



Law Society  
of Scotland

**70**  
Years  
1949-2019

# Written Evidence

## Disclosure (Scotland) Bill

20 August 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Education and Skills Committee call for evidence on the Disclosure (Scotland) Bill. We have the following comments to put forward for consideration.

## General comments

We are a professional body statutorily required to represent the interests of the solicitor profession and the interests of the public in relation to the profession<sup>1</sup>. We are also required to have regard to regulatory objectives<sup>2</sup>:

- supporting the constitutional principle of the rule of law and the interests of justice;
- protecting and promoting the interests of consumers and the public interest generally;
- promoting access to justice and competition in the provision of legal services;
- promoting an independent, strong, varied and effective legal profession;
- encouraging equal opportunities within the legal profession;
- and promoting and maintaining adherence to the professional principles<sup>3</sup>

How disclosure operates in Scotland directly engages this statutory and regulatory framework. The disclosure scheme is integral to how we promote and maintain professional principles as a regulator - on admission to the profession, re-entry to the profession or as part of our anti-money laundering regulation. Conducting these checks is one of the ways that we protect and promote the interests of consumers, ensuring that legal services are provided only by those people fit and proper to do so. The balance of the

<sup>1</sup> Solicitors (Scotland) Act 1980, section 1

<sup>2</sup> Legal Services (Scotland) Act 2010, section 1

<sup>3</sup> The professional principles are set out in section 2 of the 2010 Act and include the principles that persons providing legal services should support the proper administration of justice, act with independence (in the interests of justice), act with integrity, act in the best interests of their clients, meet obligations under professional rules, act in conformity with professional ethics and comply with duties owed to the court

disclosure regime - between the right to privacy for an individual and the right to protection for the public – also involves issues around the interests of justice and the public interest.

We do believe that the current system of disclosure would benefit from simplification, as the current system is difficult to navigate. We appreciate that a degree of flexibility may be required, particularly as disclosure regimes across the UK have been tested in court in recent years. We also appreciate the rationale for the change in policy around offences committed before the age of 18. Our response to the Committee's call for evidence, though, is primarily from the perspective and with the experience of acting as regulator of the solicitor profession in Scotland. Lord Sumption highlighted the importance of certainty in a recent Supreme Court judgment<sup>4</sup> and we believe that more may be needed before the Disclosure (Scotland) Bill meets that need. We have raised issues around the Bill (and particularly its practical implementation) with Disclosure Scotland and received some assurance.

### *'Fit and proper'*

This role operates in very different ways to the employer and employee relationship involved in many disclosure checks. We have a statutory responsibility to ensure that anyone who seeks to become a Scottish solicitor is a 'fit and proper person'<sup>5</sup>. That requirement is engaged on entry to the profession, admission as a solicitor, or where seeking reinstatement to the roll, where a standard disclosure under the current regime would be sought<sup>6</sup>. A basic disclosure under the current regime is also sought when an applicant seeks the Society's approval (as supervisory authority) to be a BOOM<sup>7</sup> under Reg 26 of the AML Regulations 2017<sup>8</sup>.

Solicitors occupy a privileged position, trusted by the public with their most confidential concerns, their most valuable assets and most important interests. They are trusted by the justice system to fulfil duties to the court and uphold the rule of law. Solicitors must meet the highest standards of honesty, integrity and professionalism in order to deserve that trust. A fair and just society and thriving and competitive economy require that individuals and businesses can have confidence that Scotland's legal and regulatory system will support them by providing appropriate protection of their rights and interests, whether in the commercial or personal sphere. That confidence is eroded if those providing legal services do not meet the highest standards of competence and ethics.

