



The Scottish Parliament
Pàrlamaid na h-Alba

EDUCATION AND SKILLS COMMITTEE

AGENDA

31st Meeting, 2019 (Session 5)

Wednesday 20 November 2019

The Committee will meet at 10.00 am in the James Clerk Maxwell Room (CR4).

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

Maree Todd MSP, Minister for Children and Young People, Scottish Government;

Kevin Lee, Disclosure Bill Team Leader, Disclosure Scotland;

Gerard Hart, Director of Protection Services and Policy, Disclosure Scotland; and

Gemma Grant, Lawyer, Legal Directorate, Scottish Government.

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

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The papers for this meeting are as follows—

Agenda item 2

SPICe briefing paper

ES/S5/19/31/1

Submissions pack

ES/S5/19/31/2

Education and Skills Committee Disclosure (Scotland) Bill Wednesday 20 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 Bill covers both the disclosure of criminal history and other information by Scottish Ministers and the Protection of Vulnerable Groups (PVG) scheme. The PVG scheme falls under the responsibility of the Minister for Children and Young People, Maree Todd MSP, who will be giving evidence to the Committee on the Bill.

The Committee took evidence from [Scottish Government officials on 4 September 2019](#) and heard from panels of witnesses on [8 October 2019](#), [6 November 2019](#) and 13 November 2019.

The Committee issued a call for views on 28 June 2019 and the written submissions it has received can be found on the [Committee’s website](#). A summary of themes of written evidence was included in Annex A of the [SPICe paper](#) prepared for the Committee’s evidence session on 8 October 2019. In addition, the Committee held two informal evidence gathering sessions on 12 and 13 November 2019; a note of those meetings is included in paper 2.

This paper seeks to cover the main issues that have come up in the Committee’s work on the Bill. There is therefore a higher number of themes than usual.

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

THEME 1: SIMPLIFICATION

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.

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.

A move to digital delivery was welcomed by respondents to the Committee’s call for views. The need for other formats to be available was also highlighted. Community Justice Scotland’s submission commented on this and 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.”

The Committee may wish to explore with the Minister—

- **To what degree a certain amount of complexity is unavoidable. What administrative steps are being taken to ensure that the system comprehensible, e.g. accessible guidance material.**
- **How digitisation of the service will support a better user experience.**

THEME 2: 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 Police Act 1997. Schedule 8A lists offences that will always be disclosed, unless the conviction is removed upon application to a sheriff. Schedule 8B lists offences which will be disclosed for a period of time, unless conviction is removed upon application to a Sheriff. The adoption of lists followed a judicial challenge to the original system whereby higher-level disclosures contained all types convictions.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 also proposes a number of changes to:

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

The final bullet is covered in a later section.

Timescales and use of lists

The Bill proposes to reduce the period of time before which an adult spent conviction of a List A offence can be reviewed from 15 to 11 years. The Bill would also reduce the duration that a spent conviction on List B would be disclosed – from 15 to 11 years for an adult conviction and 7.5 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.

There were mixed views in responses to the Scottish Government's consultation over these timescales. This was also reflected in the Committee's call for views, Scottish Women's Aid stated—

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

Howard League Scotland welcomed a reduction in these periods however it also expressed concerns at the rationale for the durations proposed and suggested a greater reduction. Howard League Scotland stated, “studies *conservatively* estimate that *in general* after an average of 7-10 years without a new arrest or conviction, a person's criminal record essentially loses its predictive value”.

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

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

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

“The disclosure of information should be proportionate, relevant and justifiable. Therefore, we suggest the Bill to adopt a similar approach to the one adopted for retention of DNA and other forensic information in the Criminal Justice and Licensing (Scotland) Act 2010, where a separate list of offences for children is available.”

On 13 November 2019, Alistair Hogg from the SCRA told the Committee that the SCRA would be open to working with the Scottish Government to explore what a list for childhood offending might include. Debbie Nolan from the Centre for Youth and Criminal Justice said that such a list should be drawn fairly narrowly. On 9 October, the Law Society of Scotland commented on this suggestion. Andrew Alexander said—

“When we considered [whether there should be different lists based on whether the person is a young person or an adult], we thought that we would need to see evidence for making a distinction between lists.” ([OR 9 October 2019](#), Col 24)

Offences included in the lists

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

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

- resulted in serious harm to a person;
- represented a significant breach of trust and/or responsibility;
- demonstrated exploitative or coercive behaviour;
- demonstrated dishonesty against an individual;
- abused a position of trust; or,
- displayed a degree of recklessness that resulted in harm or a substantial risk of harm.”
(Policy Memorandum, para 280)

In restating the lists, the Scottish Government has taken the opportunity to amend the offences included in each list. Some respondents have suggested changes to these lists. For example, the Law Society of Scotland said—

“Though these lists largely replicate the categorization of offences under the current regime, we question the differential treatment of embezzlement (List A) and fraud (List B). There are also several other offences involving dishonesty which are not included in List A, such as attempt to pervert and attempt to defeat the ends of justice (the latter not included at all).”

CYCJ raised a concern that wilful fire-raising is a List A offence and that offences under Section 38 Criminal Justice and Licensing (Scotland) Act 2010 (threatening or abusive behaviour) can accrue to care experienced young people. The SCRA told the Committee on 13 November 2019 that many offences look different when seen through the lens of childhood offending. The SCRA’s submission reiterated that there should be a high threshold for disclosing childhood convictions as Schedule 2 includes “many offences ‘commonly’ committed by young people” and this “may increase the likelihood of childhood conviction information being disclosed (any assault, any theft, breach of the peace).”

