parental engagement in education and learning. We provide membership services to Parent Councils and PTAs, as well as offering advice and information to individual parents about any aspect of the education of their child, or the wider education system. We support education professionals in developing their skills and understanding around effective partnership working with families and the wider community.

Connect welcomes the opportunity to respond to the Scottish Parliament's Education and Skills Committee's call for views on the Draft Disclosure Bill. As SPTC we were closely involved in the development of the initial legislation, with specific regard to its impact on parents/parent groups in education settings. At that time we expressed concern about the potential for both confusion and misuse, and the impact this would have on the numbers of individuals on the Scheme.

Since the Protecting Vulnerable Groups (PVG) Scheme was introduced we have been providing training, information and advice to our members about the Scheme and effective child protection, and for the last two years Connect has been an Intermediary Body with Volunteer Scotland for those member groups that wish to process PVG applications for entitled volunteers.

1. Background

We have followed the development and implementation of the PVG Scheme and its impact on parent groups from the outset, and found the following issues with the current system:

- Defining Regulated Work is not straightforward and is open to interpretation. This particularly relates to the types of activities parents and parent groups may be involved in.
- Individuals joining the Scheme and the organisations for which they work do not understand the membership nature of the Scheme, resulting in numbers on the Scheme growing steeply and far exceeding the Government's own expectations.
- PVG (as disclosures before them) are perceived as a mechanism which protects children in any and every circumstance, rather than being one part of a raft of child protection measures. This has resulting in over-use and manipulation. For instance, we have worked with parents who have been told by their Local Authority/school that they must join the Scheme if they want any active roll on the parent group. We have also heard of parents being required to join the Scheme by the Local Authority, so they could take part in a 'Stay and Play' activity with their child, which was particularly aimed at vulnerable families.

Connect's response to the Scottish Government and Disclosure Scotland 2018 consultation on proposed changes highlighted the following:

- How many parent groups find the concept of Regulated Work difficult to understand within the context of the occasional volunteering/participation roles they may have.
- Parent groups can be pressured by the school and Local Authority to have all members join the PVG Scheme, even though they are not carrying out Regulated Work

- That any changes should make it clearer who needs to be on the Scheme, and who doesn't; it should be more accessible for everyone who needs to join; and there should be a set term of membership so people are not left on the Scheme for life
- The risk of policy conflict between the risk averse nature of schools and LAs and the drive for greater parental engagement and involvement in the life and work of schools and education settings.¹

2. The Draft Bill

We welcome the intention to simplify the Disclosure process, with PVG Scheme Records and PVG Scheme Record Updates to be combined under the one Disclosure product of Level 2 PVG. In our experience the difference between Scheme Record and Record Update has caused confusion for a number of parent groups. We are also glad to see membership will now require renewal after five years, meaning individuals will not be left unknowingly on the Scheme for life. However, we would like more clarity on the following points.

2.1 Regulated Roles as defined in the Draft Bill

We are concerned the concept of Regulated Roles and the corresponding legal test could be as confusing as Regulated Work has proven to be. To us, it appears Regulated Roles are a half way measure between Regulated Work and the list of Protected Roles proposal from the consultation, setting out a legal test where a role is designated as Regulated if it includes one of the activities listed in the Bill as a 'necessary part of the role'.

From the perspective of parents involved with their school or Parent Council/PTA, we see the key phrases which would define Regulated Roles are 'day-to-day supervising' and 'holding significant power or influence over children'. Parent groups are generally representative, or fundraising focussed and do not involve day to day supervision of children nor holding significant power or influence over children, so parent group members should not be in a Regulated Role as set out in the Bill. Where parent groups run dedicated clubs and activity groups for children, such as after-school or sports clubs, it would be mandatory that club volunteers hold PVG. We agree with this, and currently offer our services as a Volunteer Scotland Intermediary Body to support our members with PVG applications for this purpose.

While the activities the Bill defines as being a Regulated Role do not form the core part of parent group activities, many do run occasional activities for the school community including children, so we feel this remains open to interpretation. With the Scheme to become mandatory, this could cause an increase in the current trend where parent groups decide, or are pressured by the school, to have their members join the PVG scheme just in case. While these would be caught by the new application process as unsuitable for PVG if the new system works as intended, this would still result in time being wasted by parent groups. Some groups have little admin capacity due to being dependant on a small pool of volunteers and so may be discouraged from holding activities and events due to uncertainty.

¹ https://connect.scot/application/files/6915/3192/2088/PVG_Consultation_Connect_response_final.pdf

2.2 Difference between school-led and parent group-led volunteering

There is no explicit mention of volunteering in schools in the Draft Bill or the accompanying memos and notes, or of the difference between establishment and Parent Council/PTA-led volunteering. However, church volunteering, such as for Sunday school or youth church activities, is specifically mentioned. We are unsure why government has chosen to be so specific regarding this type of volunteering when a wide range of community and voluntary groups rely on volunteers, and this is potentially unhelpful as such a blanket application in this scenario may lead others to also adopt a blanket approach.

We believe it is important the Bill recognises the difference between parents volunteering in the classroom/school establishment on behalf of the school (and so under school authority) and that done on behalf of the parent group, which is independent from the school.

In Conclusion

We understand Disclosure Scotland will evaluate role descriptions according to the activities listed in the Bill and will maintain a list of Regulated Roles. We would argue this evaluation process should be as transparent as possible, with explanations as to why a role has been deemed to be Regulated or not qualifying.

It is also of utmost importance Local Authorities act consistently with regard to parent groups and volunteers and receive support and guidance from Disclosure Scotland and COSLA to do so. Most importantly, PVG must be recognised as only one aspect of child protection. It can only identify an individual unsuitable to work with children if they have been identified by the system, and so must be accompanied by robust and common-sense child protection policies and practices.

Eileen Prior
Executive Director
20 August 2019

Centre for Youth and Criminal Justice (CYCJ)

The Centre for Youth & Criminal Justice (CYCJ) is dedicated to supporting improvements in youth justice, contributing to better lives for individuals, families and communities. Our vision is a Scotland where all individuals and communities are safe and flourish; and where Scottish youth justice practice, policy and research are internationally renowned and respected. We contribute to this by developing, supporting and understanding youth justice practice, policy and research in Scotland, and through seeking and sharing learning internationally. CYCJ are pleased to respond to the current call for views by the Scottish Parliament's Education and Skills Committee, with disclosure an area we have long raised concerns about and advocated the case for change (see [Nolan, 2018](#); [CYCJ, 2018](#)). The Bill is a progressive step forward and it is evident that cognisance has been taken of the contributions made during the consultation and engagement activities. Overall, we welcome the provisions of the Bill and deem it important that this opportunity to radically reform Scotland's approach to disclosure is maximised. We have chosen to limit our submission to those areas in which we feel we have a particular contribution to make or deem improvement could be made.