### *Admission*

<sup>4</sup> *Re an application by Lorraine Gallagher for Judicial Review (Northern Ireland)* [2019] UKSC 3 (paras 51-55)

<sup>5</sup> Solicitors (Scotland) Act 1980, section 6

<sup>6</sup> If the Society is authorised to act as an approved regulator in terms of the Legal Services (Scotland) Act 2010 then the Society would also require standard disclosure reports as part of the process of fit and proper testing non-solicitor investors, Heads of Practice and/or members of any Practice Committee of a licensed provider licensed by the Society under that Act

<sup>7</sup> Beneficial owner, officer or manager

<sup>8</sup> The Money Laundering, Terrorist Financing and Transfer of Funds (information on the Payer) Regulations 2017

Should matters be disclosed as part of the admissions process, these will be considered by our Admissions Sub-committee. All matters disclosed relating to fitness and properness are assessed in line with guidance published on the Society's website<sup>9</sup> by regulatory sub-committees. At least 50% of the members of such sub-committees must be non-solicitors and the assessment (like any regulatory function of the Society) must be carried out in a way which aims to promote achievement of the regulatory objectives.

If we are to discharge our duties properly, we need the information required to enable us to make a full, considered and reasoned assessment of each individual's circumstances. We seek to be informed of anything which could lend weight (either positively or negatively) to the consideration of any application. Applications are considered based on our own established processes and tests. Each is considered on its own merit and any mitigating circumstances will be considered. It may be that previous convictions can be safely disregarded subsequently through demonstrable patterns of behaviour. The published guidance clearly sets out our processes and procedures, which are unique to the role of solicitor, and takes into account the position of trust in which solicitors are placed, both in terms of financial matters but also in the administration of justice. It is essential to us that we continue to fully regulate the solicitor profession using the requirements which have been uniquely developed for that profession.

Our decisions around suitability for admission may be appealed internally and our decision-making around suitability for admission is also subject to the supervisory jurisdiction of the courts.

#### *Complaints and compensation*

We are also responsible - along with the Scottish Legal Complaints Commission - with dealing with regulatory breaches and misconduct by solicitors. Both of these undertakings require significant resources which are paid for, in both cases, by solicitors. In addition, we administer a statutory fund - known as the Client Protection Fund or Guarantee Fund - to compensate those who suffer loss as a result of the dishonesty of a solicitor. That fund is entirely paid for by solicitors. The solicitor profession demands rigorous honesty. Misconduct by one can lead to costs for all – not just as a result of reputational damage and loss of public trust – but directly by increasing the costs of regulation, insurance and contributions required to the Client Protection Fund. Few, if any, other industries require that participants pay so directly for the dishonesty of their competitors.

#### *Officers of the court*

The responsibilities of solicitors extend beyond those to their client but into the wider community. Confidence in the justice system is crucial to the rule of law; such confidence is, to a large extent, the aggregate of the confidence in the individuals involved in this system. As the leading text on legal ethics in Scotland states, "the solicitor is a key player in the justice system with obligations not simply to clients, fellow professionals, witnesses and other third parties, but also to the court... These duties to the court are

<sup>9</sup> <https://www.lawscot.org.uk/media/359166/fit-and-proper-guidance-november-2017.pdf>

derived from the common law and are owed not to the judges or the courts in which a solicitor chooses to practice, as such, but rather to the wider community because of the public interest in the proper administration of justice.<sup>10</sup> Courts are often required to make decisions that have life-changing impacts on individuals, and on the communities in which they live. Ensuring that the people involved in this process are ‘fit and proper’ is one of the ways to ensure that justice is done and seen to be done.

### *Portability*

Ensuring that solicitors meet ‘fit and proper’ requirements is also relied upon in other circumstances. Admission to the roll as a solicitor is used as an exemption, for instance, to the requirements for providing immigration advice under the Office of the Immigration Services Commissioner regime. Standing as a Scottish solicitor can also provide some exemption or credit to qualification in other jurisdictions as a regulated legal professional.

