

Disclosure (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Disclosure (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

Outline of Bill provisions

3. The Bill reforms the system of disclosure of criminal records administered by the Scottish Ministers through their executive agency Disclosure Scotland. Disclosure functions are currently performed under Part 5 of the Police Act 1997 ("the 1997 Act") and the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act"). The Bill proposes to repeal and replace Part 5 of the 1997 Act, amend the PVG Act and make provision for new disclosure products. It will also make amendments to the provisions in the PVG Act under which the barring service and the Protecting Vulnerable Groups Scheme ("the PVG Scheme") operate, and for connected purposes.
4. The Bill also allows scope for digital processes to improve safeguarding and access to disclosure so that people who would prefer to do so can carry out their disclosure tasks online, including making applications and viewing disclosures.
5. The Bill repeals Part 5 of the 1997 Act as it applies in Scotland, and amends the PVG Act in a number of ways. Provision is made for the new Level 1 and Level 2 disclosures that replace the basic, standard and enhanced disclosures under the 1997 Act and the PVG scheme record and

short scheme record under the PVG Act. The Bill makes membership of the PVG mandatory for anyone in a ‘regulated role’ (the new concept to replace regulated work). Changes are also proposed with regard to Ministers’ barring functions under Part 1 of the PVG Act.

6. If enacted, the Bill will:

- reduce the number of disclosures from four main levels (basic, standard, enhanced and PVG) with ten products to two main levels (Level 1 and Level 2) with four products (sections 1 to 4 and 13 to 22), plus ‘confirmation of scheme membership’ as a replacement for ‘statement of scheme membership’ (section 84);
- end the automatic disclosure of convictions accrued by an individual while aged 12 to 17 years old (sections 5, 6, 8 to 12, 17, 23, 25, 30 to 34 and 41);
- reform and streamline the process to have certain spent convictions removed from Level 2 disclosures (sections 28 to 34);
- provide Level 2 disclosure applicants with a right to comment on proposed Other Relevant Information (“ORI”) prior to that information being issued to a third party (sections 26 to 27 and 31 to 34);
- establish clear procedures for the registration of accredited bodies who can countersign Level 2 applications, including provisions to ensure the protection of individuals’ criminal history information (sections 47 to 57);
- provide clarity on disclosure arrangements for individuals directly employing a PVG scheme member for example, for personal care or home tuition of children (section 57);
- end life-time membership of the PVG Scheme and replace it with a five-year membership period (sections 72 and 73);
- make it a requirement that anyone carrying out a regulated role (paid, or unpaid and voluntary) must be a member of the PVG Scheme (section 74);
- replace the concept of ‘regulated work’ in the PVG Act with ‘regulated roles’ (sections 75 to 76 and schedules 3 and 4);
- enable Scottish Ministers to impose standard conditions where appropriate on any individual who is under consideration for inclusion in one or both of the lists held under section 1 of the PVG Act i.e. the children’s list or the adults’ list, and to permit

- Ministers to give notice that a person is under consideration for listing and of their barred status (sections 77 to 80);
- provide new referral powers for Police Scotland and Scotland's councils and integration joint boards (sections 81 and 83); and
 - re-state and amend the lists of offences in schedules 8A and 8B of the 1997 Act (schedules 1 and 2).

Rationale for subordinate legislation

7. The Bill contains a number of delegated powers which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or included in secondary legislation careful consideration has been given to the importance of each matter against the need to:

- strike the appropriate balance between the importance of the issue and providing sufficient flexibility to respond to changing or unforeseen circumstances without the need for primary legislation;
- ensure proper use of parliamentary time;
- allow detailed administrative arrangements to be kept up to date within the basic structures set out in the Bill;
- take account of the likely frequency of amendment; and
- anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament.

8. The relevant provisions are described in detail below. For each provision the Memorandum sets out:

- the person upon whom the delegated power is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power and the purpose of each such provision; and
- the Parliamentary procedure to which the exercise of the power is to be subject to, if any.

Delegated powers

General subordinate legislation provision

9. Section 70 provides that all references to "prescribed" in Part 1 mean prescribed by regulations made by the Scottish Ministers. Section 87 is the

general provision on regulation-making powers in the Bill. Section 87(1)(a) permits the regulation-making powers to be used to make incidental, supplementary, consequential, transitional, transitory or saving provision and section 87(1)(b) allows different provision to be made for different purposes. Section 87(4) provides that regulations made under the Bill are subject to the negative procedure, unless they are made under one of the provisions referred to in subsections (2), (3) or (5).

10. Accordingly, each reference to “prescribed” in Part 1 means prescribed by regulations.

Part 1 – Disclosure of criminal history and other information

Section 1(a) – power to prescribe details of convictions to be included on a Level 1 Disclosure

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

11. Section 1 defines “Level 1 disclosure” for the purposes of Part 1 of the Bill. This is the lowest level disclosure product. Section 1(a) permits the Scottish Ministers to prescribe the details of every conviction of an individual (other than a spent conviction or a childhood conviction) that would be included on a Level 1 Disclosure. Section 1(a) provides that only convictions which are recorded in central records can be included in a Level 1 disclosure. ‘Central records’ is defined in section 70 of the Bill.

Reason for taking power

12. While the Bill sets out what convictions must be included in a Level 1 disclosure, this power is needed to give the Scottish Ministers the ability to set out the details of such convictions contained within central records that should be included on a Level 1 disclosure. This might, for example, include the date of the conviction, the convicting court, the actual offence and the method of disposal. It would not be appropriate to include that level of detail within section 1(a). Having a power to prescribe these details gives the Scottish Ministers the flexibility to respond to changing or unforeseen circumstances. For example, changes made to how criminal history information is recorded by police forces in central records could result

in a need to make changes to the details of convictions included on a Level 1 Disclosure.

13. This is also consistent with the previous situation under section 112 of the 1997 Act, which also referred to “prescribed details of every conviction” in relation to criminal conviction certificates, which the Level 1 disclosure replaces. Regulation 4 of the Police Act 1997 (Criminal Records) Regulations 2010 (SSI 2010 No. 168) (“the 2010 Regulations”) then prescribed the date of the conviction, the convicting court, the offence, and the method of disposal for the offence as the details. It is expected that regulations made under section 1(a) will be broadly similar to the provision made in the 2010 Regulations.

Choice of procedure

14. The negative procedure is considered appropriate for this power given the administrative nature of the information being prescribed and also the need for flexibility and for the Scottish Ministers to have the ability to respond timeously to any changes as to how convictions are recorded within central records. The power to prescribe details cannot amend the convictions which can be included on a Level 1 disclosure as they are determined on the face of the Bill by section 1(a), but rather the power can determine and amend only the specific details such as the date etc. regarding every conviction which the Bill requires to be included. Accordingly, the negative procedure is considered appropriate.

15. The negative procedure was also used in respect of regulations made under section 112 of the 1997 Act, namely the 2010 Regulations.

Section 4(1) – power to prescribe the period during which an applicant can either request to share or notify an intention to seek review of a Level 1 disclosure provided by using electronic communications

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

16. Section 4(1) provides that, when an applicant is provided with a Level 1 disclosure via electronic communications, the applicant may either (a) request that the Scottish Ministers arrange for the disclosure to be made

available to a third party specified by the applicant or (b) notify the Scottish Ministers of their intention to make a Level 1 review application. The applicant must do this within the time period which is to be prescribed by the Scottish Ministers.

17. Section 4(3) provides that an applicant may withdraw a notification given under section 4(1)(b) before the end of the prescribed period. Section 4(4) provides that if no request or notification is made or given under subsection (1) within the prescribed period, at the end of that period the disclosure lapses and nothing further may be done in relation to it. Accordingly, reference to the “prescribed period” in section 4(3) and 4(4) is a reference to the same period prescribed under section 4(1).

Reason for taking power

18. The power to set the time period during which a Level 1 Disclosure may be shared or reviewed is practical and administrative in nature and it is necessary that the Scottish Ministers have flexibility in setting that period in order to allow the disclosure system to operate smoothly. The time period during which an applicant is allowed the opportunity to decide whether to share or request a review of a disclosure (or let the disclosure lapse) will also be, at least partially, determined by how the planned digital system operates. It is envisaged that the prescribed period will be 10 working days initially. The Scottish Ministers will keep the time period under review as the system develops, and therefore it is necessary to have a power to modify the time period, if it is considered appropriate or necessary to do so.

Choice of procedure

19. As the Scottish Ministers are only able to set a time period using this power, and, as the essential principle that Level 1 disclosures can either be shared, reviewed or be allowed to lapse is stated on the face of the Bill, it is considered that the negative procedure is appropriate.

Section 6(1) – power to prescribe the period during which a review application may be made

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

20. Under section 6(1), an applicant can, within a prescribed period, apply to the Scottish Ministers for a review of the content of their Level 1 disclosure for: (a) accuracy of any information included, or (b) the inclusion of childhood conviction information included under section 5. In the case of Level 1 disclosures provided electronically, the applicant can only seek a review where they have first notified Ministers of their intention to do so under section 4(1).

Reason for taking power

21. The power to set the time period during which an applicant may apply to the Scottish Ministers for a review of their Level 1 disclosure is practical and administrative in nature and it is necessary that the Scottish Ministers have flexibility in setting that period in order to allow the disclosure system to operate smoothly. As the making of the application may involve the preparation of written representations and evidence, it is appropriate that this is a longer period than that prescribed under section 4(1). As the time period for the purposes of section 4(1) is to be prescribed, it is also appropriate that the subsequent period during which the review application is to be made is also left to be prescribed so that the Scottish Ministers can ensure the efficient operation of the disclosure system.

Choice of procedure

22. The Bill sets out the right of applicants to apply to the Scottish Ministers for a review of information contained in a Level 1 disclosure. This power does not affect that right, but simply allows the Scottish Ministers to set a time period within which such an application can be made and it is therefore considered that the negative procedure is appropriate.

Section 13(1)(a) – power to prescribe the details of criminal disposals to be included on a Level 2 disclosure

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

23. Section 13(1) defines “Level 2 disclosure” for the purposes of Part 1 of the Bill. Section 13(1)(a) permits the Scottish Ministers to prescribe the

details of every criminal disposal incurred by an individual that would be included on a Level 2 disclosure. Section 13(1)(a) provides that only criminal disposals which are recorded in central records can be included in a Level 2 disclosure. ‘Central records’ is defined in section 70 of the Bill. ‘Criminal disposal’ is defined in section 13(3) as meaning certain convictions as well as unspent cautions.