Childhood convictions

In respect of childhood convictions, CYCJ have long argued the need for a different approach to the disclosure of offending behaviour that occurred during childhood and to limit the disclosure of information relating to children. The provisions in the Bill that such convictions are treated as a separate category distinct from other convictions and to end the automatic disclosure of convictions accrued by an individual while aged 12 to 17 years old are positive and supported by the evidence that:

- Children are not mini adults, they have different developmental needs and legal status and as such require unique approaches ([Nolan, 2018](#); [SCYJ, 2017](#)).
- The failure to distinguish between the treatment of criminal records accrued in childhood has been at odds with virtually every other approach we take to children and adversely affects our ability to achieve the aims for, and to fulfil our legal and policy requirements to, children and children's rights ([Nolan, 2018](#)).
- Offending in childhood and adulthood differs, with childhood offending predominantly low level, a common feature of childhood as children grow and test boundaries which most children "grow out" of with maturation, and is a poor indicator of future behaviour as an adult ([CYCJ, 2016](#); [SCYJ, 2017](#); Children's Commissioner for England, as cited by [House of Commons Justice Committee, 2017](#)).
- Distinguishing between child and adulthood records is done in the majority of jurisdictions internationally and, it has been concluded, is an essential component of a child-friendly disclosure system ([Sands, 2016](#); [Nolan, 2018](#)).

Similarly, the crucial aim of the Bill to end the automatic disclosure of childhood convictions is supported by:

- The recognised wide ranging and particularly destructive effect of disclosing childhood criminal records (see for example [House of Commons Justice](#)

Committee, 2017; [Carlile, 2014](#); Sands, 2016). Criminal records can adversely affect access to employment, education, training, volunteering opportunities, housing, insurance and visas for travel (House of Commons Justice Committee, 2017; SCYJ, 2017). Many of these factors are recognised as critical in reducing reoffending (and therefore preventing future potential harm and victims of offending); supporting reintegration which should be promoted in accordance with the UNCRC; promoting desistance; and in children's development into adulthood (Nolan, 2018). These are areas where children often already face disadvantages, for example by virtue of their age, the common prevalence of school exclusion, poorer educational outcomes, lack of networks and lack of previous employment, training or experience (CYCJ, 2016).

- The above affects disproportionate impact on certain children. It is well established that a high proportion of children involved in frequent and/or serious offending are amongst the most vulnerable, victimised and traumatised children in society (CYCJ, 2016). These children have often had multiple experiences of childhood adversity; neglect; abuse; loss and bereavement; inequality and deprivation; experiencing physical and mental health needs; speech, language and communication needs; and learning disabilities, with offending increasingly recognised to be an indicator of wellbeing need (CYCJ, 2016). Moreover, the behaviours of looked after children are more likely to have been reported to the police, including for minor offences and trauma-related behaviours - thereby attracting a criminalising state response - than Scotland's child population in general, and care leavers are overrepresented in the justice system ([Scottish Government, 2018](#)). Therefore "while a conviction is not a protected characteristic, the ways in which it intersects with protected characteristics means that barriers relating to convictions have an impact on equalities" ([Thomson, Laing and Lightowler, 2016](#), p.iii). We would echo conclusions of the House of Commons Justice Committee (2017) that the disclosure regime can cause secondary discrimination to certain already stigmatised and discriminated groups of children.
- The disclosure of criminal record information is inherently anxiety-provoking for individuals with convictions, often being experienced as traumatic, stigmatising and embarrassing, which can result in the limiting of horizons, avoidance of accessing opportunities such as volunteering, education and employment or a mismatch between attainment and abilities, as well as detrimentally impacting on an individual's wellbeing and identity (Thomson et al., 2016). The above factors combine to bring real and psychological barriers to improving life chances and outcomes, causing significant issues for children at key transition points and just when they are trying to change and turn their lives around (Children's Commissioner for England, as cited by House of Commons Justice Committee, 2017; SCYJ, 2017). It is therefore

important children have the right to “move on” from offending behaviour and to put offences committed in childhood behind them (Nolan, 2018).

Ending the automatic disclosure of childhood convictions should therefore contribute to reducing these negative impacts.

We welcome that the provisions in the Bill apply to all childhood convictions (including those of now adults) in the interests of fairness and equity, and the listing of childhood conviction information under a separate heading to distinguish this from adult offending as this conveys an important message. In addition, measures to enable the date of offence (as opposed to date of conviction) to be used in determining a childhood conviction are important, given that practice and lived experience indicates there can be significant system delays between the time of offence and the time of conviction. Failure to include this provision would unfairly disadvantage those children who have committed an offence in childhood but owing to delays in the system, may not become a conviction until adulthood.

While welcomed, this provision differs to the Management of Offenders (Scotland) Act where provisions for under 18s are based on the date of conviction. This is indicative of a wider concern that we have expressed previously regarding the approach to reform of the disclosure system, given the system is impacted on, and underpinned, by various pieces of legislation and policy, which have been reformed in a piecemeal manner. This underlines the importance of ensuring the policy intentions and provisions within the recent legislative amends - including the Age of Criminal Responsibility (Scotland) Act 2019 (ACR Act), Management of Offenders (Scotland) Act and Disclosure (Scotland) Bill, all of which impact on disclosure - are connected and the provisions in one piece of legislation do not adversely affect another. A further example of this is in respect of the fact that the Disclosure (Scotland) Bill governs state disclosure and other legislation (such as the Management of Offenders (Scotland) Act) governs self-disclosure.

We have a concern that under current provisions there may be situations whereby a child requires to self-disclose something, which within the provisions of the Disclosure (Scotland) Bill the state may decide not to disclose, therefore meaning the benefits provided by the proposed changes have little impact. Further amends similar to those required in the ACR Act may be worth considering. Likewise, whilst we welcomed some of the provisions under the Management of Offenders (Scotland) Act in respect of the Children’s Hearings System, we remain concerned that under the proposed changes, this information will still be considered as a childhood “conviction” and as such disclosable which we deem to be inappropriate for various reasons, not least due to the incompatibility of this position with the welfare-based Children’s Hearings System (see [SCRA, 2018](#)). It is crucial that the Disclosure (Scotland) Bill does not further complicate an already complex landscape, with the disclosure system poorly understood and complex to navigate almost universally, but particularly for children and young people.

We welcome the introduction of a case-by-case, structured approach to any decision to include childhood conviction information on level 1 and 2 products. This is important in balancing the rights to public protection with upholding the rights of individuals with conviction information, with it having been suggested that schemes without flexibility to permit to use of discretion and individual assessment cannot be compliant with Article 8 of the ECHR protecting an individual’s right to respect for

private and family life (House of Commons Justice Committee, 2017; Nolan, 2018). Given the far-reaching implications of these decisions, to promote consistency and transparency of decision making and understanding of what might be disclosed, readily available and accessible guidance will be important, although we retain concerns about how easy this will be to achieve in practice.