### *Key views*

We therefore have a duty, primarily to the public but also to our members, to do all we can to ensure that those seeking to become and remain solicitors are ‘fit and proper’ for the onerous responsibilities they will face. Indeed, the existing legislation and disclosure scheme recognises that we, as the gatekeeper acting to protect the public, have a legitimate interest in seeking a higher level of disclosure in respect of solicitors and prospective solicitors<sup>11</sup>. In our discharge of this responsibility, we have these key views around the Bill:

- **Level of detail:** There are a range of details including processes, timescales, and notification procedures providing the framework for the new proposed disclosure system where sufficient details have not been included at the stage of the Bill’s introduction. We appreciate that regulatory powers providing necessary flexibility are included within the provisions of the Bill.<sup>12</sup> There are several issues where more detail should be provided now in order to provide the necessary transparency and inherent fairness of the processes and knowledge as to the relevant timescales in which reviews and appeal must be made.
- **Draft guidance:** Paragraph 291 of the Policy Memorandum<sup>13</sup> commits Disclosure Scotland to providing more guidance and training (our emphasis). Given the significant discretion being afforded to Disclosure Scotland to decide whether information in providing Level 1 or Level 2 disclosure is to be included depends on how the respective tests of “ought to be included” and “relevant for the purposes of disclosure” are to be interpreted. What this means in practice is that there needs to be much greater clarity specifically on how the role of Disclosure Scotland as gatekeeper in deciding whether to make disclosure will operate (for instance, it is not clear from the

<sup>10</sup> Alan Paterson and Bruce Ritchie, *Law, Practice & Conduct for Solicitors: 2<sup>nd</sup> Edition*, 2014

<sup>11</sup> And, if the Society is authorised to act as an approved regulator of licensed legal services providers (LLSPs), non-solicitors who seek to hold certain interests or roles in such LLSPs

<sup>12</sup> Section 87 of the Bill

<sup>13</sup> [https://www.parliament.scot/S5\\_Bills/Consumer%20Scotland%20Bill/SPBill50PMS052019.pdf](https://www.parliament.scot/S5_Bills/Consumer%20Scotland%20Bill/SPBill50PMS052019.pdf)

Bill whether information must meet either or both of the “ought to be included” and “relevant for the purposes of disclosure” tests).

With our regulatory role, we seek assurance that there will be no reduction in our ability to determine who is admitted or stays in the profession. We would welcome early engagement in how the relationship may work in the future to ensure that convictions are disclosed which may be pertinent for us to in performing our functions.

- **Experience:** The Policy Memorandum refers to the current experience and expertise of Protection Services within Disclosure Scotland. Disclosure Scotland, of course, deals with organisational and court referrals as well as conviction information to decide whether individuals should be barred from working with children or protected adults. It is that experience and expertise on which Disclosure Scotland will rely in seeking to assess the facts and decide whether a “spent conviction” is relevant to the position applied for, and consequently whether it should be disclosed on a Level 2 disclosure. Exactly what the expertise comprised was mentioned in our response to the 2018 consultation<sup>14</sup>. Clarification as to how that experience will equip Disclosure Scotland to consider relevance in the context of entry to certain professions, such as the solicitors’ profession, will be important.
- **Legislation:** The law on ‘self-disclosure’ and “state-disclosure” reflects the Rehabilitation of Offenders Act 1974 and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (as amended)) (the amended 2013 Order). The Bill does not appear to amend the amended 2013 Order to bring it into line. We would welcome clarification.
- **List A and List B offences:** the Bill revises the List A, or always to disclose offences and the List B, to be disclosed until they become non-disclosable offences. Though these lists largely replicate the categorization of offences under the current regime, we question the differential treatment of embezzlement (List A) and fraud (List B). There are also several other offences involving dishonesty which are not included in List A, such as attempt to pervert and attempt to defeat the ends of justice (the latter not included at all). Our concerns particularly relate to offences of dishonesty because of their potential impact on an individual’s suitability to be in a position of trust. Though there is the power to amend these lists by regulations, resolving such inconsistencies at Bill stage may be more appropriate.
- **The role of regulator:** Any regulator, by its nature, has a role which differs to that of an employer. Not only does a regulator have processes and procedures in place which mean that every case is looked at in its own merit, but there is a clear appeal process for any person affected by a decision taken. The decisions taken by the regulator are relied on by organisations when employing an individual to provide legal services, whether to the employer or the public. The Law Society’s members and the public, quite reasonably, have the expectation that a person deemed to be a fit