Reason for taking power

24. This is similar to the power referred to above in paragraph 11 in relation to Level 1 disclosures. While the Bill sets out what convictions must be included in a Level 2 Disclosure, this power is needed to give the Scottish Ministers the ability to set out what details about such criminal disposals contained within central records should also be included within a Level 2 disclosure. In relation to a conviction, this might, for example, be the date of the conviction, the convicting court, the actual offence and the method of disposal. It would not be appropriate to include that level of detail within section 13(1)(a). Having a power to prescribe these details allows gives the Scottish Ministers the flexibility to respond to changing or unforeseen circumstances. For example, changes made to how criminal history information is recorded by police forces in central records could result in a need to make changes to the details of convictions included on a Level 2 disclosure.

25. This is also consistent with the previous situation under section 113A(3)(a) and under section 113B(3)(a) of the 1997 Act, which also referred to “prescribed details” of every relevant matter in relation to criminal record certificates and enhanced criminal record certificates, which the Level 2 disclosure replaces. Regulation 6 of the 2010 Regulations then prescribed, the case of a conviction within the meaning of the Rehabilitation of Offenders Act 1974 (“the 1974 Act”), the date of the conviction, the convicting court, the offence, and the method of disposal for the offence as the details, and, in the case of a caution, the date of the caution, the police force which gave the caution and the offence which the person given the caution had admitted. It is expected that regulations made under section 13(1)(a) will be broadly similar to the provision made in the 2010 Regulations.

Choice of procedure

26. As noted above at paragraph 14 the negative procedure is considered appropriate for this power given the administrative nature of the information being prescribed and also the need for flexibility and for the Scottish

Ministers to have the ability to respond timeously to any changes as to how convictions and cautions are recorded within central records. The power to prescribe the details cannot amend the convictions and cautions which can be included in a Level 2 disclosure as they are determined on the face of the Bill by section 13(1)(a), but rather the power can determine, and amend, only the specific details of convictions and cautions, such as the date etc. regarding every conviction or caution which the Bill requires to be included. Accordingly, the negative procedure is considered appropriate.

27. The negative procedure is also used in respect of regulations made under section 113A and 113B of the 1997 Act, namely the 2010 Regulations.

Sections 14(4) – power to modify schedule 1 and schedule 2

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

28. Section 14 defines “non-disclosable conviction”. Subsections (1)(b)(i) and (1)(b)(ii) refer to spent convictions for offences listed in schedule 1 (“List A offences”) and schedule 2 (“List B offences”). List A offences include the most serious offences and spent convictions for such offences are disclosable forever. However, after a period of at least 11 years has passed the convictions then become reviewable under section 23(1)(b). List B offences include less serious offences than are included on List A, but still serious enough to warrant disclosure for a certain period of time. Spent convictions for List B offences become non-disclosable if (a) 11 years have passed since the date of conviction if the offence was committed when aged 18 or over or (b) 5 year and 6 months have passed since the date of the conviction if the offence was committed under the age of 18 or (c) the disposal for the conviction was an admonition or absolute discharge. While they remain disclosable, convictions for List B offences are reviewable under section 23(1)(b). Convictions for offences which are not included on either List A or List B become non-disclosable when they become spent under the 1974 Act.

29. List A and List B restate, with some amendments, the offence lists inserted into the 1997 Act by the Police Act 1997 and the Protection of

Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (No. 2) (SSI 2015 No. 423).

30. Subsection (4) allows Ministers to modify the lists in schedules 1 and 2.

Reason for taking power

31. The Scottish Ministers require this power so that any offences created after the coming into force of the Bill can be included in either List A or List B, if it is considered appropriate to do so, in order to help avoid any potential safeguarding gaps. It would not be appropriate to require amendments to List A or List B to be always made by primary legislation. This could take a significant amount of time following creation of an offence, leaving a potential safeguarding gap. Also it is not considered to be an appropriate use of Parliamentary time to have repeated primary legislation to amend List A or List B. The power will also allow Ministers to review the content of the lists to ensure the inclusion of an offence within List A or List B remains appropriate.

Choice of procedure

32. The affirmative procedure is considered appropriate given that the amendment of either List A or List B will involve the amendment of primary legislation and it is important that the Parliament has the opportunity to scrutinise such amendments fully. The inclusion of an offence on either List could have significant consequences on individuals who have convictions for that offence. Their convictions may be disclosable for longer, depending on the specific circumstances. The Parliament will be able to scrutinise any offences to be added to or removed from either List.

Section 19(1)(b) – power to prescribe purposes for Level 2 disclosures relating to non-PVG Scheme Members

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

33. Section 19 provides that further information may be included on a Level 2 disclosure where the applicant is not a PVG scheme member and the disclosure request is made for a prescribed purpose. Subsection (2)

provides that the Scottish Ministers may prescribe (a) purposes relating to children and (b) purposes relating to protected adults.

Reason for taking power

34. The Scottish Ministers require this power in order to set out purposes for which this type of disclosure may be applied for. This is information that is considered too detailed for the face of the Bill. Changes to employment, work practices or licencing regimes could also require changes to be made to the purposes prescribed for this kind of Level 2 disclosure. Such changes could be based on changes to appointments or positions where it would become relevant to provide suitability information in relation to work with children or work with adults. Such changes would be made to mitigate the risk of a safeguarding gap arising.

35. Regulation 9 of the 2010 Regulations performs a similar function for section 113B(2)(b) of the 1997 Act. It is intended that regulations made under section 19(1)(b) will be broadly similar to the 2010 Regulations.

Choice of procedure

36. The negative procedure is considered appropriate given the level of detail being prescribed and the Scottish Ministers also need flexibility in order to respond to changing or unforeseen circumstances, such as the emergence of a new purpose, for which this kind of disclosure product would be appropriate.

37. The negative procedure is also used in respect of the 2010 Regulations.

Section 19(4)(a)(ii) and 19(4)(b)(ii) – power to prescribe the details to be included on a Level 2 disclosure for non-PVG scheme members where the applicant is barred from carrying out regulated roles

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

38. Section 19(4) sets out the specific additional information that may be included on a Level 2 disclosure where the applicant is not a PVG scheme member and the disclosure request is made for a prescribed purpose. Subsections (4)(a)(ii) and (4)(b)(ii) provide that, with regards to individuals barred from regulated roles with children and regulated roles with adults respectively, the Scottish Ministers may prescribe details of the circumstances in which that individual was barred that are to be included on a Level 2 disclosure for non-PVG scheme members.

39. This is similar to the current provision in section 113CA(2)(b) and section 113CB(2)(b) of the 1997 Act in relation to disclosure of suitability information relating to children and protected adults respectively on an enhanced criminal record certificate issued under section 113B of the 1997 Act. Regulations 11 and 13 of the 2010 Regulations prescribe that the details to be disclosed where an applicant is barred are the details of the list under which they are barred.

Reason for taking power

40. This power is required so that the specific details of an applicant's barring can be included on the relevant Level 2 disclosure, and so that, should the way that information is presented on the underlying lists be changed, that same information can continue to be disclosed. It would not be appropriate for this detail to be on the face of the Bill, nor would it be an appropriate use of Parliamentary time or resources to require primary legislation to respond to changes regarding how information is presented.

41. This power would enable the Scottish Ministers to include details of the barred list on which the individual is included if the individual is barred from work with children by virtue of the Safeguarding Vulnerable Groups Act 2006 ("the SVG Act"), which is the equivalent legislation to the PVG Act operating in England and Wales. If changes were to be made to the SVG Act, this power would allow Scottish Ministers to respond to such developments, which is preferable to having to make such changes through the use of primary legislation.

Choice of procedure

42. The negative procedure is considered appropriate to enable the Scottish Ministers to respond quickly and with sufficient flexibility to changing or unforeseen circumstances. As the Bill already requires the details of an individual's barring to be included on a Level 2 disclosure, it will only be possible for the Scottish Ministers to prescribe the details of the circumstances in which the individual was barred.

Sections 19(4)(a)(v) and 19(4)(b)(v) – power to prescribe civil court orders for inclusion on for Level 2 disclosures relating to non-PVG scheme members, and to prescribe the detail included relating to those orders

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

43. Section 19(4) sets out the specific additional information that may be included on a Level 2 disclosure where the applicant is not a PVG scheme member and the disclosure request is made for a prescribed purpose. Subsection (4)(a)(v) provides that, where the purpose of the disclosure is related to children, this additional information includes the prescribed details of every prescribed civil court order in effect in respect of the individual or a statement that no such order is in effect. Subsection (4)(b)(v) provides the same in respect of disclosures where the purpose relates to adults. This therefore concerns two powers under each subsection. The first is to prescribe the civil court orders to be included on the Level 2 disclosure, the purpose of which relates to either adults or children, as prescribed under section 19(1)(b). The second power permits the Scottish Ministers to prescribe the specific details of those civil court orders already prescribed which will be contained on the Level 2 disclosure.

Reason for taking power

44. The details of civil court orders to be prescribed include a level of detail that would be inappropriate for the face of the Bill. Currently, the civil court orders to be disclosed on an enhanced criminal record certificate are noted on the face of the 1997 Act at sections 113CA(2)(e) to (m) and 113CB(2)(e) to (m). These were added by the Police Act 1997 (Alteration of

the Meaning of Suitability Information relating to Children and Protected Adults)(Scotland) Order 2010 (SSI 2010 No. 190), made under section 113CC(1)(a) of the 1997 Act, and the Anti-social Behaviour, Crime and Policing Act 2014. It is expected that regulations made under sections 19(4)(a)(v) and 19(4)(b)(v) will prescribe the civil court orders currently listed in sections 113CA(2)(e) to(m) and 113CB(2)(e) to (m) and will also prescribe a similar level of detail as sections 113CA(2)(e) to (m) and 113CB(2)(e) to (m) currently provide for.

45. This power is also required in order to allow for any new civil court orders created by subsequent legislation to be listed and disclosed on a Level 2 disclosure relating to a non-PVG scheme member. This power will provide the Scottish Ministers the flexibility to make changes if necessary to do so in the future without making changes to primary legislation.

Choice of procedure

46. As the main principle that civil court orders may be included in Level 2 disclosures is provided for on the face of the Bill, it is appropriate for the Scottish Ministers to prescribe the actual civil court orders by means of regulations subject to the negative procedure. The negative procedure is also considered appropriate because the Scottish Ministers need flexibility to respond to the introduction of new civil court orders or repeal of existing civil court orders which the Scottish Ministers may consider appropriate to subsequently include on or remove from this disclosure product.