The Committee may wish to explore with the Minister—

- **Whether the proposed timescales relating to List A and List B offences were based on time-to redemption studies covering those offences. What is the rationale for the timescales set out in the Bill.**
- **Whether consideration was made of creating a separate list or lists for childhood offences. Whether other aspects of the Bill’s approach to the treatment of childhood offending sufficiently take account of the differences between childhood and adult offending.**
- **Whether the Scottish Government plans to amend the offences on List A and List B during the passage of the Bill.**

THEME 3: TESTS

The Bill sets out the tests against which Scottish Ministers (in practice, Disclosure Scotland) must determine whether to disclose conviction information.

There are a number of tests for disclosure in the Bill. For Level 1 disclosures there is a one-part 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.

Under the Bill, similar two-part tests will be applied in determining reviews and whether the police will include other relevant information (“ORI”). The Minister [wrote to the Committee in October 2019](#) to provide more detail on the two part test in which she referred to a Supreme Court judgment on the provision of non-conviction information, *R(L) v Commissioner of Police of the Metropolis*.

The Scottish Government intends to produce statutory guidance for the independent reviewer and the police in relation to considering reviews and the inclusion of ORI. Non-statutory guidance is intended to be produced for Disclosure Scotland in considering whether to include childhood convictions and reviews of adult removable convictions. The Minister’s letter stated—

“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.”

One suggestion the Committee has explored is that the Bill include a set of principles to support decision-making on disclosing conviction and non-conviction information. CLAN Childlaw noted that it is difficult to advise young people on the consequences of accepting criminal grounds at a children’s hearing due to the complexity of the system and will not automatically be disclosed. Alison Reid from CLAN Childlaw told the Committee—

“The law has to be understood and it has to be foreseeable. We are trying to explain the scheme to young people who potentially have complex mental health issues, who have experienced physical and emotional abuse or trauma or who have been exposed to neglect.” ([OR 9 October 2019, col 8](#))

Cynthia Marks of Business in the Community said—

“A consistent set of principles would give everyone confidence in the process and a transparent understanding of what is taking place and how decisions were made. That would give employers more confidence, as well. If there was a published set of standards by which everyone came to decisions, that would give everyone clarity, so I absolutely think that that would be welcomed.” ([OR 6 November 2019, Col 23](#))

The Committee wrote to the Law Society of Scotland and the Faculty of Advocates on this matter and those organisations’ responses are included in paper 2.

The Committee may wish to explore with the Minister—

- **How the proposed guidance documents will be developed and consulted on. The rationale for statutory guidance having no procedures attached.**
- **Views on the proposal that principles to guide decision making should be on the face of the Bill.**
- **How a young person would know or could be advised of the long-term consequences of accepting offence grounds at a children’s hearing.**

THEME 4: OTHER RELEVANT INFORMATION

Under enhanced and PVG disclosures, a third party may be provided with other relevant information ("ORI"). ORI is information that the police have provided on an individual that can include information about behaviour which may not have been tested at trial or led to a conviction.

The Bill provides for Ministers to produce guidance for the chief constable on the production of ORI and any reviews of ORI. Section 64 sets out that the Scottish Government must consult with the Chief Constable before issuing such guidance and that the Chief Constable must have regard to the published guidance. There are no other statutory consultees proposed in the Bill and no parliamentary procedure is attached to guidance under section 64.

The Bill expands the situations where ORI may be included to all Level 2 disclosures. Including circumstances where currently a Standard Disclosure would be made. Currently a Standard Disclosure would not include ORI.

A particular concern has been that the offending behaviour of a person who was 12-17 years that would not be disclosed as a conviction might be included in ORI. Children in Scotland’s submission stated that a high threshold should be set for the disclosure of ORI. It said—

“We have concerns that the provision of ORI ... could undermine the new system of discounting convictions between the age of 12-17. Provision of ORI could allow employers to access information that relates to convictions without giving access to the convictions themselves.”

The Bill provides for the Chief Constable to produce ORI subject to the two-stage test, noted above. There is little specific limitation set out in the Bill for information being shared through ORI; for example there is no time limit as there is for most spent convictions. Witnesses on 13 November 2019 argued that the Bill should be more prescriptive in when ORI should be included, particularly in relation to behaviour dating from when the individual was under 18.

Howard League Scotland argued “the bill should categorically rule out the disclosure of certain kinds of information that might be disclosed currently as ORI”. These types of information are set out in the Howard League’s submission and include the criminal history family members or details of charges on which the person was found Not Guilty at trial.

The Committee may wish to explore with the Minister—

- **Reasons for expanding the use of ORI to cover situations where currently a Standard Disclosure would be provided, which does not include ORI.**

- **Views on whether the Bill should be more prescriptive in what should be included in ORI and the circumstances when ORI is included.**
- **Whether there is risk that information could be disclosed under ORI that would not be disclosed if it had led to a conviction, particularly for childhood offending. Whether there are plans to monitor this.**
- **Whether the Scottish Government plans to consult more widely than only with the police in developing statutory guidance for the Chief Constable.**

THEME 5: CHILDHOOD OFFENCES – INDIVIDUALISED APPROACH

The Bill seeks 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).

There has been support for the end of automatically disclosing childhood convictions. CELCIS and Who Cares? Scotland also report that the messages they had received was that the was to be a “presumption against” disclosure of childhood convictions. This is not set out in the Bill. Several respondents argue that the threshold for disclosing childhood offences should be high (e.g. SCRA).

The Committee has heard some concerns that the proposed system is still at odds with the welfare-based Children’s Hearing System. Brian Houston, from Who Cares? Scotland told the Committee that at a hearing, the panel focus on the child or young person’s welfare. However, to get to on to the discussion about welfare a child must accept grounds (there is a separate process if the child does not accept the grounds). Mr Houston continued and said that as the child gets older, only the accepted offence ground remains, not the rich context that the panel considered. The Commissioner for Children and Young People Scotland’s submission stated:

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

Who Cares? Scotland’s submission argued that any conviction information should be provided in the context of how it came about. Witnesses on 6 November 2019 suggested that the individual could be given the opportunity to provide such context before agreeing to share the disclosure information with a potential employer (for example).