<sup>14</sup> <https://www.lawscot.org.uk/media/360728/18-07-18-crim-consultation-pvg-and-disclosure-of-criminal-information.pdf>

and proper person to be a solicitor has been through the regulator's rigorous checks and is therefore suitable for employment.

## **Conclusion**

We support the development of a simplified regime for disclosure in Scotland, balancing an individual's right to privacy with protection of the public interest. The current disclosure regime is complex and can be difficult to navigate. We also appreciate the reasons for changing the way in which offences committed before the age of 18 are treated.

The Bill proposes significant changes to the disclosure system which, if enacted, may restrict the information which will be disclosed to us through future disclosure certificates. Whether a particular conviction will be disclosed may depend on the offence; the age of the offender at commission; the amount of time which has elapsed since the conviction; and an assessment (initially by Disclosure Scotland but reviewable – at the instance of the subject of the certificate only - by an independent reviewer and the sheriff) as to whether the conviction is “relevant” for the purpose for which the certificate is sought and “ought to be disclosed”. Because of the importance of our professional principles and the robustness of our admissions process, which may be appealed internally and is subject to the supervisory jurisdiction of the courts – we believe that an approach recognising the distinctiveness of the role of professional regulators is required.

We have included more detailed comments on the Bill in Annex A to this response and are very happy to provide any additional information that the Committee may find helpful in its scrutiny of the Bill.

## Annex A: Additional comments on Disclosure (Scotland) Bill

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### Level 1 Disclosures

Section 1- 5 deal with Level 1 disclosures which replaces the current basic disclosure. It will include:

- unspent convictions accrued when the applicant was aged 18 or over,
- where there is any childhood conviction<sup>15</sup> determine that information about a childhood conviction ought to be included in the disclosure and
- if the individual should be subject to notification requirements under Part 2 of the Sexual Offences Act 2003

#### *Online disclosure*

For Level 1 disclosures, online delivery is envisaged. The integrity and security of data in setting up such a system needs to be carefully safeguarded with appropriate authentication processes embedded within it. A Code of Practice is to be produced regarding the standards of performance of the accredited bodies that will need to include reference to data standards: this will provide and promote confidence for the users of the integrity of the system. As the policy memorandum notes, there will also need to be alternatives to that online delivery, to ensure that the disclosure system remains accessible to all.

#### *Prescribed periods*

The disclosure process requires particular actions to be taken within a “prescribed period”. This period is not defined within the Bill, instead being determined by subsequent regulations. Depending on the prescribed period set by regulations, this may impact on an applicant when requesting that electronic communications is to be sent or require a review (section 6 of the Bill does not permit any discretion if a time period is missed). Time periods provided must be sufficient to allow adequate time for an applicant to consult. The process also needs to be as straightforward as possible. The Bill needs to be clear on such points for purposes of transparency and fairness.

#### *Childhood convictions*

Section 5(2) of the Bill provides discretion to the Scottish Ministers as to information and the form disclosed regarding childhood convictions. More clarity on the form and notification process for these would be helpful, particularly guidance on when such a disclosure will be made and what information will be included. There are implications arising from section 5(3)(a) of the Bill as applicants require time applicants to understand and potentially to consult. There may also be implications for legal aid, if advice was required around the disclosure.

