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Protection of Vulnerable Groups and the Disclosure of Criminal Information Consultation: A joint response from the Centre for Youth & Criminal Justice and Improving Life Chances Implementation Group

The Centre for Youth & Criminal Justice (CYCJ) is dedicated to supporting improvements in youth justice, contributing to better lives for individuals, families and communities. Our vision is a Scotland where all individuals and communities are safe and flourish; and where Scottish youth justice practice, policy and research are internationally renowned and respected. We contribute to this by developing, supporting and understanding youth justice practice, policy and research in Scotland, and through seeking and sharing learning internationally. Our work centres on three key activities:

- **Practice Development**: Working with practitioners and policy-makers in **developing,** supporting and coordinating activities to improve youth justice
- **Research:** Undertaking, supporting and coordinating research which helps with **understanding** youth justice
- **Knowledge Exchange:** Supporting the sharing and dissemination of knowledge

CYCJ is predominantly funded by the Scottish Government and hosted by the University of Strathclyde.

The Improving Life Chances Implementation Group has been established as part of the Scottish Government's Youth Justice Strategy "Preventing Offending Getting it right for children and young people". The Implementation Group is tasked with taking forward work under the priorities of school inclusion; opportunities for all; health and wellbeing; relationships; victims and community confidence; and reintegration and transitions. This is in recognition of what we know about the needs of young people involved in or at risk of involvement in offending behaviour and the necessity of taking a holistic approach, beyond merely focusing on offending behaviour, if we are to improve outcomes for these young people. Under the priority of opportunities for all there is a commitment in the strategy to "Implement changes on disclosure of childhood offences in 2016 to reduce the impact on future life chances". As such, disclosure of criminal records is a priority for this group and change to the current system is deemed critical. The membership of the Group includes representatives from the Scottish Prison Service, Education Scotland, ADES, Skills Development Scotland, further education providers, Centre for Youth and Criminal Justice, Child Health Commissioners and third sector organisations.

The following response is a collective one on behalf of CYCJ and the Improving Life Chances Implementation Group, which will be supplemented with responses from the individual organisations represented in the Implementation Group.

We are pleased to respond to the Protection of Vulnerable Groups and the Disclosure of Criminal Information Consultation. At the outset, it should be acknowledged that we deem significant change to the current system of disclosure is essential. We have not responded to all of the questions in this consultation and in many sections we deem the options that have been put forward are insufficient to effect the change needed. We have therefore chosen to offer a more in-depth response and analysis to these sections instead. Underpinning all of our responses is the need for any change to the system to:

- Ensure the system promotes and upholds human and children's rights and the principles of fairness and justice
- Be child-centred
- Adopt a proportionate and individualised, developmental, needs led approach to the disclosure of criminal records, promoting and devoting attention to the context of behaviour or circumstances of

the individual at the time of the offence and subsequently. This is critical given it has been concluded elsewhere that schemes without flexibility to permit to 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 (House of Commons Justice Committee, 2017; Nolan, 2018).

- Minimise the complexity of the system as far as possible and ensure support is provided to people at all levels, including: people with convictions, practitioners supporting individuals, employers and opportunity providers, to understand the system, and their roles and responsibilities. All of the above listed should be able to gain individualised, independent, case-specific support, including to fulfil their rights, consistently and free at the point of need.
- Avoid the additional criminalisation, and subsequent stigmatising and discrimination of individuals by ensuring the failure to fulfil an obligation related to the disclosure system does not lead to further conviction and net-widening
- Address the incompatibility between the welfare-based Children's Hearings System and the current system of disclosure and ensure that the acceptance or establishment of offence grounds at a Hearing should not be treated as a conviction
- Reduce the timeframes before which convictions can be considered spent and introduce processes for reviewing convictions that under the current system and legislative changes proposed will never become spent
- Must be based on evidence and research, with a lack of comparable evidence to suggest that the current or proposed system will have better results or impacts than alternatives
- Contribute to positively changing the UK's culture of criminal record checks (Nolan, 2018).

CYCJ, the Improving Life Chances Group and a range of other organisations would welcome further discussions and the necessary wholesale, systemic consideration of how the above could be made a reality. As detailed below, we would welcome a pause in the consultation process to enable further discussions to take place and to ensure the window of opportunity that is currently available is not lost.

Question 1: Do you agree that reducing the disclosure products will simplify the system?

Yes ☐ No ☒

Question 1a: If you have answered no, what do you think will simplify the system?
We believe that much more fundamental change is needed than reducing the number of products to really simplify the system and make it understandable by all. A level of complexity within the legislation which governs the system of disclosure is somewhat unavoidable in order to permit the sharing of necessary disclosure information. However, the current system of disclosure is impacted on by multiple different pieces of legislation, many of which have changed parts of the system to a minimum standard, for example, to comply with judicial rulings. We are frustrated that reforms that are inherently linked are being undertaken in a piecemeal manner, each of which impact on each other (e.g. the proposals in section 5 inherently rely on the changes to rehabilitation periods as proposed in the Management of Offenders (Scotland) Bill). We deem it essential that a holistic review of the system is undertaken, including a review of the basic principles and purposes of the system, which the current approach to reform prevents.

We also believe that the legislative complexity of the system has no need to be replicated for individuals with convictions, but currently lack of understanding of the system remains and is a highly significant concern. This is fundamentally an issue of rights, which will arguably remain with the proposed changes (Nolan, 2018). We appreciate the commitment to develop further guidance and training and the need for a comprehensive and appropriate programme to ensure this awareness continues to evolve with the completion of the review and commencement of a refreshed Scheme. We deem it important that this guidance and information is accessible to all who are affected by it, is understandable and includes resources specifically aimed at children and young people. It is also important that this information and support is available at all appropriate times (i.e. available at the point of charge, conviction and

subsequently when the impact on life chances is realised). Moreover, training needs to be accessible, engaging and participatory, and should adopt a tiered approach across professions and stages of development. The above however must be accompanied with individualised, in-person (either face-to-face or by phone) information and support that is available to everyone. We believe more focus is needed on this. People often do not know what information is held about them or how this is or may be used, and currently have nowhere to turn to for support. We believe there is a duty to provide this for everyone, particularly for young people.

