



The Scottish Parliament  
Pàrlamaid na h-Alba

## EDUCATION AND SKILLS COMMITTEE

### AGENDA

27th Meeting, 2019 (Session 5)

Wednesday 9 October 2019

The Committee will meet at 10.00 am in the Robert Burns Room (CR1).

1. **Decision on taking business in private:** The Committee will decide whether its consideration of a draft report on STEM in early years education should be taken in private at future meetings.
2. **Disclosure (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Alison Reid, Principal Solicitor, Clan Childlaw;

Nicola Dickie, Chief Officer – Children and Young People, COSLA;

Andrew Alexander, Head of Policy, Law Society of Scotland;

Sheena Brennan, Information Manager (Disclosure), Police Scotland;

Cheryl Campbell, Acting Director of Regulation, Scottish Social Services Council.

3. **Review of evidence (in private):** The Committee will consider the evidence it heard earlier.

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The papers for this meeting are as follows—

**Agenda item 2**

Paper from the clerk	ES/S5/19/27/1
SPICe briefing paper	ES/S5/19/27/2
Submissions pack	ES/S5/19/27/3

## Education and Skills Committee

### Disclosure (Scotland) Bill

#### Paper by the clerk

#### Introduction

1. This will be the Committee's second evidence session on the Disclosure (Scotland) Bill, following on from a briefing from the Bill Team on 4 September 2019.
2. The Committee will take evidence today from Police Scotland, Clan Childlaw, the Law Society of Scotland, COSLA, and the Scottish Social Services Council. Submissions from each of these organisations can be found elsewhere in the Committee's papers for this meeting.
3. The Bill and its accompanying documents are available on the Parliament website:

<https://www.parliament.scot/parliamentarybusiness/Bills/111895.aspx>

4. The written submissions received to the Committee's call for evidence are available here:

<https://parliament.scot/parliamentarybusiness/CurrentCommittees/112286.aspx>

5. As with all Bills, the Finance and Constitution Committee invited submissions on the estimated financial implications of the Bill as set out in the Financial Memorandum. The Finance and Constitution Committee received one response – from Shetland Islands Council – which is available here and in the submissions pack:

[https://parliament.scot/S5\\_Finance/General%20Documents/ShetlandCouncil.pdf](https://parliament.scot/S5_Finance/General%20Documents/ShetlandCouncil.pdf)

6. The Delegated Powers and Law Reform Committee has also considered the delegated powers provisions within the Bill. The DPLR Committee reported on these provisions on 2 October 2019 and confirmed it is content with the provisions contained within the Bill. Its full report is available here:

<https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2019/10/2/Disclosure--Scotland--Bill--Stage-1/DPLRS052019R46.pdf>

**Education and Skills Committee  
Disclosure (Scotland) Bill  
Wednesday 9 October 2019****INTRODUCTION**

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

The Bill covers both the disclosure of criminal history and other information by Scottish Ministers and the Protection of Vulnerable Groups (PVG) scheme. The PVG scheme falls under the responsibility of the Minister for Children and Young People, Maree Todd MSP. On 26 June 2019, the Parliament agreed that the Education and Skills Committee be the lead committee for the Bill at Stage 1.

The Committee issued a call for views on 28 June 2019 and has received 33 submissions. Those written submissions can be found on the [Committee's website](#). A brief description of some of the themes from the written submissions can be found in Annexe A to this paper.

[A SPICe briefing on the Bill was published](#) at the end of August 2019 to support the Scottish Parliament’s scrutiny.

The Committee took evidence from [Scottish Government officials on 4 September 2019](#). This week, the Committee will take evidence from:

- Andrew Alexander, Head of Policy, [Law Society of Scotland](#)
- Alison Reid, Principal Solicitor, [Clan Childlaw](#)
- Nicola Dickie, Chief Officer – Children and Young People, [COSLA](#)
- Sheena Brennan, Information Manager (Disclosure) [Police Scotland](#)
- Cheryl Campbell, Acting Director of Regulation, [Scottish Social Services Council](#)

Submissions from the organisations appearing this week are included in Paper 3.

This paper provides a short background briefing on the Bill and then covers a number of themes that members may wish to explore with the panel.

**BACKGROUND**

The purpose of the Bill is to reform how the state provides information on individuals' past behaviour, typically in situations when an individual is seeking employment or volunteering.

The Bill also proposes changes to the Protection of Vulnerable Groups (PVG) scheme, notably updating the definition of the type of activities for which membership of the PVG scheme would be appropriate and making membership mandatory in these cases.

The Bill has two substantive parts.

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

The Scottish Government has [provided the Committee with an informal<sup>1</sup> Keeling schedule](#) to assist the Committee members in their scrutiny of the Bill.<sup>2</sup> The Keeling schedule shows the PVG Act with the amendments the Bill would make in tracked changes.

The current system of disclosure and the PVG scheme are complicated. Both the SPICe bill briefing and the policy memorandum provide summaries of the current system.

The policy memorandum sets out the key policy changes the Bill proposes:

- reducing four main levels of disclosure (basic, standard, enhanced and PVG) to two (Level 1 and Level 2);
- introducing a mandatory PVG Scheme for people working with vulnerable groups;
- replacing the concept of 'doing regulated work' with a list of core activities giving rise to 'regulated roles' that trigger mandatory PVG scheme membership (voluntary and paid);
- ending life-time PVG scheme membership and replacing it with a renewable five year membership;
- reforming the provision of police 'Other Relevant Information' ("ORI").
- recognising adolescence as a unique phase of life by ending the automatic disclosure of convictions accrued while aged between 12 and 17 years;
- in relation to the lists of offences that are disclosed in higher level disclosures despite being spent, the bill proposes to amend the content, timescales for disclosure and review processes;
- establishing clear procedures for the registration of accredited bodies who can countersign higher level disclosure applications;
- providing clarity on disclosure arrangements for individuals directly employing a PVG scheme member for, for example, personal care or home tuition of children;
- enabling the Scottish Ministers to impose standard conditions where appropriate on any individual who is under consideration by Ministers be barred from working with vulnerable groups; and

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<sup>1</sup> i.e. it does not form part of the Bill or accompanying documents.

<sup>2</sup> Whilst every effort has been made by the Scottish Government to ensure that the Keeling schedule accurately reflects the amendments proposed to the PVG Act by the Bill at introduction, the Scottish Government cannot warrant its accuracy.

- providing new referral powers for Police Scotland and Scottish councils and integration joint boards.

## THEME 1: BALANCE OF RIGHTS

In her statement on the introduction of the Bill, the Minister for Children and Young People, Maree Todd MSP, told Parliament—

“The Scottish Government is committed to policies that balance public protection with the right to move on from past offences. Those are not contradictory aims; both can be achieved.” ([OR, 13 June 2019, Col 62](#))

The disclosure systems across the UK have been subject to a number of successful legal challenges from individuals whose information formed part of a disclosure by the state. This has led to two remedial orders being made in relation to the schemes in Scotland. For example, prior to 2015, all spent conviction information held on the police national database would be disclosed on an enhanced, standard or PVG scheme record disclosure made under the 1997 Act or PVG Act. In 2014, the UK Supreme Court found that similar practice in England and Wales was unlawful and incompatible with Article 8 of the European Convention of Human Rights - the right to respect for private and family life.

This section covers the three overarching aspects: public protection; moving on from offending; and how to ensure that the Bill provides for a system that is not susceptible to successful challenges under ECHR.

### Public protection

The current system has developed taking account of findings of public inquiries into tragic and high-profile cases, such as the Cullen Inquiry into the Dunblane massacre and the Richard Inquiry into the Soham murders.

The disclosure system aims to protect the public by providing information on an individual’s previous offending behaviour. This is often used for people in a position of responsibility over other people (e.g. children) or who have responsibility in other ways (e.g. security guards, licensees, solicitors, professions regulated by the Financial Conduct Authority). Different disclosure products are intended for different purposes and will include different information. The key difference of PVG scheme membership is that members will be subject to ongoing monitoring; other disclosure products provide only a snap-shot at the time of the check. The PVG Act also provides for Ministers to be able to bar individuals (whether members of the PVG scheme or not) from working with children and/or protected adults.

The broad outline of different products for different purposes will not substantially change under the Bill. Annex B includes tables which explain the current products, the products proposed in the Bill, and how these sets of disclosure products relate to each other. The tables are reproduced from the SPICe bill briefing.

A number of respondents to the Committee’s consultation noted that disclosure checks should not be relied upon on their own by organisations and should form part of a safeguarding policy. [Children in Scotland](#) said:

“We believe that the Disclosure system is essential for safeguarding purposes and the Bill will be a key piece of legislation in defining how we support and protect

children and young people ... However, it is important to remember that this is only one part of safeguarding for vulnerable groups. It is essential that employers working with vulnerable groups have a clear safeguarding system within their organisation that includes, but is not limited to, undertaking disclosure checks. This system must begin before potential employees undergo a disclosure check by confirming identification and following up on all references.”

A key change in the Bill that the Scottish Government considers will improve public protection is the introduction of mandatory PVG membership when individuals undertake regulated roles.

Currently it is not compulsory for individuals undertaking regulated work to be members of the PVG Scheme. However, it is an offence to offer a role doing regulated work (including voluntary work) to an individual who has been barred from that type of work. In most cases, the only practical way to be sure that an individual is not barred from regulated work is to undertake a PVG check. The Bill provides for a number of additional offences in regard to PVG membership and carrying out regulated roles, essentially making it an offence to offer or undertake work in a regulated role to an individual who is not a member of the scheme.

The new offences under the Bill do not apply to individuals under 16. Under the proposed changes, people under the age of 16 are excluded from being members of the scheme. The Scottish Government’s view is that this should not exclude under-16s from volunteering. Very few children under 16 have been barred from undertaking work with vulnerable groups. Scottish Government officials told the Committee on 4 September 2019—

“In most circumstances, a child who has something in their background or their circumstances that would lead them to be under consideration for barring under the age of 16 or who was involved with the police in a significant way would already be managed under the getting it right for every child process. The police, social workers and other organisations would link up to provide the care and welfare of that person, as well as the management of any offending behaviour risk.” ([OR, 4 September 2019, Col 9](#))

Interest Link Borders, a volunteer befriending service which currently has some volunteers under 16, stated in its submission to the Committee that without being able to undertake a PVG check, it would not allow a volunteer to undertake a regulated role. Interest Link Borders argued that the practical result of the proposed policy will be to prevent under-16s being able to volunteer for regulated roles. The Royal Yachting Association also had concerns about the position of children under 16 undertaking potentially regulated roles.

