



The Scottish Parliament
Pàrlamaid na h-Alba

EDUCATION AND SKILLS COMMITTEE

AGENDA

29th Meeting, 2019 (Session 5)

Wednesday 6 November 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 its work programme should be taken in private at its next meeting.

2. **Disclosure (Scotland) Bill:** The Committee will take evidence from—

Ben Hall, Scottish Development Manager, Shared Lives Plus;

Oisín Murphy-Lawless, Policy, Parliamentary & Programme Support Officer, Coalition of Care and Support Providers in Scotland (CCPS);

Adam Dillon, Convener Safeguarding Committee, Church of Scotland;

Florence Witherow, National Secretary, Scottish Youth Football Association;

Sarah Latto, Chair of the Scottish Volunteering Forum and Volunteer Development Manager, Shelter;

and then from—

Dughall Laing, Director, Recruit With Conviction;

Rose McConnachie, Policy Development Lead, Community Justice Scotland;

Dr Cynthia Marks, Senior Manager- Operations and Policy, Business in the Community (BITC);

Dr Beth Weaver, Vice Convener, Howard League Scotland.

3. **Review of evidence (in private):** The committee will consider the evidence it heard earlier.
4. **STEM in early years education (in private):** The Committee will consider a draft report.

Roz Thomson
Clerk to the Education and Skills Committee
Room T3.60
The Scottish Parliament
Edinburgh
Tel: 85222
Email: Roz.Thomson@parliament.scot

The papers for this meeting are as follows—

Agenda item 2

SPICe briefing paper

ES/S5/19/29/1

Submissions pack

ES/S5/19/29/2

Agenda item 4

PRIVATE PAPER

ES/S5/19/29/3 (P)

**Education and Skills Committee
Disclosure (Scotland) Bill
Wednesday 6 November 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 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 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](#) and began to take evidence from stakeholders on [8 October 2019](#). This week, the Committee will take evidence on the Bill from two panels.

The first panel will be:

- Ben Hall, Scotland Development Manager, [Shared Lives Plus](#);
- Oisín Murphy-Lawless, Policy, Parliamentary & Programme Support Officer, [Coalition of Care and Support Providers in Scotland](#) (“CCPS”);
- Andrew Dillon, Convener of the Safeguarding Committee, [Church of Scotland](#);
- Florence Witherow, National Secretary, [Scottish Youth Football Association](#) (“SYFA”); and
- Sarah Latto, Chair, [Scottish Volunteering Forum](#) and Volunteer Development Manager of Shelter Scotland.

The second panel will be:

- Dughall Laing, Director, [Recruit With Conviction](#);
- Rose McConnachie, Policy Development Lead [Community Justice Scotland](#);
- Dr Cynthia Marks, Senior Manager – Operations and Policy, [Business in the Community](#) (“BITC”); and
- Dr Beth Weaver, Vice Convener, [Howard League Scotland](#).

Scottish Women’s Aid were invited to participate in Panel 2, but could not do so for scheduling reasons. However, points raised in their submission are included in this paper. Submissions from the organisations appearing this week are included in Paper 2. A summary of themes of written evidence was included in Annexe A of the SPICe paper prepared for the Committee’s evidence session on 8 October 2019.

The remainder of this paper is structured in two parts covering the respective panels. There are a number of suggested themes for each panel and there is inevitably some repetition. The paper assumes readers are familiar with the content of the Bill. The [SPICe Bill briefing was published in August 2019](#) and the [Bill and its accompanying documents can be found on the Scottish Parliament's website](#).

PANEL 1

Panel 1 consists of representatives of organisations which would utilise disclosure products as part of their recruitment of volunteers or employees. The focus of themes for this panel is on the practicalities of the current system and the proposed reforms.

Theme 1: Disclosure products role in supporting organisations' protection policies

[Disclosure Scotland's consultation](#) that led (in part) to the Bill stated—

“Stakeholder feedback leaves no doubt that they value Disclosure Scotland’s products and that these fulfil an important role in Scottish life, assisting employers and other decisionmakers to take better informed decisions. But there is also an appetite for change; stakeholders need Disclosure Scotland to embrace new technology and to rethink how products meet user needs and requirements.” (p14)

Currently to undertake a higher-level disclosure or PVG check, an organisation is required to be a registered body with Disclosure Scotland. The nomenclature will change under the Bill to an Accredited Body and those bodies will be subject to a statutory code of practice. Any disclosure beyond a basic disclosure (a Level 1 disclosure) must be for a prescribed purpose (e.g. a PVG check for working with vulnerable groups).

One issue raised by respondents to the Committee’s call for views on the Bill was that disclosure products should be part of a wider approach to safeguarding. Connect’s submission 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.”

Children in Scotland’s submission 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.”

In relation to the proposed change from regulated work to regulated roles (set out in schedules 3 and 4 of the Bill), the CCPS’ submission stated—

“There’s a concern that this broader definition of roles, in combination with the compulsory nature of the PVG scheme, will result in employers erring on the side of caution and making PVG membership a condition of any given job.”

The Church of Scotland supported the proposal to make PVG membership mandatory for people working with protected groups. However, it also suggested the proposal could have a negative impact on volunteers who might be put off by the risk of committing an offence. The Policy Memorandum addresses this point, it says (para 209)—

“Disclosure Scotland’s experience in operating the barring system is that individuals in the voluntary sector do sometimes engage in conduct which clearly makes them unsuitable for regulated work. For instance, in relation to the allegations of historical child sexual abuse in football considered by the Health and Sport Committee, a substantial amount of that abuse is likely to have been committed by people acting in a voluntary capacity. Scottish Ministers therefore considers the creation of a mandatory scheme with a linked offence provision to be applied in all circumstances to be a proportionate approach.”

The Bill makes a number of changes which will have the effect of potentially reducing the amount of information provided to organisations. For example: ending automatic disclosure of childhood offences; making reviews of disclosed information simpler; and reducing the timescales during which List B offences would be disclosed.

Another proposed change is that young people under 16 will not be able to join the PVG scheme. The offences under the Bill which make PVG scheme membership mandatory for individuals doing regulated roles do not apply where the individual is under 16. However, the existing offence of allowing an individual who is barred from doing regulated work will remain. The Committee has explored the impact of this and during the evidence session [on 9 October 2019](#), Nicola Dickie from COSLA stated—

“GIRFEC means that many young people who are troublesome or have behavioural issues are already well known to support services such as social work, teaching staff and Police Scotland, depending on the level of the behavioural difficulties. Many of those young people are also involved in the children’s hearings system. We are comfortable that the bill strikes the right balance between the risk of having those young people outwith the system and having them in the system and continually monitoring their behaviour for a significant time.” (Col 5)

It is important to distinguish between individuals under 16 who have been listed (i.e. where their past behaviour has led Ministers to decide that they should not be allowed to do regulated work) and others whose behaviour falls short of this but nonetheless may have information disclosed if they were 16 or over. The former category is very small, the latter is likely to be larger.

The RYA Scotland’s submission stated that the bill’s proposals would most likely “be interpreted to mean, young people under 16 cannot undertake regulated roles”. The Scottish Volunteering Forum reported that a 2014 survey found that more than half of 11-18 year olds had volunteered in the previous 12 months. The Scottish Volunteering Forum said—

“CHAS [an SVF member] regularly involve school age volunteers in their hospices, and Befriending Networks shared examples of youth and elderly befriending schemes that are heavily reliant on young volunteers. To presume that young

people are incapable or unlikely to fulfil roles where a PVG is required greatly underestimates the potential of young people, and does not reflect the current reality.

“With this in mind, removing criminal records checks for young people may decrease the likelihood of volunteer involving organisations to recruit young people due to added safeguarding risk, thus undermining the Scottish Government’s commitment to encourage volunteering from ‘the earliest possible age’.”

The Committee may wish to explore with the panel:

- **The role that disclosure products have in supporting safeguarding within organisations.**
- **Any proposals in the Bill which will assist or hinder organisations to improve safeguarding and how the Bill might be improved in this respect.**
- **Whether the Bill’s provisions and mandatory PVG Scheme membership is likely to encourage organisations to expand the roles in which they require an employee/volunteer to be PVG Scheme members.**
- **Views on the proposals in relation to under-16 year olds not being able to join the PVG scheme and any practical impacts this may have in relation to young people’s volunteering opportunities.**

Theme 2: Review processes, Childhood information and ORI

During the evidence session on 9 October 2019, the Committee explored with witnesses the proposed review processes, and how childhood information and Other Relevant Information “ORI” is included and presented in disclosures. Some of the issues raised were the timeliness of such processes and the tests for whether the information would be included.

Tests

There are a number of tests for disclosure in the Bill. For Level 1 disclosures there is a one-test for the disclosure of childhood convictions: whether they ought to be disclosed. At Level 2 there is a two-part test of “relevant” and “ought to be disclosed” for whether to include ORI and childhood convictions in disclosures. In considering reviews, Disclosure Scotland, the Police (for ORI), and the independent reviewer, will also be required to consider the two-part test of “relevant” and “ought”. The independent reviewer is a role which was established under the Age of Criminal Responsibility (Scotland) Act 2019.

On 21 October 2019, the Minister for Children and Young People wrote to the Committee in relation to the tests for whether information would be disclosed in relation. She said—

“The two-part test is well-established and has been approved and applied by multiple decisions of the UK Supreme Court. In particular, it was approved by Lord Neuberger in the case of *R(L) v Commissioner of Police of the Metropolis*. In that judgement, the court gives examples of the factors that may be pertinent to a decision by the chief officer of what “ought to be included” as other relevant information. Judicial commentary like this already informs decisions made under this two-part test, as do other well-established principles of public and administrative law

that apply to public bodies when exercising a decision-making function. Accordingly, any guidance issued, statutory or otherwise, will require to conform to and be informed by these existing legal rules and principles.”

The decision-making will be supported by guidance. The intention is that decisions regarding ORI will be supported by statutory guidance under the Bill (s.64(1)). [Section 22 of the Age of Criminal Responsibility \(Scotland\) Act 2019](#) requires Ministers to issue guidance to the independent reviewer about the exercise of the reviewer’s functions. Decisions by Ministers (in practical terms, Disclosure Scotland) are intended to be supported by non-statutory guidance. The Minister noted that all of these documents will reflect case-law.

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.”

Childhood convictions

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).

Any information on childhood offences will be presented in a way that Ministers “consider appropriate” (see s.5(2) and s.17(2)). The policy memorandum states—

“The information would not be listed along with any other convictions, but would fall under a separate heading to distinguish offending behaviour within this age range from adult offending.” (Para 99)

This Bill should be considered alongside the impact of other recent legislation. 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. In practice, therefore, in many cases childhood convictions would not appear on a Level 1 disclosure (being spent); spent convictions of offences on Lists A and B could be disclosed in a Level 2 disclosure, subject to the test noted above.

Other Relevant Information

Other Relevant Information (“ORI”) is information held by the police 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.

The Bill provides for ORI to continue to be part of the scheme where appropriate for Level 2 disclosures. ORI may appear in more disclosures than currently, i.e. including those circumstances which would currently be covered by a [Standard Disclosure](#) (e.g. a disclosure for solicitors, accountants etc) which does not currently include ORI.

Review processes

The Bill provides the following types of review:

- *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.”

Timeliness

Under the proposed system, an individual will be able to seek a review of information contained within a disclosure or whether to agree for this information to be passed on to a third party.

Andrew Alexander from the Law Society said—

“One of areas that we highlighted involves the prescribed periods during which reviews could take place, because there is a degree of tension there. Often, if a disclosure is for the purposes of employment, the review process might need to be fairly quick. Equally, if the review process is particularly short, it might not allow people the opportunity to adequately represent their position, or to get independent advice on what could be some serious consequences.” (OR 9 October, Col 7)

The impact of potential delays caused by reviews was raised by CCPS’ submission which 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.”

Members may wish to explore with the panel:

- **Views on whether Disclosure Scotland or the police are well-placed to determine the relevancy of disclosed information for a particular role and how this may affect organisations’ proportionate use of the information.**
- **Whether the proposal for childhood convictions to be listed separately will assist organisations to contextualise those convictions.**
- **What weight is given by organisations to non-conviction information provided through ORI.**
- **What impact, if any, the proposed review processes may have on individuals seeking paid work or volunteering.**

Theme 3: 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 a previous system whereby higher level disclosures contained all types convictions.¹

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.

Timescales

The Bill proposes shorter periods of time for when an adult spent conviction of a List A offence can be disclosed (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 and 7.5 years to 5.5 years for a childhood 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)

¹ The challenge was against the system in England and Wales, however, the system in Scotland was similar and was subsequently changed.

