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Dear Convener,

Thank you for the constructive and helpful Stage 1 Report on the Disclosure (Scotland) Bill. I would also like to take this opportunity to thank all those who have engaged with us to help shape the Bill, and in particular all those who provided evidence.

It is clear that the Committee has carefully considered this complex area and I am grateful for the comments and recommendations in the report. I note that the Committee agreed to support the general principles of the Bill.

I have considered the points raised within the report, a response is attached as Annex A to this letter.

In response to the Committee's letter of 22 November 2019 requesting detail on the policy intention of amendments that seek to ensure that this legislation and legislation which received Royal Assent in 2019 can complement and coordinate with each other, and a list of all the amendments that the Scottish Government will lodge at Stage 2, a response is attached as Annex B. I can confirm that all amendments will be lodged at Stage 2 to maximise opportunities for scrutiny.

I hope the Committee finds this response helpful.

Yours sincerely

**MAREE TODD**

## ANNEX A

### Response to the Stage 1 report on the Disclosure (Scotland) Bill

#### Overview

8. The Committee notes the extensive engagement work undertaken by the Scottish Government in advance of the introduction of the Bill and throughout its consultation period. The Committee welcomes the extent to which the Scottish Government sought the views of those with a direct interest in advance of the introduction of the Bill and encourages further engagement, particularly on the issues raised later in this report.

#### The Scottish Government response

The Scottish Government is pleased to note the Committee welcomes the extensive stakeholder engagement that has been undertaken in the development of this Bill. That engagement will continue through the Parliamentary process, transition, implementation and beyond.

#### **Reforming the disclosure system**

23. The Committee generally supports the reforms within the Bill, and the intention to simplify and update the disclosure system.

24. The Committee welcomes reassurances that non-digital means of seeking disclosures will remain, but urges the Scottish Government to continue to engage with stakeholders to ensure that smaller organisations or organisations without access to digital platforms remain fully supported in their use of disclosure products.

#### The Scottish Government response

We welcome the Committee's support of the reforms the Bill makes to the disclosure regime as well as the intention to simplify and update the disclosure system. The Scottish Government is mindful of the importance of ensuring the disclosure system is fully accessible including through non-digital means. Disclosure Scotland has already carried out user research into accessibility, they are committed to continuing this work and to work with stakeholders to ensure that those who cannot use online products are not precluded from the disclosure system.

#### **Other legislation**

35. The Committee is very concerned by some discrepancies between this Bill as currently drafted and related Acts recently passed by the Parliament. The Committee is further concerned, regardless of how complex the area of law may be, that such discrepancies are present in primary legislation introduced by the Scottish Government in the same parliamentary year.

36. The Committee expects the Scottish Government to address these discrepancies at Stage 2, or to explain how the discrepancies highlighted during

## ANNEX A

Stage 1 will otherwise be addressed. Should the Committee remain concerned by these discrepancies, the Committee may choose to take further evidence at Stage 2.

37. Given the likelihood of proposed future legislation, such as legislation incorporating the United Nations Convention on the Rights of the Child, interacting with measures in the Bill, it is also vital that there are no discrepancies which could arise in the future. The Committee invites the Scottish Government to confirm that the measures within the Bill have been drafted in line with the policy intent of legislation which it is anticipated will be introduced later this session on children's rights.

### The Scottish Government response

The Committee's concerns about the discrepancies have been noted.

The Government progressed all three pieces of legislation - the Age of Criminal Responsibility (Scotland) Act 2019, the Management of Offenders (Scotland) Act 2019 and the Disclosure (Scotland) Bill - by adopting a joined up policy model, sharing ideas, information and team members, ensuring policy coherence uniting the three.

Each Act (or Bill) has had its own parliamentary journey and the provisions of each are absolutely consistent with each other in broad policy terms but there are inevitably procedural and technical inconsistencies between them that may require to be remedied by the development of cohesive operational solutions or by the Government making minor amendments to bring everything fully into line. It is with this in mind that we have developed a solution to self and state disclosure that offers a transformational outcome for people with convictions from childhood.

I would like to reassure the Committee that the Bill was drafted with regard to UNCRC principles and the Children and Young People (Scotland) Act 2014.

### **Role of the independent reviewer**

50. The Committee welcomes the extended role of an independent reviewer for applications to remove certain information from an individual's disclosure record.

51. The Committee notes the suggestions made by stakeholders on measures which could improve the efficiency of the review process, such as the independent reviewer undertaking all first stage reviews. The Committee recommends the Scottish Government explores this option with a view to introducing the necessary amendments at Stage 2.

52. The Committee believes it is vital that appropriate support is provided to individuals seeking reviews, particularly in relation to childhood offences. The Committee recommends that the Scottish Government ensures appropriate support services are available, and that these are available by the time the provisions of the Bill come into force.