The Bill provides for Ministers to place conditions on individuals being considered for barring from work with vulnerable groups. These may restrict the individual’s ability to work with one or both vulnerable groups.

Responses from professional regulators noted that they have a particular role in determining the fitness of individuals to be members of the profession. Some concerns were raised about the possibility of having less information when making this determination.

The Bill provides for new referral powers under the PVG Act for Integration Joint Boards and Councils to make a referral regarding an individual to Disclosure Scotland for the

purposes of having them considered for listing – being barred from undertaking a regulated role. The Bill will remove power for courts to make a referral for a similar purpose; the Policy Memorandum suggests that the referral power would not be necessary when PVG membership is mandatory for regulated roles as the conviction will be picked up through other means. The Bill also provides for Police Scotland to have a duty to make a reference to Disclosure Scotland if it finds an individual who is working in a regulated role but is not a PVG member. COSLA’s submission to the Committee indicates that it has reservations over the proposal in relation to councils. However, the Policy Memorandum (para 274) stated—

“Local authorities and integration authorities consider that having a power to refer a person to Disclosure Scotland for the purposes of having them considered for listing would close safeguarding loopholes within the context of self-directed support and personal employment where there is often no statutory regulatory body involved. During formal child and adult protection investigations local authorities may have found evidence of physical, financial or sexual abuse of vulnerable people.”

### **Moving on from offending**

In relation to supporting individuals to move on from offending behaviour, the Bill develops a strand of policy which was also implemented by the Management of Offenders (Scotland) Act 2019.

An important concept here is a “spent conviction”. Depending on the disposal of the court (i.e. the sentence), each offence will have a period where an individual must disclose that they have a criminal record, if asked in certain circumstances (e.g. applying for a job). Once the period is over, the conviction is spent, and that conviction would not normally need to be disclosed, nor would it appear on a Basic disclosure (Level 1 disclosure under the Bill). Convictions that attract a prison sentence over a certain length will never become spent; for example, a conviction for Murder attracts a mandatory life sentence and therefore will never become spent and will always be disclosed.

The Management of Offenders (Scotland) Act 2019 will shorten the period before a conviction becomes spent for many sentences. It also provides for all children’s hearings “convictions” to be spent immediately, and as such will no longer be disclosed on a basic disclosure (Level 1 disclosures).

Some convictions will be disclosed in certain circumstances after they have become spent; these offences are currently listed in schedules 8a and 8b of the Police Act 1997. The Bill provides for replacing the lists of offences included in schedules 8a and 8b of the Police Act 1997 with List A and List B of Bill. List A is of offences for which a conviction would always be disclosed, even if spent, in a higher-level disclosure unless, after a period of time, that information is removed through a review process (currently an application would be made to a sheriff for this purpose). List B contains offences that spent convictions would be disclosed for a period of time. The Bill proposes shorter periods of time for when an adult spent conviction of a List A offence can be reviewed (from 15 to 11 years) and the period a spent conviction on List B would be disclosed (from 15 to 11 years for an adult conviction).

The Bill also provides for a change to the approach in when and how childhood convictions are disclosed, this is covered in more detail in a later section.

Community Justice Scotland told the Committee that—

“We subscribe to the view that work (paid or unpaid) is a key factor in desistance; as identified in a range of academic studies on the subject. Employment in and of itself does not automatically lead to desistance but being in a job, other form of work or other meaningful activity can influence a person’s sense of self-worth/esteem and contributes to the idea that one has a stake in society.”

The Committee received responses from organisations supporting businesses to recruit more individuals with convictions. Recruit with Conviction argued that recruiting staff can have “significant concerns over new applicants where information is disclosed”, the submission continued—

“This ‘offender stereotype’ anxiety leads to many recruiting staff perceiving risk as far outweighing any potential benefits as they do not have the requisite understanding of the individual and their convictions. This normally results in those with any disclosure of information not being offered employment and undermines the principles of [Fair Work in Scotland](#).”

## **Individual rights**

As noted above, the disclosure system has been challenged on human rights grounds under article 8 of the ECHR. As usual, the Bill received statements of legislative competence from the Scottish Government and the Presiding Officer; which means., among other things, that in their view the Bill as introduced does not conflict with the Human Rights Act 1998.

The submission from the Commissioner for Children and Young People Scotland provided a useful summary of some of the human rights considerations. He said—

“The Protection of Vulnerable Groups (PVG) and Disclosure system is an important part of the protections the State has in place to fulfil its obligations to keep children safe. It serves to meet the State’s obligations to take steps to protect children from violence and abuse (article 19 of the UNCRC).

“... Any interference with article 8 of the ECHR must be lawful, proportionate and necessary. Lawfulness refer to the requirement that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting their rights under the Convention. Lawfulness also requires that there be adequate safeguards to ensure that an individual’s article 8 rights are respected. Proportionality is a key element of the necessity of infringe this right. In order to determine whether an infringement on article 8 is “necessary in a democratic society”, it should be balanced the interest of the Member State in discussion against the right of the applicant. The European Court of Human Rights has clarified that “necessary” in this context does not have the flexibility of such expressions as “useful”, “reasonable”, or “desirable”, but implies the existence of a “pressing social need” for the interference in question.”

CLAN Childlaw made a particular criticism about the complexity of the system, which makes it “impossible to advise a child with any certainty as to the long-term consequences of offending behaviour”. CLAN Childlaw continued—

“A system so complex as to mean there is the lack of foreseeability, is at risk of being incompatible with Article 8 ECHR.”

## **Members may wish to explore with the panel:**

- **The value that disclosures provide in protecting the public and whether there is a good public understanding of the limitations of the disclosure system in safeguarding people and property.**
- **Whether and how the Bill strengthens the value of the disclosure system to public protection and if there are areas where this could be improved.**
- **Views on the proposal that under-16s will not be able to join the PVG scheme and voluntary groups can ensure that they are able to manage any risk. How voluntary organisations can check whether an individual who is under 16 is not barred or is suitable to undertake a regulated role.**
- **Whether the police as part of a GIRFEC approach will be able to ensure that under-16s are not inappropriately undertaking voluntary roles.**
- **Whether there should be a differentiation between what is disclosed to professional bodies and disclosures received by individual employers. If this could or should be set out in the Bill.**
- **Whether the panel agree that moving on from offending behaviour should be an aim of the Bill and if it achieves that aim.**
- **The panel's views on the proposed changes to powers to make references to Disclosure Scotland regarding individuals.**
- **Whether the panel has any concerns that the Bill would be susceptible to challenge under ECHR.**

## **THEME 2: SIMPLIFYING THE SYSTEM, ACCREDITED BODIES AND FEES**

### **Complexity**

A key aim of the Scottish Government's reforms to the disclosure system is to make it easier to understand and to simplify the system for users. The Scottish Government's consultation found that the current system is confusing.

There are two aspects to this. First, the Bill provides for a reduction in the number of disclosure products to two. The number of outputs is greater than two as Level 2 disclosures could cover a number of situations (see Annexe B). The intention is that a user seeking a Level 2 disclosure would be led by the application process to ensure that the appropriate information is obtained, and the appropriate disclosure is issued. As part of this greater use of digital technology is planned in the application for and delivery of the new disclosure products, which it is hoped will speed up the process.

The Bill intends to clarify the circumstances where an individual would need to become a member of the PVG scheme. Regulated work with children and protected adults is currently defined in Schedules 2 and 3 of the PVG Act respectively.

The Policy Memorandum states that the current definition of regulated work is considered confusing. Disclosure Scotland sifts applications and rejects approximately 1,700 ineligible PVG applications per year. The Bill attempts to move away from lists of jobs or workplaces

and more toward a description of the type of work undertaken. The Bill replaces Schedules 2 and 3 of the PVG Act (see Schedules 3 and 4 of the Bill) and provides for a three-stage test to determine whether an individual is undertaking a regulated role:

- that the individual undertakes one or more of a list of activities;
- that the activities are "a necessary part of the role"; and
- that the activities include the opportunity to have contact with protected adults or children<sup>3</sup>.

The move from regulated work to regulated roles received a mixed response from respondents to the Committee's call for views.

COSLA's submission agreed that the proposed change would provide greater clarity and that it is broadly in agreement with the descriptions of regulated roles in the Bill. Business in the Community also supported the change but warned that there may still be confusion and that guidance will be required to support businesses. The Coalition of Care Support Providers in Scotland argued that the move toward regulated roles would not stop employers wrongly requiring PVG membership.

Some respondents were concerned that particular roles may become excluded from the PVG scheme. On a related matter, Scottish Women's Aid had a concern that the definition of a protected adult under the Bill will focus on adults who "by reason of physical or mental disability, illness or old age" require support or who are receiving healthcare. The SWA's concern therefore is that work with women who have been victims of domestic abuse may not meet these criteria.

The Centre for Youth Criminal Justice welcomed the work to reduce complexity in the system. It said—

"The complexity of the disclosure system lies not only in the number of products available. We understand that a level of complexity will be unavoidable but consider it important that in respect of the Bill and the disclosure system as a whole, guidance, information and support, including resources specifically aimed at children and young people, is made available. It is crucial that such information and support is independent, individualised, free, in-person (either face-to-face or by phone) and available to everyone, whatever stage of their disclosure journey they are at. Many good supports are already available, which we suggest should be built upon and efforts made to ensure such support is consistently available."

The Policy Memorandum notes that—

"Disclosure Scotland have made a commitment to providing more guidance and training. They are continually engaging with stakeholders to develop guidance and training that meets user needs." (Para 291)

## **Accredited Bodies**

Currently, Basic Disclosures issued under the 1997 Act can be provided to any person for any purpose. Any PVG, Standard, or Enhanced disclosure must be for a specific purpose

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

and can only be made if the application is countersigned by an organisation which has registered with Disclosure Scotland. The Bill proposes to continue this distinction for Level 1 and Level 2 disclosures, although the terminology is changing from a registered person to an accredited body.

The Bill (S.56) provides for a duty on Ministers to publish a Code of Practice to govern the accredited bodies, which must be followed and will cover how disclosure information will be handled.

Companies or charities can use a third party to undertake disclosure checks on their behalf and the Bill makes provision for this to continue for Level 2 disclosures. These bodies are known as umbrella bodies, typically the organisations using umbrella bodies are small charities or companies. The Bill provides for umbrella bodies to undertake checks for individuals, for example as a music tutor or when the individual employs someone directly as part of their Self-Directed Care. However, the umbrella body will only be able to provide advice to the individual, rather than to pass on the details of the disclosure check.

