

Justice Committee

Management of Offenders (Scotland) Bill

Written submission from Clan Childlaw

About Clan Childlaw

Clan Childlaw improves life chances of children and young people by using their legal skills and expert knowledge to help young people take part in decisions that affect them and by making sure that children's rights are realised in Scots Law.

Clan Childlaw provides free, outreach, child-centred legal representation to children and young people, most of whom have experience of living in care. We have extensive experience gained over 10 years of representing vulnerable children and young people where child protection issues arise.

We also:

- provide information to professionals in relation to child law
- deliver practice-based training on child law
- contribute to policy development

We have offices in Edinburgh and Glasgow.

Introduction

Our evidence is confined to Part 2 of the Management of Offenders (Scotland) Bill ("the Bill"), relating to "Disclosure of Convictions" and, in particular, section 29, insofar as it relates to Children's Hearings Proceedings.

According to the Policy Memorandum, at paragraph 95:

"The provisions of the Bill will reform the [Rehabilitation of Offenders Act] 1974 ... so that it achieves an appropriate balance between the rights of people not to disclose their previous offending behaviour and to move on with their lives and ensuring the rights of the public to be protected are effectively maintained. The provisions are also intended to increase clarity and make the legislation more accessible to those required to understand it."

The changes proposed by the Bill would only affect the system of basic disclosure. No changes are proposed to the higher level disclosure system, whereby certain spent convictions are required to be disclosed in certain situations.¹

Disposals by children's hearings

Section 187 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") sought to amend the Rehabilitation of Offenders Act 1974 ("the 1974 Act") to provide that, when an offence ground in children's hearings proceedings is accepted, established

¹ Policy Memorandum, paragraphs 100 to 103

or treated as established, and a compulsory supervision order is made, varied or continued, or the referral is discharged, the child has been given an “alternative to prosecution”. That alternative to prosecution would have become spent after a period of 3 months. (Provision was made in relation to the equivalent disposals under the Children (Scotland) Act 1995 (“the 1995 Act”).) However, section 187 has never been brought into force.

Section 3 (as amended) of the 1974 Act broadly provides that where offence grounds are accepted or established, that acceptance or establishment shall be treated for the purposes of the 1974 Act as a conviction, and any disposal by a children’s hearing thereafter shall be treated as a sentence.

By virtue of section 29 of the Bill, the 1974 Act would be amended by inserting section 5J, which would provide for sentences to which no disclosure period would apply. Those sentences would include the following disposals by a children’s hearing:

- the discharge by a children’s hearing of the referral of a child’s case under the 1995 Act
- a supervision requirement under the 1995 Act
- the discharge by a children’s hearing or by the sheriff of the referral of a child’s case to a children’s hearing under the 2011 Act
- a compulsory supervision order under the 2011 Act

Disposals with no disclosure period would be spent immediately.²

Effect of proposed changes

The effect of the proposed changes in section 29 of the Bill in relation to disposals by children’s hearings of referrals on offence grounds would be to reduce to zero the length of time before the disposal is treated as a spent conviction. We welcome the reduction in time.

If the Age of Criminal Responsibility (Scotland) Bill is passed in its current form, children’s hearings disposals for children under 12 will no longer be capable of being treated as convictions. Disclosure by the police of information on harmful behaviour occurring under the age of 12 will only be capable of being disclosed as “Other Relevant Information” on an enhanced disclosure or a PVG scheme record.

However, in relation to referrals on offence grounds for children over 12, there would be no change to the treatment of such disposals as convictions. They would continue to fall under the schemes set out in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007, as amended. The most recent amendment to the schemes was set out in The Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (S.S.I. 2018/52), in response to the decision of the Court of Session in *P v The Scottish Ministers* [2017] CSOH 33.

² Policy Memorandum, page 18, footnote 10

In our response³ to the Scottish Government consultation on that Remedial Order, we expressed certain concerns around the treatment of convictions which resulted from disposals by children's hearings. Those concerns remain, given that the current Bill would not change such disposals being treated as convictions.

In summary, those concerns are:

- Automatic disclosure for spent convictions for schedule 8A offences will continue during the initial period of 7.5 (for a person under 18 at the time of conviction) with no possibility of review. The scheme will not allow the individual circumstances of each case to be considered, as required by Article 8 European Convention on Human Rights. The circumstances in *P v the Scottish Ministers* demonstrated that there will be circumstances where disclosure of convictions for offences listed in schedule 8A Police (Scotland) Act 1997 may be disproportionate and the proposed draft Order would not allow any such assessment to be made in the initial period. We are particularly concerned about the potential impact of this approach on young people's life chances.
- The onus is on the applicant to seek removal of the conviction information by a sheriff. We have concerns that an applicant's Article 8 privacy rights could be at risk during the appeal process, for example if a delay or inclusion on court lists leads to an employer or training provider finding out about a conviction before the process is complete.
- The schemes as amended do not sufficiently reflect the approach taken in the children's hearings system that children who are charged with offending behaviour are considered having regard to their welfare and not on a punitive basis.
- The right balance is not struck between protecting the public and vulnerable groups and the right of individuals to put adverse childhood experiences behind them.

Conclusion

In conclusion, while we welcome the reduction to zero in the length of time before a disposal from a children's hearing is treated as spent, we continue to have concerns about how the disclosure scheme as a whole operates for those who have been referred to a children's hearing on offence grounds, and in particular about the potential impact on young people's life chances.

Clan Childlaw
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³ https://consult.gov.scot/disclosure-scotland/remedial-order-2018/consultation/view_respondent?uuld=570751286