<sup>15</sup> Conviction for an offence committed when the individual was under 18 years of age (section 70 of the Bill)

## Level 1 disclosures - review application

Sections 8 – 12 of the Bill refer to an Independent Reviewer to be set up under section 11 of the Age of Criminal Responsibility (Scotland) Act 2019. In our response to the Scottish Government consultation,<sup>16</sup> we expressed concerns about the review mechanism. Appeals should not be restricted only to points of law. This is not consistent with other rights of appeal in public law decision making processes. Appeals should be allowed for procedural irregularities and *Wednesbury*<sup>17</sup> unreasonableness.<sup>18</sup> A restriction on the appeal process would not be desirable until such time as all this new system of disclosure can be tested operationally. Section 9 of the Bill refers to representations (which is an issue common to other sections of the Act). It is unclear whether this would include both written and oral representations, though because of the significance of the issues involved, provision for the latter may be required.

## Level 2 disclosures

Sections 13- 22 of the Bill deal with Level 2 disclosures.<sup>19</sup> The approach taken to simplification seems sensible in treating Level 2 disclosures as a “single product... [disclosing] different information depending on the reason for which it was requested and the identity of the ultimate recipient.”<sup>20</sup> Level 2 disclosures are more complex with various categories where disclosure may be made including:

- childhood convictions (section 13(1) (b) of the Bill)
- information provided by the Chief Constable (section 13(1) (c))
- further information for members and non- members of the PVG scheme (section 13 (1) (d) and (e))

Section 21 of the Bill affords control to the applicant whether the disclosure is made available to others and the above comments regarding Level 1 disclosures also apply to the process for Level 2 disclosures. Indeed, these are more salient given that these types of disclosure have significant implications for entry to regulated professions.

We question the allocation of resources given the potential number of these applications to be processed and/or the implications where such applications are subject to review. There may be a significant effect for employers and job offers if they do not receive such information timeously. This arises too in connection with section 18(2) of the Bill (police information) that states “as soon as practicable.” We prefer specification of a time period as well as assurance regarding training, rather than to have this delegated to regulations.

16 [www.lawsco.org.uk/media/360728/18-07-18-crim-consultation-pvg-and-disclosure-of-criminal-information.pdf](http://www.lawsco.org.uk/media/360728/18-07-18-crim-consultation-pvg-and-disclosure-of-criminal-information.pdf)

17 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

18 Section 11 of the Bill

19 Defined in section 13(1) of the Bill

20 Paragraph 70 of the Policy Memorandum of the Bill

There is no indication of how Level 2 disclosure is to be given. Though there are regulatory powers to decide how disclosure is to be made, this seems to assume a paper-based system at the outset. If online delivery is intended in future, there may be capacity to include the legislative provisions for online disclosure included in the Bill for Level 1 disclosures.

## **Level 2 disclosure: review processes**

Sections 23 – 34 of the Bill deals with the review and appeal processes. There are several different for processes which differ. Though these processes are, at least in part, less complex than the current regime, there may be need for public information around which process is to be used and how. We reiterate our views around review for Level 1 disclosures, indeed more so for Level 2 disclosures as these are complex, may well require time to obtain legal advice and have implications for legal aid.

## **Regulations making Provisions**

Sections 35- 41 of the Bill deal with various miscellaneous provisions. Section 38 of the Bill includes powers to make provisions regarding time periods. We have highlighted that these should form part of the Bill to allow scrutiny to ensure that it is both fair and transparent. Section 39 of the Bill deals with possible modifications of Level 1 and 2 disclosures. Though these are subject to affirmative procedures and may assist in future-proofing the disclosure process under the new regime, we believe that getting the initial process right in primary legislation is important.

## **Offences**

Sections 42- 46 of the Bill deal with a range of offences. Though the implications of unlawfully disclosing a level 2 disclosure is made an offence under section 43(3) of the Bill, there is no equivalent offence for level 1 disclosures which seems inconsistent. The offence seems to be committed by the individual who discloses. Additional provision could be included to provide protection for individuals in situations of accidental disclosure, such as Disclosure Scotland's staff.