Moreover, in aiding understanding of information that can be disclosed, we would like to see the information included on disclosure certificates and Subject Access Requests (SARs) made more meaningful and understandable by labelling individual convictions as unspent, spent, spent and protected, spent and protectable, or spent and not protectable. If disclosure processes are defined in a way which enables an individual with convictions and those supporting them to clearly understand what needs to be disclosed, then adding a computerised algorithm to SARs and disclosure certificates should be easy to produce.

Question 2: As we are trying to simplify the system, do you have any views on what this product should be called?
Basic ☐ Level 1 ☐ Other (please state)☐

Question 3: As an applicant, do you have any concerns with this approach?
Yes ☐ No ☐

Question 4: Which fee option do you prefer for the level 1/Basic disclosure? And why?
Our dominant comment here (and for all questions relating to fees) would be that costs should be kept to a minimum so that the system is as accessible as possible, particularly since it relates to the individual's own information. At a minimum we would advocate that basic disclosures must be made available free of charge, given the link between deprivation, inequality and offending and therefore impacting on many people living in poverty. While we welcome SARs now being made available free of charge, any disparity between the price of SAR and basic disclosure creates a risk that some people may choose to provide employers and other opportunity providers with a SAR rather than a basic disclosure, or that opportunity providers may come to expect that people without convictions will choose to provide a SAR and that those with spent convictions will choose a basic disclosure. It is important that these potential unintended consequences are avoided.

Question 5: Do you agree that it is appropriate to regulate registered bodies in relation to B2B applications?

Yes ☐ No ☐

Question 6: What impacts, if any, do you foresee from moving from a paper based system to a digital system?

We deem this will be helpful in providing a more efficient and potentially easier process, which places greater ownership of the information shared with the applicant, including in sharing this with another person. Our concerns would be ensuring that the online system:

- is readily accessible for all
- that the processes and responsibilities on the individual to share this information are clearly understood
- that provisions remain to enable person-to-person contact and support as necessary

Questions 7: Do you agree with our proposed fee for the apostille service?

Yes ☐ No ☐
See response to question 4

Question 7a: If not, what do you think the fee should be?

Question 8: Are there any professions/roles for the Level 2 disclosure that are not included that should be on the list?
Yes ☐ No ☐

Question 8a: If you have said yes, please note what these are.

Question 9: Are there any professions/roles you think should be removed from the list?
Yes ☐ No ☐

Question 9a: If you have said yes, please note what these are.

Question 10: Do you agree with the proposal to remove certain kinship carers and all foster carers from a membership scheme?
Yes ☐ No ☐
See below for comment on these questions

Question 11: Do you think that the two types of kinship arrangements should continue to be treated differently under the future arrangements?
Yes ☐ No ☐

Question 12: Do you agree with this proposal that any member of the fostering/kinship household aged over 16 will require a level 2 check?
Yes ☐ No ☐

Question 13: Do you agree with the proposal that a level 2 check should be undertaken by anyone in the foster/kinship carers network who supervises the children?
Yes ☐ No ☐

Question 13a: Do you think that anyone else in the foster/kinship carer's network needs to be checked? If so, who and why?

Questions 10-13a
We deem that a proportionate and child-centred approach, which seeks as far as possible to keep the experiences of looked after children as close as possible to those of other children is important. We deem that the above proposals should be revised in keeping with this.

It is also important that the disclosure system is recognised as part of a process and not a risk assessment tool. Many identified issues of concern could be addressed through supportive approaches and discussions with carers and monitored by agency involvement, Local Authority risk assessments and checks, and within the context of wider processes such as MAPPA, child and adult protection, sex offender registration, looked after children reviews etc.

Question 14: It is currently not possible for individuals over the age of 16 residing in a residential school setting (for example, spouses of house parents), but who do not have specific responsibilities, to obtain an enhanced disclosure. We believe that they should be subject to a Level 2 disclosure, do you believe that this is the correct approach going forward?

Yes ☐ No ☐

Question 15: Which option should be the content of the Level 2 disclosure product be based upon? Please provide the reason for your choice.
Option 1 ☐ Option 2a ☐ Option 2b ☐

Question 16: Which price option do you prefer for the Level 2 product?
Option 1 ☐ Option 2 ☐
See response to question 4

Question 17: Is it proportionate that the free checks should continue for volunteers who obtain Level 2 disclosures?

Yes ☒ No ☐

Question 18: What issues, if any, do you foresee with a move to a digital service?
See response to question 6

Question 19: How should a mandatory PVG Scheme be introduced and how should it work?

Question 20: Do you agree with the proposal to replace the "regulated work" definition with a list of roles/jobs?

Yes ☐ No ☐

Question 21: Do you foresee any challenges for organisations from this proposed approach?

Yes ☐ No ☐

Question 22: Are there any roles/jobs not within the list in Annex B that you think should be subject to mandatory PVG scheme membership?

Yes ☐ No ☐

Question 22a: If so, please provide more detail on why.

Question 23: To avoid inappropriate membership, what criteria to you think should be used to decide if an individual is in a protected role?

Question 24: Do you think that the decision about whether someone who is in a protected role meets an exception which makes them ineligible for the PVG Scheme should be taken by Scottish Ministers?

Question 25: Are there roles that would not be protected roles and therefore ineligible for membership to the new scheme, that should, however, be eligible for a level 2 disclosure?

Question 26: Are there any welfare services that provide support to individuals with particular needs that should be added, or are there any services that should be removed?
Yes ☐ No ☐

Question 26a: If yes, please state what these are

Question 27: There is the question of the extent to which someone has to be involved in the delivery of a service to bring them within the scope of doing regulated work. At present, the front-line member of staff or volunteer whose normal duties require them to carry out certain activities with an adult, such as 'caring for', means that staff member is doing regulated work.

Is this appropriate?

Yes ☐ No ☐

Question 28: Should the immediate line manager of that member of staff is also able to become a scheme member?