## ANNEX A

53. The Committee is concerned that an unsuccessful review of a List A offence cannot be reviewed for the same purpose a second time, and that this may result in these offences being disclosed for the remainder of the individual's life. The Committee recommends that the Scottish Government should introduce an amendment at Stage 2 to ensure consistency with the Age of Criminal Responsibility (Scotland) Act 2019.

54. More generally, the Committee notes the uncertainty among stakeholders regarding how review processes will work and how individuals can engage with the process. The Committee recommends that the Scottish Government works with appropriate stakeholders to draft guidance which will clearly set out the review process.

55. The Committee would welcome confirmation from the Scottish Government of whether, in light of these suggested changes, it would expect an increase in the anticipated costs set out in the Financial Memorandum linked to the role of the independent reviewer.

### Scottish Government response

The Scottish Government is pleased to note the Committee supports the extended role of the independent reviewer, to be appointed under the Age of Criminal Responsibility (Scotland) Act 2019, to review the disclosure of childhood convictions, removable convictions and other relevant information ("ORI").

The Scottish Government notes the Committee's suggestion that all first stage reviews should be undertaken by the independent reviewer to improve efficiency. We believe that this would not increase efficiency, and would in fact have the opposite effect due to the large numbers of cases involved. Countless decisions are made on a daily basis by public authorities in Scotland which have an impact on members of the public. It is more efficient for Disclosure Scotland to make an initial assessment when in the process of compiling the information to be disclosed, rather than pass it off to the independent reviewer which would, in cases where information can be removed, be an unnecessary step that would build in time delays. It is also the case that the only right of appeal would then be to the sheriff, which has been widely criticised and the Government was urged to address. The Bill therefore offers a two-step process without needing to involve the sheriff.

We note the Committee's concerns that the result of an unsuccessful review is that a decision, on application of the two-part test, to disclose a conviction for a List A offence will endure for all subsequent disclosures for the same purpose. This is the situation under the existing legislation where the consequence of an unsuccessful application to a sheriff for conviction removal is that it will continue to be disclosed either indefinitely, in the case of convictions for schedule 8A offences (replaced by List A), or until it becomes "protected" in the case of convictions for schedule 8B offences (replaced by List B).

However, we agree with the Committee's recommendation to ensure consistency with the Age of Criminal Responsibility (Scotland) Act 2019 and an appropriate

## ANNEX A

amendment will be brought forward for consideration at Stage 2. We also believe that subsequent reviews would further enhance proportionality, in keeping with the policy intent of the Bill.

The Scottish Government agrees with the Committee that it is vital support is provided to individuals seeking reviews and that this is particularly true in relation to convictions accrued in childhood. The Scottish Government has made a commitment to providing targeted, quality guidance and training on all aspects of the disclosure regime including the review processes.

This guidance will be provided in a range of formats for a wide range of audiences in conjunction with users and stakeholders, including young people, those with an interest in youth criminal justice and organisations who advocate for people with experience of the justice system. Scottish Government officials have begun to engage with various stakeholders to assist with the development and dissemination of guidance. In 2018, Scottish Government officials ran a workshop with the Criminal Justice Voluntary Sector seeking feedback on the current guidance available and advice on what needs to change and improve going forward.

### **Disclosure – the two-part test**

83. The Committee welcomes the commitment given by the Minister for Children and Young People that, to support the application of the two-part test for disclosure, guidance will be developed in collaboration with stakeholders, and informed by existing case law.

84. The Committee considers that consultation on draft guidance should be widely publicised and adequate time given for responses. Ultimately, the final guidance should be made widely accessible in a range of formats in order to support both decision makers and others who need to understand and provide advice to individuals about the effect of the law.

85. However, in light of the evidence received about the two-part test for disclosure contained in the Bill, the Committee is concerned that it does not set out a sufficiently clear legal test for decision makers.

86. The Committee considers that the Law Society of Scotland's suggestion of the inclusion in the Bill of a set of guiding principles or criteria, which should apply to all decision making whether at first instance or through review, would provide greater legal certainty about the decision making process and improve the foreseeability of outcomes. The Committee recommends, as suggested by the Law Society of Scotland, that any such principles should be amendable through secondary legislation.

### The Scottish Government response

The Scottish Government is pleased to note that the Committee welcomes the commitment to develop guidance on the application of the two-part test. As the Committee will be aware, the Bill requires Ministers to issue statutory guidance to the chief constable and the independent reviewer and, for decisions to be made by

## ANNEX A

Disclosure Scotland when exercising Minister's functions, internal guidance will be developed.

We have begun early engagement with stakeholders to develop the guidance to be used by decision-makers. The guidance will make the outcome of any assessment or review processes more foreseeable and accessible to disclosure applicants. We recognise the importance of providing user-friendly and widely-available guidance in a variety of formats for both applicants themselves and those who may support them so that they can fully engage in the review processes provided under the Bill. The Scottish Government would like to reiterate its commitment to providing this guidance for users of the disclosure system.

