This is the text of the written intervention made by Clan Childlaw in the case: In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland) R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants) R (on the application of P) (Appellant) v Secretary of State for the Home Department and others (Respondents) [2019] UKSC 3.

INTERVENER – CLAN CHILDLAW

Written Submissions

Introduction and overview

1. The Intervener welcomes the opportunity to make written submissions. These submissions are made in accordance with the Order of the Court dated 17 May 2018 and intimated to the Intervener on 24 May 2018. That Order directs that these submissions are restricted to the provision of information about the scheme for disclosure in Scotland, and about the functioning of that scheme in practice.

2. The Intervener provides legal advice and representation to children and young people in Scotland, the majority of whom are or have been looked after children within the care system. The Intervener's clients are all children and young people under the age of 25. The Intervener has 10 years of experience in representing children in children's hearings proceedings in Scotland. Approximately 50% of the cases they worked on in 2016-2017 involved representation at children's hearings. A significant number of their clients have been the subject of adverse childhood experiences, including having been involved in childhood offending behaviour which may be disclosed in later life. In providing advice to clients, the Intervener's responsibilities often extend to assisting them in understanding what the consequences of their offending behaviour may be in the context of educational and employment opportunities. That includes providing advice about the operation of the disclosure regime.

3. In the course of preparing these submissions, the Intervener has taken the opportunity to meet and discuss the factual description of the current disclosure regime in Scotland with officials from the Scottish Government. The Intervener is very grateful for the assistance provided. The views expressed in these submissions are solely those of the Intervener.

4. The existing disclosure system is not straightforward. Nor is it static. Developments in case law, most recently *P v Scottish Ministers* [2017] CSOH 33[1], have led to some adjustments and the Scottish Government is currently consulting on proposals for changes in the short to medium term. In these submissions, the Intervener seeks to set out the main features of the current scheme and the impact of that scheme on its clients, and also to give an indication of changes that may follow as a result of the consultation proposals.

5. The present appeals concern the extent to which spent convictions may be disclosed. In order to understand the disclosure scheme in Scotland, it is necessary to consider three statutes: the Rehabilitation of Offenders Act 1974 ("the 1974 Act")[2]; the Police Act 1997 ("the 1997 Act")[3]; and the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act")[4].

6. Within the overall framework, there are two essential elements. The first is the obligation of so-called 'self-disclosure'. The 1974 Act, together with relevant subordinate legislation, form the basis of the requirements that are imposed on past offenders obliging them to disclose their convictions in appropriate circumstances.

7. Self-disclosure is one aspect of the disclosure regime. The second essential element is the system of 'state disclosure', as permitted in Scotland under the 1997 Act and the 2007 Act. Taken together, and with the associated subordinate legislation, these provide for the system of state disclosure in Scotland. That system is administered by Disclosure Scotland, which is an Executive Agency of the Scottish Government and which discharges the functions of the Scottish Ministers under the 1997 Act and the 2007 Act. The 1997 Act has been amended separately for Scotland and therefore a different version applies from those applicable in England and Wales and in Northern Ireland.

[1] Authorities, Volume X, Tab 65
[2] Authorities, Volume 1, Tab 3
[3] Authorities, Volume 1, Tab 2
[4] Authorities, Volume X, Tab 39

Relevant statutory provisions

8. As in England and Wales, the starting point is the 1974 Act. Under that Act, the general position is that a person convicted of a criminal offence and sentenced to custody for a period of 30 months or less is regarded as rehabilitated after a specified period has expired, provided he or she receives no further convictions. (The Management of Offenders (Scotland) Bill is currently before the Scottish Parliament. Among its provisions is an amendment which will extend the 30-month period to 48 months. If enacted, that will bring Scotland into line with the current position in England and Wales.) In some circumstances, a person can never be subject to the rehabilitation provisions, such as a person who has received a life sentence.

9. The 1974 Act must be read with the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (SSI 2013 No.50) ("the 2013 Order"), as amended. That Order makes provision for the protections of the 1974 Act to be excluded in certain circumstances. Whereas under the 1974 Act a person does not have to disclose any convictions once they become spent, in situations where the 2013 Order applies a person can be asked about, and required to disclose, both unspent and spent convictions.

