



**Centre for excellence**  
for Children's Care and Protection

## **Response to the Education and Skills Committee Call for Evidence on the Disclosure (Scotland) Bill**

**August 2019**

CEL CIS is Scotland's Centre for excellence for children's care and protection, based at the University of Strathclyde. We welcome the opportunity to provide evidence to the Education & Skills Committee to inform the scrutiny of the Disclosure (Scotland) Bill at Stage 1. In addition to strengthening and simplifying the disclosure system to ensure the protection and safeguarding of children and vulnerable adults, the Bill's provisions advance the fairness of the disclosure system and, wherever possible, enable people with past convictions to move on in life, and access education, training and work. Proposals to transform the approach to childhood convictions constitute a significant step in the ongoing work of the Scottish Parliament to advance children's rights. As such, we strongly support these provisions, which have been informed by a wide range of stakeholders and supported by a robust evidence base.

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.<sup>1</sup> The complexity of the current disclosure system can exacerbate existing barriers faced by people with care experience when seeking to access opportunities. As corporate parents (under Part 9 of the [Children and Young People \(Scotland\) Act 2014](#)) Scottish Ministers, Disclosure Scotland and Police Scotland, together with other public bodies, have statutory duties to looked after children and care leavers, which they must uphold across all areas of their work. These include responsibilities to be alert to matters which adversely impact on these individuals, promote their interests, and enable them to make use of supports and services provided by corporate parents.<sup>2</sup> As such, particular attention must be paid to the needs and views of those with care experience when considering changes to Scotland's disclosure system.

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<sup>1</sup> Scottish Government (2016) [The Report of the Advisory Group on the Minimum Age of Criminal Responsibility](#), Edinburgh: Scottish Government; The Howard League of Penal Reform (2016) *Criminal Care*. London: The Howard League of Penal Reform; Moodie, C. & Nolan, D. (2016) [Between a rock and a hard place: Responses to offending in residential childcare](#). Glasgow: CYCJ

<sup>2</sup> Scottish Government (2015) [Statutory guidance on Part 9 \(Corporate Parenting\) of the Children and Young People \(Scotland\) Act 2014](#). Edinburgh: Scottish Government

We support the general principles of the Bill, and agree that its proposals positively advance the current system. To secure truly progressive change, some provisions would benefit from further strength and additional scrutiny, particularly in relation to upholding the rights and meeting the needs of children and young people in need of care and protection, and those with care experience. We draw particular attention to four key areas:

- Improving Scotland's approach to childhood convictions
- Ensuring 'Other Relevant Information' (ORI) provisions protect children's rights
- Reducing system complexity
- Regulated roles and kinship care

### **Improving Scotland's approach to childhood convictions**

It is internationally accepted that further effort is required to prevent the criminalisation of children.<sup>3</sup> Article 40 of the [United Nations Convention on the Rights of the Child](#) (UNCRC) (which the Scottish Government is currently seeking to incorporate into Scotland's domestic law) is clear that young people should receive child-friendly justice. The UNCRC and the 2010 [Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice](#) both state those under 18 years of age should be treated as children. Disclosure of childhood criminal records has wide ranging and damaging effects, particularly in relation to factors which are critical in reducing reoffending, such as accessing employment, education and housing, and experiencing stigma. The impact of these effects is felt disproportionately by certain children. A high proportion of children involved in frequent or serious offending have had multiple experiences of adversity, including neglect, abuse, bereavement and deprivation, and their offending behaviour is increasingly acknowledged to indicate unmet wellbeing needs.<sup>4</sup> The brain continues to develop until individuals are in their mid-twenties, and significant changes take place in early adolescence, often leading to individuals engaging in impulsive and risk-taking behaviours.<sup>5</sup> For some young people with care experience, issues such as disrupted care placements, disrupted education, loss, mental health difficulties and other adverse childhood experiences can compound to leave individuals struggling to cope on a daily basis. Experience of neglect, abuse and exposure to domestic violence (for example) all impact on how a child develops emotionally and psychologically, and how they learn to adapt and survive. Care experienced children and young people may communicate their needs through disruptive or offending behaviour, and require a supportive response, rather than one which inappropriately criminalises them or threatens their access to opportunities later in life.

