

Friday, 24 November 2017

Background

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. Among its fundamental principles are:

- the needs of children or young people in trouble should be met through a single holistic and integrated system, whether concerns relate to their welfare or behaviour
- a preventative approach is essential, involving early identification and diagnosis of problems
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making

The Scottish Children's Reporter Administration (SCRA) operates the Reporter service which sits at the heart of the Children's Hearings System. SCRA employs Children's Reporters who are located throughout Scotland, and who work in close partnership with panel members and other professionals such as social work, education, the police, the health service and the courts system.

SCRA's vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard
- Our hopes and dreams for the children of Scotland are what unite us
- Children and young people's experiences and opinions guide us
- We are approachable and open
- We bring the best of the past with us into the future to meet new challenges.

SCRA welcomes the opportunity to respond to this consultation.

INTRODUCTION

Our response to this consultation is based on our fundamental position - that a child and their family should not be punished in any way as a result of their involvement in the Children's Hearings System. The system is not punitive and unintended consequences of system involvement should not be punitive and should not have a punitive effect.

Following on from this position our view is that the acceptance of offence grounds for referral should not automatically be categorised as a 'deemed conviction'. In the same manner, grounds for referral accepted or established in respect of Schedule 1 offending (b, c, d grounds for referral) / domestic abuse (f ground for referral) / sexual offending (g ground for referral) or other grounds for referral where there are potential criminal convictions available do not equate to a criminal conviction and there is a different standard of proof.

The decision in P(AP) against the Scottish Ministers is very clear that:

"The automatic disclosure of the conviction information constituted, in my judgment, an unlawful and unjustifiable interference with his rights under Article 8 of the European Convention on Human Rights."

Whilst we recognise that this proposed change is a remedial and an interim position which will be subject to fundamental review and reform we do not recognize that it addresses in full the concerns of the P(AP) decision. In fact the proposed remedy may make the situation more complex and confusing – and less fair as a result - by creating two separate lists of offences with a right to have a Sheriff review offences from either list, instead of two lists where offences on one would remain.

In August 2015 SCRA responded to a consultation on the Rehabilitation of offenders Act 1974. We were very clear that the Children's Hearings (Scotland) Act 2011 resulted in significant changes being proposed to the way the Rehabilitation of Offenders Act operates in relation to the Children's Hearings System.

In particular, accepted or established offence grounds were to be treated as Alternatives to Prosecution (ATPs) instead of convictions. This would mean that in most cases accepted or established offence grounds would become spent 3 months after the Hearing. However, if the offence committed is on the list set out in regulations, it may still appear on a disclosure check when applying for some jobs. This was done in order to ensure that information relating to more serious sexual or violent offences could continue to be taken into account when someone was applying to work with children for example.

In August 2015 we noted with disappointment that the changes introduced by the 2011 Act have still yet to be implemented. We recognised that some of this delay was due to the need for an Order to be passed by the Westminster Parliament. We also accepted that there is an argument for seeking to ensure that the changes made

in relation to the hearings system align conceptually and in practice with those proposed for the criminal system. In 2015 we were concerned that the delay in implementation was becoming significant.

We are now of the view that the delay in reform is long overdue and requires urgent redress. Necessary and clear reform needs to happen as soon as possible so that children, young people and adults unduly affected by the behaviour of their youth can begin to benefit from the changes.

Police Scotland weeding rulesⁱ also need to be considered alongside the retention of information by Scotland's public bodies. When the Children's Hearings (Scotland) Act was not fully implemented Police Scotland changed their rules for weeding offences in 2013. The 40/20 rule (the subject to whom data applies has to be 40 years old or over and the information been on record for at least 20 years before the Criminal History System CHS will automatically weed it); 70 / 30 rule (then subject to whom the conviction applies has to be 70 years old or over and the information on record for at least 30 years before an automatic weed on CHS and 100 years / life of subject – convictions will be retained until 100th birthday. These time spans are far, far greater than three months, and even after convictions become spent (after 7 years and six months or 15 years) they can still appear as other relevant information (ORI) as long as they exist in the criminal history system. The specific "Weeding and Retention Guidance for Accepted and Established Findings from Children's Hearings" reference in the Police weeding rules still appears to be in draft, somewhere.

We would also like to raise a further issue which is not considered in the proposed interim reforms – that Protection of Vulnerable Groups (PVG) listing can prevent young people accessing college or university courses that involve contact with children and / or vulnerable adults (nursing, teaching, sports science, child care for example). It can also affect employment in these fields. PVG listing has a punitive effect. For each individual involved, requests for information from Disclosure Scotland under the PVG scheme for information, could affect their whole adult future - if they result in PVG listing.