Yes ☐ No ☐

Question 29: Outwith the activities, a person can be doing regulated work with adults if they work in certain establishments, namely, a care home; or in residential establishment or accommodation for people aged 16 or over.
Do you think these are the correct facilities, or should any be added or removed?

Yes ☐ No ☐

Question 29a: If yes, please state what these are

Question 30: There are also certain exclusions that apply to work in such establishments. A person whose normal duties involve working in such a place will only be doing regulated work if doing something permitted by their position gives them unsupervised access to adults, and where that contact with the adults is not incidental. Do you think this approach is clear and helpful?

Yes ☐ No ☐

Question 31: the appointment of a person into certain positions in relation to services for adults means that membership of the PVG Scheme is possible. The positions are:

- **member of a council committee or council sub-committee concerned with the provision of education, accommodation, social services or health care services to protected adults**
- **the chief social work officer of a council, and**
- **charity trustee of a charity whose—**

(a) main purpose is to provide benefits for protected adults, and
(b) principal means of delivery of those benefits is by its workers doing regulated work with protected adults.

Do you think that list of positions is correct?

Yes ☐ No ☐

Question 31a: Should it be amended either by adding to it, or by taking away from it?

Question 32: How long should scheme membership last in a mandatory scheme?
a) 5 years ☐
b) 3 years ☐

c) 1 year ☐

Question 33: Do you think a membership card would be beneficial to you as a member of the PVG scheme?
See below for comment on these questions
Yes ☐ No ☐

Question 34: Do you think a membership card would be beneficial to you as an employer?

Yes ☐ No ☐

Question 33-34
We do not see any substantial benefits from the introduction of membership cards. Although the consultation states employers could not simply rely on the presentation of a membership card as indicating a person could work with children or protected adults, in the context of the system being so poorly understood and the potential that such a card could be used as a form of validity or endorsement, we deem this could be an unintended consequence.

We have concerns about it being made an offence not to return a membership card when barred and do not see the benefits of this approach. However, we have a wider concern about all suggestions that bring the potential for individuals to face criminal prosecution for having failed to fulfil an obligation related to the disclosure system. As detailed, the lack of understanding of the system is well established and therefore the potential for inadvertent failures to comply with the responsibilities of this system is high. We would be highly concerned about the potential for such failures to be criminalised. As detailed further in question 75, many of the individuals whose information is handled through the disclosure system may face a range of other challenges such as learning disabilities, mental health issues, communication needs, and may have chaotic lives. Processes need to be as straightforward as possible for them to comply with requirements, and it would be harmful for them and their life chances to potentially gain more information that can be disclosed.

Question 35: Do you agree with the proposals to review the conditions for registered bodies as set out in the Code of Practice and Police Act 1997 and to develop a scheme that can be delivered digitally, that includes registered body duties where possible?

Yes ☐ No ☐

Question 36: What is your preferred option for membership and costs for PVG level disclosure?

Option 1 ☐ Option 2 ☐ Option 3 ☐
See response to question 4

Question 37: Are you in favour of being able to interact with Disclosure Scotland online to manage PVG scheme membership?

Yes ☐ No ☐
Please see our responses about the importance of person-to-person support.

Question 38: Are you in favour of using electronic payment method for fees?

Yes ☐ No ☐

Question 39: Do you have an electronic payment method that you prefer?
Yes ☐ No ☐

Question 39a: If you have answered 'yes' please say what it is:

Question 40: Do you have any proposals on how the transitional arrangements for moving away from a life-time scheme membership should work?

Question 41: Should volunteers continue to receive free membership?

Yes ☒ No ☐

Question 41a: If no, should they be subject to a reduced fee?
Yes ☐ No ☐

Question 42: Do you agree that voluntary organisations seeking to benefit from a reduced fee or the fee waiver should be subject to a public interest test?

Yes ☐ No ☒

Question 42a: If so, how should that test be defined?

Question 43: Do you agree that employees and employers alike (including volunteers and volunteering bodies) who work or allow an individual to work in protected roles without joining the PVG Scheme or to stay in protected roles after membership has expired should be subject to criminal prosecution?

Yes ☐ No ☐
See response to question 33-34

Question 44: Do you agree that any scheme member who fails to pay the relevant fee to renew their PVG Scheme membership and where there are no employers (or volunteering bodies) registered as having an interest in them in a protected role should exit the PVG Scheme automatically at the expiry of their membership?

Yes ☐ No ☐

Question 45: Should a person who joined the Scheme as a volunteer and benefitted from free entry later try and register a paying employer against their volunteer membership then the full fee would become payable and a new 5 years of membership would commence. Do you agree with this?

Yes ☐ No ☐

Question 46: Do you agree with our proposals to dispense with the current court referral procedure under section 7 of the 2007 Act?
Yes ☐ No ☐

Question 47: Are there offences missing from the Automatic Listing Order that you think should be included? You can access the order here
Yes ☐ No ☐

Question 47a: if you answered yes to question 47, please list the offences you believe are missing

Question 48: Do you agree with proposals to create new referral powers for the Police?

Yes ☐ No ☐

Question 49: Do you agree these powers should be limited to when police have charged a person with unlawfully doing a Protected Role whilst not a scheme member or where a referral has not been made by a relevant organisation?
Yes ☐ No ☐

Question 50: Do you think this proposal, to extent the powers of referral currently available to regulatory bodies to local authorities/health and social care partnerships, closes the safeguarding gap in terms of self-directed support?

Yes ☐ No ☐

Question 51: Do you think that this list of regulatory organisations with powers to make referrals should be amended?

- **Healthcare Improvement Scotland**
- **The Registrar of Chiropractors**
- **The registrar of dentists and dental care professionals**
- **The registrar of the General Medical Council**
- **The registrar of the General Optical Council**
- **The Registrar of health professionals**
- **The Registrar of nurses and midwives**
- **The Registrar of Osteopaths**
- **The registrar of pharmacists**
- **Social Care and Social Work Improvement Scotland (the Care Inspectorate)**
- **The General Teaching Council for Scotland**
- **The NHS Tribunal**
- **The Scottish Social Services Council**

Yes ☐ No ☐

Question 52: If you think the list should be amended, please gives details of additions or removals.

