

Who Cares? Scotland

Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018

November 2017



Who Cares? Scotland [WC?S] is an independent advocacy and influencing organisation working with care experienced people. We provide direct advocacy to care experienced young people, as well as opportunities for national and local participation. WC?S aims to provide looked-after children and young people in Scotland with knowledge of their rights. We strive to empower them to positively participate in the formal structures they are often subject to solely because of their care experience. At WC?S we utilise the voice of the care experienced population of Scotland to inform everything we do as an organisation.

Q1. Do you have any views / observations on this Proposed Draft Order?

We welcome the Proposed Draft Order in its aim to bring legislation into line with the recent Supreme Court ruling in the case of *P v Scottish Ministers*¹. By aiming to ensure compliance with the law, the Proposed Draft Order will marginally improve the Protection of Vulnerable Groups (PVG) system and its application to care experienced people. However, we believe that the Proposed Draft Order, or indeed further legislative change, should go much further.

Statistics reveal that although care experienced people make up less than 0.5% of the general population, they make up 33% of Scotland's youth offender population and 31% Scottish adult prisons.²

There are many reasons why care experienced people face higher rates of criminal convictions, which are rooted in the lived experiences of being in care. These include over-involvement with, and stigmatisation by, the Police; increased scrutiny in care placements; and participation in difficult formal processes. For example, interactions with the Children's Hearing System can lead a young person to gain a criminal record in an informal yet legal setting. The informality of the Children's Hearing System is generally welcome; however, it sometimes means that young people are not fully informed of their rights, or given access to independent advocacy or legal aid. This is particularly problematic when considering long-term consequences of criminal behaviour.

The disclosure process which exposes criminal convictions, specifically affects, and adds to the poor outcomes of care experienced children and young people.³ In a report released this year by the House of Commons Justice Committee, research in England and Wales identified that

¹ [2017] CSOH 33

² Scottish Prison Service (2016), *Prisoner's Survey 2015 – Young People in Custody*.

³ House of Commons Justice Committee (October 2017), *Disclosure of youth criminal records, First Report of Session 2017–19HC 416*.

there is concretely disproportionate impact of their disclosure regime on looked-after children.⁴ We believe the same impact is being felt as a result of the current set-up of the Scottish disclosure process.

We agree with The Centre for Youth and Criminal Justice (CYCJ), that the evidence shows conviction disclosure is inherently anxiety-provoking for individuals with convictions.⁵ The process of disclosure is experienced as traumatic, stigmatising and embarrassing and often results in the avoidance of accessing opportunities such as volunteering, education and employment.⁶ Care experienced people with criminal convictions are therefore forced to deal with the stigma of being labelled as criminals, along with the stigma they already face due to their care identity.

As well as a source of anxiety, criminal records received in childhood strongly impact an individual's access to opportunities for employment, education, housing and other public services and serve to further disadvantage care experienced people. There is strong evidence of the destructive effect of childhood criminal records on the rest of an individual's life.⁷ We know from the young people we work with, that a criminal history can often prevent care experienced children from moving on from their past and making the most of their potential. In some instances, corporate parents⁸ are faced with recruitment barriers when they attempt to employ adults who have a care experience which has resulted in a criminal charge. This can be especially frustrating for care experienced adults, who feel that their corporate parents should be able to better support their inclusion in the labour market. It is also necessary to compare the PVG scheme, and its poorly understood long-term consequences, with the collaborative, child-centred ethos of the Children's Hearing System.

More broadly, we believe aspects of Scots Law currently fail to fully promote the rights under the UN Convention on the Rights of the Child, particularly when it comes to care experienced children and young people. Whilst we appreciate that this is outside the scope of the Proposed Draft Order, we have previously advised that the Minimum Age of Criminal Responsibility should be raised to the age of 16, and the criminogenic nature of care should be addressed. In the meantime, and in line with the Children and Young People (Scotland) 2014 Part 1 Duties to give further effect to the UNCRC responsibilities, changes should be made to the PVG scheme to improve respect for children's rights.

