Howard League Scotland (HLS)

We have previously submitted evidence in relation to associated consultations, including the Management of Offenders Bill (HLS, 2018), and the Minimum Age of Criminal Responsibility (HLS, 2016), on which the Disclosure (Scotland) Bill (hereafter 'the Bill') seeks to build. We welcome the opportunity to respond to this call for evidence by the Scottish Parliament's Education and Skills Committee on the Bill, which sets out a series of proposed changes to the existing Disclosure and PVG scheme with the aim of achieving a more proportionate and individualised process that balances safeguarding the public with the rights of individuals to move on from previous offending behaviour. We recognise that the Bill was preceded by an extensive national consultation on the proposed changes, and takes cognisance of the responses submitted. In what follows, our submission attends to the following areas: Childhood Convictions: Individualising Disclosures; the use of Other Relevant Information (ORI); Representation, Review and Appeal; Removable and Non-Disclosable Convictions.

Childhood Convictions: Individualising Disclosure

HLS welcomes the provisions in the Bill that accommodate a more progressive approach to the disclosure of childhood convictions. We refer, in particular, to those provisions that treat childhood convictions as a separate category distinct from convictions accrued in adulthood, and which limit the disclosure of information relating to children, and as part of that, the automatic disclosure of convictions acquired between the ages of 12-17 years of age.

We also welcome the introduction of an individualised and structured discretionary 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 convictions. This is critical to compliance with article 8 of the ECHR, but it is likely to require the issuance of clear guidance to inform this decision-making process to promote consistency and allow for transparency and evaluation of decision-making.

HLS would argue that this approach is no less pertinent to the disclosure of adult convictions but the Bill appears to make no provision for this. Yet, the European Court of Human Rights (ECtHR) would seem to require it, and has levelled a number of critiques at the *existing* UK system of disclosure, principally as it pertains to Higher Level or, as proposed in the Bill, Level 2 disclosures. These critiques include: that no distinction with regard to the disclosure of spent convictions is made on the basis of the nature of offence, the disposal of the case, the time elapsed (discussed further below) or the relevance of the data to the employment in question. The significance of these elements to the assessment and contextualisation of the risk associated with convictions in employment contexts is further reflected in guidelines to inform employer decision-making issued by the US Equal Employment Opportunity Commission (EEOC) in 2012, which we discuss further below.

It has been argued that the mandatory disclosure of all convictions, spent and unspent, on what were formerly referred to as 'higher level disclosures' was disproportionate and did not allow for the exercise of discretion to balance public protection and rights to privacy; and that disclosure should be limited to convictions.[1] While the proposed reforms have increased individuals' opportunities for review and appeal, and reduced the periods after which convictions may be non-disclosable or potentially removed, the broadly blanket approach to the disclosure of adult convictions is relatively unaltered, and the proposed provisions still allow for the disclosure of non-conviction data. They remain, then, open to critique that they do not reach an appropriate balance. We discuss these concerns in detail below, but, in sum, we contend that even these proposed reforms still fail to meet the main criticisms of the disclosure system in place in the UK from a human rights perspective, not least in that non conviction data or ORI will still be disclosed.

Other Relevant Information (ORI)

HLS has concerns about the use of ORI. This allows for the disclosure of any material which the Chief Officer 'reasonably believe[s] might be relevant' for the purpose of the disclosure. This *Other Relevant Information* (ORI), also known as 'soft information', is supplied by the Chief Constable of a relevant police force. In practice, ORI or 'soft' information can include allegations, records of arrest and/or charge and/or prosecution, statements by witnesses, cautions, convictions, records of penalty notices for disorder, sentencing reports and so on (Grace, 2014[2]). The practice of disclosing 'soft information' has been criticised (e.g. Baldwin 2012[3]), and judicially challenged with reference to issues of human rights, specifically under Article 8 of the European Convention on Human Rights (ECHR). Baldwin (2012) cites evidence that this has included unsubstantiated claims including information which ultimately resulted in the individual being released without charge; details of a non-applicant's criminal family history (even though the individual was never suspected of any offence); and details of cases which proceeded to court but resulted in an acquittal. Critically, Appleton (2014[4]) reports that 37% of job offers were withdrawn based on such 'non-conviction information'. We recognise that Disclosure Scotland intend to issue some guidance to inform ORI decision-making and disclosure but, as discussed in Weaver (2018[5]), the mere presence of information can be a barrier in terms of employers operating on a blanket policy of a