10. The 2013 Order makes provision for 'protected convictions' and 'higher level disclosures'. 'Protected convictions' are defined in article 2A of the 2013 Order. They are convictions which are spent, and which are either not convictions for offences listed in Schedule A1 or Schedule B1 to the 2013 Order, or, if for a Schedule B1 offence, the sentence imposed was an admonition or absolute discharge, or the person was under 18 at the date of conviction and seven and a half years have passed, or aged 18 or over and 15 years have passed. The latter includes a discharge from a children's hearing. A person does not have to disclose a spent conviction once it has become protected. Article 4(2) of the 2013 Order also makes clear that a person does not have to disclose certain spent convictions until they appear on a higher level disclosure (as defined in article 2(1)). The effect of this is to allow the individual the chance to apply (under the 1997 Act or the 2007 Act) for removal of certain conviction information prior to its disclosure to a third party. (For further details regarding applications for removal of conviction information see paragraphs 10 and 32 to 34 below.) For the purposes of state disclosure, the definition of 'protected conviction' is exactly mirrored in section 126ZA of the 1997 Act, a section

which is only applicable in Scotland; and Schedules A1 and B1 to the 2013 Order are exactly mirrored in Schedules 8A and 8B to the 1997 Act. (Given that they are in the same terms, there is no need to make separate reference to Schedules A1 and B1.) Schedules 8A and 8B to the 1997 Act, as applicable in Scotland, are included in the authorities before the Court at number 33. The version which has been lodged is that which was in force prior to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (SSI 2018 No. 52), as a result of which certain very minor changes have been made to two paragraphs within Schedule 8B. Nothing turns on those and there is no need to refer to the up-to-date Schedules.

11. Under the 1997 Act, three types of disclosure may be issued: basic disclosures, standard disclosures and enhanced disclosures.

12. A basic disclosure contains only unspent convictions. Any person may request a basic disclosure in respect of himself or herself, and for any purpose. Basic disclosures tend to be used for general employment purposes. The present appeals do not concern basic disclosures.

13. A standard disclosure is issued under section 113A of the 1997 Act and contains the prescribed details of every 'relevant matter'. The definition of 'relevant matter', in section 113A(6), covers any unspent convictions, unspent cautions (from England, Wales and Northern Ireland) and certain spent convictions. Information as to whether a person is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003 is also included in a standard disclosure. Standard disclosures are available for employment purposes where a person applies for a position which is listed in the 2013 Order and is therefore excluded from the application of the protections to spent convictions given by the 1974 Act. Such positions might involve access to high value assets, or where there is an expectation of integrity. Also included are applications for membership of certain professional bodies. An employer or organisation seeking a standard disclosure in relation to an applicant must be registered with Disclosure Scotland.

14. An enhanced disclosure is issued under section 113B of the 1997 Act. It contains the same information as would be covered in a standard disclosure, but, in addition, it may also contain information from the police detailing non-conviction information, provided under section 113B(4) of the 1997 Act. This is known as 'other relevant information'.

This may cover, for example, credible suspicion by the police that a person had committed serious offences relevant to the post applied for, but in respect of which the person had not been convicted. If the police provide such other relevant information, Disclosure Scotland must include it. Disclosure Scotland has no discretion to remove or amend any material provided in this way. Enhanced disclosures are available where a person is being considered for a role where there is a high degree of sensitivity, for example as a prospective adoptive parent or employment in Crown Office. These roles are excluded from the protections of the 1974 Act by virtue of the 2013 Order. In addition, enhanced disclosures are only available where the purposes of the disclosure have been prescribed in regulations 9, 10 or 12 of the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010 No168).

15. Until the introduction of the protection of vulnerable groups ("PVG") provisions, the disclosure scheme under the 1997 Act covered all circumstances, including working with children. The PVG scheme was established under the 2007 Act and came into effect on 28 February 2011. The essential purpose of the PVG scheme was to create a disclosure system for people doing 'regulated work' with children or protected adults. 'Regulated work' is subject to a very detailed definition in terms of section 91 of the 2007 Act, and schedules 2 and 3 thereto. It encompasses a wide range of educational, supervisory and caring roles. 'Protected adults' are, generally, adults who are provided with community care or health or welfare services; the term is defined in section 94 of the 2007 Act. In setting up a separate PVG scheme, the effect was to remove any disclosures relating to regulated work with children or protected adults from the scope of the 1997 Act.

