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SPICe Briefing

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# The Disclosure (Scotland) Bill

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The Disclosure (Scotland) Bill was introduced on 12 June 2019 and makes changes to the disclosure system and Protection of Vulnerable Groups scheme. This briefing sets out the background to the legislation, an overview of the current system, and the key changes the Bill seeks to make.

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# Contents

<b>Executive Summary</b>	<b>4</b>
<b>Background</b>	<b>7</b>
What is disclosure?	7
A brief overview of the current system	8
Rehabilitation of Offenders Act 1974	8
Police Act 1997	8
Protection of Vulnerable Groups (Scotland) Act 2007	9
Legal challenges	9
2015 Remedial Order	9
2018 Remedial Order	10
Part of a legislative package	11
The Management of Offenders (Scotland) Act 2019	11
The Age of Criminal Responsibility (Scotland) Act 2019	11
<b>What the Bill does</b>	<b>13</b>
<b>Range of products and services</b>	<b>14</b>
Current system	14
Proposed new disclosure products	16
Current vs New	17
What this might mean for individuals and organisations	17
<b>Disclosable Offences and Lists</b>	<b>18</b>
Current system	18
The Bill	19
Offences on Lists A and B	19
Time periods	20
What this means for individuals and organisations	21
<b>Other Relevant Information</b>	<b>22</b>
Current system	22
The Bill	23
<b>Childhood offences</b>	<b>24</b>
Recent legislation	24
The Bill	24
Options for childhood convictions	25
What this means for individuals and organisations	27
<b>Reviews</b>	<b>28</b>

Current system	28
The Bill	28
Consultation	29
What this means for individuals and organisations	30
<b>Protection of Vulnerable Groups</b>	<b>31</b>
Current system	31
The Bill	31
Regulated roles	32
Membership	33
Barred lists	34
Listing	34
Current process for when an individual is considered for listing	35
Conditions	35
Compulsory PVG membership	35
New offences	35
Policy development	36
What this means for individuals and organisations	37
<b>Accredited bodies and individuals</b>	<b>39</b>
<b>Costs</b>	<b>41</b>
<b>Fees</b>	<b>42</b>
<b>Bibliography</b>	<b>43</b>

# Executive Summary

The [Disclosure \(Scotland\) Bill](#) ("the Bill") seeks to amend the law governing how the state discloses previous offending behaviour and the Protecting Vulnerable Groups ("PVG") scheme.

## Current system

Current system and PVG scheme have developed over a number of years and are complicated. The system has developed gradually and has been amended following successful court challenges. These court challenges focused on whether the state's interference with individuals' right to privacy by disclosing past convictions was lawful.

The Disclosure (Scotland) Bill is also part of a package of recent reforms contained within the Management of Offenders (Scotland) Act and the Age of Criminal Responsibility (Scotland) Act.

[More information on the current system and its development can be found here.](#)

## Range of products and services

A key aim of the Bill is to simplify the system for users and organisations. The Bill proposes to reduce the number of disclosure products to two: Level 1 and Level 2. Level 1 disclosures would include mainly basic information on unspent convictions; Level 2 disclosure could include certain spent convictions and other information depending on the purpose of the disclosure. This is a development from the current basic, standard, enhanced and PVG scheme disclosures. Standard and enhanced disclosures and PVG scheme memberships are known as "higher level" disclosures.

[More information on the range of products and services can be found here.](#)

## Disclosable offences and lists

One of the consequences of court challenges to the disclosure systems in the UK was that the Scottish Government introduced lists of convictions for offences that would be disclosed in higher level disclosures once spent. The Bill seeks to make changes to these lists and how long these spent convictions could be disclosed.

[More information on disclosable offences and lists can be found here.](#)

## Other relevant information

Under enhanced and PVG disclosures, a third party may be provided with other relevant information ("ORI"). ORI is information that the police have provided on an individual that can include information about behaviour which may not have been tested at trial or led to a conviction. The Bill provides for Ministers to produce guidance for the chief constable.

[More information on ORI can be found here.](#)

## Childhood convictions

Offending behaviour in childhood and subsequent convictions have been the subject of reforms in the Management of Offenders (Scotland) Act 2019 and the Age of Criminal

Responsibility (Scotland) Act 2019. The Bill provides for Disclosure Scotland to assess in each case whether information about childhood convictions ought to be disclosed. The Scottish Government's proposals have developed since the consultation that led to the Bill.

[More information on childhood convictions can be found here.](#)

## **Reviews**

The Bill provides for disclosures to be provided to the individual before being shared with a third party. This provides an opportunity for an individual to seek an independent review of the content of the disclosure before it is seen by a prospective employer, for example. The Bill provides for new review processes. The types of information that can be reviewed are certain spent convictions, ORI, and childhood convictions.

[More information on reviews can be found here.](#)

## **Protection of Vulnerable Groups**

Part two of the Bill seeks to amend the Protection of Vulnerable Groups (Scotland) Act 2007 and therefore changes to the PVG scheme. The main proposed changes to the PVG Act are:

- a list of activities which give rise to regulated roles which replace the concept of regulated work
- the current lifetime membership of the PVG scheme to be replaced by 5-year membership
- to allow Ministers to impose conditions on individuals who are being considered for barring (i.e. being barred from working with a vulnerable group)
- PVG membership to become mandatory.

[More information on the proposed changes to the PVG Act can be found here.](#)

## **Fees**

The Bill maintains the powers for Ministers to set out the fees for the disclosure system and PVG scheme in regulations.

[More information on fees can be found here.](#)

## **Key policy considerations**

- Ensuring the correct balance between protecting vulnerable groups, providing information for appointments to sensitive roles, respecting individuals' rights to privacy, and allowing individuals to move on from offending behaviour.
- Ensuring the proposed system is user-friendly for both organisations and individuals.
- Ensuring the appropriate differentiation between adolescent and adult offending.
- Making the disclosure system easier to understand, particularly in relation to regulated work/roles.

- Considering how the package of legislation, including other Acts, will work together.

# Background

## What is disclosure?

Disclosure is the system where employers or others can ask the state about an individual's previous convictions. Normally this will be in relation to employment or volunteering opportunities.

A fundamental aim of the disclosure regime is to balance protecting the public with ensuring that the rights of individuals to a private life are respected and that they have ability to move on from offending behaviour. The system has developed taking account of findings of public inquiries into tragic and high-profile cases, such as the Cullen Inquiry into the Dunblane massacre and the Bichard Inquiry into the Soham murders. The regime initially disclosed all conviction information held on the police national databases, regardless of how old or minor the conviction in higher level disclosures. The state disclosure of such information in the UK has been successfully challenged a number of times in the courts and legislation has been adapted and updated in response.

The Minister for Children and Young People, Maree Todd MSP, told the Parliament:

“ The Scottish Government is committed to policies that balance public protection with the right to move on from past offences. Those are not contradictory aims; both can be achieved.”

Scottish Parliament, 2019<sup>1</sup>

There are different levels of disclosure. At its basic level an individual's "unspent" convictions will be disclosed. For particular types of roles more information may be disclosed, such as "spent" convictions or other information the police may hold.

The purpose of disclosure is to support organisations to make informed decisions about individuals. This is often because the prospective role will have an element of responsibility. This could be financial responsibility or caring responsibilities. The type of information and "disclosure product" will vary depending on the reason for seeking the information.

Working with, and having responsibility for, children or vulnerable groups has an added layer of protection. People working in these roles are normally expected to be members of the Protecting Vulnerable Groups ("PVG") scheme. Over 1.2 million people are members of the PVG scheme in Scotland. Members of this scheme are monitored and if information comes to light that they should not work with vulnerable groups they can be barred from doing so. Non-members can also be barred from working with vulnerable groups by Scottish Ministers.

Disclosure by the state is provided for in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007. The Rehabilitation of Offenders Act 1974 is also relevant, see the [A brief over view of the current system section](#).

The system is maintained by Disclosure Scotland, an executive agency of the Scottish Government. Disclosure Scotland undertakes the duties of Scottish Ministers in relation to providing information under the 1997 and PVG Acts and maintaining the PVG scheme.

Disclosure Scotland undertook the Consultation that led to the development of the Bill ("the Consultation"). The Consultation found that people consider the current system complicated.

## A brief overview of the current system

The current system of disclosure relies mainly on three Acts: The Rehabilitation of Offenders Act 1974; the Police Act 1997; and the Protection of Vulnerable Groups (Scotland) Act 2007.

### Rehabilitation of Offenders Act 1974

Until the [Rehabilitation of Offenders Act 1974](#) ("the 1974 Act"), the common law position was that an individual would have to truthfully declare any convictions in certain circumstances, for example, when an individual agreed a contract of employment. Not doing so would be grounds for the employer or provider to terminate the contract without penalty.

The 1974 Act introduced the concept of a rehabilitation period. This provided for certain convictions which attracted a sentence of 30 months or less to be "spent" after a further period. Spent convictions are not usually required to be disclosed. Part 2 of the Management of Offenders (Scotland) Act 2019 provides for convictions leading to longer sentences, up to 48 months, to be spent and changes to rehabilitation periods.