[1] European Court of Human Rights in *MM v United Kingdom* (24029/07), cited in Larrauri Pijoan (2014), n 6 *infra*

[2] Grace, J., (2014) Old Convictions Never Die, They Just Fade Away: The Permanency of Convictions and Cautions for Criminal Offences in the U.K. *The Journal of Criminal Law* 78: 121-135

[3] Baldwin, C., (2012) Necessary Intrusion or Criminalising the Innocent? An Exploration of Modern Criminal Vetting. *The Journal of Criminal Law* 76: 140-63

[4] Appleton, J., (2014) *Checking Up*, London Civitas

[5] Weaver, B., (2018), *Time for policy redemption? A review of the evidence on disclosure of criminal records*, SCCJR and the University of Strathclyde. https://strathprints.strath.ac.uk/64981/1/Weaver_SCCJR_2018_Time_for_policy_redemption_a_review_of_the_evidence.pdf

clean record, rather than weighing up the information against the nature of the employment. Thus, *if* ORI is to be disclosed, the implications of the information disclosed need to be carefully evaluated in terms of proportionality and necessity to the ends of public protection, against individuals' rights under the ECHR.

While some, such as Laurraui-Pijoan[6] (2014), propose that the disclosure of ORI is contrary to the ECHR, others, such as Grace (2014), have argued for the need for a universal set of guiding principles to underpin the disclosure of 'soft' information; otherwise, he contends, public authorities will never be able to catch up as case law will continue to develop fragmentally. Grace (2014: 130) suggests that the following test should apply to the disclosure of soft information to engender greater alignment with Article 8 of the ECHR, which might usefully be provided for within the provisions of the Bill to ensure consistency and transparency:

> 'Is the information indicative of the (alleged) commission of a *sufficiently serious* offence which it is *reasonably certain* was committed by the individual, that is *currently relevant* to the purpose … of public protection, and which the individual concerned has had an opportunity to *comment meaningfully* upon (where the information is of an allegation, caution, arrest, charge, or prosecution not resulting in a conviction)?' (italics in original).

HLS also believes that the new Bill should categorically rule out the disclosure of certain kinds of information that may currently be disclosed as 'ORI'. In particular, details of the criminal history of other members of a non-applicant's family, and details of charges on which the person was found 'Not Guilty', should never count as 'ORI'.

We note below the proposed provision for subject representation and formal review, which we welcome, but strongly propose the issuance of clear rights-informed guidelines to streamline decision-making to ensure that if ORI is to be disclosed, it is both proportionate and relevant.

Representation, Review and Appeal

HLS welcomes the provisions in the Bill relating to reviewable data including rights of review, representation and appeal; and the commitment to publish guidelines to enhance consistency in decision-making. With regard to the review processes, while we welcome measures to include representation from the applicant, HLS would like to propose that further consideration is given to providing for an Independent Reviewer on first request for review, rather than a review initially being undertaken by the body whose decision is to be reviewed. For example, where a review is sought in relation to the ORI provided by the Chief Constable, proposed provisions suggest that the application be referred back to the Chief Constable for review to 'decide whether the chief constable still reasonably believes that the information is

