

**SUBMITTING EVIDENCE TO A SCOTTISH PARLIAMENT COMMITTEE
DATA PROTECTION FORM**

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| Date: | 20.08.2019 |
| Organisation: (if required) | Who Cares? Scotland |
| Topic of submission: | Disclosure (Scotland) Bill |

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EDUCATION AND SKILLS COMMITTEE

DISCLOSURE (SCOTLAND) BILL

SUBMISSION FROM

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

Introduction

We welcome the new Disclosure (Scotland) Bill as a chance to radically change the way disclosure works and to remove the barriers it can currently create for Care Experienced people with a criminal record. As a named corporate parent, this Bill also offers an important opportunity for Disclosure Scotland to fully realise their duties to the Care Experienced population in Scotland, as legislated for in the Children and Young People (Scotland) 2014 Act.¹ We must ensure that the disclosure system we adopt allows those who have convictions to be supported to move on and achieve the success and happiness in their lives which they deserve.

Why this Bill is important for Care Experienced people?

We are campaigning for ***a lifetime of equality, respect and love***. We know that those who experience care have a higher chance of becoming criminalised and entering the justice system in Scotland. We also know that because of this, the current complex system of disclosure, which exposes criminal convictions, specifically adds to the poor outcomes of Care Experienced children and young people.²

Statistics show that Care Experienced young people and adults are overrepresented in the criminal justice system in Scotland and although those who have been in care only make up an estimated 0.5% of the general population, they make up 33% of Scotland's youth offender population and 31% Scottish adult prisons.³ In 2014, 50% of prisoners in Scotland identified as having been in care at some point in their life.⁴ Unfortunately, many people do not recognise that they are Care Experienced or in many cases, they wish to disassociate with their Care Experience. This coupled with the fact that most statistics rely on self-reporting of care status, means that even these statistics may underrepresent the problem.

Children and young people 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.⁵ These risk factors include: unnecessary over-involvement with the police; felt and

¹ Corporate Parents are defined in law, to promote the interests of care experienced people [by Part 9 of the Children and Young People \(Scotland\) Act 2014](#).

² House of Commons Justice Committee (October 2017), *Disclosure of youth criminal records, First Report of Session 2017–19HC 416*.

³ Scottish Prison Service (2016), *Prisoner's Survey 2015 – Young People in Custody*; Scottish Prison Service (2013), *14th Survey Bulletin*.

⁴ Broderick, R, McCoard, S & Carnie, J (2014), *Prisoners who have been in care as 'looked after children'*.

⁵ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*.

experienced stigmatisation by the Police; increased scrutiny and punitive responses to unmet mental health needs, sometimes expressed through challenging behaviour; and frequent participation in formal processes such as reviews and Children's Hearings.

There is strong evidence of the consequential, destructive effect of childhood and teenage criminal records on the rest of an individual's life.⁶ We know from speaking to our Care Experienced members, that a criminal history can prevent Care Experienced people from moving on from their past and making the most of their potential.

'Still terrified about having to share about convictions - can still come back to haunt me and causes me issues - experience of care still impacts me in my adult life.'

WC?S Member

There is extensive evidence which shows conviction disclosure is inherently anxiety-provoking for those who have convictions.⁷ 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.⁸ 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.

Change of approach to childhood convictions

We are supportive of many of the changes proposed in the Bill to mitigate the effects of disclosing criminal records, especially the presumption against disclosing childhood convictions received when under 18. As stated by the Centre for Youth and Criminal Justice (CYCJ) in their response, 'the failure to distinguish between the treatment of criminal records accrued in childhood has been at odds with virtually every other approach we take to children and adversely effects our ability to achieve the aims for, and to fulfil our legal and policy requirements to, children and children's rights (Nolan, 2018).'