16. There are two principal parts to the 2007 Act. Part 1 concerns listing. The Scottish Ministers are obliged to keep two lists, the children's list and the adults' list, which contain the names of persons whom the Scottish Ministers have decided are unsuitable to work with children or adults, respectively. The 2007 Act contains detailed provisions for the maintenance of the lists and the process by which a person can be placed by the Scottish Ministers on either or both of the lists. There are procedures for a person listed to appeal against listing and to make an application for removal from the list or lists. An individual who is included on the children's list is barred from doing regulated work with children, and the same applies *mutatis mutandis* for adults. It is a criminal offence to do regulated work after being barred.

17. Part 2 of the 2007 Act (sections 44 to 77) is of particular significance in the present appeals. This establishes the PVG scheme. Under that scheme, information about individuals who do, or wish to do, regulated work with children or protected adults is collated and disclosed. Disclosure Scotland maintains scheme records of PVG scheme members. A scheme record is a document comprising a scheme member's statement of membership and vetting information obtained by Disclosure Scotland. 'Vetting information' is defined in section 49(1)(a) of the 2007 Act, by reference to section 113A(3)(a) of the 1997 Act, i.e. every 'relevant matter' relating to the applicant. Vetting information also includes information as to whether a person is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003, and also any 'other relevant information' which the police decide to disclose, as well as certain civil orders which are prescribed in the Protection of Vulnerable Groups (Scotland) Act 2007 (Vetting Information) Regulations 2010 (SSI 2010 No. 189). The information in a PVG scheme record is, therefore, the same information that is contained in an enhanced disclosure issued under section 113B of the 1997 Act. The chief difference between an enhanced disclosure under the 1997 Act and a PVG scheme record disclosure is that Disclosure Scotland continues to update and monitor a scheme record for as long as the individual remains a member of the PVG scheme. If new vetting information is added to the scheme record, whether as a result of a conviction or new non-conviction information from the police, Disclosure Scotland will consider whether, as a result of that information, it is appropriate to bar that person from working with children or protected adults, or both.

18. Under the PVG scheme, there are three types of disclosure which would be available to a person or organisation considering a scheme member's suitability to do regulated work. These are:

- A statement of scheme membership. This contains no vetting information.
- PVG scheme record disclosure. This contains vetting information.
- PVG short scheme record. This contains no vetting information.

19. A standard disclosure and an enhanced disclosure under the 1997 Act and a PVG scheme record disclosure are all 'higher level disclosures'.

20. The central question for present purposes is which spent convictions may be included in a higher level disclosure. The provisions mirror the requirements imposed on individuals under the 1974 Act and the 2013 Order to disclose their spent convictions. Whether a spent conviction can be included in a higher level disclosure is determined by reference to the definition of 'relevant matter', as set out in section 113A(6) of the 1997 Act, which in turn refers to 'protected convictions', and that depends on reference to the offences listed in Schedules 8A and 8B. This definition, and, indeed, the scheme as a whole, have been revised in recent years as a result of developments in cases considered by the courts. These developments are discussed by the parties in their cases. For present purposes, it is necessary only to note their particular consequences in Scotland.

21. The Scottish Ministers recognised that the decision of the Supreme Court in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49[5] had implications for Scotland. This led to the Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No.2) Order 2015 (SSI 2015 No. 423), which came into force on 8 February 2016 (confirming changes in the law made on 10 September 2015 by the Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (SSI 2015 No. 330)). In *P*[6] Lord Pentland explains the effects of this Order. His decision, at paragraphs [25] to [31], helpfully sets out a clear account of the approach taken by the Scottish Ministers to the new policy, following *T*[7], and a description of the amended version of the statutory scheme.

22. The facts of the case in *P*[8] are given in paragraphs [13] to [20]. Very briefly, at the age of 14, P was involved in minor sexual offending, first concerning pornographic magazines, and masturbating in a park, where he was seen by a police officer. Secondly, he exposed himself to his sister in the family home. He was referred to a children's hearing on the grounds that he had committed the offence of lewd and libidinous practices. He was made the subject of a supervision requirement. At the age of 42, having obtained a social care qualification, P applied to work as a care assistant in a care home. Lewd and libidinous practices were a sexual offence within the meaning of section 210A(1) of the Criminal Procedure (Scotland) Act 1995 and were within the scope of Schedule 8A to the

[5] Authorities, Volume 1, Tab 21
[6] Authorities, Volume x, Tab 65
[7] Authorities, Volume 1, Tab 21
[8] Authorities, Volume x, Tab 65

1997 Act. Thus, P's "conviction" was not a "protected conviction". It was therefore a relevant matter relating to P and it fell to be disclosed on his higher level disclosure. As a result, his prospective employers were unwilling to offer him the job.