47. The negative procedure is also used to make regulations under section 113CC(1)(a).

Section 20(3)(d) – power to prescribe civil court orders to be included on Level 2 disclosures relating to PVG scheme members, and to prescribe the detail included relating to those orders

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

48. Section 20 provides that certain additional information can be included on a Level 2 disclosure where the applicant is a member of the PVG Scheme and the purpose of the disclosure is to enable or assist a person

(or any other person for whom the person acts) to consider the individual's suitability to carry out, or to be offered or supplied for, a type of regulated role. Subsection (3)(d) provides that that additional information includes the prescribed details of every prescribed civil court order in effect in respect of the individual or a statement that no such order is in effect. As with section 19(4)(a)(v) and 19(4)(b)(v), this therefore concerns two powers. The first is to prescribe the civil court orders to be included on the Level 2 disclosure for PVG scheme members. The second power permits the Scottish Ministers to prescribe the specific details of those civil court orders already prescribed which will be contained on the Level 2 disclosure.

Reason for taking power

49. Given that this power is similar to section 19(4)(a)(v) and 19(4)(b)(v) and that it is likely that the same orders would be prescribed, please see the reasoning given at paragraph 44.

50. Regulation 3 of the Protection of Vulnerable Groups (Scotland) Act 2007 (Vetting Information) Regulations 2010 (SSI 2010 No. 189) currently prescribes civil court orders for the purposes of section 49(1)(d) of the PVG Act and it is expected that regulations made under section 20(3)(d) will prescribe the same civil court orders and a similar level of detail as currently prescribed.

Choice of procedure

51. Given that this power is similar to section 19(4)(a)(v) and 19(4)(b)(v) and that it is likely that the same orders would be prescribed, please see the reasoning given at paragraph 46.

Section 21(1) – power to prescribe the period during which an applicant can either request the sharing or review of a Level 2 disclosure

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

52. Section 21 makes provision for an applicant to request, within a prescribed time period, that the Scottish Ministers arrange for the Level 2

disclosure to be made available to the accredited body that countersigned the application, or notify the Scottish Ministers that the applicant intends to make an application to review the inclusion of certain information before the Level 2 disclosure is made available to the accredited body. If the applicant makes no request or notification, the disclosure lapses under section 21(4). Subsection (1) allows the Scottish Ministers to prescribe that period.

53. Section 21(3) provides that an applicant may withdraw a notification given under section 21(1)(b) before the end of the prescribed period. Section 21(4) provides that if no request or notification is made or given under subsection (1) within the prescribed period, at the end of that period the disclosure lapses and nothing further may be done in relation to it. Accordingly, reference to the “prescribed period” in section 21(3) and 21(4) is a reference to the same period prescribed under section 21(1).

54. This section replicates, for Level 2 disclosures, the provisions at section 4 for making Level 1 disclosures available to third parties.

Reason for taking power

55. The power to set the time period during which a Level 2 Disclosure may be shared or reviewed is practical and administrative in nature and it is necessary that the Scottish Ministers have flexibility in setting that period in order to allow the disclosure system to operate smoothly. The time periods applicable to the sharing or reviewing of an application will be, at least partially, determined by how the planned digital system operates. It is envisaged that the prescribed period will be 10 working days initially. The Scottish Ministers will keep the time period under review as the system develops, and therefore it is necessary to have a power to modify the time period, if it is considered appropriate or necessary to do so.

Choice of procedure

56. As the Scottish Ministers are only able to set a time period using this power, and, as the essential principle that Level 2 disclosures can either be shared, reviewed or be allowed to lapse is stated on the face of the Bill, it is considered that the negative procedure is appropriate.

Section 23(1) – power to prescribe the period during which a review application may be made

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

57. Section 23(1) provides that, where a Level 2 disclosure has been provided to an applicant, the applicant may, within the prescribed time period, apply to the Scottish Ministers to (a) review the accuracy of the information contained in the disclosure or (b) review the inclusion of any reviewable information included in their Level 2 disclosure. Reviewable information is defined by subsection (2) as information included under section 17 about childhood convictions, information provided by the police under section 18 or details of removable convictions as defined at subsection (6). As subsection (3) sets out, a Level 2 review application can only be made if the applicant has notified the Scottish Ministers under section 21(1)(b) of an intention to make an application. Section 23(1) concerns the time period during which the application for a review is to be made, following that earlier notification.

Reason for taking power

58. The power to set the time period during which an applicant may apply to the Scottish Ministers for a review of their Level 2 disclosure is practical and administrative in nature and it is necessary that the Scottish Ministers have flexibility in setting that period in order to allow the disclosure system to operate smoothly. As the making of the application may involve the preparation of written representations and evidence, it is appropriate that this is a longer period than that prescribed under section 21(1). As the time period for the purposes of section 21(1) is to be prescribed, it is also appropriate that the subsequent period during which the review application is to be made is also left to be prescribed so that the Scottish Ministers can ensure the efficient operation of the disclosure system.

Choice of procedure

59. The Bill sets out the right of applicants to apply to the Scottish Ministers for a review of information contained in a Level 2 disclosure. This power does not affect that right, but simply allows the Scottish Ministers to set a time period within which such an application can be made and it is therefore considered that the negative procedure is appropriate.

Section 27(2) – power to prescribe the period within which an applicant may request the Scottish Ministers arrange a review of ORI by the independent reviewer

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

60. Section 27 enables an applicant to request that the Scottish Ministers arrange for the information included by the police in a Level 2 disclosure to be reviewed by the independent reviewer following a review of the inclusion of that information by the chief constable under section 26. Subsection (2) allows the Scottish Ministers to prescribe the time period in which the applicant may request the Scottish Ministers to arrange for this review by the independent reviewer to be carried out.

61. The time period prescribed here is also the “relevant period” for the purposes of section 30, which provides that the Scottish Ministers must ensure that a review to be carried out to by the independent reviewer is not started until earlier first level reviews have been completed, and the period prescribed here has elapsed.

Reason for taking power

62. The review applications process is new and precise timescales are yet to be identified to ensure the smooth running of the state disclosure regime, both in terms of giving applicants a reasonable amount of time to request such a review but also ensuring Level 2 disclosures are provided in a timely manner so that there is no undue interference in recruitment or appointment of individuals. Flexibility is also required to ensure that all the first level reviews are able to go to the independent reviewer at the same time, and that Ministers may prescribe different periods for different reviews depending on how many concurrent strands are running. As the system develops and beds in, the Scottish Ministers will keep the time periods under review, and therefore it is necessary to have a power to modify the time period, if it is considered appropriate or necessary to do so.

Choice of procedure

63. As the Scottish Ministers are only able to set a time period using this power, and, as the essential principle that ORI included on Level 2 disclosures can be reviewed is stated on the face of the Bill, it is considered that the negative procedure is appropriate.

Section 29(2) – power to prescribe the period within which an applicant may request the Scottish Ministers arrange a review of a removable conviction by the independent reviewer

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

64. Section 29 enables the applicant to request that the Scottish Ministers arrange for the independent reviewer to carry out a review of a removable conviction, following the Scottish Ministers' first level review carried out under section 28. Subsection (2) allows Scottish Ministers to prescribe the time period in which the applicant may request the Scottish Ministers arrange for this review by the independent reviewer to be carried out.

65. The time period prescribed here is also the "relevant period" for the purposes of section 30, which provides that the Scottish Ministers must ensure that a review to be carried out by the independent reviewer is not started until earlier first level reviews have been completed, and the period prescribed here has elapsed.

Reason for taking power

66. Given that this power is similar to section 27(2) and that it is likely that a similar time period would be prescribed, please see the reasoning given at paragraph 62.

Choice of procedure

67. As the Scottish Ministers are only able to set a time period using this power, and, as the essential principle that removable convictions to be included on Level 2 disclosures can be reviewed is stated on the face of the Bill, it is considered that the negative procedure is appropriate.

Section 37 – power to make regulations about procedure for disclosure requests

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

68. Section 37 permits the Scottish Ministers to make further provision by regulations about the procedure to be followed in connection with:

- a) applications under Part 1 for Level 1 disclosures or Level 2 disclosures,
- b) the provision of such disclosures to applicants under Part 1,
- c) making such disclosures available to persons other than the applicants.

Reason for taking power

69. The Scottish Ministers require this power in order to make provision for the technical and procedural aspects of the processes for applications for, and provision of, disclosures under Part 1. Subordinate legislation is considered appropriate in view of the level of further detail required, which would be inappropriate on the face of the Bill. The Scottish Ministers may require to amend the procedure to take into account the development of the proposed digital system.

Choice of procedure

70. The negative procedure is considered appropriate in view of the technical and detailed nature of any regulations which may be made under this power.

Section 38(1) – power to make regulations about review procedures

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

71. Section 38(1) gives the Scottish Ministers a regulation-making power in respect of the procedure for the reviews of information to be included in a Level 1 or Level 2 disclosure, whether carried out by the Scottish Ministers, the chief constable or the independent reviewer.

72. Subsection (2) notes a non-exhaustive list of what this power may specifically provide for, including:

- (a) the time period within which any statement of reasons is to be provided for the purposes of a review,
- (b) the time period within which the applicant may make representations for the purposes of a review,
- (c) the time period within which a person required to provide information for the purposes of a review is to do so,
- (d) the time period within which any notice or notification required in connection with a review is to be given.

Reason for taking power

73. The power is required to enable the Scottish Ministers to make provision to regulate procedural matters connected with the review processes. The various possible strands of review must be able to be co-ordinated effectively, in order to reduce the administrative burden on the Scottish Ministers and the time taken by enabling multiple reviews to run concurrently. A delay caused by overlapping procedures not running smoothly could negatively affect an applicant's employment chances, so it is crucial that the Scottish Ministers are able to make provision for a flexible procedure that can be adapted to the range of possible reviews running concurrently.

Choice of procedure

74. The negative procedure is considered as offering an appropriate level of scrutiny due to the practical and detailed nature of the regulations that could be made under this power. The substantive frameworks for the review applications, and the carrying out of reviews by the Scottish Ministers, the chief constable and the independent reviewer are all set out on the face of the Bill.

Section 39(1) – Power to modify definitions of Level 1 disclosure and Level 2 disclosure

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

75. This section gives the Scottish Ministers the power to modify by regulations section 1 which defines Level 1 disclosures and section 13 which defines Level 2 disclosures. Subsection (2) clarifies that regulations made under subsection (1) may make modifications for the purposes of, or in connection with, enabling Level 1 and Level 2 to include details of information held outside the United Kingdom. The provision at subsection (2) replicates the power at section 113BA of the 1997 Act which enables the Scottish Ministers to respond to any information sharing agreements between the UK and overseas jurisdictions that result in new information sources, outwith the UK, becoming available for use in connection with criminal record checks.

Reason for taking power

76. Since the 1997 Act (and subsequently the PVG Act) came into force, there have been various changes made to the type of information which must be included within disclosure certificates. This power is necessary to enable Scottish Ministers to be able to respond flexibly and appropriately if they consider that further changes should be made to the definition of Level 1 and Level 2 disclosures.