The presumption against disclosing convictions received when under the age of 18 shows how the Bill is taking a positive step forward in designing a disclosure system which automatically rules out unnecessary information. However, we understand the need for a structured approach to understand which information is relevant on a case-by-case basis, when dealing with more complex or extreme types of criminal convictions. We are unclear how this presumption against disclosing convictions received when under 18 may be overturned in some cases, as this detail is not obvious on the face of the Bill. If there is a process in place which could lead to the presumption being potentially overturned and a conviction for an under 18 being disclosed, this needs to be very clearly laid out. We understand that there might be need to show information about an incident which happened when an individual was under 18, but we would hope this to happen only in the most serious cases, where risk to children and young people has been clearly demonstrated and relevance to the role being applied for is proven in order to make the disclosure. We urge the committee to explore in more detail how this will work in practice.

We support the statement by CYCJ that using a case-by-case approach allows for the rights to public protection to be balanced with upholding the rights of individuals with conviction information. It has also been suggested that schemes 'without flexibility to permit the use of discretion and individual assessment cannot be compliant with Article 8 of the ECHR that protects an individual's right to respect for private and family life'.⁹ It is important that work is carried out by Disclosure Scotland to remove unnecessary information from a disclosure certificate in order to protect an individual's right to privacy, which does not feel respected within the current Disclosure process. WC?S members have

⁶*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*.

⁷ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018*.

⁸ *Ibid.*

⁹ CYCJ (2019), *Education and Skills Committee, Disclosure (Scotland) Bill, Submission from Centre for Youth and Criminal Justice*.

consistently expressed concern over the need for certain types of information to be passed on in disclosure processes. We hope the committee will support the Bill to appropriately balance the privacy rights of individuals with the need for public protection.

We are also still greatly concerned about the emphasis being placed on 'Other Relevant Information' (ORI), as another source of information able to display criminalised behaviours on disclosure certificates. We would like to see the committee consider this form of information held on a criminal record when scrutinising the Bill, as we are unclear how the risk of this being used as an alternative method to criminalise individuals will be safeguarded against. We are also under the impression that ORI can be used to pass on information about a conviction, even if the conviction itself is not shown on a disclosure certificate and would like the committee to consider the implications of this. We understand ORI may be necessary in extreme cases where there are risks to public protection, however, the process must be extremely clear about how this function can be used by Police Scotland and Disclosure Scotland. We are also unsure if challenging ORI by making contact with Police Scotland is a process which all individuals with a criminal history would want to take up in order to contest information shown on their disclosure, due to the contact with police being the reason for that criminal record.

Alongside Clan Childlaw, we are also concerned that convictions accrued via the welfare-based Children's Hearing System will still be considered for disclosure. We support this statement provided by Clan Childlaw in their response to the 2018 consultation on the Bill: 'Allegations of offending behaviour are addressed in the context of the whole circumstances of the child, and often there are wider family issues that are best addressed at the same time. The Children's Reporter may have a choice as to whether to bring offence grounds or welfare grounds. If the decision is taken to bring offence grounds because it is in the best interests of the child, it appears unfair that there could be repercussions for the young person affecting their life chances when they are older, unless they are of a particularly serious nature. Referring at all to the term "conviction" is wholly inappropriate within this system given the focus on the needs of the child rather than the alleged offending behaviour.'¹⁰ This is of particular importance to the Care Experienced population who are much more likely to have had contact with the Children's Hearing System. We also know that when accepting grounds for a hearing, young people might not know this will lead to a conviction on their criminal record.

The need for context in decision-making around disclosure

We also welcome the introduction of an 'independent reviewer' role that can provide accountability for Disclosure Scotland's processes. It is vital that this new role, alongside the Disclosure Scotland workforce which will now have greater power in associated decision-making, are made up of individuals that have a thorough understanding of corporate parenting duties and the context of care experience.

This is because WC?S members consistently tell us that behaviours which have been criminalised, must be viewed in full context. There can be ongoing cases of trauma and abuse from a person's childhood, which have not been fully understood or discussed until the disclosure process brings it into focus. They may have been too young at the time of the crime to understand what has happened and the implications this has on their criminal record. Especially in a Care Experienced person's life where they may have had little support of this kind.

'Take the whole situation into consideration when a child commits a crime i.e. family, home conditions.'