In respect of change, at the very least we continue support Section 187 of the Children's Hearings (Scotland) Act 2011 – Rehabilitation of Offenders Act 1974: treatment of certain disposals by children's hearings of the Children's Hearings (Scotland) Act 2011. We support the full enactment of the provisions of this section; particularly in relation to the Alternative To Prosecution (ATP) re-definition of offence grounds for referral to a children's hearing. This would mean that most offences accepted or established within the Children's Hearing process would become spent three months after the Hearing.

Furthermore, it is worth pointing out that the current position (without any change) is already incredibly complicated for professionals to explain to children and families coming to a Children's Hearing, and as a result any explanation given is very limited. At the moment a leaflet is attached to offence grounds for referral, when they are sent to a young person and their family (available online at

<http://www.scra.gov.uk/wp-content/uploads/2016/03/Rehabilitation-of-Offenders.pdf>). The leaflet is very general – and this is the explanation that young people and their families receive. It is very easy for this to be lost within the Children’s Hearings process – the Hearing is considering the circumstances for the young person at the time of the Hearing, not in the future. The fact that there may be future consequences is easily forgotten - until the consequences become real; a young person is not selected for a job interview or does not get a college course, for example. When the consequences become real, the onus is on the *individual* affected to seek to challenge the basis for the offence continuing to be disclosed. SCRA’s position is that this burden should sit with the *state* – who should demonstrate that an offence requires to be retained and or disclosed - and why that should continue to be the case, beyond any ‘normal’ timescale (as set down in statute).

We would say that an independent review of the Rehabilitation of Offenders Act 1974 provisions alongside the framework requirements of Disclosure Scotland and the current PVG scheme(s) is long overdue – and should be progressed as a matter of some urgency.

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

1. That the Proposed Draft Order may not be the remedy to the legislation that the Court of Session requires to see.
2. That adjustment to the extant process may add an additional layer of confusion to an already confusing process.
3. That the Scottish Children’s Hearings System deals with the majority of youth offending in Scotland.
4. That Scotland’s system of rehabilitation and any ongoing requirement to disclose past offending recognises in full that our system of addressing offending at the point of need is, in the most part, not the reponse of a criminal justice system.
5. That the Children’s Hearings System is not punitive. The Children’s Hearings System deals with the deeds and the needs of Scotland’s children at the same time – and the children who require care and protection are often the children who also involved in offending.
6. That any intervention by a Children’s Hearing in the life of a child or young person should be to make things better, Children’s Hearings (Scotland) Act 2011 s28 (2). That a retrospective, future response to the intervention which makes things worse is at odds with this statutory precondition for intervention.
7. That grounds for referral accepted or established at a children’s hearing are not accepted by children and their families in the full understanding of the possible consequences of this acceptance for them. That the situation as it is, is complex and confusing, even for professionals to

navigate. That young people and their families are not told what the possible consequences of the ground for referral could be.

8. That the grounds for referral to a Children's hearing are something other than a 'conviction'. A conviction implies a punitive response has been taken when the hearing never takes a punitive response. Accepted or established grounds for referral are not the same as a conviction, as they fulfill a very different purpose in the life of the child and family.
9. That adults and young people should be able to clearly understand the possible consequences of grounds for referral, before the grounds for referral are put to them and they are asked to respond to them.
10. That adults and young people should be able to ask a Sheriff to strike aspects of their childhood behaviour from the information which requires to be disclosed under the Rehabilitation of Offenders Act or the PVG scheme, subject to specific, explainable caveat(s).
11. That the proposal that a young adult will be able to apply to a Sheriff for removal of conviction information prior to the disclosure of conviction information may be ill conceived. That any undue delay in a prospective employer receiving information from Disclosure Scotland may be interpreted in a negative way (in that it is taking time as an individual is seeking to hide something) and that an individual's prospects may be unduly affected by this.
12. Currently the legislative framework is complicated and difficult to navigate. Simplifying the process to enable individuals to fully engage with it should be a priority.
13. The proposed remedial order may be adding additional complication. It may become confusing if the 'always disclose' list of offences becomes the 'always disclose unless this rule applies....' list. There needs to be a fuller consideration of the designation of the offences and their application to an adult or a childhood criminal history. There also needs to be consideration of how this is communicated to the public, for example whether there are two lists or whether there should be one list with applicable rules.
14. There absolutely requires to be a balance between individual rights and the interests of public protection. The automatic disclosure of offences on Schedule 8A tips this balance away from individual rights towards the interests of public protection and as such requires some redress.