The Scottish Government acknowledges the Committee's recommendation on including on the face of the Bill a set of guiding principles or criteria for the application of the two-part test. As such an appropriate Stage 2 amendment will be brought forward for consideration. We also agree with the Committee's recommendation that any such provisions on the face of the Bill should be amendable through secondary legislation.

### Other relevant information

106. The Committee notes the evidence from the Scottish Government about the very low percentage of PVG certificates which contain other relevant information under the current system. The Committee also notes that the Bill expands the situations where other relevant information may be included to all Level 2 disclosures, including circumstances where currently a standard disclosure would be made.

107. The Committee is concerned about the potential for the disclosure of other relevant information held by the police to undermine one policy objective of the Bill, which is to allow individuals to move on from past offending behaviour. This concern is most strongly held in connection with childhood offending and for care-experienced people.

108. The Committee welcomes the implementation of the Age of Criminal Responsibility (Scotland) Act 2019, which means that any behaviour which took place before an individual's twelfth birthday will not be considered to be criminal. However, it notes that offences committed when the individual was aged between 12 and 17 will continue to be treated as convictions and may be disclosed even when deemed spent. The Committee supports the inclusion in the Bill of provisions which will create a right of review of childhood conviction information by the independent reviewer. However, the Committee notes that such a review must be initiated by the individual concerned making an application, which may constitute a significant barrier for some people.

109. The Committee is also concerned about the possibility that disclosure of other relevant information by the chief constable could allow employers to access information related to a conviction despite the conviction itself being withheld. This concern applies generally, but particularly, given the intent of the Bill, to ORI relating to incidents that occurred in adolescence and childhood.

## ANNEX A

110. The Committee therefore invites the Scottish Government to give further consideration to the processes set out in the Bill regarding disclosure of other relevant information in order to strengthen opportunities for review and challenge by an applicant prior to disclosure to a third party.

### The Scottish Government response

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 known to the police and about whom there are valid safeguarding concerns. The ability to include other relevant information (“ORI”) on a disclosure is a very significant part of the measures that followed these tragic cases and the Scottish Government consider that it must continue to be available for public protection.

ORI is widely accepted by the public, our courts and stakeholders as a key aspect of the disclosure regime. The Bill does not erode this vital power which can lead to barring under PVG as well as disclosure to an employer or potential employer. The main changes will allow individuals to provide further information to the chief constable before a potential employer is made aware of its existence, have a right of review to the independent reviewer and statutory guidance will be issued to the chief constable.

The Scottish Government notes the Committee’s concerns about the potential for the disclosure of ORI to undermine one policy objective of allowing individuals to move on from past offending behaviour, particularly convictions from childhood, and that ORI may be disclosed in relation to childhood convictions not otherwise disclosed.

As Sheena Brennan from Police Scotland confirmed in her evidence, all information the police have to hand is assessed before disclosing relevant information. This means that if the behaviour took place in childhood it is taken into account before a disclosure is made. Alistair Hogg from the Scottish Children’s Reporter Administration also confirmed in his evidence that there are some – in which he stressed – “highly exceptional circumstances” where the behaviour exhibited by a child is of such a concern that it may point to future risk and risk to other people. The point being made by Mr Hogg is reflected in the number of higher level disclosure applications containing ORI, which is very small.

For decisions relating to Level 2 disclosures, Ministers will take account of any ORI disclosed by the chief constable before making their own determination. This will ensure there is no unnecessary duplication of information being provided on a disclosure. Information that appears as a conviction may also not tell the whole story and the police may elect to provide ORI to contextualise it. To illustrate, an individual could have a conviction which appears minor and irrelevant to participating in the Scheme in relation to children. However, the police may have information about that offence which shows the victim was a child and the conduct involved a betrayal of a position of trust. In those circumstances, the police have more information available to them than Ministers at that early application stage.

## ANNEX A

The Scottish Government is confident that Police Scotland and other UK police forces exercise utmost rigour before deciding to include ORI. Its use has also been successfully justified in UK courts. This coupled with the changes in Bill in relation to disclosure of ORI, including the opportunity for the applicant to submit representations, enhances proportionality without comprising safeguarding.

In terms of the Committee's comments regarding the disclosure of spent childhood convictions, it should be noted that spent convictions cannot appear on Level 1 disclosures. For Level 2 disclosures, only convictions that appear on List A or List B may be disclosed once they are spent and only after the individualised approach described at page 14 of the response. The Bill provisions on childhood offences must also be considered alongside the Management of Offenders (Scotland) Act 2019 which, when enacted, will reduce the disclosure periods. Of note, the disclosure period for children's hearings for offence grounds will be nil i.e. spent immediately.