The [Rehabilitation of Offenders Act 1974 \(Exclusions and Exceptions\) \(Scotland\) Order 2013](#) provides for exceptions where individuals should disclose spent offences in certain circumstances.

### Police Act 1997

The 1997 Act provides for Scottish Ministers to provide criminal record checks. Disclosure Scotland exercise the Scottish Ministers' powers under the 1997 Act. Disclosures under the 1997 Act fall into three broad categories:

- **Basic Disclosure.** This is available to anyone following an application for any purpose and will show an individual applicant's unspent convictions.
- **Standard Disclosure.** In addition to information on unspent convictions, a standard disclosure will show unspent cautions, certain spent convictions, and information from the Sex Offenders Register. This service is available only to organisations who are registered with Disclosure Scotland and for a job or role where this level of disclosure would be suitable (and lawful). These jobs can be, for example, an accountant, solicitor, allied health professions, taxi/private hire driver, and most roles governed by the Financial Conduct Authority.
- **Enhanced Disclosure.** In addition to the information disclosed in a Standard Disclosure, an enhanced disclosure will include other relevant information ("ORI") provided to Disclosure Scotland by the police, and certain court orders. In some cases details on whether an individual has been barred from working with vulnerable groups



will be included. As with standard disclosures, enhanced disclosures can only be provided to organisations who are registered with Disclosure Scotland and for specific roles. This type of disclosure could be for a potential adopter, to obtain a gambling licence, or to work in a prison.

Standard disclosures and enhanced disclosures (along with PVG scheme membership) are commonly known as “higher level disclosures”.

## **Protection of Vulnerable Groups (Scotland) Act 2007**

The PVG Act introduced a number of new features to the disclosure system in relation to those working with vulnerable groups. It defined the concept of Regulated Work: work, whether paid or unpaid, with children or protected adults.

The PVG Act provided for Scottish Ministers to maintain lists of individuals who are barred from undertaking this work (one each for work with children and work with protected adults). The PVG Act also provided for Ministers to maintain a membership scheme whereby members are continually monitored on their suitability to undertake regulated work. This ongoing monitoring is the key difference between PVG membership and an enhanced disclosure.

It is not currently mandatory to be a member of the PVG scheme to undertake regulated work. However, it is an offence to offer regulated work to an individual barred from regulated work. Under the PVG Act, certain organisations can seek a PVG Scheme Record, which includes the same information as an enhanced disclosure.

More details on the current and proposed disclosure products can be found [in the \*Range of products and services\* section of this briefing](#).

## **Legal challenges**

The disclosure scheme has been amended twice in the past few years by Remedial Orders. Remedial Orders are made under a power in section 12 of the Convention Rights (Compliance) (Scotland) Act 2001. This power allows the Scottish Ministers to make changes to legislation in order to remedy an incompatibility with rights protected by the European Convention on Human Rights.

The first was the Scottish Government's response to a successful legal challenge in relation to the system in England and Wales and the second was made following a successful legal challenge in Scotland.

The fact that previous regimes have been subject to successful legal challenge illustrates the importance of ensuring the correct balance is found between the protection of the public and individuals' rights.

### **2015 Remedial Order**

Prior to 2015, all spent conviction information held on the police national database would be disclosed on an enhanced, standard or PVG scheme record disclosure made under the

1997 Act or PVG Act. In 2014, the UK Supreme Court found<sup>i</sup> that similar practice in England and Wales was unlawful and incompatible with Article 8 of the European Convention of Human Rights - the right to respect for private and family life.<sup>ii</sup>

The Supreme Court held that the disclosure system then in place was incompatible because "the cumulative effect of the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the absence of any mechanism for independent review of a decision to disclose data" and therefore was not in accordance with the law. The Supreme Court also held that this interference did not meet the requirement of being "necessary in a democratic society", and was therefore not a legitimate interference of rights under Article 8. Lord Reed commented in the judgement that there was a lack of "any rational connection between dishonesty as a child and the question of whether, as an adult, the person might pose a threat to the safety of children with whom he comes into contact".<sup>2</sup>

The Scottish Government's response was to introduce two lists of offences to the 1997 Act by adding schedules 8A and 8B. The offences listed on these schedules are of particular relevance to Standard and Enhanced disclosures and PVG scheme record disclosures.

Schedule 8A is a list of offences which should always be disclosed because of their seriousness, even after they become spent. Schedule 8B is a list of offences that can be disclosed for a certain period of time after becoming spent. These periods of time are fifteen years from the time of conviction if the individual was convicted as an adult, and seven and a half years if the individual was under 18 at the time of the conviction.

The disclosure of these offences would be in cases where the individual would be undertaking certain specific roles which typically involve a level of power or responsibility. The Scottish Government stated that the lists of offences were ones that would evidence conduct that "caused harm to an individual and/or is evidence of misconduct in a position of authority".<sup>3</sup>

These reforms also allowed for individuals to be able to apply to a Sheriff to have a spent offence listed in schedule 8B removed from their disclosure certificate before the specified period.

## 2018 Remedial Order

In a Scottish case heard in the Court of Session in 2017,<sup>iii</sup> Lord Pentland declared that the amended scheme which included the use of Schedules 8A and 8B of the 1997 Act had unlawfully interfered with the petitioner's Article 8 rights. The petitioner had a conviction from a Children's Hearing for behaviour dating from when he was 14, nearly 28 years earlier.

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i In [R \(On the application of T and another\) \(Respondents\) v Secretary of State for the Home Department and another \(Appellants\)](#)

ii [ECHR ARTICLE 8: Right to respect for private and family life](#). 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

iii [P v Scottish Ministers \[2017\] CSOH 33, 28 February 2017](#),

Subsequently, the Scottish Government laid a further remedial order.<sup>4</sup> The effect of the second remedial order was more limited than the first. It provided for an individual to make an application to a Sheriff for the removal of information relating to a conviction included in schedule 8A from a higher level disclosure after a period of time. The time periods replicated those for the disclosure of convictions listed on schedule 8B, namely: fifteen years for a conviction as an adult, and seven and a half years for a conviction dating from when the individual was under 18 years of age.<sup>5</sup>

## Part of a legislative package

The Bill can be considered as part of a package of reforms to the management of offenders and the treatment of convictions of individuals under 18 years of age. The policy intentions of the Bill interact with two other Acts passed recently by the Scottish Parliament, the [Management of Offenders \(Scotland\) Act 2019](#) and the [Age of Criminal Responsibility \(Scotland\) Act 2019](#). At the time of writing (August 2019) neither Act is in force.

Summaries of these Acts are set out below.

### The Management of Offenders (Scotland) Act 2019

- The Management of Offenders (Scotland) Act 2019 will reduce disclosure periods significantly. This will shorten the period before a conviction becomes spent for almost all sentences.
- All children's hearings convictions will be spent immediately, and as such will no longer be disclosed on a basic disclosure.
- The shortening of disclosure periods will mean that an applicant for a higher level disclosure (with a spent conviction for an offence included on schedule 8B<sup>iv</sup> of the 1997 Act) will be able to make an application (currently to a sheriff) for that information not to be disclosed at an earlier date.

### The Age of Criminal Responsibility (Scotland) Act 2019

- The Age of Criminal Responsibility (Scotland) Act 2019 increases the age of criminal responsibility in Scotland from 8 to 12. This will mean that offences cannot be committed before that age.
- Disclosure of information about behaviour from before the age of criminal responsibility would only be possible after an independent review of a police decision to include it as "Other Relevant Information" on a higher level disclosure.
- This Act provides for an independent reviewer to undertake this task. As part of that independent review process the individual will have the opportunity to provide representations in relation to the information before the decision is made on whether it

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iv The list of offences in schedule 8B of the 1997 Act are proposed to be replaced by Schedule 2 of the Disclosure (Scotland) Bill.

should be disclosed to an employer or another third party. The independent reviewer will have the power to gather relevant background information to help set the information in context.

- The independent reviewer also has a key role in the proposed review procedures provided for in the Disclosure (Scotland) Bill.

# What the Bill does

The [Disclosure \(Scotland\) Bill](#) ("the Bill") was introduced on 12 June 2019 by Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP.

On 26 June 2019, the Parliament agreed that the Education and Skills Committee be the lead committee for the Bill at Stage 1. Details of the Committee's work on the Bill can be found [on its website](#).

The purpose of the Bill is to reform how the state provides information on individuals' past behaviour, typically in situations when an individual is seeking employment or volunteering. The Bill also proposes a number of changes to Protecting Vulnerable Groups ("PVG") scheme, notably updating the definition of the type of activities for which membership of the PVG scheme would be appropriate and making membership mandatory in these cases.

The Bill has two substantive parts.

- Part 1 provides for the disclosure of unspent criminal convictions and other information that may be relevant. The Bill repeals and will broadly replace provisions of Part 5 the Police Act 1997 , insofar as it applies to Scotland. <sup>6</sup>
- Part 2 makes amendments to the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act").

The remaining sections of this briefing summarise and analyse the main areas of reform. Where appropriate, the briefing will identify impacts on individuals and organisations of these reforms. The briefing does not seek to replicate the policy memorandum or other accompanying documents prepared by the Scottish Government. [Those documents are published alongside the Bill](#).