WC?S Member

Yet the current process does not allow for this context to come to light, in fact there is simply a list of information created to pass to employers with no explanation at all. It is then up to the individual to explain to the employer the circumstances around the convictions – which is could be extremely distressing and uncomfortable for many Care Experienced people. Members also tell us that it is

¹⁰ Clan Childlaw (2018), *Response to Protection of Vulnerable Groups and Disclosure of Criminal Information*.

extremely difficult to have to repeat their personal stories to those that need to know the context about their background.

‘There’s reasons behind a crime, we need to understand that...being arrested, that could make things worse.’

WC?S Member

We welcome the fact that individuals will now see their disclosure certificates before they are sent to employers, as we called for this in our consultation response.¹¹ However, the information being considered for the certificate should identify: the age at which a crime was committed; the reasons behind the crime; whether the conviction was gained via the Children’s Hearing System and if the young person was in a time of crisis. Young people have told us that context around mental health, disability and whether the person had experienced trauma, should also all be considered when judging a criminal conviction. There must also be a way that the PVG process allows for context of care to be identified when information is being reviewed as relevant or not.

‘When I was 16 I thought I knew what I was doing and looking back I thought I didn’t know anything. Alcohol has so much to do with it, you genuinely don’t know what you’re doing, I’ve seen myself and waking up in the polis station and not even knowing why you’re there. I’ve got a load of charges which I genuinely don’t know how I got.’

WC?S Member

Support employers to understand the purpose of disclosure

Although we welcome the changes in the Bill which will allow applicants to see their disclosure certificate before employers receive a copy, and be able to challenge the information shown, there will of course still be cases where it is appropriate and relevant for conviction information to be shown to employers. It is therefore important that alongside the Bill there is a continued national effort to engage employers and HR professionals in how to utilise the information they are provided with on a disclosure certificate, so they can sensitively support applicants and make proportionate decisions about the risk a person may cause in the role they are applying for.

‘Something came up on my disclosure and my local authority (employer) didn’t let me volunteer anymore until an investigation was carried out and in that time, they pressured me to resign. I carried on in my role but had to have ‘1-1 support’, which I felt was just surveillance. However, I was confused because I had been doing this role for a year already without any issues.’

WC?S Member

In some instances, corporate parents¹² 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. There is much more that needs to be done alongside reforming the disclosure process, around the understanding of employers who offer opportunities to those who have a criminal record.

We welcome the ‘Scotland Works for You’ project, which we feel is a step in the right direction in educating employers about what disclosed criminal history means and combats the discriminatory practice that creates barriers to those with criminal histories gaining employment. The existence of a criminal record should never mean a person is automatically discounted from a job role, without a proper assessment of risk being carried out. However, the disclosure process itself should include a full suite of training and guidance specifically designed for all employers that have access to the disclosure system going forward.

¹¹ WC?S (2018), *Response to Protection of Vulnerable Groups and Disclosure of Criminal Information*.

¹² Corporate Parents are defined in law, to promote the interests of care experienced people [by Part 9 of the Children and Young People \(Scotland\) Act 2014](#).

‘Educating people about the changes is a must, the decision NOT to apply for a job is often taken because of criminal charges, there is a presumption (one perpetuated by some working in the sector – I know I was told I would never get a job and I’ve heard similar stories more recently) that criminal charges inhibit you from working in certain jobs.’

WC?S Collective Member

As an organisation, we also have valuable learning from employing individuals with a criminal history and feel we have developed a supportive approach based on honesty, transparency and lack of judgement. However, this process has been created using pre-existing tools from other third sector organisations and is influenced by our values and culture. There is currently a lack of clear national guidance on how employers should assess risk when considering a Disclosure certificate.

We would like to see a mandatory, standardised framework created for all employers to use when making recruitment decisions based on disclosure, using a series of logic questions that ensure employers look beyond the conviction and realistically consider the risks posed. Alongside this standardised set of tools, there must be emphasis on the need for employers to sensitively engage with applicants to understand the implications their disclosure might have for the role. This process could be aided by the risk assessment tool, to show the applicant the thought process of the organisation when considering their disclosure certificate. These tools could potentially be influenced by the materials Disclosure Scotland already utilise when making barring decisions. We know these resources are greatly needed for employers to be encouraged to undertake this process, as there is recruitment practice which exists that automatically rules out applicants with convictions, rather than trying to understand the relevance of their criminal history to the related job role.

