

This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

# Disclosure (Scotland) Bill

[As Amended at Stage 2]

---

## Supplementary Delegated Powers Memorandum

### Introduction

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with Rule 9.7 of the Parliament's Standing Orders. It describes provisions in the Disclosure (Scotland) Bill conferring powers to make subordinate legislation which were introduced at Stage 2.
2. The Memorandum has been prepared by the Scottish Government. It does not form part of the Bill and has not been endorsed by the Parliament. It should be read in conjunction with the original Delegated Powers Memorandum published to accompany the Bill as introduced.

## New delegated powers introduced at Stage 2

### Delegated powers

Section 18A(5) – power to make regulations about further provision in connection with the carrying out of a review of relevant overseas police information by the independent reviewer

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

## **Provision**

3. Section 18A(1) places a duty on the Scottish Ministers, before providing a Level 2 disclosure to an applicant, to request the chief officer of every relevant overseas police force (that is a police force outside the UK) to provide other relevant information (“ORI”) which meets the two-part test of relevant for the purpose of the disclosure and ought to be included in the disclosure. Subsection (2) states that where such information is provided, the Scottish Ministers must arrange for a direct review to be carried out by the independent reviewer who, under subsection (3), will apply the same two-part test. Subsection (4) provides ORI may only be included in a Level 2 disclosure if determined that is relevant and ought to be included in the disclosure by the independent reviewer, including, if taken, an appeal to a sheriff against the independent reviewer’s decision. Subsection (6) provides a meaning of the “chief officer” and “overseas police force”.

4. Subsection (5) provides the Scottish Ministers with the power to make by regulations further provision for or about the carrying out of a review by the independent reviewer under this section. This includes power to make provision for opportunity for the applicant to make representations to the independent reviewer and an appeal to the sheriff against the independent reviewer’s decision. Section 87(4) of the Bill applies meaning that regulations will be subject to negative procedure.

## **Reason for taking power**

5. The number of cases where, under the existing provisions in the Police Act 1997 (“the 1997 Act”) and the Protection of Vulnerable Groups (Scotland) Act 2007 (“the PVG Act”), ORI is provided to Scottish Ministers from overseas police forces is very rare. Given how infrequently it is anticipated the review process under section 18A will be utilised in practice, the administrative aspects of this review are considered too detailed for the face of the Bill.

## **Choice of procedure**

6. The Bill provides for a direct review to the independent reviewer for ORI provided by the chief officer of an overseas police force. The regulation making power does not affect that direct review or that the independent reviewer must apply the two-part test in making their decision. The negative procedure is considered appropriate in view of the procedural and detailed nature of any regulations which may be made under this power.

This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

## Section 18A(6) – power to prescribe “relevant overseas police forces”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

### **Provision**

7. Subsection (6) provides the Scottish Ministers with the power to prescribe “relevant overseas police forces” for the purpose of section 18A(1), described above. This is subject to negative procedure by virtue of section 87(4) of the Bill.

### **Reason for taking power**

8. The Scottish Ministers require this power for reasons similar to those behind the power under section 50(5) of the Bill to prescribe what is meant by a “relevant police force”. The power under section 18A(6) is required in order to set out the criteria that will determine when a specific overseas police force is to be treated as a “relevant overseas police force” for the purpose of section 18A(1). The criteria will include a level of detail too detailed for the face of the Bill.

9. Further, as with the prescribing power under section 50(5), the power under 18A(6) is required to enable the Scottish Ministers to capture any changes to the organisation or jurisdiction of overseas police forces that may be made following the Bill entering into force.

### **Choice of procedure**

10. The negative procedure is considered appropriate given the level of administrative detail being prescribed and the need for flexibility for the Scottish Ministers to respond to changing and unforeseen circumstances. The power to prescribe “relevant police forces” under section 50(5) of the Bill is also subject to the negative procedure which replicates the existing and equivalent power under section 113B(4) of the 1997 Act.