# Range of products and services

A key aim of the Scottish Government's reforms to the disclosure system is to make it easier to understand and to simplify the system for users. The Bill proposes to reduce the number of products and services Disclosure Scotland provide.

## Current system

Currently there are four types of disclosure checks: Basic, Standard, Enhanced and PVG. The latter three are sometimes grouped together and termed "higher level" disclosures. There is also a 'statement of scheme membership' which allows people to confirm that an individual is a PVG scheme member, but does not include any other information.

The tables below provide details of products currently available.

## Disclosures under the Police Act 1997

Product	
<p><b>Basic Disclosure</b></p>	<p>Anyone can apply for a Basic Disclosure relating to their own information.</p> <p>It can be used for any purpose.</p> <p>If a request is from an employer, then the applicant's consent is required.</p> <p>Only one certificate is provided.</p> <p>The information is disclosed is:</p> <ul style="list-style-type: none"> <li>• unspent convictions under The Rehabilitation of Offenders Act 1974.</li> </ul>
<p><b>Standard Disclosure</b></p>	<p>Standard disclosures can be for:</p> <ul style="list-style-type: none"> <li>• certain 'exempted' professions (accountant, solicitor, allied health professions, taxi/private hire driver, most roles governed by the FCA)</li> <li>• any employment concerned with the provision of a care service</li> <li>• any employment concerned with the provision of health service where role involves contact with patients etc.</li> </ul> <p>An application can only be completed in paper format and must be countersigned by an organisation authorised by Disclosure Scotland, known as a Registered Body.</p> <p>A certificate is provided to both the applicant and the Registered Body.</p> <p>The information is disclosed is:</p> <ul style="list-style-type: none"> <li>• unspent convictions</li> <li>• relevant spent convictions</li> <li>• sex offenders notification requirements</li> <li>• unspent cautions.</li> </ul>
<p><b>Enhanced Disclosure</b></p> <p>There are four types of Enhanced Disclosure.</p> <ul style="list-style-type: none"> <li>• Enhanced Disclosure.</li> <li>• Enhanced Disclosure with working with children suitability.</li> <li>• Enhanced Disclosure with working with protected adults suitability.</li> <li>• Enhanced Disclosure with working with both children and protected adults suitability.</li> </ul>	<p>Enhanced disclosure can be for:</p> <ul style="list-style-type: none"> <li>• people who carry out work in a prison (wholly or partly)</li> <li>• individuals being assessed as suitable for adopting a child</li> <li>• adult residents in same household as foster carers or child-minders.</li> </ul> <p>A certificate is provided to both the applicant and the Registered Body.</p> <p>The information is disclosed is:</p> <ul style="list-style-type: none"> <li>• unspent convictions</li> <li>• certain spent convictions</li> <li>• sex offender notification requirements</li> <li>• 'other relevant information' (ORI)</li> <li>• any prescribed court order &amp; sex offender notification requirements</li> <li>• information about being from regulated work barred under the PVG Act</li> <li>• certain civil orders.</li> </ul>

## Disclosures under the Protection of Vulnerable Groups (Scotland) Act 2007

Product	
<b>PVG Scheme Record</b>	<p>Individuals undertaking regulated work can apply.</p> <p>A PVG Scheme Record application can only be completed in paper format and must be countersigned by an organisation authorised by Disclosure Scotland, known as a Registered Body.</p> <p>A certificate is provided to both the applicant and the Registered Body.</p> <p>Information disclosed is the same information as Enhanced Disclosure. Additionally, a PVG Scheme Record confirms scheme membership in relation to children/adults or both. The individual is subject to ongoing monitoring.</p>
<b>PVG Scheme Record Update</b>	<p>Existing PVG members can apply (for same group, i.e. children and/or protected adults).</p> <p>Only issued if no convictions or Other Relevant Information are present.</p> <p>If convictions or Other Relevant Information were/are present a PVG Scheme Record will be issued.</p>

## Proposed new disclosure products

The Bill proposes to reduce the number of products and services that Disclosure Scotland provide. From the users' point of view, it is intended that there will be two disclosure products; Level 1, which will be the equivalent of a Basic Disclosure, and Level 2 which will be the equivalent of the higher level disclosures. Level 2 Disclosures will provide different information depending on the purpose of the disclosure.

Disclosure Type	Description
Level 1	<p>This product will replace the current basic disclosure under the 1997 Act.</p> <p>Available to any individual aged 16 and over<sup>v</sup>, for any purpose on payment of the prescribed fee.</p> <p>This product will include notification requirements under Part 2 of the Sexual Offences Act 2003.</p>
Level 2 (e.g. for a gaming licence)	<p>This disclosure product will replace all standard disclosures and some enhanced disclosures under the 1997 Act.</p> <p>Available to an individual aged 16 and over for a prescribed purpose, where that purpose is connected to an accredited body, and on payment of the prescribed fee.</p>
Level 2 with suitability information (e.g. prospective adoptive parents)	<p>This disclosure product will replace certain enhanced disclosures under the 1997 Act.</p> <p>Available to an individual aged 16 and over for a prescribed purpose, where that purpose is connected to an accredited body, and on payment of the prescribed fee.</p>
Level 2 PVG Disclosure (e.g. for a school teacher)	<p>This type of disclosure will replace the PVG scheme record and short scheme record.</p> <p>Available to an individual aged 16 and over and mandatory for those working with vulnerable groups.</p>

There will remain a 'confirmation of scheme membership' which is proposed to replace the 'statement of scheme membership'.

<sup>v</sup> Available for younger individuals in exceptional circumstances.



## Current vs New

While there are some substantive differences between the current products and the products proposed in the Bill, there are some clear similarities between the two sets of products. How the current products map to the proposed products is set out below.

Current Product	Proposed Product
Basic Disclosure	Level 1
Standard Disclosure	Level 2
Enhanced Disclosure	Level 2
Enhanced Disclosure with working with children suitability	Level 2 with suitability
Enhanced Disclosure with working with protected adults suitability	Level 2 with suitability
Enhanced Disclosure with working with both children and protected adults suitability	Level 2 with suitability
PVG Scheme Record	Level 2 with PVG
PVG Scheme Record Update	Level 2 with PVG

The intention of the Scottish Government is to move away from paper-based systems for disclosures, both in terms of applications and the provision of information. Both will be available to be administered digitally.

## What this might mean for individuals and organisations

The Government's aim is to make the system simpler for individuals to understand and to be more user friendly. The intention is that the customer only need know the role and the system will guide them to the correct disclosure.<sup>7</sup>

By applying and receiving disclosures digitally, the process is expected to be faster. The individual will have more control over the process, receiving the information prior to a third party, such as a potential employer, and will have to release the information to the third party. This will allow the individual to seek a review of the information disclosed before the third party received it. More detail on the proposed reviews is set out in [the Reviews section of this briefing](#).

Moving towards a digital system is intended to reduce the need for organisations to spend time ordering, completing, scanning and mailing paper forms. Organisations will receive disclosure information only after the disclosure applicant has seen it and chosen to share it with the organisation.

While the age limit to obtain Level 1 disclosures is proposed to be 16, the Bill makes provision for individuals aged 12 to 15 to use the service in exceptional circumstances (s. 2(2)). The kinds of exceptional circumstances envisaged are, for example, for a young person taking up a place at college at 15 on a course that requires a criminal record check.

# Disclosable Offences and Lists

This section looks at disclosable offences. For higher level disclosures, there are references to lists and schedules. The Bill provides for Schedules 8A and 8B of the Police Act 1997 to be replaced by Lists A and B in Schedules 1 and 2 of the Bill. This is explained in more detail below.

References to similar lists with different names is potentially confusing. The terminology used in this briefing and bill documents will differ depending on whether they are referring to the current system or the proposed system. To avoid confusion, the table below illustrates the read-across of the lists.

Current system	Proposed system
Police Act 1997	Disclosure (Scotland) Bill
Schedule 8A	List A (included in Schedule 1)
Schedule 8B	List B (included in Schedule 2)

## Current system

[Rehabilitation of Offenders Act 1974](#) introduced the concept of rehabilitation periods for offences. These are periods of time after a conviction that certain offences would be disclosable. Once that period had elapsed, an individual would no longer have to disclose the conviction to a potential employer, for example. The rehabilitation periods depend on the disposal of the court, and under the 1974 Act any prison sentence of over 30 months would never become spent and would always need to be disclosed.

The [Management of Offenders Act 2019](#) reduces the length of time most people with convictions have to disclose them. It also extends the range of custodial sentences covered by the provisions of the 1974 Act. Under the 2019 Act, convictions leading to a custodial sentence of more than 48 months will always need to be disclosed.

There are categories of offence that despite being spent, would appear in higher level disclosures. These are currently listed in Schedules 8A and 8B of the 1997 Act. Schedule 8A lists offences that will always be disclosed, unless the conviction is removed upon application to a sheriff. Schedule 8B is lists offences which will be disclosed for a period of time, unless conviction is removed upon application to a Sheriff.

For disclosure purposes, there are four types of convictions.