We also believe it is important that this decision is based on independent assessment and in terms of streamlining provisions, question if it would be more appropriate to align this decision-making process with the ACR Act, with the independent reviewer being the first line of decision making. In informing the inclusion of conviction information, we understand the factors that will be taken into account in informing such decisions (such as amount of time elapsed, the number of offences) and the rationale behind the test for inclusion differing on level 1 and 2 disclosures. We would however suggest that further attention should be given to the context of offending, in particular trauma, mental health and care experience, and any progress in terms of risk and rehabilitation that had been made since the time of the offence (Nolan, 2018; see Who Cares? Scotland evidence submission). With all of the frameworks/guidance to inform decision making on the inclusion of information or review, we would like to propose further consideration of the inclusion of this information within the Bill or statutory guidance. The provisions for explaining why such information has been included, right of appeal, review and representation are improvements and key components of a rights compliant system, as discussed further below (Nolan, 2018). In respect of disclosure of childhood convictions (and the use of the above provisions), we would like to see provisions built into the Bill (or associated documents) for monitoring and evaluation of the frequency of childhood convictions being disclosed and for this information to be made publically available. This could provide valuable information for considering the further extension of the approach adopted to childhood conviction information to (for example) young adults and adults, as we argued for in our previous submission (and as also highlighted in Howard League Scotland evidence submission).

Other relevant information (ORI)

As summarised in Nolan (2018) and our previous consultation submissions, CYCJ have raised concerns about the use of ORI. The provisions in the Bill to rights of review and appeal and the development of statutory guidance in relation to the disclosure of ORI should address some of the concerns raised regarding the ability to challenge information, the onus being on the state to evidence and explain why such information should be included, and transparency. In developing the statutory guidance, the principles and tests as outlined by Grace (as cited by Weaver, 2018) may be useful and we would suggest, in maintaining the ethos of the Bill that there is a specific section relating to the additional considerations for ORI related to behaviours in childhood. We still however retain concerns about the use of ORI in terms of rights as detailed elsewhere (see for example Nolan, 2018; Howard League Scotland evidence submission); the potential for children who are under greater scrutiny, such as looked after children, to have more information that could be disclosed as ORI, which may result in the provisions of the Bill to reduce disclosure having lesser impact; the extent of what can be included as ORI; and the potential unpredictability of what could be included as ORI, which makes it difficult to appropriately advise and support young people in regards to this.

Representation, review and appeal

CYCJ welcome the provisions within the Bill relating to reviewable information including rights of review, representation, and appeal; efforts to streamline these processes and mechanisms; and the commitment to make guidance available. In order to be utilised and fulfil individual's rights of participation, it is crucial that these measures are clearly communicated; individuals are equipped with the tools, knowledge, information and appropriate support to be enabled to exercise these rights; processes should be as easily understood and as simple as possible; and timescales should be set for how long this process should take to avoid unnecessary delays and the resulting impact on opportunities. This is essential if these provisions are to become real opportunities, improvements and rights, not just rights in law that are extremely difficult to exercise in reality and indeed are inaccessible to many (Nolan, 2018). In doing so, we would urge further consideration of building further provisions into the Bill (or associated statutory guidance) for monitoring and evaluation of the frequency of such provisions being utilised and the experience of those utilising such measures, with this information being made publically and readily available. With all reviews, we question if making the Independent Reviewer the first line of review and appeal in all cases, and indeed the first line of decision making in respect of childhood convictions and ORI, would be beneficial in terms of independence, simplicity, streamlining processes and ensuring the same standards of justice are achieved across the different pieces of legislation. Within all provisions it is beneficial that no disclosure will be issued to a third party until the individual agrees/requests this, has the opportunity for review and all the review processes are complete.

Removable and non-disclosable convictions

It is a necessary and welcome improvement that the Bill makes provisions for reducing the periods after convictions can become non-disclosable or an application for removal can be made and amends the process for asking for convictions to be removed, given the significant challenges detailed in the Consultation paper. We remain concerned about the lengthy 11 and 5-year 6-month time frame, and although the periods are shorter for under 18s, these represent a greater proportion of a child's life than those applying to adults (House of Commons Justice Committee, 2017). We would like to propose further consideration of the evidence in establishing these timeframes based on Time to Redemption studies (see for example [Weaver, 2018](#)). With regards to the process for removal, we would echo comments made elsewhere in terms of the potential to streamline and simplify processes; that this is still placing onus on the individual; the need to ensure individuals can be supported to exercise these rights; and that there should be no fee for this application. As detailed in our previous submission, we question the rationale behind having two different lists and deem if the desire exists to simplify the system and promote consideration of individual circumstances, then consideration should be given to developing one list of offences coupled with an individualised and nuanced approach that requires specific consideration in each case. We welcome the move of Section 38 Criminal Justice and Licensing (Scotland) Act 2010 threatening or abusive behaviour to List B, given that this covers a wide range of offences and is one that children, particularly those in care, may accrue for fairly minor behaviours or those rooted in trauma. However, we are concerned about the positioning of wilful fire-raising as a List A offence.

Complexity

CYCJ welcome the reduction in the number of disclosure products, the use of digital opportunities but retaining non-digital options, and the increased individual control over the use and sharing of disclosure data. However, as detailed above the complexity of the disclosure system lies not only in the number of products available. We understand that a level of complexity will be unavoidable but consider it important that in respect of the Bill and the disclosure system as a whole, guidance, information and support, including resources specifically aimed at children and young people, is made available. It is crucial that such information and support is independent, individualised, free, in-person (either face-to-face or by phone) and available to everyone, whatever stage of their disclosure journey they are at. Many good supports are already available, which we suggest should be built upon and efforts made to ensure such support is consistently available. We would suggest further consideration should also be given to any adjustments, specific support, or entitlements for young people with additional needs or vulnerabilities, for example children with additional support needs; learning disabilities; speech, language and communication needs; and those with care experience (including in respect of corporate parenting duties). The requirements for self-disclosure of criminal information, which we acknowledge are out with the scope of the bill, still place full onus on the individual and remain extremely difficult for individuals to understand (and indeed for those professionals supporting people with potentially disclosable information), with significant costs of over or under-disclosure (Nolan, 2018). As detailed in our previous submission, we deem the Bill provides an opportunity to enable the provision of clear, accessible, usable information to individuals, free of charge, which clearly label individual convictions as unspent, spent, and protected, along with dates showing when the status of the conviction will change. Some suggestions for how this could be achieved included the development of an online portal where individuals can access this information; making the calculation algorithm for establishing timeframes more readily available; or introducing the provision for doing so on free Subject Access Requests. This would support individuals with disclosable information, and those supporting them, to better understand what needs to be disclosed and for how long. Moreover, where the onus is on the individual (for example in respect of removable convictions) they are being asked to do so within the context of a system that is difficult to understand. Many of these individuals are frequently disenfranchised, their motivation to fight the system has often been lost and it may be difficult for them to see the benefits of doing so, meaning such provisions may not have the intended positive impact.

Scottish Children's Reporter Administration (SCRA)

SCRA welcomes the opportunity to provide written evidence to the Education & Skills Committee.

INTRODUCTION:

The Children's Hearings System is Scotland's distinct statutory system, in which, concerns about a child's circumstances (whether about the care or treatment of the child by adults or the behaviour of the child) are considered by Children's Reporters and then by panel members in a Children's Hearing, who make a decision about whether there needs to be compulsory professional involvement with the child and family.

