

The Protection of Vulnerable Groups and Disclosure of Criminal  
Information - A consultation on proposals for change

Dear Sirs,

Please find attached the:

**Scottish Children's Reporter Administration (SCRA) Response to the Protection of Vulnerable Groups and Disclosure of Criminal Information - A consultation on proposals for change.**

- SCRA are happy for the author's name and / or the name of the organisation to be on the submission and for it to be published alongside the other consultation responses.
- SCRA would ask that their response be accepted in a non-standard way and that its contents are used as part of the analysis and evaluation of all the consultation responses submitted.

**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

SCRA (the Scottish Children's Reporter Administration) operates the Reporter service which sits at the heart of the system. SCRA employs Children's Reporters who are located throughout Scotland, working 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 is pleased to respond to the April 2018 Protection of Vulnerable groups and the Disclosure of Criminal Information - A Consultation on proposals for change.





SCRA will approach this consultation response through a letter – rather than through responding to the questions set by the consultation document. We would ask that the analysis of the consultation responses also considers and reports on those questions which were not answered by respondents, as this information will also be of value.

SCRA's approach has been governed by one key thing – our firm view is that the starting point for an effective system is to define the core principles and issues which should govern the protection of criminal groups and the disclosure of criminal information in Scotland. The processes are, of course, crucial – but we do not feel that they can be developed until we get the core principles and issues right, and they are not currently identifiable or in alignment with the principles of the statutory approaches we take in Scotland to youth offending and to community justice. Understanding and agreement in relation to the core principles of all the elements of the Disclosure system is Scotland is needed before we can move on to develop processes which will work now and into the future.

SCRA is pleased that there is currently a national focus in Scotland on the ways in which we deal with offending and that this includes changes to the Rehabilitation of Offenders Act 1974 in the proposed Management of Offenders Bill<sup>1</sup> currently being considered by the Justice Committee and changes to the adult disclosure of youth offending within the current PVG review<sup>2</sup>.

However, SCRA would like to see this wider system reform fully and consciously embrace the established ethos of the Children's Hearings System – a system which does not punish young people, but which identifies their needs and seeks to put in place supports which encourage young people to become healthy, fully functioning and contributing adult members of society.

The Children's Hearings System is a distinct and discrete system for dealing with the needs and the deeds of children and young people aged 0 -18 which has operated in Scotland since 1971. The Children's Hearings System does not punish, rather it seeks to provide support in order for a young person to overcome the barriers, vulnerabilities or difficulties they (and their family) may face. The Children's Hearing will deal in the same way with a child who has experienced a lack of parental care and a child who has been involved in offending or other harmful behaviour, within the same statutory order – a Compulsory Supervision order. A Compulsory Supervision Order can only last for a 12 month period before it requires a review – and will remain in place until a child and family no longer require statutory intervention. For most children and young people this will be the 'end' of their involvement with the Children's Hearing System.

However, for young people who have been involved in offending or other harmful behaviours it may be that as adults their involvement with the Hearing becomes relevant again – in a requirement to disclose childhood offending which was dealt with by the hearing. To date Scotland's legislation has not recognised the Children's Hearing System as distinct and discrete and worthy of specific provisions in relation to the later (adult) disclosure of an offence ground for referral dealt with by the Hearing.

Instead, Scotland has managed 'bolted on' provisions which were developed in Westminster in relation to adult offending behaviour and we have used this legislation<sup>3</sup> to provide some protection to children in relation to their requirements to disclose aspects of their childhood when they become adults. This 'bolt on' approach has never

<sup>1</sup> [http://www.parliament.scot/Management%20of%20Offenders%20\(Scotland\)%20Bill/SPBill27S052018.pdf](http://www.parliament.scot/Management%20of%20Offenders%20(Scotland)%20Bill/SPBill27S052018.pdf)

<sup>2</sup> <https://beta.gov.scot/publications/protecting-vulnerable-groups-scheme-review-terms-reference/>

<sup>3</sup> The Rehabilitation of Offenders Act 1974 - <http://www.legislation.gov.uk/ukpga/1974/53>





been consistent with the ethos and aims of the Children’s Hearings System and is increasingly contrary to what Children’s Hearings are trying to do with the children who are subject to Compulsory Supervision Orders.

To help illustrate the approach we think should be taken we will suggest some key principles in relation to how the public interest is reconciled with the rights of children who have offended or behaved in a manner that might suggest they cause a risk to others. Of course, these behaviours may be managed without statutory intervention; but there may be the statutory involvement of the Reporter and / or a Children’s Hearings System. These key principles are in relation to how adult disclosure of childhood offences should or could be managed in our specific Scottish context.