Category of conviction	Disclosure
Unspent conviction, or a conviction that does not have a rehabilitation period.	Must disclose, would appear in all disclosure products which list offences.
Spent convictions that do not appear in schedules 8A and 8B of the 1997 Act.	No need to disclose, would not appear in any disclosure products.
Spent conviction listed in schedule 8A of the 1997 Act	Not disclosable on a basic disclosure but would appear in higher level disclosure products. Can apply to a Sheriff for the conviction to be removed from any disclosure certificate after the relevant period. The relevant periods are: <ul style="list-style-type: none"> <li>• 15 years from the date of the conviction where the individual was 18 or older at the time of the conviction</li> <li>• 7.5 years from the date of the conviction where the individual was under 18 at the time of the conviction or offence grounds accepted at a children's hearing.</li> </ul>
Spent conviction listed in schedule 8B of the 1997 Act	Not disclosable on a basic disclosure but would appear in higher level disclosure products for the duration of the relevant period. The relevant periods are again: <ul style="list-style-type: none"> <li>• 15 years from the date of the conviction where the individual was 18 or older at the time of the conviction</li> <li>• 7.5 years from the date of the conviction where the individual was under 18 at the time of the conviction or offence grounds accepted at a children's hearing.</li> </ul> <p>An individual can apply to a Sheriff for the spent conviction to be removed from any disclosure certificate at any time.</p>

There are however some circumstances not covered in those four categories. For example, if the court's disposal for a conviction of an offence listed in schedule 8B of the 1997 Act was an admonition or absolute discharge, it will not be disclosed on a higher level disclosure.

## The Bill

The Bill replicates the approach of two lists of offences in Schedules 8A and 8B of the 1997 Act in Schedules 1 and 2 of the Bill. The Bill proposes a number of changes to:

- the offences included in the lists
- the time periods in relation to disclosure of convictions and for an application for removal of convictions from a disclosure certificate
- the process of applying for the removal of convictions from a disclosure certificate.

This section will look at the first two of the bullets above. The final bullet is examined in the [Review section of this briefing](#).

### Offences on Lists A and B

As set out in the introduction to this briefing, the Scottish Government stated that the lists of spent convictions of offences that would be disclosed in higher level and PVG disclosures were ones that would evidence conduct that "caused harm to an individual and/or is evidence of misconduct in a position of authority".<sup>3</sup> The offences are ones that:

- resulted in serious harm to a person

- represented a significant breach of trust or responsibility
- demonstrated exploitative or coercive behaviour
- demonstrated dishonesty against an individual
- abused a position of trust
- displayed a degree of recklessness that resulted in harm or a substantial risk of harm.

The Bill provides for a number of new offences to be included in both lists and some offences to move between the lists. The [Policy Memorandum](#) accompanying the Bill sets out these changes in paragraphs 278 to 290.

The use of these lists began in 2015 and followed a legal challenge in England. Prior to that, all previous convictions were disclosed in higher level disclosures both in England & Wales and Scotland. The Policy Memorandum states:

“ Ministers made a commitment to review the offence lists when the 2015 amendments were first introduced and the consultation set out proposals for the categorisation of new offences to reflect recent developments in legislation and the experience of operating the lists in practice in the context of the disclosure system. The vast majority of respondents were in favour of the proposed changes to the offence lists. <sup>8</sup> ”

A number of suggestions to changes in the lists were made during the Consultation and these suggestions have largely been included in the new lists in Schedules 1 and 2 of the Bill. For example, theft, abduction and fraud. The common law offence of murder is not specifically listed. However, the [Murder \(Abolition of Death Penalty\) Act 1965](#) provides for a mandatory life sentence for murder; such a conviction will never become spent and always be disclosable.

Some respondents to the Consultation argued that the lists ought not be used at all or not in some cases. The summary of consultation responses noted that some responders argued that "the use of the 8A and 8B lists could create conflict with the aims of rehabilitation" and "all spent convictions should be removed from a disclosure unless the state makes a case to disclose it". <sup>9</sup>

## Time periods

The Bill makes provision (s.14(2)) to reduce the periods during which a List B offence would be disclosed to 11 years, if the individual was an adult when convicted, and 5 years and 6 months, if the individual was under the age of 18 when convicted. The period after which an individual could apply for a conviction of a List A offence to be removed from a higher level disclosure would also be 11 years. The Policy Memorandum notes that:

“ The disclosure period of 11 years mirrors arrangements elsewhere in the UK whilst allowing for a significant extended disclosure of relevant spent convictions on Level 2 disclosures ... This change is also supported by emerging research in relation to certain convictions types and reoffending.”

Disclosure (Scotland) Bill, Policy memorandum (para 113), n.d.<sup>10</sup>

The inclusion of a childhood conviction for a List A offence on a Level 2 Disclosure would be first decided by the Scottish Ministers (s.17), with the opportunity of a review of that decision by the independent reviewer. The separate review procedures for childhood convictions are discussed further in the [Childhood offences section of this briefing](#).

The Policy Memorandum stated:

“ Stakeholders expressed strong support for a reduction in the time periods for disclosure of convictions now listed in schedules 1 (List A) and 2 (List B), with a majority supporting a reduction to between 11 and 14 years for disclosure. ”

Disclosure (Scotland) Bill, Policy Memorandum, (para 138), n.d.<sup>11</sup>

The report on the Consultation indicated that there were mixed views on the matter, particularly for adult convictions. In answer to a question on whether "the rules for disclosure in the current form of 15 years and 7.5 years provide appropriate safeguarding and privacy protections", 148 (out of 193) agreed. Conversely, in answer to a further question on whether the periods should be reduced, 125 (out of 191) agreed. The Consultation gave options for the period of disclosure and a plurality of those that answered the question supported maintaining the period at 15 years; the results were: <sup>12</sup>

11 years	12 years	13 years	14 years	15 years	Other
59	33	11	1	70	6

## What this means for individuals and organisations

Including offences from Schedule 8B of the Police Act 1997 to List A in the Bill could mean that a spent offence not currently disclosed on a higher-level disclosure could become disclosable on a Level 2 disclosure.

The reduction in the relevant time periods would mean that individuals will potentially be able to move on from offending behaviour earlier than previously. Consequently, organisations wishing to check disclosures may not have access to the same amount of conviction information on individuals.

# Other Relevant Information

## Current system

Other Relevant Information ("ORI") is information which currently can only be disclosed in enhanced disclosures or full PVG Scheme Record checks. ORI may include allegations held on local police records about the applicant's criminal or other behaviour which may not have been tested at trial or led to a conviction. The Age of Criminal Responsibility (Scotland) Act 2019 provides that offending-type behaviour of a child under the age of 12 may, after a review, be disclosed as ORI.

Disclosure Scotland can ask the chief officer of any relevant police force to provide information about the applicant for inclusion on the enhanced disclosure or PVG check. The chief officer can also provide ORI to Disclosure Scotland as part of the continuous monitoring arrangements that are in place for PVG scheme members. This could lead to an individual being barred from certain types of work.

There is Home Office guidance for Chief Officers in England and Wales in relation to the disclosure of ORI. The Consultation indicated that Police Scotland currently follows this guidance "to the extent that it can be done".<sup>13</sup> In England and Wales, chief officers have a power to seek representations from applicants, and applicants have the right to apply for an independent review of the ORI before disclosure.<sup>14</sup> In Scotland, ORI is disclosed to a third party at the same time as the individual.

The provision of non-conviction information has been subject to some debate and judicial consideration. In October 2009, the Supreme Court held that police should consider two questions when deciding whether to disclose non-conviction information: first, whether the information is reliable and relevant; and second, in light of the public interest and the likely impact on the applicant, whether it is proportionate to disclose the information. The Supreme Court also held that the factors to be considered in assessing proportionality include:

- the gravity of the information;
- its reliability and relevance;
- the applicant's opportunity to rebut the information;
- the period that has elapsed since the relevant events; and
- the adverse effect of the disclosure.<sup>15</sup>

The Supreme Court also held that "if disclosure may be: (i) irrelevant; (ii) unreliable; or (iii) out-of-date, the applicant should be given the opportunity to make representations prior to the decision to disclose".<sup>16</sup>

## The Bill

A key change proposed in the Bill is that individuals will see their disclosure before it is provided to a third party. The Bill provides for a different process of how an individual can apply for ORI to be removed from their disclosure and this is set out in [the Reviews section of the briefing](#).

The Bill also provides for Scottish Ministers to create statutory guidance to the Chief Constable of Police Scotland in relation to what information to disclose under ORI.

The Bill continues to apply a two-stage test before the chief constable can provide ORI (s.18). First that they reasonably believe the information to be relevant to the purpose of the disclosure, and second that, in their opinion it, ought to be included. Section 64 provides for a duty on Scottish Ministers to issue guidance to the chief constable on this and other matters. The Explanatory Notes (para 34) indicated that the Scottish Government expects to make similar provision for other relevant police forces under s.104 of the Scotland Act 1998.