23. The court held that the scheme failed to provide any, or sufficient, safeguards to enable the proportionality of the admitted interference in the petitioner's case to be evaluated fairly and objectively and operated arbitrarily in his case. It automatically generated disclosure of the conviction information without having afforded him an opportunity to challenge it on the basis that it would be disproportionate in the particular circumstances of his case. The scheme's approach was too sweeping and indiscriminate and did not allow for consideration of the highly relevant circumstances of the petitioner's conviction at the stage of deciding whether to disclose it, and with regard to those circumstances, disclosure in his case was not justified by the policy. The statutory scheme gave rise to an arbitrary outcome in the petitioner's case and was not in accordance with the law in terms of Article 8. His rights had been violated, and the automatic disclosure of the conviction information constituted an unlawful and unjustifiable interference therewith.

24. The Scottish Ministers did not reclaim the Lord Ordinary's decision. Instead, the 1997 Act and the 2007 Act were amended. The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (SSI 2018 No. 52) came into force on 17 February 2018. Since that date, a person in P's position is able to apply to the sheriff to make an order requiring Scottish Ministers to issue a new certificate that does not include those details, in respect of a Schedule 8A offence, provided that a certain period of time has passed since the date of conviction. For a person who was aged under 18 at the date of conviction, that period is seven years and six months. For a person who was aged 18 or over at the date of conviction, the period of time that must have passed before such an application can be made is 15 years. The sheriff can order that the disclosure should be issued without the conviction details if he or she considers that the conviction is not relevant in relation to the purpose for which the disclosure was sought (if it was a standard or enhanced disclosure), or that it is not relevant to the type of regulated work in relation to which the person participates in the PVG scheme. The application to the sheriff is made under section 116ZB of the 1997 Act in relation to standard or enhanced disclosures or under section 52A of the 2007 Act in relation to PVG scheme records.

25. The position in relation to Schedule 8B offences is set out in the summary at paragraph 33 below.

Disclosure and childhood offending

26. In Scotland, children charged with an offence are mostly dealt with in the children's hearings proceedings. Children in need of compulsory measures of care and protection because of welfare concerns are also dealt with in such proceedings. The procedure involves the child being referred into the children's hearings system on one or several grounds, which include: lack of parental care; exposure to persons whose conduct is likely to be harmful to the child; the child having committed an offence; and failure to attend school without reasonable excuse. Throughout the children's hearings system, the need to safeguard and protect the welfare of the child throughout childhood is the paramount consideration, subject to certain qualifications which are not relevant here.

27. Typically, a child who has been referred into the children's hearings system on offence grounds has the option to admit or deny the offence. If the child admits the offence, the children's hearing will make a decision about disposal. If the child denies the offence, proceedings before the sheriff will determine whether the offence grounds are established. If the offence grounds are not established, that is an end of the matter. If the grounds are established, the children's hearing will make a decision about disposal.

28. If offence grounds are either admitted or established, then the disposal by the children's hearing is treated as a conviction by virtue of section 3, as amended, of the Rehabilitation of Offenders Act 1974, for the purposes of the 1974 Act, and also the 1997 Act and the 2007 Act, with all the attendant consequences of a conviction and its subsequent disclosure.

29. It should be remembered that, even where there is no conviction or, within the context of the children's hearings system, offence grounds are not established, the police may retain information about the circumstances in which the referral to the children's hearing was made. That information may be used at a subsequent point if the police decide that the

test is met to provide 'other relevant information' on either an enhanced disclosure or a PVG scheme record.

30. It follows that children who present with a referral on offence grounds need legal advice as to the consequences of the grounds being admitted or established. Further, adults, and in particular young adults, with such a history of children's hearing involvement are also likely to need advice in relation to disclosure.

Summary of up-to-date position

31. Unspent convictions are always disclosed on higher level disclosures. Some, but not all, spent convictions may also be disclosed. There are two lists of offences contained within Schedule 8A and Schedule 8B to the 1997 Act. A spent conviction for an offence not listed in either Schedule 8A or 8B is a protected conviction under section 126ZA of the 1997 Act and will not be disclosed.