In the Children's Hearings System:

- the needs of children or young people are addressed through one holistic and integrated system which considers all the circumstances of the child and the child's welfare
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making
- the rights of children and families are respected

The role and purpose of SCRA is to:

1. Make effective decisions about a need to refer a child/young person to a Children's Hearing
2. Prepare for and participate in court proceedings where statement of grounds or Hearings findings are appealed and ensure the wellbeing of children and young people – particularly vulnerable witnesses – are protected throughout the court process
3. Support Panel Members (though we are not involved in making Hearing decisions) and ensure fair process in Hearings
4. Support children, young people and families to participate in Hearings
5. Disseminate information and data to influence, inform and reassure
6. Provide premises for Hearings to take place
7. Work collaboratively with partners to support and facilitate the Getting it Right For Every Child (GIRFEC) agenda

SCRA's vision of service is that:

We operate within Scotland's Children's Hearings System to protect and support the country's most vulnerable and at-risk children and young people identified as requiring the full protection of the law due to difficulties, challenges and risks they face.

SCRA commented extensively on the ‘Protection of Vulnerable Groups and Disclosure of Criminal Information - A consultation on proposals for change’ when the detail of the approach was at consultation last year

<https://www.scra.gov.uk/wp-content/uploads/2018/12/PVG-Full-Consultation-Response.pdf>).

1. Scotland has focused on the needs and deeds of individual children in their specific set of circumstances through the statutory intervention of the Children’s Hearing System since 1971. However, we have not been able to take the same approach to the way in which the offending of children and young people is captured, recorded and then used when children reach adulthood. The Rehabilitation of Offenders Act 1974 has layered a response developed for the criminal justice system on top of the Children’s Hearing, which is a welfare system, not a punitive criminal justice system. This has always been incongruous and at odds with the ethos and approach of the Children’s Hearing. SCRA agree with the Policy Memorandum for the bill, at section 36, recognising: ‘adolescence as a unique phase of life by ending the automatic disclosure of convictions accrued while aged between 12 and 17 years and introducing an assessment by Disclosure Scotland acting on behalf of Ministers as to whether convictions ought to be disclosed, with a subsequent right of review by the independent reviewer (followed by an appeal to the sheriff on a point of law) prior to disclosure to a third party’.

2. We continue to believe that the approach of the Children’s Hearing to the offending behaviour of young people is an approach that works. In the Children’s Hearing System all of the adversity faced by young people who behave in a way contrary to the criminal law is assessed and a plan to address the adversity is developed and ratified by the Children’s Hearing as a statutory decision maker. This holistic approach does not differentiate between offending behaviour or neglect / abuse (for example) as a presenting adversity – and we have always believed that the outcome of involvement in the Children’s Hearing should, for the vast majority of children, not ‘come back’ to a young person later in life. We also recognise that there are some children and young people whose behaviour during childhood and adolescence is such that, given certain circumstances, they may continue to pose a risk – and this ongoing risk requires to be assessed and determined in order to keep the public, other children and the individual safe.

We are pleased that our key concerns have been addressed in the Disclosure Bill.

We are hopeful that the future vision of the approach to the disclosure of offending for children and young people in Scotland as laid out in the Disclosure Bill will allow the very real chance for young people who experience adversity in their childhood to change and to have positive futures.

PART 1:

Level 1 Disclosure:

3. The Management of Offenders (Scotland) Act 2019 has altered the situation in relation to the relevant disclosure period for cases dealt with in the Children’s Hearing System, so that there is no longer any relevant disclosure period. Once implemented, the act will mean there is no longer any relevant disclosure period

regardless of whether the accepted or established grounds are discharged by a children's hearing or the children's hearing makes a CSO.

Consequently, Children's Hearing information will no longer appear in Level 1 Disclosures.

4. However, SCRA think that the proposed level 1 and Level 2 tiers for disclosure is clear and transparent. We agree with the specification on age (applicants over 16, can be given between 12-16 if there is a need) and we agree with accredited body applications.

5. SCRA support the move towards the use of electronic communications and think that this approach is clearly described.

6. We would ask that the information "recorded in central records" (section 5(1)(a) by Police Scotland should be clearly and simply stated online – in respect of record keeping timescales and weeding and retention policies. This area of work has been complicated for a long time and it is important that the changes which have been made are clearly explained for people.

7. SCRA are pleased that there is no longer any automatic disclosure of childhood 'conviction' information. The approach outlined to the inclusion of childhood conviction data based on a case by case assessment is well developed and thorough. We are in full support of the review process as set out and we fully support the creation of the Independent Reviewer post.

8. We are hopeful that Scotland's approach to any inclusion of childhood conviction information will become more systematic, rigorous and consistent. The transparent review process makes sense and the appeal process also makes sense. We would want to see a presumption that childhood conviction information will not be included unless Scottish Ministers are able to demonstrate why information is relevant and ought to be included and we would want to see this clearly stated in either the bill or in the guidance to be developed as part of the Bill implementation. We do not believe that childhood conviction information should be included in disclosure certificates unless there is a justified need to do so – the process as delineated means that such justification has to be given.

Level 2 Disclosure:

9. SCRA are pleased that there is an alteration to the timescales in relation to conviction and that these timescales (5 years 6 months from the date of a child hood conviction; 11 years from the date of any other conviction) recognize that desistance for children and young people cannot be understood in the same way as adult desistance from offending.

Common Provisions:

10. The approach outlined in section 30 – of a single review being carried out by the Independent Reviewer if an individual applies for review under more than one relevant section of the Bill makes sense, and we think that this 'single review' approach needs to be maintained in all applicable circumstances in the Bill – for example where there is a need to look at conviction information for pre / post 12 behaviour in a single case. SCRA also think that the 'single review' approach should

be taken if there is a need for conviction and other relevant information (ORI) to be included in a Disclosure. We are not sure whether this process is clear enough.

11. We support the concepts of lawful and unlawful disclosure of level 1 and level 2 disclosure information – it is absolutely right that the information is used for the stated and intended purpose and not for other things and that there are clear consequences if the level 1 or 2 disclosure information is used in any other way.

Accredited bodies:

12. We support the register of accredited bodies and the management of persons with access to the disclosure information. We also support the electronic approach – which gives an individual access to and rights over their own information held by Disclosure Scotland. We fully support the code of practice.

We accept that identity checks will require to be done but have some reservations about the use of biometric data in relation to these checks – and would want to have clear and stated restrictions on the retention of, for example, fingerprint data used to establish identity. We accept that checks carried out by Disclosure Scotland carry a fee – but question whether the same fee should apply to public bodies as to individuals and wonder whether the movement of public money around public agencies can be entirely justified. This argument we would extend to the fee to be charged for the work of public agencies to mine information from data systems to assist Disclosure Scotland in their work.

PART 2:

PVG Scheme:

13. SCRA agree that the PVG scheme should not apply for young people under the age of 16 and that the level 1 or 2 disclosures will provide assurance for this group should it be required. We think that the ending of ‘lifetime’ membership makes sense, even though we have some reservation about the increased workload for organisations (particularly organisations in the public sector) and the increased cost burden.