## **Accredited bodies**

Sections 47- 57 of the Bill refer to the legal framework and the setting up of accredited bodies. These replace the higher-level disclosures currently requested and received by “registered persons.” Sections 48(8) and 51(4) of the Bill about making representations remain unclear as to the form that this takes. Notification is set out under section 54 of the Bill and a review mechanism is included. No further details are provided though regulatory making powers are included under section 55(2) (g) of the Bill.

Section 56 of the Bill deals with the Code of Practice. Given the substantial level of detail to be included potentially in that Code of Practice, we would consider that there should be a requirement for draft to be laid for the purposes of consultation prior to any Code being published.

## Protection of Vulnerable Groups (PVG)

Sections 71- 74 of the Bill set out a new framework for participation in the PVG scheme which is compulsory for those undertaking regulated roles with children or protected adults and includes the proposed duration of membership.<sup>21</sup> These represent significant changes to the way in which the scheme operate as it will no longer involve lifetime membership and introduces a time-limited membership for five years.<sup>22</sup>

These changes have the benefit principally of clarification<sup>23</sup> since the PVG scheme was not well understood by the public. Review of the system too is important and timely as various high-profile cases have illustrated problems including:

- Children in sport which was highlighted by the Independent Review of Sexual Abuse in Scottish Football concern specified a need “to reduce risk to young people and to ensure their protection and not to supersede this with the reputational interest of the organisation, club or individual. Organisational culture, processes and practices must change to ensure that the protection of young people and the reduction of risk are... the paramount considerations.”<sup>24</sup>
- Adults with disabilities, as has been shown by recent prosecutions for abuse.

Where changes follow, these need to be accompanied by high-level publicity to ensure that any organisations concerned with PVG membership are aware of the requirements of the PVG scheme and that those individuals affected are aware of requirements and implications arising from scheme membership.

Those affected may include volunteers who could be convicted of an offence under section 73 of the Bill if they fail to renew their five-year membership. There is also liability upon organisations under section 90 of the Bill. This may be a deterrent to volunteering, though it seems that the major consideration must be the safety of those children and adults. The possibility of risk of harm must be minimised and their future protection secured. There may need to be transitional arrangements be to ensure members of the relevant groups avoid inadvertent breaches.

<sup>21</sup> Paragraph 198 of the Policy Memorandum

<sup>22</sup> Section 72 of the Bill

<sup>23</sup> Paragraph 218 of the Policy memorandum

<sup>24</sup> [www.scottishfa.co.uk/media/4025/independent-review-of-sexual-abuse-in-scottish-football\\_executive-summary.pdf](http://www.scottishfa.co.uk/media/4025/independent-review-of-sexual-abuse-in-scottish-football_executive-summary.pdf)

Regulated roles will be set out in accordance with the legal test set out under section 75(2) of the Bill<sup>25</sup>, which will provide certainty as to what roles and circumstances require regulation and membership of the PVG scheme. These will be where it is identified that there is a “potential for an unsuitable person to harm a child or protected adult.” These outweigh the requirement for them to register on the PVG scheme. Section 76 (1) of the Bill provides a definition of “protected adult” to help bring clarity to those roles working with adults may create an opportunity to harm.

There has been recent media adverse publicity regarding abuse of children abroad in relation to the international aid sector. Changes are welcomed which make it clear under Schedule 4 paragraph 1(4) of the Bill that the provisions and offences will apply to activities carried out with the United Kingdom<sup>26</sup>, where an organisation has its place of business or personnel in Scotland<sup>27</sup> and its functions are principally carried out at that place of business<sup>28</sup>. This provides safeguarding abroad to the standards required in Scotland.

