

Commissioner for Children and Young People Scotland

Evidence for the Scottish Parliament's Education and Committee on the Disclosure (Scotland) Bill

August 2019

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights. The Commissioner is fully independent of the Scottish Government and Parliament.

Recommendations

- Disclosure of information relating to children's behaviour before the age of 18 should be exceptional and rare and in compliance with human rights standards;
- Disclosure should only take place where there are sound and well evidenced public protection or best interest grounds to do so.
- The legal definition of convictions should preclude information and orders made, relating to any of the Section 67 Grounds in the Children's Hearings System;
- There should be no disclosure of information proposed to be defined as 'other relevant information' (ORI) relating to children's behaviour before the age of 18;
- The introduction of the independent reviewer should be accompanied by sufficient advice and support and comply with the principles of accessibility, quality and adequacy for children and young people.

Introduction

We welcome the Bill purpose which is to make changes to the system of criminal record checks in order to modernise and improve the proportionality of the State disclosure system in Scotland. We are pleased to see that the proposals contained in the Disclosure (Scotland) Bill simplify what has been a complex system. However, we continue to have concerns in relation of the proportionality of it in relation to children and the application of the best interest of the child when decisions are made by Disclosure Scotland.

In August 2018, in response to the Scottish Government's consultation on the PVG scheme, we wrote to the Minister for Children and Young People asking the government to conduct a thorough review based on human rights principles. In particular we were concerned that both the PVG and wider disclosure system may result represent a disproportionate interference with the rights of children and young people.¹

Human Rights Context

The Protection of Vulnerable Groups (PVG) and Disclosure system is an important part of the protections the State has in place to fulfil its obligations to keep children safe. It serves to meet the State's obligations to take steps to protect children from violence and abuse (article 19 of the UNCRC).

In legislating, the State must however balance the protective role of any Disclosure system, with the need to ensure respect for children's rights, including privacy and family life (article of the 16 UNCRC and article 8 of the European Convention on Human Rights (ECHR)) and pay particular attention to the children's best interests as a primary consideration in all matters concerning them (article 3 of the UNCRC). Furthermore, article 40 of the UNCRC requires the State to recognise the right of children in conflict with the law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth... and which takes into account the child's age, the desirability of promoting their reintegration and their assuming a constructive role in society.

Any interference with article 8 of the ECHR must be lawful, proportionate and necessary. Lawfulness refer to the requirement that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting their rights under the Convention. Lawfulness also requires that there be adequate safeguards to ensure that an individual's article 8 rights are respected. Proportionality is a key element of the necessity of infringe this right. In order to determine whether an infringement on article 8 is "necessary in a democratic society", it should be balanced the interest of the Member State in discussion against the right of the applicant. The European Court of Human Rights has clarified that "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question.²

Children and adults are entitled to protection of their rights to a fair trial (article 6 of the ECHR) which should be read in conjunction with article 14 of the International Covenant on Civil and Political Rights: *"In the case of juvenile persons, the*

¹ <https://www.cypcs.org.uk/ufiles/PVG-consultation.pdf>

² *The Sunday Times v United Kingdom* (Series A No 30), European Court of Human Rights (1979-80) 2 EHRR 245, 26 APRIL 1979

procedure shall be such as will take account of their age, and the desirability of promoting their rehabilitation.”

The UNCRC provides additional safeguards to children in conflict with the law, including the presumption of innocence; clear and prompt information of the charges against them, and to the right to have legal assistance in the preparation of any defence (article 40.2(b)(i) and (ii) of the UNCRC).

In addition, The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as the ‘Beijing Rules’) clearly state that any juvenile justice system should be designed to promote the wellbeing of the young person and that any response to a child or young person’s actions should be proportionate to what they have done.

The Bill

As mentioned above, we are supportive of the policy intent which underpins the provisions within the Disclosure (Scotland) Bill which is to strike the appropriate balance between safeguarding and providing for rehabilitation of children in conflict with the law. However, there persists to exist concerns about the new system when assessed against the human rights principles outlined above. We provide three examples below when this happens. We also highlight some concerns in relation to the Independent Reviewer.

Offence grounds accepted at a children’s hearing, or established in court, will continue to be classed as convictions.

This is at odds with the welfare-based nature of the Children’s Hearings System. The unique nature of the Children’s Hearings System is, as an independent, quasi-judicial decision-making forum whose purpose is not, unlike a Criminal court to determine evidential matters in fact and law. Rather, the welfare-based system, requires holistic consideration of whether ‘compulsory measures of supervision³’ are necessary for the protection, guidance, treatment or control of a child, irrespective of the ground upon which the child was referred to the Children’s Hearing.

The Children’s Hearings System in Scotland is therefore distinguishable from the criminal justice system whereby ‘convictions’ are determined in Criminal court proceedings. Even if the Sheriff Court makes a finding that a child has committed an offence, and the Ground⁴ is established, the Children’s Hearing is not empowered to make a punitive decision when making any orders in the best interests of the child.

