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Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018

RESPONDENT INFORMATION FORM

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Full name or organisation's name

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

QUESTION 1

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

Comment

We welcome the opportunity to comment on the Police Act 1997/Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018. For the purposes of this consultation, we have focused our answers on the impact we believe this Order will have on children and young people who offend under the age of 18.

We note that this Order has come about as a direct result of the judgment in *P v Scottish Ministers* [2017] CSOH 33, which found that the provisions of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 unlawfully and unjustifiably interfered with the petitioner's rights to privacy and family life under Article 8 of the European Convention on Human Rights (ECHR). However, we believe that this consultation offers an opportunity to explore the wider impacts of Scotland's current disclosure system on children's human rights.

The 2015 Remedial Order also came about as a result of a successful Article 8 ECHR challenge via *R(T) v Chief Constable of Greater Manchester Police and Others* [2015] AC49 ("T"). The judgment in the case '*found that requirements in relation to blanket disclosure of all spent convictions were not in accordance with the law* [in England and Wales]'[a]

The Scottish Government then sought to amend Scots Law to ensure that similar provisions were ECHR compliant. However, these amendments offered children and young people significantly different provisions to those adopted in England and Wales. At the time, we expressed concern in relation to the amount of time it took for a Schedule 8B offence to disappear from a higher level disclosure or PVG Scheme Record (7.5 years for a Schedule 8B conviction before the age of 18 years and 15 years for a Schedule 8B conviction after the age of 18). We note that this proposed draft Remedial Order does not seek to assuage those concerns.

We would suggest that the changes proposed by the 2018 proposed draft Order attempt to take a piecemeal approach, where what is really required is a wholesale review of the disclosure system in Scotland.

We recognise that the disclosure system in Scotland is primarily designed to safeguard children and young people and vulnerable adults. It is therefore important that robust systems are in place to ensure that they can be protected from harm.

[a] https://www.ucpi.org.uk/wp-content/uploads/2017/02/RT-v-Chief-Constable-of-Greater-Manchester-Police-2015-AC-49.pdf

At the same time, we know that the current system of disclosure can severely limit the life chances of someone who commits an offence in childhood and can prevent them from pursuing opportunities which would otherwise be open to them. There is therefore a delicate balance to be struck between public protection and allowing a child or a young person to move on from offending behaviour.

The disclosure system in Scotland is in stark contrast to the Children's Hearings system, which is regarded as an exemplar worldwide for its approach towards recognising the link between a child or young person's offending and unmet welfare needs.

Rights Framework

As previously stated, *P v Scottish Ministers* [2017] CSOH 33 primarily focused on Article 8 of the European Convention on Human Rights[a], that is the right to respect for private and family life.

However, the issue of criminal records and disclosures for those convicted of offences under the age of 18 engages several other significant children's human rights.

Article 16 of the UNCRC protects children and young people from *'arbitrary and unlawful interference with his or her privacy',* stating that children and young people also have the right to protection from *'unlawful attacks on his or her honour and reputation'.*[b] Article 16 of the UNCRC both reinforces and aids in the interpretation of Article 8 of the European Convention on Human Rights in relation to children and young people.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as the Beijing Rules) clearly state that any juvenile justice system should be designed to promote the well-being of the young person and that any response to a child or young person's actions should be proportionate to what they have done.[c] However, the current system of disclosure does not allow some children and young people who have committed an offence under the age of 18 to leave such behaviour in the past. A single minor incident can persist on a child's record for the rest of their life and adversely affect their life chances, something that would appear to run directly counter to the 'proportionality' principle set out in the Beijing Rules.

Under the United Nations Convention on the Rights of the Child (UNCRC), Article 3 states that *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration'*[d]. However, there is little to suggest that it can ever be in a child's best interests to have an incident in childhood follow them into adulthood, save where this is required to allow them to access appropriate support or in the interests of public protection.

[a] http://www.echr.coe.int/Documents/Convention_ENG.pdf
[b] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
[c] http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf
[d] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

In 2007, the United Nations Committee on the Rights of the Child produced General Comment No. 10 which sought to explore children's rights in juvenile justice.[a]

In that document, the Committee set out clearly their view that children and young people diverted from prosecution should not be viewed as having a criminal record, stating that '*The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as 'criminal records' and a child who has previously diverted must not be seen as having a previous conviction'.*[b]

Article 40 of the UNCRC states that diversion from prosecution should always be considered for children and young people in conflict with the law, where human rights and legal safeguards can be fully respected[c].