The Scottish Government notes the Committee's concern in relation to the fact that any review must be initiated by the individual, which may be a barrier to some people. We believe that an automatic review could also be a barrier. During our engagement with stakeholders during the 2015 reforms, and our further engagement with the Bill, we often found that applicants have lived with their conviction for so long and that their employers are aware of it that any automatic appeal would be unnecessary (and in some cases unwelcome) in those circumstances. We are committed to working with stakeholders to provide training and develop guidance to reduce any barriers. Disclosure Scotland user researchers will also be working with stakeholders as they develop the digital system, hoping to reduce any barriers further.

### Changes to the PVG Scheme

121. The Committee supports the principle of proposed mandatory membership of the PVG scheme, and the move from lifetime membership to a renewable 5 year membership of the scheme. The Committee believes this will reduce the burden of constant monitoring of those who no longer require this, while also securing the right to privacy for those who no longer require to be part of the scheme.

122. The Committee welcomes the grace periods contained within the Bill, which should minimise the risk of employees and employers failing to hold PVG membership where necessary. However, the Committee remains concerned that some individuals and organisations might, through administrative errors, fail to renew scheme membership or realise they need to do so, and therefore potentially be subject to criminal sanctions. Additionally, the Committee notes that the proposed penalty of a short custodial sentence runs contrary to the current presumption against short sentences. The Committee therefore recommends the Scottish Government reconsiders the sentencing provisions associated with nonrenewal of scheme membership.

123. The Committee recommends that the Scottish Government clearly sets out how the transition from lifetime membership to a five-year membership will be managed for current PVG scheme members, and for those who will join in the

## ANNEX A

period between the potential passage of the Bill and its subsequent implementation.
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### The Scottish Government response

The Scottish Government welcomes the Committee's support for a mandatory PVG Scheme as well as the move from a lifetime scheme to a time-limited scheme with periodic renewals. We also note the Committee's concerns and recommendations in relation to offences connected with the mandatory scheme and lapsed membership, and associated penalties.

The mandatory scheme can only truly work if it is supported by a criminal offence to compel PVG membership, and the offence provisions are targeted at those who intentionally try to evade the PVG Scheme. It must be stressed that it is not the intention of the Scottish Government to criminalise individuals and organisations for administrative mishaps – a common sense view is required. It is for this reason that the Bill includes provision to safeguard against unintentional lapses to ensure a scheme member will not fall out of the Scheme once their membership ends.

As the Committee notes, at least three months before the end of their membership, the scheme member and any person they carry out a regulated role for must be notified of the membership's expiry date. The Bill also makes provisions for circumstances where a scheme member fails to apply for renewal before the end of their membership to ensure there are no safeguarding risks. This includes extending membership periods for Disclosure Scotland to conduct checks to ascertain if the individual is still carrying out a regulated role and should be in the Scheme.

Officials from the Bill team made clear during their evidence session on 4 September 2019 that in the case of lapsed membership, our approach would be to encourage the individual to renew their membership rather than to resort to criminal proceedings. This would be the ultimate sanction against a person carrying out a regulated role without being a scheme member, but many steps, as identified above, would be taken before making a report to Police Scotland.

We acknowledge the Committee's recommendation in relation to the penalties associated with nonrenewal of scheme membership within the context of the current presumption against short sentences. The penalties proposed in the Bill are consistent with those in the PVG Act relating to barred individuals doing regulated work. The Scottish Government will reconsider the offence provisions in the Bill and, given this issue extends to the provisions within the PVG Act, review those also.

We welcome the Committee's recommendations on transition. The Scottish Government are proposing a phased implementation of the Bill to allow for a smooth transition. There are different ways this can be achieved, for example, by date of joining the Scheme or by sector. However, current scheme members will not need to apply again to join the Scheme at implementation. Disclosure Scotland will make enquiries to ensure that individuals who are scheme members are aware of the new arrangements, and that where appropriate they remain in the Scheme. Disclosure Scotland will also mount a major communications exercise well in advance of any changes.

## ANNEX A

Work with stakeholders is underway to better understand and capture the transitional arrangements that are required and officials have started early planning for what may be required for implementation. We will not commence these parts of the Bill until the fundamentals are in place to ensure a safe and smooth transition.

### Removing under 16s from the PVG Scheme

137. The Committee recognises that the proposal to prevent those under the age of 16 joining the PVG scheme is based on the Scottish Government's views on children's rights. However, the Committee believes that this proposal on its own could unintentionally contribute to a decline in volunteering opportunities for young people depending on how organisations interpret the legislation and their wider safeguarding measures.

138. The Committee therefore recommends that the Scottish Government sets out the ways in which it will support organisations to continue to offer volunteering opportunities to under 16s, including through the promotion of safeguarding measures or alternative disclosure products.

139. The Committee also recommends that, after an initial period of operation, the Scottish Government conducts a review of this change to measure whether there has been a negative effect on volunteering rates among under-16s.