## **Fees**

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

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

Section 70 of the PVG Act provides for Ministers to make regulations on fees in respect of the PVG Scheme, such as membership and disclosures.

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

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

The SCRA's submission questioned whether public bodies should be subject to a fee, given that the result is "the movement of public money around public agencies". COSLA's submission noted that the changes in fees would be minor.

## **Members may wish to explore with the panel:**

- **Whether the proposed 2 levels of disclosure will remove complexity and meet users' needs. If further action is necessary to ensure users understand the system.**

- **Whether the approach of regulated roles where PVG scheme membership is necessary is welcomed. If there are any specific changes the panel would make to Schedules 3 and 4 of the Bill.**
- **Whether the panel considers the definition of protected adult to be sufficient.**
- **Whether the panel has any comments on what should be included in the Code of Practice for accredited bodies.**
- **The panel's views on individuals' access to disclosure information.**
- **The panel's views on the proposals for fees and whether any changes should be made to the powers to set fees contained in the Bill or the PVG Act.**

### **THEME 3: CHILDHOOD OFFENCES**

The Bill seeks to reform how offences committed by young people aged between 12 and 17 years are disclosed. This may be seen as a part of a package of recent legislation addressing childhood offending behaviour.

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

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

One of the policy goals of the Bill is to recognise "adolescence as a unique phase of life by ending the automatic disclosure of convictions accrued while aged between 12 and 17 years and introducing an assessment by Disclosure Scotland, acting on behalf of Ministers, as to whether convictions ought to be disclosed" (Policy Memo, para 36).

The Bill sets out the tests against which Scottish Ministers (in practice, Disclosure Scotland) must determine whether to disclose conviction information. The tests differ for Level 1 and Level 2 disclosures. For Level 1, the test is "whether information about the conviction ought to be included" (s.5). For Level 2, the test is two-fold: "whether the childhood conviction is relevant for the purposes of the disclosure" and "whether information about the conviction ought to be included" (s.25).

The Policy Memorandum (para 103) provides a rationale for the difference between the tests:

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

The Policy Memorandum also sets out a rationale for Disclosure Scotland being the body to undertake this task. It says (para 130):

“Protection Services within Disclosure Scotland already considers 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 considered that this experience and expertise would suitably equip Disclosure Scotland to assess the facts and decide whether or not a spent conviction is relevant to the position applied for and consequently whether it should or should not be disclosed on in future on a Level 2 disclosure.”

The Law Society’s submission questions whether this experience necessarily provides the appropriate skills to make such judgments, particularly if this means that regulators have less information to determine whether an individual is fit to become a solicitor, for example. The SSSC also noted that in its role as a regulator that it may seek information from Disclosure Scotland. In relation to the tests, the SSSC stated—

“We consider that clarity is required regarding the tests that will be applied to determine the inclusion of information and the factors that will be taken into account.”

The SSSC posed a number of questions in relation to how Disclosure Scotland would carry out this task including whether regulators would be involved in developing and reviewing criteria. CELCIS stated that it was its understanding that the policy position was to be a “default position ... against the disclosure of childhood information” but that this is not set out in the Bill. CLAN Childlaw said in its submission—

“There is no framework for decision-making on the face of the Bill beyond the ‘ought to be disclosed’ and ‘relevant’ tests. This limits transparency and the basis for legal challenge to decisions ... It would be more appropriate to further define the basis on which decisions will be made in the Bill itself. These should include the context of the childhood offending, in keeping with the approach of the Children’s Hearings System which looks at the whole circumstances of the child. We understand guidance will be drafted by Disclosure Scotland, but this would not be legally binding.”

A theme of policy discussions in this area is how care-experienced young people are particularly susceptible to becoming involved with criminal justice agencies. CELCIS’ submission stated—

“The disclosure of childhood information disproportionately affects young people and adults with care experience, who are more likely to have had contact with the police, and to have been involved in formal processes which lead to recording of behaviour. They are more likely to be criminalised, and accrue convictions for minor matters which, in other circumstances, would more likely be dealt with by parental sanctions.”

Who Cares? Scotland’s submission stated—

“We know from speaking to our Care Experienced members, that a criminal history can prevent Care Experienced people from moving on from their past and making the most of their potential.”

The Bill proposes that provisions in relation to childhood convictions should apply to the point at which the offending behaviour takes place, i.e. before the individual’s 18<sup>th</sup> birthday. Whether this is the appropriate age where these provisions should apply was consulted on

and attracted differing views. Some respondents suggested that the maximum age at which a conviction is considered a childhood conviction should be lower than 18. Some, including CLAN Childlaw, argued that specific provisions should apply up to the age of 25. CELCIS' submission cited evidence that the "brain continues to develop until individuals are in their mid-twenties, and significant changes take place in early adolescence, often leading to individuals engaging in impulsive and risk-taking behaviours."

CLAN Childlaw's submission indicated that it had preferred a different approach altogether to childhood and adolescent offending. Its submission stated:

"We supported applying the same disclosure system the Age of Criminal Responsibility (Scotland) Act 2019 has created for children under 12 to childhood offending by those over 12. We proposed this system should apply to all convictions accrued up to the age of 25. This would be accessible and understandable to children and young people and, in line with the principle that the welfare of the child is paramount, would stop the behaviour being treated as a conviction."

**Members may wish to explore with the panel:**

- **Whether the Bill complements the Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019 and provides for a cohesive approach to childhood offending behaviour.**
- **Views on the tests for disclosing childhood information.**
- **Whether Disclosure Scotland is best placed to determine whether a childhood offence should be disclosed. How else might this be undertaken.**
- **Whether there should be statutory guidance on the process of applying the tests.**
- **Whether the Bill adequately reflects the needs of care-experienced people.**
- **Views on the age at which convictions should cease to be treated as childhood convictions.**

#### **THEME 4: OTHER RELEVANT INFORMATION**

Other Relevant Information ("ORI") is information which currently can only be disclosed in enhanced disclosures or full PVG Scheme Record checks. It can also be provided to Disclosure Scotland on PVG members as part of ongoing monitoring.

ORI may include allegations held on local police records about the applicant's criminal or other behaviour which may not have been tested at trial or led to a conviction. The Age of Criminal Responsibility (Scotland) Act 2019 provides that offending-type behaviour of a child under the age of 12 may, after a review, be disclosed as ORI.

ORI was introduced in the Police Act 1997 in response to the Cullen Inquiry. The Policy Memorandum explains that there are relatively few disclosures which contain ORI (less than 1%) and that Ministers consider "ORI to be important for public protection".<sup>4</sup> There is

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<sup>4</sup> [Policy Memorandum](#) p30.

current Home Office guidance for Chief Officers in England and Wales in relation to the disclosure of ORI. The Policy Memorandum (para 142) explains:

“In England and Wales, the police forces work to Home Office guidance governing ORI and the law provides chief officers with a power to seek representations from disclosure applicants. It also affords applicants the right to apply for an independent review of the ORI to have it removed or changed prior to disclosure. Police Scotland have advised that, to the extent that it can be done, this Home Office Guidance is largely followed by them when considering a request to provide ORI.”

Like other parts of the disclosure system, the provision of non-conviction information has been subject to some debate and judicial consideration. The Supreme Court has held that police should consider two questions when deciding whether to disclose non-conviction information: first, whether the information is reliable and relevant; and second, in light of the public interest and the likely impact on the applicant, whether it is proportionate to disclose the information.

A key change proposed in the Bill is that individuals will see their disclosure before it is provided to a third party. The Bill provides for new review processes, including in relation to the inclusion of ORI.

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

In terms of the panel’s views on the ORI and the Bill, COSLA stated it was broadly supportive of the new review processes. The Law Society of Scotland’s submission sought “specification of a time period” for the police to provide ORI<sup>5</sup> as well as “assurance regarding training”. CLAN Childlaw’s submission stated—

“We have long been concerned about Other Relevant Information, which currently creates huge difficulties in advising children and young people, because in a Children’s Hearing even if offence grounds are not established, there is a risk that the behaviour could appear on a higher-level disclosure. The proposal in the Bill to place duties on the Scottish Ministers to issue guidance to Police Scotland and for them to have regard to such guidance is therefore welcome. Very significantly, the applicant now will see any Other Relevant Information before it goes to an employer or other third party.”

**Members may wish to explore with the panel:**

- **What aspects of Home Office guidance on ORI are not followed in Scotland.**
- **Whether the Bill’s two stage test for the Chief Constable to determine whether to disclose non-conviction information is appropriate.**

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<sup>5</sup> S18(2) of the bill states ORI must be provided “as soon as practicable” after receiving a request.

- **Whether there should be greater transparency and certainty for an individual regarding whether non-conviction information will be shared as ORI and whether, and how, this could be achieved.**

## **THEME 5: LISTS**

There are currently categories of offence that despite a conviction being spent, would appear in higher level disclosures. These are currently listed in Schedules 8A and 8B of the 1997 Act. Schedule 8A lists offences that will always be disclosed, unless the conviction is removed upon application to a sheriff. Schedule 8B lists offences which will be disclosed for a period of time, unless conviction is removed upon application to a Sheriff. The adoption of lists followed a judicial challenge to the original system whereby higher level disclosures contained all types convictions.<sup>6</sup>

The Bill provides for Schedules 8A and 8B of the Police Act 1997 to be replaced by Lists A and B in Schedules 1 and 2 of the Bill. The Bill proposes a number of changes to:

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

The final bullet is covered in the following section.

### **Timescales and use of lists**

As noted above, the Bill proposes shorter periods of time for when an adult spent conviction of a List A offence can be reviewed (from 15 to 11 years) and the period a spent conviction on List B would be disclosed (from 15 to 11 years for an adult conviction). The policy memorandum stated—

“The disclosure period of 11 years mirrors arrangements elsewhere in the UK whilst allowing for a significant extended disclosure of relevant spent convictions on Level 2 disclosures.” (Para 133)

There were mixed views in responses to the Scottish Government’s consultation over these timescales. In response to the Committee’s call for views, Scottish Women’s Aid stated—

“Given the nature of the offences listed in Schedule 8A and the need to protect the public, particularly vulnerable adults and children, from those who have carried out these offences, a reduction in these periods is not appropriate and the existing periods of 15 and 7.5 years should be maintained.”

Howard League Scotland welcomed a reduction in these periods however it also expressed concerns at the rationale for the durations proposed and suggested a greater reduction. Howard League Scotland stated, “studies *conservatively* estimate that *in*

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<sup>6</sup> The challenge was against the system in England and Wales, however, the system in Scotland was similar and was subsequently changed.

*general* after an average of 7-10 years without a new arrest or conviction, a person's criminal record essentially loses its predictive value".