[6] Larrauri Pijoan, E., (2014) Criminal Record Disclosure and the Right to Privacy *Criminal Law Review* 10: 723-737

relevant to the purpose of the disclosure and that it ought to be included' (S.26 Explanatory Notes). It is not clear to HLS why referring back to the body making the initial decision is necessary, even if different personnel might undertake the review. HLS would suggest that, if this does not in itself discourage the applicant from pursuing review, this is likely to result in additional and unnecessary delays to the extent that such a significant delay in disclosure is likely to signal to prospective employers that something is amiss. It would seem to us that in the interests of expediency, justice and independent scrutiny, the first line of review *in each instance in which a review is sought* should be undertaken by the Independent Reviewer, and that clear time-scales for review should be issued. In our view, this would allow for a greater level of independent scrutiny of decision-making.

Removable and Non-Disclosable Convictions

HLS welcome the provisions contained in the Bill for reducing, by four years for adult convictions and two years for childhood convictions, the period after which a conviction may become non-disclosable or an application for removal by the subject can be made. We do however have a number of points of query relating to this process. Firstly, we remain concerned about the 11 year time frame, and how this was arrived at. For example, in the Bill, List B convictions acquired as an adult will be disclosed for 11 years, becoming non-disclosable thereafter. 'Time to Redemption' studies empirically investigate the period of time when people with convictions can statistically be considered as exhibiting the same risk of reconviction as people with no convictions. The key question that these studies seek to answer is this: How many years of non-offending does it take for a person with convictions to resemble a person without convictions in terms of his or her probability of offending? Key to this is establishing that the base-line risk level of a non-convicted person is not zero because they have a certain probability of offending (Soothill and Francis, 2009[7]). Non-convicted persons are those who have never been convicted, which is different to saying that they have never committed an offence. Moreover, the absence of convictions does not preclude the potential to commit a crime and acquire a conviction in the future (e.g. Soothill, Ackerley and Francis, 2004[8]; Soothill and Francis, 2009).Taken together, these studies *conservatively* estimate that *in general* after an average of 7-10 years without a new arrest or conviction, a person's criminal record essentially loses its predictive value (Blumstein and Nakamura, 2009[9]; Bushway, et al., 2011[10]; Kurlychek et al., 2006[11]; 2007[12]; Soothill and Francis, 2009;

[7] Soothill, K., and Francis, B., (2009), When do Ex-Offenders Become Like Non-Offenders? *The Howard Journal* 48(4) 373-387

[8] Soothill, K., Ackerley, E. and Francis, B., (2004) Profiles of Crime Recruitment: Changing Patterns Over Time, *British Journal of Criminology*, 44, 401–18.

[9] Blumstein A, Cohen J, Roth J.A and Visher C.A (Eds) (1986) *Criminal Careers and 'Career Criminals'* Washington DC: National Academy Press.

[10] Bushway, S.D., Nieuwbeerta, P., and Blokland, A., (2011) The Predictive Value of Criminal Record Background Checks: Do Age and Criminal History Affect Time to Redemption. *Criminology* 49(1) 27-60

[11] Kurlychek M.C., Brame, R., and Bushway, S.D., (2006) Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending? *Criminology and Public Policy* 5(3): 483-504

for a detailed review of this research, see Weaver, 2018). This raises questions around the disclosure of spent convictions, ostensibly for the purposes of public protection, in circumstances where the evidence would suggest that the individual is statistically no more likely than members of the non-convicted population to commit crimes in the future. While noting that in Europe spent convictions are *not* disclosed (see Weaver, 2018), HLS therefore suggests that the 11 year time scale should at least be reduced to reflect the evidence.