140. Whether or not the Scottish Government decides to amend the current proposals within the Bill to bar under 16s from joining the PVG scheme, the Committee believes it is vital that specific guidance is developed to explain the implications of the disclosure system for young people.

### The Scottish Government response

It is the case that the Scottish Government position on under 16s joining the PVG Scheme is viewed through a children's rights lens, however, it is also an issue of proportionality.

The number of under 16s applying to join the Scheme is already very low, annually there are around 300 applications for voluntary positions from people aged under 16. Further, only six people under the age of 16 have ever been listed and all of these were automatic listing cases, for context, the Protection of Vulnerable Groups (Scotland) Act 2007 (Automatic Listing) (Specified Criteria) Order 2010 covers offences such as murder of a child and rape.

As COSLA highlighted in their evidence, when children do pose a risk of this kind there are other, more appropriate, measures available to manage any risks that they may pose of harmful behaviour. The nature of these offences also means it will be impossible in most cases for the individual who is under 16 to carry out a regulated role as they would be incarcerated during the period that the Committee is concerned could be a window of risk.

## ANNEX A

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.

It is more proportionate to respond to this risk, not by subjecting under 16s to PVG membership and continuous monitoring, but through training and guidance in transitioning to the provisions under the Bill.

As already stated, the Scottish Government is committed to providing new and improved guidance and we note the Committee's recommendation that this include the implications of the disclosure system for young people.

We will ensure support is provided to organisations recruiting under 16s for voluntary work, the appropriate safeguarding measures are adopted and monitor the impact of these proposals on volunteering opportunities for young people.

### Accredited bodies

150. The Committee welcomes the proposed extension of referral status to other public bodies such as local authorities, but it is important the Scottish Government addresses the concerns raised by COSLA and others about how this could be interpreted in relation to self-directed support. The Committee invites the Scottish Government to respond to these concerns.

#### The Scottish Government response

The Scottish Government is pleased to note the Committee welcomes the referral powers provided to local authorities under the Bill. Officials are engaging with relevant stakeholders, including COSLA and Social Work Scotland, to address their concerns and to ensure the intended benefits of these new referral powers are realised.

### Regulated roles

163. The Committee highlights the concern and confusion it has heard from a variety of organisations over the implications of the Bill's proposals to move PVG membership from lists of jobs and workplaces (regulated work) towards a description of the work undertaken (regulated roles). The Committee believes the Scottish Government should engage with volunteering organisations and those who raised concerns with the Committee ahead of Stage 2 to identify ways in which further clarity can be provided on this change.

164. The Committee welcomes the Scottish Government's willingness to consider how the definition of a protected adult could be improved, and its commitment to engage with stakeholders ahead of Stage 2.

#### The Scottish Government response

## ANNEX A

The Scottish Government acknowledges that the move from “regulated work” to “regulated roles” is a big change. The PVG Scheme has been in operation for nearly nine years now and during that time, through feedback from stakeholders and Disclosure Scotland’s own experience of operating the Scheme, it has been clear that regulated work is poorly understood among users and complex in definition. Disclosure Scotland’s Customer Engagement Team provides extensive, free training on the current system and this engagement work with stakeholders on the definition of regulated work has indicated that many felt this had to be clarified. The fundamental change being made will ensure that we have a system which is readily understood and delivers real safeguarding

We can confirm that a number of workshops specifically on regulated roles have been held with a wide range of stakeholders to ascertain how best the Scottish Government can support and provide guidance to PVG users on this change.

An appropriate amendment will be brought forward for consideration at Stage 2 to deal with the issues identified with the protected adult definition.

### **Disclosure of offences**

176. The Committee believes that the system for disclosing offences proposed by the Bill strikes the correct balance between public protection and individual rights. However, the Committee believes offering individuals the opportunity to provide contextual information about any disclosed offences would be a positive step, and recommends that the Scottish Government considers how individuals can be given this opportunity at the appropriate juncture in the disclosure system.

### The Scottish Government response

The Scottish Government is pleased to note the Committee’s view that the Bill achieves the correct balance between public protection and the rights of individuals.

The Committee’s recommendation that consideration is given to how individuals can, at an appropriate stage in the disclosure process, provide contextual information about offences to be disclosed is also noted. The Scottish Government do not consider that it would be appropriate for such contextualising information to be included on a state disclosure, via a free text box, as there would be a risk that employers would believe this information has been provided or endorsed by Disclosure Scotland. The Committee previously raised concerns about applicants initiating a review could be seen as a barrier, and we believe that allowing contextual evidence by the applicant could also be a barrier. There is a possibility for an applicant to over disclose when asked to provide additional information, for example, refer to other convictions or provide sensitive information. Some applicants may not engage in this process and those that do, the quality of the contextual information may vary wildly making it difficult for employers to navigate.