Understanding the Implications of an Offence in Childhood

Children and young people themselves may have a limited understanding of the longer-term impact of admitting to, or having an offence ground established, via a Children's Hearing.

In *P v Scottish Ministers* [2017] CSOH 33 the petitioner stated that he was unable to remember *'too much about what happened at the hearing'*[d] when he was 14 years old and that he considered that the matter had been left in the past until an offer of employment was withdrawn as a result of conviction information appearing on his PVG Scheme Record nearly 30 years later.

At a recent Young People's Human Rights Gathering organised by our office[e], young people also told the Commissioner that they did not understand the information that was included on their higher level disclosure certificates or PVG Scheme Records, and the decision-making process behind this. They clearly felt that it was unfair and disproportionate that minor incidents that took place when they were young and vulnerable were still inhibiting their life chances as they moved into adulthood. The issue of childhood offences appearing on higher level disclosures and PVG Scheme Records is also something that has been consistently raised by those contacting my office for advice around children and young people's rights.

Whatever the new disclosure provisions might be for those convicted under the age of 18, there needs to be clear information provided to children and young people at the point where a Children's Hearing takes place and at the point where their conviction is due to disappear from their record.

It would be inappropriate for the Children's Reporter to provide such information, as they have an interest in the child accepting the grounds. The legislative framework around this issue is also so complex that we believe it would be unfair to expect

[a] http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf
[b] http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf
[c] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
[d] https://www.scotcourts.gov.uk/search-judgments/judgment?id=70d42ba7-8980-69d2-b500-ff0000d74aa7
[e] CYPCS Young People's Human Rights Gathering, November 2017

individual panel members to be familiar with and able to explain the implications of admitting to or having an offence ground established to a child or young person in a Children's Hearing.

General Comment 10 also explores how children and young people can be allowed to move on from offending behaviour stating that governments should *'introduce rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions (e.g. not having committed an offence within two years after the last conviction)'.*[a]

Linking the length of time a young person is on a Compulsory Supervision Order (CSO) to the length of time for which a 'conviction' is disclosed treats a CSO as a sentence which is directly related to the seriousness of the offence and the ongoing risk posed by the young person. This is a complete misunderstanding of the way in which the Children's Hearings system operates. In fact, the length of time for which a CSO persists is more accurately related to the young person's vulnerability. A child may enter the Children's Hearings system on offence grounds but still be on a supervision years later for reasons that have nothing whatsoever to do with offending.

In 2016, the UK's record in implementing the UN Convention on the Rights of the Child was examined by the UN Committee on the Rights of the Child. In their Concluding Observations, the Committee expressed concern at the very low minimum age of criminal responsibility in Scotland and recommended that it be raised in accordance with acceptable international standards.[b] We would suggest that the forthcoming legislation to raise the minimum age of criminal responsibility in Scotland would provide an excellent opportunity to examine the wider impact of current justice provisions on children and young people.

The UN Committee on the Rights of the Child also stated in 2016 that children in conflict with the law should *'always be dealt with within the juvenile justice system up to the age of 18 years'* and that governments should ensure that *'diversion measures do not appear in children's criminal records'*[c]

Other children's human rights which may be engaged in relation to this consultation include Article 24 which recognises the child or young person's right to the highest attainable standard of health (including mental health) and Articles 28 and 29 which recognise the child's right to education and for that education to develop the child's talents and personality to their fullest potential.[d]

The independent Advisory Group on the Minimum Age of Criminal Responsibility found in 2016 that offence grounds often impact on children and young people[e] most at transitional points in their lives, for example, when they are transitioning from school to college or university or where they are seeking their first employment.

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[a] http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf
[b] http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fCO%2f5&Lang=en
[c] http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fCO%2f5&Lang=en
[d] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
[e] https://consult.gov.scot/youth-justice/minimum-age-of-criminal-responsibility/supporting_documents/00497071.pdf

Were measures to be put in place to alleviate some of the difficulties young people experience at key transition stages, then it is likely that this will lead to improved longer-term outcomes for them and provide a clear incentive for them not to repeat the offending behaviour.

