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Minister for Children and Young People
Scottish Government
St. Andrew's House, Regent Road
Edinburgh EH1 3DG

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Dear Minister

Consultation on PVG and the Disclosure of Criminal Convictions

Community Justice Scotland (CJS) welcomes the opportunity to respond to the Consultation on PVG and the Disclosure of Criminal Convictions.

The consultation is of relevance to CJS as an employer and also as a public body with a corporate plan commitment to ensure the effective reintegration into the community of people who have been convicted. Access to employment, housing, learning and volunteering are all routes to providing people with the opportunity to reintegrate successfully, to aid their rehabilitation and ultimately to reduce the likelihood of further offending. The proposals to amend the various disclosure regimes which currently govern the access to certain roles are therefore of direct relevance to CJS.

We acknowledge the point made in the foreword to the consultation that disclosure must strike a balance between safeguarding our communities on the one hand and enabling people to get into work. We agree that the current system is complex and that a more proportionate system must be developed, taking account of risks where they exist but also to allow for rehabilitation and reintegration. It is clear from research that after a period of 7-10 years with no further convictions, a person with a historic conviction presents no greater risk than those without a conviction.

We would wish to highlight the conclusions of a recent research review paper by Dr Beth Weaver from the University of Strathclyde ¹ which states that '*the use of criminal record background checks by employers has become increasingly pervasive*' and that '*having a criminal record can have significant effects on employment prospects producing 'invisible punishment' or collateral consequences of contact with the justice system*'. It is possible that employers may be erring on the

¹ Time for Policy Redemption? A review of the evidence on disclosure of criminal records, Dr Beth Weaver, University of Strathclyde (2018) http://www.sccjr.ac.uk/wp-content/uploads/2018/03/Weaver_Time-For-Policy-Redemption1.pdf

side of caution given the lack of clear guidance on disclosure although the consultation document does refer to potentially vexatious or spurious requests. To address this we would propose that easily accessible material summarising the purpose and processes around disclosure are made available to individuals, employers and other organisations.

Regarding easily accessible information, at over 90 pages and containing 94 questions it would have been helpful for an 'easy read' or summary version of the Disclosure Scotland consultation to have been made available. This would have ensured that those most affected by the proposals and others are given the opportunity to comment fully. We would comment that the consultation requires a level of understanding of the current system that may go beyond the key factors that would satisfy the requirements of most people. The consultation also presupposes that the current bills around Management of Offenders and the Age of Criminal Responsibility will not alter in any meaningful way (e.g. the questions in Section 5 rely on the changes to the rehabilitation periods as proposed in the Management of Offenders Bill). We would question the timing of this consultation, given it is largely operational in nature and may therefore be impacted by subsequent changes to the Bills currently under parliamentary consideration.

We agree that unnecessary or vexatious checks are damaging, costly and time-consuming but rather than making the carrying out of unnecessary disclosure checks a criminal offence we would propose that Disclosure Scotland restricts the circumstances in which such checks are really necessary in the first place. Fundamentally we need a reform of the disclosure system rather than a review and rebranding of current products.

We would also caution against net-widening by creating further offences, several of which are proposed in the consultation. For example, the proposal to make the PVG scheme applicable for defined time periods as opposed to the current life membership and creating an offence for the individual and employer should a person continue in a role having previously elected to either leave the scheme or having failed to renew their membership at the requisite time is potential net-widening. Whilst we note that the purpose of this proposal is largely to cut down on ongoing (lifetime) monitoring of people on the PVG scheme which comes at a cost to Disclosure Scotland, it will result in further administration for employers, voluntary and third sector organisations. It could also have the unintended consequence of creating potential 'breaks' in service depending on how effective the administration of such a renewal scheme is in practice. It will also incur more frequent membership costs for the individual. (*Question 36 refers*).

Similarly the failure to return the proposed 'PVG membership card' after a person has been barred (or presumably fails to renew their membership) creates a further new offence solely linked to the administration of the disclosure system. The ultimate consequence is again net-widening and creating more offences. Having a PVG card in itself seems like a very 20th century proposal given the digital world we now operate in (*Pages 34 -39 refer*).

The economic and social consequences of an unduly or disproportionately punitive disclosure system is even more significant when we consider that 38% of all men and 9 % of women in Scotland have some form of conviction. This is a potential talent pool which the country cannot ignore, either on grounds of social justice or in

the light of demographic trends, as highlighted by the Cabinet Secretary for Finance Derek Mackay MSP and others at the recent launch of the Release Scotland website at the Scottish Parliament in May 2018.

We subscribe to the view that work (paid or unpaid) is a key factor in desistance, as has been identified in a range of academic studies on the subject. Employment in and of itself does not automatically lead to desistance but being in a job, other form of work or other meaningful activity can influence a person's sense of self and contributes to the idea that one has a stake in society.²

We are therefore supportive of any disclosure regime which operates on the basis that information should only be disclosed where there is a continued risk to public safety. The present system and the proposals in the consultation do not however seem to be proportionate in that regard and amount to piecemeal changes rather than taking the opportunity for a more fundamental reform. This may be a missed opportunity particularly given the simultaneous changes proposed by the Management of Offenders and Age of Criminal Responsibility Bill. The statistics quoted in the consultation (*page 58*) on the low numbers of people who successfully apply to remove spent convictions reveals just how complex the disclosure system is for individuals seeking removal of spent convictions from their records

Also the proposals do not align with the principles of the National Strategy for Community Justice³ which advocates a person-centred approach to community justice, taking account of the particular circumstances of a person. Rather than question whether rebranding the different disclosure products is required (basic, standard, enhanced and PVG to be altered and renamed 1,2 and PVG – *page 15 refers*) or if introducing new fee regime for each type of disclosure is appropriate, we feel that Disclosure Scotland should consider the purpose of disclosure. Stigma and recurrent obstacles in obtaining employment can increase the risk of offending⁴ so any system must be fair and proportionate.