77. This power in subsection (2) is required to ensure that the Scottish Ministers have the flexibility to respond to any information sharing agreements between the UK and overseas jurisdictions that result in new information sources, outwith the UK, becoming available for use in connection with criminal record checks. This change will enable the Scottish Ministers to gather information from a wider range of sources when discharging their functions under the Bill. The power is being taken in secondary legislation to enable the Scottish Ministers to respond quickly and flexibly to new sources of information as and when they become available. Making use of the new source of information should help ensure that the disclosure system is as comprehensive and robust as possible.

Choice of procedure

78. Given the extent of the possible changes to disclosure products provided by the regulation-making power, we consider that regulations made under this section should be subject to the affirmative procedure. This will afford the appropriate level of parliamentary scrutiny of amendments to primary legislation while still enabling the Scottish Ministers the speed and flexibility to respond to changing circumstances.

Section 40(1) – Childhood information: power to modify other enactments

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

79. This section gives the Scottish Ministers the power to modify by regulations any enactment that requires or allows the disclosure of convictions, cautions or alternatives to prosecution from childhood to ensure that such disclosure is not required or allowed until the information has been disclosed on a Level 1 or Level 2 disclosure provided under the Bill.

80. This section concerns the interaction between the disclosure of convictions by the Scottish Ministers (“state disclosure”) and the individual themselves (“self-disclosure”). These two elements of the disclosure system work in tandem, with a state disclosure provided by the Scottish Ministers, through Disclosure Scotland, being used to verify the self-disclosure of convictions made by an individual under the 1974 Act to an employer. The power will enable the Scottish Ministers to continue to ensure the alignment of the state and self-disclosure systems.

Reason for taking power

81. Given that the Bill treats convictions accrued before the age of 18 differently from convictions accrued when 18 or over, it is important that childhood conviction information is not required to be self-disclosed until it has been decided by the Scottish Ministers, the independent reviewer or a sheriff that it would be appropriate to be included within a state disclosure. This power is considered necessary given the technical nature of the 1974 Act. This Bill is being introduced shortly after the passing of the Age of Criminal Responsibility (Scotland) Act 2019 and during the passage of the Management of Offenders (Scotland) Bill. Both of these Bills may affect the need to make substantive and consequential changes regarding the self-disclosure of childhood conviction information. It is therefore appropriate, particularly given the technical nature of the existing legislative provision in the 1974 Act, to take a regulation-making power so that Ministers can ensure that the self-disclosure provisions in relation to childhood convictions obtained between the ages of 12 and 17 remain aligned with the state disclosure provisions.

Choice of procedure

82. This regulation-making power will be subject to affirmative procedure. This is appropriate as the regulation-making power conferred on the Scottish Ministers under this section will enable the modification of primary legislation.

Section 46(1)(f) – power to prescribe purposes for which disclosing a Level 2 disclosure is not an offence under section 43

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

83. Section 46(1) sets out exceptions to the offence of unlawful disclosure of a Level 2 disclosure provided for under section 43. Subsection (1)(f) gives the Scottish Ministers the power to prescribe other purposes for which the offence at section 43 does not apply.

Reason for taking power

84. Regulations made under subsection (1)(f) will be used to prescribe purposes for which a Level 2 disclosure can be lawfully disclosed where such purposes come to light with the benefit of usage. This could be for example for audit or monitoring purposes or could be due to changing employment or volunteering practices.

Choice of procedure

85. The negative procedure is considered appropriate given the need for flexibility to respond to unforeseen circumstances or changes to the employment landscape, in which disclosure of a Level 2 disclosure should be made lawful.

86. Additionally, five different exclusions from the offence provisions are already specifically provided for in subsections (1)(a) to(e) and any regulations would therefore be extending the exclusions which are already detailed in the primary legislation.

87. The negative procedure was also considered appropriate for regulations made under section 68(1)(g) of the PVG Act, which performed a similar function regarding the offence of unlawful disclosure of scheme records in section 66(1) of the PVG Act, which is analogous to the offence provided for at section 43(1) of the Bill.

Section 46(2)(f) – power to prescribe circumstances in which use of a Level 2 disclosure is not an offence under section 45

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

88. Section 46(2) sets out exceptions to the offence of unlawful request for and use of a Level 2 disclosure provided for by section 45. Subsection (2)(f) allows further circumstances to be prescribed in which the offence in section 45 will not apply.

Reason for taking power

89. Regulations made under subsection (2)(f) may prescribe circumstances in which a Level 2 disclosure can be lawfully requested and used, which are additional to the circumstances set out in section 46(2)(a) to (e). Such circumstances might come to light following the benefit of usage. It is also known already that provision will need to be made to ensure that, where individuals are PVG scheme members in relation to carrying out regulated roles under transport contracts between local authorities or health boards and the employer of the PVG scheme member, provision can be made to ensure that the contracting authority can lawfully request or use a Level 2 disclosure. Given the detail that will be required and the possibility for further amendments if practices change, it is appropriate to make this provision in regulations. Such provision in relation to transport contracts was made in regulation 3 of the Protection of Vulnerable Groups (Scotland) Act 2007 (Unlawful Requests for Scheme Records) (Prescribed Circumstances) Regulations 2010 (SSI 2010 No. 194) which prescribes circumstances for the purposes of section 67(3)(b) of the PVG Act. Section 67 provided an analogous offence under the PVG Act to that under section 45 of the Bill.

Choice of procedure

90. The negative procedure is considered appropriate given the need for flexibility to respond to unforeseen circumstances or changes to the employment landscape, in which disclosure of a Level 2 disclosure should be lawfully requested and used.

91. Additionally, five different exclusions from the offence provisions are already specifically provided for in subsections (2)(a)-(e) and any

regulations would therefore be extending the exclusions which are already detailed in the primary legislation.

92. The negative procedure was also used in the making of the Protection of Vulnerable Groups (Scotland) Act 2007 (Unlawful Requests for Scheme Records) (Prescribed Circumstances) Regulations 2010 (SSI 2010 No. 194).

Section 50(5) – power to prescribe “relevant police force”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

93. Section 50 provides for the information that the Scottish Ministers may have regard to in respect of determining suitable persons to have access to disclosure information for the purposes of section 48(5) or 49(2). Subsection (2) provides that before making a determination as to suitability, the Ministers may request information from the chief officer of any relevant police force. Section 70 defines “police force” generally for the purposes of the Bill to mean the main police forces in the UK. Subsection (7) lists other bodies which are to be included in the meaning of “police force” for the purposes of section 50. Subsection (5) gives Ministers the power to prescribe the meaning of relevant police force for the purpose of this section.

Reason for taking power

94. The Scottish Ministers require this power in order to set out the detailed criteria which will determine when a specific police force, or body to be treated as a police force under section 50(7), is relevant for the purposes of section 50(2), such that the Scottish Ministers must request the chief officers of those police forces to provide information before determining whether an individual is a suitable person to have access to disclosure information under section 50(1). It would not be appropriate to state this level of detail on the face of the Bill.

95. This power is also required to enable the Scottish Ministers to capture any changes to the organisation or jurisdiction of police forces that may be made following the entry into force of the Bill.

Choice of procedure

96. The negative procedure is considered appropriate given the level of administrative detail being prescribed and the need for flexibility so that the Scottish Ministers can respond to changing circumstances.

97. The negative procedure was also used in respect of provision prescribing police forces within the meaning of “relevant police force” for the purposes of section 113B(4) of the 1997 Act.

Section 50(7)(c)(iii) – power to prescribe departments or bodies

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

98. Subsection (7)(c) lists various bodies to be treated as police forces for the purpose of section 18. These bodies would otherwise fall outwith the definition of “police force” as provided in section 70 and section 50(7)(a). Subsection (7)(c)(iii) gives the Scottish Ministers the power to prescribe other such departments or bodies. Regulations prescribing such departments or bodies may also prescribe the person to whom a reference to the chief officer of a police force is to be taken to be in relation to that department or body.

Reason for taking power

99. This power is required to enable the Scottish Ministers to include any newly created bodies to the list of those which should be treated as a police force. It is would not be an appropriate use of Parliament’s time or resources to leave this to be amended by primary legislation.

Choice of procedure

100. The negative procedure is considered appropriate given the need for flexibility to respond to changing or unforeseen circumstances.

101. The negative procedure is also used in respect of the 2010 Regulations.

Section 52(5) – power to prescribe the details to be provided in making an application to become a lead signatory or a countersignatory

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

102. Section 52(1) provides that an applicant making an application on behalf of a body corporate or unincorporated, or a statutory office-holder must nominate a lead signatory and, if the application relates to registration of the type mentioned in sections 48(1)(b) or (c), namely the countersigning of an application for a Level 2 disclosure, must also nominate one or more countersignatories. Subsection (2) provides that an accredited body that is a body corporate or unincorporated, or a statutory office-holder may nominate a lead signatory in substitution for an individual previously nominated as lead signatory, or a may nominate a countersignatory, if appropriate, in addition to or substitution for an individual previously nominated as a countersignatory. Subsection (5) provides that an application under section 52 containing a nomination of a lead signatory or a countersignatory must also contain the prescribed details of the lead signatory or the countersignatory. Subsection (6) provides that those prescribed details must also be included in the entry for the relevant accredited body in the register for accredited bodies if the Scottish Ministers accept the nomination or nominations.

103. References in sections 50(1)(d)(iv), 52(6), 52(7), 52(11), 53(3), 53(6), 53(7)(b), 54(1)(d), 54(4)(d), 54(5)(b), 55(2)(f) and 55(2)(g)(iv) to “prescribed details” should be read as references to details prescribed under section 52(5).

Reason for taking power

104. This power is required so that the specific details of a lead signatory or countersignatory can be included on the relevant entry of the register of accredited bodies. It would not be appropriate for this detail to be on the face of the Bill, nor would it be an appropriate use of Parliamentary time or resources to require primary legislation to respond to changes regarding how information is presented.

Choice of procedure

105. The negative procedure is considered appropriate given the level of administrative detail being prescribed and the need for flexibility so that the Scottish Ministers can respond to changing circumstances.