As we have stated before, there are particular issues with accepted grounds, where the evidence has not been tested and the child may not have been legally represented or able to understand the consequences of accepting grounds. There are limits to the Children’s Reporters’ or Panel Members’ abilities to resolve this issue. It must be considered in terms of the child’s rights under article 6 of the ECHR and article 40 of the UNCRC.

³ Within the meaning of section 83 of the Children’s Hearings (Scotland) Act 2014

⁴ Section 67(2)(j) of the Children’s Hearings (Scotland) Act 2014

We note that in the recent case of [NH v Her Majesty's Advocate](#)⁵, the Crown sought successfully to rely on accepted grounds as evidence to prove a criminal case, against contrary legal advice. This suggests that considerable care must be taken where a child is being advised on whether to accept or refute Section 67 Grounds to prevent infringements of their human rights.

While it would be possible to provide every child appearing before a hearing on offence grounds with a solicitor, or independent legal advisor, or for every section 67(2)(j) offence ground to have to go to the Sheriff Court for proof, we consider that a more rational and proportionate approach would be to legislate for a presumption that accepted or established grounds would not count as convictions.

In exceptional circumstances, where it is considered by a multi-agency group that a child continues to present a risk of harm to themselves or others which cannot be mitigated through an order for compulsory measures of supervision, provision could be made for application to the Sheriff Court for the grounds to be classed as a conviction. This would provide a more proportionate approach as it would place the burden on the State to justify retention and disclosure of the information related to the behaviour.

An approach based on lists of offences is a blunt instrument which does not allow for a proper assessment of risk of future harm and.

The proposed List A and List B is at odds with the principle that disclosure of childhood convictions should be exceptional and rare. 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. Furthermore, placing the burden on the State, based on a multi-agency discussion and an application to the court would allow for more holistic and risk-based decision-making.

When Other Relevant Information (ORI) is disclosed, there is no formal process to challenge the accuracy of the information recorded.

We are concerned that there is no formal process to establish fact or to challenge the accuracy of the information recorded in cases of ORI. This seems to be based on the fact that ORI is not subject to the same legal tests as conviction information and unlike conviction information. Therefore, there is a higher risk to violate article 8 of the ECHR and 16 of the UNCRC by disclosing information under this heading. If a child has been assessed as not meeting the legal thresholds for either prosecution by the Crown or to require compulsory measures of supervision in the Children's Hearings System, then there is no legal basis for interference in the child's rights of privacy, no matter their age. This conforms to the added protections afforded in the processing of data and information relating to children by the [Data Protection Act 2018](#).

⁵ [2019] HCJ 46

It is our view that if ORI is to be disclosed in terms of the proposed scheme, it should be subject to additional scrutiny and more rigorous human rights protections prior to disclosure, not less. Accordingly, the disclosure of any ORI relating to the behaviour of children under the age of 18 should be subject to review by the Independent Reviewer *before* it is recorded. We note that at present ORI is disclosed on only 1% of enhanced disclosures or PVGs. This statistic should be monitored to ensure it does not increase, with statistics disaggregated by age.

The Independent Reviewer and Access to Justice

The Bill introduces an independent review of disclosure information, through which individuals can challenge the inclusion of both conviction and ORI in a disclosure. While we welcome the intention behind providing individuals with a right to challenge disclosure of information, this does present issues in terms of timing, access to justice and representation.

We are concerned that the proposed review and appeal processes, which are different for disclosure and ORI, are excessively complex and this is likely to prevent a barrier to young people exercising their rights. In particular, we are concerned that looked after children, whilst being disproportionately likely to have conviction or ORI information recorded, may face particular barriers in seeking review of disclosure information.

Voice of children: Last year we received an enquiry from a young person who wished to challenge the contents of a disclosure. Despite making a number of phone calls over several days, we were unable to find a solicitor with the appropriate knowledge and experience to assist them. There seems to be a lack of appropriate legal and advocacy support for young persons in this area.

In order to be effective, the review process needs to be made accessible and adequate for young people (child friendly). Furthermore, the Scottish Government will need to provide sufficient funds to ensure advice and support is available to children and young people.

We are also concerned that the costs in the scheme could present a barrier to access to justice. Therefore, we recommend that fees for review and appeal should be waived for children aged 16 and 17 as well as care-experienced young people, in line with Scottish Government and Disclosure Scotland's corporate parenting duties⁶.

It is our experience that some young people whose previous interactions with the police have been distressing, will find particularly difficult to approach the police service with regard to ORI challenge. Therefore, we would prefer the Bill to adopt a single process for challenging both types of information (Disclosure Scotland and the independent reviewer).

End.

⁶ In terms of the Children and Young People (Scotland) Act 2014