The Policy Memorandum set out the Scottish Government's reasons for supporting the continued use of ORI:

“ The Scottish Government considers ORI to be important for public protection. It allows for the disclosure of non-conviction information and is a direct response to past tragic cases where information was known about serious offenders but not disclosed. The Bichard Report, following the Soham murders on 4 August 2002, and the Cullen Inquiry that followed the Dunblane massacre on 13 March 1996, both highlighted the importance of managing better what is known about individuals who are of interest to the police and about whom there are valid safeguarding concerns. ”

Disclosure (Scotland) Bill, Policy Memorandum, (para 140), n.d.<sup>17</sup>

In relation to consultation on ORI, the Policy Memorandum noted that:

“ Respondents regarded ORI as playing an important role in safeguarding which is only used sparsely as a proportion of all disclosures. However, concerns were raised about the fairness of having the possibility of ORI disclosed, and a perceived lack of transparency in the process. Some expressed a view that it was difficult for individuals to foresee whether ORI would be included in their certificate, and what they could do about it if they felt the inclusion of ORI was unfair.”

Disclosure (Scotland) Bill, Policy Memorandum, (para 149), n.d.<sup>18</sup>

The Policy Memorandum (para 151) stated that the new processes are intended to address these concerns.

# Childhood offences

The Bill continues the Scottish Government's focus on how childhood offending is managed and addressed. Childhood offences also featured in judgements which led to amendments to the disclosure scheme through Remedial Orders ([discussed in the \*Legal challenges\* sub-section above](#)). The Bill seeks to reform how offences committed by young people aged between 12 and 17 years are disclosed.

## Recent legislation

The [Age of Criminal Responsibility \(Scotland\) Act 2019](#) raises the age of criminal responsibility from 8 to 12 years of age. This Act provides that existing record of criminal offences of children under 12 can only be included as Other Relevant Information on a higher level disclosure certificate and only after the information has been approved for inclusion by the independent reviewer, a role which the Act establishes.

The [Management of Offenders \(Scotland\) Act 2019](#) provides that any offence ground established or accepted through the Children's Hearing System, which can be treated like a conviction, becomes spent immediately. That Act will also reduce the disclosure periods for young people who have been dealt with by a criminal court.

## The Bill

The Bill provides for childhood conviction information to be assessed by Scottish Ministers (in practice, Disclosure Scotland) who will determine whether this information ought to be disclosed. The individual has the right to challenge the inclusion of any conviction information from when they were under 18 by applying for a review by the independent reviewer.

Under the Bill, Level 1 Disclosures will include only unspent convictions and any notification requirements under the Sexual Offences Act 2003 Part 2. Level 2 disclosures (see the tables in [Range of products and services](#) section) will potentially include spent convictions of List A or List B Offences. The Bill sets out the test against which Scottish Ministers must determine whether to disclose conviction information. The tests differ for Level 1 and Level 2 disclosures. For Level 1, the test is "whether information about the conviction ought to be included" (s.5). For Level 2, the test is two-fold: "whether the childhood conviction is relevant for the purposes of the disclosure" and "whether information about the conviction ought to be included" (s.25).<sup>vi</sup> The Policy Memorandum provides a rationale for the difference between the tests:

“ This two tiered test is appropriate and varies from Level 1 disclosures because there will always be a declared purpose for Level 2 disclosure applications. ”

Disclosure (Scotland) Bill, Policy Memorandum, (para 103), n.d.<sup>19</sup>

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vi This is similar to the proposed test for the Chief Constable providing ORI (see [the section on Other Relevant Information](#)).



One of the policy objectives of the Bill, listed in the Policy Memorandum, is the recognition of adolescence "as a unique phase of life" and therefore "ending the automatic disclosure of convictions accrued while aged between 12 and 17 years".<sup>20</sup>

The Consultation noted that youth crime "places a significant burden on society" and stated that while typically those involved in youth crime will desist by their mid-twenties, for some it is the start of a wider pattern of behaviour. The Consultation also noted that care experienced young people's behaviour would be more likely to accrue convictions than their peers who had behaved similarly but had not been in care. Furthermore, the Consultation argued that the adverse childhood experiences of some care experienced young people could "draw children into harmful behaviours and lead to contact with the police that simply would not have occurred had the child not had to negotiate the care system".<sup>21</sup>

The Consultation stated:

“ Scottish Ministers consider that we have a duty to help young people move on from early harmful or criminal behaviour and live productive lives when they are ready to do so, whilst simultaneously ensuring that the disclosure system addresses those who pose risks of serious harm to the public. ”

Scottish Government, 2018<sup>21</sup>

## Options for childhood convictions

The Consultation set out three options and also asked what the upper limit of the age range options should apply to.

The three options are set out below.

- Option 1: no change to the current system. Convictions are treated the same as adult convictions, albeit with differing time limits on when offences are spent and in respect of disclosure of Lists A and B offences (currently schedules 8A and 8B in the 1997 Act) in Level 2 (currently higher level) disclosures.
- Option 2: no disclosure of convictions in Level 1 disclosures; conviction information could only appear as ORI in Level 2 disclosures after a review. This option mirrors the disclosure of offending-type behaviour for under-12s in the Age of Criminal Responsibility (Scotland) Act 2019.
- Option 3: no conviction information disclosed unless it is for an offence included in Lists A or B or is excluded from rehabilitation under the 1974 Act. Protected convictions would not be disclosed in Level 2 disclosures (e.g. where the time period had elapsed for a List B conviction). ORI relating to other offending might still be included in Level 2 disclosures.<sup>21</sup>

The proposal in the Bill allows for any unspent convictions to be disclosed, subject to Ministers determining that the information ought to be disclosed.

Responses to the Consultation's questions on the three options did not provide a clear indication of which was most strongly favoured.

Question 75 asked whether there should "be specific provisions reducing the possibility of the state disclosure of criminal convictions accrued by young people 12 years or older on all types of disclosure". Of those that answered, 145 agreed that there should be and 43 disagreed. It is not clear if those that agreed included any that thought that existing specific provisions in relation to childhood convictions are sufficient in this regard (i.e. shorter time frames before convictions became spent and disclosed in relation to List A and B offences).

Questions 76 and 77 asked about options 2 and 3 respectively. Of those that answered these questions, a majority agreed with both options and the numbers were similar for both questions. 99 responses supported Option 2 and 70 respondents opposed; 103 responses supported Option 3 and 61 opposed. There appears to have been some overlap between those that supported Option 2 and Option 3.

The Policy Memorandum provides a narrative of the Consultation and the reasons for the final proposal in the Bill but does not make it clear that the specific proposals in the Bill were not included in the Consultation.

The Policy Memorandum described the three options as "no changes, a special regime for childhood convictions, or changing the disclosure rules which would result in no disclosure of childhood convictions" and continues to say "most respondents favoured the special case-by-case regime for childhood convictions".<sup>22</sup> This appears to imply that Option 2 was the most favoured option. This is not clear from the report on the Consultation and, as noted above, Option 3 appears to have received greater support. A reader might also assume that the Bill's provisions mirror the option set out in the Consultation.

SPICe sought the Scottish Government's views on this apparent discrepancy. The Government's position is that while the policy has been refined, the key policy aim of moving away from automatic disclosure of childhood offences has remained intact. The Government stated that the majority in favour of "special case-by-case regime for childhood convictions" refers to the responses to Question 75, not any specific option. The Government described the proposals in the Bill as a development of both options 1 and 2 in the Consultation. (Personal Communication)

In terms of the age range where any special provisions should apply, the Consultation gave a number of age ranges for respondents to choose from. It was not clear however whether the upper age-ranges were inclusive or exclusive. For example, whether the option 12-18 meant up to the 18th or 19th birthday.

The Policy Memorandum stated "the majority of respondents favoured the age range of 12-17" for special provision to be made. As seen in the table below, there was a plurality (43 out of 140 that answered) for the option of 12-18 years.

12-14	12-15	12-16	12-17	12-18	12-21	No Answer
7	17	27	16	43	30	212

Scottish Government, 2019<sup>23</sup>

Subsequent correspondence between SPICe and the Scottish Government indicates that at least 15 of those respondents that chose 12-18 option meant up to the 18th birthday. Just accounting for those responses would change the option that gained the highest number of responses to 12-17.

The Policy Memorandum appears to have taken a different approach to analysing the responses to this question to the responses in relation to the period of time before convictions of List B offences are disclosed. In this example, the Policy Memorandum appears to focus on the plurality whereas it does not in the example regarding disclosure periods (see the subsection *Time periods* ).

## **What this means for individuals and organisations**

Given that the effect of the Management of Offenders (Scotland) Act 2019 will be to reduce the number of unspent convictions, the main impact will be on those individuals who have adolescent convictions of offences listed in List A or B which could be included in a Level 2 disclosure. Therefore, for an individual, it will be less likely that adolescent offending behaviour will be disclosed to organisations entitled to ask about spent conviction information.

From the perspective of an organisation countersigning a disclosure, the intention is that Disclosure Scotland will still disclose relevant convictions for List A and B when the disclosure satisfies the two-part test. However, there will be some circumstances where a third party disclosure recipient will have less information than under the current regime, particularly taking into account the effect of the Management of Offenders (Scotland) Act 2019.