## Schedules 1 and 2 of the Bill

Section 14(1) (b) of the Bill deals with non-disclosure convictions which are pertinent when considering Level 2 disclosures. Non-disclosure convictions are not included in Level 2 disclosures which are defined as being a “spent”<sup>29</sup> conviction and either:

- (i) an offence that does not appear on either List A or List B of the relevant schedules or
- (ii) an offence that does appear on List B and that one of the following three conditions are satisfied:
  - The disposal was one of admonition or absolute discharge
  - The conviction was a childhood conviction and at least 5 years and 7 months have elapsed since the date of conviction
  - The conviction was not a childhood and at least 11 years have passed from the time of conviction

Though lists were always included, the Bill is proposing to substitute new lists for the previous List 1 and List 2. Much of the earlier content remains but offences have been moved from one list to the other or dropped altogether, having the effect that these “spent” convictions will no longer be disclosed. Though recognizing the need for review, there are some questions arising in relation to these changes:

- Omitted from List A includes fraud, perjury, attempt to pervert and attempt to defeat the ends of justice (which is not included at all) and other serious offences involving dishonesty.

<sup>25</sup> Including schedules 3 and 4

<sup>26</sup> Paragraph 1(4)(a) of Schedule 4 of the Bill.

<sup>27</sup> Paragraph 1(4)(b) (i) and (ii) of Schedule 4 of the Bill

<sup>28</sup> Paragraph 1(4) (c) of Schedule 4 of the Bill

<sup>29</sup> As defined in the Rehabilitation of Offenders Act 1974

- Embezzlement has been moved from List B to List A. Though embezzlement is serious, it seems that the same criminal components may be involved in many frauds. The nature of the conviction depends largely on the decision made by COPFS regarding prosecution remains similar. The scope exists to charge Department of Work and Pensions as either a fraud or embezzlement, but the criminality is the same. Similarly, fraud can range in scale and severity. While the lack of disclosure of one minor fraud conviction might not be too significant, we would be concerned that a course of criminal conduct including various frauds was not included.
- There is duplication under paragraph 1 (a) and paragraph 8 of false accusation of a crime.
- Changes can be made by regulations to these schedules, though we believe that consideration of these issues at Bill stage is important. There may also need to be future-proofing in terms of new – such as under the Counter-Terrorism and Border Security Act 2019 - or future offences, to ensure consistency of approach.

## Equalities

There are very significant equality impacts from this new disclosure regime, both in terms of individuals seeking disclosure who may have particular vulnerabilities, or disclosures to protect people who have particular vulnerabilities. Depending on the time determined for the “prescribed period” under the Bill, this may create concerns for vulnerable people, and their ability to respond. As noted above, there is not discretion to disapply these periods.

We also have concerns around the definition of “protected adult” under section 76 of the Bill, amending section 94 of the PVG Act. This amendment risks having a morass of different definitions and assessment criteria across the range of legislation around vulnerable people. For instance, under the definition proposed in the Bill, an individual could qualify for Personal Independence Payment and need a carer to meet assessed needs but still not be considered a “protected adult” for the purposes of this legislation. Further, we believe that the section overall provides far too much legislative discretion; at most, there should be discretion only to extend the definition, but there surely needs to be parliamentary approval or at least scrutiny. The use of the term “significantly impaired”, without wider definition, is likely to create uncertainty and delay, or potentially result in litigation (as in the recent PIP case in the Supreme Court).

## Publicity

The changes to the disclosure regime contemplated by the Bill are wide-reaching. We have highlighted a number of areas where we believe that greater clarity will be needed. We also believe that, not least as the changes might see offences committed by individuals or organisations who, for instance, fail to comply with the new PVG regime, there needs to be adequate publicity of these changes. Some users of the disclosure system, such as public bodies and financial services organisations, may be better placed to communicate these changes to relevant staff. Communicating the changes to the voluntary sector, though, where organisations operate on a smaller scale - 54% of charitable organisations across Scotland have incomes

of less than £25,000 – and raising awareness would be an important element to the successful implementation of the Bill.



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