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.

Members may wish to explore with the panel:

- **The panel’s view on whether the timescales set out in the Bill in relation to the disclosure of convictions of List A and List B offences are appropriate.**
- **Whether the panel has any suggestions for changes to the offences on Lists A and B.**

Theme 4: Regulated roles, Accredited Bodies and Fees

Complexity and regulated roles

A key aim of the Scottish Government's proposed 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, from the users’ viewpoint, to two. The number of outputs is greater than two as Level 2 disclosures could cover several situations. 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. Disclosure Scotland plans greater use of digital technology in the application process and delivery of the new disclosure products, which is hoped to speed up the process.

The Bill also 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 children².

Some respondents were concerned that particular roles may become excluded from the PVG scheme. Shared Lives Plus noted in their submission that family members within households where there has been an adult placement may not meet the test for a PVG check. The Church of Scotland suggested that the lists of regulated roles should have "distinct roles relating to religious institutions".

The Scottish Volunteering Forum was concerned that the move to regulated roles would make it "more challenging to determine who needs a PVG" than at present. The Scottish Volunteering Forum also argued that the proposed definition of a protected adult is problematic. It said—

"[The definition] focuses primarily on health, and doesn't reflect other common vulnerabilities such as asylum seeker status, homelessness or old age. It also doesn't take into consideration the vulnerability that arises when an individual comes into contact with certain types of regulated role, particularly advice roles. The imbalance of power resulting from knowledge, and the potential to exploit people, creates a vulnerability in individuals who might not otherwise be considered vulnerable."

Accredited bodies

As noted above, under the Bill, organisations will continue to be required to register with Disclosure Scotland to be able to apply for Level 2 disclosures. The Bill provides that an accredited body can be:

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

The Bill provides for the nomination of lead signatories and counter signatories³ of an accredited body. This is similar to the current system and, as they are now, both of these types of individual would be subject to a vetting procedure by Disclosure Scotland. The CCPS' submission highlighted section 50(1)(g) which states that Ministers must have

² 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)).

³ Lead signatory: the main person in an organisation responsible for handling disclosure information.
Countersignatory: other members of the organisation authorised to seek Level 2 disclosures.

regard to 'any other information held by Scottish Ministers' when considering if someone is a suitable person to receive disclosure information. The CCPS' submission notes that this is vague but that in correspondence Disclosure Scotland has provided reassurance that it would be information already held by Disclosure Scotland in relation to its functions under the *Accredited bodies* cross-heading of the Bill (i.e. sections 47 to 57).

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 (s57(4)).

Disclosure Scotland's consultation which led to the Bill indicated that there was support for individuals being able to see more vetting information. The Policy Memorandum (p39) acknowledges this, however it argues that becoming an accredited body is not a trivial matter (e.g. accredited bodies will be subject to a code of practice, and there are attached offences) and is not suited to a private individual. Furthermore, the Policy Memorandum noted that any disclosure of such information is an interference with human rights which needs to be necessary, proportionate and in accordance with the law. The Government therefore argues that the proposals in the Bill find the right balance.

The Church of Scotland noted that organisations with a large number of employees or volunteers would require a significant lead-in time when any new mandatory scheme is introduced.

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 with a £10 fee for each disclosure.

The intention is that fees relating to the PVG scheme would be waived for volunteers. The Scottish Volunteering Forum called for this to be extended to cover all disclosures to both relieve financial pressure on the sector and to remove a potential barrier for volunteering from less affluent areas.

Members may wish to explore with the panel:

- **Whether the proposed two levels of disclosure will remove complexity and meet users' needs.**
- **If further action will be necessary to ensure users understand the system.**
- **If there are any specific changes the panel would make to Schedules 3 and 4 of the Bill which set out the regulated roles where PVG scheme membership is necessary.**
- **Views on the proposed definition of a protected adult.**
- **The panel's views on the proposed role of some accredited bodies undertaking disclosure checks on behalf of individuals.**
- **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.**

PANEL 2

Panel 2 comprises of a number of organisations with a focus on the balance between protection and rehabilitation. Scottish Women's Aid's submission focused on improving the protection afforded by the disclosure system.

The themes below cover similar ground to the themes suggested for Panel 1. To avoid too much repetition, the paper refers to those themes above.

Theme 1: Public protection and moving on from convictions

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 Bill strengthens certain aspects of the disclosure system in terms of public protection (e.g. mandatory PVG membership). The Bill will also reduce the amount of information available on some disclosures, potentially allowing people to move on from previous behaviour more quickly.

Level 1 and Level 2 disclosures are broadly comparable to the current basic level and higher level⁴ disclosures respectively. Level 1 disclosures can be made by an individual for any purpose and will include unspent convictions and notification requirements under

⁴ Higher level disclosures are the collective name for PVG scheme records, and standard and enhanced disclosures.

Part 2 of the Sexual Offences Act 2000. Level 2 disclosures can only be made for certain purposes (e.g. certain professions or regulated roles). Level 2 disclosures can include, any unspent convictions, spent convictions of offences on List A, spent convictions of offences on List B within certain timeframes, notification requirements under Part 2 of the Sexual Offences Act 2000, and ORI. In some cases, a Level 2 disclosure could include whether the individual is barred from working with a vulnerable group or subject to certain civil orders.

Importantly, while any employer may ask an individual to undertake a Level 1 disclosure, only Level 2 disclosures will only be undertaken for particular roles and through accredited bodies. This is similar to the current system.

The ways in which less information may be available are through: more accessible review processes; the approach to childhood convictions; and the reduction of the timescales in relation to the disclosure of List A and List B offences for Level 2 disclosures. However, the reforms will expand the use of ORI to cover all Level 2 disclosures and any notification requirements under Part 2 of the Sexual Offences Act 2000 will be included in Level 1 and Level 2 disclosures.

In relation to List A and List B offences, 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 general* after an average of 7-10 years without a new arrest or conviction, a person’s criminal record essentially loses its predictive value”. Business In the Community agreed with the change in durations. Scottish Women’s Aid’s submission 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.”

Members may wish to explore with the panel—

- **Whether the panel’s view is that the proposed changes have found the correct balance between public protection and the ability of individuals to move on from past offences.**
- **Whether the types of information provided on Level 1 and Level 2 disclosures are suitable for the purposes of those disclosure products.**
- **Views on whether the processes and timescales for disclosing convictions of List A and List B offences are appropriate.**

Theme 2: Employers’ approach to conviction information

Business in the Community’s submission notes that it is “an advocate of removing barriers to employment for people with criminal convictions” and in particular working with organisations on “whether, when and how” to best ask about conviction information in recruitment processes. Recruit with Conviction has a similar role and purpose; its submission said—

“[The] “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.”

Recruit with Conviction also argued that people with convictions think this will be a bar from being employed and “self-deselect” from applying to forms of regulated work.

Community Justice Scotland made similar points in its submission. It said—

“We would wish to highlight the conclusions of a recent research review paper⁵ by Dr Beth Weaver from the University of Strathclyde which states that ‘the use of criminal record background checks by employers has become increasingly pervasive’ and that ‘having a criminal record can ‘have significant effects on employment prospects producing ‘invisible punishment’ or collateral consequences’ of contact with the justice system’. Such a blanket approach towards disclosure by employers inhibits the ability of people with convictions to reintegrate.”

Members may wish to explore with the panel—

- **Whether employers understand the different products and their strengths and limitations.**
- **Whether employers are well-equipped to take proportionate risk-based decisions supported by disclosure products. If different sectors are more or less risk-averse.**
- **What support can be given to employers to use disclosed information to best effect.**
- **The benefits and risks of improving employment opportunities for people with past convictions and the balance of responsibilities between the state and employers for realising any benefits and managing any risks.**
- **The degree to which individuals have a realistic understanding of how their previous convictions can affect their employment prospects and for how long. How this could be improved.**

Theme 3: Review processes, Childhood information and ORI

[Theme 2 of the first panel](#) discusses the proposed changes in relation to the review processes, childhood information and ORI. This section highlights some of the views of the panel with reference to their written submissions.

⁵ Time for Policy Redemption? A review of the evidence on disclosure of criminal records, Dr Beth Weaver, University of Strathclyde (2018)
https://strathprints.strath.ac.uk/64981/1/Weaver_SCCJR_2018_Time_for_policy_redemption_a_review_of_the_evidence.pdf

Reviews

Business in the Community supported the proposed review processes but suggested that guidance would be required for both individuals and employers.

Community Justice Scotland's submission stated—

“We would support the development of specific easily accessible guidance to inform people about this change and the steps they should take if they wish to make an appeal. Any lengthy delays in providing information from Disclosure Scotland to an employer could act as a proxy signal that there is matter under consideration which may undermine an applicant. A commitment to maximum time periods for treatment of appeals would be welcomed as would a guarantee that this is cost-free, to ensure financial considerations do not deter people from attempts to get jobs.”

Howard League Scotland broadly supported the new review processes but 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. Police Scotland reviewing its decision to include ORI. Howard League Scotland also questioned why it should be the responsibility of individuals to instigate a review on whether a spent conviction of a List A or B offence is relevant and ought to be included in a disclosure; it argued that the onus should be on Disclosure Scotland as part of a more individualised approach.

Recruit with Conviction supported the role of the independent reviewer and suggested that its “role should be further enhanced by allowing for the verifier to act as a method of evaluation of the expanded disclosure system with the consequential ability to challenge procedures as they develop”.

Childhood convictions

Business in the Community welcomed the proposals to stop automatic disclosure of childhood convictions. It said—

“BITC agrees with this change and believes that this will assist individuals making the transition to adulthood without the negative narrative from childhood prosecutions serving as a barrier in the next stage of life. Responsible employers will welcome details that no longer have a bearing on employment risk being taken out of the equation when considering prospective employees.”

The Howard League Scotland also welcomed the approach, arguing that a more individualised approach should also be taken in respect of adult convictions.

Community Justice Scotland welcomed the proposed ending of automatic disclosure of childhood convictions and that any convictions disclosed would be under a separate heading. However, within this context, Community Justice Scotland highlighted a need for “clear and rigorous guidelines” to avoid “over-disclosure” through ORI.

Other Relevant Information

Howard League Scotland raised concerns about the use of ORI particularly in relation to the potential for disclosures to be incompatible with Article 8 rights under ECHR. Howard League Scotland cited research which found that “37% of job offers were withdrawn based on such ‘non-conviction information’”. It described ORI as—

“ORI or ‘soft’ information can include allegations, records of arrest and/or charge and/or prosecution, statements by witnesses, cautions, convictions, records of penalty notices for disorder, sentencing reports and so on.”

Howard League Scotland suggested that certain types of information should be explicitly excluded from ORI, such as the criminal history family members or details of charges on which the person was found Not Guilty at trial.

Community Justice Scotland recognised the need for ORI but, as noted above, argued for “clear statutory guidance and evidence-based processes and guidance for decision makers” to avoid “retrospective criminalisation through the back door”.

Section 64(1) of the Bill provides for a requirement for Ministers to issue guidance to the Chief Constable in relation to their functions under Part 1 of the Bill. There is no parliamentary procedure attached the laying of this guidance in the Bill. Ministers must consult with the Chief Constable when producing the guidance which may include provisions about the conduct of reviews of ORI. The Delegated Powers Memorandum explains that the Government considers “that an operational resource that supports the Chief Constable in performing their functions should not take up parliamentary time.”

Members may wish to explore with the panel—

- **What support is required to best enable individuals to exercise rights to seek a review of the inclusion of information in a disclosure.**
- **Whether the role of the independent reviewer ought to be expanded within the proposed review processes to undertake all reviews in the first instance.**
- **How the Howard League Scotland’s suggestion of a more individualised approach for all Level 2 disclosures could work in practice and if it is necessary for the system to be so proportionate.**
- **Whether employers currently take account of the age of an individual when they were convicted. How the knowledge that Disclosure Scotland has determined that any disclosed childhood information is both relevant and ought to be disclosed could affect that judgement.**
- **The panel’s views on the use of ORI and the extent to which any concerns might be allayed through guidance to the Chief Constable.**
- **Whether the panel is content with the statutory consultation required for statutory guidance to the Chief Constable.**

Theme 4: Complexity, Regulated roles, Accredited Bodies and Fees

[Theme 4](#) for the first panel covers regulated roles, accredited bodies and fees. Again this section will focus on the submissions from participants from Panel 2.

Community Justice Scotland said—

“We recognise that the disclosure regime in Scotland is complex, affected by a range of legislation including the recent Management of Offenders and Age of Criminal Responsibility Acts and that such complexity creates confusion for many.