CELCIS' submission said that the use of "two separate lists of offences (List A and List B) with differing and arbitrary rules applying to disclosure and the removal of spent convictions in relation to each" is confusing for individuals. The Centre for Youth and Criminal Justice proposed a different approach:

"We question the rationale behind having two different lists and deem if the desire exists to simplify the system and promote consideration of individual circumstances, then consideration should be given to developing one list of offences coupled with an individualised and nuanced approach that requires specific consideration in each case."

For childhood convictions, a further concern raised with the committee is whether the lists should be the same. The Commissioner for Children and Young People Scotland said that "an approach based on lists of offences is a blunt instrument which does not allow for a proper assessment of risk of future harm", he argued—

"The disclosure of information should be proportionate, relevant and justifiable. Therefore, we suggest the Bill to adopt a similar approach to the one adopted for retention of DNA and other forensic information in the Criminal Justice and Licensing (Scotland) Act 2010, where a separate list of offences for children is available. Furthermore, placing the burden on the State, based on a multi-agency discussion and an application to the court would allow for more holistic and risk-based decision-making."

### **Offences included in the lists**

The Scottish Government provided a rationale for which offences are included in these lists. The Policy Memorandum states—

"In order for a conviction to be eligible for disclosure for longer when otherwise spent, a conviction has to satisfy specific criteria. These are that the conviction:

- resulted in serious harm to a person;
- represented a significant breach of trust and/or responsibility;
- demonstrated exploitative or coercive behaviour;
- demonstrated dishonesty against an individual;
- abused a position of trust; or,
- displayed a degree of recklessness that resulted in harm or a substantial risk of harm."

(Policy Memorandum, para 280)

In restating the lists, the Scottish Government has taken the opportunity to amend the offences included in each list.

Some respondents have suggested changes to these lists. For example, the Law Society of Scotland said—

“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.”

**Members may wish to explore with the panel:**

- **Whether the panel agrees with the continuation of the system of having two lists.**
- **The panel’s view on whether the timescales set out in the Bill in relation to List A and List B are appropriate.**
- **Whether the provisions in relation to childhood offences – namely no time limit for review for List A offences and five-and-a-half-year disclosure period for List B offences – suitably differentiate childhood offending.**
- **Whether the panel has any suggestions for changes to the offences on Lists A and B.**

**THEME 6: REVIEW PROCESSES**

A key aspect of the reforms provided for in the Bill is a set of new review mechanisms for an individual to challenge the inclusion of information.

One proposed change is that Level 2 disclosures will go to the individual before the accredited body. The individual therefore has the opportunity to challenge disclosed information before it is seen by, for example, a potential employer.

The current system allows individuals to apply to a Sheriff to have a conviction of a list 8B offence removed or a list 8A offence removed after certain time periods have lapsed (known as *removable convictions*). An individual may apply to the Scottish Ministers to have the accuracy of the information on their disclosure certificate reviewed if they consider it to be inaccurate; similar provisions in section 51 of the PVG Act apply for PVG checks. An individual can also ask that the information provided by the police through ORI be reviewed. This is undertaken by the chief officer of the relevant police force. This decision is final and can only be challenged through judicial review.

There have been mechanisms to apply to a sheriff for 8B offences to be removed since 2015. More recently, a similar mechanism was introduced for list 8A offences. The Policy Memorandum (Para 128) provided some details of how well these have been used—

“Since 10 September 2015, 605 applicants have intimated to Disclosure Scotland their intention to apply to a sheriff for the removal of a conviction from their disclosure. Only 48 of those applicants have actually proceeded to make an application to a sheriff. In seven cases the sheriff has ordered convictions removed from the disclosure. In five cases the sheriff has ordered that convictions should not be removed because they were still relevant. Out of these 48 cases where an application has been made to a sheriff, ten have yet to be decided by the sheriff. It

can be seen that despite over 600 individuals notifying Disclosure Scotland of an intention to apply to the sheriff the number doing so is very modest. It seems clear from these figures that the current arrangements certainly do not seem to encourage people to make applications to the sheriff.”

The Bill provides for the same types of information to be reviewed as is currently available but with reformed processes. In addition, the Bill provides for a process to review the inclusion of any childhood convictions. These processes include a role for the independent reviewer, a role which was established under the Age of Criminal Responsibility (Scotland) Act 2019.

The processes are:

- *Review for accuracy*: Disclosure Scotland reviews, no further review mechanism.
- *Review seeking to remove a removable conviction (adult)*: Disclosure Scotland reviews, second review by independent reviewer, final appeal to a sheriff on a point of law.
- *Review seeking to remove a childhood conviction*: Independent reviewer, final appeal to a sheriff on a point of law.
- *Review seeking to remove ORI*: Police review, second review by independent reviewer, final appeal to a sheriff on a point of law.

The intention of the Bill is to simplify the system of reviews. The Policy Memorandum (para 156) stated—

“The policy intention is that in unifying the appeal mechanisms, so that the independent reviewer is responsible for all types of appeal (for Level 2 disclosures in particular), it will make the system as simple and coherent as possible for applicants and stakeholders.”

Where a review is successful, the information reviewed should not appear on any subsequent Level 1 disclosure or Level 2 disclosure for the same purpose (s12(4) & s13(2)). If the review is unsuccessful, the individual is unable to seek another review of the same information on a subsequent disclosure for the same level or type of disclosure<sup>7</sup> (s.12(5) & 34 (5)). Section 38 provides for Ministers to make regulations<sup>8</sup> in connection with the procedure for any of the possible reviews. The Policy Memorandum provides some details of how the decision making in relation to the disclosure of childhood offences will work. It said (para 101)—

“The factors to be taken into account will include the amount of time elapsed, the number of offences, whether a pattern of offending behaviour has continued into adulthood, and the seriousness of any childhood convictions.”

Broadly, the changes to the processes of reviewing the content of disclosure were welcomed by respondents to the Committee’s call for evidence.

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<sup>7</sup> I.e. another Level 1 disclosure, or another Level 2 disclosure “for the same purpose as the original Level 2 disclosure”.

<sup>8</sup> Under the negative procedure.

The Law Society of Scotland acknowledged that the proposed processes are, to an extent, less complex than the current regime, but it nonetheless had concerns. It argued that further appeals to a sheriff should not be only on points of law, particularly as the system beds in. It also raised questions about the procedure for reviews: timescales, whether oral representations might be made, and the possibility that the individual may be well-advised to obtain legal advice which would have implications for legal aid. The Law Society argued that time periods in relation to reviews should be set out in the Bill rather than by regulations.

CELCIS expressed concerns about how such decisions would be made in practice, it said—

“The lack of detail of a decision-making framework is concerning, and should be included in statutory guidance going forward, both in relation to decisions made by Disclosure Scotland, and those made by an independent reviewer. This is particularly important to ensure individuals are able to understand, in advance, what the implications of any childhood convictions will be for their disclosure information.”

The impact of potential delays caused by reviews was raised by some respondents to the Committee. For example, the Coalition of Care & Support Providers in Scotland said—

“The time required by the review process may act as a disincentive to apply for work within the sector for applicants with previous convictions. They may be concerned that any delay to receiving a disclosure statement could prejudice employers against them. Furthermore, review also requires applicants to pay for it, which is another barrier. Finally, some members have reported that lived experience of the justice system can be of value when delivering voluntary sector social services and that this might be lost if applicants with previous convictions decide not to apply for posts in our sector.”

Howard League Scotland questioned whether the independent reviewer ought to undertake all first stage reviews, rather than the first stage review being undertaken by the organisation that made the decision initially, e.g. the Police Scotland reviewing its decision to include ORI.

#### **Members may wish to explore with the panel:**

- **Whether the proposed review processes will be easy to understand for individuals and third parties (e.g. employers). If the panel has suggestions for improvements.**
- **The balance of how much of the review processes should be included within the Bill or left to regulations.**
- **How Police Scotland currently undertakes a review of any ORI it has provided to Disclosure Scotland. Whether Police Scotland ought to decide on any review of ORI in the first instance.**
- **Whether there should be a mechanism for childhood convictions to be reviewed more than once, given that the time elapsed may be a determining factor as to whether a conviction is disclosed or not.**

**Ned Sharratt**  
**SPICe Research**  
**4 October 2019**

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The Scottish Parliament, Edinburgh, EH99 1SP [www.parliament.scot](http://www.parliament.scot)

## Themes of submissions

To date the Committee has received 34 submissions on the Bill. The following is brief summation of themes arising from the Committee's submissions. This brief paper assumes the reader is familiar with the policy and with provisions of the Bill.

The Committee has received submissions from individual organisations which utilise volunteers, professional regulators, local authorities, other public bodies, advocacy and human rights bodies, organisations focusing on rehabilitation, and others. Scottish Women's Aid was the only organisation which had a particular focus on victims.

Many of the organisations also responded to the Scottish Government consultation, which received 352 responses; 268 from organisations and 84 from individuals. Details of that consultation can be found here: <https://consult.gov.scot/disclosure-scotland/protection-of-vulnerable/>

### *Broad support for the Bill*

Submissions broadly supported the aims and the direction of the Bill. A theme of responses was that there needed to be good guidance and support for individuals and organisations on all aspects of the proposed system.

Children in Scotland suggested that there should be a set of principles on the face of the Bill to support the decision-making processes.

Who Cares? Scotland asked that the Bill should reflect corporate parenting duties.

### *Simplifying the system*

There was an acceptance that the current system is complex and support for the aim to simplify. Different respondents highlighted complexity from different angles: from the point of view of businesses, voluntary groups, individuals, etc.

Several respondents (e.g. CELCIS, COSLA) noted that there would continue to be complexity and that good accessible guidance will be required.

Children in Scotland noted that it is hard to explain consequences, e.g. of accepting grounds at a children's hearing. CLAN Childlaw which provides advice to young people in such circumstances, argued that there is a lack of foreseeability, which means the system is "at risk of being incompatible with Article 8 ECHR".

Scottish Women's Aid supported the aims of the Bill but was concerned that protections should not be lessened. Its submission stated—

"Simplification and clarity of process is, of course, welcome but only where this allows the same, or improved, levels of disclosure, coverage and protection for vulnerable people and does not inadvertently create loopholes capable of exploitation."

## *PVG Scheme membership*

On the whole, there was support for making PVG scheme membership mandatory. There were some reservations expressed about whether criminalising a volunteer that failed to renew membership is proportionate (e.g. the Law Society of Scotland).