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

The CYCJ’s submission suggested that Disclosure Scotland should monitor the number of disclosures with childhood convictions included. It said—

“We would like to see provisions built into the Bill (or associated documents) for monitoring and evaluation of the frequency of childhood convictions being disclosed and for this information to be made publicly available. This could provide valuable information for considering the further extension of the approach adopted to childhood conviction information to (for example) young adults and adults.”

A move toward a more individualised approach for childhood convictions has been welcomed in evidence to the Committee. Some have suggested that this approach be extended to all disclosures, including for adult convictions.

Links with other legislation

The Disclosure (Scotland) Bill may be seen as a part of a package of recent legislation.

The Age of Criminal Responsibility (Scotland) Act 2019 raises the age of criminal responsibility from 8 to 12 years of age. This Act provides that criminal-type behaviour of children under 12 can only be included as Other Relevant Information on a higher-level disclosure certificate and only after the information has been approved for inclusion by the independent reviewer, a role which the Act establishes. This Act is not yet in force; two sections are due to come into force on 29 November 2019: section 3, which prevents someone under 12 being referred to a children's hearing on offence grounds; and section 27 which affects the information the reported can give to person affected by child's offence or behaviour. The [Scottish Government expects](#) to bring the Act fully into force next summer.

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. When in force, this Act will amend the Rehabilitation of Offenders Act 1974 and will also reduce the disclosure periods for young people who have been dealt with by a criminal court. Part 2 of this Act on the disclosure of convictions is not yet in force.

Debbie Nolan, Practice Development Advisor, Centre for Youth and Criminal Justice, told the Committee on 13 November 2019 that there is a gap between the self-disclosure required by the Management of Offenders (Scotland) Act 2019² and the state disclosure proposed in the Bill. An example of this might be where a young person was convicted at in a court setting when under the age of 18 and would have to self-declare the unspent conviction but a state disclosure may or may not include this information.

Some witnesses have noted that the Management of Offenders (Scotland) Act 2019 treats offending as being an adult conviction based on the date of the conviction. The Disclosure (Scotland) Bill treats an offence as a childhood conviction on the basis of the date of the offence, albeit for administrative purposes Disclosure Scotland will make a rebuttable assumption that the date of the conviction is the date of the offence. Another concern therefore is where an offence would be considered an adult offence under the Management of Offenders (Scotland) Act 2019 but a childhood offence under the Bill.

The links between the state-disclosure and self-disclosure are issues that the Scottish Government is aware of. The Minister's letter to the Committee on 16 August 2019 stated—

“We intend to lodge amendments to the Bill in relation to the Rehabilitation of Offenders Act 1974. This Act provides for a system of protection to individuals with previous convictions not to have to self-disclose their convictions in certain circumstances. The 1974 Act will need to be amended to ensure there is consistency between ‘self-disclosure’ and ‘state-disclosure’ regimes, particularly in relation to the treatment of childhood convictions. In addition, the Age of Criminal

² The Management of Offenders (Scotland) Act 2019 amends the Rehabilitation of Offenders Act 1974.

Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019 make changes to the self-disclosure system. There are currently no provisions in the Bill to make necessary consequential amendments to those Acts, as neither had received Royal Assent at the time of the Bill being introduced.”

The Committee may wish to explore with the Minister—

- **Whether in practice the tests applied to childhood convictions being disclosed would be a high bar and to what degree the Minister considers the provisions in the bill to be a “presumption against” disclosure of childhood convictions.**
- **Whether and how the numbers of childhood convictions being disclosed will be monitored. How the Bill provides flexibility if Ministers were to consider the number to be too high or too low.**
- **Whether and how the context for a conviction would form part of the consideration of whether a conviction will be disclosed. Whether and how any context could be provided to a potential employer if the conviction is disclosed.**
- **Whether consideration was given to extending an individualised approach for the disclosure of all spent convictions.**
- **What the intended amendments to the Bill to provide “consistency between ‘self-disclosure’ and ‘state-disclosure’ regimes” are.**
- **How an individual can navigate whether and when they are required to self-disclose a childhood conviction.**

THEME 6: REVIEWS

The Bill provides the following types of review:

- *Review for accuracy:* Disclosure Scotland reviews, no further review mechanism. This could be to determine whether an offence was committed when the individual was under 18, if the conviction date was after the individual turned 18, i.e. that the conviction should be treated as a childhood conviction when the conviction date does not make this clear.
- *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 and generally witnesses and submissions are supportive of the system. 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.”

An important issue is the time for any review to take place, balancing the need to conclude reviews quickly and the opportunity for the individual to seek advice and make representations. Oisín Murphy-Lawless from the Coalition of Care and Support Providers in Scotland told the Committee—

“The review process should balance the need for a swift review of the information at the behest of the applicant against their getting a fair view. [We would like a commitment that] the review process will be sufficiently resourced and that there will be enough money and hours for the independent reviewer to consider any differing interpretations of what is relevant and what ought to be done.” ([OR 6 November 2019, col 9](#))

Several respondents have suggested that all reviews should go in the first instance to the independent reviewer, rather than, in the case of ORI, the police reviewing their own decision.