Question 53: Do you agree with the proposal to provide Disclosure Scotland with powers to impose standard conditions on individuals under consideration for listing?

Yes ☐ No ☐

Question 54: If yes, how long should the conditions last before lapsing?
a) 3 months ☐
b) 6 months ☐

Question 55: Under what circumstances do you think Disclosure Scotland should be able to impose standard conditions and why?

Question 56: Do you agree that it should be a criminal offence if an individual and employer/voluntary body failed to comply with standard conditions?

Yes ☐ No ☐

See response to question 33-34

Question 57: Do you agree the age threshold for the shorter prescribed period for a removal application from inclusion on the list(s) to be made should be raised?

Yes ☒ No ☐

Question 58: Which option do you prefer?

a) no change to the age threshold
b) raise the age threshold to under 21 years
c) raise the age threshold to under 25 years

Option A ☐ Option B ☐ Option C ☒

Option C would benefit a greater number of people with the ability to apply to be removed from the list(s) after shorter time frames; would be more consistent with the evidence on the peak age of offending, the distinct needs of young adults and on maturation and brain development, as detailed below; and could bring greater consistency with the changes detailed in section 6 and with legislative provision that recognises certain young people, for example care leavers, should be afforded additional support until the age of 26.

Question 59: Do you think it's appropriate that organisations, irrespective of where the regulated work is to be carried out, should be informed of a listed individual's barred status?

Yes ☐ No ☐

Question 60: Do you agree with our approach for PVG Scheme Members in a protected role overseas or organisations employing PVG members to do a protected role, such as providing aid services?
Yes ☐ No ☐

Question 61: We are proposing that there should be criminal offences in relation to organisations who employ barred persons overseas. Do you think that we should also consider introducing criminal offences in relation to barred individuals offering to undertake a protected role overseas?

Yes ☐ No ☐

Section 5 Offence Lists and the Removal of spent convictions from a disclosure

Question 62: Are there any offences missing from either list, those being schedule 8A or schedule 8B, that you think should be included? If so what are they, on what list should they appear and why?
See below for our response to these questions

Question 63: Are there any offences on schedule 8A that you think should be on schedule 8B? If so, please list them and explain why.

Question 64: Are there any offences on schedule 8B that you think should be on schedule 8A? If so, please list them and explain why.

Question 65: Do you agree with the categorisation of the new offences included in Annex C?

Yes ☐ No ☒

Question 65a: If no, please state how they should be categorised.

Question 62-65a
At a minimum, we would argue that once convictions become spent, the responsibility to evidence and argue for why the conviction should continue to be disclosed should fall to the state (with processes for representations, appeals etc. built into the system). We recognise that this is a fundamental change of direction but would advocate that fundamental change in the system is what is needed.

Notwithstanding the above, we question the rationale behind having two different lists and deem if the desire exists to simplify the system, then consideration should be given to developing one list of offences coupled with an individualised and nuanced approach that requires specific consideration in each case. This is an area where international evidence can be drawn upon. This individualised approach would take account of factors such as the context of the offence, which is especially relevant for children and young people, and should include factors like trauma, mental health and care experience; the nature and severity of the offence; age and maturity at the time of the offence; time since offence was committed (drawing on time to redemption research); engagement with services; progress in terms of risk and rehabilitation; and nature of the job/opportunity (Nolan, 2018; Weaver, 2018). We would welcome this type of individualised approach across the whole system of disclosure to avoid further disproportionate impact and discrimination by the system. In particular, Schedule 8A and 8B lists do not lend themselves to such approaches.

At the present time we have concerns about the number and very wide ranging offence types contained within the Schedule 8A and 8B lists, particularly taking account of the wide scope of behaviours contained within some of the individual offences. For example, Section 38 Criminal Justice and Licensing (Scotland) Act 2010 threatening or abusive behaviour is contained on the Schedule 8A but covers a wide range of offences and is one that children, particularly those in care, may accrue for fairly minor behaviours or those rooted in trauma. However, under the proposed arrangements all offences will continue to be treated the same, with the only distinction between offences being the list that they have been placed on. We urge that attention be given to this important matter, which appears to be missing in the current consultation.

For children and young adults (under the age of 25), we would argue that the current Schedule 8A and 8B offence lists are not fit for purpose and is a further area of the current system of disclosure which should be amended to distinguish between offences committed by children and young adults, and adults. We would advocate that a very small number of offences should be subject to specific consideration when they are committed in childhood, and would welcome the opportunity to reflect further on this and contribute further advice. Learning from international evidence could be useful here (for example, Sands (2016) has highlighted the international provisions for expunging and sealing childhood criminal records).

Particular provisions that we have concerns about are the current placement on the Current 8B list of the Sexual Offences (Scotland) Act 2009, s37(1) or (4) Older children engaging in sexual conduct with each other and the new additions of Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s.2 disclosing or threatening to disclose intimate photograph or film to schedule 8A, particularly where these offences apply to children, and to 8B the inclusion of Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016, s.1.

Question 66: Do you believe the rules for disclosure in the current form of 15 years and 7.5 years provide appropriate safeguarding and privacy protections?
See below for our responses to these questions
Yes ☐ No ☒

Question 67: Do you agree that a reduction in the disclosure periods from 15 & 7.5 years is appropriate considering the changing policy on rehabilitation of offenders?

Yes ☐ No ☒

Question 68: What period between 11 and 15 years do you think is appropriate for disclosure?

11 ☐ 12 ☐ 13 ☐ 14 ☐ 15 ☐

Question 66-68
As detailed in our previous consultation responses, we retain concerns about the timescales before which convictions can be deemed 'spent' and the fact that some convictions can never be considered spent. This is in spite of the evidence suggesting that these timescales may go beyond the point when the risk is predictive of future criminality, and indeed where the risk presented by an individual with a previous conviction may be comparable to the non-convicted population. In addition, we regard this as being unduly punitive in respect of article 8 of the ECHR (Weaver, 2018). We also deem blanket timeframes, with no scope for individual consideration as to when offences on schedule 8A or 8B list can become protected, is disproportionate and infringes rights (Nolan, 2018).