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<sup>3</sup> Davidson, J., Elsley, S., Giraldi, M., Goudie, A., Hope, K., Lyth, A., & Van Kiersbilck, B. (2019) [Justice for Children, Justice for All: The Challenge to Achieve SDG16+ Call to Action](#). Glasgow: CELCIS – Inspiring Children's Futures – University of Strathclyde

<sup>4</sup> CYCJ (2016) [Key messages from the Centre for Youth and Criminal Justice](#). Glasgow: CYCJ

<sup>5</sup> Dyer, F. & Carter, K. (2017) [Supporting young people involved in offending up to 21 years old: Extending the Whole System Approach](#). Glasgow: CYCJ

We strongly support provisions in the Bill which propose to end the automatic disclosure of convictions accrued by children under the age of 18, and if such behaviour must be disclosed, that it will be listed separately from convictions accrued when aged 18 and over. Such reform brings Scotland into line with the majority of jurisdictions internationally, and reflects an understanding of: the distinction between offences committed by children and adults; the developmental trajectories and needs of children and young people (particularly those who have experienced trauma and other adverse childhood experiences); and the need for individualised responses.<sup>6</sup> Throughout their engagement activities, Disclosure Scotland have been clear that the default position and policy aim is *against* the disclosure of childhood information. It is important that this position is clear, and we are concerned that the language in the Bill and accompanying documents does not always reflect this.<sup>7</sup> Going forward, this must be more clearly emphasised in legislation and accompanying guidance.

We recognise the requirement for provisions to enable disclosure in relation to very serious offending by children aged under 18, under certain circumstances, and for the purposes of protection. The Bill allows for the disclosure of childhood information where relevant and necessary, following consideration and an initial decision made by Disclosure Scotland. Applicants will be informed of the reasons for decisions, and such decision can then be subject to independent review if requested, and further appealed to a sheriff (on a point of law). We welcome the provisions enabling applicants to understand, challenge and appeal decisions, and the capacity to involve an independent reviewer. The consideration of factors which will be taken into account in decision making are noted within the Bill's Policy Memorandum to include "*the amount of time elapsed, the number of offences, whether a pattern of offending behaviour has continued into adulthood, and the seriousness of any childhood convictions*" (para 101). The structured and individualised approach to decision making is welcome, as an important feature of a system which protects an individual's right to respect for private and family life under [Article 8 of the European Convention on Human Rights](#) (ECHR). However, further clarity is required in relation to:

- How, and to what extent, the **context** of the behaviour resulting in the conviction information will be considered. Contextual factors such as care experience, trauma, and progress in relation to risk and rehabilitation will vary significantly, and require specialist knowledge (particularly in relation to care experience and corporate parenting) and skilled assessment. The Bill proposes provisions allowing Disclosure Scotland to gather information from relevant persons to assist them in their decision-making, but does not require them to do so. Dialogue with the individual concerned, their

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<sup>6</sup> Sands, C. (2016) [Growing Up, Moving On: The International Treatment of Childhood Criminal Records](#). Standing Committee for Youth Justice.

<sup>7</sup> E.g., paragraph 99 of the Bill's [Policy Memorandum](#) states "The Disclosure Bill ensures that convictions for an offence committed when the individual was under the age of 18 years will be disclosed on all disclosure products...but only after the applicant has been given the chance to make representations"

advocate or other representations should form an important part of decision-making.

- How **transparency and consistency in decision-making** will be achieved, and assured. The lack of detail of a decision-making framework is concerning, and should be included in statutory guidance going forward, both in relation to decisions made by Disclosure Scotland, and those made by an independent reviewer. This is particularly important to ensure individuals are able to understand, in advance, what the implications of any childhood convictions will be for their disclosure information.