Enhanced disclosure and the PVG Scheme allow for other relevant information (ORI) held by the police (pages 63-71) to be shared with an employer. We note that this section of the consultation to a certain extent mirrors issues raised around police powers in the ACR Bill. In our response to the ACR Bill we stated that we are apprehensive about the use of police powers in relation to ORI and that these should be clearly defined. This definition should also include how relevant this information is, particularly when it relates to referrals of children and young people under the Children's Hearing System. In line with our ACR Bill response we believe that any process to remove ORI should be automatic.

We note the case study on page 68 highlighting the criminalisation of certain actions by vulnerable and care-experienced young people and would comment that

² Training and Employment in an Economic Downturn: Lessons for Desistance Studies, Irish Probation Journal Vol 6, B Owens (2009)

[http://www.probation.ie/EN/PB/0/5F89DA76B27C20B580258034004E84BC/\\$File/IPJ2009OWENS.pdf](http://www.probation.ie/EN/PB/0/5F89DA76B27C20B580258034004E84BC/$File/IPJ2009OWENS.pdf)

³ National Strategy for Community Justice, Scottish Government, 2016. <http://www.gov.scot/Publications/2016/11/5600>

⁴ Weaver (2018) op city

equivalent situations which could arise for children who are not looked after by the state are unlikely to result in police involvement, a referral to the Hearing System or the creation of ORI held by the police. It is therefore imperative that such ORI relating to young people is removed automatically to avoid long-term detriment. It has been suggested to us by stakeholders that ORI held by the police could potentially be in breach of the subject's human rights and we would urge Disclosure Scotland to review this.⁵ It is apparent that even if a conviction is spent and removed that ORI can be retained. In 37% of cases where ORI is disclosed it has a detrimental impact on employability.⁶

Regarding the impact on employers and voluntary organisations, the impact of the proposed changes on them needs to be addressed and costed. Also any implications of GDPR (General Data Protection Regulation) where an organisation has to have permission to hold any personal data and how it will be used, needs to be addressed and guidance provided.

It is clear that people are not aware of their rights in relation to disclosure nor of the potential impact of future disclosure at the time of sentencing. Age specific guidance and advice should be published as is the case in England and Wales, in an easy-read format.

Regarding the proposals to amend the process for reviewing spent convictions including a question (*question 69 refers*) regarding whether there is a need to maintain the status quo, introduce an additional administrative process prior to application to a sheriff, create an independent reviewer or via an application to Scottish Tribunals a more basic question is why isn't the process automatic? (*Pages 59-62 refer*). A potential proposal could be to expunge automatically unless the sheriff at point of conviction records that the conviction must remain on public record for a particular reason. In this way it would be a judicial decision and not one made by civil servants.

Of the various options proposed (*pages 59-61 refer*), the proposed role, purpose and remit of the independent reviewer is an option for further consideration although its role, remit and terms of reference would still need to be subject to further public consultation. There is of course a need to continue to protect vulnerable groups via PVG disclosure checks. The disclosure should relate to the conviction and the implications of that conviction on future employment and other prospects should be clearly laid out at the point of conviction. It may be instructive for Disclosure Scotland to consider disclosure practices elsewhere, for example Access Northern Ireland.

Similarly there are options on various age ranges to which special provisions could apply '*in relation to criminal convictions accrued by young people 12 years or older on all types of disclosure*' (*pages 69-70 refer*). We are concerned by the inappropriate language used in this section. Question 75 talks about the 'convictions accrued by young people 12 years or older' whereas they should be termed 'grounds for referral to the Children's Hearing System'. It is our view that only a matter that is decided upon in a court should be defined as a 'conviction' and this would not be the case for young people 12 years or older.

⁵ Weaver op cit

⁶ Appleton J, Checking Up, London Civitas (2014)

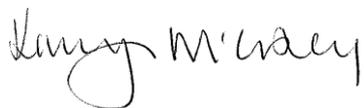
<http://journals.sagepub.com/doi/abs/10.1177/1461355715616989>

We are also concerned that questions 90-94 suggest that no impact assessments in relation to equality, business & regulation, privacy or children's rights and wellbeing have been undertaken. It would have been helpful for the proposals put forward to have been tested against these various criteria as is normal practice.

In summary CJS welcomes the opportunity to comment. We agree that the current system is unduly complex. We would support a wholesale reform of the current disclosure system to ensure that it is made simpler and easier to understand. We would question the timing of this consultation given the current bills under consideration by the Scottish Parliament. The consultation proposals seem increase what is in scope for disclosure and create new offences specifically in relation to failure to comply with new administrative processes. Given the need to reintegrate people into the community we feel that a more balanced approach in relation to public protection and risk is required. By all means a PVG scheme in relation to the protection of vulnerable groups is necessary but basic (or level 1) and other regimes may be disproportionate. We would support public guidance around what the purpose of disclosure is and when it is necessary, particularly for employers, voluntary organisations as well as those subject to disclosure. We are concerned that the format and length of this consultation document may inhibit responses from those with personal experiences of the disclosure system and the barriers it can create.

We would be happy to continue a dialogue with Disclosure Scotland on these matters.

Yours sincerely



Karyn McCluskey
Chief Executive

Copy to:

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