In terms of the proposals contained within the current consultation for reducing the disclosure periods in relation to schedule 8A and 8B offences, we would strongly recommend that these be based upon evidence, whereas the current proposals seem to be driven by the proposals contained within the Management of Offenders (Scotland) Bill. Weaver (2018) has summarised time to redemption research which investigate the period of time when in general, people with convictions can statistically be considered as exhibiting the same risk of reconviction as people with no convictions. The research suggests that in general after 7-10 years without a new arrest or conviction, a person's criminal record essentially loses its predictive value (see Weaver (2018) for further information). The above proposals are not reflective of this research evidence.

Moreover, the proposed timeframes are still significant periods within which individuals opportunities (or perceived ability to access opportunities) may be restricted. It should also be noted that although the

periods are shorter for under 18s, these represent a greater proportion of a child's life than those that apply to adults (House of Commons Justice Committee, 2017).

We deem this could be an area where we could learn from the approaches taken by other countries as detailed by Weaver's (2018) international review of the evidence and would welcome fuller consideration of the available evidence being undertaken.

Question 69: Do you think the application process to seek removal of a spent conviction should be reviewed?

Yes ☒ No ☐
See below for our response to these questions

Question 70: At present, an individual has three months from the date of notification of an intention to appeal to make an application to a Sheriff. Do you think this time period is:

Too long ☐ Too short ☐ Correct ☐

Question 70a: If you indicated that the time period is too long or too short, what do you think the time period should be?

Question 71: Do you think any of the options set out above, those being the *introduction of an administrative process stage prior to application to a sheriff, the introduction of an independent reviewer or making an application to a tribunal,* offer viable alternatives to an application to a Sheriff?

Yes ☐ No ☐

Question 71a: If yes, which one?

Question 71b: If not, do you have any other suggestions?

Question 69-71b
Yes we believe the application process to seek removal of a spent conviction should be reviewed. The evidence contained within the Consultation document is clear and echoes the significant issues we have heard from those who have considered such an appeal: costs, length of time, uncertainty of how to apply, and inconsistent information and lack of support, with virtually no one available to provide the necessary information or support. These are major prohibiting factors. As a result, the current system is not working as it should and the rights made by law are proving to be extremely difficult to exercise. It is critical that learning from this evidence informs any reform to the application process. We believe that the maintenance of the status quo cannot be an option.

If the onus was placed on the state to apply for the continuation of disclosure of spent convictions as detailed above the following would not be necessary.

None of the options proposed in the consultation are perfect. We deem that Disclosure Scotland should not have the responsibility for making decisions regarding the removal of information and that this process, if it is to be implemented, should be independent of Disclosure Scotland. The introduction of an administrative process stage would also introduce a further stage into what is already a complex process.

We deem the use of the Independent Reviewer could be beneficial and introduce a level of consistency to the system. However, it is critical that this individual is truly independent, and of course appropriately

skilled and knowledgeable, given the significance and complexity of the decision that will be made. Finding an individual who is able to do so is likely to be challenging as even skilled professionals including legal professionals find the system of disclosure difficult to understand and navigate.

For reasons of accessibility and equity we would argue that there should be no fee for appeals. Timely decision making is critically important as any delay can flag to an employer or opportunity provider that there is a potential issue, which can result in missed opportunities, stigma and discrimination.

As detailed elsewhere, we still retain concerns that each of these options leave the onus for application for removal of information with the individual to exercise to have their rights fulfilled. Individuals are being asked to do so within the context of the system that is poorly understood. Moreover, individuals with convictions are frequently disenfranchised, their motivation to fight the system has often been lost and it may be difficult for the individual to see the benefits of doing so. It is also recognised that even where the system had been amended to promote rights compliance, the extent to which young people were supported and equipped with the tools to utilise these rights was limited. Therefore any such changes in future need to be accompanied with support to understand the process and exercise rights.

Question 72: Do you agree that Ministers should have a power to issue statutory guidance to Police Scotland on the processes governing the generation and disclosure of ORI, including seeking representations from the individual before issuing it for inclusion on an enhanced disclosure or PVG scheme record?
See below for our responses to these questions
Yes ☐ No ☐

Question 73: Do you agree with Ministers proposals to allow for representations to the chief constable before disclosure of ORI to a third party and for providing the individual with the option to appeal to an independent reviewer before ORI is disclosed?

Yes ☐ No ☐

Question 74: Do you agree that the independent reviewer being appointed under the ACR Bill should be used for reviewing ORI?

Yes ☐ No ☐

Questions 72-74

The provisions contained within the consultation in respect of Other Relevant Information (ORI) relate more to revising the process of disclosing ORI rather than reform to the use of ORI. Whilst we understand the arguments behind the use of ORI; that the numbers of enhanced and PVG scheme record disclosures that contain such information are small; and that some provisions for review currently exist, we have concerns about ORI in general and the current approaches to ORI. ORI by definition allows for the disclosure of non-conviction information (including unsubstantiated claims, cases that proceeded to court but did not result in conviction, allegations etc.) and can include information beyond the individual concerned for example in respect of family members (Grace, as cited by Weaver, 2018; Weaver, 2018). As such this raises fundamental questions about an individual's right to a fair trial, right to private and family life, and the implementation of the best interests of the child being a primary consideration as enshrined in the UNCRC and ECHR. We also have concerns regarding:

- provisions for such information to be disclosed indefinitely
- inclusion of information about behaviour from any age (including childhood) in spite of the increase of the age of criminal responsibility

- the delays that the consideration of such information can bring to processes (for example, the Care Inspectorate consider such information in discussing fitness to practice)
- the evidenced detrimental impact of such information on ability of an individual to access opportunities (for example see Weaver, 2018).

We would welcome further discussion about ORI in general and particularly in respect of children. We therefore provide the following comments in light of these views and concerns.