32. A spent conviction for an offence listed in Schedule 8A will always be disclosed, unless a sheriff has ordered that it is not to be disclosed. The individual affected may apply to the sheriff for removal of the spent conviction from the disclosure, provided that seven and a half years have passed if the individual was convicted when he or she was under the age of 18, or that 15 years have passed if the individual was convicted when he or she was 18 or over.

33. A spent conviction for an offence listed in Schedule 8B will be disclosed unless it is a 'protected conviction'. A spent conviction for a Schedule 8B offence is protected if either a period of seven and a half years has passed if the individual was convicted when he or she was under the age of 18, or a period of 15 years has passed if the individual was convicted when he or she was 18 or over. Separately, a conviction for an offence listed in Schedule 8B is also protected if the disposal in respect of the conviction was an admonition or absolute discharge. In the period before a spent conviction becomes protected, there is a process whereby the individual affected can apply to the sheriff, also under section 116ZB of the 1997 Act or section 52A of the 2007 Act, for removal of the spent conviction from the disclosure.

34. If an application is made to the sheriff for an order to remove information about either a Schedule 8A or a Schedule 8B conviction, the sheriff can order the conviction to be removed only if he or she is satisfied that the conviction is not relevant in relation to the purpose for which the disclosure was sought (if it was a standard or enhanced disclosure) or that it is not relevant to the type of regulated work in relation to which the person participates in the PVG scheme.

35. Finally, in contrast with the situation in England and Wales and Northern Ireland, and for the avoidance of doubt, it is not the case that any spent conviction in respect of which a custodial sentence has been imposed will be disclosed. Nor is there an equivalent of the "multiple conviction rule".

An illustrative example – Schedule 8A

36. At the age of 14, Chloe was a looked after child, living in a residential unit. She was involved in a disagreement with another child over the use of the Xbox in the unit. A member of staff in the unit intervened, and Chloe started shouting abuse and swearing at the staff member. The police were called and Chloe was charged with threatening or abusive behaviour, an offence under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. She was referred to a children's hearing on offence grounds. Chloe did not have legal advice. She accepted the grounds and the children's hearing made her the subject of a compulsory supervision order. She was subject to that order until her sixteenth birthday, at which point, as a deemed conviction, it became spent. The offence with which Chloe was charged is listed in Schedule 8A to the 1997 Act. It is an offence which must be disclosed unless the sheriff orders otherwise. Chloe will have to wait until she is 21, seven and a half years after the compulsory supervision order was made, before she can apply to the sheriff to make an order requiring the Scottish Ministers to issue a new certificate excluding details of that offence. The sheriff will require to assess whether the offence under section 38(1) is relevant to the purpose of the higher level disclosure. Until then, if Chloe needs a higher level disclosure, details of the offence will be disclosed, and her employment prospects will be adversely affected as a result.

An illustrative example – Schedule 8B

37. John was a looked-after child, accommodated in a residential unit. At the age of 15, he was on an outing to a fast food restaurant with others from his unit. He was involved with the others in a disturbance at the restaurant, as a result of which he was charged with a breach of the peace. He was referred to a children's hearing on offence grounds. He accepted the grounds and the children's hearing made him the subject of a compulsory supervision order, which ended after one year. He consulted the Intervener at the age of 19. He had applied for a job for which he required a higher level disclosure. He was worried that the breach of the peace would be disclosed. By virtue of section 3, as amended, of the 1974 Act, the acceptance of the grounds was treated as a conviction. It had become spent when the compulsory supervision order came to an end, at which point John was 16. Breach of the peace is listed in Schedule 8B to the 1997 Act. It is an offence which is to be disclosed until it becomes protected. It would be disclosed as a spent conviction for seven and a half years, by which time John would be 22. John was advised to apply to the sheriff to make an order requiring Scottish Ministers to issue a new certificate excluding those details. The sheriff was required to assess whether the breach of the peace remained relevant to the purpose of the higher level disclosure.