Regulated roles:

14. SCRA agrees that people carrying out work in regulated roles require to be members of the PVG scheme and that this provides the strongest protection for Scotland’s vulnerable groups. This does have an impact on recruitment timescales and employment procedures and we think this should be recognised nationally.

Consideration for listing:

15. We think this approach makes sense and is in the best interest of vulnerable people and the individual being considered for listing.

Barred status:

16. This process is well explained and is required.

PART 3:

General:

17. SCRA have no comments to make.

FINAL COMMENTS:

18. We welcome the review process and the post of Independent Reviewer. It can be quite difficult to 'see' how the post will work, without being able to see all of the guidance / information in relation to the role / work of the Independent Reviewer.

19. We would, however, say that we think the processes put in place by the Independent Reviewer will require to be quick. Recruitment practices will need to recognise this additional step and may need to factor in extra time for all recruitment – so that if the Independent reviewer does become involved that does not become obvious and therefore prejudicial for a candidate in any recruitment exercise.

20. In respect of List A and List B we remain of the view that these offence 'lists' are quite difficult to explain to young people and their families. We are pleased that the offences on the lists have been restated and amended in Schedule 1 & 2 of the Bill, but we would still prefer an approach which considers each offence on its own merits, rather than relying on a binary list.

21. Section 38 offences of threatening and abusive behaviour (Criminal Justice and Licensing (Scotland) Act 2010) have moved from the current 8A list to the new schedule 2 list. SCRA welcomes this move in relation to section 38 offences committed by children – and would ask that if there are any proposals to move it to schedule 1, then there should be an exception for section 38 offences that are childhood convictions. We still feel that the inclusion on the schedule 2 list of many offences 'commonly' committed by young people may increase the likelihood of childhood conviction information being disclosed (any assault, any theft, breach of the peace). We would therefore ask that the test applied before the offence is included is a high test – and, as previously indicated, that the presumption should be that childhood conviction information is not included unless the Scottish Ministers can demonstrate that it should be.

22. We support the end of the 'lifetime' PVG membership and think that a renewal every 5 years gives more of a chance for people to move on from their past offending behaviour.

CONCLUSION:

23. SCRA welcomes the progressive approach of the Disclosure Bill towards the disclosure of offending behaviour which has occurred during childhood and adolescence and we think that the Bill will genuinely allow young people to move on from their past to fulfilled and meaningful adult lives, whilst also providing robust and consistent protection from risk for Scotland's most vulnerable people. We would ask the committee to support the Disclosure Bill.

SCRA Practice & Policy Team, 2019.

Who Cares? Scotland

Who Cares? Scotland [WC?S] is an independent advocacy and influencing organisation working with people who have experience of the care system. We provide direct advocacy to children and young people with care experience, as well as opportunities for local and national participation. WC?S aims to provide care experienced people in Scotland with knowledge of their rights. We strive to empower them to positively participate in the formal structures and processes they are often subject to solely because of their care experience. At WC?S we ensure the voice of the care experienced population of Scotland informs everything we do as an organisation.

Introduction

We welcome the new Disclosure (Scotland) Bill as a chance to radically change the way disclosure works and to remove the barriers it can currently create for Care Experienced people with a criminal record. As a named corporate parent, this Bill also offers an important opportunity for Disclosure Scotland to fully realise their duties to the Care Experienced population in Scotland, as legislated for in the Children and Young People (Scotland) 2014 Act.² We must ensure that the disclosure system we adopt allows those who have convictions to be supported to move on and achieve the success and happiness in their lives which they deserve.

Why this Bill is important for Care Experienced people?

We are campaigning for ***a lifetime of equality, respect and love***. We know that those who experience care have a higher chance of becoming criminalised and entering the justice system in Scotland. We also know that because of this, the current complex system of disclosure, which exposes criminal convictions, specifically adds to the poor outcomes of Care Experienced children and young people.³

Statistics show that Care Experienced young people and adults are overrepresented in the criminal justice system in Scotland and although those who have been in care only make up an estimated 0.5% of the general population, they make up 33% of Scotland's youth offender population and 31% Scottish adult prisons.⁴ In 2014, 50% of prisoners in Scotland identified as having been in care at some point in their life.⁵ Unfortunately, many people do not recognise that they are Care Experienced or in many cases, they wish to disassociate with their Care Experience. This coupled with the fact that most statistics rely on self-reporting of care status, means that even these statistics may underrepresent the problem.

Children and young people in care are recognised as experiencing a form of 'double jeopardy' as by being placed in care they are often exposed to further risk factors which make them vulnerable to criminalisation.⁶ These risk factors include:

² Corporate Parents are defined in law, to promote the interests of care experienced people [by Part 9 of the Children and Young People \(Scotland\) Act 2014](#).

³ House of Commons Justice Committee (October 2017), *Disclosure of youth criminal records, First Report of Session 2017–19* HC 416.

⁴ Scottish Prison Service (2016), *Prisoner's Survey 2015 – Young People in Custody*; Scottish Prison Service (2013), *14th Survey Bulletin*.

⁵ Broderick, R, McCoard, S & Carnie, J (2014), *Prisoners who have been in care as 'looked after children'*.

⁶ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*.

unnecessary over-involvement with the police; felt and experienced stigmatisation by the Police; increased scrutiny and punitive responses to unmet mental health needs, sometimes expressed through challenging behaviour; and frequent participation in formal processes such as reviews and Children's Hearings.

There is strong evidence of the consequential, destructive effect of childhood and teenage criminal records on the rest of an individual's life.⁷ We know from speaking to our Care Experienced members, that a criminal history can prevent Care Experienced people from moving on from their past and making the most of their potential.

'Still terrified about having to share about convictions - can still come back to haunt me and causes me issues - experience of care still impacts me in my adult life.'

WC?S Member

There is extensive evidence which shows conviction disclosure is inherently anxiety-provoking for those who have convictions.⁸ The process of disclosure is experienced as traumatic, stigmatising and embarrassing and often results in the avoidance of accessing opportunities such as volunteering, education and employment.⁹ Care Experienced people with criminal convictions are therefore forced to deal with the stigma of being labelled as criminals, along with the stigma they already face due to their care identity.

Change of approach to childhood convictions

We are supportive of many of the changes proposed in the Bill to mitigate the effects of disclosing criminal records, especially the presumption against disclosing childhood convictions received when under 18. As stated by the Centre for Youth and Criminal Justice (CYCJ) in their response, 'the failure to distinguish between the treatment of criminal records accrued in childhood has been at odds with virtually every other approach we take to children and adversely affects our ability to achieve the aims for, and to fulfil our legal and policy requirements to, children and children's rights (Nolan, 2018).'