One issue that has not been explored thus far by witnesses or in submissions is that an individual is not able to review the same information twice that would appear on a Level 2 disclosure for the same purpose (s34(5)). The time elapsed between for example a List A offence being committed and the disclosure may be critical to whether the review is successful. Under the Bill, if the review was unsuccessful, the individual would not be able to seek another review of a disclosure for the same purpose at any time in the future and a List A offence would be disclosed for the remainder of the individual’s life. This would also happen currently if a sheriff determined a List A offence should be disclosed following a referral. Section 20 (5) of the Age of Criminal Responsibility (Scotland) Act 2019 allows for repeated appeals to a sheriff regarding the independent reviewer’s decision to include (or not) information relating to the behaviour of a child under the age of 12 in future disclosures.

The Committee may wish to explore with the Minister—

- **How long the Minister expects different review processes to take and how this is factored into the costs outlined in the financial memorandum.**
- **The reason for the proposal that the Chief Constable would review the inclusion of ORI rather than the Independent Reviewer.**
- **Given the time elapsed may be a factor in a decision to disclose information, whether an individual should be barred from seeking a review of the inclusion of conviction information more than once.**

THEME 7: CHANGES TO PVG SCHEME

The Protecting Vulnerable Groups scheme is a membership scheme for individuals who work with children or protected adults. The scheme was introduced by the PVG Act and the scheme came into effect in 2011. The PVG Act also provides for barred lists of individuals who are not allowed to do "regulated work", as currently defined.

It is not currently an offence to do regulated work without being a scheme member. However, it is an offence to employ someone (or engage a volunteer) to do regulated work when they are barred from doing so.

Part 2 of the Bill provides for a number of changes to the PVG scheme including—

- replacing the concept of "regulated work" with "regulated roles"
- providing for 16 as a minimum age for membership
- changing the period of membership of the PVG scheme to 5 years
- making scheme membership compulsory for doing regulated roles and providing for offences.

Regulated roles

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 seeks 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 children³.

The move from regulated work to regulated roles received a mixed response from in the Committee's work on the Bill and there have been differing views on whether the change will be clear or clearer than currently. COSLA's submission agreed that the proposed change would provide greater clarity and that it is broadly in agreement with the descriptions of regulated roles in the Bill.

Business in the Community also supported the change but warned that there may still be confusion and that guidance will be required to support businesses. Lindsay Law, Convener of Connect told the Committee on 13 November that more clarity is needed on regulated roles and when PVG scheme membership would be required.

Scottish Women's Aid had a concern that the definition of a protected adult under the Bill will focus on adults who "by reason of physical or mental disability, illness or old age" require support or who are receiving healthcare. The SWA's concern therefore is that work with women who have been victims of domestic abuse may not meet these criteria.

A number of witnesses have had specific concerns that roles in their organisation would not fall into regulated work. For example, Ben Hall from Shared Lives Plus noted that "a

³ 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)).

shared lives carer is not identified as a regulated role” but a foster carer, which is a similar position, is a regulated role.

Minimum age

The Bill provides that an individual must be 16 to join the PVG scheme. The Bill also specifically excludes situations where the individual is under 16 from the offences which make PVG membership mandatory. However, the current offence of allowing someone doing regulated work/roles who is barred from doing so will remain, but the Bill would not legally prevent a child under 16 undertaking a regulated role. The EQIA on the Bill stated—

“It is not considered to be appropriate for under 16s to be in the position of doing regulated roles and having the level of responsibility for vulnerable groups that would support eligibility for PVG membership.”

The Committee has heard varying opinions on this proposal. In terms of protecting vulnerable groups. Where a young person posed a serious risk if they worked with a vulnerable group, perhaps at a level where they may be barred, it has been argued that the person would be well-known to social services and the police and this would provide the necessary protection. 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.” (OR [9 October 2019 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 group is very small, the latter is likely to be larger and it is less obvious how a GIRFEC approach might robustly prevent someone from that group from undertaking a regulated role.

Some have suggested that children under-16 would not do regulated work (e.g. see Church of Scotland and SYFA ([OR 6 November 2019](#), col 7)) or that when a child is participating in that type of work, others would be supervising which, in certain settings would mean that the activity would not be regulated (see footnote 4 above and sch3 para 1 read alongside sch3, part 2, para 21). RYA Scotland’s submission noted that young people can take the role of an “Assistant Instructor”, which while is a supervised role but may not take place in one of the settings (e.g. school) where contact with a vulnerable group would need to be unsupervised to count as regulated work. RYA Scotland stated that the Bill’s proposals would most likely “be interpreted to mean, young people under 16 cannot undertake regulated roles” and called for a more “supportive statement” to ensure that young people are not precluded from volunteering opportunities.

Scheme membership

PVG Scheme membership has grown since 2011 and now includes 1.2m people. Currently membership of the PVG scheme is for life. Section 72 of the Bill provides for the duration of the scheme to be five years before membership is required to be renewed. Section 72 also would require Ministers to inform the scheme member, and any relevant organisation and personnel supplier that scheme membership is required to be renewed, three months before expiry. The Bill provides for a further 4-week period of "extended membership" after the date of expiry where additional efforts would be made to by Ministers to determine whether the individual is carrying out a regulated role.

As noted above, mandatory membership is underpinned by new criminal offences in the Bill. The Committee has heard some concerns that the criminal offences might be disproportionate. Rose McConnachie from Community Justice Scotland said—

“We are, however, concerned about the creation of a new offence of performing work that would be covered by the PVG scheme without a PVG or following a failure to renew scheme membership, thereby potentially criminalising more people. In particular, the proposed penalty of up to 12 months in custody for a summary conviction seems disproportionate for what may amount to a lapse in paperwork and is a substantial shift from the present system. Of course, a custodial sentence is also inconsistent with the recent extension of the presumption against short prison sentences.” ([OR 6 November 2019](#), col 17)

GTCS' submission noted a concern about how the transition to a five-year cycle of membership would be managed with potentially a very high number of people entering the new system at the same time. The Scottish Government's response to the consultation that led to the Bill recognised “that the transition from the current scheme membership arrangements to the new model may pose challenges and will require careful consideration of fairness.” The Scottish Government said that it would work with stakeholders to ensure a smooth transition.