# Reviews

## Current system

The current system allows individuals to apply to a Sheriff to have a conviction of a list 8B offence removed or a list 8A offence removed after certain time periods have lapsed.<sup>vii</sup> Under [section 117 of the 1997 Act](#), an individual may apply to the Scottish Ministers to have the accuracy of the information on their disclosure certificate reviewed if they consider it to be inaccurate; similar provisions in section 51 of the PVG Act apply for PVG checks.

An individual can also ask that the information provided by the police through ORI be reviewed. This is undertaken by the chief officer of the relevant police force. This decision is final and can only be challenged through judicial review.

## The Bill

The Bill amends and expands opportunities for individuals to review the disclosure of both convictions and ORI.

One of the key changes to how disclosures will be administered is that the individual will receive the disclosure certificate before it is sent to a third party. Currently, the certificate is normally issued to the individual and the employer or service provider at the same time, making an application for information to be removed of limited immediate value.

The Bill proposes that an individual can apply for the disclosure of conviction information to be removed from disclosures by application for a review by Disclosure Scotland or the independent reviewer. This can be to review:

- accuracy
- the inclusion of childhood conviction information
- the inclusion of a "removable" conviction
- the inclusion of ORI.

Under the Bill, a removable conviction is a spent conviction of an offence that appears on Lists B or a conviction of an offence on List A from over 11 years previously.

Reviews of Level 1 disclosures can only cover the first two bullets; reviews of Level 2 disclosures could include any of the four bullets. An initial review of accuracy or the inclusion of a removable conviction would be carried out by Disclosure Scotland. The police would carry out the initial review of ORI.

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vii As noted in the [Disclosable Lists and Offences section](#) of this briefing, the lists of offences in Schedules 8A and 8B are amended and called Lists A and B in the Bill.

The inclusion of childhood conviction information is determined by Disclosure Scotland before any disclosure is provided to the applicant. Reviews of the inclusion of this information would be considered by the independent reviewer.

A review on the grounds of accuracy has no further mechanism of review. The Explanatory Notes indicate that it is intended for mainly administrative errors. A review on these grounds may also look at cases where an individual claims that a conviction when they were an adult related to offending behaviour when they were under 18 and should be treated as a childhood conviction.

In terms of the bottom two bullets, individuals who are not satisfied with the outcome of a review by Disclosure Scotland or the police could seek a second review by the independent reviewer.

The role of independent reviewer is provided for by the [Age of Criminal Responsibility \(Scotland\) Act 2019 \(s.11\)](#). Under that Act, the role of the independent reviewer is to review any ORI relating to offending-type behaviour of a child under 12 which may be subject to disclosure in the future.<sup>viii</sup> It was also envisaged that the role of the independent reviewer may be extended and this Bill does that.

The Bill provides for a final stage of appeal against a decision of the independent reviewer to a Sheriff. Such an appeal can only be on a point of law.

The appeal mechanisms for different aspects of information included in disclosures are similar. The Scottish Government's response to the report on its consultation stated:

“ We believe that unifying the appeal mechanisms, so that the independent reviewer is responsible for all types of appeal, will make the system as simple and coherent as possible for applicants and stakeholders. There will also be arrangements in place for dealing with combination reviews for circumstances when an applicant pursues a review for more than one type of information, for example childhood information and the removal of spent convictions.”

Scottish Government, 2019<sup>24</sup>

## Consultation

### Removable offences

As noted at the beginning of this section, individuals may apply to the courts to have information on spent convictions of offences listed in schedules 8A or 8B of the 1997 Act removed from a disclosure certificate. The Consultation provided some detail on how the current system is working. At the time of that consultation (April 2018), 346 individuals intimated to Disclosure Scotland their intention to apply to a sheriff for the removal of a conviction from their disclosure. Of these, 27 proceeded to make an application to the sheriff and of these, four cases had been decided by a sheriff and 23 had not yet been decided.<sup>ix</sup> The Consultation stated:

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viii Reviews of this type of ORI are provided for in the Age of Criminal Responsibility (Scotland) Act 2019 and are not covered in this Bill.

ix The Policy Memorandum provides more recent figures at para 128.

“ The average time from an applicant's notification of intention to Disclosure Scotland to apply to a sheriff for removal of a conviction to the completion of their case by the sheriff has taken 6 months, but some of the pending cases have taken considerably longer than that. ”

Scottish Government, 2018<sup>25</sup>

A survey undertaken by Disclosure Scotland identified a number of reasons why individuals who had intimated that they would make an application to a sheriff do not then go on to do so. The reasons identified were: cost; time delay; and uncertainty of the process.<sup>25</sup>

The Consultation made a number of proposals for reform: the introduction of an administrative review; the use of the independent reviewer; and the use of a tribunal. Of these most respondents favoured an internal review by Disclosure Scotland and the next most popular option was a review by the independent reviewer. The option to use a tribunal was supported by fewer than 15 respondents.

The process whereby Disclosure Scotland would undertake an initial review, followed by the possibility of applying to the independent reviewer, was not set out specifically in the Consultation document.

### **Other Relevant Information**

The proposal that the independent reviewer be involved in reviewing ORI, after the relevant chief officer had considered the matter, was supported by a large majority of respondents to the Scottish Government's consultation.

## **What this means for individuals and organisations**

The key changes for individuals and employers is that individuals will see the disclosure product before it is provided to a third party. This removes the chance of information being revealed to potential employers without the individual knowing and gives the opportunity for the individual to apply for information to be removed

The intention is that individuals will find the process of applying for changes to their disclosure simpler than at present.

# Protection of Vulnerable Groups

## Current system

The Protecting Vulnerable Groups scheme is a membership scheme for individuals who work with children or protected adults. The scheme was introduced by the PVG Act and the scheme came into effect in 2011. The PVG Act also provides for barred lists of individuals who are not allowed to do "regulated work".

There are three types of scheme membership: one for doing regulated work with protected adults; one for doing regulated work with children; and one for doing regulated work with both. Similarly an individual could be barred from working with either or both children and vulnerable adults. Courts, employers, employment agencies, and professional regulatory bodies have duties to refer certain individuals to the Scottish Ministers for consideration for listing. Anyone may be a member of the PVG scheme if they are not barred from doing regulated work (relating to the type of membership they are applying for).

An organisation that employs an individual to do regulated work cannot seek an Enhanced Disclosure. The organisation would instead need to ask for a PVG Scheme Record check which provides the same information as an Enhanced Disclosure.

The key difference between an enhanced disclosure and a PVG Scheme Record is that scheme members are subject to ongoing monitoring by Disclosure Scotland. Ongoing monitoring means that those who display harmful behaviour while doing regulated work can be assessed as and when the new information about that harmful behaviour is brought to Disclosure Scotland's attention. If appropriate, the scheme member can then be placed under consideration for listing, and, if listed, removed from regulated work so reducing the opportunity or risk of them doing harm. Without ongoing monitoring, this information would only come to the attention of Disclosure Scotland if an update was carried out on that scheme member by their employer. In practical terms, ongoing monitoring means that once an individual becomes a member of the PVG scheme, Disclosure Scotland will add any new vetting information (that is information about a new conviction, or information provided by a chief police officer) to their scheme record as and when it arises. Disclosure Scotland has procedures in place to identify that new information. The new vetting information is assessed by Disclosure Scotland on a case-by-case basis, and if it suggests that the scheme member may have become unsuitable to work with children or protected adults, a consideration for listing case will be started.

## The Bill

Part 2 of the Bill makes amendments to the PVG Act. Some of the key changes are

- replacing the concept of "regulated work" with "regulated roles"
- changing the period of membership of the PVG scheme to 5 years and providing for 16 as a minimum age for membership

- providing for Scottish Ministers to put conditions on individuals who are being considered for listing (i.e. Ministers are determining whether to bar the individual from working with a vulnerable group)
- making scheme membership compulsory for doing regulated roles and providing for offences.

This is not an exhaustive list of the provisions of Part 2.

## Regulated roles

Under the PVG Act, the PVG scheme membership and the barred lists relates to individuals doing regulated work. Regulated work with children and protected adults are defined in Schedules 2 and 3 of the PVG Act respectively.

These schedules define regulated work in a number of ways. Schedule 2 of the PVG Act defines regulated work in relation to the activity of an individual (e.g. work that includes having unsupervised contact with children), the workplace (e.g. a school), or a specific position (e.g. a foster carer).

The Policy Memorandum reports that the current definition of regulated work is considered confusing. Disclosure Scotland sifts applications and rejects approximately 1,700 ineligible PVG applications per year.<sup>26</sup> The Bill attempts to move away from lists of jobs or workplaces and more toward a description of the type of work undertaken. The Bill replaces Schedules 2 and 3 of the PVG Act (see Schedules 3 and 4 of the Bill) and provides for a three-stage test to determine whether an individual is undertaking a regulated role:

- that the individual undertakes one or more of a list of activities;
- that the activities are "a necessary part of the role"; and
- that the activities include the opportunity to have contact with protected adults or children<sup>x</sup>.

In addition, a supervisor of such an individual would be considered to be doing a regulated role, as would an individual who is undertaking training for a regulated role and who has the opportunity to have contact with vulnerable groups.