The presumption against disclosing convictions received when under the age of 18 shows how the Bill is taking a positive step forward in designing a disclosure system which automatically rules out unnecessary information. However, we understand the need for a structured approach to understand which information is relevant on a case-by-case basis, when dealing with more complex or extreme types of criminal convictions. We are unclear how this presumption against disclosing convictions received when under 18 may be overturned in some cases, as this detail is not obvious on the face of the Bill. If there is a process in place which could lead to the presumption being potentially overturned and a conviction for an under 18 being disclosed, this needs to be very clearly laid out. We understand that there might be need to show information about an incident which happened when an individual was under 18, but we would hope this to happen only in the most serious cases, where risk to children and young people has been clearly demonstrated and relevance to the role being

⁷*Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court*, chaired by Lord Carlile of Berriew CBE QC. June 2014 quoted in House of Commons Justice Committee (October 2017), *Disclosure of youth criminal records, First Report of Session 2017–19HC 416*.

⁸ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*.

⁹ *Ibid.*

applied for is proven in order to make the disclosure. We urge the committee to explore in more detail how this will work in practice.

We support the statement by CYCJ that using a case-by-case approach allows for the rights to public protection to be balanced with upholding the rights of individuals with conviction information. It has also been suggested that schemes 'without flexibility to permit the use of discretion and individual assessment cannot be compliant with Article 8 of the ECHR that protects an individual's right to respect for private and family life'.¹⁰ It is important that work is carried out by Disclosure Scotland to remove unnecessary information from a disclosure certificate in order to protect an individual's right to privacy, which does not feel respected within the current Disclosure process. WC?S members have consistently expressed concern over the need for certain types of information to be passed on in disclosure processes. We hope the committee will support the Bill to appropriately balance the privacy rights of individuals with the need for public protection.

We are also still greatly concerned about the emphasis being placed on 'Other Relevant Information' (ORI), as another source of information able to display criminalised behaviours on disclosure certificates. We would like to see the committee consider this form of information held on a criminal record when scrutinising the Bill, as we are unclear how the risk of this being used as an alternative method to criminalise individuals will be safeguarded against. We are also under the impression that ORI can be used to pass on information about a conviction, even if the conviction itself is not shown on a disclosure certificate and would like the committee to consider the implications of this. We understand ORI may be necessary in extreme cases where there are risks to public protection, however, the process must be extremely clear about how this function can be used by Police Scotland and Disclosure Scotland. We are also unsure if challenging ORI by making contact with Police Scotland is a process which all individuals with a criminal history would want to take up in order to contest information shown on their disclosure, due to the contact with police being the reason for that criminal record.

Alongside Clan Childlaw, we are also concerned that convictions accrued via the welfare-based Children's Hearing System will still be considered for disclosure. We support this statement provided by Clan Childlaw in their response to the 2018 consultation on the Bill: 'Allegations of offending behaviour 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. The Children's Reporter may have a choice as to whether to bring offence grounds or welfare grounds. If the decision is taken to bring offence grounds because it is in the best interests of the child, it appears unfair that there could be repercussions for the young person affecting their life chances when they are older, unless they are of a particularly serious nature. Referring at all to the term "conviction" is wholly inappropriate within this system given the focus on the needs of the child rather than the alleged offending behaviour.'¹¹ This is of particular importance to the Care Experienced population who are much more likely to have had contact with the Children's Hearing System. We also know that when accepting grounds for a hearing, young people might not know this will lead to a conviction on their criminal record.

¹⁰ CYCJ (2019), *Education and Skills Committee, Disclosure (Scotland) Bill, Submission from Centre for Youth and Criminal Justice*.

¹¹ Clan Childlaw (2018), *Response to Protection of Vulnerable Groups and Disclosure of Criminal Information*.

The need for context in decision-making around disclosure

We also welcome the introduction of an ‘independent reviewer’ role that can provide accountability for Disclosure Scotland’s processes. It is vital that this new role, alongside the Disclosure Scotland workforce which will now have greater power in associated decision-making, are made up of individuals that have a thorough understanding of corporate parenting duties and the context of care experience.

This is because WC?S members consistently tell us that behaviours which have been criminalised, must be viewed in full context. There can be ongoing cases of trauma and abuse from a person’s childhood, which have not been fully understood or discussed until the disclosure process brings it into focus. They may have been too young at the time of the crime to understand what has happened and the implications this has on their criminal record. Especially in a Care Experienced person’s life where they may have had little support of this kind.

‘Take the whole situation into consideration when a child commits a crime i.e. family, home conditions.’

WC?S Member

Yet the current process does not allow for this context to come to light, in fact there is simply a list of information created to pass to employers with no explanation at all. It is then up to the individual to explain to the employer the circumstances around the convictions – which is could be extremely distressing and uncomfortable for many Care Experienced people. Members also tell us that it is extremely difficult to have to repeat their personal stories to those that need to know the context about their background.

‘There’s reasons behind a crime, we need to understand that...being arrested, that could make things worse.’

WC?S Member

We welcome the fact that individuals will now see their disclosure certificates before they are sent to employers, as we called for this in our consultation response.¹² However, the information being considered for the certificate should identify: the age at which a crime was committed; the reasons behind the crime; whether the conviction was gained via the Children’s Hearing System and if the young person was in a time of crisis. Young people have told us that context around mental health, disability and whether the person had experienced trauma, should also all be considered when judging a criminal conviction. There must also be a way that the PVG process allows for context of care to be identified when information is being reviewed as relevant or not.

‘When I was 16 I thought I knew what I was doing and looking back I thought I didn’t know anything. Alcohol has so much to do with it, you genuinely don’t know what you’re doing, I’ve seen myself and waking up in the polis station and not even knowing why you’re there. I’ve got a load of charges which I genuinely don’t know how I got.’

WC?S Member

Support employers to understand the purpose of disclosure

¹² WC?S (2018), *Response to Protection of Vulnerable Groups and Disclosure of Criminal Information*.

Although we welcome the changes in the Bill which will allow applicants to see their disclosure certificate before employers receive a copy, and be able to challenge the information shown, there will of course still be cases where it is appropriate and relevant for conviction information to be shown to employers. It is therefore important that alongside the Bill there is a continued national effort to engage employers and HR professionals in how to utilise the information they are provided with on a disclosure certificate, so they can sensitively support applicants and make proportionate decisions about the risk a person may cause in the role they are applying for.

‘Something came up on my disclosure and my local authority (employer) didn’t let me volunteer anymore until an investigation was carried out and in that time, they pressured me to resign. I carried on in my role but had to have ‘1-1 support’, which I felt was just surveillance. However, I was confused because I had been doing this role for a year already without any issues.’

WC?S Member

In some instances, corporate parents¹³ are faced with recruitment barriers when they attempt to employ adults who have a Care Experience which has resulted in a criminal charge. This can be especially frustrating for Care Experienced adults, who feel that their corporate parents should be able to better support their inclusion in the labour market. There is much more that needs to be done alongside reforming the disclosure process, around the understanding of employers who offer opportunities to those who have a criminal record.

We welcome the ‘Scotland Works for You’ project, which we feel is a step in the right direction in educating employers about what disclosed criminal history means and combats the discriminatory practice that creates barriers to those with criminal histories gaining employment. The existence of a criminal record should never mean a person is automatically discounted from a job role, without a proper assessment of risk being carried out. However, the disclosure process itself should include a full suite of training and guidance specifically designed for all employers that have access to the disclosure system going forward.