‘It is without doubt a stress for people to know that they must discuss their criminal past with several people, that some within their workplace will know of their history. The more who know the more likely it is that someone will divulge that information to a colleague, a partner, a friend etc. irrespective of data protection rules, this is the reality.’

WC?S Collective Member

Support applicants to navigate the disclosure process

The Bill must consider the resources necessary to operationalise the changes proposed, in order to make the most positive impact on those applying for disclosures. This is especially important to ensure applicants fully understand their rights to appeal, challenge and remove information held about them. We support CYCJ’s position that support provided to applicants must be ‘independent, individualised, free, in-person (either face-to-face or by phone) and available to everyone, at whichever stage of their disclosure journey they may be at.’¹³

It is promising that the opportunity to make representation and appeals has been removed from a formal court process in the first instance, however, this could unintentionally lead to a less clear understanding of the legal rights an individual has in these types of processes. We would also like to support CYCJ’s statement that the Bill (or associated documents) should allow for ‘monitoring and evaluation of the frequency of such provisions being utilised and the experience of those utilising such measures and for this information to be made publicly available.’¹⁴ This is vital in understanding how accessible these processes are to individuals making applications.

The proposals in the Bill ultimately still accept that individuals applying will be expected to understand complex processes and be able to provide specific types of information. We would like to highlight that this continues to place a burden of responsibility on the individual applying for disclosure, which could create barriers to successfully gaining a disclosure certificate and/or securing a desired job role.

¹³ CYCJ (2019), *Education and Skills Committee, Disclosure (Scotland) Bill, Submission from Centre for Youth and Criminal Justice.*

¹⁴ *Ibid.*

Our members have told us how difficult it is to experience the disclosure process on their own, when they have criminal convictions that they need to declare. Currently, disclosure processes depend on individuals being aware of and using legal processes, for example when having to make representation when under consideration for listing. As mentioned, this places responsibility of being properly informed with the individual, yet Care Experienced people are often deprived of information and control over their own lives in the care system, and these processes add yet another barrier which they must navigate. We would urge Disclosure Scotland to continue to consider how vulnerable people or those who experience disadvantage in Scotland are able to navigate any processes or systems they put in place.

'A friend who also needed to get PVG done at same time for course just gave up and decided not to go through process as knew that they would have charges on disclosure.'

WC?S Alumni Member

We would also like to suggest that there should be a process for individuals to access their disclosable information before they apply for a job role, via Disclosure Scotland. As mentioned above, there are cases where individuals are not aware of having accrued charges and do not have access to the information which is contained on their criminal record. Being able to access this information would allow individuals to pro-actively understand what could be displayed in a disclosure when they do decide to apply for a role that requires it, rather than waiting to apply for a job before undertaking this process. Time would then be available for an individual with convictions and other disclosable information to prepare a supporting letter and think about what they would say to an employer when discussing the information on their disclosure. It would also give more time for an individual to be supported to challenge any information that may be disclosed, guarding against the time delays that may be involved in challenging this information when an employer is waiting for a disclosure to be made available.

We also urge the committee to consider the impact of the potential conditions imposed on scheme members when under consideration for listing. Although this a process controlled by Disclosure Scotland, we feel that an employer knowing that an individual is being considered for listing, could lead to an extreme reaction of removing them completely from their role either temporarily or permanently. Where conditions are imposed, these need to be proportionate and should be subject to the same scrutiny and decision-making as any other decision to suspend or restrict duties would be and should be made in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures. While restriction of duties or suspension is not considered to be 'punitive' or an assumption of guilt, it is often perceived this way. Conditions therefore have the potential to further add to the sense of criminalisation and stigmatisation experienced by those with Care Experience. We would also like to bring to the committee's attention that an individual should be able to withdraw from the listing process if they decide to no longer work in a regulated role and will not be planning to in the future, at the moment we have been told this is not possible. This has impacted directly on an individual we work with, who is now stuck in a listing process even though they are no longer working in a regulated role and do not intend to do so in the future.