Section 55(1) – power to make regulations about registration

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

106. Section 55(1) allows Scottish Ministers to make further provision about the register of accredited bodies and registration in it. Subsection (2) provides a non-exhaustive list of examples of what this power may be used for:

- a) the information to be included in an application for registration;
- b) the information to be included in the register;
- c) the registration of any accredited body to be subject to conditions, including under subsection (3) provision for the registration or continued registration of any accredited body to be subject to such conditions as may be specified or, if the regulations so provide, such conditions as the Scottish Ministers think fit and for the Scottish Ministers to vary or revoke those conditions;
- d) the process for refusing registration or removing an accredited body from the register;
- e) the nomination of a lead signatory or countersignatory and acceptance or refusal by the Scottish Ministers of such a nomination;
- f) the removal of all of the prescribed details of a lead signatory or countersignatory of an accredited body from the entry for the accredited body in the register;
- g) the process for reviewing a decision to—

- (i) refuse an application for registration;
 - (ii) remove an accredited body from the register;
 - (iii) refuse to accept the nomination of a lead signatory or countersignatory;
 - (iv) remove all of the prescribed details of a lead signatory or countersignatory of an accredited body from the entry for the accredited body in the register;
- h) the suspension of the registration of an accredited body;
- i) the period which must elapse before any person refused registration, or removed from the register, may apply again for registration.

Reason for taking power

107. The Scottish Ministers intend to use the regulation-making power under section 55(1) to deal with the technical and administrative aspects of the system for registering accredited bodies and that would include a level of detail inappropriate for the face of the Bill. Under the 1997 Act, the Scottish Ministers had similar powers to make regulations in relation to the register of registered persons held under section 120 of the 1997 Act. Section 55 re-states, and amends to some extent, the regulation-making powers under the 1997 Act; those powers were exercised in the Police Act 1997 (Criminal Records) (Registration) Regulations 2010 (SSI 2010 No. 383) and it is likely that the Scottish Ministers would make similar regulations under section 55.

Choice of procedure

108. The negative procedure is considered as offering an appropriate level of scrutiny due to the nature of the regulations to be made under this power and given the fact that the substantive framework for registration of accredited bodies is set out on the face of the Bill.

Section 56(1) – requirement on the Scottish Ministers to publish a code of practice

Power conferred on: the Scottish Ministers

Power exercisable by: code of practice

Parliamentary procedure: none

Provision

109. Section 56(1) requires the Scottish Ministers to publish a code of practice in connection with the use of information provided to, or the exercise of any function by, accredited bodies under Part 1 of the Bill. Subsection (3), (4) and (5) requires accredited bodies to comply with the code and take all reasonable steps to ensure bodies on whose behalf they act also comply with the code. Under subsection (7) the Scottish Ministers have the power to impose conditions on an accredited body where there has been a failure by the body or its lead signatory or countersignatories to comply with the code of practice. The Scottish Ministers have a power under subsection (6) to revise the code of practice from time to time.

Reason for taking power

110. The Scottish Ministers require this power in order to publish a code of practice which will place obligations on accredited bodies including in relation to the fair use of disclosure information, handing disclosure information and assurance and audit. The code of practice is an operational resource requiring flexibility to adapt and respond to changes in circumstances, meaning that it would not be appropriate to provide for something to the same effect in primary legislation. A similar provision in section 122 of the 1997 Act required the Scottish Ministers to publish a code of practice and it is essential that the Scottish Ministers continue to have a similar power under the Bill.

Choice of procedure

111. There is no parliamentary procedure, but the Scottish Ministers are required under section 56(2) to lay the code of practice before the Parliament as soon as possible after publication.

Section 57(5) – power to make provision about the fees that may be charged for the countersigning of an application for a Level 2 disclosure

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

112. Section 16(1) provides that an application for a Level 2 disclosure must be countersigned by an accredited body. Section 57(1) enables an accredited body to countersign an application for a Level 2 disclosure on its own behalf or on behalf of another person who falls within the meaning of sections 48(3)(a) to (c) but who is not an accredited body. Subsection (1)(b)(ii) provides that an accredited body may also countersign an application for a Level 2 disclosure on behalf of an individual who does not employ other persons in the course of business. Subsection (5) allows the Scottish Ministers by regulations to make provision about the fees that may be charged by accredited bodies in connection with the countersigning of applications under subsection (1)(b)(ii).

Reason for taking power

113. This power is required so that the Scottish Ministers are able to regulate the charging of fees by accredited bodies for the countersigning of applications for Level 2 disclosures where they are countersigning them on behalf of individuals who are not acting in the course of a business. This could include setting an actual fee or setting a maximum possible fee. Where accredited bodies countersign applications under subsection (1)(b)(ii) for individuals not acting in the course of a business, subsection (4) states that the accredited body cannot make the disclosure information available to the individual, but can provide advice to the individual. This enables accredited bodies to develop a new service, for example to individuals who are employing carers using self-directed support payments. It is essential that the Scottish Ministers have this power to regulate the charging of fees for this service by accredited bodies to protect the individuals who may use this new service. This power gives the Scottish Ministers flexibility and will allow them to respond to unforeseen and changing circumstances.

Choice of procedure

114. Although this provision is not about fees chargeable by the Scottish Ministers, but is rather about fees chargeable by accredited bodies, it is still in accordance with other fee provisions in relation to the disclosure system which are all contained within regulation-making powers. The negative procedure is considered appropriate given the need for the Scottish Ministers to be able make, and amend, provision in relation to fees charged by accredited bodies quickly in response to unforeseen and changing

circumstances, while still affording an appropriate level of Parliamentary scrutiny.

Section 59(2)(d) – power to prescribe other persons holding data

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

115. Section 59(2) lists the personal data holders from which the Scottish Ministers may obtain information for use by them in order to check evidence of identity under section 59(1). Subsection (2)(d) permits the Scottish Ministers to prescribe further data holders from whom they may obtain information that they may use for that purpose.

Reason for taking power

116. The Scottish Ministers have no immediate intention to use this power but it allows for additional bodies to be added should the UK Government or the Scottish Government decide to change the arrangements for the administration and holding of the record types currently listed.

Choice of procedure

117. The negative procedure is considered appropriate in view of the technical nature of this provision and given the limited nature of the regulations to be made under this power which simply provides for the prescribing of further personal data holders from whom the Scottish Ministers may obtain information. The use to which that information will be put to check evidence of identity is already detailed in the primary legislation.

Section 60(1) – Power to use fingerprints to check identity

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

118. The Scottish Ministers may require an applicant, as set out under section 58, to provide them with such evidence of identity as they may

require. Section 60 permits the Scottish Ministers to require an applicant to have their fingerprints taken for the purpose of confirming their identity where other means of authentication have been unsuccessful. Section 60(1) gives the Scottish Ministers the power to prescribe how, by whom and where fingerprints are to be taken.

Reason for taking power

119. The Scottish Ministers require the power under 60(1) in order to prescribe the manner for the taking of fingerprints, as well as the person who is to take them and the place they are to be taken at. As the substantive power to require fingerprints, the requirement of consent and the obligation to destroy fingerprint data after they have been used are stated on the face of the Bill, it is considered appropriate that the details of where, by whom and how fingerprints are taken be left to subordinate legislation.

Choice of procedure

120. The negative procedure is considered appropriate in view of the technical and procedural nature of regulations to be made under this provision.

121. The negative procedure was also used in respect of the 2010 Regulations made under section 118(2)(a) of the 1997 Act and the Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Manner and Place for the Taking of Fingerprints and Prescribed Personal Data Holders) Regulations 2010 (SSI 2010 No. 192) made under section 63(1) of the PVG Act. It is expected that regulations made under this section of the Bill will be broadly similar.

Section 62(1) – Fees

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

122. This section gives the Scottish Ministers a power to make regulations for the charging of fees in respect of the exercise of their functions under Part 1 of the Bill. Subsection (2) gives a non-exhaustive list of the provision that Scottish Ministers may make in particular for the charging of fees for or in connection with:

- applications for Level 1 disclosures or Level 2 disclosures;
- applications for registration in the register of accredited bodies and for nomination of lead signatory and countersignatories;
- the notification of any changes relating to the prescribed details of an accredited body's lead signatory or countersignatory;
- the provision of any documentation confirming the authenticity of a certificate provided in response to an application for a Level 1 disclosure;
- review applications for Level 1 and Level 2 disclosures; and
- the verifying of the identity of a disclosure request.

123. Subsection (3) clarifies that the regulation-making power may provide for different fees to be charged in different circumstances, and fees to be waived, reduced or refunded. The regulations may also provide for the manner in which fees are to be paid. Subsection (4) expressly provides that fees in relation to applications for registration in the register of accredited bodies can include annual or recurring fees.

Reason for taking power

124. The Scottish Ministers intend to review fees periodically, meaning that it would be inappropriate to include the specific fees on the face of the Bill. The regulation-making power will give flexibility in respect of any future changes to the fee structure and allow the detail of the fees as well as any reductions, waivers or refunds to be set out. The Scottish Ministers intend to use this regulation-making power to continue the waiver of fees for qualifying voluntary organisations.

Choice of procedure

125. The negative procedure is considered appropriate taking into account the need to strike a balance between being able to change fees quickly, for example, in line with inflation, while also ensuring there is an appropriate level of Parliamentary scrutiny.

126. Disclosure certificate fees under the 1997 Act are set by regulation 3 of the 2010 Regulations and were made under the negative procedure. The Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010 (SSI 2010 No. 167) set the fees payable for PVG Act disclosures under section 70 and these were similarly subject to the negative procedure. It is appropriate that the parliamentary procedure for fees regulations under the Bill should be

consistent with these previous Acts. The power in section 70 of the PVG Act will continue to apply in relation to fees relating to membership of the PVG scheme.

Section 64(1) – requirement to issue guidance to the chief constable

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: none

Provision

127. Section 64(1) requires the Scottish Ministers to issue guidance to the chief constable about the chief constable's functions under Part 1 of the Bill. Subsection (2) enables the Scottish Ministers, from time to time, to issue revised guidance. Subsection (5) requires the chief constable to have regard to guidance issued under subsection (1).

Reason for taking power

128. The guidance issued by the Scottish Ministers will cover the process governing the generation and disclosure of police information on Level 2 disclosures. The level of detail that will be required by the guidance is beyond that which would ordinarily be found in primary or secondary legislation. Guidance will provide a flexible and responsive resource to support the chief constable. It is considered that an operational resource that supports the chief constable in performing their functions should not take up parliamentary time.

Choice of procedure

129. There is no parliamentary procedure.

Section 69(d) – power to prescribe other purposes for which a Level 2 disclosure for PVG scheme members may be used to consider an individual's suitability

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

130. Section 69 defines “consideration of suitability” for the purposes of sections 20(1)(b) and 45(2). Subsection (d) gives the Scottish Ministers the power to prescribe other purposes for which an individual’s suitability may be considered.

131. This is similar to the power provided for in section 73(g) of the PVG, under which three sets of regulations have been made:- the Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Purposes for Consideration of Suitability) Regulations 2010 (SSI 2010/381); the Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Purposes for Consideration of Suitability) Regulations 2011 (SSI 2011 No. 411) and the Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Purposes for Consideration of Suitability) Regulations 2016 (SSI 2016 No. 27). Each of these sets of regulations prescribed purposes for the purposes of section 73(g) of the PVG Act.