Children's Hearings (Scotland) Act 2011

We remain frustrated that Sections 187 and 188 of the Children's Hearings (Scotland) Act 2011 remain uncommenced, as we believe that these Sections would offer a more child-centred approach, consistent with the ethos of the Children's Hearings System and provide a solution to the key issues raised by the *P v Scottish Ministers* [2017] CSOH 33 judgment.

As with the Remedial Order, Sections 187 and 188 of the 2011 Act are designed to amend the Rehabilitation of Offenders Act 1974 and allow some offences dealt with through the Children's Hearings system to be recorded as Alternatives to Prosecution.

For the purposes of the 2011 Act, offences have been categorised and divided into lists, to ensure that the most serious of offences continue to be disclosed, and lesser offences are removed from disclosures more quickly.

A Scottish Government led expert stakeholder group, of which our office was part, carefully considered which offences should appear on which list, taking into account spectrum offences (that is, those ranging from a very minor incident to a more serious event) and the likely risk of a child or young person re-offending.

The lists of offences created by the 2015 Remedial Order (i.e. Schedule 8A and Schedule 8B) do not mirror the 2011 Act lists. Neither do they offer any real prospect of risk assessing whether an individual child or young person is likely to re-offend, or take into account the context in which the offending behaviour took place. As such, the approach taken by both the 2015 and proposed 2018 Remedial Orders is most unhelpful.

To provide an example of how this approach can impact negatively upon children and young people, the current Schedule 8A includes the offence of 'Threatening and Abusive Behaviour'. This is a spectrum offence which is most commonly used for children committing extremely minor infractions. We are aware of children who have acquired lifetime criminal records as a result of pushing over a Christmas tree or throwing a carrot at a residential worker.

It should be noted that the United Nations Convention on the Rights of the Child defines a child as someone up to the age of 18. As such, we believe the best approach is to commence Sections 187 and 188 of the Children's Hearings (Scotland) Act 2011 and for the remit of the Children's Hearings System to be extended to include all under 18s.

Without this key change, there is a danger that 16 and 17 year olds coming into contact with the justice system for the first time (e.g. it is their first offence and they are not under a Compulsory Supervision Order) will be subject to harsher rules than

under 16s or those already in contact with the Children's Hearings system.

Automatic Removal of Offence Grounds from Higher Level Disclosure Certificates and PVG Scheme Records

A key element of Sections 187 and 188 of the Children's Hearings (Scotland) Act 2011 was that they were designed to ensure that offences could be recorded as alternatives to prosecution and that these could automatically be removed from higher level Disclosure Certificates and PVG Scheme Records after 3 years, unless there was a compelling case made for such information to be retained.

As previously stated, commencing Sections 187 and 188 of the Children's Hearings (Scotland) Act 2011 would provide for a more child-centred approach to be taken, which still allowed for information to be retained where the child/young person was thought to pose a continued risk to themselves or to others. Provision was also made for further risk assessments at set points after a conviction, in order to allow a child or a young person more than one opportunity to modify their behaviour and move on from an incident. Otherwise, there is little incentive for someone to behave differently, if one incident, or a series of incidents which may have taken place at a difficult point in a child or young person's life, continues to follow them throughout life.

If these provisions remain uncommenced, then we believe that the proposed draft Remedial Order 2018 should reflect the spirit of the 2011 Act. As currently worded, the proposed draft Remedial Order 2018 suggests that the onus should be on the person with a conviction to try and have information removed from the higher level disclosure certificate or PVG Scheme Record via application to the Sheriff.

As previously stated, many children and young people (and those supporting them) remain unaware of the long-term impact of admitting to or having offence grounds established when attending a Children's Hearing.

The approach suggested by the proposed draft Remedial Order 2018 appears to be based on the premise that:

a) Children and young people will always be aware of the long-term impact of admitting to or having an offence ground established by a Children's Hearing
b) Children and young people will know when 7.5 years have passed (and that this is the length of time they are required to wait before attempting to have a conviction removed)
c) Children and young people will know how to, and have the means to, apply to the Sheriff to have information removed from their disclosure certificate or PVG Scheme Record
d) All children and young people will have equal access to such processes

We would instead argue that where there is concern about the ongoing risk posed by someone convicted under the age of 18, then the onus should be on authorities to argue against a presumption that such information be automatically removed after a set period of time. Any decision taken about whether to retain or remove information from a record should be based on a stringent risk assessment process, which takes

into account the young person's individual needs and circumstances, and any risk they might pose to themselves or others.