Furthermore, our members consistently tell us that processes involved in challenging disclosure information, such as removing convictions from a disclosure and making representations to prevent being listed, can also be difficult and drawn out for those involved.

One WC?S Alumni Member reflected that although they successfully appealed in both cases they chose to take up, their success was due to the support of the professionals they worked and studied with. They commented that they would have found it extremely difficult to go through appeals processes alone. They also reflected that they were in a stable place in their personal life, with a considerable period having passed since they were in crisis when the convictions were accrued. If a young person who is trying to find their first job must go through this process, without a person to support them - it is inconceivable how they are supposed to navigate such a system. If the process itself is to continue placing responsibility on individuals to understand the various processes involved, WC?S calls for resources to be provided that create individualised support, particularly for the PVG process.

The need for support to be provided, to navigate through the current disclosure process, shows that the system itself is not designed to be easy to understand for individuals who have criminal records. The Bill offers a route to simplifying the products on offer and we welcome the new ideas around digital access, however, there must be a user-led approach at every stage of re-designing the system within the Bill and the resources needed to make it accessible for *all* individuals applying.

Corporate Parenting duties

Disclosure Scotland and Scottish Ministers are named corporate parents in the Children and Young People (Scotland) Act 2014. This means they have specific duties in legislation towards the Care Experienced population in Scotland, including pro-actively promoting their interests and improving its services specifically for the needs of this group.¹⁵

Currently the Bill does not name these duties and for corporate parenting to be truly embedded within the new disclosure system, these must be recognised in the face of the Bill. We have also created some specific asks to be considered on behalf of Care Experienced people in Scotland, to ensure the new disclosure system realises corporate parenting duties:

1. Waive fees for Care Experienced people applying for disclosures of any type.
2. Ensure funding is available to support Care Experienced people to gain legal advice on matters relating to their disclosure, if needed.
3. Afford Care Experienced people special protections in disclosure processes, allowing for a self-declaration tick-box in the process so that a tailored approach can be followed and specialist, trained advisors can provide support if needed.
4. Create a clear point of contact and tailored information available online for Care Experienced people.
5. Ensure the independent reviewer and those working in Disclosure Scotland making decisions about individual disclosures, are trained in corporate parenting and commit to understanding the context of care experience.
6. Continue to work with employers to end discriminatory practice against those with convictions and Care Experience, introduce ways to monitor the way disclosure is being utilised in recruitment decision-making processes.
7. Recognise corporate parenting duties in the Bill¹⁶ and legally enshrine the need for the new disclosure process to take these into account.

Concluding statement

Although the Bill is positive in a number of the policy intentions and changes proposed, we would also like to echo the concerns of CYCJ and others around the multiple pieces of policy and legislation which impact the disclosure system that seem to be disconnected. It is of vital importance that the policy intentions and provisions within the Age of Criminal Responsibility (Scotland) Act 2019, Management of Offenders (Scotland) Bill and Disclosure (Scotland) Bill are connected and do not adversely affect each other.

We would like to work with the committee to ensure that this Bill is utilised to create a disclosure process that is not risk averse to a level that adversely affects some of the most disadvantaged people in Scotland. Our goal is to ensure that a disclosure system exists which safeguards children and protected adults – yet at the same time allows those trying to move on from a criminalised past to live fulfilled and happy lives.

“I was a shop lifter to survive – got caught aged 17 – have convictions which appear on disclosure now. This was one of the most difficult periods in my life and I had no support or care whatsoever from anyone, other than myself.”

WC?S Alumni Member

¹⁵ Corporate Parents are defined in law by [Part 9 of the Children and Young People \(Scotland\) Act 2014](#).

¹⁶ Corporate Parenting duties are defined in law, [by Part 9 of the Children and Young People \(Scotland\) Act 2014](#).