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?

Whilst this amendment is a move in the right direction it does not simplify the complicated situation which exists or make the situation any easier for people who offended as children to navigate. Indeed, it may make the situation even more complicated when we need to be making it fairer.

The 2016 SCRA research *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending* reaffirmed that this group of children presented with a myriad of concerns (Page 4)ⁱⁱ:

- **39% of children had disabilities and physical and/or mental health problems.**
- **There were recorded concerns about their educational achievement, attendance or behaviour in school for 53%.**
- **A quarter (25%) had been victims of physical and/or sexual abuse; most by family members or associates of their parents.**
- **75% had service involvement for at least a year, and over half had been involved with services for at least 5 years.**
- **75% had previous referrals to the Reporter. Seventy children had been referred on non offence grounds and five on offence grounds. Twenty six children were on Compulsory Supervision Orders (CSO) at the time of the offence referral incident in 2013-14.**

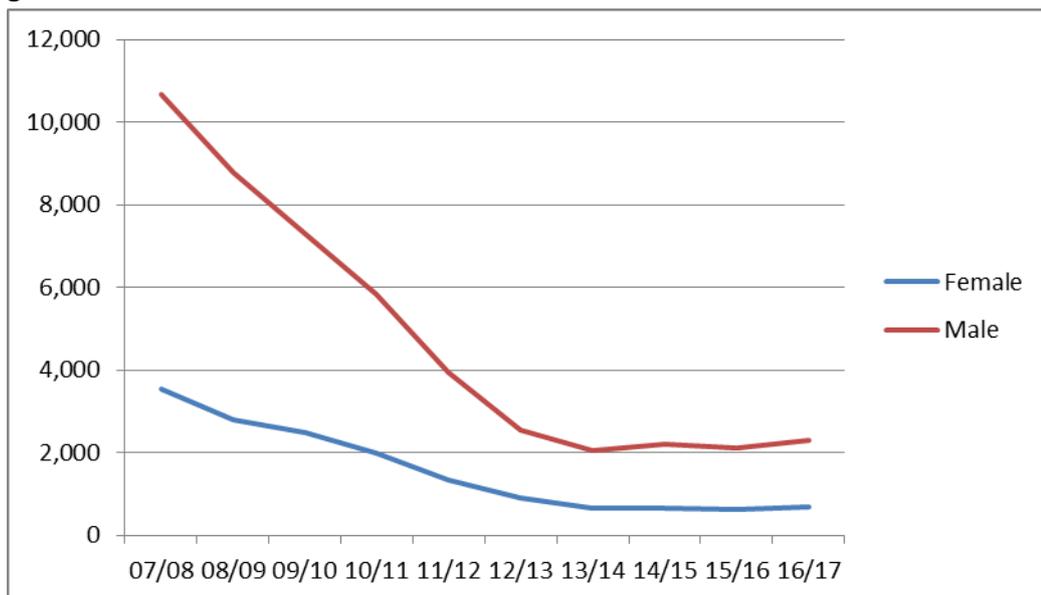
Whilst this group of children is possibly the most extreme (as their offending behaviour has begun very early), they are a group of young people with complex and layered difficulties, which can persist over time and which impact on their ability to make any sense of the world around them. Consequently, their understanding of and their ability to engage with services is also affected and they are unlikely to be able to make sense of and navigate the legislation around rehabilitation and disclosure of offending, particularly when this is not explained in any detail to them at the time of the Children's Hearing.

The potential impact on young adults with grounds for referral accepted or established within the children's hearings system can be profound and the complexities of the current system have largely resulted in silence around this potential impact. Childhood offending can prevent an individual following the career they always wanted. It can prevent a young person and their family even thinking of further education or study – and their adult life choices become further restricted.

Likewise, the potential changes for young people if the process for disclosing childhood offending was altered, could be just as profound. Young people could have options available to them which were previously closed off – they could see a future where previously there was no future path clear for them. This impact is not clear from this remedial draft order, as it seeks merely to amend extant legislation to fit a specific purpose.

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?

Statistics demonstrate that the proportion of young men coming to the attention of the Children’s Hearing for offending is still higher than young women. The chart below is taken from SCRA statistics and demonstrates the children referred on offence grounds to the reporter between 2007/2008 by gender.



Young males are therefore more likely to be affected by any changes to their requirement to disclose their offending. There is also a spike in children referred for offending to the reporter age 14 and 15 (regardless of gender), which means that the consequences of offending for this group of young people may be more immediate just at the point where they are navigating into the adult world, aged 16.