‘Educating people about the changes is a must, the decision NOT to apply for a job is often taken because of criminal charges, there is a presumption (one perpetuated by some working in the sector – I know I was told I would never get a job and I’ve heard similar stories more recently) that criminal charges inhibit you from working in certain jobs.’

WC?S Collective Member

As an organisation, we also have valuable learning from employing individuals with a criminal history and feel we have developed a supportive approach based on honesty, transparency and lack of judgement. However, this process has been created using pre-existing tools from other third sector organisations and is influenced by our values and culture. There is currently a lack of clear national guidance on how employers should assess risk when considering a Disclosure certificate.

We would like to see a mandatory, standardised framework created for all employers to use when making recruitment decisions based on disclosure, using a series of logic questions that ensure employers look beyond the conviction and realistically consider

¹³ Corporate Parents are defined in law, to promote the interests of care experienced people [by Part 9 of the Children and Young People \(Scotland\) Act 2014](#).

the risks posed. Alongside this standardised set of tools, there must be emphasis on the need for employers to sensitively engage with applicants to understand the implications their disclosure might have for the role. This process could be aided by the risk assessment tool, to show the applicant the thought process of the organisation when considering their disclosure certificate. These tools could potentially be influenced by the materials Disclosure Scotland already utilise when making barring decisions. We know these resources are greatly needed for employers to be encouraged to undertake this process, as there is recruitment practice which exists that automatically rules out applicants with convictions, rather than trying to understand the relevance of their criminal history to the related job role.

'It is without doubt a stress for people to know that they must discuss their criminal past with several people, that some within their workplace will know of their history. The more who know the more likely it is that someone will divulge that information to a colleague, a partner, a friend etc. irrespective of data protection rules, this is the reality.'

WC?S Collective Member

Support applicants to navigate the disclosure process

The Bill must consider the resources necessary to operationalise the changes proposed, in order to make the most positive impact on those applying for disclosures. This is especially important to ensure applicants fully understand their rights to appeal, challenge and remove information held about them. We support CYCJ's position that support provided to applicants must be 'independent, individualised, free, in-person (either face-to-face or by phone) and available to everyone, at whichever stage of their disclosure journey they may be at.'¹⁴

It is promising that the opportunity to make representation and appeals has been removed from a formal court process in the first instance, however, this could unintentionally lead to a less clear understanding of the legal rights an individual has in these types of processes. We would also like to support CYCJ's statement that the Bill (or associated documents) should allow for 'monitoring and evaluation of the frequency of such provisions being utilised and the experience of those utilising such measures and for this information to be made publicly available.'¹⁵ This is vital in understanding how accessible these processes are to individuals making applications.

The proposals in the Bill ultimately still accept that individuals applying will be expected to understand complex processes and be able to provide specific types of information. We would like to highlight that this continues to place a burden of responsibility on the individual applying for disclosure, which could create barriers to successfully gaining a disclosure certificate and/or securing a desired job role.

Our members have told us how difficult it is to experience the disclosure process on their own, when they have criminal convictions that they need to declare. Currently, disclosure processes depend on individuals being aware of and using legal processes, for example when having to make representation when under consideration for listing. As mentioned, this places responsibility of being properly informed with the individual,

¹⁴ CYCJ (2019), *Education and Skills Committee, Disclosure (Scotland) Bill, Submission from Centre for Youth and Criminal Justice.*

¹⁵ *Ibid.*

yet Care Experienced people are often deprived of information and control over their own lives in the care system, and these processes add yet another barrier which they must navigate. We would urge Disclosure Scotland to continue to consider how vulnerable people or those who experience disadvantage in Scotland are able to navigate any processes or systems they put in place.

'A friend who also needed to get PVG done at same time for course just gave up and decided not to go through process as knew that they would have charges on disclosure.'

WC?S Alumni Member

We would also like to suggest that there should be a process for individuals to access their disclosable information before they apply for a job role, via Disclosure Scotland. As mentioned above, there are cases where individuals are not aware of having accrued charges and do not have access to the information which is contained on their criminal record. Being able to access this information would allow individuals to pro-actively understand what could be displayed in a disclosure when they do decide to apply for a role that requires it, rather than waiting to apply for a job before undertaking this process. Time would then be available for an individual with convictions and other disclosable information to prepare a supporting letter and think about what they would say to an employer when discussing the information on their disclosure. It would also give more time for an individual to be supported to challenge any information that may be disclosed, guarding against the time delays that may be involved in challenging this information when an employer is waiting for a disclosure to be made available.

We also urge the committee to consider the impact of the potential conditions imposed on scheme members when under consideration for listing. Although this a process controlled by Disclosure Scotland, we feel that an employer knowing that an individual is being considered for listing, could lead to an extreme reaction of removing them completely from their role either temporarily or permanently. Where conditions are imposed, these need to be proportionate and should be subject to the same scrutiny and decision-making as any other decision to suspend or restrict duties would be and should be made in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures. While restriction of duties or suspension is not considered to be 'punitive' or an assumption of guilt, it is often perceived this way. Conditions therefore have the potential to further add to the sense of criminalisation and stigmatisation experienced by those with Care Experience. We would also like to bring to the committee's attention that an individual should be able to withdraw from the listing process if they decide to no longer work in a regulated role and will not be planning to in the future, at the moment we have been told this is not possible. This has impacted directly on an individual we work with, who is now stuck in a listing process even though they are no longer working in a regulated role and do not intend to do so in the future.

Furthermore, our members consistently tell us that processes involved in challenging disclosure information, such as removing convictions from a disclosure and making representations to prevent being listed, can also be difficult and drawn out for those involved.

One WC?S Alumni Member reflected that although they successfully appealed in both cases they chose to take up, their success was due to the support of the professionals they worked and studied with. They commented that they would have found it

extremely difficult to go through appeals processes alone. They also reflected that they were in a stable place in their personal life, with a considerable period having passed since they were in crisis when the convictions were accrued. If a young person who is trying to find their first job must go through this process, without a person to support them - it is inconceivable how they are supposed to navigate such a system. If the process itself is to continue placing responsibility on individuals to understand the various processes involved, WC?S calls for resources to be provided that create individualised support, particularly for the PVG process.

The need for support to be provided, to navigate through the current disclosure process, shows that the system itself is not designed to be easy to understand for individuals who have criminal records. The Bill offers a route to simplifying the products on offer and we welcome the new ideas around digital access, however, there must be a user-led approach at every stage of re-designing the system within the Bill and the resources needed to make it accessible for *all* individuals applying.