Reason for taking power

132. This power is required so that the Scottish Ministers have the flexibility to amend and expand the scope of “consideration of suitability” as and when necessary to ensure that Level 2 disclosures in relation to PVG scheme members are available to those persons who should have access to them, so that the risk of safeguarding gaps is reduced. It is considered that a regulation-making power is more appropriate than including provision on the face of the Bill because of the technical nature of the possible provisions. The need for provision under this power could arise as a result of other statutory provisions affecting regulatory bodies whose members are generally members of the PVG scheme.

Choice of procedure

133. The negative procedure is considered appropriate given the need for flexibility to respond to changing or unforeseen circumstances.

134. The negative procedure also applies to regulations under section 73(g) of the PVG Act.

Section 70 – power to define “central records”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

135. Section 70 provides definitions for various terms used throughout the Bill. This includes the definition of “central records” as used in sections 1(a), 5(1)(a), 13(1)(a), 17(1)(a), 50(1)(a) and 66(1). The definition given is such records of convictions, cautions or other information held for the use of police forces generally as may be prescribed. Accordingly, this section gives the Scottish Ministers the power to prescribe the central records to be searched for the purposes of providing a disclosure.

Reason for taking power

136. The Scottish Ministers intend to prescribe the databases to be searched for the purposes of producing a disclosure, for example, the Scottish Criminal History System held by Police Scotland. The power is required given the need for flexibility to respond to changing or unforeseen circumstances, such as a change to the databases in which criminal history information is recorded by police forces. Including those references in primary legislation would run the risk that the Scottish Ministers would no longer be able to perform their functions under the Bill, if the definition were to be changed. If ‘central records’ are prescribed in regulations, the need to have amendment of primary legislation is avoided.

Choice of procedure

137. The negative procedure is considered appropriate given the technical nature of the content of the regulations to be made under the power. The negative procedure was used in respect of regulation-making powers under the 1997 Act to prescribe central records. It is expected that regulations made under this section will be broadly similar to the 2010 Regulations.

Part 2 – Protection of vulnerable groups

Part 2 of the Bill makes amendments to the PVG Act.

General subordinate legislation provision

138. Section 97 of the PVG Act provides that “prescribed” means prescribed in regulations made by Ministers (and that “prescribe” is to be construed accordingly). Section 100(1) of the PVG Act provides that any power of Ministers under the PVG Act to make an order or regulations is exercisable by statutory instrument. Subsection (2) provides that any such power includes a power to make (a) such incidental, supplemental,

consequential, transitional, transitory or saving provision as Ministers consider appropriate and (b) different provision for different purposes. Subsection (3) provides that, unless subsection (4) makes contrary provision, a statutory instrument containing regulations made under this Act is made under the negative procedure.

139. Accordingly, any power to make regulations, or any power to prescribe details, in provisions being inserted into the PVG Act by the Bill should be read in the context of section 97, if applicable, and section 100 of the PVG Act.

Section 75 - Schedule 3 (inserted schedule 2, paragraph 2(4)) – power to prescribe circumstances in which an activity is or is not to be treated as being done in the course of a family or personal relationship.

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

140. Section 75(3) of the Bill substitutes schedule 2 of the PVG Act with a new schedule 2 which is set out in schedule 3 of the Bill. Paragraphs 1 and 2 of the new schedule 2 set out the circumstances in which carrying out an activity in Part 2 would or would not be a regulated role with children.

Paragraph 2(1)(b) provides that where the activity is carried out in the course of a family or personal relationship it would not be a regulated role.

Paragraphs 2(2) and (3) further clarify what is meant by family and personal relationship. Paragraph 2(4) gives the Scottish Ministers the power to prescribe circumstances in which an activity is to be or is not to be treated as being done in the course of a family or personal relationship for the purposes of the new schedule 2. This power is broadly similar to that currently provided for by section 95(9) of the PVG Act, which the Bill will repeal.

Reason for taking power

141. The regulation-making power under this paragraph is required to ensure that the reference to family or personal relationship in paragraph 2(1)(b) links effectively with definitions in other legislation for specific purposes, for example to apply the same definition of family as applies in fostering law. There is also a need to be able to respond to future

developments, given the changing nature of family and personal relationships within society.

Choice of procedure

142. The negative procedure is considered appropriate given the need for flexibility to respond to changing or unforeseen circumstances and the negative procedure currently applies to regulations which could be made under section 95(9) of the PVG Act.

Section 75 - Schedule 3 (inserted schedule 2, paragraph 32) - power to amend the definition of “further education institution”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

143. Section 75(3) of the Bill substitutes schedule 2 of the PVG Act with a new schedule 2 which is set out in schedule 3 of the Bill. Paragraph 31 includes a definition of ‘further education institution’ by reference to the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”).

Paragraph 32 of the new schedule 2 gives the Scottish Ministers the power to amend the definition of “further education institution” in paragraph 31 of schedule 3 to include or exclude bodies listed in schedule 2 of the 2005 Act. This power reproduces the power provided for by paragraph 15 of schedule 2 of the PVG Act.

Reason for taking power

144. This regulation-making power enables the Scottish Ministers to respond to changes either to the 2005 Act or institutions that provide further education in Scotland. As with the similar existing provision in the PVG Act, the Scottish Ministers only intend to use this power if it is necessary to do so to preserve the policy effect of the provisions in the Bill which is to cover institutions which provide further education (and not higher education institutions which will have no routine contact with children) or if existing educational institutions are subject to changes of name.

Choice of procedure

145. The negative procedure is considered appropriate due to the technical and practical nature of this provision, and currently applies to

regulations which could be made under paragraph 15 of schedule 2 of the PVG Act (which is subject to the negative procedure – see section 100(3) of that Act).

Section 75 - Schedule 3 (inserted schedule 2, paragraph 33) – power to amend schedule 2

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

146. Section 75(3) of the Bill substitutes schedule 2 of the PVG Act with a new schedule 2 which is set out in schedule 3 of the Bill. New schedule 2 of the PVG Act makes provision regarding the concept of “regulated roles” with children. Paragraphs 1 to 3 set out general provisions on regulated roles with children. Paragraphs 4 to 30 set out the activities in relation to children which will fall within regulated roles and therefore for which scheme membership is mandatory. Paragraph 33 gives the Scottish Ministers the power to modify schedule 2.

147. Paragraph 34 further provides that, under the regulation-making power, the Scottish Ministers may disapply or otherwise modify the application of the offence provisions in sections 34 to 37 of the PVG Act (concerning barred individuals doing regulated work, and organisations and personnel employers using barred individuals for regulated work) and the mandatory scheme offences at section 45C to 45F to be inserted into the PVG Act by section 74 of the Bill (in relation to individuals) in particular circumstances. This regulation-making power replicates, and expands in relation to the mandatory scheme offences, the power at paragraphs 28 and 29 of schedule 2 of the PVG Act.

Reason for taking power

148. This power is needed to give the Scottish Ministers the flexibility to respond properly and adequately to changes in employment and other practices and to ensure that new and emerging roles for which mandatory scheme membership should be required will be capable of falling within the definition of regulated roles.

Choice of procedure

149. This regulation-making power is subject to affirmative procedure. This is considered appropriate given that any regulations made under this power will enable the Scottish Ministers to modify primary legislation and could be used to extend the number of roles which are subject to mandatory PVG scheme membership, which would subject a greater number of individuals to PVG scheme membership and the offence provisions. If more activities were added to the definition of regulated roles with children, this would also result in the exclusion of barred individuals from a wider range of roles.

150. The affirmative procedure currently applies to the power to make orders amending schedule 2 under paragraph 28 of schedule 2 of the PVG Act.

Section 75 - Schedule 4 (inserted schedule 3, paragraph 2(4)) – power to prescribe circumstances in which an activity is or is not to be treated as being done in the course of a family or personal relationship.

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

151. Section 75(4) of the Bill substitutes schedule 3 of the PVG Act with a new schedule 3 which is set out in schedule 4 of the Bill. Paragraphs 1 and 2 of new schedule 3 set out the circumstances in which carrying out an activity in Part 2 would or would not be a regulated role with protected adults. Paragraph 2(1) provides that where the activity is carried out in the course of a family or personal relationship it would not be a regulated role. Paragraphs 2(2) and (3) further clarify what is meant by family and personal relationship. Paragraph 2(4) gives the Scottish Ministers the power to prescribe circumstances in which an activity in Part 2 is to be or is not to be treated as being done in the course of a family or personal relationship for the purposes of the new schedule 3 of the PVG Act.

Reason for taking power

152. The regulation making power under this paragraph is required to ensure that the reference to family or personal relationship in paragraph 2(1) links effectively with definitions in other legislation for specific purposes, for example to apply the same definition of family as applies in

fostering law. There is also a need to be able to respond to future developments, given the changing nature of family and personal relationships within society.

Choice of procedure

153. The negative procedure is considered appropriate given the need for flexibility to respond to changing or unforeseen circumstances and the negative procedure currently applies to regulations which could be made under section 95(9) of the PVG Act which provided for a similar power for the Scottish Ministers to prescribe circumstances in which work either is or is not to be treated for the purposes of the PVG Act as being done in the course of a family or personal relationship.

Section 75 - Schedule 4 (inserted schedule, paragraph 24) – power to amend Schedule 3

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

154. Section 75(4) substitutes schedule 3 of the PVG Act with a new schedule 3 which is set out in schedule 4 of the Bill. New schedule 3 of the PVG Act makes provision regarding the concept of “regulated roles” with protected adults. Paragraphs 1 to 3 set out general provisions on regulated roles with adults. Paragraphs 4 to 23 set out activities which will fall within regulated roles and therefore in relation to which scheme membership is mandatory. Paragraph 24 gives the Scottish Ministers the power to modify schedule 3.

155. Paragraph 25 further provides that, under the regulation-making power, the Scottish Ministers may disapply or otherwise modify the application of the offence provisions at section 34 to 37 of the PVG Act (concerning barred individuals doing regulated work, and organisations and personnel employers using barred individuals for regulated work) and the mandatory scheme offences at section 45C to 45F to be inserted by section 74 of the Bill (in relation to individuals) in particular circumstances. This regulation-making power replicates, and expands in relation to the mandatory scheme offences, the power at paragraphs 13 and 14 of schedule 3 of the PVG Act.

Reason for taking power

156. This power is needed to give the Scottish Ministers the flexibility to respond properly and adequately to changes in employment and other practices and to ensure that new and emerging roles for which mandatory scheme membership should be required will be capable of falling within the definition of regulated roles.