Simplification of this landscape is critical to ensure that people with convictions are afforded opportunities to move on with their lives. It is particularly important that people also understand when a conviction becomes spent and is no longer required to be disclosed. The provision of accessible guidance will be important in ensuring the effective implementation of the new system.”

In terms of regulated roles, Community Justice Scotland stated—

“We agree that regulated roles should be based on assessment of power, influence and dynamic of the relationship (e.g. a football coach). We do however anticipate that incorporating all roles within the proposed assessment tool may prove challenging, particularly as we understand it may require self-declaration. We would welcome being involved in any future consultation on the development of such a tool.”

Business in the Community supported the move to a two-tier system. It also welcomed the move toward regulated roles and called for “clear guidance for where responsibility lies to trigger the PVG scheme application and how and when this should be done.”

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 is that work with women who have been victims of domestic abuse may not meet these criteria.

Criminal Justice Scotland said that it was “concerned that the cost of repeated applications for membership of the PVG disclosure scheme may be prohibitive and we look forward to the consultation around fees levels in due course.” Business in the Community said that care should be taken not to “create barriers for employers, especially SMEs, from supporting the rehabilitation through the provision of employment opportunities.” It suggested that a fee system that is too prohibitive may do so.

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 will be necessary to ensure users understand the system.**
- **Whether the move toward regulated roles from regulated work will be easier to understand and administer.**
- **The panel’s views on whether the definition of a protected adult is drawn too narrowly in the Bill.**
- **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.**

**Ned Sharratt
SPICe Research
31 October 2019**

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond

to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot

Education and Skills Committee

29th Meeting, 2019 (Session 5), Wednesday, 6 November 2019

Disclosure (Scotland) Bill – submissions pack

This pack contains the submissions from some of the witnesses. There are two panels of witnesses for this meeting.

Panel 1

- [Church of Scotland](#)
- [Coalition of Care and support Providers \(CCPS\)](#)
- [Scottish Volunteer Forum](#)
- [Shared Lives Plus](#)

Panel 2

- [Business in the Community \(BITC\)](#)
- [Community Justice Scotland](#)
- [Howard League Scotland](#)
- [Recruit with Conviction](#)

This pack also has a submission from Scottish Women's Aid who were invited to give evidence but were unable to provide a witness for this particular meeting.

- [Scottish Women's Aid](#)

The Committee has received a letter from the Scottish Government.

- [Scottish Government](#)

Panel 1

Church of Scotland

Introduction

The Safeguarding Committee of the Church of Scotland welcomes the opportunity to give evidence to the Scottish Parliament on the Disclosure (Scotland) Bill and would also like to thank staff and MSP's for considering this written submission.

The Safeguarding Committee provides governance for the work of the Church's Safeguarding Service and is responsible for formulating policy and strategy.

One of the key objectives of the Safeguarding Service is to prevent people from coming to harm in Church communities by promoting safer recruitment practices. It is the policy of the Church that paid staff and volunteers who undertake regulated activity become members of the Protecting Vulnerable Groups (PVG) Scheme.

Since the implementation of the Scheme in 2011, the Safeguarding Service has processed in excess of 38, 000 PVG applications-most of these being for a volunteer population.

Disclosure (Scotland) Bill

The Church of Scotland's Safeguarding Committee welcomes the proposal to modernise and improve the proportionality of the disclosure system in Scotland.

Our understanding is that there are a number of key proposals relating to the Bill, but we have considered the most relevant to the Church of Scotland in brief detail below:

Mandatory PVG Scheme

We welcome the fact that anyone doing work with vulnerable groups would now be required to be a member of the PVG Scheme and also welcome the proposal that applicants renew their membership of the scheme every five years.

However, the proposal does have the potential to have a negative impact on the volunteering population given that it would become an offence for an individual to work in a regulated role without being a member of the PVG Scheme, and an offence for organisations to employ someone in a regulated role who is not a PVG Scheme member.

Some volunteers might think that this would present too great a risk of harm to them and withdraw their goodwill.

The Church will seek to assist volunteers to maintain their role by ensuring that individual members are notified of the requirement to renew their membership in good time, thereby minimising the risk to the individual and the Church of committing a criminal offence.

In addition, the success of retaining some volunteers in role will also be dependent on Disclosure Scotland having robust mechanisms in place for notifying individuals of the need for renewal and notifying organisations when the individual has not renewed their

membership by agreed timescales. The Church welcomes the suggestion of an extended membership period of 4 weeks and a discretionary membership period of 6 months. Hopefully this will allow us to renew all of our members in good time and terminate the membership of those who are no longer doing regulated work for the Church.

Another important aspect of the introduction of the mandatory scheme is the transitioning of individuals who are already members onto the new scheme. The Church of Scotland has in excess of 38,000 individuals registered with Disclosure Scotland. It is unlikely that all of these people are still undertaking regulated work but the final number is likely to run into the thousands. We would ask that there is a significant 'lead in' time for the transition and that the transition is staggered so as to be manageable in the first instance and for subsequent renewal of registration.

We would also ask that the transition time frames be included within subordinate legislation as is customary, allowing a more manageable change to time frames should it be required.

Regulated Role as opposed to Regulated Activity

The Church of Scotland would like to see distinct roles relating to religious institutions published by Disclosure Scotland and included more comprehensively in Annex B Schedule 3 and 4—Regulated roles with Children/Adults. At the moment religious institutions are mentioned in Schedule 3 and 4 Part 2 under Leisure Activities. While some people might recognise that a particular role carried out within a religious institution could 'fit' under the headings of e.g. child protection, care health and accommodation, education and training, childcare etc. some might not easily identify with these activities.

The concept of regulated roles and the wider concept of 'positions of trust' may see more people from the Church becoming a Scheme member than less.

The Church of Scotland would be happy to work with Disclosure Scotland on the production of a separate section in Annex B which is tailored to the needs of this sector.

Digital System

Overall, the Church believes that a move to a digital system for the processing of disclosure products is a positive step. We anticipate that it will be a more efficient and secure process which is less open to error. It would allow applicants to have greater control of who has access to their information.

However, moving to a digital system will not necessarily negate the need for another system of application. Some of our volunteers do not have easy access to appropriate technologies or indeed the necessary skill to utilise some of the new technologies. We would support the retention of a paper option so as to remove any unnecessary barrier to the full participation of all members of society, regardless of age, income or technical skills.

Fees

At the present time volunteers in the Church have their PVG application fees waived. It would be helpful to have absolute clarity on whether this is going to continue and to hear what the definition of a qualifying voluntary organisation is going to be.

Imposing Conditions on Individuals Considered for Listing

It would be helpful to have further information about how this might work in practice if employers are at odds with the conditions imposed by Ministers.

List of Regularity Organisations with Power to make Referrals to Disclosure Scotland

We suggest that it may be appropriate to add to the list of regulatory organisations the Office of the Scottish Charity Regulator.

PVG Scheme members working overseas

The Church of Scotland welcomes the strengthening of safeguards in overseas work by ensuring that overseas work which would be regarded as a regulated role if done in Scotland will be a specified regulated role so that such work benefits from the same level of safeguarding as regulated roles carried out in Scotland. This would allow clearer expectations of management of safeguarding from Scotland of overseas projects, carrying over the robust principles of safeguarding in Scotland to overseas projects managed by Scottish organisations.

Coalition of Care and support Providers (CCPS)

CCPS welcomes the opportunity to submit evidence on behalf of our membership. We would like to thank the staff and MSPs of the Education and Skills Committee for taking the time to consider our submission.

Summary

1. Fees:

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.

2. Regulated Roles

We do not believe the shift in definition to regulated roles will achieve the aim of preventing employers from insisting on given posts requiring compulsory membership.

We welcome that regulated roles, as now defined, close the loophole in PVG membership whereby trustees of charities that work with both children and adults do not require PVG checks.

3. Membership Cards

We are seeking greater clarity regarding non-digital ways of interacting with the scheme, what the cost may be to those of our members' staff who are not able to interact with the scheme digitally, and whether this acts as a disincentive.

4. Impact of ORI and Review of Decisions on Recruitment

The opportunity for individuals to request reviews on disclosure statements is welcome, but the process described is likely to impact on recruitment, potentially acting as a disincentive to apply.

5. S.50 - considering a signatory/counter-signatory for role of Suitable Person

We were concerned that one of the factors to be considered, 'other information held by Ministers', was too broadly defined and may have privacy implications although dialogue with Disclosure Scotland (DS) indicates that guidance should address this.

These points are expanded in the following pages.

1. Fees

- a) Under S.62(2), fees may be charged for changing prescribed details of accredited bodies' signatory/counter-signatory (e.g. addresses if they move), and also for nominating a signatory/counter-signatory. This doesn't happen currently and will be an unnecessary additional cost for the voluntary sector providers of social services.

- b) Fees are charged for reviews of level 1 and level 2 applications. In addition to noting that this process presents a challenge for recruitment (see point 4 in this document), these fees are a further disincentive for people to apply to work in regulated roles.
- c) It's not clear from the legislation or the policy memorandum whether volunteers will be expected to pay for disclosure, nor whether volunteers will continue to have fees waived to be members of the PVG scheme. The annual CCPS workforce survey, covering almost half of the voluntary sector workforce, showed that in 2018/19 ninety two percent of respondents used volunteers and use is increasing. Forty five percent reported an increase in the use of volunteers compared to the forty two percent reporting this in 2017/ 18. We would like confirmation that volunteers will not be expected to pay for disclosure nor to be members of the PVG scheme, as otherwise it imposes a significant barrier to volunteering and a cost to our members.
- d) Another area which hasn't been addressed since our submission to the consultation is whether volunteers would be expected to pay to be on the PVG scheme upon becoming paid staff. Given the high number of volunteers working within the sector, this remains a significant concern.

2. Regulated work vs Regulated Roles

- a) The schedule of regulated roles is a combination of certain listed roles, and broadly-defined roles. There's a concern that this broader definition of roles, in combination with the compulsory nature of the PVG scheme, will result in employers erring on the side of caution and making PVG membership a condition of any given job. It's not clear that this achieves the aim laid out in the policy memorandum of reducing the number of people on the PVG scheme. As a result, it may act as a disincentive to apply for posts and impose unnecessary costs on our members.
- b) Disclosure Scotland (DS) have said that the revised roles in the schedules close a loophole in the Protection of Vulnerable Groups Act (2007). Previously trustees of those charities working with both adults and children weren't eligible for PVG checks. We welcome the wording of S.30 of Schedule 2 and S.22 of Schedule 3 of the Bill which closes this loophole, as some of our members had expressed concern about trustees not being required to be eligible.

3. Membership Cards

- a) There's no mention in the Bill of membership cards although this was brought up in the consultation. The policy memorandum circulated with the Bill speaks of making available a non-digital alternative for those who cannot access the scheme digitally (see S.168 of policy memo). It says regulations can be drawn up for administration of the membership scheme but makes no mention of fees. We would be concerned about the possibility of a fee being introduced, as the charge imposed on those employees who couldn't access the scheme digitally would be a further cost in a low-paid area and disincentive to applying for posts. Some of our members have reported that their staff include those who are themselves visually impaired. As a result, we would welcome further detail as to how a non-digital alternative could be implemented at minimum cost to potential employees.

4. Impact of ORI and Review of Decision on Recruitment process

- a) The legislation lays out a review process for the information in the disclosure in S.7-12 and S.23-33. This review can be requested, then submitted for independent review and finally, if on a point of law, reviewed by a sheriff.
- b) PVG enrolment will be compulsory for regulated roles, requiring employers to build extra time into the recruitment process to potentially allow for review.
- c) This is likely to impact on members in two ways. Firstly, roles dependent on external funding cannot start as quickly, so projects that have received such funding must complete the work in a shorter time. If conditions of funding insist on posts starting by a certain date, it potentially requires our members to make a choice between a swift recruitment to comply with funding conditions and running a recruitment process that is procedurally fair to all applicants.
- d) Secondly, 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.
- e) It is unclear from the legislation how many times an applicant might have to go through this process when applying for jobs that are considered regulated.
- f) Given that social care recruitment is currently facing well-evidenced recruitment and retention challenges¹, we are keen that this legislation avoids creating further barriers to employment.

