Scottish Care Leavers Covenant Alliance: Response to Scottish Government’s Consultation on Protection of Vulnerable Groups and the Disclosure of Criminal Information

July 2018

The Scottish Care Leavers Covenant supports Scotland’s Corporate Parents, carers, practitioners, managers and decision makers in fulfilling their duties to improve the life chances of all of Scotland’s looked after children and care leavers (and any individual with care experience). Created by an alliance of stakeholders (comprising Barnardo’s Scotland, the Centre for Excellence for Looked After Children in Scotland (CELCIS), the Centre for Youth and Criminal Justice (CYCJ), IRISS, the Life Changes Trust, Quarriers, Staf (the Scottish Throughcare and Aftercare Forum), and Who Cares? Scotland) the Covenant calls upon all corporate parents to uphold particular principles in all areas of their work, and commit to actions which, if implemented fully and consistently, will transform culture and practice across all corporate parents. The Covenant is underpinned by a number of guiding principles including:

- Care-proofing of policy: which recognises the inequalities in opportunity encountered by care leavers and their vulnerability as young adults, and prioritises and references them in policy documents; and
- Assumption of entitlement: Corporate parents will assume all care leavers are entitled to services, support and opportunities, up to their 26th birthday. Where discretion exists in definitions of vulnerability, or in giving priority access, these will be in favour of care leavers. This includes access to bursaries and grants; access to employment or training support and provisions; and access to ‘second-chance’ opportunities.

We believe that significant change to the current system of disclosure is essential. What is required is a more fundamental reform and simplification of the current system for children and young people. Such reform requires:

- an understanding of the developmental needs of children and young people (particularly those who have experienced trauma and other adverse childhood experiences, ACE’s);
- understanding of the distinction between offences committed by children and adults;
- individualised responses and consideration of contextual information.
Rather than applying a one-size fits all model of disclosure, the treatment of children’s criminal records must allow for vulnerable children and young people to be supported to move on from their past.

Underpinning our response is the need for any change to the system to:

- Address the incompatibility between the welfare-based Children’s Hearings System and the current system of disclosure and that the acceptance or establishment of offence grounds at a Hearing should not be treated as a conviction
- Ensure the system promotes and upholds human and children’s rights and the principles of fairness and justice;
- Be child-centred;
- Adopt a proportionate and individualised, developmental, needs led approach to the disclosure of criminal records, promoting and devoting attention to the context of behaviour or circumstances of the individual at the time of the offence and subsequently;
- Avoid the additional criminalisation, stigmatising, shame and discrimination of individuals; and

**Key issues for individuals with care experience**

Children are not mini adults. They have different developmental needs and are afforded a different legal status. This is recognised in the unique approaches to children, which includes the systems, processes and frameworks within which their behaviour is addressed (Nolan, 2018; SCYJ, 2017). However, the current limited distinction between the treatment of criminal records accrued in childhood is at odds with virtually every other approach we take to children and adversely effects our ability to achieve the aims for, and to fulfil our legal and policy requirements to, children (Nolan, 2018).

Care experienced young people are particularly disadvantaged as their involvement in the care system means they are much more likely than other children to have contact with the police, and be involved in formal processes which lead to recording of behaviour (Scottish Government, 2016). Young people in care are more likely to be criminalised than their non-looked after peers (The Howard League, 2016), and research identifies that young people living in residential care are more likely to accrue criminal convictions for minor matters which, in other circumstances, would likely be dealt with by parental sanctions (Moodie and Nolan, 2016).

It must be understood that many behaviours, which become criminalised, are influenced and informed by the experience of childhood trauma and abuse. Experience of neglect, abuse and exposure to domestic violence for example all impact on how a child develops emotionally and psychologically, and how they learn to adapt and survive. Looked after children may communicate their needs through disruptive or ‘offending’ behaviour.
The Kilbrandon Report (HMSO, 1964) states the principles, which underpin the Children’s Hearing System in Scotland, and makes clear that the focus should be on ‘needs, not deeds’. Currently, it a great concern that Children’s Hearings can lead to children accruing convictions which disadvantage them in adulthood. As stated, this is often for childhood behaviour which otherwise may well have been dealt with by way of parental sanction.

**Part 9 (Corporate Parenting)** of the Children and Young People (Scotland) Act 2014 places new duties on local authorities and other corporate parents to ensure the best possible outcomes for care leavers into adulthood. Scottish Government Guidance describes corporate parenting as ‘An organisation’s performance of actions necessary to uphold the rights and safeguard the wellbeing of a looked after child or care leaver, and through which physical, emotional, spiritual, social and educational development is promoted.’