As a result it may be that young adult males would be more likely to consider areas of work which would require a PVG application if it was possible for them to have aspects of their history considered for removal by a Sheriff.

It may also mean that more volunteering opportunities are available to young adult males if they were no longer be constrained by the ongoing effects of their past behaviour and the implications this has for them in the adult world of work.

However, for any of these positive consequences to be delivered, the process in place would need to one which could be clearly navigated by a young person. The process would also need to be without any unintended consequences arising from the process itself. It is not clear that the adjustments as indicated in the remedial order would prompt these positive outcomes.

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?

- 1) This should have a significant impact on the approach taken by Children's Reporters and Children's Hearings and by SW and other professionals involved in young people's care to offending by young people.

Social Workers, SCRA and CHS should be aware of the potential of lifelong negative consequences as a result of the requirement to disclose under the PVG scheme and this may have an effect on the recommendations made by the social work department, the decision to refer to Children's Hearings and the decision of a Children's Panel to discharge or consider a ground for referral in the disposal of a Children's Hearing.

This could require further examination.

- 2) It may also be that a young person with an offending history limits their aspiration from an early stage, and opportunities for them are curtailed or not offered. Without these limitations the work done with young people at different stages could change.

This could require further examination.

- 3) The figures from Disclosure Scotland around challenge to the current PVG scheme are not the same as valid applications to withhold information as a result of a legislative amendment.

Caution should be taken with using the low figure of challenges (24) as a predictor of the numbers of applications to withhold – not least because it

is going to take a particularly focused and committed individual to progress any challenge. Figures from England and Wales are considerably higher than 24ⁱⁱⁱ.

In 2016/2017 706 girls and 2293 boys were referred to the Children's Reporter, in relation to 7174 offences (offence grounds for referral – j ground)^{iv}. These numbers do not include the young people who were jointly reported and discussed by the Reporter and the Procurator Fiscal, and do not include the young people prosecuted in the adult criminal court by the Procurator Fiscal.

'There is an increase in young people involved in sexual behaviours which require a criminal response and these offences are on the always disclose list. The number of cases reported to the Crown Office & Procurator Fiscal Service (COPFS) involving a sexual offence committed against a child by a child rose by 34% between 2011/12 and 2015/16'.v

With the proposed change these young people as adults could have a different path and could instigate a Sheriff Court application to withhold aspects of their juvenile criminal history.

- 4) It may be that the Sheriff Court becomes much busier with the work to assess the need for disclosure of information and this could also tie up the PVG and consequently the recruitment process.

There could be an entirely unintended consequence of this – if the delay is significant then it would become clear to an employer that it was because an applicant was seeking to have something held back during the recruitment process –and in itself this could disadvantage individuals and be the basis of an ECHR challenge.

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.

The ripple effects of a change in approach to rehabilitation and disclosure of past offending could range across service provision for children and young people and could have a positive and lasting long term impact.

An ECHR compliant system would open opportunities to young people who until now would not have considered these opportunities as open or applicable to them.

This would be a positive impact – not just on their ability to put juvenile offending behind them more quickly – but in terms of their aspirations and their planning in preparation for adult life.

The changes as outlined in this remedial order do not do this. We recognise that the changes are an interim ‘improvement’ until wide scale reform can begin. However, the wide scale reform should have occurred already and it hasn’t.

At the very least we should be seeking to implement the existing legislation in full – in terms of s187 of the Children’s Hearings (Scotland) Act 2011, but actually, we should be implementing wide scale reform which re-inforces the underlying principles of Scotland’s holistic approach to the needs and deeds of children and treats them accordingly. This should be discreet from and distinct to the way in which we address offending committed by adults, accepting throughout that on rare occasions there will be offending by a child that requires to remain on record.

In these rare cases it should be for the state to make the arguments for the offending to remain and it should be for the state to continue to make these arguments. It should not be the responsibility of an individual.

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ⁱ <http://www.scotland.police.uk/assets/pdf/151934/184779/recording-weeding-and-retention-of-information-on-criminal-history-system-procedure>

ⁱⁱ <http://www.scra.gov.uk/wp-content/uploads/2016/03/Backgrounds-and-outcomes-for-children-aged-8-11-years-old-who-have-been-referred-for-offending.pdf>

ⁱⁱⁱ <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/416/416.pdf>

^{iv} The figure published in SCRA statistics is 2995 children; the breakdown of figures may include some children counted twice at different ages within the year.

^v From <http://www.copfs.gov.uk/media-site/media-releases/1601-protecting-children-from-sexual-offending>