¹ Evidence can be found in the CCPS HR Benchmarking Report. It notes that 78% of respondents “reported that recruitment of front-line support and nursing staff was very or quite difficult”: CCPS, 2019, Annual Voluntary Sector HR Benchmarking, Edinburgh <<http://www.ccpsscotland.org/wp-content/uploads/2019/05/2018-Benchmarking-Exec-Summary-FINAL.pdf>>, Page 5. See also the jointly issued paper by the Care Inspectorate and Scottish Social Services Council which reports 45% of respondents finding vacancies hard to fill: Care Inspectorate and Scottish Social Services Council, 2017, Staff Vacancies in Care Services 2017, <www.careinspectorate.com/images/documents/4766/Joint%20CI%20&%20SSSC%20staff%20vacancies%20in%20care%20services%202017.pdf>, Page 20. Finally, see the Scottish Government Social Work Services Strategic Forum’s Recruitment and Retention Project, which notes that “Most respondents reported that their organisation has experienced difficulties, either regularly or occasionally, in recruiting care or support workers”: Fawcett, J, Granville S and Mullholland S, 2016, Recruitment and Retention Project: Survey findings, <<https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2016/12/social-work-recruitment-retention-project-survey-findings/documents/recruitment-retention-survey-findings-pdf/recruitment-retention-survey-findings-pdf/govscot%3Adocument/Recruitment%2B%2526%2BRetention%2BSurvey%2BFindings.pdf>>, Scottish Government, P.20

5. Section 50, Suitable Persons and Other Information held by Scottish Ministers

- a) Under S.50(1)(g) the Ministers must have regard to 'any other information held by Scottish Ministers' when considering if someone is a suitable person to receive disclosure information. This is a broadly-defined term and does not indicate what other information they consider, where it comes from within government, what permissions were associated with its use, what the original intention for use of that information was.
- b) There is a concern that members cannot tell their employees what checks they can expect to have run as to their suitability for the role of signatory or counter-signatory, since they have no way of knowing what 'other information' DS would be making use of.
- c) DS have assured us in correspondence that this broad definition is not their intention and it should only relate to information already held by DS in relation to its functions under S.47-57. They have said that explanatory notes will make clear that this is not a wide-ranging power. We welcome this and hope it addresses our concerns that the legislation, as it currently stands, might impact on the Article 8 right to privacy and possibly be non-compliant with both the European Convention of Human Rights (ECHR) and the General Data Protection Regulation (GDPR).

Once again, many thanks for taking the time to read and consider the points raised in our submission.

19 August 2019

CCPS – Coalition of Care & Support Providers in Scotland

About CCPS-Coalition of Care & Support Providers in Scotland

CCPS-Coalition of Care & Support Providers in Scotland is a member's organisation representing the Third Sector voluntary care and support providers. Our mission is to identify, represent, promote and safeguard the interests of third sector and not-for-profit social care and support providers in Scotland, so that they can maximise the impact they have on meeting social need.

CCPS membership comprises over 80 of the most substantial care and support providers in Scotland's third sector, providing high quality support in the areas of community care for adults with disabilities and for older people, youth and criminal justice, addictions, homelessness, and children's services and family support. Our members support over 206,000 people and their families; employ approximately 43,000 staff and work with approximately 5000 volunteers in providing services. They work in all 32 of Scotland's council areas.

CCPS is a company limited by guarantee registered in Scotland No. 279913, and as a Scottish Charity registered with the Office of the Scottish Charity Regulator (OSCR) Charity No. SCO29199

Scottish Volunteer Forum

The Scottish Volunteering Forum is a collaborative group of cross-sector organisations that are committed to developing and improving volunteer participation in Scotland. We exist to influence the strategic landscape and champion innovative approaches using our collective intelligence and expertise. Our members were heavily involved in the development of the 'Volunteering for All' National Framework that was launched by the Scottish Government in early 2019.

Volunteering plays a significant role in society and is estimated to contribute over £2 billion to the Scottish economy. In her foreword to the aforementioned National Framework, the Cabinet Secretary for Local Government and Communities stated that:

'volunteering is key to us achieving our shared ambition of a fairer and more prosperous country with equality of opportunity for all – a country where everyone has the chance to participate and make a difference.'

26% of the Scottish population regularly volunteer in formal roles, whilst 36% volunteer more informally in their communities. As such, it is vital that the needs and experiences of volunteers are acknowledged when considering the Disclosure Bill.

We largely welcome the proposals in the Disclosure Bill to make the system simpler and more efficient. We also welcome the proposal to maintain free PVG membership for volunteers given the vital contribution volunteers make to society. The current system can be complicated for individuals to understand and lengthy to process, and therefore can often act as a barrier for people who wish to volunteer. However, we have several concerns about the proposals which are detailed below.

1. Free membership for all Volunteers

Given the significant contribution that volunteers make to Scottish society, we feel it is appropriate to extend free Disclosure checks to all volunteers, not just those undertaking regulated work. A 'State of the Sector' report published by SCVO in October 2018 highlighted that the financial situation of many voluntary organisations is 'tepid', with smaller organisations in particular struggling generate income.

Given that so many voluntary organisations are reliant on the contribution of volunteers, the cost of Disclosure applications for volunteers who often only contribute a few hours a week can be a significant burden. One of our members, Chest Heart and Stroke Scotland, said that 'it is a great financial burden for charities to undertake, especially when resources are limited'. Similarly, Volunteer Glasgow highlighted that 'any fee could be prohibitive and, given the lower levels of volunteering in areas of lower affluence, it would create another barrier for an already under-represented group of potential volunteers.'

2. Digitisation

Whilst we welcome proposals to simplify the system and to move to a digital platform, it is vital that paper application options remain. We have concerns that a

wholly digital system could exclude volunteers who have significant barriers to participation. A report published by Citizens Advice Scotland in February this year found that a third of their clients who responded to a survey had difficulty using a computer or cannot use one at all. In addition, one in 5 respondents who accessed the internet only did so using a smartphone. Given that volunteer participation is significantly lower in areas of multiple deprivation, where digital literacy is likely to be lower, it is important that a paper application form remains in place.

It is also vital that provisions are made for representatives from organisations to provide support to individuals whilst completing digital applications. Providing evidence of identity or address history is a challenge for many, particularly students, people who do not originate from the UK or people with recent experience of homelessness. One of our members, Shelter Scotland, provides significant support to applicants and estimate that upwards of 1 in 5 applications forms is currently submitted incomplete or lacking appropriate evidence. They have also had to pay for volunteers to get a copy of their birth certificate to progress their application on several occasions. We believe that, without this support, many prospective volunteers would fail to progress into volunteering.

3. Volunteering with Convictions

For many people, volunteering is part of a recovery journey where they are in the process of turning their lives around and/or using their experience to support others. Having convictions can pose a huge barrier for many people who want to move on with their lives, and as such we welcome the proposal to reduce the disclosure period for some convictions.

However, uncertainty surrounding an individual's eligibility to work with vulnerable groups can have an impact on their motivation and confidence. One Shelter Scotland volunteer, who has significant relevant personal experience to support people experiencing homelessness, was barred from working with vulnerable groups when she first considered volunteering. She successfully appealed this with the organisation's support, but experienced significant anxiety and found the process very intimidating due to the complicated language used in correspondence. As such, the process for considering an applicant for barring, and the subsequent appeals process, need to be both quick and easy to understand.

Several volunteers have also suggested that the computerised system provides an opportunity for applicants to provide some personal commentary on their convictions before they share it with organisations. Community Justice Scotland have some powerful case studies on their website highlighting the strain on people who continuously have to share the details of their convictions. In one, Kim McGuigan, stated 'why do I still have to justify and explain events that take me back to the night of that conviction? Why do I have to revisit the trauma?'. The inclusion of an open text box at the stage before a volunteer shares conviction information with an organisation might be helpful in providing context.

4. PVGs for Under 16s

We have significant concern about the proposal to remove PVG membership for individuals under the age of 16. Young people often volunteer in roles such as befriending, sports coaching or peer support which usually require a disclosure check or PVG membership.

Research completed by Volunteer Scotland in 2014 demonstrated that more than half of young people aged 11-18 volunteered in the previous 12 months. The Scottish Government is committed to improving volunteering rates with young people and commissioned a national youth volunteering design team to contribute to the implementation of the Volunteering for All National Framework.

To confirm this, several of our members highlighted examples of young people volunteering in their organisations. CHAS regularly involve school age volunteers in their hospices, and Befriending Networks shared examples of youth and elderly befriending schemes that are heavily reliant on young volunteers. To presume that young people are incapable or unlikely to fulfil roles where a PVG is required greatly underestimates the potential of young people and does not reflect the current reality.

With this in mind, removing criminal records checks for young people may decrease the likelihood of volunteer involving organisations to recruit young people due to added safeguarding risk, thus undermining the Scottish Governments commitment to encourage volunteering from 'the earliest possible age'.

5. Definition of Regulated work

We have concerns that the proposed definition of 'regulated roles' for individuals working with vulnerable groups, as opposed to 'regulated work' currently, may make it more challenging to determine who needs a PVG, particularly for those in voluntary roles. The vast majority of volunteer roles are unlikely to be included on the list of regulated roles, leaving it open to interpretation.

The 'incidental' principle, whereby an individual is only deemed to be doing regulated work if work with vulnerable groups is part of their 'normal duties', is helpful when determining whether an individual is completing regulated work. The proposed removal of this could again make it more challenging to define regulated voluntary roles.

The proposed definition of vulnerability when identifying protected adults is also problematic because it focuses primarily on health and doesn't reflect other common vulnerabilities such as asylum seeker status, homelessness or old age. It also doesn't take into consideration the vulnerability that arises when an individual comes into contact with certain types of regulated role, particularly advice roles. The imbalance of power resulting from knowledge, and the potential to exploit people, creates a vulnerability in individuals who might not otherwise be considered vulnerable.

Conclusion

To conclude, there are a number of proposals in the Disclosure Bill which have the potential to undermine the Scottish Government's ambitions regarding volunteering in Scotland. The Volunteering for All Outcomes Framework outlines the need to improve equality of participation for volunteering and provide opportunities for people to get involved from a young age. Given the significant number of applicants for Disclosures or PVG membership who are volunteers, it is vital that these concerns are considered carefully.

Shared Lives Plus

Shared Lives Plus welcomes the opportunity to respond to the Education and Skills Committee's Call for Evidence on the Disclosure (Scotland) Bill.

Shared Lives Plus is the UK membership organisation for Shared Lives carers, Shared Lives schemes and Homeshare organisations. All 15 Shared Lives schemes in Scotland are members of Shared Lives Plus, as are many Shared Lives carers. Last year, over 430 people in Scotland used Shared Lives, and this number is growing.

We note that, within the Bill, an "adult placement setting" is defined as "a residential establishment or accommodation occupied exclusively or mainly by individuals aged 18-35". We would wish to highlight the distinctive nature of Shared Lives as a form of Adult Placement.

Shared Lives is a unique form of care, where the care and support provision takes place in the home of a paid carer. Vulnerable adults may live with or visit the self-employed carers' home on a regular basis. Placements are frequently long-term and family life is often shared; there is a blurring of lines between paid-for and voluntary activities. This is especially true for the family of the paid carer, who may have no formal role but by virtue of living together and sharing family life are in a privileged position in relation to the vulnerable adult. Shared Lives arrangements are supervised by a registered Shared Lives scheme, delivered by a local authority or independent provider; these are in turn regulated by the Care Inspectorate, under the Adult Placement regulations.

Shared Lives Plus welcomes in principle the move to regulated roles, which trigger mandatory scheme membership, but we note that Shared Lives/Adult Placement carers are not – unlike foster carers – identified within the list of regulated roles. Paragraph 15 of Schedule 3, which 'makes provision for self-employed individuals providing personal care services', appears to be of particular relevance to Shared Lives carers: "Being engaged by or on behalf of a protected adult to support the protected adult to live independently, including providing personal care services, food preparation or recreational services". Other activities within Part 2 also relevant to the role of Shared Lives carers include, but are not limited to:

- 13. Being engaged in the provision of a domestic service (including cleaning, preparing food, acting as a caretaker of premises or carrying out maintenance of premises) that is provided exclusively for protected adults in a hospital, hospice, care home or adult placement setting.
- 14. Being in charge of protected adults
- 20. Being engaged in the provision of cultural, leisure, social or recreational activities for protected adults.

While the disclosure requirements for Shared Lives carers therefore appear clear, we would call for clarity on the position regarding disclosure of other members of the Shared Lives carer's household.

Shared Lives Plus has previously made representations on the importance of the families of Shared Lives carers being subject to at least an enhanced background check. Although not contracted to deliver care, other members of the Shared Lives carer's household have privileged access to vulnerable people, with one-to-one

contact in a private environment, and bonds of trust being developed. We have argued that the privileged position of paid carers' family members living with the vulnerable adult means that they require a level 2 disclosure.