Choice of procedure

157. This regulation-making power is subject to the affirmative procedure. This is considered appropriate given that any regulations made under this power will enable the Scottish Ministers to modify primary legislation and could be used to extend the number of roles which are subject to mandatory PVG scheme membership which would subject a greater number of individuals to PVG scheme membership and the offence provisions. If more activities were added to the definition of regulated roles with protected adults, this would result in the exclusion of barred individuals from a wider range of roles.

158. The affirmative procedure currently applies to the power to orders amending schedule 3 under paragraph 13 of schedule 3 of the PVG Act.

Section 76(2) – amending section 94 of the PVG Act – power to prescribe health services provided to “protected adults”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

159. Section 76 of the Bill amends the meaning of “protected adult” for the purposes of section 94 of the PVG Act. It adds to section 94 a new subsection (1)(b) which provides that where an adult is being provided with a prescribed health service that involves carrying out of an activity mentioned in paragraphs 6 to 12 of schedule 3 of the PVG Act, that adult will meet the definition of protected adult. The Scottish Ministers have the power to prescribe health services under subsection (1)(b).

Reason for taking power

160. This power is required to ensure that the Scottish Ministers are able to capture any new, emerging or evolving health services to ensure there are no safeguarding gaps in respect of which an adult might experience vulnerability on a transient basis bringing them into scope of the meaning of protected adult.

Choice of procedure

161. The negative procedure is considered to provide the appropriate level of flexibility to respond to changing circumstances combined with the need for the appropriate level of parliamentary scrutiny.

Section 77(2) – inserting section 13A(1)(a) into the PVG Act – power to prescribe conditions imposed upon scheme members under consideration for listing

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

162. Section 77(2) of the Bill inserts a new section 13A into the PVG Act, which allows the Scottish Ministers to impose prescribed conditions, including restrictions or requirements, on scheme members who are under consideration for listing by virtue of sections 10 to 13 or the new section 45B(6) of the PVG Act (to be inserted by section 73 of the Bill). Subsection (2) provides a non-exhaustive list of conditions which regulations may prescribe.

Reason for taking power

163. This power is required so that the Scottish Ministers are able to prescribe the conditions that can be imposed on a scheme member. It would not be appropriate to set out on the face of the Bill the details of an exhaustive list of conditions that may be imposed during consideration for listing. In addition, it may be that it becomes necessary to amend the prescribed conditions depending on the experience of imposing such conditions and it would not be appropriate if such changes necessitated changes to primary legislation. This power will also allow the Scottish Ministers to develop appropriate and workable conditions to be adopted in

consultation with scheme members and organisations. The power is also limited by section 13A(1)(b) which provides that the Scottish Ministers may only impose such conditions as they consider necessary for the protection of the public or otherwise in the public interest meaning the prescription of a condition would not necessarily lead to it being imposed on a scheme member who is being considered for listing, unless the public protection or public interest test was also met.

Choice of procedure

164. The negative procedure is considered appropriate given the technical and operational nature of the regulations to be made under this power. The Bill includes the framework for imposing conditions and provides a non-exhaustive list of the type of conditions that might be specified in the regulations to be made under this power.

Section 77(2) – inserting section 13A(4) into the PVG Act – power to prescribe the initial time period imposed conditions apply

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

165. Section 77(2) of the Bill inserts a new section 13A into the PVG Act, which allows the Scottish Ministers to impose prescribed conditions, including restrictions or requirements, on scheme members who are under consideration for listing by virtue of sections 10 to 13 or the new section 45B(6) of the PVG Act. Subsection (4) gives the Scottish Ministers the power to prescribe the period during which the conditions will apply before the conditions must be confirmed by a sheriff if they are to continue.

Reason for taking power

166. This power will enable the Scottish Ministers to develop appropriate and workable time limits in consultation with scheme members and organisations. It is not considered appropriate for this procedural detail to be included on the face of the Bill. In addition, it will also allow the Scottish Ministers the flexibility to amend the time period without amending primary legislation if it is considered necessary to change the time period following experience of imposing conditions.

Choice of procedure

167. The negative procedure is considered appropriate for a power that allows the Scottish Ministers to prescribe the detail of a procedure, such as in this case a time period during which a condition will apply unless confirmed by a sheriff.

Section 77(2) – inserting section 13A(8) into the PVG Act – power to prescribe any other person who is to be read as a “relevant regulatory body”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

168. Sections 13A(6)(c) and 13B(9)(c) as inserted into the PVG Act by section 77(2) of the Bill require the Scottish Ministers to notify the scheme member, all relevant organisations and regulatory bodies and the chief constable where the individual has been made subject to conditions imposed under section 13A and the sheriff's decision whether to confirm those conditions under section 13B. Section 13A(8) specifies the relevant regulatory bodies which must be notified under both sections 13A(6)(c) and 13B(9)(c) and gives the Scottish Ministers the power to prescribe under subsection (8) any other person for the purposes of sections 13A(6)(c) and 13B(9)(c).

Reason for taking power

169. The power provides the flexibility needed to respond to developments in the structure and involvement of professional regulatory bodies in relation to regulated roles as well as to ensure that the Scottish Ministers have the flexibility to be able to add further bodies to the list of relevant regulatory bodies if that were necessary in order to ensure that all regulatory bodies which should be notified about conditions imposed on scheme members can be properly notified. Similar powers already exist in sections 8(2), 19(3) and 30(7) of the PVG Act to add relevant bodies to similar lists.

Choice of procedure

170. The negative procedure is considered appropriate given the need for flexibility and the limited nature of the enabling power which enables the Scottish Minister to specify other persons who must receive notice of

conditions imposed on scheme members under consideration for listing. Negative procedure also ensures consistency with sections 8, 19 and 30 of the PVG Act as it might be that a person was added to the list in more than one of those sections at the same time.

Section 81(2) – inserting new section 6A to the PVG Act – power to prescribe information to be given by the chief constable

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

171. Section 81(2) of the Bill inserts new section 6A into the PVG Act, which provides that the chief constable must give the Scottish Ministers any prescribed information that the chief constable holds in relation to an individual whom the chief constable considers is or has been carrying out a type of regulated role without being a scheme member in relation to that type of regulated role. Section 81(3) of the Bill inserts new section 10(1)(aa) into the PVG Act which makes reference to the prescribed information provided by the chief constable under section 6A. Section 10 of the PVG Act applies where the Scottish Ministers have received prescribed information under sections 3 to 6A or 8 of the PVG Act or from the Disclosure and Barring Service and allows them to consider an individual for listing if they are satisfied that the information received indicates that it may be appropriate for the individual to be included in the children's or adults' list (or both).

Reason for taking power

172. This regulation-making power is needed due to the level of detail required in relation to the information to be provided by the chief constable to the Scottish Ministers which could trigger the consideration for listing process under section 10 of the PVG Act. It is considered that the level of detail would be excessive to include on the face of the Bill. The information to be prescribed under the new section 6A (for the purposes of new section 10(1)(aa) of the PVG Act) will be similar to the information already prescribed for organisational referrals under sections 3 to 6 and 8 of the PVG Act in the Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010 (SSI 2010/181).

Choice of procedure

173. The negative procedure is considered appropriate given the operational and technical nature of regulations to be made under the power and the flexibility required as the mandatory PVG Scheme and the police referral provisions develop. It is also in accordance with the procedure for prescribing the information to be provided for other organisational referrals under sections 3 to 6 and 8 of the PVG Act.

Section 84(2) amending section 46(2)(d) of the PVG Act – power to prescribe information to be included in a confirmation of scheme membership

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

174. Section 84(2) inserts a new section 46 into the PVG Act which provides that the Scottish Ministers must provide a confirmation of scheme membership to each scheme member. Subsection (2) sets out the information to be included on a confirmation of scheme membership. Subsection (2)(d) confers on the Scottish Ministers the power to prescribe other information in relation to scheme members to be included in the confirmation of scheme membership.

Reason for taking power

175. This power is needed so that additional information may be added to the confirmation of scheme membership, for example, if information was to be made available about whether an individual is under consideration for listing (or equivalent) in another jurisdiction in the UK; such information is currently not available to the Scottish Ministers and therefore it cannot be included within section 46(2). If the Scottish Ministers were granted access to such information, they may wish to include it on a confirmation of scheme membership. The regulation making power at subsection (2)(d) replicates the existing power at section 46(2)(d) of the PVG Act.

Choice of procedure

176. The negative procedure is considered appropriate given the need to respond flexibly to changing or unforeseen circumstances without requiring

to amend primary legislation, and while still ensuring an appropriate level of Parliamentary scrutiny.

Part 3 – General

Section 87 – Regulations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative (but affirmative if it amends an Act)

Provision

177. Section 87 provides that any power of the Scottish Ministers to make regulations under the Bill includes the power to make incidental, supplementary, consequential, transitional, transitory or saving provision. In addition, different provision can be made for different purposes. Subsection (2) provides that regulations made under sections 14(4) (modification of List A or List B), section 39(1) (power to modify definitions of Level 1 disclosure and Level 2 disclosure) or section 40(1)(childhood information: power to modify other enactments) are subject to the affirmative procedure. Subsection (3) provides that regulations made under section 88(1) (ancillary provision) containing provisions which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure.

178. Otherwise, subsection (4) provides that regulations made under the Bill are subject to the negative procedure. Subsection (5) provides that section 87 does not apply to regulations made under section 93(2) (commencement regulations).

Reason for taking power

179. The complexity and scope of the Bill gives rise to a need for a range of regulation-making powers. This is a general provision applying generally to powers to make regulations under the Bill (other than the commencement power under section 93(2)) and the specific instances of where those powers may be exercised have been detailed throughout this memorandum.

Choice of procedure

180. The affirmative procedure is considered appropriate where regulations made under this section will be used to add to, replace or omit any part of

the text of primary legislation using the powers under sections 14(4), 39(1), 40(1) or 88(1). Otherwise the procedure is negative.

Section 88(1) – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative where adding to, replacing or omitting the text of an Act, otherwise negative

Provision

181. This section confers on the Scottish Ministers the power to make supplementary, incidental, consequential, transitional, transitory or saving provision for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the Bill. This may include modifying any enactment, including the Bill.

Reason for taking power

182. As with any new body of law, the Bill may give rise to a need for a range of regulation provisions as well as amendments, both to the Bill and other primary legislation. Without the power to make incidental, supplementary, consequential, transitional, transitory and saving provision it may be necessary to return to Parliament, through subsequent primary legislation, to deal with technical, operational or implementation matters clearly within the scope and policy intention of the original Bill. This would not be an efficient use of the Parliament's or the Scottish Government's resources. The power, while potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, or for the purposes of giving full effect to any provision made by, or under, the Bill.