With a time-limited membership, some respondents have raised a concern on the impact of additional fees. Fees associated with the Bill are covered in a later section of the paper.

The Committee may wish to explore with the Minister—

- **The extent to which replacing the concept of "regulated work" with "regulated roles" will reduce complexity. Any other work planned to ensure that organisations will require PVG scheme membership in appropriate situations.**
- **The Minister's views on evidence the Committee has taken that some roles would be inappropriately excluded from requiring scheme membership under the Bill. For example, Scottish Women's Aid's concerns that individuals who were victims of domestic abuse may not be covered by the definition of a protected adult.**
- **Views on whether under 16 year of age ought to be undertaking regulated roles and how the Bill supports the Minister's position.**
- **Whether another product, which does not include ongoing monitoring, could be used to support organisations' safeguarding policies where they utilise**

volunteers under the age of 16 working with other children or protected adults.

- **The Minister’s views on criticism that the offences in relation mandatory PVG membership may be disproportionate.**
- **How the transition to a mandatory 5-year membership will be undertaken.**

THEME 8 ACCREDITED BODIES & FEES

Accredited Bodies

Currently, Basic Disclosures issued under the 1997 Act can be provided to any person for any purpose. Any PVG, Standard, or Enhanced disclosure must be for a specific purpose and can only be made if the application is countersigned by an organisation which has registered with Disclosure Scotland. The Bill proposes to continue this distinction for Level 1 and Level 2 disclosures, although the terminology for an organisation or person that can apply for a Level 2 disclosure is changing from a registered person to an accredited body.

Witnesses to the Committee have noted that PVG checks should be part of a suite of protection policies in recruiting employees and volunteers. Dughall Laing from Recruit with Conviction said—

“PVG scheme membership is part of the process; it is not the be-all and end-all. Good clarification and good understanding of how information will be used will be vital. Small businesses do not have that information or the capacity to develop that, so guidance and good support for them need to be in place from the outset.” ([OR 6 November 2019, Col 20](#))

The Bill (S.56) provides for a duty on Ministers to publish a Code of Practice to govern the accredited bodies, which must be followed and will cover how disclosure information will be handled. The [current code of practice](#) provided guidance for registered persons in what factors to take into account when considering disclosure information; it stated—

“Recruiters or employers should consider the following:

- whether the conviction or other matter(s) revealed on the disclosure is relevant to the position in question;
- the nature of any offence or other matter(s) revealed;
- whether the person is barred from working with particular vulnerable groups;
- the length of the time since the offence or other relevant matter(s) occurred;
- whether the individual has a pattern of offending behaviour or other relevant matters; and
- whether the individual’s circumstances have changed since the offending behaviour or the other relevant matters.” (para 108)

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 from £75 to £100.

In terms of PVG, currently the scheme membership costs £59 for a life membership and £18 for each subsequent short scheme record sought. The Consultation intimated that a 5-year membership scheme could cost £65 and with a £10 fee for each disclosure. Fees in this area will be subject to a further consultation.

The Scottish Government has said that it intends to maintain free PVG checks for volunteers. Under certain circumstances, volunteers can also become members of the PVG scheme free of charge. Similar dispensation does not apply to other disclosure products and either the individual or organisation will meet those costs. In terms of moving from a volunteer role to a paid role, Sarah Latto from the Scottish Volunteering Forum said—

“We feel that it is unfair to expect people to pay if, as a result of their volunteering, they move into employment, particularly given that, if someone moves into a role that is relevant to the volunteer role that they had previously, it is likely to be quite low paid and at quite a low grade to begin with. Expecting them to pay seems a bit unfair and it does not recognise the value that they added as a volunteer up to the time when they applied for paid employment.” ([OR 6 November 2019 Col.12](#))

[The report on the EQIA on the Bill](#) noted that 69% of PVG members are women. The EQIA stated that the most strongly recurring negative impacts identified in a consultation were that:

- charging volunteers would introduce a barrier to volunteering, costing charities financially and socially;
- renewals would be a barrier to low income workers and may prevent them remaining in their field – it has been suggested Disclosure Scotland could mitigate impact by introducing tiers (either based on income, similar to SSSC, or an option of one, three or five year membership at different costs), payment plans or set a renewal that was lower than the cost of initially joining the Scheme; and
- a digital system could prove to be a deterrent to those who cannot access digital.

The report on the EQIA on the Bill concluded—

“Although some negative impacts were identified by respondents during the consultation process, a number of these in relation to a change in fees and not specific to protected characteristics, careful consideration has been given to these and the Scottish Government has found that the overall aims of the Disclosure (Scotland) Bill will have a positive impact upon the various protected characteristic groups. Where possible, steps will be taken to mitigate any negative impact.”

The Committee may wish to explore with the Minister—

- **How to ensure that organisations do not rely too heavily on PVG membership in their safeguarding policies.**
- **The role of Disclosure Scotland to ensure that organisations are well-equipped to take proportionate risk-based decisions supported by disclosure products.**
- **Any further details on the fee structure or consultation on fees. Whether consideration has been given to making all disclosure products free for volunteers, not only PVG checks.**
- **Whether changes to the fees and five year membership will impact women more than it impacts men.**
- **Whether and how volunteers who move to paid work will be charged under the PVG scheme.**

**Ned Sharratt
SPICe Research
15 November 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**31st Meeting, 2019 (Session 5), Wednesday, 20 November 2019****Disclosure (Scotland) Bill – submissions pack**

This pack contains letters from the Minister for Children and Young People the first is in respect of information on the test of “relevant for the purpose of the disclosure” and “ought to be included in the disclosure”. The second letter is in respect the making of regulations concerning conditions imposed on scheme members under consideration for listing.