If ORI is to continue to be disclosed, measures are needed as detailed in the consultation to address the concerns with current practice. These include:

- the unpredictability of what could be included which makes it difficult to appropriately advise and support young people regarding this
- lack of transparency of this process, in part as a result of the limited guidance available in respect of decision-making
- lack of ability to challenge this information (and to have this removed or adapted) prior to the being included on a disclosure certificate
- the potentially negative interface with other areas of policy, for example the Whole System Approach, if information in terms of cases dealt with through Early and Effective Intervention or Diversion from Prosecution could be included as ORI (it is noted that the UN Committee on the Rights of the Child (2007) has recommended that diversion from judicial proceedings should lead to a definite and final closure of the case without the child being treated as having a criminal record or previous conviction) (Nolan, 2018).

In themselves however the effectiveness of the proposed measures is likely to be limited. Again there may be scope here for the onus being on the police to defend why they want to disclose ORI on a case-by-case basis, as opposed to the onus being on the individual to challenge proposed ORI and have this removed or adapted. As detailed elsewhere, if individuals are going to be able to utilise such provisions, the rights and opportunities to request a review need to be clearly communicated to individuals; appropriate support must be provided to make such challenge and representations so these measures can be utilised; the process should be as easily understood and as simple as possible; timescales should be set for how long this process should take to avoid unnecessary delays and the resulting impact on opportunities; and there should be no costs for doing so. This is essential if these provisions are to become real opportunities and rights, not only rights in law that are extremely difficult to exercise in reality and indeed are inaccessible to many.

We would welcome provisions for monitoring the frequency with which ORI is being shared and the circumstances for doing so. We retain concerns about the independence of the police in undertaking the first stage of reviewing whether ORI should be disclosed having considered an individual's representations and would be interested to know how frequently the existing right to seek a review by the chief officer has resulted in changes to information. This is an area we would like to be monitored and this information to be made publically available. We wonder in addressing this, as well as attempting to simplify the system, whether it would be more appropriate for review by the independent reviewer to be the first line of review. For example, when the police intend to disclose ORI, the individual is notified and given the opportunity to make representation, which is considered along with representations from the police by the independent reviewer, with a subsequent right of judicial review.

Overall, we would also echo Grace (as cited by Weaver, 2018) in concluding that having a set of principles to underpin the moderated disclosure of such information would be beneficial. Ultimately any disclosure of ORI should meet various tests, including the alleged committal of a sufficiently serious offence which there is reasonable certainty was committed by the individual, that the information to be disclosed is relevant to the purpose of the disclosure and that the individual has had the opportunity to comment upon the information that could be disclosed (Grace as cited by Weaver, 2018).

Question 75: Should there be specific provisions reducing the possibility of the state disclosure of criminal convictions accrued by young people 12 years or older on all types of disclosure?

Yes ☒ No ☐

We would argue that change in the current system to distinguish between offences committed by children and by adults would give more appropriate emphasis to the public's right to protection but also to the rights of individuals, as detailed elsewhere, including to "move on" from offending behaviour and to put offences committed in childhood behind them (Nolan, 2018). As such we welcome the intent and provisions within the consultation to reduce the possibility of the state disclosure of criminal convictions by children and young people. The rationale behind this is clear on multiple levels.

Children are not mini adults, they have different developmental needs and legal status which are recognised in the unique approaches to children and to offending by children, including the aims, systems, processes and frameworks within which their behaviour is addressed (Nolan, 2018; SCYJ, 2017). However, the current limited distinction between the treatment of criminal records accrued in childhood is 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 (Nolan, 2018). For example:

- Scotland wants to be the best place to grow up, where we get it right for every child, but it is difficult to see how this can be achieved when we routinely penalise our children into adulthood for minor infringements in childhood
- Within our welfare-based Children's Hearings System when offence grounds are established or are accepted by the child these are treated as convictions
- Measures within our Whole System Approach that aim to avoid the criminalisation of children and to keep children out of formal systems, such as Early and Effective Intervention and Diversion from Prosecution, can result in information that can be disclosed
- In spite of clearly-articulated corporate parenting duties and the legislatively enshrined responsibilities to safeguard the rights and promote the wellbeing of care experienced young people, large numbers of looked after children and care leavers attract a criminalising state response, bringing records that last into adulthood and compounding negative outcomes.

As such, the current system of disclosure inherently hampers the ability of other legislation, policy, systems and practice to achieve their aims and fulfil their responsibilities to children and young people. It also impedes the meeting of our obligations under the UNCRC which enshrines that the best interests of the child should be a primary consideration; the child's right to private and family life; treatment of children who infringe penal law should take into account their age; children who have been in conflict with the law should be enabled to reintegrate into society; and expects State Parties to promote the establishment of laws and procedures that are specifically applicable to children.

We also know that there are differences between offending in childhood and adulthood, including the nature of childhood offending. Low level offending is a common feature of childhood as children grow and test boundaries, with 95% of children in Scotland self-reporting that they commit an offence at some point in their childhood (such as stealing from mum's purse, graffiti, underage drinking) (McAra and McVie, 2010; CYCJ, 2016). Research highlights a natural maturational tipping point for the majority of children who "grow out" of offending (CYCJ, 2016). Offending by children is currently regarded as a short and long-term indicator of risk (SCYJ, 2017). In fact, the evidence is that child offending is a poor indicator of future behaviour as an adult (Children's Commissioner for England, as cited by House of Commons Justice Committee, 2017). This information further underlines the need for specific provisions for children and young people relating to the disclosure of criminal records accrued in childhood.

Only a small percentage of children involved in offending behaviour cause major concerns owing to the frequency and severity of their offending (CYCJ, 2016). It is well established that a high proportion of

these children are amongst the most vulnerable, victimised and traumatised children in society, having often had multiple experiences of childhood adversity; neglect; abuse; loss and bereavement; inequality and deprivation; experiencing physical and mental health needs; speech, language and communication needs; and learning disabilities, with offending increasingly recognised to be an indicator of wellbeing need (CYCJ, 2016). In addition, in spite of only 0.28% of the population being care experienced, a third of young people in custody have reported being care experienced. It is acknowledged that the behaviours of looked after children are more likely to have been reported to the police, including for minor offences and trauma-related behaviours – and therefore to attract a criminalising state response – than Scotland's child population in general (Nolan, 2018; Broderick and Carnie, 206; Scottish Government, 2018). This means that the disclosure of childhood criminal record information has a disproportionate impact on certain children and "while a conviction is not a protected characteristic, the ways in which it intersects with protected characteristics means that barriers relating to convictions have an impact on equalities" (Thomson, Laing and Lightowler, 2016, p.iii). We would echo the conclusions of the House of Commons Justice Committee (2017) that the disclosure regime causes secondary discrimination to certain already stigmatised and discriminated groups of children who are disproportionately represented within the criminal justice system, as detailed above. We know that bias, discrimination and stigma against people with criminal records remains very much alive, with devastating consequences. Reducing the possibility of the state disclosure of criminal conviction accrued in childhood should to some extent have a positive impact on these issues.

