



SPICe Briefing

Pàipear-ullachaidh SPICe

# Disclosure (Scotland) Bill, Briefing for Members at Stage 3

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A short briefing to support MSPs considering the Disclosure (Scotland) Bill at Stage 3.

**Disclosure (Scotland) Bill**  
[AS INTRODUCED]

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# Background and intention of the Bill

The Disclosure (Scotland) Bill was introduced on 12 June 2019. The Education and Skills Committee was designated the lead Committee at Stage 1.

This briefing is to support Members' consideration of the Bill at Stage 3 by providing a short narrative of what the Bill seeks to do, and Parliament's consideration of the Bill so far.

## What is disclosure?

Disclosure of criminal and other information by the state may be required to gain employment, unpaid volunteering work, enter a profession, or access a service. Disclosure products include the Protection of Vulnerable Groups ("PVG") scheme, membership of which is usually required for teachers, coaches, health and social care staff, for example. The PVG scheme is only one part of the Disclosure system, other products may be used by anyone for any purpose, or for other specific purposes, such as gaining a gaming licence or becoming a solicitor.

The system has many purposes and is complicated. The Bill seeks to simplify the system and the number of products available. The SPICe Briefing on the Bill, as introduced, provides information on the [current system](#), the [proposed new system](#), and a read across of [how the current system maps to the proposals in the Bill](#).

## Key purposes of the Bill

The key purposes of the Bill are to:

- Simplify the Disclosure System;
- Safeguard children and vulnerable adults; and
- Balance this with an individual's right to move on positively from offending behaviour.

Specifically, the Bill will reform and reduce the types of disclosure products available. It makes changes to the PVG Scheme and creates offences both for employers (and similar) and individuals where an individual would undertake a regulated role when they are not members of the relevant PVG Scheme – essentially making the scheme mandatory. The Bill seeks to reduce the likelihood of an offence, committed by an individual when they are a child, being disclosed and creates new processes for applying for disclosed information to be removed from state disclosures.

## Progress through Parliament

- The Bill was introduced in June 2019. [The Bill and its accompanying documents are available on the Scottish Parliament's website](#).

- A [SPICe Briefing on the Bill, as introduced, was published on 30 August 2019](#) .
- The Education and Skills Committee began taking oral evidence in September 2019. Details of all of the [work of that Committee on the Bill can be found on its website](#) . Of particular interest are its [Stage 1 Report](#) published in December 2019 and the [Scottish Government's response in January 2020](#).
- The [Stage 1 Debate was held on 16 January 2020](#) , when the Parliament agreed the general principles of the Bill.
- In advance of Stage 2, on 19 February 2020, the Committee took evidence from the Bill team to explore the Government's intentions for amendments. The [Official Report](#) and [briefing papers](#) for that meeting are available online.
- The Committee considered amendments at Stage 2 on 4 March 2020 and 11 March 2020.

# Key issues in Stage 1 and Stage 2

## Education and Skills Committee report

The [Committee's Stage 1](#) report broadly supported the Bill's intentions. It identified a number of areas of interest.

The Committee was concerned with how the Bill's provisions dovetailed with recent legislation covering adjacent policy areas, particularly the Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019. Concerns centred on how self-disclosure duties and state disclosure rules would tally. (pages 8-11 of its report)

The Committee highlighted some concerns it had heard from stakeholders about how individuals would engage with the review processes and the resources required by the Independent Reviewer<sup>i</sup>. (pages 12 -14 of the Committee's report)

Under the Bill there are a number of situations where officials or the Independent Reviewer will be required to use a two-part test to determine whether to include information in a disclosure. The test is set out in the Bill on whether the information is relevant and whether the information ought to be disclosed. The relevance test is in relation to the type of work the individual may undertake and the "ought" part of the test relates to whether information should be disclosed in any case. Case law provides guidance on the application of the tests; the decision maker would need to consider (among other things) the gravity of the material involved, whether the individual has had the opportunity to rebut the information, the period of time since the incident(s) and the impact on the individual. One of the issues identified by stakeholders was that an individual may not be able to foresee the consequences of an action (e.g. accepting offence grounds at a children's hearing) and the Committee recommended that the Bill include a set of guiding principles to support decision makers applying these tests. (pages 15-20)

Other Relevant Information ("ORI") is non-conviction information held by the police that may appear on some higher-level disclosures, including PVG checks. The Committee raised a concern about how the release of ORI, relating to behaviour from when an individual is a child, sits alongside the policy intention to, in most cases, allow individuals to move on from childhood offending. (pages 21-25)

In terms of the PVG scheme, the Committee broadly welcomed the move to a time-limited five-year membership. It, however, raised concerns about the penalties for non-renewal while continuing to undertake regulated roles and sought assurance on the transition from the current lifetime membership. (pages 22-28).