- [Letter from the Minister for Children and Young People 21 October 2019](#)
- [Letter from the Minister for Children and Young People 15 November 2019](#)

The Convener wrote to the Law Society and the Faculty of Advocates in respect of information on the test of “relevant for the purpose of the disclosure” and “ought to be included in the disclosure”. Read the letter from the Convener and the response from the Law Society. The Faculty of Advocates response will follow in due course

- [Letter from the Convener to the Law Society and Faculty of Advocates](#)
- [Law Society response](#)

The Committee held two focus groups the notes from both are below

- [Voluntary Sector Focus Group Tuesday 12 November 2019](#)
- [Focus group notes – care experienced young people](#)

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

Scottish Government

**Minister for Children and Young People
Maree Todd MSP**

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

5 November 2019

Dear Convener,

I am writing to you in respect of the Committee's letter dated 5th September regarding the Disclosure (Scotland) Bill, specifically the making of regulations concerning conditions imposed on scheme members under consideration for listing.

I am unable to provide any greater clarity at this early stage about the anticipated timescales for the making of these regulations however, I think it would be beneficial to take this opportunity to provide some information on the steps my officials are taking in co-developing these conditions with stakeholders.

As the Committee is aware, conditions can be made under the new section 13A of the PVG Act, as inserted by section 77 of the Bill. These conditions refer to the action the state may take when an individual is being considered for listing. The policy intent of these provisions is to further increase safeguarding by addressing any risk that an individual being considered for listing may pose if they were otherwise able to continue to work freely in a regulated role while that consideration takes place. This is particularly important when one considers that many members of the PVG Scheme are not registered with a professional body; the controls that a regulator may impose in circumstances where a serious question mark exists about suitability to practice are simply not available. In other circumstances, a regulatory body might have curtailed the ability of an individual to work in a specific professional area but cannot exert control on the individual doing work outside the professional area, for example the GTCS may stop a teacher from teaching but cannot prevent them from volunteering with children in other contexts. It is these gaps that the new PVG conditions will close.

Annex A attached is a discussion paper to be used when engaging with stakeholders to help formulate discussion. It sets out a number of key thresholds and principles that will need to be considered in the development of these conditions, and also sets out examples of how these conditions might be formulated. This engagement with stakeholders is starting imminently, with a meeting with a number of regulatory bodies scheduled to take place on 21st November. Annex B lists those bodies invited to the session. Once we have had this initial discussion, we will work with those involved to develop the best way forward and to engage further other stakeholders.

I would be happy to update the Committee on this work as it progresses and provide clarity on timelines for regulations when I have it.

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

Conveners Letter to Law Society and Faculty of Advocates



The Scottish Parliament
Pàrlamaid na h-Alba

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By e-mail

15 November 2019

Dear Mr Alexander

Disclosure (Scotland) Bill

As you will be aware, the Scottish Parliament's Education and Skills Committee is currently scrutinising the Disclosure (Scotland) Bill. As part of this process, the Committee has explored the tests of "relevant for the purpose of the disclosure" and "ought to be included in the disclosure". The Minister for Children and Young People, Maree Todd MSP, providing information on these tests in a letter to the Committee, which can be read [here](#).

Given that the Law Society referred to these tests in both its submission and its oral evidence, the Committee would be grateful for any commentary the Law Society may wish to provide on the Minister's letter and the details provided on its intended interaction with any future guidance. I have copied this letter to the Faculty for Advocates to seek any views they may have on the tests set out in the Bill and the details provided by the Minister.

As the Committee is scheduled to take evidence from the Minister on Wednesday 20 November, I would be grateful for any response by Thursday 14 November.

Best wishes,

Clare Adamson MSP
Convener

cc: Dean's Secretariat, Faculty of Advocates

Law Society

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

BY EMAIL

14 November 2019

Dear Convener,

Disclosure (Scotland) Bill

Thank you for your letter of 31 October, attaching correspondence from the Minister for Children and Young People, regarding the statutory tests for disclosure. We had highlighted the need for greater clarity around the ways in which the test would apply, particularly in the context of our role as the regulator of solicitors in Scotland, where the disclosure process forms part of our admissions and other processes.

We welcome the confirmation by the Minister that guidance will be developed in collaboration with stakeholders and that this guidance, whether statutory or non-statutory, may allow for appeal on a point of law. This guidance will assist organisations reliant on the disclosure process and provide clarity to applicants through this process.

We hope that this guidance will provide greater detail, in particular, around relevance. In the recent Supreme Court case, *In Re an application by Lorraine Gallagher for Judicial Review* [2019] UKSC 3, Lord Sumption stated:

“[I]t is entirely appropriate that the final decision about the relevance of a conviction to an individual’s suitability for some occupations should be that of the employer. Only the employer can judge whether the particular characteristics of the particular job make it inappropriate to employ the particular ex-offender. Very often, this will be a judgment that the employer makes in the course of discussion with the candidate in the light of what is disclosed. The employer will bear the responsibility for the consequences of its choice, and in sensitive appointments the responsibility may be a heavy one. In order to discharge that responsibility with the thoroughness that the public interest requires, the employer must have access to potentially relevant information about a candidate’s past. He may end up by disregarding some or all of it as irrelevant or insufficiently weighty. But unless the decision is to be taken out of his hands, he must be told about any criminal record which might reasonably influence him, even if further consideration or discussion of the circumstances with the candidate may ultimately cause him to disregard or attach limited weight to it.”