By no means is this list of principles exhaustive or definitive. We hope they serve in an illustrative way to demonstrate some of the thinking we believe is required to underpin the system we develop.

Following our illustration of principles we will address some of the specific elements of the consultation in relation to the Children’s Hearings System.

### **An illustration of Key Principles of the Rehabilitation of Offenders and the disclosure of convictions / other relevant information in Scotland to begin to define a way forward.**

#### **The Principles:**

- 1) **DISTINCT - The rules which apply to the disclosure of information in relation to the adult criminal justice system and the Children’s Hearings System should be different, discrete and distinct. The disclosure of information in relation to offending behaviour should be fair, accurate and based on assessing future risk, regardless of when the offending behaviour occurred.**
  - a. The Children’s Hearings System is not a criminal justice system, even when it deals with children as a result of their offending behaviours. It is a welfare based system that is focussed simultaneously on individual deeds and needs and on the provision of holistic support through statutory intervention where that is in the best interest of a child. The language of the Children’s Hearing system is not be the language of criminal justice – and should not use words like sentencing and conviction. Children can be referred to a Children’s Hearing as a result of offending behaviour – an offence ground for referral to a Children’s Hearing. In the majority of circumstances this ‘offence’ ground should have the same status and consequences of any ground for referral – e.g. ‘lack of parental care’; ‘victim of a schedule 1 offence’.
  - b. For the majority of children involved in harmful or offending behaviour, whether they are involved with the Children’s Hearing or not, there should be no requirement to disclose any information relating to that behaviour when they become adults.
  - c. For some children there may be additional identified risks. For these children and their families the state should be firm and clear in identifying this and explaining these risks to children and their families.





- 2) ALIGNED - The rules which apply to the disclosure of system information should align with the principles and the ethos of the system to which they apply.**
- a. The consequences of involvement in the Children’s Hearings System should not be punitive.
  - b. Children’s Hearings do not ‘convict’ young people and therefore ‘conviction information’ should not be retained in respect of a child’s involvement in this system.
  - c. The Police Scotland Rules for weeding offences on the criminal history system are not in alignment with the ethos of the Children’s Hearings System. The rules mean that information is kept on the criminal history system for long periods of time before it is automatically considered for weeding. So, the 40/20 rule means 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 will automatically weed it; the 70 / 30 rule means the 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 the 100 years / life of subject rule means that convictions will be retained until 100<sup>th</sup> birthday. It is our view that these rules all urgently need review and revision in relation to the offending of young people.
  - d. For offending behaviour in childhood we believe that only the most serious of offending behaviours should ever be disclosed; and then only after a case has been subject to independent review and possibly subject to judicial challenge as well.
  - e. The offending behaviour of young people should not be categorised by lists. In a minority of cases it may be that the risk is assessed to be so high that adult disclosure of childhood offending may be likely. In these cases we believe the new role of Independent Reviewer could have a key role - in determining what information is likely to require to be disclosed and then in communicating this to children and their families.
- 3) CLEAR CONSEQUENCE - The consequences of involvement with the Children’s Hearings System or adult Criminal Justice System should be clear and transparent at the point in time of that involvement. The consequences of involvement with either system should not be hidden and applied retrospectively.**
- a. The disclosure of system information is not a risk assessment, but risk assessment has to inform the decision making process in respect of the disclosure of information. The process of risk assessment is ongoing, reactive and affected by numerous variables. Risk assessment tools are being developed all the time and the effectiveness of these tools is evaluated.
  - b. Rules in relation to the retention of information should be clear, simple and easy to follow, and should cover:
    - i. Timescales for the retention of this information





- ii. What information is retained
- iii. The communication of retained information, to the individual it concerns and to other parties
- iv. The challenges which can be made to this retained information (the content and the decision about retaining the information).

4) **PROPORTIONATE – The retention of information and the later disclosure of that information requires to be proportionate and governed by risk assessment. It needs to take into account the effects of offending behaviour – in a commensurate way according to the ethos of the system which is dealing with the offence and according to whether the response to the offending behaviour of an individual is punitive or reparative. It should also be governed by what we know about desistance.**

- a. Information in relation to people under the age of 18 should be sealed and should not be ordinarily available.
- b. The onus to retain information and to communicate it in relation to the protection of others should lie with the state.
- c. Information retention should be proportionate and with a legitimate aim. Children and their parents need to know what information is held, by whom and for how long.
- d. Any processes associated with information retention should be clear, simple and easy to follow.
- e. It is no longer acceptable to hold information indiscriminately and indefinitely.