The proposal for 5-year membership received a mixed response. The purposes of the change, to reduce an administrative burden on Disclosure Scotland and to reduce the number of individuals being monitored continually was accepted, where it was mentioned. However, the potential for additional fees and administration for organisations was a concern for some. East Lothian Council stated—

“Whilst this may not be an issue for those within higher paid roles, this will be a significant impact on those within the part time workforce and / or those on the lower salary / national minimum wage, who will predominately be female workers.”

GTCS raised a concern about how the transition would be managed with potentially a very high number of people entering the new system at the same time. It said—

“If there is a large cohort with similar, or identical, start dates this is likely to cause a significant administrative burden not only on Disclosure Scotland but also on employers, professional regulators and others.”

A separate concern was the position of children under 16 being excluded from the scheme and being able to undertake regulated roles. (See Interest Link Borders and RYA Scotland.)

## *Regulated roles*

Generally, the move from regulated work to regulated roles was welcomed as an improvement. However, more clarity was called for by several respondents (e.g. Business in the Community, Release Scotland).

Several respondents were concerned that aspects of their own work or certain roles would appear to fall outwith the definition (e.g. Shared Lives Plus, SSSC, NHS Healthcare Improvement Scotland, Ross of Mull and Iona Community Transport Scheme).

Scottish Women’s Aid was concerned that the proposed definition of a protected adult may not include victims of domestic abuse.

Coalition of Care & Support Providers in Scotland and Connect were both concerned that organisations may still require PVG membership in inappropriate situations.

## *Standard conditions for individuals considered for listing*

On the whole this aspect of the Bill was welcomed. COSLA stated that the new powers are likely to “ensure safeguarding concerns are addressed”.

Some called for more detail and clarity on how the process will work (GTCS, Scottish Catholic Safeguarding Service).

Who Cares? Scotland asked that the impact of such conditions on the individual be considered. It stated—

“[Conditions] need to be proportionate and should be subject to the same scrutiny and decision-making as any other decision to suspend or restrict duties would be and should be made in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures.”

### *Lists A and B*

Scottish Women’s Aid which argued for a retention of the current timescales for disclosure of List A and B offences. Other respondents who addressed this issue agreed with the reduction. Some argued for further reduction in the time periods in reference to time to redemption studies (Howard League Scotland, CYCJ).

There were some suggested changes to the content of Lists A and B. For example, the Law Society of Scotland and SSSC both questioned Embezzlement and Fraud appearing on different lists.

Some respondents thought it inappropriate to have the same lists for children and adults (e.g. Commissioner for Children and Young People Scotland). It was also noted that the impact of accepting grounds at a Children’s Hearing on offences on one of these lists is difficult to explain to children and there should be a more individualised approach. The SCRA stated—

“In respect of List A and List B we remain of the view that these offence ‘lists’ are quite difficult to explain to young people and their families. We are pleased that the offences on the lists have been restated and amended in Schedule 1 & 2 of the Bill, but we would still prefer an approach which considers each offence on its own merits, rather than relying on a binary list.”

### *Childhood convictions*

There was support for the end of automatically disclosing childhood convictions. Some concerns were raised by regulators on the basis that it may reduce the information available to them to determine whether an individual is fit to practice.

Some respondents thought the tests were unclear and that guidance would be needed. A number of respondents questioned whether grounds accepted at Children’s Hearing should be considered an offence for the purposes of disclosure (e.g. CLAN Childlaw). The Commissioner for Children and Young People Scotland stated:

“There are particular issues with accepted grounds, where the evidence has not been tested and the child may not have been legally represented or able to understand the consequences of accepting grounds.”

Several respondents consider that the context of childhood convictions (e.g. care experience, trauma) should be important in respect of the decision-making of whether to disclose (e.g. CELCIS, Who Cares? Scotland).

CELCIS and Who Cares? Scotland also report that the messages they had received was that the was to be a “presumption against” disclosure of childhood convictions. This is not set out in the Bill. The SCRA noted that given some of the offences on Lists A and B are “commonly’ committed by young people”, there should be a high bar to disclose childhood information.

Some suggested there should be consideration of a differentiated approach to conviction to a higher age (e.g. Children in Scotland).

### *Part of safeguarding*

A small number of respondents noted that disclosure products should be part of a wider approach to safeguarding. Connect stated—

“Most importantly, PVG must be recognised as only one aspect of child protection. It can only identify an individual unsuitable to work with children if they have been identified by the system, and so must be accompanied by robust and common-sense child protection policies and practices.”

### *Reviews*

The new review processes were considered an improvement on the current process. A consistent theme of responses was that reviews must be conducted to reasonable timescales. The Criminal Justice Voluntary Sector Forum suggested that the independent reviewer would need to be adequately resourced to avoid delays.

This is another area where clear guidance was called for both for individuals on how to access rights of review and for decision-makers so that there is clarity about how decisions would be made.

Some respondents argued that all reviews should go to the independent reviewer in the first instance for all reviews (e.g. Centre for Youth and Criminal Justice). The Criminal Justice Voluntary Sector Forum suggested that where a review is upheld, it should be open for that information to be removed from all future disclosures.

Law Society of Scotland argued that final references to a sheriff should not be constrained to a point of law.

### *Other relevant information*

Some respondents found ORI to be potentially problematic and argued that where it is used, there should be a great deal of caution applied (e.g. Commissioner for Children and Young People Scotland). A number of respondents suggested that all ORI should be reviewed, rather than the onus being upon the individual to seek a review (e.g. CELCIS).

Some respondents were concerned that ORI should not be used to provide information on childhood convictions which would not be otherwise disclosed (Who Cares? Scotland, Children in Scotland).

Howard League Scotland suggested that some types of information should not be disclosed under ORI, for example information on a charge where the individual was found not guilty.

The provision of statutory guidance on ORI was welcomed (e.g. CELCIS).

### *Fees*

Some respondents were concerned at the potential for additional fees and administration costs (e.g. East Lothian Council). The Criminal Justice Voluntary Sector Forum argued that fees could be prohibitive in people seeking work or seeking reviews.

The Coalition of Care & Support Providers in Scotland stated—

“Further clarity is required on how fees work for disclosure checks and the Protection of Vulnerable Groups (PVG) scheme, and size of the fees involved, as we are concerned that this will result in barriers to entry for people looking to work in the third sector as care providers, both as volunteers and paid staff.”

### *Accredited bodies*

Clarity on the roles of accredited bodies was welcomed. The Law Society of Scotland suggested that any statutory guidance should be laid in draft for consultation. Release Scotland suggested there should be guidance for organisations on best practice for employing individuals with convictions.

### *Digital*

A move to digital delivery was welcomed by respondents. The need for other formats to be available was also highlighted.

**Ned Sharratt**  
**SPICe Research**  
**4 October 2019**

## Current and proposed products

### Current system

#### Disclosures under the Police Act 1997

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

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

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

## Proposed products under the Bill

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

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

## Current vs New

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

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

**Education and Skills Committee**

**27th Meeting, 2019 (Session 5), Wednesday, 9 October 2019**

**Disclosure (Scotland) Bill – submissions pack**

This pack contains the submissions from the witnesses.

- [Clan Childlaw](#)
- [COSLA](#)
- [Law Society of Scotland](#)
- [Police Scotland](#)
- [Scottish Social Services Council](#)

We have also attached a submission from Shetlands Islands Council to the Finance and Constitution Committee regarding the Financial Memorandum for the Bill:

- [Submission to Finance and Constitution Committee from Shetland Islands Council](#)

## CLAN CHIDLAW

Clan Childlaw is a unique legal outreach service for children and young people. Our dedicated child-centred legal service gives practical effect to Article 12 of the United Nations Convention on the Rights of the Child, enabling children to participate in decision-making processes which affect them and allowing their voices to be heard.

We believe that:

- every child and young person should have the opportunity to express their views freely in all matters affecting them and that their views should be listened to and taken account of;
- every child and young person should have the opportunity to be heard and represented in any judicial and administrative proceedings affecting them. We believe that children and young people who need legal advice and legal representation should be able to have their own lawyer;
- children and young people and those who work with them should know their rights and should be able to access information and guidance about their rights and how to exercise them;
- people should be able to move away from childhood mistakes and not be prejudiced later in life by disproportionate disclosure of childhood offending behaviour designated as criminal convictions; a rights and welfare-based disclosure system recognises and accounts for the very different nature of childhood offending and the circumstances in which ‘convictions’ can be accrued. Offending behaviour being addressed within the Children’s Hearings System should not be disclosable.

We improve children and young people’s life chances by using our legal skills and expert knowledge to help young people take part in decisions that affect them and by making sure that children’s rights are realised in Scots Law.

Our evidence is informed by our practice representing children and young people, often within the Children’s Hearings System. We represent children who are the subject of a referral to a children’s hearing on offence-based grounds and who are asking what the consequence will be for them in later life, in relation to disclosure. We are also consulted by young people who are about to apply for a job and are asking if anything will appear on their disclosure. Because of this experience, in 2018 we intervened as a third party in the public interest in Supreme Court cases on the treatment of childhood convictions in England and Wales.<sup>1</sup>

We support the Scottish Government in their policy objective to safeguard children and vulnerable adults whilst achieving a better balance between disclosures in the public interest and protecting an individual’s right to move on with their lives. The Scottish Government recognises involvement in offending behaviour in childhood constitutes a form of adversity that young people have the right to move on from in adulthood. We welcome its commitment to a distinct disclosure system for childhood behaviour and its recognition that care experienced people are disproportionately

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<sup>1</sup> In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland), R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants), R (on the application of P) (Appellant) v Secretary of State for the Home Department and others (Respondents) [2019] UKSC 3. Our intervention assisted the court with details of the Scottish system and is published [here](#).

affected by disclosure (the evidence submitted by Who Cares? Scotland details the far-reaching and lasting effects of this). The particularly destructive effect of disclosing childhood criminal records and the evidence base for distinguishing between child and adulthood records are well documented (the evidence submitted by the Centre for Youth and Criminal Justice summarises this). Our youth justice system is designed to address childhood difficulties through a whole system approach to children's welfare and a children's rights-centred disclosure system is a key element of this.

We welcome the opportunity to simplify, modernise and rebalance the disclosure regime the Disclosure (Scotland) Bill ("the Bill") presents. Together with the recently enacted Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019, the Bill is a significant milestone in the development of a distinctive disclosure regime for childhood offending.

In recent years, reforms to the disclosure regime have been piecemeal and largely in response to court judgments on article 8 privacy rights<sup>2</sup> - finding automatic indiscriminate disclosure, which does not take into account individual circumstances, incompatible with article 8 rights - and it is right that the whole system is now under review to ensure it is accessible, joined-up and respects those rights, allowing people to move on from past mistakes.