It is recognised however, as Sarah Latto from the Scottish Volunteering Forum described in oral evidence, that having to discuss convictions and the circumstances surrounding them can be a difficult and often re-traumatising experience for people. The Scottish Government is keenly aware of the importance of employment to

## ANNEX A

desistance from offending and it is for this reason that Disclosure Scotland founded and is a leading member of the Scotland Works for You initiative.

This is an alliance group comprising of representatives across various sectors who together have produced guidance for individuals with convictions, and organisations to help them understand how to evaluate convictions. Included within this guidance for individuals with convictions is an example of a self-disclosure letter to assist people with convictions in drafting a letter to a prospective employer to tell their story.

The Scotland Works for You guidance for individuals is complemented by the guidance materials and training package aimed at employers which is designed to give employers a structured approach to making defensible, risk based recruitment decisions whilst ensuring fair opportunity is given to applicants with previous convictions.

### **Lists of offences**

191. The Committee supports the continuing existence of lists of offences to be disclosed when otherwise spent. However, the Committee considers that improvements can be made to ensure confidence in this system. For example, the Committee notes the example of embezzlement and fraud, two offences rooted in dishonesty, being on different lists, and recommends that the Scottish Government re-examines its proposed lists ahead of Stage 2 to ensure that offences of a similar nature are treated similarly.

192. The Committee notes the differing views on the appropriate timescales for review and disclosure of offences, and that the timescales given appear to be designed to fit with other legislation in this area rather than on an evidential basis. The Committee recommends that further consideration is given to whether these timescales meet the Scottish Government's stated aim to balance public protection with the right to move on from past offences and would welcome further exploration of the basis for the proposed eleven year period at Stage 2.

### The Scottish Government response

The Scottish Government notes the Committee's view on the offence lists and are considering this ahead of Stage 2.

The Scottish Government are of the view the time periods in the Bill for the disclosure of spent convictions are appropriately set.

As highlighted in the National Strategy for Community Justice, people with convictions can turn their lives around and to do so they need opportunities and support. It is also known that employment is one of the essential components for an individual's reintegration back into society. It is clear from stakeholder feedback that people believe the current legislation does not get the balance right between protecting public safety and enabling people with convictions to move on with their lives.

## ANNEX A

The consequence of having to disclose previous criminal convictions for long periods of time can be severe, which is why it is necessary to strike the right balance. The majority of people who have committed minor offences will not have to disclose these convictions once spent, therefore the disclosure period could be as short as one year.

There is a broad spectrum of interest in the disclosure periods, those who want less disclosure and those who expect the same or more disclosure. In reaching the appropriate time period we had regard to these perspectives and concluded the timescales set out in the Bill achieve the right balance between safeguarding and individual rights. The changes also take into account the reduced disclosure periods in the Management of Offenders (Scotland) Act 2019, as it is proportionate that the timescales in the Bill mirror those reductions. Further, the timescales mirror arrangements elsewhere in the UK too, which aids foreseeability for people living and working across borders.

Emerging research in relation to certain offences and reoffending supports the reduction in the extended disclosure period. However, it is important to note such research has caveats and the offence lists cover a broad spectrum of offences. The research evidence referred to in the oral evidence given to the Committee suggests disclosure of 7 to 10 years, however the Government does not consider it to be unreasonable for the disclosure of more serious offending - for instance, sexual crimes, child cruelty and violent crime - should be 11 years to balance safeguarding and proportionality.

### Childhood offences

208. The Committee welcomes the end of automatic disclosure of childhood offences committed between the ages of 12 and 17. However, the Committee agrees that more could be done to provide opportunities for any information relating to childhood offences included on a disclosure to be set in context. This is particularly important for care-experienced people, given their disproportionate level of engagement with the justice system.

209. The Committee notes the proposal that childhood offences on Lists A and B should have no time limit for review and a shorter period for disclosure respectively which differs from offences committed as an adult, as well as calls for a separate list entirely for childhood offences. Given the Scottish Government's opposition to creation of a separate list for childhood offences, the Committee recommends that it explores with stakeholders how childhood offending can be better assessed within these two lists.

### The Scottish Government response

The Scottish Government is pleased to note the Committee's support for ending the automatic disclosure of offences committed between 12 and 17. We agree with the view expressed by the Committee and stakeholders on the disclosure of convictions from childhood. It is for this reason that the Bill includes provisions that give Ministers flexibility when disclosing convictions from childhood to disclose not as stark conviction information but as a narrative so that the offending behaviour can be

## ANNEX A

put in context. It is also the case that convictions accrued in childhood will appear separately on a disclosure from any accrued aged 18 or over.