The wide ranging and particularly destructive effect of childhood criminal records has been well established and therefore efforts to reduce the disclosure of childhood criminal records are welcomed (see for example House of Commons Justice Committee, 2017; Carlile, 2014; Sands, 2016). It is widely recognised that criminal records can adversely affect access to employment, education, training, volunteering opportunities, housing, insurance and visas for travel (House of Commons Justice Committee, 2017; SCYJ, 2017). Many of these factors are recognised as critical in reducing reoffending; supporting reintegration which should be promoted in accordance with the UNCRC; promoting desistance; and in children's development into adulthood (Nolan, 2018). These are areas where children often already face disadvantages, for example by virtue of their age, the common prevalence of school exclusion, poorer educational outcomes, lack of networks and lack of previous employment, training or experience, which can be exacerbated by having to disclose their previous convictions for lengthy time periods (CYCJ, 2016; Smith, Dyer & Connelly, 2014; Moodie & Nolan, 2016). It is also recognised that conviction disclosure is inherently anxiety-provoking for individuals with convictions, often being experienced as traumatic, stigmatising and embarrassing, which can result in the limiting of horizons, avoidance of accessing opportunities such as volunteering, education and employment or a mismatch between attainment and abilities, as well as detrimentally impacting on individual's wellbeing and identity (Thomson et al., 2016). The above factors combine to bring real and psychological barriers to improving life chances and outcomes, causing significant issues for children at key transition points and just when they are trying to change and turn their lives around (Children's Commissioner for England, as cited by House of Commons Justice Committee, 2017; SCYJ, 2017).

Distinguishing between child and adulthood records is possible and is done in the majority of jurisdictions internationally. It has been concluded that such distinction is needed for a child-friendly system (Sands, 2016; Nolan, 2018). Drawing on this international learning would be useful in developing specific provisions reducing the possibility of the state disclosure of criminal convictions accrued by children and young people on all types of disclosure. We would like to see this include provisions of expunging childhood records (Sands, 2016).

One significant further point in relation to the current proposals is that these benefits will not extend to those individuals who were under 18 at the time of the offence being committed, but were over 18 at the time of conviction. We are aware that there can be significant system delays between the time of offence and the time of conviction and deem it to be unjust for some children to be unfairly penalised and excluded from such protections as a result. Moreover, it is critical that these provisions also apply to adult applicants

who have convictions from adolescence in the interests of equity, fairness, upholding of rights and in reducing the complexity of the system, even if this brings additional resource implications.

Question 75a: If there should, what age range should the special provisions apply to?

1. **12 – 14 years ☐**
2. **12 – 15 Years ☐**
3. **12 – 16 years ☐**
4. **12 – 17 years ☐**
5. **12 – 18 years ☐**
6. **12 – 21 years ☐**

Question 75b: Please tell us why you have selected an age range or given your answer.

We deem that we have a window of opportunity to take a developmental, circumstantial, proportionate and needs-led approach, as opposed to being driven by arbitrary age related thresholds. This type of reform would be in keeping with a rights-based system that affords scope for individualised responses, regardless of age.

However, should an age range be established we would suggest that this should extend to children and young adults aged from 12- 25. The rationale behind this age range exists on numerous levels. This is consistent with the peak age of offending and would recognise the emerging evidence that the brain is not fully mature until mid-20s and that psychosocial and cognitive development continues up to age 25 (and possibly even beyond) (McEwan, 2018). As a result, it has been concluded that, child and youth justice rationale and functions should extend to the young adult age group because of psychosocial immaturity (McEwan, 2018). Similarly, such recognition would afford consistency with the attention being given to young adults within the criminal justice system, with the House of Commons Justice Committee concluding that "there is a strong case for a distinct approach to the treatment of young adults in the criminal justice system" (2016, p.3) and that "[d]ealing effectively with young adults while the brain is still developing is crucial for them in making successful transitions to a crime-free adulthood" (2016, p.3). Specifically, the House of Commons Justice Committee (2017) concluded on the disclosure of youth criminal records that their recommended new approach to the treatment of such records should also be considered for young adults up to the age of 25. As detailed above, the impact of the disclosure of records is highly significant on children and young people who are making transitions. This particular age range is one in which children make multiple transitions, but as detailed above they often do not have the previous experience to buffer the impact of such records. The consequences of the disclosure of criminal records may frustrate their efforts of moving on with their lives and desisting from offending (House of Commons Justice Committee, 2016). This would also be in accordance with other policy and legislation including the UNCRC and the Children and Young People (Scotland) Act 2014, which defines childhood as up to 18; the Whole System Approach where many areas have already, or are interested in, extending such support up to 21 or 26 years; and the duties on corporate parents to care leavers up to (and including) the age of 25 under the Children and Young People (Scotland) Act 2014 in order to uphold the rights and safeguard the wellbeing of these young people and young adults.

Questions 76: Should there be a presumption against the disclosure of all convictions accrued between 12 and a specified upper age, with the only possibility being police disclosure as ORI after ratification by the Independent Reviewer on the Level 2 and PVG Level disclosures?
See responses to these questions below
Yes ☐ No ☐

Question 77: Should there be no state disclosure of any conviction between the age of 12 and the specified upper limit, except where the conviction is for an offence listed in schedule 8A or 8B?

Yes ☐ No ☐

Question 78: If there is a disclosure of an 8A or 8B conviction(s) should all other unspent convictions be disclosed even if the other unspent convictions are for offences not listed in schedule 8A or 8B?