The Bill removes the option for individuals under the age of 16 to join the PVG scheme; it also disapplies the offences which make PVG scheme membership mandatory in the case of an individual under the age of 16. The Committee explored the possible impact of this change (e.g. for young people's volunteering opportunities). The Committee sought clarity

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<sup>i</sup> The Independent Reviewer is a role provided for by the Age of Criminal Responsibility (Scotland) Act 2019 to consider whether information about criminal-type behaviour of a child under the age of 12 should be shared in future. The Bill extends the role of the Reviewer to consider applications from individuals on the content of a state disclosure to be reviewed.

on what this will mean for young people and recommended that the Scottish Government review the impacts of this change after it has been implemented. (pages 22 to 32)

The Bill replaces the concept of regulated work when working with children or protected adults with a range of regulated roles. The intention is to make it easier to identify when PVG scheme membership would be required. The Committee highlighted concerns from stakeholders that the definition could still be confusing and a specific concern that the definition of a protected adult may not cover victims of domestic abuse. (pages 35-38)

The Committee commented that the Bill “strikes the correct balance between public protection and individual rights”. The Bill proposes a continued use of two lists of offences which could be disclosed even after they became spent either for a period of time or for the remainder of the individual’s life, depending on the list on which the offence is found. The Committee explored the content of these lists and the time periods for disclosure; it also explored how well childhood offending is fitted to the use of these lists. (pages 39-44).

Lastly in relation to the financial memorandum, the Committee commented on the potential for time-limited membership of the PVG scheme to create an additional cost, through fees, particularly for volunteers. (pages 45 to 51).

## The Scottish Government’s response

The [Scottish Government responded](#) positively to several of the Committee's recommendations. The response noted that Disclosure Scotland would be continuing to engage with stakeholders on a range of issues “through the Parliamentary process, transition, implementation and beyond”.

The Scottish Government indicated that it intended to amend the Bill to include “guiding principles or criteria for the application of the two-part test” and would be lodging amendments to align the Bill with other pieces of legislation.

In terms of children’s membership of the PVG Scheme, the Government stated:

“ It must be emphasised that the Bill does not prevent children from undertaking roles which would be regulated roles if they were 16 and over. Organisations can continue to offer opportunities to children, such as peer-to-peer mentoring. Criminal record checks are only one aspect of safeguarding and organisations should never be solely reliant on criminal background checks for their safeguarding procedures. (p11)”

The Government indicated that it would seek to amend the Bill to broaden the definition of a protected adult. The Scottish Government also noted that the levels of fees would be subject to further consultation and secondary legislation.

These issues were also highlighted in the Stage 1 debate.

## Stage 2

At Stage 2 of the Bill there were 231 amendments lodged.

Level 1 disclosures under the proposed scheme are analogous with the current Basic disclosure product. It is a criminal record check which will show any unspent convictions. The Bill, as introduced, would allow for unspent childhood convictions to be disclosed but only after Disclosure Scotland had considered whether this information ought to be disclosed and provided for review mechanisms on the inclusion of childhood convictions. Stage 2 amendments lodged by the Scottish Government, and agreed by the Committee, changed this approach. The Minister explained that the amended Bill would make changes to the Rehabilitation of Offenders Act 1974 to the effect that all childhood convictions would become spent immediately except for “the most serious forms of criminality during childhood.” She explained to the Committee:

“ [Exceptions] would be for individuals who have a conviction that resulted in a custodial sentence exceeding 48 months—known as an “excluded sentence” under the 1974 act—and, in the case of a sexual offence, a conviction that resulted in a custodial sentence exceeding 12 months. ([Official Report 4 March 2020, col 5](#))”

The Bill was also amended to remove any decision-making by Disclosure Scotland as to whether to include childhood convictions in a Level 1 Disclosure – any unspent convictions will be disclosed. The purpose of these changes was to ensure that duties to self-disclose convictions and state disclosure were aligned.

The Committee agreed a number of amendments that altered the regulated roles that would require PVG membership. It also agreed to amend the definition of a protected adult which, among other things, included victims of domestic abuse.

The Scottish Government lodged amendments which set out what might be considered when officials apply the two-stage test to disclosing information on Level 2 disclosures. These are set out in section 34B of the Bill as amended at Stage 2<sup>ii</sup>. The lists are non-exhaustive and reflect existing case law on state disclosure. The decision-maker would have discretion to consider all, any or none of the matters outlined in section 34B. Ministers would be able to amend the matters that are listed in this section through secondary legislation under the negative procedure.

Daniel Johnson MSP lodged a similar amendment – the key differences between Mr Johnson’s amendment and the Government amendment were that decision makers would have a duty to have regard to the matters outlined in the Bill and that any amendments to the list of matters would require regulations to be passed under the affirmative procedure.