Our view of the scope of relevance may be broader than for some stakeholders, as our role as a regulator differs from that of an employer, and the role of solicitor is wider than that of an employee in a position of trust. Solicitors are officers of the court and key participants in the justice system. The public are protected from any wrongdoing by an individual through an indemnification across the profession as a whole. Confidence in the profession and in the justice system is reliant on ensuring that only those fit and proper to do so are admitted as solicitors.

We hope that guidance can reflect these types of considerations around the statutory tests and are keen to assist Scottish Government, Disclosure Scotland or others in the development of guidance that supports the implementation of this Bill.

We hope that this information is helpful and if we can assist further in the committee's scrutiny of the Bill, please do contact me.

Yours faithfully,

Andrew Alexander,
Head of Policy.

Disclosure (Scotland) Bill – Voluntary Sector Focus Group**Tuesday 12 November 2019****MSPs present:** Clare Adamson MSP (Convener), Iain Gray MSP, Liz Smith MSP

This note provides a summary of the issues which were raised during the discussion between members of the Education and Skills Committee and representatives of eight. The comments are not attributed to any particular individual or organisation.

Personal employers and Self-Directed Support

Personal employers accessing Self-Directed Support (“SDS”) don’t see any vetting information detail (e.g. convictions and alternatives to prosecution) on a PVG scheme membership statement whereas a registered intermediary body would. (Members were presented with a redacted example of a PVG scheme membership statement as well as a corresponding PVG scheme record document which contained additional vetting information about the same individual). The PVG scheme member statement is the issue. Disclosure Scotland doesn’t treat the scheme membership statement as a disclosure. It was hoped that the Bill would address this discrepancy.

It is possible that an SDS support service could seek the disclosure, but the service doesn’t want to be seen as the employer. It is there to support, not to make recruitment decisions on behalf of the employer.

There is an issue with self-employed people as they are not contracted to an employer so they are not entitled to full scheme membership. This will change for carers under the Bill proposals but it’s not clear how it will change for people who are self-employed. If they then go on to contracted employment will have to pay the full scheme membership fee (currently £59).

The scheme member statement doesn’t contain vetting information so if someone with a scheme statement goes on to become barred then there’s no way of the organisation knowing.

One major disadvantage of being a personal employer is that a personal assistant wouldn’t be registered with SSSC and often PA’s will move frequently between roles with different people.

Trustees

A concern was raised regarding the status of charity trustees. Children’s charity trustees and adult charity trustees qualify for a trustee check, but if working more widely with both groups they don’t currently qualify although this may be addressed by the new legislation.

The Code of Practice from Disclosure Scotland used to advise seeking support from a lawyer in terms of trustee disclosure. Small organisations don’t have the capacity to do that.

There can be an issue in small communities about the level of paperwork required for charity trustees in processing the Disclosure checks. It is helped by having a local organisation act as an accredited body, but small organisations also face issues regarding secure storage of disclosure forms, etc.

In a small rural community there may be many people who are vulnerable but who don’t meet the criteria listed. Is there discretion to increase protection for them?

Sports organisations

Sports governing bodies represent hundreds of small groups and if an incident occurs or something goes wrong the onus is on the small group has to make a referral to the governing body and Disclosure Scotland, but these small groups are often run by families, close friends or neighbours so may not be keen to do so. The governing body could make referral instead but haven't been allowed to do so historically because they are not the employer/supervisor. If someone volunteers with young people and also works with young people, then they could lose their job not just volunteering role which is why some smaller organisations are not always keen to make a referral.

This process should be about safeguarding and child protection and not just the sharing of conviction information – it isn't just about convictions but information sharing.

Confusion about requirements

People are confused about what they have to declare on a self-declaration form because some convictions may be self-declared despite being spent and then the PVG disclosure does not match. Employers then have to disregard the information they have seen on the self-declaration form. It is difficult to “unsee” what was on the self-declaration.

This issue can sometimes put people off volunteering in addition to the time it can take to complete the process. It's also a challenge for the people making the decision on placing volunteers. If they get information on a self-declaration that doesn't appear on the PVG, or if the potential volunteer hasn't disclosed something that then appears, it makes it a very difficult judgement call. Sometimes a person can be offered a different volunteering role or occasionally there isn't an alternative. This has the result of putting people off volunteering altogether.

What is the solution?

Clear guidance is the answer. Small organisations don't all have access to resources to get advice.

More consistency about who needs PVG checks would be appropriate. Not everyone requires it. For example, a janitor in a school needs a PVG but a janitor in a community centre doesn't.

5-year membership

There was general agreement that this proposed change was sensible.

Support from Disclosure Scotland

There was a strong desire for Disclosure Scotland to give more detailed advice about who needs a PVG check. Experience had been that staff tend to quote regulations back to individuals seeking advice. There remains widespread confusion.

Continuing training opportunities should be made available to organisations who use the scheme.

Preparation of case study examples would be useful to help organisations make decisions about seeking PVG or disclosure checks.

Role of intermediary organisations

Part of the role of a Third Sector Interface (“TSI”) is to deliver training around disclosure. It was felt that PVG is very good at stating the black or white i.e. suitable or barred, but the challenge comes with the grey areas in between.

1 in 3 adult males and 1 in 9 adult females in Scotland will have some information on a PVG check. This doesn't make them barred but there is a lack of awareness or guidance about what this means in practice. TSI's don't make recruitment decisions for member organisations. Small organisations will come to the TSI to ask if they can recruit but the TSI cannot make that decision for them. Small employers don't feel confident to decide for themselves.

Self-declaration

The group reported that inclusion of self-declaration on application forms is wide spread in voluntary sector. Some charities (often large charities) have a standard application form for volunteer positions that might never require a PVG check. This is inappropriate and could constitute a breach of an individual's human rights.