Corporate Parenting duties

Disclosure Scotland and Scottish Ministers are named corporate parents in the Children and Young People (Scotland) Act 2014. This means they have specific duties in legislation towards the Care Experienced population in Scotland, including pro-actively promoting their interests and improving its services specifically for the needs of this group.¹⁶

Currently the Bill does not name these duties and for corporate parenting to be truly embedded within the new disclosure system, these must be recognised in the face of the Bill. We have also created some specific asks to be considered on behalf of Care Experienced people in Scotland, to ensure the new disclosure system realises corporate parenting duties:

1. Waive fees for Care Experienced people applying for disclosures of any type.
2. Ensure funding is available to support Care Experienced people to gain legal advice on matters relating to their disclosure, if needed.
3. Afford Care Experienced people special protections in disclosure processes, allowing for a self-declaration tick-box in the process so that a tailored approach can be followed and specialist, trained advisors can provide support if needed.
4. Create a clear point of contact and tailored information available online for Care Experienced people.
5. Ensure the independent reviewer and those working in Disclosure Scotland making decisions about individual disclosures, are trained in corporate parenting and commit to understanding the context of care experience.
6. Continue to work with employers to end discriminatory practice against those with convictions and Care Experience, introduce ways to monitor the way disclosure is being utilised in recruitment decision-making processes.
7. Recognise corporate parenting duties in the Bill¹⁷ and legally enshrine the need for the new disclosure process to take these into account.

¹⁶ Corporate Parents are defined in law by [Part 9 of the Children and Young People \(Scotland\) Act 2014](#).

¹⁷ Corporate Parenting duties are defined in law, [by Part 9 of the Children and Young People \(Scotland\) Act 2014](#).

Concluding statement

Although the Bill is positive in a number of the policy intentions and changes proposed, we would also like to echo the concerns of CYCJ and others around the multiple pieces of policy and legislation which impact the disclosure system that seem to be disconnected. It is of vital importance that the policy intentions and provisions within the Age of Criminal Responsibility (Scotland) Act 2019, Management of Offenders (Scotland) Bill and Disclosure (Scotland) Bill are connected and do not adversely affect each other.

We would like to work with the committee to ensure that this Bill is utilised to create a disclosure process that is not risk averse to a level that adversely affects some of the most disadvantaged people in Scotland. Our goal is to ensure that a disclosure system exists which safeguards children and protected adults – yet at the same time allows those trying to move on from a criminalised past to live fulfilled and happy lives.

“I was a shop lifter to survive – got caught aged 17 – have convictions which appear on disclosure now. This was one of the most difficult periods in my life and I had no support or care whatsoever from anyone, other than myself.”

WC?S Alumni

Scottish Government

**Minister for Parliamentary Business and
Veterans**

Graeme Dey MSP

Clare Adamson MSP
Convener
Education and Skills Committee
Scottish Parliament
EDINBURGH
EH99 1SP

09/10/19

Dear Convener

**DISCLOSURE (SCOTLAND) BILL: SCOTTISH GOVERNMENT VIEW ON
PROTECTED SUBJECT-MATTER**

I write with regard to the Presiding Officer's statutory duty under section 31(2A) of the Scotland Act 1998 (as amended) to decide whether any provision in a Bill relates to a protected subject-matter.

The Scottish Government considers that, on introduction, the Disclosure (Scotland) Bill does **not contain** provision that relates to protected subject-matter as defined by section 31(5) of the Scotland Act 1998 (as amended).

The reason is that, under section 31(4) of the Scotland Act 1998, a provision relates to a protected subject-matter if it would modify, or confer power to modify, any of the four protected subject-matters in section 31(5). I consider that legislating for the Disclosure (Scotland) Bill does not modify any of the protected subject-matters that require super majority procedure in the Scottish Parliament.

I am copying this letter to the Lord Advocate, and to Ms Todd as the Minister in charge of the Bill.

GRAEME DEY

Scottish Throughcare and Aftercare Forum (STAF)

Submission from Staf (on behalf of the young people involved in Youth Just Us)

Thank you for giving us the opportunity to pass on the views of the young people of Youth Just Us as part of your Stage 1 consideration of the Disclosure (Scotland) Bill.

We believe that it is important that the voice of young people with experience of the justice and care systems is considered when scrutinising new legislation that will have a direct impact of their lives.

As such, our Youth Justice Voices project – facilitated in partnership with the Centre for Youth and Criminal Justice – seeks to amplify the voice of care-experienced young people within the justice system to influence change.

In its first year the group has already begun to influence decision-makers. On 2 September 2019 members of Youth Just Us met with the Minister for Children and Young Maree Todd MSP and Scottish Government officials to discuss the Disclosure (Scotland) Bill.

To aid the Education and Skills Committee's consideration of the Bill we have summarised the views of the young people at this meeting below.

Summary of Youth Just Us views on Disclosure (Scotland) Bill

General comments on disclosure and the Bill

There is a negative impact on young people from having to explain many times to different employers and organisations what happened around offence that occurred when they were children or young adults and which they are trying to move on from.

Providing address history can be difficult for care-experienced people when apply for disclosure. A simpler process for young people with care-experience should be considered.

While Scottish Ministers and Disclosure Scotland are both Corporate Parents, Corporate Parenting is not mentioned on the face of the Bill. This should be revisited.

Childhood convictions

One young person had been previously told by services that their childhood convictions could be disclosed after they turned 16.

The young people believe that the provision ensuring that unspent convictions accrued between the age of 12 and 18 will not be automatically included for Level 1 disclosures is fairer than the current system.

For one young person who had some knowledge of self- and state-disclosure, it wasn't clear to them when information needed to be disclosed or was disclosable and when they were eligible to get that removed from the lists. The different legislation guiding this is complicated, meaning young people often self-disclose to be on the safe side.

It is important that the context and circumstances on which offending behaviour occurred is taken into account, including care-experience, when decisions about disclosure are made.

Removable convictions

The young people agreed that it would be easier and less stressful to access an administrative removal process, rather than having to pay legal fees to apply to the Sheriff. While some young people had received information with disclosures telling them they had a right to apply to the Sheriff, they hadn't accessed this right.

There was surprise that all aggravators are not on List A offences (which replace Schedule 8A of the 1997 Act). The young people were supportive of these aggravators, particularly relating to disability, being on the same list but had no opinion on whether this was List A or List B.

Training and guidance

Skills Development Scotland staff should know about disclosure and understand how to explain it to people looking to get into work. Skills Development Scotland and back-to-work schemes should be working with partnerships like Scotland Works For You and Release Scotland, to help people find employers who are willing to take on people with a conviction history. It is difficult to stay motivated when applying to employers who have a blanket ban.

All public bodies should have clear recruitment policies for people with convictions. Disclosure Scotland's Code of Practice should also include a duty not to take a blanket ban approach to employing people with convictions and a requirement to attend training on how to consider convictions.

Guidance should be in available different formats, including video tutorials. Written guidance should be succinct and clear. As well as providing factual information, Disclosure Scotland's website should take a more positive approach and should include "success stories" of people moving on from past behaviour and getting work.

Finally, it needs to be made clear in schools, and by the children's hearing system and courts, how their conviction and sentencing or grounds will impact their employment prospects as adults. As people often become aware of the existence of criminal record checks at the point of applying for a job, it would be helpful if there was better general awareness of disclosure.