5) **LEGITIMATE - Some behaviour is of such concern that information about the behaviour may need to be retained and communicated.**

- a. The disclosure of information in relation to childhood offending should be an exception.
- b. The disclosure of information in relation to childhood offending should take the form of Other Relevant Information (ORI) and should be subject to Independent Review and if appropriate, judicial challenge. It should not take the form of 'conviction' information.
- c. Children and their families should be told of the possible consequences of their behaviours at the earliest opportunity. If there is a likelihood that their behaviour will require to be disclosed when they become an adult, then this should be known.
- d. There should be a transparency about retained information which is not currently present.





- e. Independent and impartial review of retained information will bring consistency and a trusted standard to this information.
- 6) **ACCOUNTABLE – There should be clear decision making in relation to the consequences of offending which is appropriately communicated. There should be an independent route to challenge decision making which is simple, accessible and affordable and which should allow for judicial scrutiny of decision making as a last resort.**
- a. There should be a clear statement of intent / framework document / guidelines in relation to any Other Relevant Information (ORI). There should be a process for the Independent Reviewer to be involved in determining the use of ORI and a clear process for:
    - 1) challenge of the ORI
    - 2) review of the ORI.
  - b. Any ORI should be visible to those it concerns at the earliest opportunity and should be accompanied by a relevant challenge / review period that is built in each time ORI is recorded. We think that processes around the impact of ORI should be developed for two occasions;
    - 1) the initial presenting concern;
    - 2) (possibly years later) any work which has been done to mitigate the initial presenting concern alongside any subsequent or ongoing behaviours.
  - c. There should be a clear differentiation between ORI on young people and ORI on parents and other adults who are associated with referral of a child/young person. The former is usually related to offence referrals whereas for the latter the ORI can be wide ranging and not necessary related to an offence. Many young people who commit offences are now dealt with through diversion, not through the Children’s Hearings System or the adult criminal justice system. ORI could be still requested from other agencies and could be on young people who have not been referred or prosecuted.
  - d. Separately, there should be a clear statement of intent / framework document / guidelines in relation to the provision of information which is to be used by Disclosure Scotland for the consideration of PVG listing so that the process is clear and transparent for those people who are involved.
- 7) **CAPACITY TO CHANGE - People have a capacity to change, regardless of the ‘system’ which is in place to address their behaviour and Disclosure rules and processes should be designed to promote this capacity to change whether the individual concerned was involved in offending behaviour as a child or as an adult.**
- a. The Children’s Hearings System approach should be supported by rules about the adult disclosure of information about childhood behaviour(s).





- b. Children and young people subject to prosecution should also be subject to rules which differ from adult criminal justice rules on account of their age and the ethos of the general approach we take in Scotland to the offending behaviours of children.
- c. Reform should maintain the approach to 'rehabilitation' in that, once 'rehabilitated' young people are treated as someone who has not committed or been charged with the offence, and are entitled to not disclose their involvement in committing or being charged with the offence when asked.

**Specific Question / area responses:**

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

**NO.** The disclosure system is complicated because it does not work with or for the specific Scottish context. This is evident when we consider youth offending, the Whole Systems Approach and the Children's Hearings System but is also evident when we consider the Scottish shift to community justice. We need a disclosure system which sits alongside and supports the positive work we already do across the country. Scotland has to be able to provide our vulnerable people with protection whilst also ensuring that people who want to change, can change. As outlined above we think a significant piece of work on the principles of the disclosure system should clarify what changes we can and should make.

**Question 10: Do you agree with the proposal to remove certain kinship carers and all foster carers from a membership scheme? (Including Questions 11 – 13a).**

**YES.** We believe that local authority assessment of kin and foster care are robust and ongoing and that the safety of young people who are looked after and accommodated away from home is fully recognised by the procedures in place. We think it is right that local authority arrangements in relation to on-going risk assessment are seen by everyone as the way in which we keep looked after and accommodated children safe and protected. We also recognise that kin and foster care arrangements are fluid and can change and that lifetime scheme membership does not reflect this fluidity. We think the same approach should apply to people caring for children away from their birth family whether this is a private fostering arrangement or one arranged and overseen by the local authority. We agree that a local authority should have sight of people within a household and sight of those people who regularly come and go from a home. We think that the local authority checks and assessment should be robust enough to ensure the safety of a child who is unable to live with their birth parents and that this should not necessarily require specific disclosure checks of all the involved people. We agree that a local authority should know who is providing care to children who are placed away from their birth family and that the local authority should be able to determine whether disclosure certificates are required by specific individuals.