In [our response to the 2018 Scottish Government consultation on PVG and the Disclosure of Criminal Information](#) we set out our concerns about the current system and its treatment of childhood offending and our evidence here is confined to the aspects of the Bill relating to childhood offences. Whilst welcoming the progressive nature of the Bill, particularly the proposed regime for treating childhood (aged 12-17 years) convictions separately from adult convictions, ending automatic disclosure of childhood conviction information, we have a number of concerns about the proposals and how they will work in practice.

Before setting out these concerns, and due to the complexity of the proposed scheme read along with current legislation, we have attempted to summarise the implications of childhood offending in the table below:

**Level 1 Disclosures**

<b>Under 18s</b>	<b>Unspent</b>	<b>Spent</b>	<b>Other Relevant Information</b>
"Convictions" in Children's Hearings System	Not Applicable, as under the Management of Offenders (Sc) Act 2019 these are spent immediately.	NO	NO
Conviction in adult court for under 18	YES – Included if Disclosure Scotland think ought to be; have right to independent reviewer process and then appeal to sheriff on point of law	NO	NO

**Level 2 Disclosures**

<b>Under 18s</b>	<b>Unspent</b>	<b>Spent</b>	<b>Other Relevant Information</b>
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<sup>2</sup> P v Scottish Ministers [2017] CSOH 33; R (T) v Chief Constable of Greater Manchester Police [2014] UKSC 35.

<p>“Convictions” in Children’s Hearings System</p>	<p>Spent immediately under Management of Offenders (Sc) Act 2019</p>	<p><b>List A</b>                  YES – Included if Disclosure Scotland think ought to be and if relevant; have right to Independent Reviewer process and then appeal to sheriff on point of law  <b>List B</b>                  NO – If admonished or discharged, or happened more than 5 ½ years ago                  YES - if not been admonished or discharged and happened within the last 5 ½ years and Disclosure Scotland assess it is relevant and ought to be disclosed; have right to apply to Independent Reviewer and appeal on point of law  <b>Not in List A or B</b>                  NO – unless appears as Other Relevant Information</p>	<p>YES – if Chief Constable thinks relevant and ought to be disclosed; applicant can ask for review: first review is by Chief Constable (reviews if still thinks relevant and ought to be disclosed); then can apply for review of that decision by Independent Reviewer, with right of appeal to sheriff of Independent Reviewer’s decision on point of law</p>
<p>Conviction in adult court for under 18</p>	<p>YES – Included if Disclosure Scotland think ought to be and if relevant; have right to independent reviewer process and appeal to sheriff on point of law</p>	<p><b>List A</b>                  YES – Included if Disclosure Scotland think ought to be and if relevant; have right to independent reviewer process and appeal on point of law  <b>List B</b>                  NO – If admonished or discharged, or happened more than 5 ½ years ago                  YES - if not been admonished or discharged and happened within the last 5 ½ years and Disclosure Scotland assess it ought to be disclosed and if relevant; have right to apply to Independent Reviewer and appeal on point of law  <b>Not in List A or B</b>                  NO – unless appears as Other Relevant Information</p>	<p>YES – if Chief Constable thinks relevant and ought to be disclosed; applicant can ask for review: first review is by Chief Constable (reviews if still thinks relevant and ought to be disclosed); then can apply for review of that decision by independent reviewer, with right of appeal to sheriff of Independent Reviewer’s decision on point of law</p>

The proposed system for disclosing childhood behaviour builds in the following notable welcome safeguards:

- An active decision must be taken by Disclosure Scotland that childhood conviction information ought to be disclosed. Childhood convictions cannot be automatically disclosed.

- Applicants have the right to seek review of that decision by an Independent Reviewer and then a Sheriff on a point of law.
- Applicants have the right to know the reasons for a decision to disclose and must be informed of their right to apply for independent review. They have the right to give their representations to the Independent Reviewer and must be notified of that right.
- No disclosure will be given to a third party until all the review processes are complete and the individual had requested disclosure to a third party.
- Information on childhood convictions will be listed separately on a disclosure certificate.
- In relation to List A convictions, there is no longer an initial period during which Disclosure Scotland cannot consider whether a conviction ought to be disclosed. A List A childhood conviction will be subject to the review procedure for childhood convictions rather than the removable convictions process applicable to adults (who must wait 11 years to seek removal).
- Other Relevant Information will be regulated and decisions by Police Scotland to disclose are subject to review. We have long been concerned about Other Relevant Information, which currently creates huge difficulties in advising children and young people, because in a Children's Hearing even if offence grounds are not established, there is a risk that the behaviour could appear on a higher level disclosure. The proposal in the Bill to place duties on the Scottish Ministers to issue guidance to Police Scotland and for them to have regard to such guidance is therefore welcome. Very significantly, the applicant now will see any Other Relevant Information before it goes to an employer or other third party.
- The relevant date for classification as a childhood conviction is the date of offence rather than the date of conviction, meaning individuals who committed an offence aged 17 but who were convicted after their 18th birthday will not be penalised. We note in contrast that in the Management of Offenders (Scotland) Act 2019 the relevant date is the date of conviction.

We have the following significant concerns however:

### **Complexity**

The way the Bill is presented and its place as just one of several relevant pieces of legislation, makes the system complex to understand. Clear information and guidance will be imperative to allow applicants for disclosure to access their rights. Because there are different consequences for children depending on whether the conviction is from a children's hearing or a court, whether non-conviction information is retained by police as Other Relevant Information, or whether the offence is a List A, List B or an unlisted offence, continues to make it impossible to advise a child with any certainty as to the long-term consequences of offending behaviour. A system so complex as to mean there is the lack of foreseeability, is at risk of being incompatible with Article 8 ECHR.

## **Offending Behaviour addressed within the welfare-based Children's Hearings System should never be disclosed**

Offending behaviour within the Children's Hearings System can be disclosed in Level 2 disclosures which is not in-keeping with the ethos of the welfare-based system. Children who are charged with offending behaviour are considered having regard to their welfare and best interests and not on a punitive basis. Allegations of offending behaviour, including the most serious offending, are addressed in the context of the *whole circumstances* of the child, and often there are wider family issues that are best addressed at the same time, being considered simultaneously under a number of the grounds listed in section 67 of the Children's Hearings (Scotland) Act 2011. On this basis, we consider it completely inappropriate that any offences established in the Children's Hearings System are disclosable. We would indeed argue that referring at all to the term "conviction" is inappropriate within this system given the focus on the needs of the child rather than the alleged offending behaviour.

The disproportionate negative effects of disclosure on care experienced people, who are more likely to have contact with police and accrue convictions particularly whilst being part of the Children's Hearings System which is making decisions about their wellbeing and has corporate parenting duties, could at least partially be addressed by rendering all Children's Hearings 'convictions' as non-disclosable.

In our response to the 2018 consultation (Q.94), we supported applying the same disclosure system the Age of Criminal Responsibility (Scotland) Act 2019 has created for children under 12 to childhood offending by those over 12. We proposed this system should apply to all convictions accrued up to the age of 25. This would be accessible and understandable to children and young people and, in line with the principle that the welfare of the child is paramount, would stop the behaviour being treated as a conviction.

## **Unpredictability of long-term implications of Childhood Behaviour**

Within the proposed scheme, it is impossible to advise a young person of the long-term implications of accepting statement of grounds referring to offending behaviour, apart from to say that there may be implications. This is because it could appear on any Level 2 disclosure or as Other Relevant Information. In our current practice, we often make the argument to the Reporter to the Children's Hearings that behaviour be addressed under conduct grounds rather than offence grounds, in order to minimise any potential future disclosure. This difficulty remains within the proposed scheme.

## **The Need for Legal Advice and Legal Aid**

Within the proposed scheme, as conviction and non-conviction information could be disclosed, children being presented with a Statement of Grounds relating to offending behaviour in the Children's Hearings System will still, given the potentially serious implications of future disclosure as a result of accepting offences, require access to legal advice and representation from a solicitor and legal aid. Currently the legal aid duty scheme does not extend to statements of grounds in relation to offending

behaviour. This means that a young person may not have a solicitor to explain the system to them.

### **Onus on Applicant to seek Review**

The onus will be on the applicant to seek review of a Disclosure Scotland decision or of the Chief Constable's decision that information ought to be disclosed. This contrasts with the Age of Criminal Responsibility (Scotland) Act 2019, where pre-12 behaviour Other Relevant Information is automatically reviewed by the Independent Reviewer before it can be disclosed. The onus is not on the applicant to apply for review. We understand that Disclosure Scotland will make the application process as seamless as possible, but our view is that this burden should not rest with the applicant.

### **No framework for Decision-making by Disclosure Scotland or Independent Reviewer**

The Policy Memorandum sets out the intention that factors to be taken into account will include "the amount of time elapsed, the number of offences, whether a pattern of offending behaviour has continued into adulthood, and the seriousness of any childhood convictions." Disclosure Scotland can gather information from relevant persons to assist them to determine whether a childhood "conviction" ought to be disclosed.

However, there is no framework for decision-making on the face of the Bill beyond the 'ought to be disclosed' and 'relevant' tests. This limits transparency and the basis for legal challenge to decisions. Decisions by the Independent Reviewer can only be appealed on a point of law. It would be more appropriate to further define the basis on which decisions will be made in the Bill itself. These should include the *context* of the childhood offending, in keeping with the approach of the Children's Hearings System which looks at the whole circumstances of the child. We understand guidance will be drafted by Disclosure Scotland, but this would not be legally binding. The Guidance issued by the Scottish Ministers about the exercise of the Independent Reviewer's functions pursuant to section 17 of the Age of Criminal Responsibility (Scotland) Act 2019 will also be of relevance.

It is imperative that clear, accessible information on processes and rights are made available and accessible. Applicants for review may well need access to legal advice, given the implications of such decisions. Their representations to the independent reviewer are likely to be strengthened through the advice of a solicitor.

### **Offences Lists**

As already explained, our view is that there should be no need for "Lists" at all, in relation to Childhood Offending behaviour as these should not be disclosed. However, if the "Lists" are to remain applicable to children, there should be separate offence lists for children and young people than from those for adults. The issue is highlighted in relation to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening or abusive behaviour) which has now been moved from List A to List B. This is welcomed in relation to children as convictions under this section can often be accrued by young people within the care system, particularly for example within

residential units for relatively minor offending behaviour. We also note that fire-raising, an offence which when committed in childhood should be distinguished from adult offending, is to now be a List A offence. This emphasises the need for a different approach to childhood offending and would be resolved by our already outlined position of non-disclosure.