As the Committee heard from officials on 20 November 2019, List A and List B cannot be viewed in isolation in respect of childhood convictions. The offence lists must be read with section 14 of the Bill which sets out when a conviction, including a conviction from childhood, is non-disclosable. The offence lists alongside section 14 act as a filter, removing from scope convictions that are irrelevant for state disclosure. These provisions make clear that for childhood convictions for offences that do not appear on either list, representing the vast majority of offences, once spent they will no longer be capable of being disclosed. For convictions for offences appearing on List A or List B an assessment on a case-by-case basis will be made about disclosure following a decision-making framework set down in guidance and, as set out earlier, a list of matters that may be taken into account which will be brought forward as a Stage 2 amendment.

The guidance will be produced in conjunction with stakeholders, including young people with experience of the criminal justice system as well as practitioners who support them, allowing for defensible decisions about disclosure to be made whilst also providing foreseeability for applicants.

The Scottish Government consider that this individualised approach to disclosure of childhood convictions is more proportionate than introducing separate lists of offences for childhood convictions. We believe that the provisions in the Bill, building on the reforms in the Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019, will offer a transformative opportunity with people with childhood offending in their past who now live productive, law abiding lives.

### Financial Memorandum

223. The Committee notes the estimated costs in the Financial Memorandum, and understands the need for fees to be charged in relation to disclosure products. However, it is unclear what the fee structure could mean for these estimates, and the Committee recommends that the Scottish Government acts swiftly to assuage some of the concerns raised.

224. The Committee welcomes the Scottish Government's intention to waive fees relating to the PVG scheme for volunteers. However, the Committee supports the Scottish Volunteering Forum's call for all disclosure product fees to be waived for volunteers to prevent any barriers to volunteering in less affluent areas, and also asks the Scottish Government to consider how it can best support those in lower-paid jobs who require PVG checks.

225. Elsewhere in this report, the Committee explores the Bill proposal for the PVG scheme being open to individuals aged 16 years or older. One possible response could be that under 16s may be required to obtain other disclosure products in order to volunteer (e.g. a Level 1 disclosure). The Committee recommends that the Scottish Government consider waiving fees of any individual

## ANNEX A

under-16 applying for a disclosure check where they are doing so to undertake volunteer work.

### The Scottish Government response

The proposals within the Bill can be delivered without a change to the current fee structure. However, there is a legitimate question as to whether we can deliver this in a better way. The 2018 consultation on the *Protection of Vulnerable Groups and the Disclosure of Criminal Information* set out some alternative fee models and costs.

However, responses and the information gathered from Disclosure Scotland's stakeholder advisory board made it clear that more work is needed to understand what the impact of the current fee model is and what changes may be required. Some of this early work has started and further engagement with stakeholders will take place next year.

The Scottish Government will carry out a formal consultation on fees in due course, we will be happy to ensure the points raised by the Committee, including fee waivers for all disclosure products and how scheme members - particularly those in low paid roles - can get the best value for money are covered in the consultation. Any change to the current fee levels will be laid before Parliament for scrutiny.

### **General principles of the Bill**

226. The Committee supports the general principles of the Bill. However, the Committee believes that there are a number of areas within the Bill which will require further clarification and consideration at Stage 2 to ensure that the Bill delivers on its aims in full.

### The Scottish Government response

The Scottish Government welcomes the Committee's support for the general principles of the Bill.

## ANNEX B

### Disclosure (Scotland) Bill stage 2 amendments: new and significant topics

Description of topic	Benefits and any additional information
<p><b>Alignment between self-disclosure and state disclosure: childhood convictions</b> Consequential amendments are required to ensure consistency between self-disclosure, which is governed by the Rehabilitation of Offenders Act 1974 (“the 1974 Act”), and state disclosure under the Disclosure (Scotland) Bill.</p>	<p>Consequential amendments are required to the 1974 Act to ensure alignment between both systems of disclosure. The Bill provisions on childhood convictions will be of no benefit to an individual who is already compelled by the 1974 Act to reveal an unspent conviction accrued under the age of 18. The amendments will ensure that an individual is never required under the 1974 Act to disclose a childhood conviction which the Scottish Ministers would not disclose under the Bill.</p>
<p><b>Protected adult</b> Increasing the scope of the definition of “protected adult” to be inserted into the Protection of Vulnerable Groups (Scotland) Act 2007 (“the PVG Act”) by section 76 of the Bill.</p>	<p>We are responding to concerns raised by stakeholders that the definition of protected adult is too narrow. The changes will ensure that the coverage provided by the existing definition under section 94 of the PVG Act is maintained and there are no safeguarding gaps.</p>
<p><b>Regulated roles</b> Amendments in relation to regulated roles including expanding the concept of <i>unsupervised contact with children</i> in paragraph 1(2)(b)(i) of schedule 3 to more activities mentioned in Part 2 of this schedule, narrowing the exceptions to regulated roles in the course of personal relationships and removing councillors from the scope of the Scheme to maintain the status quo with the existing law.</p>	<p>These changes will ensure the scope of the PVG Scheme is adequately drawn.</p>
<p><b>List of matters that will apply to decision making</b> Providing a list of matters in the Bill to be applied by all decisions makers whether at first instance or on review.</p>	<p>We are responding to views of stakeholders and echoed by the Committee, that a set of guiding principles or criteria for decision making would provide greater legal certainty about the decision making process and improve the foreseeability of outcomes.</p>
<p><b>Permanence of decision making</b> Permitting subsequent reviews against decisions to disclose information on a Level 2 disclosure where the purpose of that subsequent disclosure is the same.</p>	<p>We are making changes so that there is some possibility of a further review taking place in limited circumstances, to ensure that the review process is proportionate.</p>