The Scottish Government has stated that it intends regulated roles to be "synonymous with roles holding power or influence over children or adults who are vulnerable as a result of receiving a service".<sup>27</sup> The list of activities tend to be broadly drafted, e.g. "Coaching children in relation to sports or physical activity". Some however are more specific, e.g. "Acting as a foster carer".

The Consultation indicated that there was support for a shift away from job titles towards the activities undertaken in those jobs. This is reflected in the differences between the lists of jobs/roles in the Consultation and the lists of roles in the Bill.

While there was general agreement that the regulated roles approach would be an improvement to the current system of regulated work, the majority of respondents also

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<sup>x</sup> For roles in certain settings (e.g. a school) and which are not covered elsewhere in the list of activities, the test for regulated work for children is "unsupervised contact" (sch 3, para 1(2)(b)(i)).



believed that the proposed system would bring challenges, for example, in determining whether a particular job includes regulates roles.<sup>28</sup>

The Scottish Government acknowledges these concerns and in its response to the report on the Consultation it said:

“ Disclosure Scotland will publish a list of roles for typically-encountered positions for which PVG scheme membership would be mandatory to save applicants’ time in auditing their role against the core characteristics.”

Scottish Government, 2019<sup>29</sup>

## Membership

The PVG scheme now includes over 1.2 million members, over a fifth of the population of Scotland. The table below shows the growth of scheme membership since its inception in 2011.

### PVG Scheme Size From February 2011 to 31st December 2018

Calendar Years	No. of PVG Scheme Members
2011	134,600
2012	298,300
2013	528,000
2014	745,000
2015	916,000
2016	1,027,400
2017	1,126,500
2018	1,214,100

Disclosure Scotland (2019), personal communication.

Section 71 of the Bill amends the criteria for participation in the scheme. It provides for a minimum age for members of the scheme of 16 years<sup>xi</sup>. Previously there was no minimum age. Section 71 also provides explicitly for the renewal of membership of the scheme.

Currently membership of the PVG scheme is for life. The PVG Act provided for Ministers to make regulations which would "prescribe circumstances in which scheme members are to be removed from the Scheme" and the Explanatory Notes to the Act stated "this power could be used, for example, to set the lifetime of scheme membership at 10 years".<sup>30</sup> Ministers have not used this power for this purpose.

Section 72 of the Bill provides for the duration of the scheme to be five years before membership is required to be renewed. Section 72 also would require Ministers to inform the scheme member, and any relevant organisation and personnel supplier that scheme membership is required to be renewed, three months before expiry. The Bill provides for a further 4 week period of "extended membership" after the date of expiry where additional efforts would be made to by Ministers to determine whether the individual is carrying out a regulated role.

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xi As seen in the [Compulsory PVG membership subsection](#) below, the mandatory nature of the PVG scheme does not apply to individuals under 16.

Disclosure Scotland estimates that around a fifth of members of the PVG scheme no longer do regulated work. An individual can choose to leave the scheme but, in practice, few do. A member of the PVG scheme will be continuously monitored, potentially unnecessarily if they are no longer doing protected work. The Consultation stated:

“ The fact that PVG scheme membership involves continuous updating of the scheme record is a source of surprise and confusion for many. This is regrettable because the system of ongoing monitoring of PVG scheme members is a unique feature of the PVG Scheme and a major investment in public safety. ”

Scottish Government, 2018<sup>31</sup>

The Consultation stated that "better managing the PVG Scheme size is a critical outcome" of the reform of disclosure schemes.<sup>32</sup> The response of the Information Commissioner's Office to the Consultation welcomed this aim but also suggested that Disclosure Scotland do more to ensure that individuals are not subject to the monitoring of PVG scheme membership unnecessarily. It said:

“ The data protection principles require that personal data is kept in an identifiable form no longer than is necessary for the purpose. People who are no longer undertaking regulated work (or a protected role as it may become) and have no intention to do so in the near future should not be part of the scheme and subject to the monitoring requirements. As well as fixed membership periods, there are other ways which could also identify that a person no longer needs to be part of the PVG scheme. People could inform Disclosure Scotland that they will leave the scheme before a membership period expires as they are not involved with a vulnerable group anymore and have no immediate plans to do so. If take-up of the option has been low under the current framework, Disclosure Scotland should identify additional ways and opportunities to raise awareness of the ability to request removal.”

Information Commissioner's Office, 2018<sup>33</sup>

## Barred lists

The Bill makes provision for Scottish Ministers to set interim conditions on individuals who are being considered for listing. Under the PVG Act, Scottish Ministers maintain barred lists of individuals who may not undertake regulated work with children, protected adults or both.

### Listing

Certain offences may lead the individual to be barred from working with vulnerable groups, under the PVG Act. The Protection of Vulnerable Groups (Scotland) Act 2007 (Automatic Listing) (Specified Criteria) Order 2010 provides a list of offences where if an individual were to be convicted (or acquitted on grounds of insanity) they would be barred from working with children or protected adults. Scottish Ministers also have the power to place an individual on a barred list if they are satisfied by information relating to the individual's conduct that the individual is unsuitable to work with children or protected adults or both.

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Employers, professional bodies and regulators, courts and others may make a reference to Scottish Ministers about an individual who is, has or will be doing regulated work.

References to Ministers can be on the grounds of an individual causing harm to a vulnerable person or putting them at risk of harm; inappropriate behaviour of a sexual nature; or giving them inappropriate medical treatment. In certain circumstances, for example where an individual has been dismissed on one of the referral grounds, it is an offence not to refer an individual to Scottish Ministers for listing.

### **Current process for when an individual is considered for listing**

Currently, if Scottish Ministers receive a valid referral, they will consider the individual for listing. It is not an offence for an individual to continue to undertake regulated work while they are being considered for listing. Section 30 of the PVG Act provides that Scottish Ministers must notify an individual and their employer (if known) and any relevant regulatory body that an individual is being considered for listing or has been barred. The Explanatory Notes to the PVG Act stated, "it is expected that [the employer or regulatory body] will take any appropriate action to mitigate any risk"<sup>35</sup>.

### **Conditions**

Section 77 of the Bill provides for conditions to be imposed on individuals who are being considered for listing. The precise conditions will be prescribed in later regulations, but they may prevent the individual undertaking a regulated role or require them to be supervised while doing so. Restrictions will be time limited but the period could be extended after an application to a Sheriff. The time for which the restrictions may last are not set out on the face of the Bill.

The Policy Memorandum notes that there was strong support for this approach - 206 out of 220 respondents supported the proposal. The Consultation sought views on how long the conditions should last with two options: 3 months and 6 months. 74% of those that responded to the question preferred 6 months.<sup>36</sup>

### **Compulsory PVG membership**

Currently it is not compulsory for individuals undertaking regulated work to be members of the PVG Scheme. However, it is an offence to offer a role doing regulated work (including voluntary work) to an individual who has been barred from that type of work. In most cases, the only practical way to be sure that an individual is not barred from regulated work is to undertake a PVG check.

### **New offences**

The Bill provides for a number of new offences in regard to PVG membership and carrying out regulated roles.

- An offence for an individual to carry out or seek to carry out any type of regulated role unless they have the appropriate scheme membership.
- An offence for an organisation<sup>xii</sup> to offer<sup>xiii</sup> any type of regulated role to an individual unless it has received an appropriate Level 2 disclosure statement.

- An offence for a personnel supplier to knowingly offer or supply an individual to do any type of regulated role unless it has received an appropriate Level 2 disclosure statement.

In relation to the first offence listed, the Bill provides for a defence where "the individual did not know, and could not reasonably be expected to have known" the work was a regulated role or that their PVG membership had not been renewed for that type of work. [Section 89 of the PVG Act](#) provides that where an organisation commits an offence under that Act, in some cases, a senior individual in that organisation will also be held responsible. This would apply to the offences listed above.

None of these offences apply when the individual is under 16. Under the Bill (s.71), membership for the PVG scheme is also only for individuals 16 or over.

The Bill does not change the offence of offering an individual regulated work who is barred from doing that type of work, and the PVG Act does not have a minimum age limit for Ministers barring individuals. Potentially this may lead to a gap, for individuals who are under 16 and have been barred seeking to do a protected role. There have been very few (six) individuals who have been barred when under 16 years of age<sup>37</sup> and in practice these children would be subject to close monitoring within their communities.

## Policy development

The Scottish Government's consultation reported that "stakeholders have overwhelmingly supported that the PVG Scheme ought to be mandatory for people who want to work in sensitive roles with children and protected adults."<sup>38</sup> The Policy Memorandum sets out the intention of making the scheme mandatory:

“ The overall policy intention behind this part of the Bill is in response to recent public events involving sexual abuse in sport and other spheres of life that impact on children and young people, which have raised public consciousness about the importance of a safeguarding scheme that removes unsuitable individuals from working with children. There have also been a number of high profile cases involving the abuse and exploitation of protected adults. Examples include people with disabilities becoming the victims of harmful behaviour and exploitation; and the targeting of members of the public, rendered vulnerable because they were using health services, by unscrupulous professionals, such as the widely publicised case in 2017 where a reputable surgeon had performed many unnecessary operations on members of the public. This serves to remind that the PVG Scheme is there to protect all of us at various stages of our lives and in circumstances where we have no intrinsic vulnerability but may become especially vulnerable to harm at certain times. ”

Disclosure (Scotland) Bill, Policy Memorandum, (para 198), n.d.<sup>39</sup>

In 2017, the Health and Sport Committee held an inquiry into child protection in sport. One of its conclusions was:

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xii The PVG Act defines "organisation" at [Section 97](#) and this includes "an individual who, in the course of a business, employs or otherwise gives work to other persons".

xiii An offer may be made subject to a satisfactory Level 2 Disclosure statement.