It is our understanding that, as the Bill currently stands, the family of Adult Placement carers would not be subject to a level 2 disclosure. There therefore appears to be an inconsistency between Shared Lives and its only analogous service within the care system: namely, foster care, where family members would be subject to a level 2 disclosure. Given that the key difference between the two services is the age of the vulnerable person, we would wish to ensure that the Bill rectifies this anomaly and that, in terms of protection, there is parity between Shared Lives and child fostering arrangements. It is worth noting that a proportion of Shared Lives carers have transitioned from being foster carers once the person they care for has reached adulthood. It would appear logical for the disclosure regime to afford vulnerable individuals the same level of protection when they reach adulthood and move from foster care to Shared Lives.

For the Committee's information, we would highlight the position in England, where DBS checks can only be carried out on a Shared Lives carer who will be carrying out a regulated activity. Members of the household who are not carrying out a Shared Lives role must not have a DBS check carried out on them by the scheme. However, if a worker from the Shared Lives scheme ticks the 'home based occupation' box on the Shared Lives carer's DBS application form, the police will disclose any relevant information to the Shared Lives scheme if a member of a household will pose a risk to a person using Shared Lives being set up in an arrangement in that household. It should be noted that there are drawbacks to this approach, namely:

- if the Shared Lives scheme makes an online status check on the Shared Lives carer after a period of time, it will not reveal any new information on members of their household
- if a Shared Lives carer moves to another service, it will not be clear whether the 'home based occupation' box was ticked in their original online DBS application, and it is therefore only possible for the new scheme to check the status of the main Shared Lives carer and not the rest of their household.

Despite these drawbacks, this practical approach does help provide an enhanced level of protection for vulnerable adults using Shared Lives services, and it is worth noting that this is currently lacking in Scotland.

Ultimately, however, Shared Lives Plus would call for clarity and consistency in the approach taken to providing level 2 disclosures for family members of foster carers, and family members of Shared Lives carers. We would see an amendment to the bill as being the most appropriate means of ensuring the necessary protection for vulnerable adults using Shared Lives services.

Panel 2

Business in the Community (BITC)

About us

Business in the Community is the oldest and largest business-led membership organisation dedicated to responsible business. We were created nearly 40 years ago by HRH The Prince of Wales to champion responsible business.

We inspire, engage and challenge members and we mobilise that collective strength as a force for good in society to:

- Create a skilled, inclusive workforce today and for the future
- Build thriving communities in which to live and work
- Innovate to repair and sustain our planet.

Today, we have a vibrant membership of hundreds of businesses, large and small, connected by the conviction that their success is inextricably linked to society's prosperity.

Business in the Community and Ban the Box

Business in the Community has long been an advocate of removing barriers to employment for people with criminal convictions. With Walgreens Boots Alliance, we set up the national Reducing Reoffending through Employment Network in 2012 and launched the Ban the Box campaign in the UK in 2013. The campaign urges employers to remove the tick box from application forms that asks about criminal convictions and to decide whether, when and how best to ask for that information later in the recruitment process. The campaign has gained traction nationally, with more than 130 employers currently signed up, covering more than 187,000 roles. It has been adopted by the Civil Service in England and features in the Ministry of Justice's employer guide.

The campaign was officially launched in Scotland on its 5th anniversary in 2018. Since then Business in the Community has joined Release Scotland Steering Group. Now Ban the Box is promoted as part of the Release Scotland approach to recruitment.

Responsible business perspective

Business in the Community welcomes the direction of the Disclosure (Scotland) Bill, especially its focus on rehabilitation and the removal of barriers to work for people with criminal convictions. Its aim to strike a balance between rehabilitation and safeguarding is also to be commended, as is the empowerment of individuals to have control over their data.

Our member businesses engaged in inclusive employment are proactive in providing opportunities to people with criminal convictions and removing barriers in their recruitment processes. These businesses have seen the powerful impact employment has on individuals' lives and are aware of its role in reducing reoffending.

Ban the Box is a meaningful way that employers can indicate their willingness to open up their mainstream recruitment practices to people with criminal convictions. It is aligned to the rehabilitation aspect of the proposed Disclosure (Scotland) Bill.

We would encourage the Scottish Government to adopt the Ban the Box commitment and promote it as part of the Disclosure (Scotland) Bill and surrounding communications. This could be done through signposting by organisations such as Scottish Enterprise, Highlands and Islands Enterprise and the South of Scotland Enterprise agencies.

Whilst we welcome the direction of the Bill, we do have some further comments and recommendations for the Scottish Government as they consider this Bill. Our aim is to ensure it creates a system that supports employers and individuals as they contribute to an inclusive, diverse workforce as part of a vibrant wellbeing economy in Scotland.

Response to specific aspects of the bill

The Disclosure (Scotland) Bill will seek to make the following changes to current provisions which we believe are relevant to employers.

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). ‘Regulated roles’ will be synonymous with roles holding power or influence over children or adults who are vulnerable as a result of receiving a service;

BITC agrees that the concept of ‘doing regulated work versus regulated roles’ to trigger a PVG scheme membership requirement is a good one, as job duties can vary widely from role titles. However, this change does require clear guidance for where responsibility lies to trigger the PVG scheme application and how and when this should be done. For example, how regularly does the individual need to ‘do regulated work’ in order to require a PVG, and whose responsibility is it to know that the work is regulated and will trigger the PVG scheme? What guidance will be given to large and small businesses on this change and who will provide it? Who will determine the level of influence on vulnerable groups which will trigger a classification of regulated work? Especially for small organisations who lack a dedicated HR function, clear guidance and support is essential to ensure the law is being followed, as well as to give confidence to employers that they are doing the right thing.

Reducing four main levels of disclosure (basic, standard, enhanced and PVG) to two (Level 1 and Level 2). The ten products offered under the current structure that contain vetting information will be reduced to four within the new two-level structure, plus ‘confirmation of scheme membership’ as a replacement for the ‘statement of scheme membership’;

BITC welcomes the simplification of a complex system. A two-tier approach will make it clearer for businesses to understand when and why checks are needed and should improve the effectiveness of the scheme.

Changing the period after which an application can be made for removal of a conviction for an offence on schedule 8A of the 1997 Act (now re-stated and amended in List A of schedule 1 in the Bill). In relation to spent convictions for offences currently listed on schedule 8B of the 1997 Act (re-stated and amended in List B, set out in schedule 2 of the Bill), the disclosure period will be shortened. The process for asking for convictions to be removed from a disclosure will be in the form of an internal application to Disclosure Scotland for removal, followed by a right to

apply for review by the independent reviewer and from there an appeal to the sheriff on a point of law;

BITC agrees with this change and believes that this will assist rehabilitated individuals in securing work and will remove one of the barriers they face to employment due to bias.

There will be new rules on the disclosure of convictions obtained by a person whilst under the age of 18. These will prevent automatic disclosure of such convictions. Instead an assessment will be made as to whether such convictions should be disclosed, and this will be subject to a right of review by the independent reviewer.

BITC agrees with this change and believes that this will assist individuals making the transition to adulthood without the negative narrative from childhood prosecutions serving as a barrier in the next stage of life. Responsible employers will welcome details that no longer have a bearing on employment risk being taken out of the equation when considering prospective employees.

All products available via online application. Digital certificates with one “certificate” produced which the applicant can then share. Applicants for disclosure will need to explicitly consent for their disclosure to be shared with a third party.

BITC sees the benefits from a digital system, including reducing wait-times for employers going through this process. However, it is essential to remember that as Scotland has a diverse and disparate economic landscape, many businesses (and predominately SMEs) do not have access to reliable and fast internet, and therefore the system design should consider those with slower connection speeds and those who require an analogue interface.

Whilst we welcome the right of individuals to view their data before prospective or current employers, we recognise that there is the potential for this to slow the process down should the individual request changes to their data. Guidance for individuals and employers on both the opportunity to review and request changes, and the potential implications of decisions made around this to the process, must be provided, with responsibility for this provision being transparently assigned for accountability.

Revised fee structure for which further consultation will be required. Free checks for qualifying volunteers will continue

Given the changes to the law in regard to ‘doing regulated work’ versus ‘regulated roles’ and the potential for this to mean that employers are triggering the PVG scheme more frequently as people’s roles mutate over time in and out of the system, it is essential that the consultation on fee structures takes this into account. The Disclosure (Scotland) scheme should be intended to balance rehabilitation of the individual with safeguarding of the community but should not create barriers for employers, especially SMEs, from supporting the rehabilitation through the provision of employment opportunities. If the fee structure proves too prohibitive, employers may change how they design roles in a way that restricts opportunities for progression as well as restrict their willingness to recruit people with convictions.

Dr Cynthia Marks, Senior Manager – Policy and Operations
Business in the Community Scotland

Community Justice Scotland

Community Justice Scotland (CJS) welcome the opportunity to comment on the Disclosure (Scotland) Bill (the Bill). As Scotland's national body for community justice, we have a strong interest in supporting improvements to systems and processes that can help foster people's rehabilitation and reintegration into their communities, helping make Scotland safer. Access to employment, learning and volunteering are all routes to providing people with the opportunity to reintegrate successfully, to aid their rehabilitation and ultimately to reduce the likelihood of further offending.

We recognise that the disclosure regime in Scotland is complex, affected by a range of legislation including the recent Management of Offenders and Age of Criminal Responsibility Acts and that such complexity creates confusion for many. Simplification of this landscape is critical to ensure that people with convictions are afforded opportunities to move on with their lives. It is particularly important that people also understand when a conviction becomes spent and is no longer required to be disclosed¹. The provision of accessible guidance will be important in ensuring the effective implementation of the new system.

Supporting people's rehabilitation journey

As we have outlined previously², 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, as shown in our Second Chancers campaign.³

People with convictions who have concluded their sentences and are trying to reintegrate into their communities often face stigma and barriers to attaining employment and education as well as volunteering opportunities, access to insurance and visas which could support their future employability. Fear of such negative treatment can mean people with convictions self-select out of potential opportunities.

In contrast, employment opportunities contribute to a host of other positive outcomes related to wellbeing, including improved physical and mental health and moving out of poverty, not just for the individual but for their families too.

We welcome the principles underpinning the Bill of simplification and privacy and recognise many of the provisions within this legislation represent a significant shift towards a more progressive, proportionate and sustainable system for identifying potential risk as well as reducing barriers to people with convictions accessing

¹ Punishment in Instalments: Understanding and navigating the disclosure and conviction process, Community Justice Scotland, June 2019 https://communityjustice.scot/reports_and_stats/punishment-in-instalments-understanding-and-navigating-the-disclosure-and-conviction-process/

² <https://communityjustice.scot/wp-content/uploads/2018/07/Letter-to-Disclosure-Scotland-PVG-response-July-2018.pdf>

³ Second Chancers Campaign, Community Justice Scotland, 2018 <https://secondchancers.tv/>

education and employment. We acknowledge the desire of the Government to balance the need for adequate safeguarding of vulnerable people while helping to reduce the stigma that people with convictions may face.

Our submission relates only to the following areas, highlighting where we feel the Bill contains welcome proposals and where we feel there may be further consideration required.

Reduced periods for Disclosure

Reducing the periods for which people have to disclose prior convictions is a welcome development which will facilitate the reintegration of people into their communities following the completion of their sentence whilst also taking due account of the needs of vulnerable people in our communities who require safeguarding. We note however that the proposed timeframes remain lengthy. It is clear from research that after a period of 7-10 years with no further convictions, a person with a historic conviction presents no greater risk than those without a conviction.

Applicants seeing their disclosure first, and routes to appeal

The proposal to allow applicants to see their disclosure and where appropriate to be able to appeal its contents before it is submitted to a prospective employer is welcomed. We would support the development of specific easily accessible guidance to inform people about this change and the steps they should take if they wish to make an appeal. Any lengthy delays in providing information from Disclosure Scotland to an employer could act as a proxy signal that there is matter under consideration which may undermine an applicant. A commitment to maximum time periods for treatment of appeals would be welcomed as would a guarantee that this is cost-free, to ensure financial considerations do not deter people from attempts to get jobs.