Yes ☐ No ☐

Question 79: Should disclosure applicants with 8A and 8B convictions be able to apply immediately to a sheriff (or other authority) to have those treated as protected regardless of the passage of time?

Yes ☐ No ☐

Question 80: When including ORI on any disclosure about conduct between the age of 12 and the upper age limit should the police only be able to refer to matters they reasonably considered to be serious?

Yes ☐ No ☐

Questions 76-80
Again we do not deem that any of the options included in the consultation offer a complete solution. Option 1 is the status quo, which for the reasons above we deem untenable. Option 3 offers only limited change and protection. We would express concerns about the additional complexity this option would bring to the system and the well-established difficulties people have in exercising their rights, in this instance regarding the application for removal of conviction information accrued between 12 and this upper age limit.

In terms of option 2, we would welcome the introduction of no automatic disclosure of a conviction accrued between the ages of 12 and 25, for the reasons detailed above and deem this option would afford the greatest protection. We deem the introduction of the independent reviewer in determining whether information should be included on Level 2 and PVG level disclosures will support greater consistency to the process, given that this will bring arrangements in line with the decision making processes for under 12s and the proposals detailed elsewhere in this consultation for this role. However, we deem it to be important that this role is truly independent; is provided with clear and accessible information to guide decision-making and bring transparency to the process, which should detail the limited specified exceptions whereby information will be considered for disclosure (which we would suggest should only include conviction information, which has gone through the rigour of the judicial process). The onus should be on system to justify the inclusion of such information, not on the individual to challenge this. It is also important that a right to make representation and to challenge the decision of the independent reviewer is introduced to this process. Our concerns about ORI have been detailed elsewhere in this response. Given our hope that only conviction information would be disclosed in the aforementioned circumstances, we believe it may be more beneficial to avoid referring to this as ORI. We deem that each of these matters need to be addressed if the system is to embody the best interests of the child as a paramount concern.

It is critical that these provisions also apply to adult applicants who have convictions from adolescence in the interests of equity, fairness, upholding of rights and in reducing the complexity of the system, even if this brings additional resource implications in building capability, including for the police and the independent reviewer service.

Question 81: Do you agree with the proposal to place a lower age limit on applicants for criminal record checks?

See response to these questions below

Yes ☐ No ☐

Question 82: In what circumstances should a criminal record check for a child under 16 be permitted?

Question 81 and 82

These circumstances should be considered on an individual basis, taking account of the context of the situation, providing scope for a more individualised response and greater discretion in the system. We deem this the only way that the best interests of the child can be a paramount concern.

Question 83: Do you have any concerns with the proposal to introduce a minimum age of 18 years for people who want to become registered person or those who are nominated to be countersignatory in connection with Level 2 and PVG Level disclosures?

Question 84: Do you think a supported person arranging self-directed social care should have access to vetting information which could include details about previous convictions relating to a prospective carer?

Yes ☐ No ☐

Question 84a: If you responded 'No' to Q84 , do you have any suggestions about how Disclosure Scotland checks could be structured to assist a supported person making their own arrangements for self-directed social care?

Question 85: Do you think this approach for private individuals working with children or protected adults is correct?

Yes ☐ No ☐

Question 86: Do you think that specialised interpreters whose assistance may be needed to allow a person to participate in day-to-day life it should be regulated work?

Yes ☐ No ☐

Question 87: Should vetting information be available if the arrangements are being made by a private individual?

Yes ☐ No ☐

Question 88: Do you agree that the law be changed to sort this anomaly that a charity must have one main purpose only, that is work with children or work with protected adults, for a trustee to be able to join the PVG Scheme and if a charity has as its main purpose services directed at both vulnerable groups then trustees cannot apply to join the PVG Scheme?

Yes ☐ No ☐

Question 89: Do you think that provision should be made to bring into force the amendment at section 78(1) of the 2007 Act that would have allowed information about a notification requirement under the 2003 Act made following an application by a chief constable to be included on a basic disclosure?

Yes ☐ No ☐

Question 90: Please tell us about any potential impacts, either positive or negative; you feel the proposals in this consultation document may have on any particular groups of people?
We would like to see the equality impact assessment to inform our response to this question.

Question 91: Please tell us what potential there may be within these proposals to advance equality of opportunity between different groups and to foster good relations between different groups?
As question 91

Question 92: Please tell us about any potential impacts you think there may be to particular businesses or organisations?
We would like to see the business and regulatory impact assessment to inform our response to this question.

Question 93: Please tell us about any potential impacts you think there may be to an individual's privacy?
We would like to see the privacy risk assessment to inform our response to this question.

Question 94: Please tell us about any potential impacts, either positive or negative; you feel the proposals in this consultation document may have on children?
We would like to see the children's rights and wellbeing assessment to inform our response to this question.

How satisfied were you with this consultation
We are of the opinion that the current consultation is fundamentally flawed because it does not address the wider, more systemic and fundamental changes required to ensure a fair, effective and rights compliant system of disclosure. Additionally, we have found responding to this consultation inherently difficult and fear that the length, content and questions contained within the consultation will have limited its accessibility and reduced the number and extent of responses and the range of people who have been able to respond. Even though we have had long-standing involvement in this field, it has taken us huge amounts of time and effort to develop this response. The piecemeal approach to the reform reflected in the structure of the document also renders it difficult to really think about the system that we want and the reform that would be needed to achieve this.

As a further general point we have concerns about some of the language utilised, including references to "offenders", criminals, young people rather than children, those who "persistently get in trouble with the law", and reference to "convictions" within the context of the Children's Hearings System.

We recognise we have a real window of opportunity to truly and holistically reform the current system of disclosure but fear that this opportunity has not yet been utilised to the greatest effect. We therefore urge a pause in the consultation process to allow review with stakeholders and relevant Government Departments. This would enable amendments to be made that would address the shortcomings of the current consultation and allow re-engagement in discussion around the fundamental changes that are needed to the disclosure system, which should start with agreeing the basic purposes of disclosure and the principles required to underpin the system of disclosure. CYCJ and the Improving Life Chances Implementation Group would welcome the opportunity to engage in such discussions.

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