“ We believe there is a compelling case for the PVG scheme to be made mandatory and ask the Scottish Government to consider our views and evidence as part of its review.”

Health and Sport Committee, 2017<sup>40</sup>

The formal consultation focused on how the mandatory scheme should be established.<sup>38</sup> The report on the Consultation noted that a common suggestion was that existing members should continue membership at no charge during the transition to the new arrangements. The report also raised concerns about the application of offences enforcing the mandatory scheme:

“ A number of respondents suggested that the offence should be phased in, and there was also concern about the offence of working in a protected role when not a scheme member. It was felt that this could have a devastating impact on individuals and organisations. An alternative to prosecution should be the starting point for the offence of working in a protected role rather than a prosecution. A small number of respondents remain opposed to a mandatory scheme.”

Scottish Government, 2018<sup>41</sup>

The Consultation explained the rationale in 2007 for not making PVG scheme membership mandatory initially.

“ A non-mandatory scheme was therefore brought into being, with the primary benefit of it being that circumstances, which might otherwise be drawn into ‘regulated work’, such as a neighbour helping another neighbour in return for a small remuneration, could continue to occur without either party being potentially criminalised because the person helping out was not a member of the PVG Scheme. ”

Scottish Government, 2018<sup>42</sup>

Paragraph 2 of both Schedules 3 and 4 of the Bill provide for exceptions for activities that would be a regulated role where the role is carried out as part of a family or personal relationship. Paragraph 169 of the Explanatory Notes to the Bill elaborates:

“ This will be wider than the existing exclusions from the definition of “work” in section 95(3) and (4) of the PVG Act (which are to be repealed), since it will no longer be necessary for there to be no commercial benefit. Scheme membership is considered to be unnecessary in circumstances where a relationship of trust already exists between the parties involved, even if the role being carried out is remunerated. ”

Disclosure (Scotland) Bill, Explanatory Notes, (para 169), n.d.<sup>43</sup>

## What this means for individuals and organisations

The intention is that the definition of regulated roles will be easier to understand than regulated work. This would make it less likely that organisations and individuals would use the PVG scheme and disclosure unnecessarily.

Making membership of the PVG scheme time-limited may reduce the risk that individuals are continually monitored in the long-term unnecessarily. Individuals will have to renew membership and pay any associated fees.

The intention is that by having standard conditions employers will be clearer on what they should do to manage risks while an employee is being considered for listing.

# Accredited bodies and individuals

Currently, Basic Disclosures issued under the 1997 Act can be provided to any person for any purpose. Any PVG, Standard, or Enhanced disclosure must be for a specific purpose and can only be made if the application is countersigned by an organisation which has registered with Disclosure Scotland. The Bill proposes to continue this distinction for Level 1 and Level 2 disclosures, although the terminology is changing from a *registered person* to an *accredited body*.

Disclosure Scotland currently offers businesses the ability to obtain basic disclosures for a large number of job applicants using special arrangements that allow for bulk applications, this is known as B2B (business to business). Typically this is when a large company regularly recruits lots of people. One key change proposed is that these bodies are brought into the scope of accredited bodies. The Scottish Government explained its reasons for this:

“ We believe that the law governing how B2B works needs to be tightened to assure the protection of personal data as the service moves onto new digital platforms, whilst still allowing for the efficient delivery of the service. ”

Scottish Government, 2019<sup>44</sup>

The Bill provides that an accredited body can be:

- a body corporate or unincorporated
- a statutory office holder
- an individual that employs people in the course of business.

Companies or charities can use a third party to undertake disclosure checks on their behalf and the Bill makes provision for this to continue for Level 2 disclosures. These bodies are known as *umbrella bodies*, typically the organisations using umbrella bodies are small charities or companies. One example of an umbrella body is [Volunteer Scotland Disclosure Service](#).

The Bill provides for accredited bodies to act as umbrella bodies (section 57). Such an umbrella body can share information either with a body that could become an accredited body (i.e. is one of the three bullets above) or an individual. In the first instance, the umbrella body may share the Level 2 disclosure statement.

Where the umbrella body is acting for an individual, it cannot share the content of a disclosure statement but can provide advice on the suitability of the individual. The intention is that this service for individuals would be used by people accessing Self-Directed Support or others employing a self-employed worker, for example a carer or music tutor. Individuals cannot seek a PVG Scheme Record check, but can seek a statement of scheme membership, which will confirm that an individual is a member of the scheme (and therefore is not barred). A PVG Scheme Record check does not provide conviction information or ORI.

The Consultation indicated that there was support for individuals being able to see more vetting information. The Policy Memorandum acknowledges this, however it argues that becoming an accredited body is not trivial matter (e.g. accredited bodies are subject to a

code of practice, and there are attached offences) and is not suited to a private individual. Furthermore, any disclosure of such information is an interference of human rights which needs to be necessary, proportionate and in accordance with the law. The Government therefore argues that the proposals in the Bill finds the right balance.<sup>45</sup>



# Costs

The Financial Memorandum ("FM") to the Bill stated:

“ It is anticipated that the provisions of the Bill will lead to an overall increase in costs, however these will reduce over time due to [expected efficiencies]. The expected costs fall into five categories: vetting, introduction of the independent reviewer ... review applications, accredited bodies and digital delivery.”

Disclosure (Scotland) Bill, Financial Memorandum, (Para 6), n.d.<sup>46</sup>

The efficiencies identified in the FM are through the reduction in staff following the intended move toward digital delivery. The FM states that these will eventually be £2.7m per year.<sup>47</sup>

It identifies £1.5m of costs on the "initial phases of a programme which will work with stakeholders to produce detailed options on how the principles of the Bill can best be delivered" and estimates a "further minimum of £17.5m" will be needed for the delivery transformation programme. The FM argues that the additional £17.5m is not a direct consequence of the Bill and that around £4m of this funding will come from fee income.<sup>48</sup>

Other costs for the Scottish Administration and agencies are in relation to dealing with childhood offences and reviews.

The FM anticipates an increase in fee income to the Scottish Administration. This in turn may pass on costs to other areas of the public sector, such as local authorities and health boards and to employers and individuals. The FM suggests that savings in administration costs will be realised from a move to digital delivery however and the overall costs will be "minimal".

There are a number of sources of fees: applying for disclosures, fees to become an accredited body, and PVG scheme membership. The specific fees are not set out in the Bill but it is intended that they will be set in secondary legislation.

The total cost relating to implementing the Bill is estimated as £2.0m. This figure does not include additional fee income, or the further costs or savings anticipated through the move to digital delivery (i.e. £17.5m further costs and £2.7m annual savings).

# Fees

The disclosure system attracts a number of fees. Section 62 of the Bill provides for regulations to be made to determine fees in connection with a number of activities. For example:

- undertaking a disclosure check, including PVG
- registering as an accredited body
- reviews.

Section 70 of the PVG Act provides for Ministers to make regulations on fees in respect of the PVG Scheme, such as membership and disclosures. The Bill<sup>xiv</sup> amends this power only insofar as to specify that fees can be charged for renewals of PVG membership.

The levels of fees are to be set in future regulations. Regulations laid under section 70 of the PVG Act are subject to the negative procedure; it is proposed that regulations under Section 62 of the Bill would also be subject to the negative procedure.

An issue flagged in the report on the Consultation was the need to ensure that reforms do not create onerous additional administrative costs.

Some details of possible fee structures for non-PVG scheme fees are intimated in the Financial Memorandum ("FM").<sup>xv</sup> The FM sets out two possible models of fees for non-PVG disclosures: Model 1, the status quo where all disclosures are £25; and Model 2, whereby Level 1 disclosures cost £25 (or £30 initially and £17 for subsequent disclosures) and Level 2 are £30. The estimates of fee income in the FM are based on Model 2. The FM notes the intention to increase the annual registration fees for accredited bodies (currently known as *registered persons*) from £75 to £100.

In terms of PVG, currently the scheme membership costs £59 for a life membership and £18 for each subsequent short scheme record sought. The Consultation intimated that a 5-year membership scheme could cost £65 and with a £10 fee for each disclosure.<sup>49</sup>

The Scottish Government's response to the Consultation indicated that its intention was that, under the new 5-year renewable membership, PVG members would be able to authorise disclosures to prospective employers without additional charges; it is unclear what impact this may have on the membership fee. The Government also stated:

“ Further consultation will be required on fees (as the details are not provided for in the Bill) and stakeholder engagement is ongoing to determine proposals for appropriate fees and payment methods. ”

Scottish Government, 2019<sup>50</sup>

The Scottish Government has also been clear that it intends to maintain free checks for volunteers.

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xiv Schedule 5, Part 2, Para 41

xv See pages 9 and 10.

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