Disclosure of childhood convictions

We strongly support the move to not automatically disclose convictions that happened when a young person was under the age of 18. This is in line with the positive progress Scotland has made in bringing legislation into line with evidence and best practice about young people who offend, including the planned incorporation of the United Nation's Convention of the Rights of the Child into Scots law. This at a stroke would reduce the likelihood that people will experience discrimination based on events that happened when they were a child, which have no reflection on their current or future potential to work or study as fully rehabilitated adults. Acknowledging rehabilitation in our justice system is important. As stated in the submission by the Centre for Youth and Criminal Justice (CYCJ), it is also important that 'children have the right to "move on" from offending behaviour and to put offences committed in childhood behind them'.⁴

We do have a note of caution – we recognise that there is a necessity for a mechanism to disclose conviction or non-conviction information of an extreme or exceptional nature, as is afforded by the ability to disclose information as Other Relevant Information (ORI). We are concerned however that without clear and

⁴ Submission from Centre for Youth and Criminal Justice, University of Strathclyde, to Scottish Parliament Education & Skills Committee, August 2019.

rigorous guidelines relating to balancing public protection with the rights of the individual, this mechanism is open to encouraging over-disclosure. Any consideration for listing (barring), disclosure, or appeal must be taken by professionals highly trained in risk assessment and the evidence base for association between previous offending and future risk.

As evidenced in the CYCJ submission, the fact that childhood convictions (including those of now adults) will be listed under a separate heading to distinguish from adult offending conveys an important message. Young people aged under 18 at the time of offence are often over 18 when their cases are considered and dealt with in court so age at the date when an offence was committed should be the determining factor.

Other relevant information (ORI)

The Bill continues to allow for ORI held by the police to be shared with an employer. Such powers in relation to ORI should be clearly defined. Without clear statutory guidance and evidence-based processes and guidance for decision makers, the ORI system creates an opportunity for retrospective criminalisation through the back door. Cultural atmospheres are changeable and subject to anxieties which grow with high profile cases of extreme behaviour, even if such incidents are rare. We recognise the need to have a disclosure system that can cope with such serious cases. Without robust and justifiable guidance based on evidence, however, there is a risk for disclosures to be vulnerable to the same shifts in response to public opinion that we have seen elsewhere.

Representation, review and appeal

We welcome the provisions within the Bill relating to reviewable information including rights of review, representation, and appeal; efforts to streamline these processes and mechanisms; and the commitment to make guidance available. For people to take advantage of such opportunities, such guidance will need to be developed which is easily-accessible and understandable.

Proposed criminal penalty

The suggestion that an individual is deemed to have committed an offence by failing to renew their scheme membership is disproportionate and could create the unintended consequence of criminalising more people.

Given the new arrangements are a departure from existing practice and rely on Disclosure Scotland being able to contact people primarily by digital means to remind them that a renewal of membership will be due, there needs to be some transition arrangement proportionate to a shift away from a life-time scheme to a 5-yearly renewal procedure, coupled with a communications campaign to inform employers and individuals of what the new regime entails.

Also, there would need to be some guarantee that people will not be penalised due to the failure of electronic systems/administration to be fully operational as this new regime will also create a different and additional administrative burden on Disclosure Scotland too.

Potential lack of consistency with existing Government policy

The proposed penalty of a new offence with a custodial sentence of up to 12 months in cases when people fail to renew their PVG (Protecting Vulnerable Groups) scheme membership every 5 years is inconsistent with the recent extension of the

Presumption Against Short Sentences (PASS) approved by the Scottish Parliament. It is also out of step with PASS's policy objective that the most appropriate use of custody is primarily for cases where the crime committed has caused serious harm. Not only may this not always be the case when people fail to keep their paperwork up to date, the proposal will have the consequence of net-widening criminality when the existing practice (lifetime monitoring) effectively ensures that this would not happen.

Fees

We are also concerned that the cost of repeated applications for membership of the PVG disclosure scheme may be prohibitive and we look forward to the consultation around fees levels in due course.

Whilst we note that the purpose of this proposal is largely to cut down on ongoing (lifetime) monitoring of people on the PVG scheme which comes at a cost to Disclosure Scotland and which they state may constitute an unnecessary intrusion into the lives of people who no longer do such regulated work, the proposed change may result in further administration costs for employers, voluntary and third sector organisations

We do however welcome indications that volunteers would not be required to pay for such costs given the important role that voluntary work has in supporting employability and in helping people to achieve their best outcomes.

Unnecessary requests for disclosure

We appreciate that Disclosure Scotland has to cover its costs but would caution that the new regime must also tackle disproportionate and unnecessary requests for disclosure by employers. It would be worth clarifying whether the Bill will permit Disclosure Scotland to reject applications to provide disclosures for roles that do not require regulation. Or, can any organisation still request disclosure checks regardless of the content of the role being undertaken?

We would wish to highlight the conclusions of a recent research review paper⁵ by Dr Beth Weaver from the University of Strathclyde which states that 'the use of criminal record background checks by employers has become increasingly pervasive' and that 'having a criminal record can 'have significant effects on employment prospects producing 'invisible punishment' or collateral consequences' of contact with the justice system'. Such a blanket approach towards disclosure by employers inhibits the ability of people with convictions to reintegrate.

We agree that regulated roles should be based on assessment of power, influence and dynamic of the relationship (e.g. a football coach). We do however anticipate that incorporating all roles within the proposed assessment tool may prove challenging, particularly as we understand it may require self-declaration. We would welcome being involved in any future consultation on the development of such a tool.

⁵ Time for Policy Redemption? A review of the evidence on disclosure of criminal records, Dr Beth Weaver, University of Strathclyde (2018) http://www.sccjr.ac.uk/wp-content/uploads/2018/03/Weaver_Time-ForPolicy-Redemption1.pdf

Howard League Scotland

We have previously submitted evidence in relation to associated consultations, including the Management of Offenders Bill ([HLS, 2018](#)), and the Minimum Age of Criminal Responsibility ([HLS, 2016](#)), on which the Disclosure (Scotland) Bill (hereafter ‘the Bill’) seeks to build. We welcome the opportunity to respond to this call for evidence by the Scottish Parliament’s Education and Skills Committee on the Bill, which sets out a series of proposed changes to the existing Disclosure and PVG scheme with the aim of achieving a more proportionate and individualised process that balances safeguarding the public with the rights of individuals to move on from previous offending behaviour. We recognise that the Bill was preceded by an extensive [national consultation](#) on the proposed changes, and takes cognisance of the responses submitted. In what follows, our submission attends to the following areas: Childhood Convictions: Individualising Disclosures; the use of Other Relevant Information (ORI); Representation, Review and Appeal; Removable and Non-Disclosable Convictions.

Childhood Convictions: Individualising Disclosure

HLS welcomes the provisions in the Bill that accommodate a more progressive approach to the disclosure of childhood convictions. We refer, in particular, to those provisions that treat childhood convictions as a separate category distinct from convictions accrued in adulthood, and which limit the disclosure of information relating to children, and as part of that, the automatic disclosure of convictions acquired between the ages of 12-17 years of age.

We also welcome the introduction of an individualised and structured discretionary approach to any decision to include childhood conviction information on Level 1 and 2 products. This is important in balancing the rights to public protection with upholding the rights of individuals with convictions. This is critical to compliance with article 8 of the ECHR, but it is likely to require the issuance of clear guidance to inform this decision-making process to promote consistency and allow for transparency and evaluation of decision-making.

HLS would argue that this approach is no less pertinent to the disclosure of adult convictions, but the Bill appears to make no provision for this. Yet, the European Court of Human Rights (ECtHR) would seem to require it and has levelled a number of critiques at the *existing* UK system of disclosure, principally as it pertains to Higher Level or, as proposed in the Bill, Level 2 disclosures. These critiques include: that no distinction with regard to the disclosure of spent convictions is made on the basis of the nature of offence, the disposal of the case, the time elapsed (discussed further below) or the relevance of the data to the employment in question. The significance of these elements to the assessment and contextualisation of the risk associated with convictions in employment contexts is further reflected in guidelines to inform employer decision-making issued by the US Equal Employment Opportunity Commission ([EEOC](#)) in 2012, which we discuss further below.

It has been argued that the mandatory disclosure of all convictions, spent and unspent, on what were formerly referred to as 'higher level disclosures' was disproportionate and did not allow for the exercise of discretion to balance public protection and rights to privacy; and that disclosure should be limited to convictions.⁶ While the proposed reforms have increased individuals' opportunities for review and appeal, and reduced the periods after which convictions may be non-disclosable or potentially removed, the broadly blanket approach to the disclosure of adult convictions is relatively unaltered, and the proposed provisions still allow for the disclosure of non-conviction data. They remain, then, open to critique that they do not reach an appropriate balance. We discuss these concerns in detail below, but, in sum, we contend that even these proposed reforms still fail to meet the main criticisms of the disclosure system in place in the UK from a human rights perspective, not least in that non-conviction data or ORI will still be disclosed.

Other Relevant Information (ORI)

HLS has concerns about the use of ORI. This allows for the disclosure of any material which the Chief Officer 'reasonably believe[s] might be relevant' for the purpose of the disclosure. This *Other Relevant Information* (ORI), also known as 'soft information', is supplied by the Chief Constable of a relevant police force. In practice, ORI or 'soft' information can include allegations, records of arrest and/or charge and/or prosecution, statements by witnesses, cautions, convictions, records of penalty notices for disorder, sentencing reports and so on (Grace, 2014⁷). The practice of disclosing 'soft information' has been criticised (e.g. Baldwin 2012⁸), and judicially challenged with reference to issues of human rights, specifically under Article 8 of the European Convention on Human Rights (ECHR). Baldwin (2012) cites evidence that this has included unsubstantiated claims including information which ultimately resulted in the individual being released without charge; details of a non-applicant's criminal family history (even though the individual was never suspected of any offence); and details of cases which proceeded to court but resulted in an acquittal. Critically, Appleton (2014⁹) reports that 37% of job offers were withdrawn based on such 'non-conviction information'.

We recognise that Disclosure Scotland intend to issue some guidance to inform ORI decision-making and disclosure but, as discussed in Weaver ([2018¹⁰](#)), the mere presence of information can be a barrier in terms of employers operating on a blanket policy of a clean record, rather than weighing up the information against the

⁶ European Court of Human Rights in *MM v United Kingdom* (24029/07), cited in Larrauri Pijoan (2014), n 6 *infra*

⁷ Grace, J., (2014) Old Convictions Never Die, They Just Fade Away: The Permanency of Convictions and Cautions for Criminal Offences in the U.K. *The Journal of Criminal Law* 78: 121-135

⁸ Baldwin, C., (2012) Necessary Intrusion or Criminalising the Innocent? An Exploration of Modern Criminal Vetting. *The Journal of Criminal Law* 76: 140-63

⁹ Appleton, J., (2014) *Checking Up*, London Civitas

¹⁰ Weaver, B., (2018), *Time for policy redemption? A review of the evidence on disclosure of criminal records*, SCCJR and the University of Strathclyde.

https://strathprints.strath.ac.uk/64981/1/Weaver_SCCJR_2018_Time_for_policy_redemption_a_review_of_the_evidence.pdf

nature of the employment. Thus, *if* ORI is to be disclosed, the implications of the information disclosed need to be carefully evaluated in terms of proportionality and necessity to the ends of public protection, against individuals' rights under the ECHR.

While some, such as Laurraui-Pijoan¹¹ (2014), propose that the disclosure of ORI is contrary to the ECHR, others, such as Grace (2014), have argued for the need for a universal set of guiding principles to underpin the disclosure of 'soft' information; otherwise, he contends, public authorities will never be able to catch up as case law will continue to develop fragmentally. Grace (2014: 130) suggests that the following test should apply to the disclosure of soft information to engender greater alignment with Article 8 of the ECHR, which might usefully be provided for within the provisions of the Bill to ensure consistency and transparency:

'Is the information indicative of the (alleged) commission of a *sufficiently serious* offence which it is *reasonably certain* was committed by the individual, that is *currently relevant* to the purpose ... of public protection, and which the individual concerned has had an opportunity to *comment meaningfully* upon (where the information is of an allegation, caution, arrest, charge, or prosecution not resulting in a conviction)?' (italics in original).

HLS also believes that the new Bill should categorically rule out the disclosure of certain kinds of information that may currently be disclosed as 'ORI'. In particular, details of the criminal history of other members of a non-applicant's family, and details of charges on which the person was found 'Not Guilty', should never count as 'ORI'.

We note below the proposed provision for subject representation and formal review, which we welcome, but strongly propose the issuance of clear rights-informed guidelines to streamline decision-making to ensure that if ORI is to be disclosed, it is both proportionate and relevant.