A group of young people, who were all over the age of 18, who we spoke to as part of a previous consultation on the Minimum Age of Criminal Responsibility, reflected on their teenage years and several commented that they had made mistakes and perhaps committed crimes without thinking about consequences. Some admitted that they may have acted in way

⁴ *National Police Chiefs' Council Children and Young People Portfolio* quoted in House of Commons Justice Committee (October 2017), *Disclosure of youth criminal records, First Report of Session 2017–19HC 416*.

⁵ Thomson, Laing and Lightowler, 2016. "*Exploring tertiary education for people with convictions.*"

⁶ *Ibid.*

⁷ *Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court*, chaired by Lord Carlile of Berriew CBE QC. June 2014 quoted in House of Commons Justice Committee (October 2017), *Disclosure of youth criminal records, First Report of Session 2017–19HC 416*.

⁸ Corporate Parents are defined in law by [Part 9 of the Children and Young People \(Scotland\) Act 2014](#)

that some people would deem criminal, although at the time they did not look at it in that way. It was suggested that this behaviour is sometimes the only way a young person can demonstrate how they feel and to cope with the trauma they have experienced as children.

“People noticed my behaviour, but not my trauma”.

Therefore, we suggest that there should be a strong presumption that conviction information should not appear on disclosures for behaviour that took place before the age of 16, and that anything which takes place at a Children’s Hearing should not appear on a PVG check.

More generally, we support CYCJ’s call for wider legislative change that could further promote children’s rights and wellbeing and hope the forthcoming wider PVG review will support this.⁹

Q2. In relation to the partial Equality Impact Assessment, please tell us about any potential impacts, either positive or negative; you feel the amendments to legislation in this consultation document may have on any particular groups of people?

In our view, it is important that the Equality Impact Assessment specifically considers the impact on care experienced people.

Discrimination faced by care experienced people

Over the years we have heard lots of examples of young people being treated differently because of their care identity and we know that care experienced children and young people are some of the most marginalised, socially disempowered, and stigmatised individuals in Scotland. As a result, we believe that care experience should be treated as a protected characteristic for the purposes of the Equality Impact Assessment and more broadly.

This is particularly relevant for corporate parents. Under section 58(1)(c) of the Children and Young People (Scotland) Act 2014, corporate parents (including Scottish Ministers and Disclosure Scotland) have a duty to promote the interests of care experienced young people. The statutory guidance on corporate parenting makes it clear that this duty includes taking action to tackle the discrimination faced by care experienced young people. This means that discrimination based on care identity has been recognised at a statutory level in Scotland, and corporate parents have a duty to tackle that discrimination.

Discrimination against care experienced young people takes many forms, but in particular, care experienced young people face circumstances that lead to higher rates of criminal convictions at a young age. It is often indirect discrimination which is being allowed to perpetuate or has been given permission to exist because of over-involvement with police procedures because of the placement type or police knowledge of the wider family the young person might be living with via care arrangements.¹⁰

⁹ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*

¹⁰ For more information on this issue, please see relevant materials on our [online Corporate Parenting Learning Hub](#).

Care leavers are overrepresented in the criminal justice system, with a third of those surveyed in HMYOI Polmont in 2015 reporting as care experienced.¹¹ In 2014, 50% of prisoners in Scotland identified as having been in care at some point in their life,¹² and a report published in 2013 identified that a third of young offenders had experienced living in care.¹³

We support CYCJ's statement that children in care are recognised as experiencing a form of "double jeopardy" as by being placed in care they are often exposed to further risk factors which make them vulnerable to criminalisation.¹⁴

We are aware that the high rates of criminal convictions care experienced people receive are often at least partly due to perceived unfair treatment by the police. There is evidence that young people in the care system experience an over-involvement with police and police harassment due to being stereotyped.¹⁵

As one young person said:

"I think young people end up with more charges if they live in a Children's Unit. Picking up charges for stuff like vandalism, absconding, breach of the peace, is just a by-product of unit life."

Another young person told us:

"I got a criminal record for throwing a boiled baby carrot in my own home. Now I have an assault charge that employers can see when I go through disclosure checks."