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

We agree that a mandatory PVG scheme offers the highest level of protection to vulnerable groups in Scotland and also that a mandatory scheme should be easier to understand, explain and comply with.





In respect of how it should work – we would urge that the principles of the scheme be developed before the process of the scheme is constructed.

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

**YES.** This seems to be a clear and unequivocal approach to take, although it should also specify types of work – given that the names of jobs and roles can alter and change but the nature of the work remains the same.

**Question 23 – 25:**

A proportionate and considered approach needs to be taken, based on risk assessment and the likelihood of an individual having direct access to vulnerable people or direct access to information about vulnerable people.

**Question 27 – 29:**

**YES.**

**Question 30: Do you think this approach is clear and helpful?**

**NO** – we think the approach doesn’t cover all the areas it requires to cover. We are particularly concerned that the approach doesn’t cover the access people may have to information about vulnerable people, which could then lead to information being used in order to target, exploit or abuse their vulnerabilities. We would ask that this is addressed as a matter of some urgency.

**Question 31:**

We think that the list of positions may differ if people who have access to information are also included, and that this might require to be reviewed.

**Question 46: Do you agree with our proposals to dispense with the current court referral procedure under section 7 of the 2007 Act?**

We recognise why this is being proposed, and agree that PVG scheme membership should focus on those people who are in work where they have access to the vulnerable. However, we also recognise that there are certain offences and categories of offence as well as certain offenders, where there are greater risks associated with them and their behaviour and which can suggest that they will continue to try and access people with vulnerabilities. The court referral process does provide a secure level of protection in these cases.

**Question 48 & 49: Do you agree with proposals to create new referral powers for the police? Do you agree these powers should be limited to when people 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?**

We agree that there is a gap in the current legislation which could be exploited by people, should they be so inclined. Consequently we do not agree with the limitations as set out in Q 49 and would instead ask that a different test is devised, which focuses on a person’s access to individuals / information about individuals who have vulnerability. These new powers would need to be proportionate and would need to be consistently applied.





**Question 50: Do you think this proposal closes the safeguarding gap in terms of self-directed support?**

Yes.

**Question 53 – 56:**

This is a very difficult balance to get right. We think that there needs to be a commitment to clear time frames for decision making in cases – so that vulnerable people are protected by not being exposed by someone who may pose a risk to them – and that individuals are protected as a result of their cases following a set time frame. We think that if we begin from the starting point of the principle of risk and risk assessment then it makes no sense for an individual to be prevented from one aspect of regulated work but allowed to continue to work with other vulnerable people, unless the details of a case have been assessed. This would appear to be an area which could also benefit from independent review.

Rules around this will need to be clear and straightforward in order for employers to understand and abide by them.

We have to accept, however, that cases being dealt with in a criminal court may take a long time from start to conclusion and that this could leave people in limbo.

**Question 58:**

We would say that the principles of proportionality and simplicity need to apply to any process which is put in place in relation to age thresholds and the retention of information. We would ask that an individualised risk assessment approach is taken and would again suggest that independent review could feature as part of this.

**Question 59 - 61:**

**YES to all three questions.** If an individual presents a risk in Scotland they also present a risk overseas – more so if there is little or no regulation of work with vulnerable people in an overseas territory. We would however, ask how communication between Disclosure Scotland and overseas is going to occur?

**Question 72 – 74:**

YES.

**Question 75:**

YES.

**Question 75a:**

**6. 12 – 21 years.** In line with GIRFEC, the continuing care agenda and the whole systems approach protections of early and effective intervention, opportunities to divert young people from prosecution, court support, community alternatives to secure care and custody, managing young people who present a risk of harm, and improving integration back into the community should all be available to young people for as long as is possible.





**Question 76:**

YES

**Question 80:**

YES. But statutory guidelines should clearly and definitively define this.

**Question 82:**

We have outlined above the principles which we think need to apply to the adult disclosure of childhood offending behaviours. We think that these centre on risk assessment and on independent review / challenge.

Finally and separately, we think that the fees structure should be affordable and equitable and that there should be recognition of the status of people who require disclosure clearance as a result of volunteer work they are doing.

**SCRA Practice & Policy Team - 2018**