Proposals for further reform: the Scottish Government's consultation on the disclosure regime in Scotland

38. Changes to the disclosure regime are expected to take place. These submissions are intended primarily to provide information about the current scheme but the Court may wish to be aware that reform is being consulted on. A review of the disclosure regime in Scotland was launched on 25 April 2018 by the Minister for Childhood and Early Years. In the consultation introduction it is stated:

> "*We also have an equal and determined commitment to the social inclusion of our most marginalised and stigmatised groups, including those who have convictions. These aspirations can be seen throughout our current legislative programme. We are taking legislation through the Scottish Parliament to raise the age for criminal responsibility from 8 to 12 and another bill will bring forward legislation that will*

reform the rehabilitation of offenders legislation, making sure that, where appropriate, people with convictions can move on more quickly from mistakes made earlier in life to secure employment and make a good contribution to society."[9]

39. The questions raised in the consultation paper are very wide-ranging. Only a few are mentioned here. For example, the Scottish Ministers' proposals include a reduction in the number of types of disclosure. The intention is to simplify the system. There are also proposals to move from a paper-based system to a digital system.

40. Given the circumstances of the present appeals, it is especially appropriate to mention that the Scottish Ministers are also consulting on the contents of the lists of offences in Schedules 8A and 8B[10]. They are also seeking views in respect of the disclosure periods of 15 years and seven and half years[11]. The approach is explained in the consultation paper at pages 55 to 57. It is suggested that these periods might be reduced to 11 years and five and a half years, which would reflect changes which may be made to the rehabilitation periods in the 1974 Act, if the Management of Offenders (Scotland) Bill is enacted. Views are sought as to whether a reduction is appropriate, and to what period.

41. In addition, the consultation extends to the process for applying to remove spent convictions[12]. The Scottish Ministers set out possible options as alternatives to an application made to the sheriff, including an independent reviewer or an application to the Scottish Tribunals, and seek views as to whether these are viable.

42. The Intervener's particular interest is in how the disclosure regime addresses childhood offending behaviour. In relation to 12-17 year old children this is set out at pages 65 to 71 of the consultation. The Scottish Ministers recognise the importance of Scotland's 'whole system approach' to youth justice and they also acknowledge that young people should be assisted to move on from early harmful or criminal behaviour whilst at the same time making sure that the system addresses those who are a risk to the public.

[9] Extracts of Protection of Vulnerable Groups Consultation, Page 1
[10] Extracts of Protection of Vulnerable Groups Consultation, Page 53
[11] Extracts of Protection of Vulnerable Groups Consultation, Pages 56 - 57
[12] Extracts of Protection of Vulnerable Groups Consultation, Pages 58 - 62

43. The Scottish Ministers set out three options as to the way forward. These are[13]:

- Make no change to the current system.

- For convictions accrued by children aged between 12 years and an upper age (yet to be decided), these would be treated in the same way as is proposed for children under 12 in the Age of Criminal Responsibility (Scotland) Bill. There would be no disclosure of such convictions on any type of disclosure. Disclosure of any information about such previous offending behaviour of 12 to 17 year olds could only happen on higher level disclosures if, following an independent review, it was decided that the information should be disclosed as 'other relevant information'.

- No conviction, regardless of how recent, would be disclosed on a state disclosure when the individual was, at conviction, aged between 12 years and the upper age. This protection for convictions would, however, be set aside where the conviction is for an offence listed in Schedule 8A or 8B, or where the conviction is of a type that cannot become spent under the 1974 Act, so that the effect would be that more serious youth offending behaviour would continue to be disclosed.

44. The Intervener is of the view that the second option would be the best way forward in terms of upholding children's rights, and that it would be more in line with the United Nations Convention on the Rights of the Child. It is more easily understood, would be more workable in practice and would provide a mechanism by way of an independent reviewer if it is thought that there is a need for childhood offending behaviour to be disclosed.

45. The Intervener recognises that the current scheme in Scotland is very complex. That is a widespread view. There are real concerns about accessibility. The complexities of the legislation present challenges to legal advisers, and for vulnerable people, especially children, there are aspects of the scheme which are virtually impenetrable. To an extent, that may be as a result of amendments made to the scheme in response to developments

[13] Extracts of Protection of Vulnerable Groups Consultation, Pages 67 - 69

in the law. There is something of a patchwork of remedial orders. One of the aims of the review is to simplify the scheme. That is welcome.