We would also take issue with the inertia-based system being proposed, whereby if no application is made to the Sheriff that automatic disclosure of a spent conviction for an offence on Schedule 8A will continue indefinitely. This is likely to disproportionately affect some young people, including those with limited access to family support and those with learning or communication difficulties. As such, it may also be liable to further legal challenge.

15 years/7.5 years Rule

The 7.5 year and 15 year rules suggested by this proposed Remedial Order 2018 (consistent with those used for Schedule 8B offences, as per the 2015 Remedial Order) require children and young people to wait for an extended period before being able to appeal the inclusion of an offence on a disclosure certificate or PVG Scheme Record.

This is important as we have heard anecdotal evidence that some young people/young adults may have been deterred from pursuing particular college or university courses or professions as a result of convictions obtained or offence grounds established via a Children's Hearing at a young age.

Other Relevant Information

We note that the provision of 'other relevant information' (ORI), that is, non-conviction information that can be released where a Chief Constable believes that it may be relevant to a higher level disclosure, is not altered by this proposed Remedial Order 2018.

ORI remains a significant issue for children and young people across Scotland. ORI may or may not be disclosed for many years after an incident has taken place (often exceeding the 7.5/15 year limits stated in the 2015 and draft proposed 2018 Remedial Orders). Given the discretionary nature of this process, it can prove difficult to challenge any information shared or seek to have it amended or removed.

Whilst we recognise that the 2015 Remedial Order made some changes in respect of ORI, it did not fully reflect the comprehensive changes previously agreed to Police Scotland's weeding and retention rules, linked to the Children's Hearings (Scotland) Act 2011. When the Parliament agreed the 2011 Act provisions, ACPOS (as it was then) agreed changes to the weeding and retention rules to work alongside those provisions. These would have resulted in most offences being removed from the system after 3 years.

We urge the Scottish Government to work with Police Scotland to ensure that these changes are implemented as soon as possible as they have already been agreed and we believe they offer the best possible chance for children and young people to move on from offending behaviour.

Age At Which Conviction Takes Place

We also continue to be concerned that where a young person commits an offence at the age of 17, but s/he is not convicted until the age of 18, then they would be subject to the 15 year rule, rather than the 7.5 year rule. This has the potential to create an inequitable system whereby a young person could be penalised for factors outwith their control e.g. court delays. This should therefore should be remedied.

Impact on Particular Groups of Children and Young People

We would highlight that some groups of children and young people are statistically much more likely to obtain a criminal conviction before the age of 18, than their peers. For example, a dispute in a residential unit may lead to the Police being called and a looked after young person ending up with a criminal record. Were the same dispute to happen in a home setting, it would normally be dealt with without Police involvement.

We would suggest that wider consideration be made of how to avoid particular groups of children and young people being disproportionately being drawn into the Children's Hearings System through no fault of their own.

Further Information

Should you have any further questions about the content of this response, please contact Pauline McIntyre via pauline.mcintyre@cypcs.org.uk or (0131) 346 5350.

QUESTION 2

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

Comment

There is the potential for this Remedial Order to have a negative impact on 16 and 17 year olds (particularly those who have had no previous involvement with the Children's Hearings system before offending). There may also be a negative impact for disabled children and young people, those with communication needs or other additional support needs. This Remedial Order will also not resolve the existing unfairness experienced by looked after children, who are much more likely to receive a criminal record in childhood than their non-looked after peers.

See answer to Question 1 for more detail.

QUESTION 3

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

Comment
See answer to Question 1

QUESTION 4

In relation to the partial Business Regulatory Impact Assessment, please tell us about any potential impacts you think there may be to particular businesses or organisations?

Comment
There are likely to be significant potential costs in terms of court time and Legal Aid if all children who were entitled to do so made an application to the Sheriff to have their conviction information removed. There are also significant potential costs to the Scottish Government as the proposed changes are unlikely to meet the ECHR and UNCRC requirements and will therefore be open to challenge in court.

QUESTION 5

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

Comment

The Remedial Order misses an opportunity to make any significant positive impact on children's wellbeing. Children and young people will continue to acquire convictions which seriously, unfairly and disproportionately inhibit their life chances. The practical operation and impact of the proposal, and the failure to mesh with the Children's Hearings system, means that this will be particularly true of those children who are most vulnerable and whose wellbeing is already compromised.