Jamie Greene MSP lodged an amendment which would have allowed Disclosure Scotland to accept children between the ages of 12 and 15 onto the PVG scheme if it considered membership to be appropriate in the circumstances. However, Mr Greene withdrew the amendment after debate at the Committee, during which the Minister cautioned about creating a two-tier system and said, “the Government is more than happy to work with bodies that represent volunteers in Scotland to see whether there is a change in the level of volunteering”. ([OR 11 March 2020, Cols 3-9](#))

Alex Cole-Hamilton MSP lodged amendments that sought to bring elements of elected representatives’ roles into the ambit of the PVG scheme. Mr Cole-Hamilton argued that elected representatives potentially have power and influence over children and protected adults and that it is anomalous that elected members not be subject to the PVG scheme.

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ii If the Bill is passed at Stage 3, numbering of sections will change.

Committee members from all parties, with the exception of the Scottish Liberal Democrats, raised concerns about the practicalities of Mr Cole-Hamilton's proposals and how the scheme would apply to elected members. Members suggested that the issue of arrangements for MSPs' contact with vulnerable groups ought to be considered more broadly and at greater length by the Parliament. The Committee voted against Mr Cole-Hamilton's amendments 10-1.



## Stage 3

Stage 3 proceedings are scheduled to take place on Wednesday 10 June 2020.

The deadline for amendments at Stage 3 was on Wednesday 3 June 2020. A total of 39 amendments have been lodged. 38 of these are Government amendments and many of those 38 are technical amendments.

Mr Cole-Hamilton has lodged the only non-government amendment. Mr Cole-Hamilton's amendment is on a similar theme to his Stage 2 amendments regarding elected representatives' membership of the PVG scheme. Mr Cole-Hamilton's Stage 3 amendment seeks to require the Scottish Government to establish an expert working group to examine and report on this issue.

The daily lists of amendments can be found here: <https://beta.parliament.scot/bills/disclosure-scotland-bill#target4>

# Audit Scotland report on a new IT system

One of the key ambitions for Disclosure Scotland is that it will move to a new IT platform. While the provisions of the Bill do not require online engagement with Disclosure Scotland, it is expected that the majority of interactions will be online.

In September 2019, Disclosure Scotland transferred its operations to a new online cloud-based system called PASS (Protecting and Safeguarding Scotland). The new IT platform was the subject of [a short report by the Auditor General published in December 2019](#). While Audit Scotland found that users of the new system indicated “high levels of satisfaction”, the Auditor General concluded:

“ Ultimately, the PASS system was delivered. But it was late, over budget, and with less functionality than originally intended. There remains more work to be done before the full ambition for the PASS system, and the wider transformation of the disclosure system, is realised. I have asked the auditor to review progress as part of the 2019/20 audit. (Page 9)”

Disclosure Scotland [wrote to the Education and Skills Committee on 14 January 2020](#) noting that PASS is operational and would help support a user-focused system envisaged by the Bill. Disclosure Scotland said—

“ The delivery of the Bill will be an iterative process rather than a single moment, recognising, of course, that legislative commencement will need to be carefully managed to support that. We will work with our stakeholders to ensure that the timetable for digital delivery reflects user needs and aspirations.”

On [12 March 2020](#), the Public Audit and Post-Legislative Scrutiny Committee (“PAPLS Committee”) took further evidence from representatives of Disclosure Scotland and the Scottish Government on the Auditor General’s report. Following that meeting, on 14 April 2020, the [PAPLS Committee wrote to the Education and Skills Committee](#). The letter said that the PAPLS Committee was “concerned by evidence it received during the session on 12 March on the implementation of digital elements of the Disclosure (Scotland) Bill.” It continued:

“ Disclosure Scotland is still at the very early stages of considering how it will implement certain provisions in the Bill. Committee Members raised concerns both about the timescale for implementation and the extent to which the costs of implementation would accord with those estimated in the Bill’s Financial Memorandum.”

[On 4 May 2020, the Education and Skills Committee](#) again wrote to Disclosure Scotland, asking for more detail on how Disclosure Scotland will implement the provisions of the Bill and for the latest estimates of costs.

[The response from Disclosure Scotland](#), dated 3 June, outlined how it had moved to a largely digital service during the pandemic and stated that this agility was possible due to the new system. Disclosure Scotland said that this work has allowed “rapid and significant progress which has already materially changed and improved our position to deliver the Bill.” It said:

“ The Committee may wish to note that our intention to deploy, by the autumn of this year, a secure and workable online application service will allow Disclosure Scotland to receive applications directly into PASS. This will represent a further major milestone in the platform needed to implement the Bill. When that service is deployed, the challenge thereafter will be to continuously improve on the service and to work with customers on future versions of the platform that will offer an ever improving service, including that needed for the Bill.”

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