46. However, the Intervener also recognises that the scheme must be sufficiently nuanced and flexible in order to respect the rights of individuals. There is a whole spectrum of offending and the system needs to have built within it the capacity to assess and understand potential risks. A scheme which allows for the proper checking of records in order to protect those who might otherwise come to harm, and which functions well, is an essential part of a good welfare and justice system. Inevitably, that will require careful drafting and, no doubt, a degree of complexity. What the Scottish Government is proposing is to strike the right balance between protecting the public and enabling those previously involved in criminal activities to make a positive contribution to society. The intervener agrees with this intention. The consultation closes on 18 July 2018, following which the Scottish Government will use the responses to inform the proposals for how any new legislation will operate.

The Scottish scheme and the United Kingdom context

47. The Intervener has considered the case submitted by Unlock and, in particular, the submissions made in respect of the impact of disclosure requirements on children and young people who are involved in offending behaviour. The consequences can often carry through to later life. Although the practice and expertise of Clan Childlaw are in a different jurisdiction, there are many similarities between their experience and that of Unlock. They do not seek to replicate Unlock's submissions but would wish to endorse what is said about the particular impacts on children and young people, especially the adverse effects experienced by those who are or have been in care.

48. In their statement of case, the Appellant Secretaries of State argue that a comparison with Scotland is not apt. They state that the legislative approach in Scotland is different to that in England and Wales. That is true, but only up to a point. The 2007 Act and the PVG scheme are specific to Scotland. However, in the basic structure, as set out in the 1974 Act and the 1997 Act (albeit these are subject to certain Scottish modifications), there is much in common.

49. Both systems are subject to similar cultural, criminological and political influences. In June 2004, Sir Michael Bichard published his report following his inquiry into the Soham murders. In Scotland, the response to that report and its recommendations was the 2007 Act and the PVG scheme. In England and Wales, there was a different legislative and policy response, but the fundamental issues that needed to be addressed were essentially the same.

50. For many years, there has been extensive co-operation between the jurisdictions, as would be expected. It is obvious that there is a need for a level of integration and mutual understanding between the different systems, and that also extends to Northern Ireland. To be effective, disclosure of criminal convictions has to work on both sides of the border and there are numerous provisions throughout the primary statutes which allow that co-operation to take place.

51. Indeed, the extent of cross-border co-operation goes further. The Secretaries of State refer to the 2016-17 Annual Report and Accounts of Disclosure Scotland (paragraph 119)[14]. They select a few statistics which, absent explanation, might be rather puzzling. They state that the Annual Report "indicates that its workload is under half that of the DBS in England and Wales. In the 2016-17 year, it had a total of approximately 1.9 million applications for certificates." Given the respective populations of Scotland and England and Wales, "under half" appears rather high, and 1.9 million seems startlingly high. The explanation is this. Under a Delegated Authority Agreement with the Disclosure and Barring Service, in terms of section 122A of the 1997 Act, Disclosure Scotland has handled basic disclosure applications for England and Wales, in addition to basic and higher level and PVG applications for Scotland. That has been the case since 2002. The 2016-17 Annual Report relied on by the Appellants shows that, of the 1.9 million applications for certificates, 1.6 million were for basic certificates, of which only 144,000 came from Scottish addresses.

52. The delegation ended on 31 December 2017. From September 2017, there was a gradual transfer from Disclosure Scotland to the DBS of basic disclosure business for England and Wales, with the DBS taking over all of that basic disclosure business from 1 January

[14] Available at: https://www.mygov.scot/disclosure-scotland-annual-report-accounts-16-17/dislcosure-scotland-annual-report-accounts-2016-2017.pdf?inline=true

2018. From a peak of 35,000 to 40,000 basic disclosure applications per week in September and October 2017, Disclosure Scotland is now handling 5,000 to 6,000 basic disclosure applications each week. This represents a drop in volume of basic disclosure business for Disclosure Scotland in the region of 85%. The higher level disclosures and PVG business handled by Disclosure Scotland are unaffected by the ending of the delegation.

53. In contending that the comparison with Scotland is not apt, the Appellants rely on the argument that "the most obvious distinction between them is one of volume". That has to be considered in the context of the practical reality outlined above. For some years, Disclosure Scotland has been handling a very significant proportion of the basic disclosure workload for England and Wales. Volume may not be as critical an issue as the Appellants suggest. In any event, it is difficult to see what bearing volume should have on matters of principle. Resource allocation may be affected, but that is a separate issue.