We can see here how young people in care end up with a criminal record due to a minor incident, that would have been extremely unlikely to result in police involvement if it had taken place in the family home. These experiences are supported by evidence provided by the Criminal Justice Alliance who have pointed out that those in care settings tend to be criminalised for "minor infringements and indiscretions that would be dealt with informally in a family home".¹⁶

Police over-involvement in care experienced young people's lives is also apparent when it comes to stop and search policy. Our research shows that care experienced young people are often known to police and targeted by them for stop and search as a result.¹⁷ Some young

¹¹ Scottish Prison Service (2015), *Prisoner Survey 2015* [NB: There are difficulties with understanding and identification of care status raising doubts on the accuracy of these figures, but we rely on these figures in the absence of other information].

¹² Broderick, R, McCoard, S & Carnie, J (2014), *Prisoners who have been in care as 'looked after children'*;

¹³ Scottish Prison Service (2013), *14th Survey Bulletin*

¹⁴ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*

¹⁵ WC?S (2016), *Consultation on Police Powers to Search Children and Young People for Alcohol – Response from Who Cares Scotland*

¹⁶ Written evidence from the Criminal Justice Alliance (CJA) to House of Commons Justice Committee (October 2017), *Disclosure of youth criminal records, First Report of Session 2017–19HC 416.*

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/disclosure-of-youth-criminal-records/written/43291.html>

¹⁷ WC?S (2015), *Review of the use of Stop and Search in Scotland.*

people suggested that experiencing a stop and search can make them feel so frustrated and angry that it provokes them to react aggressively to the police, or act in a way they later regret.

For example, one young person, who was 16 years old, stated:

“It [a stop and search] would just make me angry and I would just kick off for no reason.”¹⁸

These are just some of the ways that being care experienced leads to an experience of discrimination that may unfairly lead those young people to have higher rates of criminal convictions.

As a result, the PVG process has a specific type of impact on care experienced people, and, in line with the corporate parenting duties,¹⁹ this should be considered when undertaking a full Equality Impact Assessment.

Ethos of the Children’s Hearing System

Care experienced children and young people who have convictions often received their criminal record through the Children’s Hearing System. This system seeks to operate on the principle of giving priority to the needs of the child or young person. This is made clear in the National Standards for the Children’s Panel (as published by Children’s Hearing Scotland) which contain the following points:

- *Children and young people are at the centre of everything we do.*
- *Every children’s hearing makes decisions based on sound reasons in the best interests of the child or young person.*

As the recent Education and Skills Committee report makes clear,

“At its centre is supposed to be an emphasis on the collaborative, child-centred ethos of the Hearing process.”²⁰

We support the ethos of the Children’s Hearing System and believe it is particularly appropriate given the context of the criminal behaviour being discussed. As CYJ have identified, criminal behaviour discussed at Children’s Hearings is often rooted in the difficult background circumstances of the young person or child involved. In fact, of children under the age of 12 who were referred to the Children’s Hearing System because of a pattern of offending:

- **81%** had parents who posed a risk to them;
- **43%** had mental health difficulties;
- **70%** had educational problems; and

¹⁸ WC?S (2016), *Consultation on Police Powers to Search Children and Young People for Alcohol – Response from Who Cares Scotland*.

¹⁹ The corporate parenting duties are defined in law by [Part 9 of the Children and Young People \(Scotland\) Act 2014](#).

²⁰ Scottish Parliament, Education and Skills Committee Children’s Hearings System - Taking Stock of Recent Reforms, 5th Report, 2017 (Session 5)

- **30%** had been the victims of physical or sexual abuse.²¹

The vulnerability of children and young people who are required to attend Children’s Hearings could not be clearer.

However, when present at Hearings, young people are usually without legal representation, often lack information on their rights, and frequently have limited access or knowledge of independent advocacy services.²²

Many young people have also told us that when they are at Children’s Hearings they feel like their opinions and views are secondary to that of professionals. Young people spoke about how this can make them feel: “undermined, not important, untrusted, blamed.”²³

As a result, it is very unclear whether children and young people have an understanding that convictions received at a Children’s Hearing can result in a long-term criminal record that could appear on a PVG check. In fact, based on a wide range of discussions with different professionals involved in the Children’s Hearing System, it is not clear whether all the adults are aware of this fact either.