We recognise and fully support provisions within the Bill to prevent the release of any information to a third party (such as an employer) until the applicant has seen their information, and had the chance to request an independent review. Concerns remain in relation to the potential of lengthy timescales to prejudice applications, where third parties may form negative assumptions about disclosures which take longer to process. Maximum timescales for decision-making should be given further consideration.

More broadly, we continue to hold concerns in relation to the treatment of children's information from Scotland's Children's Hearing System as 'convictions'. From its inception, the Kilbrandon Report<sup>8</sup> made clear that the focus of this system should be on children's needs, not deeds. The fact that children who come into contact with the care system and Children Hearings process can still be disproportionately criminalised, accrue offences and be disadvantaged into adulthood for childhood behaviour is a cause for great concern. Scotland's welfare based system recognises the primacy of upholding children and young people's rights and wellbeing, and responding to their needs in a supportive, holistic manner. This is reflected in overarching policies such as [Girfec](#), and the [Whole Systems Approach](#) to young offending. Yet interactions with the Children's Hearings System can lead to a child or young person acquiring a criminal record, even in a setting designed to be informal where decisions are taken based on whether they are in the child's best interests. It is extremely concerning that children and young people are routinely placed in such a position, without being fully informed of their rights or the potential long term consequences of accepting offence grounds, often without the advice of a solicitor. A 2016 study found 90% of legal aid work in children's hearings was undertaken on behalf of parents, not children and young people.<sup>9</sup>

### **Ensuring Other Relevant Information (ORI) provisions protect children's rights**

ORI refers to information (other than convictions) which is held on police records about an individual's behaviour. Decisions to include ORI in disclosure information are made by the chief officer of a police force. We welcome

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<sup>8</sup> HMSO (1964) [The Kilbrandon Report](#), Edinburgh: HMSO

<sup>9</sup> CELCIS (2016) [The Role of the Solicitor in the Children's Hearing System](#). Glasgow: CELCIS

provisions within the Bill to end the process of ORI being disclosed to third parties before applicants have the opportunity to challenge this, and to provide for independent review (and subsequent appeal to a sheriff on a point of law) of ORI. We also welcome the proposal to issue statutory guidance in relation to the disclosure of ORI, which is vital to achieve transparency. We support the suggestion made by the Centre for Youth and Criminal Justice (CYCJ) that such statutory guidance should include a specific section concerning the particular considerations for ORI related to childhood behaviours.

We continue to hold more fundamental concerns about the use of ORI, which we believe should only be disclosed under exceptional and extreme circumstances. Whilst it is recognised that Scottish Ministers are confident that Police Scotland exercise utmost rigour before deciding to include ORI, the situation remains that it is possible for non-conviction information, including childhood information, (i.e. information which is not necessarily accepted or proven to true) about an individual to be disclosed, indefinitely. Published guidance which clarifies the types of ORI likely to be shared is currently lacking, making it impossible for individuals to foresee any consequences. These are rights issues of particular relevance to care experienced individuals who, as noted earlier, are more likely to have contact with formal systems where their behaviour and histories are recorded. Additionally, the onus remains on the individual to appeal against the release of this information, rather than a system whereby the police make an application to retain the information. This differs from provisions under the [Age of Criminal Responsibility \(Scotland\) Act 2019](#) (the ACR Act) regarding ORI in relation to children under the age of 12, which is automatically subject to independent review.

In relation to all decision-making and review processes provided for within the Bill, we agree with CYCJ that consideration should be given to whether the Independent Reviewer (whose role is established under Section 11 of the ACR Act) should be the first line of decision-making in respect to all childhood conviction information, and ORI. This could enhance consistency in justice across similar matters which are governed by different pieces of legislation, and assure independence in all decision-making.