Secondly, and building on the above, if an adult obtains a conviction for Theft, a List B offence Sch.2 part 1 under the Bill, and is sentenced to a Community Payback Order, comprising a 12 month Supervision Requirement, that conviction will become spent on conclusion of the Supervision Requirement, at 12 months, under the Management of Offenders (Scotland) Bill, as passed. The rehabilitation period, now disclosure period, is concluded and the individual is no longer required to disclose this under the Act; it is spent. What then is the rationale for continuing to disclose this conviction under the Disclosure arrangements if there is scope for it to be removed before then under the new provisions of the Bill (s.14), e,g, ten years earlier, and if the sentence accompanying the conviction is intended, at least, to convey the severity of the offence? Not only does this uniform approach to extending the disclosure period appear to be at odds with the ECHR and with recent reforms to the Rehabilitation of Offenders Act, 1974, but it further highlights the need to ensure that the Bill makes provision and issues statutory guidelines for a more individualised and nuanced approach to the disclosure of spent convictions. Here, then, we refer again to the guidance document issued by the US Equal Employment Opportunity Commission (EEOC) in 2012. While this document was designed to clarify standards and provide 'best practice' on how employers may check criminal backgrounds without violating prohibitions against employment discrimination under Title VII of the 1964 Civil Rights Act (EEOC 2012), it has much to commend it in relation to considerations surrounding the disclosure of spent convictions. It proposes that employers are provided with information on criminal records on an individualised basis, considering factors such as the nature of the crime, the time elapsed since it was committed, and the nature of the job (Lageson, Vuolo, Uggen, 2015[13]), and to which we would add, the disposal attached to the conviction which is assumed, under the ROA, to reflect the severity of the offence. While we recognise that such an approach is likely to increase workloads and responsibilities for Disclosure Scotland, the issuance of related guidelines that allow for both an individualised and consistent framework to inform decisions to disclose would allow Scotland to progress more closely towards a system that is in keeping with other European practices (on which see Weaver, 2018), and the ECHR, and circumvent the need for two different lists of offences, A and B, which, in part, undermines the aspirations of

[12] Kurlychek M.C., Brame, R., and Bushway, S.D., (2007) Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement. *Crime and Delinquency* 53(1):64-83

[13] Lageson, S.E., Vuolo, M., and Uggen, C., (2015) Legal Ambiguity in Managerial Assessments of Criminal Records. *Law and Social Inquiry* 40 (1) 175-204

the proposed reforms to reduce the complexity of the disclosure system, for employers and applicants.

Thirdly, we are unclear why the responsibility for application for consideration of the removal of the conviction is placed on the individual, who may find this system of disclosure an onerous and complex system to navigate and comprehend. If this provision intends to bring Scotland into closer alignment with a rights based approach, ought not the responsibility to be placed on Disclosure Scotland to review the relevancy of the continued disclosure of such convictions once they are spent? This raises the further question of why the subject is also required to pay a fee for consideration of the removal of the conviction: this requirement puts yet another barrier in the way of those with very limited means.

Finally, to ensure that people with convictions are aware of their rights to apply for the removal of convictions from disclosure, this will need to be coupled with an assertive, national level, public education strategy and the production of easily accessible information as to how such processes can be set in motion.

Concluding Comments

HLS recognises that there is much to commend in the progressive aspirations of the Bill. In addition to the foregoing, we note the aspiration to simplify the process of disclosure for various stakeholders, which includes reducing the number of products and adding the option of online-based applications. There remain, however, key areas for development, which include:

- The development of an individualised and nuanced approach to the disclosure of *all* spent convictions, not just those accrued in childhood.
- The publication of clear time-frames, guidance and procedures to inform, regulate and evaluate decision-making processes pertaining to a) the disclosure of *both* conviction and non-conviction data (e.g. ORI) b) review processes c) removal of convictions. This guidance might be informed in accordance with ECtHR rulings, EEOC (2012) guidelines and Grace (2014) recommendations, with particular regard to the salience of a) the nature of the offence; b) time lapsed; c) nature of disposal; d) severity of offence; e) nature of regulated role.
- Consideration should be given to providing for an Independent Reviewer to undertake all first requests for reviews.
- A review of the disclosure of ORI or non-conviction data.
- A review of the responsibility on the subject to apply for the removal of convictions and the removal of fees attached to this process.