Risk assessment

Careful risk assessment can help organisations take on more people with convictions. One participant reported delivering training about the disclosure system for potential employers which highlighted a concerning lack of awareness and poor practice among most organisations whether large or small. Although the current focus is on the legislation there needs to be a lot more outreach in terms of the guidance.

Contextual information

There needs to be a way to present contextual information around a conviction. Information provided on the certificate is limited and very prescriptive (formal description of offence and disposal). It would be helpful if there was support for organisations to help them to understand what the conviction was actually for. As an example, a person setting up a small play group who accesses a PVG for a prospective employee who is under consideration for listing. It will state that the individual has breached a particular section of a particular Act, but it can be difficult to establish exactly what this means. If it came with explanatory notes it would be more helpful. It is legitimate to have a conversation with the individual about it, but small organisations don't always know this or feel comfortable to do so.

Interaction with other regulators

Various professional regulators such as the SSSC need an individual to be a member of the PVG scheme prior to registration. When applying, the individual must include details about existing registration with other regulators. Therefore, Disclosure Scotland doesn't receive details of the prospective SSSC registration. This means that SSSC won't automatically be informed if in the future the individual is barred.

If someone is removed from a post then the employer has to let these bodies know. The vast majority of organisations have no knowledge about referrals even although information is sent to them.

Often the same information is required on forms for all (e.g. SSSC, Care Inspectorate, Police, Council) but you can't copy and paste information between them. Why can't the system be joined up and allow completion of one form with various tick box options for submission to relevant bodies?

The number of regulated roles

The Bill appears to increase substantially the number of job roles likely to be caught within the definition of "regulated role".

The phrase in the Bill, "engaged in the provision of" needs to be more clearly defined.

People in the voluntary sector often take on dual roles. Organisations can check against list of existing roles but will be unlikely to go back and check if it has been added to.

It was suggested that it may be easier to define an activity than create a pre-determined list of roles. A list will never stand still. Who will update it? The nature of activity rather than job title is the better option. "Support worker" could be admin support, training support for staff but is also traditionally thought of as care support. U16's not being subject to a PVG check

People don't realise how widely regulated work happens. Under 16's wouldn't be in sole charge of people but it perfectly common to have scouts, churches, sports bodies having under 16's working with younger children. U16 can carry out regulated work but don't need to be PVG checked. Organisations are going to have to put in more admin because young volunteers will have to join the scheme for their 16th birthday or they won't be allowed to carry on with their role.

Single organisational signatories

Some organisations may only nominate one signatory which is not an issue unless that person becomes barred or is moved to consideration for listing. In these circumstances, there is no one else within the organisation who can be notified of the change of status. - the bill does not address this. This further emphasises the importance of providing good guidance.

Transition period

It is vital that the transition period is right this time around. It wasn't handled well the last time the scheme was changed. For example, what happens to the people already registered? At what point will they move over to the 5-year membership?

Continuing dialogue with Disclosure Scotland will be extremely important.

Focus group notes – care experienced young people

MSPs present: Clare Adamson MSP, Alasdair Allan MSP, Jenny Gilruth MSP, Alison Harris MSP, Rona Mackay MSP

This note provides a summary of the issues raised during discussions with Who Cares? Scotland. The comments are not attributed to any particular individual.

How has disclosure affected you?

One attendee said it had affected their whole life. They had been a straight A student at school but a change in family circumstances led to them being taken into foster care at 16. They ran away from foster care at 17 and became homeless. The incident which led to criminal charges happened just as they turned 17 as a result of coercion from the group they were living with. They got a flat through the council at age 18, but shortly afterwards had to face their charges in court, being remanded in prison because of perceived issues with how they had engaged with social work reporters.

Afterwards, this person felt ashamed to have a criminal record, and would only apply for jobs where there was no need for a disclosure certificate. Once employed, this person didn't go for promotions to avoid the risk of their past coming back through disclosure. Thankfully, the college they attended was understanding, but the continuing fear of disclosure had resulted in them not taking up the opportunity of a new life abroad and not seeking a visa to go to the USA for work.

One person was required to seek a PVG a year into volunteering and something was listed from their adolescence which the person had not realised would be disclosed. This led to a change in attitude from their co-workers, who were now distrustful due to the perceived lack of transparency.

What are the wider issues with disclosure of childhood offences?

Others participants echoed the psychological impact of criminal actions/convictions arising in childhood, and how this can lead to some people limiting their choices (jobs/career) to try to avoid it. One person highlighted the many opportunities for young people abroad but those with convictions can't take those up to the fullest (visa requirements, etc) if they need to disclose the convictions.

There was a discussion about the extent to which young people are made aware of the consequences of charges laid against them in children's hearings, and that this information could later be disclosed. As individuals get older the contextual information considered during hearings is not automatically presented to prospective employers who will only see the information about offences, which makes it difficult for any offences to be set in the context of that person's vulnerability or circumstances at the time. Those present felt it was vital that there is an opportunity for the context of any convictions or charges to be communicated, as well as clarity on exactly what could be disclosed to avoid "over-disclosing" or "under-disclosing". Some felt that there needs to be a place where these stories could be told, but also asked why events under the age of 18 should be disclosed at all. They felt that there should be a route for young people to have their offences examined again to see if they should remain on their record.

How does this particularly affect care-experienced young people?

For care-experienced young people in particular, the group said that there was an additional impact, as assumptions could be made about their character/behaviour as a result. Children and young people in family homes may carry out the same acts in that setting and not have parents call the police, whereas corporate parents (e.g. children's homes) may feel the need to do so. For care-experienced people, the state is their parents; if they were with their natural parents, they would be less likely to engage in behaviour which resulted in criminal charges. The group felt that MSPs should think about how they would want the police and courts to respond to acts of their own children when considering the impact of the Bill.