### **Protection against Self-disclosure**

The Bill does not include provisions equivalent to those in the Age of Criminal Responsibility (Scotland) Act 2019 to protect individuals against self-disclosure. There is a risk under current proposals that there may be situations whereby a person is required to self-disclose something which within the provisions of the Bill, the State may in fact decide not to disclose.

### **Review of the Police “Weeding” System**

Although we understand that this issue is out with the scope of this legislation, it is important to acknowledge that the system for deciding what information is or is not retained on police records also needs urgent review.

## **COSLA**

### **Background**

1. COSLA welcomes the opportunity to respond to the call for views for the Disclosure (Scotland) Bill and we trust our response will be of assistance to the Education and Skills Committee in their considerations.

### **Principles of the Bill**

2. We welcome the broad principles of the bill to simplify the process of applying for disclosure and the continued importance of retaining the balance between ensuring that children and protected adults are safeguarded and providing individuals the opportunity to take the next step after a conviction and enter employment, education or training.
3. Employment is considered as one of the most strongly correlated predictors of reduced reoffending and entering employment, education or training allows individuals with previous convictions to re-integrated back into their communities and wider society.
4. For individuals where the nature of the conviction is less serious, this may address some of the recruitment challenges currently being experienced by local authorities, other public sector partners and businesses, which have the potentially to be compounded by Brexit.

### **Comments on Key Policy Changes Within the Bill**

- **Reducing four main levels of disclosure to two.**

Simplifying the number of disclosure products available is a welcome step. However, the products and processes will remain complex. The new process for establishing which type of Level 2 Disclosure appears closely linked to the development of a new digital system, which has the possibility of requiring greater input from local authorities (in their role as accredited bodies) during the application process than at present.

We would expect that support will be available to both local authorities and individuals to navigate the new disclosure products and the digital system during implementation, and that any resource required to interface with the new system will be met.

- **Introducing a mandatory PVG Scheme**
- **Creating ‘regulated roles’ that trigger mandatory PVG scheme membership as opposed to ‘doing regulated work’**
- **Ending life-time PVG scheme membership**
- **Enabling the Scottish Ministers to impose standard conditions individuals who are under consideration for inclusion in one or both of the lists held under section 1 of the PVG Act**

We are supportive of the changes to the PVG Scheme, including:

- Making the scheme mandatory, which would ensure children and protected adults are safeguard and public confidence in the system is strengthened.
  - Ending life-time membership of the PVG scheme and replacing with a requirement to renew every 5 years, which should decrease the financial burden on Disclosure Scotland and remove the unnecessary monitoring individuals who are no longer doing regulated work. However, if the renewal process requires any additional input for local authorities, resourcing this must be met by the Scottish Government.
  - A move to 'regulated roles' (from 'regulated work') which should provide greater clarity on who requires PVG Scheme membership. We are broadly in agreement with the descriptions of 'regulated roles' under Schedule 2 and Schedule 3 provide a clear overview of which what jobs should be covered by the PVG scheme.
  - Allowing Disclosure Scotland to impose temporary limitations and conditions for individuals being considered for listing, as this should ensure safeguarding concerns are addressed.
- **Reforming the provision of police 'Other Relevant Information' ("ORI") to end the current process of disclosures being issued to employers before the applicant has had an opportunity to challenge the disclosure of ORI.**

As set out in the Policy Memorandum for the Bill less than 1% of PVG applications include Other Relevant Information (ORI). We are broadly supportive of allowing applicants to see and challenge the relevance of ORI before it is shared with third parties and providing guidance for police chief officers in relation to the disclosure of ORI.

- **Ending the automatic disclosure of convictions accrued while aged between 12 and 17 years and introducing an assessment by Disclosure Scotland as to whether these convictions are disclosed.**

COSLA has supported the principle of raising the Age of Criminal Responsibility to 16, recognising that in many cases convictions accrued during this period could not be considering in the same light as convictions accrued as an adult, and that involvement with the justice system at a young age was associated with poorer outcomes later in life. Therefore, we are supportive of the provisions within the Disclosure (Scotland) Bill to remove the automatic disclosure of these convictions. We welcome the role of Disclosure Scotland in assessing if convictions should be disclosed, and the proposed independent review process, to ensure that public protection is safeguarded in relevant cases. COSLA and our member authorities are happy to work with Disclosure Scotland and other interested parties to ensure this is implemented consistently in the spirit of the Bill.

- **Changing the period after which an application for removal of a conviction for an offence can be made.**

We are supportive of the proposal for individuals to apply for a conviction to be removed 11 years after the date of conviction and the proposed measures to simplify the processes of removing convictions. These processes outlined in the bill will ensure that individuals are not unnecessarily held back from making progress in their personal development following certain convictions.

- **Establishing clear procedures for the registration of accredited bodies who can countersign Level 2 applications.**

We are supportive of increased clarity around the role of accredited bodies and believe the proposed code of practice should be developed with in partnership with accredited bodies, included local authorities.

- **Providing new referral powers for Scottish councils and integration joint boards.**

The provisions within the Bill for local authorities and integration joint boards to have new referral powers to reflect the changes in adult social care since the introduction of self-directed support require further consideration. At its core self-directed support is aimed at empowering individuals to take control of their care arrangements including acting as an employer directly. This means that the local authority does not have a role in the direct provision of care for these individuals, in some cases Councils do not hold any information on those employed directly by SDS budget-holders. As such we are concerned that:

- i) this provision creates the expectation that the local authorities will act as a sort of regulatory body for those employed through self-directed support within their area, which is not consistent with the aims of SDS and we would be concerned of the possible liabilities that this may place upon local authorities.
- ii) The practical operation of the proposal in light of information available to local authorities on those employed through self-directed support and the possible challenges of sharing information with local authorities to make referrals in light of GDPR regulations.

We expect further engagement with the Scottish Government on the provision ahead of consideration of the Bill at Stage 2.

## **Resources**

5. The Financial Memorandum for the Bill estimates that the impact on local authorities will be relatively small, with an increase of £25 per Local Authority to register in their role as an accredited body and a possible increase of £5 per disclosure for local authorities who opt to fund the disclosure for employees.

6. We would expect Scottish Government to meet any additional resources required for local authorities to discharge the new referral powers and would look for this to be reviewed after a full year of operation.
7. Whilst the costs identified so far are relatively minor increase in fees, they must be set against the significant ongoing financial constraints which Councils are currently working within, especially in relation to reductions in core funding.

### **Other Considerations**

8. The Bill contains a number of mechanisms to review and challenge the inclusion of information and convictions. There should be regular monitoring and evaluation of the use of these mechanisms and this information should be available publicly.
9. We welcome the intention of the Bill to update and simplify the legal framework for disclosures. It is helpful that the List A and List B Offences are clearly defined for ease of reference.
10. As care-experienced individuals are likely to have a different perspective on convictions and their impact, the Education and Skills committee should consider engaging with the Independent Care Review on the intentions and provisions within the Bill.
11. Noting that the proposed new system of disclosure appears to be driven by a new digital system, we welcome the recognition within the Policy Memorandum that other methods of delivery and payment will be retained to ensure that the disclosure process remains open to all.

## Law Society of Scotland

### Introduction

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>3</sup>. We are also required to have regard to regulatory objectives<sup>4</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>5</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 disclosure regime - between the right to privacy for an

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<sup>3</sup> Solicitors (Scotland) Act 1980, section 1

<sup>4</sup> Legal Services (Scotland) Act 2010, section 1

<sup>5</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

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>6</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>7</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>8</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>9</sup> under Reg 26 of the AML Regulations 2017<sup>10</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*

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

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<sup>6</sup> *Re an application by Lorraine Gallagher for Judicial Review (Northern Ireland)* [2019] UKSC 3 (paras 51-55)

<sup>7</sup> Solicitors (Scotland) Act 1980, section 6

<sup>8</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>9</sup> Beneficial owner, officer or manager

<sup>10</sup> The Money Laundering, Terrorist Financing and Transfer of Funds (information on the Payer) Regulations 2017

website<sup>11</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 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

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<sup>11</sup> <https://www.lawscot.org.uk/media/359166/fit-and-proper-guidance-november-2017.pdf>

community because of the public interest in the proper administration of justice.<sup>12</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>13</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>14</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>15</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

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<sup>12</sup> Alan Paterson and Bruce Ritchie, *Law, Practice & Conduct for Solicitors: 2<sup>nd</sup> Edition*, 2014

<sup>13</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>14</sup> Section 87 of the Bill

<sup>15</sup> [https://www.parliament.scot/S5\\_Bills/Consumer%20Scotland%20Bill/SPBill50PMS052019.pdf](https://www.parliament.scot/S5_Bills/Consumer%20Scotland%20Bill/SPBill50PMS052019.pdf)

how the role of Disclosure Scotland as gatekeeper in deciding whether to make disclosure will operate (for instance, it is not clear from the 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>16</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.

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<sup>16</sup> <https://www.lawscot.org.uk/media/360728/18-07-18-crim-consultation-pvg-and-disclosure-of-criminal-information.pdf>

- **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 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.

## **Annexe A: Additional Comments on Disclosure (Scotland) Bill**

### **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>17</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.

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<sup>17</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>18</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>19</sup> unreasonableness.<sup>20</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>21</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>22</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.

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

<sup>19</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

<sup>20</sup> Section 11 of the Bill

<sup>21</sup> Defined in section 13(1) of the Bill

<sup>22</sup> 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>23</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>24</sup>

These changes have the benefit principally of clarification<sup>25</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>26</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.

Regulated roles will be set out in accordance with the legal test set out under section 75(2) of the Bill<sup>27</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

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<sup>23</sup> Paragraph 198 of the Policy Memorandum

<sup>24</sup> Section 72 of the Bill

<sup>25</sup> Paragraph 218 of the Policy memorandum

<sup>26</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)

<sup>27</sup> Including schedules 3 and 4

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>28</sup>, where an organisation has its place of business or personnel in Scotland<sup>29</sup> and its functions are principally carried out at that place of business<sup>30</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>31</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.

- 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

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

<sup>29</sup> Paragraph 1(4)(b) (i) and (ii) of Schedule 4 of the Bill

<sup>30</sup> Paragraph 1(4) (c) of Schedule 4 of the Bill

<sup>31</sup> As defined in the Rehabilitation of Offenders Act 1974

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.

## **Police Scotland**

### **Disclosure (Scotland) Bill – Stage 1**

#### **Purpose**

The purpose of this report is to provide information to the Scottish Parliament Education and Skills Committee evidence session on the Disclosure (Scotland) Bill on Wednesday 9 October 2019.