### **Reducing system complexity**

The complexity of the disclosure system has been an ongoing cause of significant concern, as reflected across responses to the 2018 Scottish Government consultation on the Protection of Vulnerable Groups and Disclosure of Criminal Information.<sup>10</sup> To ensure a rights-based, simple and accessible system, clarity is required in order for individuals to be able to understand, from the outset: what information must be disclosed; how long it must be disclosed for; what ORI may be disclosed in addition; how to appeal such decisions; and

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<sup>10</sup> Scottish Government (2018) [Protection of Vulnerable Groups and the Disclosure of Criminal Information Consultation report](#). Edinburgh: Scottish Government

what the implications of disclosure are. With limited understanding (even by professionals and advocates) of the disclosure system, and a backdrop of a lack of consistent, accessible information and individualised, case-specific support, navigating the system is challenging and can be overwhelming for individuals. Such complexity can exacerbate existing barriers faced by care experienced people seeking to access opportunities, and raises concerns about the extent to which the system protects and respects human rights, particularly children's rights. Specifically, whether the system holds the best interests of children as a primary consideration (Article 3, UNCRC), and whether children's rights to privacy (Article 16, UNCRC) and a fair trial (Article 6, ECHR) are respected.

It is clear that attempts have been made through the Bill to reduce the complexity of the system (for example, by reducing the number of disclosure products), to increase fairness (e.g. by reducing disclosure periods, improving the process for removing/applying to remove convictions, and strengthening review/appeal provisions), and to enable more individualised responses (e.g. by ending the automatic disclosure of childhood convictions). However, we are concerned that the resulting system remains too complicated, and outcomes will continue to be unpredictable. In addition to limited clarity about decision-making regarding the inclusion of conviction information and ORI in relation to childhood behaviour, we are concerned about the continued use of two separate lists of offences (List A and List B) with differing and arbitrary rules applying to disclosure and the removal of spent convictions in relation to each. The use of two lists with different rules is confusing for individuals. A lack of readily available, clear information compounds this confusion and can lead to individuals disclosing matters which they are not obliged to, or avoiding the process altogether.

To be a just and fair system, individuals need to understand their rights. As such, the provision of accessible guidance, information and support is vital. This should include legal advice to children, as well as free, accessible advice and support in navigating the disclosure system (for professionals, advocates and applicants themselves), including face to face support where this is required. Those providing advice require an understanding of issues discussed earlier, particularly care experience and corporate parenting. How this will be achieved is an area which would benefit from the Committee's scrutiny.

### **Regulated roles and kinship care**

We support the new concept of 'regulated roles' which trigger mandatory PVG scheme membership. This is a more straightforward approach than previous categorisation of regulated work, and focuses on the capacity or opportunity of an individual to exert significant power or influence over a child or protected adult. Under Schedule 3 of the Bill, foster carers are required to register under the PVG scheme, whilst kinship carers (whether formal or informal) are not. Instead, kinship carers would be subject to a Level 2 Disclosure check. This

distinction recognises the special nature of kinship care, which (even in formal arrangements involving looked after children) differs from foster care, and does not differentiate between kinship carers and other family caring roles. Kinship care recognises the unique strengths of the extended family network to which the child belongs to meet their particular needs.<sup>11</sup> This differs from foster care, where carers are assessed on their suitability to provide a more general placement to a child outwith their family/friendship network. By not mandating PVG membership for kinship carers, the importance of the wider, comprehensive, process of assessment for kinship carers is acknowledged. Kinship carers whom social workers assess as best able to meet the needs of children will not be prevented from doing so for bureaucratic reasons. The histories of carers can be varied, and careful consideration should be given to past convictions and/or concerns, with contextual information. However, misdemeanours in the past should not preclude individuals from a caring role for a child or young person. It should also be recognised that, in a minority of cases, these checks may reveal concerning behaviours that would place a child or young person at risk of harm. Therefore, there is a role for appropriate criminal record checks to ensure the suitability of kinship carers, and we agreed that this can be achieved under the Level 2 Disclosure check.

### **About CELCIS**

CELCIS is a leading improvement and innovation centre in Scotland. We improve children's lives by supporting people and organisations to drive long-lasting change in the services they need, and the practices used by people responsible for their care.

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<sup>11</sup> Hill, L., Gilligan, R. & Connelly, G. (2019) How did kinship care emerge as a significant form of placement for children in care? A comparative study of the experience in Ireland and Scotland. *Children and Youth Services Review*. <https://doi.org/10.1016/j.childyouth.2019.06.003>