It seems appropriate to ask whether the PVG scheme, with its poorly understood long-term consequences, is in any way in line with the collaborative, child-centred ethos of the Children’s Hearing System.

Potential positive impact of the amendments

In terms of potential impacts, we welcome the fact that the proposed amendments to legislation will somewhat reduce the long-term consequences of certain convictions, and will potentially have a positive impact on care experienced people as a result. However, we do not believe this goes far enough.

Firstly, we support the view of CYCJ that establishing an appeal process for disclosures is not a sufficient amendment, as this depends on individuals being aware of and using legal processes to access the appeal process.²⁴ Such a process places responsibility with the individual. Care experienced people are often deprived of information and control over their own lives in the care system, and the appeal process adds yet another barrier which they must navigate.

Even more importantly, having a criminal history creates a significant disadvantage when care experienced people are attempting to access employment opportunities. It also compounds further the stereotypes and perceptions that they were “bad kids” from “bad families” and this continued legacy of stigma because of their care experience too often remains with them throughout their adulthood.

²¹ SCRA (2016), *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children’s Reporter for offending*

²² WC?S (March 2017), *Evidence to Education and Skills Committee, Children’s Hearings System – Taking Stock of Reforms.*

²³ *Ibid.*

²⁴ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*

Furthermore, consideration should be given to the effects of the traumatic backgrounds that many young people in care have experienced before they become looked after. The long-term effects of trauma can affect all areas of a child or young person's development, from learning and communication, to their ability to form appropriate, trusting and meaningful relationships. This means that many care experienced young people are functioning at a level that would be considered below that of their contemporaries. The arbitrariness of age becomes extremely apparent when used in a system that has the power to greatly affect future chances.

We suggest that there should be a strong presumption that conviction information should not appear on disclosures for behaviour that took place before the age of 16 or for convictions received at a Children's Hearing. That presumption could potentially be overturned, but only in the most serious of cases, where risk to children and young people had been clearly demonstrated. In these cases, an appeal process may be appropriate, however, in the vast majority of cases, an appeal process should not be necessary as decisions taken about under 16s and decisions taken in the Children's Hearing System should not be disclosed.

More generally, we once again support CYCJ's call for wider legislative change that could further promote children's rights and wellbeing and hope the forthcoming wider PVG review will support this.²⁵

Potential negative impacts of the amendments

The proposed amendments to this legislation (and the wider amendments that we believe are required) could potentially have a negative impact on care experienced people if these changes led to increased use of the "Other Relevant Information" process. This could potentially result in the same details being disclosed through different means – even if an individual has successfully appealed to have their conviction removed from their disclosure. We believe the Proposed Draft Order should consider how changes to the PVG process could potentially have unintended effects on the way Police record and disclose activity and behaviour through the Other Relevant Information process.

Q3. In relation to the partial Equality Impact Assessment, please tell us what potential there may be within these amendments to legislation to advance equality of opportunity between different groups and to foster good relations between different groups?

Who Cares? Scotland understands "advancing equality of opportunity" to mean creating parity between the outcomes for care experienced and non-care experienced people. We believe that public bodies in Scotland, such as Disclosure Scotland and the Scottish Ministers, should consider the barriers faced by care experienced children and young people, and work actively to eradicate them. This would also be firmly in line with their statutory corporate parenting duties.²⁶

As we have discussed, the high rates of criminal convictions for care experienced young people are influenced by the specific types of discrimination that they face because of being in care.

²⁵ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*

²⁶ The corporate parenting duties are defined in law by [Part 9 of the Children and Young People \(Scotland\) Act 2014](#).

Their treatment by the Police; the scrutiny they face during their placements; and the formal and legal processes, they must interact with, present just a few of the many factors which result in an increased risk of criminal conviction for care experienced people.