Choice of procedure

183. Section 87(3) of the Bill provides that regulations made under section 88(1) which modify an Act will be subject to the affirmative procedure. This is the appropriate procedure when making textual amendments to primary legislation. Section 87(4) of the Bill provides that, in all other cases, regulations made under section 88(1) are subject to the negative procedure. These procedures are typical for ancillary powers.

Section 93(2) – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: laid, no procedure

Provision

184. Section 93(2) enables the Scottish Ministers to make regulations appointing days on which the provisions of the Bill come into force (other than those provisions (Part 3 except for section 89) which come into force on the day after Royal Assent in accordance with section 93(1)). Regulations made under section 93(2) may include transitional, transitory or saving provision and may make different provision for different purposes.

Reason for taking power

185. This power is necessary to enable the Scottish Ministers to commence the provisions in the Bill appropriately by allowing them to take into account the existing law and provide a smooth transition into the new arrangements. Decisions on when and to what extent the Bill is commenced are best determined by the Scottish Ministers, particularly since it might be appropriate to commence provisions at different times.

Choice of procedure

186. As is usual for commencement regulations, the power is not subject to any parliamentary procedure but is subject to the laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010.

Schedule 5, Part 1, paragraph 4(2)(a) amending section 18(4)(b) of the PVG Act – power to prescribe details of every relevant matter

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

187. New section 18(4)(b) of the PVG Act permits the Scottish Ministers to require any person who holds records of convictions, cautions or other information for the use of police forces generally to provide them with the prescribed details of every relevant matter relating to an individual that is

recorded in those records for the purpose of enabling or assisting them to decide whether to list an individual. New subsection (5) provides that “relevant matter” means a conviction that is not a non-disclosable conviction within the meaning of section 14 of the Bill, a caution within the meaning given in section 70 of that Act that is not spent by virtue of schedule 3 of the Rehabilitation of Offenders Act 1974, and a prescribed court order.

Reason for taking power

188. This power is similar to the power referred to in paragraph 11 in relation to Level 1 disclosures and that referred to in paragraph 24 in relation to Level 2 disclosures and it is needed to give the Scottish Ministers the ability to set out what details about which relevant matters contained within central records they may use to enable or assist them in deciding whether to list an individual. In relation to a conviction, this might, for example, be the date of the conviction, the convicting court, the actual offence and the method of disposal. It would not be appropriate to include that level of detail within section 18(4)(b). Having a power to prescribe these details allows gives the Scottish Ministers the flexibility to respond to changing or unforeseen circumstances. For example, changes made to how criminal history information is recorded by police forces in central records could result in a need to make changes to the details of convictions that the Scottish Ministers can require are provided under section 18(4)(b).

Choice of Procedure

189. The negative procedure is considered appropriate for this power given the administrative nature of the information being prescribed and also the need for flexibility and for the Scottish Ministers to have the ability to respond timeously to any changes as to how convictions and cautions are recorded within central records. The power to prescribe the details cannot amend the convictions and cautions which the Scottish Ministers may use to assist them when deciding whether to list an individual, as they are provided for on the face of the PVG Act by section 18(5) but rather the power can determine, and amend, only the specific details of convictions and cautions, such as the date etc. regarding every conviction or caution which the Bill requires to be included. Accordingly, the negative procedure is considered appropriate.

Schedule 5, Part 1, paragraph 4(2)(b) inserting subsection (5) to section 18 of the PVG Act – power to prescribe civil court orders

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

190. New section 18(5) of the PVG Act defines “relevant matter” for the purposes of section 18(4)(b) and 49(1). This includes “a prescribed civil court order”, meaning that the Scottish Ministers may prescribe by regulations civil court orders that they could use in determining whether to list someone, and that would be included on an individual’s scheme record under section 48(b).

Reason for taking power

191. The details of civil court orders to be prescribed include a level of detail that would be inappropriate for the face of the Bill. It is expected that the court orders prescribed will be similar to those noted on the face of the 1997 Act at sections 113CA(2)(e) to (m) and 113CB(2)(e) to (m). These were added by the Police Act 1997 (Alteration of the Meaning of Suitability Information relating to Children and Protected Adults)(Scotland) Order 2010 (SSI 2010 No. 190), made under section 113CC(1)(a) of the 1997 Act, and the Anti-social Behaviour, Crime and Policing Act 2014.

192. This power is also required in order to allow for any new civil court orders created by subsequent legislation to be listed and used by the Scottish Ministers when deciding whether to list someone. This power will provide the Scottish Ministers the flexibility to make changes if necessary to do so in the future without making changes to primary legislation.

Choice of procedure

193. As the main principle that civil court orders may be included the information the Scottish Ministers may use when determining whether to list someone, and which may be included on an individual’s scheme record, is provided for on the face of the Bill, it is appropriate for the Scottish Ministers to prescribe the actual civil court orders by means of regulations subject to the negative procedure. The negative procedure is also

considered appropriate because the Scottish Ministers need flexibility to respond to the introduction of new civil court orders or repeal of existing civil court orders which the Scottish Ministers may consider appropriate to subsequently include in or remove from those prescribed under this power.

Schedule 5, Part 1, paragraph 4(3)(a) amending section 49(1) of the PVG Act – power to prescribe details of every relevant matter

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

194. New section 49(1)(a) of the PVG Act provides that “vetting information” in relation to a scheme member, includes the prescribed details of every relevant matter relating to the scheme member that is recorded in central records. New section 49(3) defines “central records” and “relevant matter” by reference to new section 18(5) of the PVG Act, which provides that “central records” has the same meaning as that provided for in section 70 of the Bill and “relevant matter” means a conviction that is not a non-disclosable conviction within the meaning of section 14 of the Bill, a caution within the meaning given in section 70 of that Act that is not spent by virtue of schedule 3 of the Rehabilitation of Offenders Act 1974, and a prescribed court order.

195. It is expected that the details prescribed under this power will be the same as those prescribed under section 18(4)(b) of the PVG Act, discussed at paragraph 187.

Reason for taking power

196. As with the power provided for in new section 18(4)(b) discussed at paragraph 187, this power is needed to give the Scottish Ministers the ability to set out what details about which relevant matters contained within central records they may use when determining whether to list an individual. In relation to a conviction, this might, for example, be the date of the conviction, the convicting court, the actual offence and the method of disposal. It would not be appropriate to include that level of detail within section 49(1). Having a power to prescribe these details allows gives the Scottish Ministers the flexibility to respond to changing or unforeseen

circumstances. For example, changes made to how criminal history information is recorded by police forces in central records could result in a need to make changes to the details of convictions that the Scottish Ministers can require are provided under section 49(1).

Choice of Procedure

197. The negative procedure is considered appropriate for this power given the administrative nature of the information being prescribed and also the need for flexibility and for the Scottish Ministers to have the ability to respond timeously to any changes as to how convictions and cautions are recorded within central records. The power to prescribe the details cannot amend the convictions and cautions which will be included in a scheme member's scheme record as they are provided for on the face of the PVG Act by the definition of 'relevant matter' in section 18(5) but rather the power can determine, and amend, only the specific details of convictions and cautions, such as the date etc. regarding every conviction or caution which the Bill requires to be included. Accordingly, the negative procedure is considered appropriate.

Schedule 5, Part 2, paragraph 8(41)(a) – modifies power in section 70 of the PVG Act

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

198. Paragraph 8(41)(a) modifies the power in section 70 of the PVG Act in relation to prescribing fees that may be charged in respect of the Scheme as a consequence of the change to disclosure products. This paragraph amends paragraphs (a) and (b) of section 70(1) to confer on the Scottish Ministers the power to prescribe a fee in respect of—

(a) renewal of membership of the PVG Scheme; and

(b) requests for a confirmation of scheme membership to be made available to a third party under section 54 of the PVG Act.

Reason for taking power

199. As noted above at paragraph 124, the Scottish Ministers intend periodically to review any fees charged for disclosure products and processes and as such it would be inappropriate to include specific fees on the face of the Bill.

Choice of Procedure

200. The negative procedure is considered appropriate in striking the balance between allowing Ministers to be able to amend the fees relatively quickly and appropriate Parliamentary scrutiny.

Schedule 5, paragraph 8(41)(b) – modifies power in section 70 of the PVG Act

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

201. Paragraph 8(41)(b) modifies section 70(2) of the PVG Act in relation to the payment of fees. This amendment provides a further example of what regulations under section 70 may provide for, namely, to set out in regulations the manner in which fees are to be paid. Paragraph 8(41)(b) amends section 70(4) of the PVG to provide further that the Scottish Ministers need not consider an application or request unless the fee is paid in the manner provided for in the regulations.

Reason for taking power

202. This power is required to ensure that the Scottish Ministers can make provision in regulations to set out the manner in which fees under the PVG Act must be paid. They may want to do this as new online payment facilities develop.

Choice of procedure

203. The negative procedure is considered appropriate due to the administrative nature of this provision and the need for flexibility in responding to changing or unforeseen circumstances.

Schedule 5, paragraph 8(43)(a) and (c) – modifies power in section 72(d) of the PVG Act – power to prescribe further procedure for making requests for confirmations of scheme membership under section 54 and providing such confirmations in pursuance of such requests

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

204. Section 72 of the PVG Act gives the Scottish Ministers the power by regulations to make further provision about the administration of the PVG scheme. Paragraph 8(43)(a) of schedule 5 amends section 72(2)(a) of the PVG Act which allows any regulations made under section 72 to prescribe further procedure in relation to renew membership of the PVG Scheme.

205. Paragraph 8(43)(c) of schedule 5 substitutes a new section 72(2)(d) which allows any regulations made under section 72 to prescribe further procedure for making requests for a confirmation of scheme membership and making such confirmations available to third parties following such requests.

Reason for taking power

206. This power will operate similarly to section 37(1) (which relates to the procedure for disclosure requests made under this Bill) and to the existing power in section 72 of the PVG Act. The power relates to the one disclosure product which is offered under the PVG Act and will enable the Scottish Ministers to make provision regarding the technical and procedural aspects of requests for a confirmation of scheme membership and provision of such confirmations under the amended section 54 of the PVG Act.

207. It is considered that the level of detail that will be required to provide for the renewal of scheme membership would not be appropriate for the face of the PVG Act as this will be of an operational nature. Additionally, as scheme membership requiring to be renewed is something new to the PVG Act, it is expected that the procedure around this will need to adapt as the system develops.

Choice of procedure

208. The negative procedure is considered appropriate in view of the technical and detailed nature of any regulations which may be made under this power

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Delegated Powers Memorandum

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