



Community Justice Scotland

Ceartas Coimhearsnachd Alba

Disclosure (Scotland) Bill 2019
Written Submission

August 2019

Disclosure (Scotland) Bill – Submission from Community Justice Scotland

Community Justice Scotland (CJS) welcome the opportunity to comment on the Disclosure (Scotland) Bill (the Bill). As Scotland's national body for community justice, we have a strong interest in supporting improvements to systems and processes that can help foster people's rehabilitation and reintegration into their communities, helping make Scotland safer. Access to employment, 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.

We recognise that the disclosure regime in Scotland is complex, affected by a range of legislation including the recent Management of Offenders and Age of Criminal Responsibility Acts and that such complexity creates confusion for many. Simplification of this landscape is critical to ensure that people with convictions are afforded opportunities to move on with their lives. It is particularly important that people also understand when a conviction becomes spent and is no longer required to be disclosed. The provision of accessible guidance will be important in ensuring the effective implementation of the new system.

Supporting people's rehabilitation journey

As we have outlined previously, we subscribe to the view that work (paid or unpaid) is a key factor in desistance; as 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-worth/esteem and contributes to the idea that one has a stake in society, as shown in our Second Chancers campaign.

People with convictions who have concluded their sentences and are trying to reintegrate into their communities often face stigma and barriers to attaining employment and education as well as volunteering opportunities, access to insurance and visas which could support their future employability. Fear of such negative treatment can mean people with convictions self-select out of potential opportunities.

In contrast, employment opportunities contribute to a host of other positive outcomes related to wellbeing, including improved physical and mental health and moving out of poverty, not just for the individual but for their families too.

We welcome the principles underpinning the Bill of simplification and privacy, and recognise many of the provisions within this legislation represent a significant shift towards a more progressive, proportionate and sustainable system for identifying potential risk as well as reducing barriers to people with convictions accessing education and employment. We acknowledge the desire of the Government to balance the need for adequate safeguarding of vulnerable people while helping to reduce the stigma that people with convictions may face.

Our submission relates only to the following areas, highlighting where we feel the Bill contains welcome proposals and where we feel there may be further consideration required.



Reduced periods for Disclosure

Reducing the periods for which people have to disclose prior convictions is a welcome development which will facilitate the reintegration of people into their communities following the completion of their sentence whilst also taking due account of the needs of vulnerable people in our communities who require safeguarding. We note however that the proposed timeframes remain lengthy. 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.

Applicants seeing their disclosure first, and routes to appeal

The proposal to allow applicants to see their disclosure and where appropriate to be able to appeal its contents before it is submitted to a prospective employer is welcomed. We would support the development of specific easily accessible guidance to inform people about this change and the steps they should take if they wish to make an appeal. Any lengthy delays in providing information from Disclosure Scotland to an employer could act as a proxy signal that there is matter under consideration which may undermine an applicant. A commitment to maximum time periods for treatment of appeals would be welcomed as would a guarantee that this is cost-free, to ensure financial considerations do not deter people from attempts to get jobs.

Disclosure of childhood convictions

We strongly support the move to not automatically disclose convictions that happened when a young person was under the age of 18. This is in line with the positive progress Scotland has made in bringing legislation into line with evidence and best practice about young people who offend, including the planned incorporation of the United Nation's Convention of the Rights of the Child into Scots law. This at a stroke would reduce the likelihood that people will experience discrimination based on events that happened when they were a child, which have no reflection on their current or future potential to work or study as fully rehabilitated adults. Acknowledging rehabilitation in our justice system is important. As stated in the submission by the Centre for Youth and Criminal Justice (CYCJ), it is also important that 'children have the right to "move on" from offending behaviour and to put offences committed in childhood behind them'.

We do have a note of caution – we recognise that there is a necessity for a mechanism to disclose conviction or non-conviction information of an extreme or exceptional nature, as is afforded by the ability to disclose information as Other Relevant Information (ORI). We are concerned however that without clear and rigorous guidelines relating to balancing public protection with the rights of the individual, this mechanism is open to encouraging over-disclosure. Any consideration for listing (barring), disclosure, or appeal must be taken by professionals highly trained in risk assessment and the evidence base for association between previous offending and future risk.