As such, we question whether we can fulfil our legislatively enshrined responsibilities and duties when large numbers of care experienced are criminalised by a state response to their childhood behaviours, which compounds negative outcomes.

We consider that the current system of disclosure inherently hampers the ability of other legislation, policy, systems and practice to achieve their aims and fulfil their responsibilities to children and young people. It also fails to meet our obligations under the UNCRC which enshrines:

- that the best interests of the child should be a primary consideration;
- the child's right to private and family life;
- treatment of children who infringe penal law should take into account their age; and
- state parties should promote the establishment of laws and procedures that are specifically applicable to children.

We also know that there are differences between offending in childhood and adulthood, including the nature of childhood offending. Low level offending is a common feature of childhood as children grow and test boundaries, with 95% of children in Scotland self-reporting commit an offence at some point in their childhood (McAra and McVie, 2010; CYCJ, 2016). Research highlights a natural maturational tipping point for the majority of children who “grow out” of offending (CYCJ, 2016).

Distinguishing between child and adulthood records is possible and is done in the majority of jurisdictions internationally. Indeed it has been concluded that such distinction is needed for a child-friendly system (Sands, 2016; Nolan, 2018). Drawing on this international learning would be useful in developing specific provisions reducing the possibility of the state disclosure of criminal convictions accrued by children and young people on all types of disclosure. We would like to see this include provisions of expunging childhood records (Sands, 2016).
Conclusion

It is vital, both in the interests of natural justice, and in upholding a person’s human rights, that childhood behaviour must be seen in the context of childhood development. We believe that the current situation is not acceptable for care experienced young people. Accruing ‘convictions’ in childhood for behaviour that may be rooted in trauma, can have a life-long impact. As such, it is essential to avoid inappropriate and disproportionate adult responses. The psychological and emotional impact of the disclosure process can serve to have a re-traumatising and stigmatising effect. This can act as a barrier to care experienced people applying for work in the first place and impede their ability to ‘move on’. This is arguably structural and systematic discrimination of a particularly vulnerable group and is counter to other key legislative drivers and policy intentions for care experienced young people.

Key Points

• We believe that that significant change to the current system of disclosure is essential. A more fundamental reform and simplification of the current system for children and young people is required. Such reform requires an understanding of the developmental needs of children and young people (particularly those who have experienced trauma and other adverse childhood experiences, ACE’s); understanding of the distinction between offences committed by children and adults; and the need for individualised responses and consideration of contextual information, particularly in relation to care experienced young people
• Care experienced young people are structurally disadvantaged in comparison, as due to their involvement in the care system they are much more likely than other children to have contact with the police, and be involved in formal processes which lead to recording of behaviour (Scottish Government, 2016). Young people in care are more likely to be criminalised than their non-looked after peers, (The Howard League, 2016) and research identifies that young people living in residential care are more likely to accrue criminal convictions for minor matters which, in other circumstances, would likely be dealt with by parental sanctions (Moodie and Nolan, 2016).
• Article 40 of the UNCRC states young people should receive child-friendly justice. The UNCRC and the 2010 Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice both state those under 18 years of age should be treated as children. What is required is an approach that recognises the distinction between offences committed in childhood and adolescence, and those committed by adults, in addition to consideration of other relevant contextual information.
• Where there is the possibility of alleged behaviour restricting an individual’s opportunities later in life, there is a need for the safeguards that are afforded to children above the age of criminal responsibility to be available at the time, such as the advice of a solicitor. It is extremely
concerning that children and young people are routinely placed in such a position, without being fully informed of their rights or the long term consequences of accepting grounds, and often without the advice of a solicitor. For example, a recent study found that 90% of legal aid work in Hearings was undertaken on behalf of parents, not children and young people (CELCIS, 2016).

• Rather than the onus being placed on care experienced people being required to seek the removal of spent ‘convictions’, a preferable system would be one in which this information was automatically removed unless judicial review found clear reasons for the information to remain.

• For Scotland to be truly the best place in the world to grow up, a specific system for the treatment of children and adolescents criminal records must be established, which recognises the distinctions between childhood and adult offending behaviour, and enables children and young people to move on from past mistakes and experiences.

Thank you for providing us with this opportunity to respond. We hope the feedback is helpful; we would be happy to discuss any aspect in further detail.

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