Representation, Review and Appeal

HLS welcomes the provisions in the Bill relating to reviewable data including rights of review, representation and appeal; and the commitment to publish guidelines to enhance consistency in decision-making. With regard to the review processes, while we welcome measures to include representation from the applicant, HLS would like to propose that further consideration is given to providing for an Independent Reviewer on first request for review, rather than a review initially being undertaken by the body whose decision is to be reviewed. For example, where a review is sought in relation to the ORI provided by the Chief Constable, proposed provisions suggest that the application be referred back to the Chief Constable for review to 'decide whether the chief constable still reasonably believes that the information is relevant to the purpose of the disclosure and that it ought to be included' (S.26

¹¹ Larrauri Pijoan, E., (2014) Criminal Record Disclosure and the Right to Privacy *Criminal Law Review* 10: 723-737

Explanatory Notes). It is not clear to HLS why referring back to the body making the initial decision is necessary, even if different personnel might undertake the review. HLS would suggest that, if this does not in itself discourage the applicant from pursuing review, this is likely to result in additional and unnecessary delays to the extent that such a significant delay in disclosure is likely to signal to prospective employers that something is amiss. It would seem to us that in the interests of expediency, justice and independent scrutiny, the first line of review *in each instance in which a review is sought* should be undertaken by the Independent Reviewer, and that clear time-scales for review should be issued. In our view, this would allow for a greater level of independent scrutiny of decision-making.

Removable and Non-Disclosable Convictions

HLS welcome the provisions contained in the Bill for reducing, by four years for adult convictions and two years for childhood convictions, the period after which a conviction may become non-disclosable or an application for removal by the subject can be made. We do however have a number of points of query relating to this process. Firstly, we remain concerned about the 11-year time frame, and how this was arrived at. For example, in the Bill, List B convictions acquired as an adult will be disclosed for 11 years, becoming non-disclosable thereafter. ‘Time to Redemption’ studies empirically investigate the period of time when people with convictions can statistically be considered as exhibiting the same risk of reconviction as people with no convictions. The key question that these studies seek to answer is this: How many years of non-offending does it take for a person with convictions to resemble a person without convictions in terms of his or her probability of offending? Key to this is establishing that the base-line risk level of a non-convicted person is not zero because they have a certain probability of offending (Soothill and Francis, 2009¹²). Non-convicted persons are those who have never been convicted, which is different to saying that they have never committed an offence. Moreover, the absence of convictions does not preclude the potential to commit a crime and acquire a conviction in the future (e.g. Soothill, Ackerley and Francis, 2004¹³; Soothill and Francis, 2009). Taken together, these studies *conservatively* estimate that *in general* after an average of 7-10 years without a new arrest or conviction, a person’s criminal record essentially loses its predictive value (Blumstein and Nakamura, 2009¹⁴;

¹² Soothill, K., and Francis, B., (2009), When do Ex-Offenders Become Like Non-Offenders? *The Howard Journal* 48(4) 373-387

¹³ Soothill, K., Ackerley, E. and Francis, B., (2004) Profiles of Crime Recruitment: Changing Patterns Over Time, *British Journal of Criminology*, 44, 401–18.

¹⁴ Blumstein A, Cohen J, Roth J.A and Visher C.A (Eds) (1986) *Criminal Careers and ‘Career Criminals’* Washington DC: National Academy Press.

Bushway, et al., 2011¹⁵; Kurlychek et al., 2006¹⁶; 2007¹⁷; Soothill and Francis, 2009; for a detailed review of this research, see Weaver, 2018). This raises questions around the disclosure of spent convictions, ostensibly for the purposes of public protection, in circumstances where the evidence would suggest that the individual is statistically no more likely than members of the non-convicted population to commit crimes in the future. While noting that in Europe spent convictions are *not* disclosed (see Weaver, 2018), HLS therefore suggests that the 11-year time scale should at least be reduced to reflect the evidence.

Secondly, and building on the above, if an adult obtains a conviction for Theft, a List B offence Sch.2 part 1 under the Bill, and is sentenced to a Community Payback Order, comprising a 12-month Supervision Requirement, that conviction will become spent on conclusion of the Supervision Requirement, at 12 months, under the Management of Offenders (Scotland) Bill, as passed. The rehabilitation period, now disclosure period, is concluded and the individual is no longer required to disclose this under the Act; it is spent. What then is the rationale for continuing to disclose this conviction under the Disclosure arrangements if there is scope for it to be removed before then under the new provisions of the Bill (s.14), e.g, ten years earlier, and if the sentence accompanying the conviction is intended, at least, to convey the severity of the offence? Not only does this uniform approach to extending the disclosure period appear to be at odds with the ECHR and with recent reforms to the Rehabilitation of Offenders Act, 1974, but it further highlights the need to ensure that the Bill makes provision and issues statutory guidelines for a more individualised and nuanced approach to the disclosure of spent convictions.

Here, then, we refer again to the guidance document issued by the US Equal Employment Opportunity Commission (EEOC) in 2012. While this document was designed to clarify standards and provide 'best practice' on how employers may check criminal backgrounds without violating prohibitions against employment discrimination under Title VII of the 1964 Civil Rights Act (EEOC 2012), it has much to commend it in relation to considerations surrounding the disclosure of spent convictions. It proposes that employers are provided with information on criminal records on an individualised basis, considering factors such as the nature of the crime, the time elapsed since it was committed, and the nature of the job (Lageson, Vuolo, Uggen, 2015¹⁸), and to which we would add, the disposal attached to the conviction which is assumed, under the ROA, to reflect the severity of the offence. While we recognise that such an approach is likely to increase workloads and

¹⁵ Bushway, S.D., Nieuwbeerta, P., and Blokland, A., (2011) The Predictive Value of Criminal Record Background Checks: Do Age and Criminal History Affect Time to Redemption. *Criminology* 49(1) 27-60

¹⁶ Kurlychek M.C., Brame, R., and Bushway, S.D., (2006) Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending? *Criminology and Public Policy* 5(3): 483-504

¹⁷ Kurlychek M.C., Brame, R., and Bushway, S.D., (2007) Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement. *Crime and Delinquency* 53(1):64-83

¹⁸ Lageson, S.E., Vuolo, M., and Uggen, C., (2015) Legal Ambiguity in Managerial Assessments of Criminal Records. *Law and Social Inquiry* 40 (1) 175-204

responsibilities for Disclosure Scotland, the issuance of related guidelines that allow for both an individualised and consistent framework to inform decisions to disclose would allow Scotland to progress more closely towards a system that is in keeping with other European practices (on which see Weaver, 2018), and the ECHR, and circumvent the need for two different lists of offences, A and B, which, in part, undermines the aspirations of the proposed reforms to reduce the complexity of the disclosure system, for employers and applicants.

Thirdly, we are unclear why the responsibility for application for consideration of the removal of the conviction is placed on the individual, who may find this system of disclosure an onerous and complex system to navigate and comprehend. If this provision intends to bring Scotland into closer alignment with a rights-based approach, ought not the responsibility to be placed on Disclosure Scotland to review the relevancy of the continued disclosure of such convictions once they are spent? This raises the further question of why the subject is also required to pay a fee for consideration of the removal of the conviction: this requirement puts yet another barrier in the way of those with very limited means.

Finally, to ensure that people with convictions are aware of their rights to apply for the removal of convictions from disclosure, this will need to be coupled with an assertive, national level, public education strategy and the production of easily accessible information as to how such processes can be set in motion.

Concluding Comments

HLS recognises that there is much to commend in the progressive aspirations of the Bill. In addition to the foregoing, we note the aspiration to simplify the process of disclosure for various stakeholders, which includes reducing the number of products and adding the option of online-based applications. There remain, however, key areas for development, which include:

- The development of an individualised and nuanced approach to the disclosure of *all* spent convictions, not just those accrued in childhood.
- The publication of clear time-frames, guidance and procedures to inform, regulate and evaluate decision-making processes pertaining to a) the disclosure of *both* conviction and non-conviction data (e.g. ORI) b) review processes c) removal of convictions. This guidance might be informed in accordance with ECtHR rulings, EEOC (2012) guidelines and Grace (2014) recommendations, with particular regard to the salience of a) the nature of the offence; b) time lapsed; c) nature of disposal; d) severity of offence; e) nature of regulated role.
- Consideration should be given to providing for an Independent Reviewer to undertake all first requests for reviews.
- A review of the disclosure of ORI or non-conviction data.
- A review of the responsibility on the subject to apply for the removal of convictions and the removal of fees attached to this process.

Recruit with Conviction

Recruit With Conviction Ltd is a Scottish social enterprise specialising in smoothing pathways to safe, suitable and sustainable employment for people with convictions.

Recruit With Conviction is funded through the delivery of training, research and consultancy services to public private and third sector partners.

The core work of Recruit With Conviction is the facilitation of professional workshops for recruiters and the community justice workforce and the development of local networks which build bridges between labour market supply and demand sides for people with convictions. Each workshop we undertake acts as an action research contribution to our wider knowledge base. We have facilitated such workshops throughout Scotland and England with hundreds attending each year.

Other research activities include the Study With Conviction action research project with Scottish Tertiary Education Partners in 2015/16 and transnational research such as our Learning in Prisons project 2012-2015.

The principle of automatic removal of the convictions of children & young people is welcomed and consideration should be given to the submission by the Centre for Youth & Criminal Justice in regard to such convictions.

We recognise the development of the Bill prior to this stage and would again refer to our previous pre-bill submission in regard to the principles of the Bill.

This has been supplemented by the following concerns as to the longer-term accessibility and potential impacts of the future Disclosure system as detailed within the Bill.

Widening of membership

While the need to ensure the safety of the vulnerable is accepted as paramount the increased use of Disclosure in recruitment will detrimentally impact on those with previous convictions and their access to employment even when passed as a fit person.

It is understood that this has not been the intention however it has been our experience through work with those using the current PVG systems that recruiting staff show significant concerns over new applicants where information is disclosed.

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.

For applicants who have information to disclose there is a belief that any conviction disclosure will be a bar and individuals will self-de-select from forms of regulated work. The increased use of the regulatory system will further impact on those seeking employment as it will be the expectation that a greater number of occupations will no longer be accessible due to the requirements of membership.

Access to information

Under the terms of the General Data Protection Regulation (2018) the ability for individual to access their own information from Police Scotland has been made free of charge allowing for individuals to with specialist support to understand the information held and any likely disclosure in terms of employment. This core principle of free access to data held will be lessened by the payments required for membership and will act as a barrier to those seeking employment.

It is welcomed that access for volunteers through the existing systems to allow for free membership is continued, however the issues raised of those seeking work with the vulnerable are lessened by a full understanding of what information will be disclosed prior to application.

The access to non-police sensitive information should therefore be free at the point of access to those who are not seeking vexatious or criminal advantage as a maintenance of the rights of individuals to their information.

Removal of historic convictions

The current system for possible removal of historic conviction information as detailed within the 2015 amendments to the PVG (Act) 07 while welcome has not been viewed as successful. The management of these processes is seen as overly complex and not accessible to those who it is intended to benefit.

The low numbers of removals within the system have been documented in the Punishment in Instalments [Report](#) where of 346 first stage applications for removal only 4 have been examined with 3 retained & 1 removal.

The lack of understanding by individuals of their rights of protection from historic offences is not understood and although the bill has the intention of improving this system there are concerns over both any administration process and the independence of those making such decisions.

Delays of information

Due to the nature of increasing the scope of occupations involved in the system and the processes detailed there is a concern that this is likely to result in delays in receiving information by employers.

While this is again understood as not being intentional and difficult to manage any delays of receipt of clearance are very likely to be viewed by employers as a reason for further investigation or concerns over an applicant. Our experience with employers has been that this is most likely to lead to removal of employment offers as questions have been raised and the perception of risks are consequently higher.

Independent verification & appeals

The objective use of Other Relevant Information within the current PVG process and developments within the Bill are accepted as a methodology for a more proportionate response to the use of conviction information.

The planned use of an independent verifier allows for a distanced viewpoint on initial ORI, appeals both against decisions & historic removals is an important step. The independence of this must however be maintained and be clearly distanced from Disclosure Scotland as an agency.

The role should be further enhanced by allowing for the verifier to act as a method of evaluation of the expanded disclosure system with the consequential ability to challenge procedures as they develop.

The verification process and its associated timescales should be made clear to all those involved within the new system as a means of addressing the concerns over delays as described.

Both by providing this tangible distance and constructive oversight any concerns over the independence should be alleviated and confidence in the decision-making process a being part of a progressive approach to safety and security of the vulnerable.

In closing the Disclosure (Scotland) Bill has made a strong start to the development of a more modern approach to higher levels disclosures and we look forward to the ongoing discussions of its development.

