DISCLOSURE (SCOTLAND) BILL

SUBMISSION FROM CENTRE FOR YOUTH & CRIMINAL JUSTICE

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.