## ANNEX B

<p><b>Part 1 of the PVG Act</b> Reforms to the provisions on removal applications from the barred lists.</p>	<p>These changes will improve the operation of Part 1 of the PVG Act, making the relevancy tests clearer and broaden the Ministers powers to receive and consider late representations when it is appropriate to do so in the circumstances.</p>
<p><b>Definition of power or influence</b> A key change to the disclosure system is the move from regulated work as the eligibility criteria for PVG membership to regulated roles that will trigger mandatory scheme membership. Regulated roles are those in which a person can exercise significant power or influence over a child or protected adult.</p>	<p>We are responding to feedback from stakeholders seeking clarity on what is meant by power or influence and making decisions that effect vulnerable groups.</p>

### Disclosure (Scotland) Bill stage 2 amendments: minor and technical topics

Description of topic	Benefit and any additional information
<p><b>Guidance for the chief constable</b> To provide that the Scottish Ministers must issue guidance about the exercise of the chief constable's functions under the PVG Act.</p>	<p>This will ensure that the chief constable has regard to the same guidance when exercising their functions under the Bill <i>and</i> under Part 1 and 2 of the PVG Act.</p>
<p><b>Notification requirements</b> Expanding the power and duty on Scottish Ministers to issue notices under the PVG Act.</p>	<p>We are responding to feedback that regulatory bodies should be informed of a failure to renew scheme membership, and allowing for notification to be sent to personal employers. These amendments will enhance safeguarding by allowing for notification to personal employers and regulatory bodies in relation to the outcome of a consideration for listing and failure to renew scheme membership.</p>
<p><b>PVG Act Offences</b> Changes to offences to be inserted into the PVG Act by sections 74 and 77 of the Bill to:</p> <ul style="list-style-type: none"> <li>• ensure that there is an ongoing impetus for an employing organisation to ensure that an individual carrying out a regulated role for them is in the Scheme,</li> <li>• reduce the reach of offences connected with failure to comply with a condition imposed on a</li> </ul>	<p>Amendments to ensure there are no safeguarding gaps, and that individuals employing others but not in the course of a business e.g. a person arranging their own self-directed support, are not disproportionately brought into the scope of the new offence provisions.</p>

## ANNEX B

<p>scheme member so that the offence provisions apply only to organisations and personnel suppliers.</p>	
<p><b>Failure to apply for renewal of scheme membership</b> To ensure that if Scottish Ministers decide to place an individual under consideration for listing because the individual has failed to apply for membership renewal when they should have, Ministers can consider the individual for listing on both lists.</p>	<p>This is consistent with provisions under section 10(1)(aa) on consideration for listing as a result of a referral made by the chief constable in relation to a person carrying out a mandatory role whilst not in the Scheme. The conduct is the same in both cases and should be responded to in the same way.</p>
<p><b>Extra territorial offences</b> To make provision to deal with circumstances when offences under sections 34 to 36 and 45C to 45E of the PVG Act are committed outside Scotland.</p>	<p>The Bill makes PVG scheme membership mandatory for those doing regulated roles and extends this requirement to certain types of roles carried out overseas which would be a regulated role if done in Scotland. The amendment ensures that jurisdiction is conferred on Scottish courts for offences under the PVG Act which may involve conduct occurring outside of Scotland.</p>
<p><b>Accredited bodies</b> Miscellaneous amendments to the provisions on accredited bodies.</p>	<p>Minor technical amendments in respect of lead signatories and countersignatories making clear the circumstances when each role is engaged.</p>
<p><b>Consequential amendments</b> A number of consequential amendments are needed to the Age of Criminal Responsibility (Scotland) Act 2019.</p>	<p>The disclosure provisions for pre-12 behaviour in this Act are based on the provisions in the Police Act 1997 and a section of the PVG Act which the Bill repeals.</p>
<p><b>Children’s hearings disposals</b> Provisions to make a clear distinction between childhood convictions in a criminal court and children’s hearings disposals on offence grounds.</p>	<p>We are addressing stakeholder concerns that children’s hearings disposals are referred to as “convictions” for the purposes of disclosure.</p>