#### **Background**

This is the first review of the primary legislation since its enactment in February 2011 and Police Scotland is generally supportive of its revised terms. Police Scotland has worked closely with Disclosure Scotland from the introduction of Part V/PVG legislation and they continue to work together on this Bill and related legislative changes.

#### **Current processes**

Disclosure Scotland trigger PVG applications to Police Scotland where there is certain, primarily new information identified eg a pending case or intelligence. Police Scotland will then assess the information held in respect of relevancy, proportionality, necessity and accuracy. Prior to any disclosure, the human rights of the applicant are considered in conjunction with the same considerations for the children and/or vulnerable adults under their care or supervision. Disclosure Scotland is responsible for extracting conviction information for inclusion on a PVG certificate – there is no change proposed in the Disclosure Bill.

People who are members of the scheme are also subject of Ongoing Monitoring to assess behaviours of concern for their continued suitability to be in regulated work.

All information is assessed using the Home Office Quality Assurance Framework. Any disclosures made are known as Other Relevant Information.

Individuals have a right to dispute information included on their PVG Certificate, initially through Disclosure Scotland then through a second dispute direct to Police Scotland. Thereafter an applicant could challenge before a Sheriff in a court of law.

#### **Proposed Changes**

There are a number of proposed changes which should impact positively to Police Scotland and members of the PVG Scheme alike.

Membership will move from lifetime to 5 years renewable, thus reducing the number of scheme members and the duty of Ongoing Monitoring.

Current membership is defined by the scheme within which the member engages in regulated work ie child scheme and/or vulnerable adult scheme. This will change to being role or post specific. The concept of regulated work will be replaced with regulated roles.

The scheme will become mandatory for identified post/job holders, addressing the shortfall in the current legislation which is not mandatory.

The existing dispute process will be replaced by representations which will be overseen by the role of the Independent Reviewer. This process and role will be similar to that of the Independent Monitor in England and Wales. The role of Independent Reviewer is first introduced by the Age of Criminal Responsibility (Scotland) Act 2019 however if Other Relevant Information is being proposed for a

Level 2 application, the applicant has the opportunity to comment prior to disclosure and the Independent Reviewer will determine whether the Other Relevant Information is relevant for disclosure and ought to be disclosed.

*The exact nature of the working relationship between the Independent Reviewer and Police Scotland is one of the issues yet to be clarified as are the changes from the dispute/appeal process to representations. For example, if the Independent Reviewer overturns the decision of the Chief Constable to disclose Other Relevant Information, clarity regarding vicarious responsibility thereafter is required.*

*Disclosure Scotland has assured Police Scotland that they will be fully consulted in the process of defining the roles and responsibilities of the Independent Reviewer and the preparation of the guidance for the interaction between the Chief Constable and Disclosure Scotland.*

Police Scotland will become a referral agency and be able to advise regarding persons detected whilst carrying out work in a regulated role or post ie committing an offence under the new legislation.

Scottish Government will produce statutory guidance to the Chief Constable of Police Scotland with regards to what information should be disclosed under Other Relevant Information. In the Bill, the Independent Reviewer will review decisions taken by Police Scotland which will require statutory guidance for both Police Scotland and the Independent Reviewer to follow to ensure a consistent decision-making rationale.

There are potential financial implications for the Chief Constable with regards to the new Bill, specifically with regards to the introduction of representations and the relationship with the Independent Reviewer.

Police Scotland is very supportive of the review of existing PVG legislation and would welcome the opportunity to discuss the specific aspects of the Disclosure (Scotland) Bill in more detail as required by the Education and Skills Committee.

## **Scottish Social Services Council**

### **Introduction**

The Scottish Social Services Council welcomes the opportunity to respond to the Committee's call for evidence on the Disclosure (Scotland) Bill (the Bill). As a progressive regulator, we consider that the Bill presents an opening to revitalise disclosure and learn from the past with a view to enhancing public safeguarding for the future.

The Scottish Social Services Council (SSSC) is the regulator for the social service workforce in Scotland. Our work means the people of Scotland can count on social services being provided by a trusted, skilled and confident workforce.

We protect the public by registering social service workers, setting standards for their practice, conduct, training and education and by supporting their professional development. Where people fall below the standards of practice and conduct we can investigate and take action.

We also have a responsibility for workforce data and intelligence. We produce workforce data, information and intelligence for employers and other customers to support the development of the sector. We develop and publish Official Statistics and National Statistics on the social service workforce, including on people employed as Mental Health Officers (MHOs) by local authorities.

Every worker on our Register is carrying out regulated work and we expect them to be PVG Scheme members.

We have considered the Bill and acknowledged in our response areas that provide clear improvements as well as those aspects that we believe require clarification.

### **Comments from the Scottish Social Work Council**

The Bill sets out multiple policy objectives. We welcome mandatory membership of the PVG Scheme for anyone undertaking work with vulnerable groups, and the requirement for Police Scotland to make referrals when they have detected a person unlawfully working with vulnerable groups. This approach complements and reinforces our requirement that registered workers be PVG scheme members.

Engagement with stakeholders has identified confusion around what 'type' of disclosure they require for their role. We therefore also welcome that the Bill proposes a reduction in the number of disclosure products available and recognises the benefits of simplifying the range.

### **Information and data sharing**

We note the proposals that allow Disclosure Scotland to assess what information to include in disclosures.

With specific reference to our Fitness to Practise proceedings, we need to receive all information that may affect a registered worker's fitness to practise and will make targeted requests to Disclosure Scotland for specific material where necessary. Where Disclosure Scotland considers a worker for inclusion on the children's list or adults' list, we have on occasion been unable to secure the release of information concerning why the worker is being considered for inclusion. This means that we are not in possession of all necessary information.

In consideration of this and in the event that the above proposals are taken forward, we would welcome Disclosure Scotland adopting an approach that encouraged data sharing where it is in the public interest to do so, for example to assist with regulatory proceedings which have public protection implications.

In relation to conditions, it is sensible that individuals who are being considered for listing be subject to conditions. We note that the Bill requires notification to the regulator of the fact and details of the condition, but not of the information leading to the imposition of the condition. If it remains the position that this information is not to be shared with regulators, their ability to regulate effectively and protect members of the public is potentially compromised. As such, we again advocate for increased data sharing in the public interest.

### **Tests for inclusion**

We consider that clarity is required regarding the tests that will be applied to determine the inclusion of information and the factors that will be taken into account. Specifically:

- Is it proposed that relevance would be assessed differently depending on the Scheme member's profession and regulator?
- Would a pattern of behaviour be taken into account when assessing relevance?
- In the context of the SSSC, would the wider public interest in effective regulation and confidence in social services be taken into account?
- How would the regulators be involved in developing and reviewing the criteria?
- If information is deemed relevant, how would Disclosure Scotland assess whether it 'ought to be disclosed'?

### **Offence Lists**

We note the lists accompanying the Bill. In consideration of these as a regulator, we would welcome clarification or guidance on the rationale behind the inclusion and exclusion of offences from the lists.

For example, we note that embezzlement has been categorised as a List A offence, but fraud is not.

**Renewals**

The Bill states that Disclosure Scotland are allowing a four-week discretionary period for renewal of membership. Disclosure Scotland will advise Members three months in advance of renewal about the need to renew. In our experience of processing renewals, we feel it is helpful to state that the introduction of this discretionary period could encourage and result in late applications for renewal.

Section 7 (4) states that Disclosure Scotland will advise employers when someone has failed to renew and is no longer a Scheme member. It is our position that a further essential step is to also notify regulatory bodies to allow them to consider the removal and determine if any interim action is necessary to protect the public.

**Regulated roles**

Whilst on our Register and fit to practise, social workers are available to carry out regulated work and as such, must be PVG Scheme members. In light of this, we consider that the Bill should contain provision to ensure that Scheme membership for social workers continues.

We are also responsible for regulating and registering Care Inspectors and their seniors. We would welcome clarification regarding whether the term 'regulated roles' covers these workers. Our position in relation to these roles is the same as our stance on social workers. Specifically, that the Bill should ensure that those employed in these register parts continue to be eligible for Scheme membership.

**FINANCE AND CONSTITUTION COMMITTEE****DISCLOSURE (SCOTLAND) BILL****SUBMISSION FROM SHETLAND COUNCIL**

1. Yes

2. In part; our main concern is the impact on employer's costs. The majority of our Council's costs relate to PVG Scheme membership fees and administration. Currently we pay all costs associated with our employee's membership. We require all post holders requiring a Police Act Disclosure or PVG Scheme membership to renew every 3 years. Moving to 5 yearly renewals will reduce staff time and would potentially reduce membership costs. However as the financial memorandum provides no clarity on the proposed fee structure for PVG Scheme we are unable to assess the impact or comment on this with any certainty.

Similarly, there is a lack of clarity in the FM on the fee structure for Police Act Disclosures. However rough calculations on the possible models would not indicate a significant cost differential.

3. It is disappointing that consultation events are taking place after the consultation questionnaire deadline, for example we have had to provide this response before being able to attend the Disclosure Scotland consultation event in Shetland on 2 September 2019.

4. As above in 2. If, however we were to continue to fully fund our staff's required PVG Scheme membership and this cost remained at £59 per employee and would be required to be renewed every 5 years; we estimate our costs in this regard would increase by 54%. This is significant. It is anticipated that there will be strong resistance to passing this cost to our employees due to the recruitment and retention challenges of this workforce. This may make what can be hard to fill posts even harder and would impact disproportionately a predominantly female, part-time workforce. It is not felt that the FM covers this aspect adequately.

The transition to digital processing is welcomed and is anticipated this will save time, resources and money on paper and postage costs.

5. Based on the limited information provided in the Bill, we do not think a comment can confidently be made on Disclosure Scotland's estimated costs and savings.

6. As above in 4; this is a real concern regarding the proposals for PVG Scheme Membership. If costs increased by the level indicated, then a decision would need to be taken about withdrawing funding of another aspect of the Council's service to fund this increase.

7. As previously stated, we do not feel that a comment can confidently be made on Disclosure Scotland's estimated costs and savings.

Equally, the level of uncertainty on the costs of PVG Scheme Membership makes it difficult to comment further.

8. None Known

9. None Known

#### General Comments

One of the main aims is to simplify Disclosure Products from the current 4 types. The proposal is to create 2 levels. However, there are 3 separate categories proposed within Level 2. There is a concern that this could still be quite confusing. Consideration could be given to naming the 3 separate categories to provide clarity.

The proposal to give powers to a Local Authority to make a referral to Disclosure Scotland in the context of safeguarding is welcomed.