As evidenced in the CYCJ submission, the fact that childhood convictions (including those of now adults) will be listed under a separate heading to distinguish from adult



offending conveys an important message. Young people aged under 18 at the time of offence are often over 18 when their cases are considered and dealt with in court so age at the date when an offence was committed should be the determining factor.

Other relevant information (ORI)

The Bill continues to allow for ORI held by the police to be shared with an employer. Such powers in relation to ORI should be clearly defined. Without clear statutory guidance and evidence-based processes and guidance for decision makers, the ORI system creates an opportunity for retrospective criminalisation through the back door. Cultural atmospheres are changeable and subject to anxieties which grow with high profile cases of extreme behaviour, even if such incidents are rare. We recognise the need to have a disclosure system that can cope with such serious cases. Without robust and justifiable guidance based on evidence, however, there is a risk for disclosures to be vulnerable to the same shifts in response to public opinion that we have seen elsewhere.

Representation, review and appeal

We welcome the provisions within the Bill relating to reviewable information including rights of review, representation, and appeal; efforts to streamline these processes and mechanisms; and the commitment to make guidance available. For people to take advantage of such opportunities, such guidance will need to be developed which is easily-accessible and understandable.

Proposed criminal penalty

The suggestion that an individual is deemed to have committed an offence by failing to renew their scheme membership is disproportionate and could create the unintended consequence of criminalising more people.

Given the new arrangements are a departure from existing practice and rely on Disclosure Scotland being able to contact people primarily by digital means to remind them that a renewal of membership will be due, there needs to be some transition arrangement proportionate to a shift away from a life-time scheme to a 5-yearly renewal procedure, coupled with a communications campaign to inform employers and individuals of what the new regime entails.

Also there would need to be some guarantee that people will not be penalised due to the failure of electronic systems/administration to be fully operational as this new regime will also create a different and additional administrative burden on Disclosure Scotland too.

Potential lack of consistency with existing Government policy

The proposed penalty of a new offence with a custodial sentence of up to 12 months in cases when people fail to renew their PVG (Protecting Vulnerable Groups) scheme membership every 5 years is inconsistent with the recent extension of the Presumption



Against Short Sentences (PASS) approved by the Scottish Parliament. It is also out of step with PASS's policy objective that the most appropriate use of custody is primarily for cases where the crime committed has caused serious harm. Not only may this not always be the case when people fail to keep their paperwork up to date, the proposal will have the consequence of net-widening criminality when the existing practice (lifetime monitoring) effectively ensures that this would not happen.

Fees

We are also concerned that the cost of repeated applications for membership of the PVG disclosure scheme may be prohibitive and we look forward to the consultation around fees levels in due course.

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 and which they state may constitute an unnecessary intrusion into the lives of people who no longer do such regulated work, the proposed change may result in further administration costs for employers, voluntary and third sector organisations

We do however welcome indications that volunteers would not be required to pay for such costs given the important role that voluntary work has in supporting employability and in helping people to achieve their best outcomes.

Unnecessary requests for disclosure

We appreciate that Disclosure Scotland has to cover its costs but would caution that the new regime must also tackle disproportionate and unnecessary requests for disclosure by employers. It would be worth clarifying whether the Bill will permit Disclosure Scotland to reject applications to provide disclosures for roles that do not require regulation. Or, can any organisation still request disclosure checks regardless of the content of the role being undertaken?

We would wish to highlight the conclusions of a recent research review paper by Dr Beth Weaver from the University of Strathclyde 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'. Such a blanket approach towards disclosure by employers inhibits the ability of people with convictions to reintegrate.

We agree that regulated roles should be based on assessment of power, influence and dynamic of the relationship (e.g. a football coach). We do however anticipate that incorporating all roles within the proposed assessment tool may prove challenging, particularly as we understand it may require self-declaration. We would welcome being involved in any future consultation on the development of such a tool.

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