Dughall Laing
Director
Recruit With Conviction
19/8/19

Scottish Women's Aid

About

Scottish Women's Aid ("SWA") is the lead organisation in Scotland working to prevent and eradicate domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. SWA is the umbrella organisation for 36 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our network members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

Introduction

We welcome the opportunity to comment on this Bill. Protecting and encouraging people with convictions into the job market and ensuring that they are not discriminated against is commendable. However, this can only be done within the confines of an unambiguous and robust framework preventing those who are unsuitable to work with vulnerable adults and children from gaining posts allowing them access to this group. 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. Ensuring the protection of women, children and young people experiencing domestic abuse in their engagement with services is our paramount consideration so we have a keen interest in ensuring that the reforms are both equitable and in no way diminish the existing protective and barring function of the PVG Scheme.

The main focus of our written submission relates to regulated work with adults and the definition of "*protected adult*."

Section 76- Meaning of Protected Adult and Schedule 4- Regulated Roles with Adults

The current PVG Scheme looks at activities and certain defined types of service received by an individual, as opposed to any particular disability or impairment making the adult vulnerable. The existing definition of "*protected adult*," under section 94 of the Protection of Vulnerable Groups (Scotland) Act 2007 ("POVG Act"), is expressed with reference to the nature of the services accessed by that adult, namely as "*... an individual aged 16 or over who is provided with—*

(a) a service by a person carrying on—

(i) a support service, (ii) an adult placement service, (iii) a care home service, or (iv) a housing support service, which is registered under [F1 Part 5 of the 2010 Act],

(b) a prescribed service—... "(c) a community care service...

(d) a prescribed welfare service.... welfare service" includes any service which provides support, assistance, advice or counselling to individuals with particular needs."

We expressed concerns with the proposals in the 2018 consultation to redefine the meaning of “protected adult” by focussing exclusively on the particular personal characteristics of a person. This listed vulnerability through “disability or illness”, an approach the Scottish Government avoided in the existing PVG Scheme, instead identifying “protected adults” by their *particular needs* and by the service they receive. Our issue was that focussing heavily on disability or illness created a loophole, as this definition would not automatically cover women experiencing domestic abuse who do not otherwise have such conditions but are equally vulnerable, at risk and open to exploitation.

Unfortunately, section 76 of the Bill reflects the consultation proposals to narrow the definition of a protected adult in respect of whom workers would have to be PVG Scheme regulated, and therefore, diminishes the protective powers of the POVG legislation, as follows

“, 76- Meaning of “protected adult”

(1) Section 94 (meaning of “protected adult”) of the PVG Act is amended as follows.

(2) In subsection (1) for the words from “an individual” to the end of that subsection 5 substitute “(a) an individual aged 18 or over who, by reason of physical or mental disability, illness or old age—

(i) has significantly impaired ability to protect themselves from physical or psychological harm, or

, i) requires assistance with the activities of daily living, and

(b) in relation to a regulated role with adults that involves the carrying out of activities mentioned in one or more of paragraphs 6 to 12 of Part 2 of schedule 3 (health care), an individual aged 18 or over who is being provided with a prescribed health service.”.

(3) Subsections (3) to (5) are repealed. “

In respect of regulating work with adults, section 76 limits the protection of the legislation to adults regarded as being vulnerable due to a “personal” condition. This is defined as a mental or physical disability, illness or old age, and the fact that they need assistance solely due to these characteristics, removing the references to community care services and welfare services in the current legislation. This is neither a constructive nor helpful revision, since the definition will essentially revert to the approach rejected when the PVG legislation was originally created.

Significantly, it will have the unforeseen consequence of excluding significant numbers of adults, without mental or physical disabilities, who require protection when accessing services and who are currently protected under the existing POVG legislation. The personal circumstances that they find themselves in and the nature of the services they are accessing make them equally vulnerable, at risk and open to exploitation without the presence of a mental or physical disability or any vulnerability due to a “personal condition” or “capacity” issue.

For SWA, this is a specific issue for the safety and security of women experiencing domestic abuse who are accessing refuge accommodation and support services and/or other temporary accommodation services, for example homeless hostels, “bed and breakfast” accommodation, along with the accompanying housing support and other services.

It has been suggested that the problem with the “protected adult” definition is alleviated by provisions in other parts of the Bill but closer inspection of the wording proves otherwise. For instance, the references in paragraph 16, in Part 2, Schedule 4 to “support services” was proposed as being sufficient to include housing and other support services within the definition of regulated roles. However, while paragraph 16 does, indeed, state that a regulated role with adults will include “...Providing counselling, therapy or support services to protected adults, other than where such services are provided in a prison by a prisoner to another prisoner...”, the revised definition of “protected adult” will still restrict the scope of “support services” governed by this provision, so this is not appropriate. A further observation is that “counselling” may not cover workers in third sector organisations supporting women and children experiencing domestic abuse or victims of crime generally, nor organisations delivering advocacy services, both formal, court-ordered and third sector, as these are not “counselling services” either.

Similarly, a reference to “independent living services” at paragraph 15 of the same Schedule will not cover homelessness services and support. Firstly, again, due to the definition of “protected adult” and also because the term “independent living services” does not describe homelessness or temporary homelessness services and ancillary support work.

We were also directed to paragraph 5, Part 2 of Schedule 4 in the Bill, defining regulated roles with adults, which makes reference to “...*Providing advice or guidance to a protected adult in relation to education, training, career development, employability, health or wellbeing...*”, on the grounds that “*wellbeing*” would be sufficient for our purposes. “Wellbeing” is a very nebulous term and not appropriate to cover the services and support we are seeking to include, particularly when the legislation links “wellbeing” health services. While the policy intention may be to move away from lengthy and complex definition, the reality is that focussing on issues affecting a person’s “wellbeing, capabilities and capacity” excludes a vast swathe of people outside this very particular health-orientated characterisation.

To address this anomaly, section 76 of the Bill requires to be re-written to replicate the coverage of the existing section 94 and the full spectrum of services within which regulated roles in respect of “protected adults” would exist. This means adding back a reference to people accessing support services, community care services and prescribed welfare services, to both section 76 and the accompanying Explanatory Notes, where a non-exhaustive list of relevant and prescribed services and roles should be included, ensuring that housing support and accommodation services are covered.

Similarly paragraph 5, Part 2 of Schedule 4 in the Bill, defining regulated roles with adults, should be expanded to include providing support services, housing support services, temporary accommodation services, community care services and welfare services and services regulated by the Regulation of Care (Scotland) Act 2001/Care Inspectorate. The current guidance on these services, which makes specific reference to refuge services in the context of welfare services, is at <https://www2.gov.scot/resource/doc/316712/0100858.pdf>

These amendments accord with the Scottish Government's intentions to ensure "well-regulated" temporary accommodation services, as expressed in their ongoing consultation on improving temporary accommodation standards - see <https://www.gov.scot/publications/consultation-improving-temporary-accommodation-standards/>

We have two further observations on the definition of "*protected adult*" and relevant regulated roles, as follows: -

- The reference to "*significant*" impairment in section 94 is also likely to exclude vulnerable people from protection. "*Significant*" is not defined, will likely fall foul of equality requirements and should be removed.
- The Explanatory Notes for paragraph 22 of Part 2, Schedule 4 should explicitly provide that, for the avoidance of doubt, "*holding a position of responsibility*", as set out in that paragraph includes those in trustee, governance and managerial positions, similar to the provisions described on pages 79 and 80 of the Notes relating to regulated roles with children.

Regulated roles with children - Schedule 3, Part 2

In Schedule 3, Part 2, it is not clear from the wording describing the various regulated activities, particularly those in paragraphs 21 and 24, that children's support services provided during the day at refuges are specifically included. A previous reference had been to services regulated by the, then, Care Commission and it would be helpful for the Bill's Explanatory Notes to clarify that, generally for services provided to children, a regulated role could be "...*provision of a service for children regulated by the Regulation of Care (Scotland) Act 2001 or the Care Inspectorate...*"

Schedule 1- List A offences

In our response to the earlier consultation paper, we identified certain relevant offences missing from the "Schedule 8A Listing" and are pleased to see that these are now specifically included in the Bill's List A. These are as follows: - offences relating to domestic abuse at paragraphs 20- 22, specifically section 1 of the 2018 Act; offences relating to forced marriage at paragraphs 26- 27; the offence of disclosing an intimate image under section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016; the domestic abuse aggravator, created by section one of the Abusive Behaviour and Sexual Offences (Scotland) Act 2016.

Also, particularly positive is that certain offences in the current "Schedule 8B" which we argued should be more appropriately included in "Schedule 8A," have now been elevated to the "List A" category. These are: breach of Non-harassment orders under both the 1995 and 1997 Acts; breach of a domestic abuse interdict with power of arrest, under the 2011 Act; breach of a forced marriage protection order under the 2011 Act,

Section 23- Level 2 Disclosures- Application for review.

We would reiterate our response to the question in the earlier consultation paper seeking views on the reduction in the disclosure periods from 15 and 7.5 years, to 11 and 5.5 years, respectively. Our comment was that, 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.

Code of Practice

Our final comment is that we support the intention to create a Code of Practice covering the implementation of the final proposals and would be interested in contributing to this in relation to the operation of the reformed PVG Scheme

Scottish Government

Minister for Children and Young People
Maree Todd MSP

Clare Adamson MSP
Convener
Education and Skills Committee
Scottish Parliament
EDINBURGH
EH99 1SP

21 October 2019

Dear Convener,

I am writing to you in respect of the Committee's Stage 1 evidence session on 9 October 2019 on the Disclosure (Scotland) Bill.

I would like to take this opportunity to provide some information on the test of "relevant for the purpose of the disclosure" and "ought to be included in the disclosure". The Committee were keen to explore this with stakeholders and as such I hope that Members will find this letter helpful to their scrutiny of the Bill.

As the Committee is aware, the two-part test of "relevant for the purpose of the disclosure" and "ought to be included in the disclosure" is to be applied by the Scottish Ministers when determining if any childhood convictions relating to the applicant are to be disclosed under section 17, and where an individual makes a Level 2 review application in respect of removable convictions under section 28. The test will also be applied by the chief constable in relation to other relevant information ("ORI") under section 18 as well as under section 26 where an applicant requests the chief constable, having regard to any representations made by the applicant, reapplies the test of "relevant for the purpose of the disclosure" and "ought to be included in the disclosure". Finally, the test will be applied in reviews to be carried out by the independent reviewer under sections 25, 29 and 27 in relation to childhood conviction information, removable convictions and ORI proposed for inclusion by the Scottish Ministers and the chief constable, respectively.

Given the prevalence of this two-part test throughout Part 1 of the Bill, it might be helpful for the Committee to have some background information on the test and the intended interaction between it and guidance to be produced, both statutory and non-statutory, under the Disclosure Bill and the Age of Criminal Responsibility (Scotland) Act 2019 ("the 2019 Act").

The two-part test is well-established and has been approved and applied by multiple decisions of the UK Supreme Court. In particular, it was approved by Lord Neuberger in the case of *R(L) v Commissioner of Police of the Metropolis*. In that judgement, the court gives examples of the factors that may be pertinent to a decision by the chief officer of what “ought to be included” as other relevant information. Judicial commentary like this already informs decisions made under this two-part test, as do other well-established principles of public and administrative law that apply to public bodies when exercising a decision-making function. Accordingly, any guidance issued, statutory or otherwise, will require to conform to and be informed by these existing legal rules and principles.

As Sheena Brennan, Information Manager for Police Scotland discussed with the Committee on 9 October there is already Home Office guidance which reflects these principles and which is applied by Police Scotland in making decisions about ORI. The intention in the Bill is to provide for Scottish-specific guidance. Section 64 of the Bill requires Ministers to issue guidance to the chief constable about the exercise of the chief constable’s functions, including applying the statutory test for the provision of ORI. In addition, section 22 of the 2019 Act requires Ministers to issue guidance to the independent reviewer about the exercise of the reviewer’s functions. This power will be used to issue guidance in respect of the independent reviewer’s functions under the Bill.

For decisions to be made by Disclosure Scotland when exercising Ministers’ functions under the Bill, non-statutory guidance will be developed in collaboration with stakeholders. All decision making by Disclosure Scotland officials must also follow the case law and public law principles mentioned previously. Therefore, in applying this same two-part test under the provisions in the Bill, Disclosure Scotland’s decision-making will also be informed by the existing case law.

The availability of statutory guidance will make the likely outcome of any assessment or review processes more foreseeable and accessible to disclosure applicants and accredited bodies. It would also set a standard against which decisions could be reviewed, so failure to comply with the guidance could give rise to an appeal on a point of law. In relation to any non-statutory guidance (e.g. internal guidance for Disclosure Scotland), while that would not be binding, a failure to follow it may give rise to lack of fairness in the process which could be the basis for an appeal on a point of law.

I hope that the Committee finds this information helpful and I am happy to provide any further information if it would assist the Committee.

Yours sincerely

MAREE TODD