Currently, the PVG system exacerbates the poorer outcomes of care experienced people. Changes to this process, amidst a movement to improve the criminal youth justice system and care system, can be powerful in tackling discrimination by using legal methods help to create parity and advance equality of opportunity for care experienced people. The Proposed Draft Order may reduce the life-long impact of receiving certain convictions and to an extent will advance equality of opportunity between care experienced people and non-care experienced people. As such, it is to be welcomed.

However, as mentioned above, we would suggest that reforms to the PVG system should go much further than the Proposed Draft Order and there should in fact be a strong presumption that anything which takes place at a Children's Hearing will not appear on a PVG check. As such, we would support CYCJ's call for wider legislative change that could further promote children's rights and wellbeing and hope the forthcoming wider PVG review will support this.²⁷

Q4. In relation to the partial Child Rights and Wellbeing Impact Assessment, please tell us about any potential impacts you think there may be on children's wellbeing.

We note that this question focusses on potential impacts to children's wellbeing. It is not clear why the question does not ask for comment on potential impacts on children's rights given we know that there is a direct link between a child's wellbeing and the fulfilment of their human rights.

Duties in relation to the UN Convention on the Rights of the Child (UNCRC) are placed on Scottish Government and public bodies under Part 1 of the Children and Young People (Scotland) Act 2014. The UNCRC is also the foundation of the Scottish Government's approach "Getting it Right for Every Child" (GIRFEC) which aims to support children, young people, and their parents to work with the services that can help them and, importantly, centres child wellbeing at its heart. The concept of wellbeing defined in GIRFEC is understood through the SHANARRI indicators and each of these indicators directly relates to different articles of the UNCRC.²⁸ Therefore, we understand impact on a child's wellbeing in relation to impact on rights.

In our view, the complicated and little understood process of disclosing criminal offences received during childhood is a failure to uphold and protect UNCRC rights. An inquiry into the comparable English and Welsh disclosure system suggested that the disclosure process for youth criminal records falls short of the UK's obligations under the UNCRC, by not being distinct

²⁷ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*

²⁸ Scottish Government (March, 2013), *UNCRC: The Foundation of Getting it Right for Every Child, Scottish Government*.

from the regime for adults and for working against the aim of rehabilitating children, whilst “undermining children’s privacy”.²⁹

Furthermore, the criminalising of children and young people is a violation of their human rights in and of itself. Scotland currently has a minimum age of criminal responsibility (MACR) of 8 years old, which is considered “not to be internationally acceptable” by the UN Committee on the Rights of the Child.³⁰ Although the Scottish Government has stated its intention to increase the MACR to 12 years old, this merely recognises the lowest internationally acceptable age. The UN Committee on the Rights of the Child suggests a higher MACR “for instance 14 or 16 years of age”.³¹

In our view, the MACR should be raised to 16 years old, however we appreciate this is outside the scope of this consultation. We understand the narrow scope of this Proposed Draft Order and that there may be further changes introduced through later legislation. However, it is important to note that this is an opportunity to significantly improve respect for children’s rights in Scotland.

The Proposed Draft Order will potentially have a positive impact on children’s rights and wellbeing, however, we believe the Remedial Order should go further so that the positive impact on rights is much greater. Whilst the MACR remains lower than 16 we should at least ensure that no conviction received under the age of 16 is disclosed on a PVG check as standard.

When we asked young people from what age they think conviction information should appear on disclosures, the majority suggested that it should be around 16. As such, we believe there should be a strong presumption that no conviction received at a Children’s Hearing will appear on a PVG check. We strongly support CYCJ’s call for wider legislative change that could further promote children’s rights and wellbeing and hope the forthcoming wider PVG review will support this.³²

If you wish to discuss the content of this response, please get in touch:

David Faith
Policy and Learning Coordinator
Who Cares? Scotland
dfaith@whocarescotland.org
0141 226 4441

²⁹ House of Commons Justice Committee (October 2017), *Disclosure of youth criminal records, First Report of Session 2017–19HC 416*.

³⁰ UN Committee on the Rights of the Child (CRC), *General comment No. 10 (2007): Children’s Rights in Juvenile Justice*, 25 April 2007. [online] <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

³¹ *Ibid.*

³² CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*