This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

**Section 34(5A)(a) – power to make regulations specifying the period after which a subsequent review application may be made**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** negative

### **Provision**

11. Section 34 requires the Scottish Ministers to provide an applicant with a new Level 2 disclosure once proceedings on a review application have finally concluded. As introduced, when an application for review of reviewable information is unsuccessful, the applicant cannot apply for a review of that same information where it appears on any subsequent Level 2 disclosure provided for the same purpose as the one for which the review was unsuccessful.

12. Subsection (5A), on the recommendation of Parliament's Education and Skills Committee, introduces the right to make a review application in relation to the same information on a subsequent Level 2 disclosure provided for the same purpose as the original. Subsection (5A) allows for subsequent review if (a) a period of time, to be prescribed by Ministers, has passed since the final outcomes of proceedings of the original review application, or (b) the Scottish Ministers are satisfied that the applicant's circumstances have changed in a material respect since the final outcome of proceedings of the original unsuccessful review application. "Prescribed" is defined in section 70 of the Bill as prescribed in regulations made by the Scottish Ministers. These regulations will fall under section 87(4) of the Bill and will therefore be subject to the negative procedure.

### **Reason for taking power**

13. As identified in the Delegated Powers Memorandum accompanying the Bill as introduced, the review application process is new and precise timescales are yet to be established. This is equally true for the subsequent review process for which a balance is required between the continued

This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

disclosure of convictions and other information on a Level 2 disclosure for safeguarding and allowing an individual to move on from past offending. The flexibility afforded by the regulation making power is required to ensure that balance is achieved.

### **Choice of procedure**

14. The negative procedure is considered appropriate as this power can only be used by the Scottish Ministers to set a time period whilst the right to make a subsequent review application is stated on the face of the Bill. This is consistent with the procedure to which the powers at sections 21(1), 23(1), 27(2) and 29(2) in relation to review applications are subject. It is also consistent with the power in section 25(3)(a) of the PVG Act on which the power in section 34(5A)(a) is based.

**Section 34B(5) – power to modify matters that may be taken account of when considering relevance and whether to include certain information**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** negative

### **Provision**

15. Section 34B(1) provides that where the Scottish Ministers, chief constable or the independent reviewer is considering whether a conviction, children’s hearing outcome or other information (ORI as per subsection (4)) is (a) relevant for the purposes of a Level 2 disclosure and (b) ought to be included in the disclosure, any of the matters in subsection (2) and (3) respectively may be taken into account. Subsection (5) provides that the Scottish Ministers may by regulations modify subsections (2) and (3). Regulations will be subject to the negative procedure by virtue of section 87(4). The matters that may be taken account of when applying the two-part test have also been inserted into section 49 of the PVG Act and

This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

section 18 of the Age of Criminal Responsibility (Scotland) Act 2019 for determinations to be made under those Acts.

### **Reason for taking power**

16. The matters that decision-makers may take account of when applying the two-part test are based on and seek to reflect significant case law. The regulation making power, which is administrative in nature, is required to ensure there is flexibility so that the principles on the face of the Bill keep pace with developments in jurisprudence.

### **Choice of procedure**

17. The negative procedure is considered appropriate in view of the administrative nature of any regulations to be made under this power.

**Section 74 – inserting new section 45DA(1) into the PVG Act - power to require organisations to stop using individuals for regulated roles without scheme membership**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

### **Provision**

18. Section 74 inserts a new section 45DA(1) into the PVG Act. This provides the Scottish Ministers with a regulation making power to require organisations to stop using individuals for regulated roles without scheme membership. Regulations made under subsection (1) may (a) prevent an organisation from allowing an individual to carry out a regulated role, and (b) require that the organisation remove an individual from a regulated role. Subsection (2) provides that regulations made under subsection (1) may impose prohibitions or requirements in relation to particular types of

This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

organisations or in relation to particular kinds of regulated roles. As per subsection (3), it is an offence for an organisation to fail to comply with regulations made under subsection (1). A defence is provided at subsection (4) for an organisation charged with an offence under subsection (3) to prove that it did not know, and could not reasonably be expected to have known, that the individual does not participate in the Scheme in relation to the relevant type of regulated role.

### **Reason for taking power**

19. The power to make further provision in regulations allows Ministers to set a procedure around the new offence in relation to organisational employers. It provides flexibility to deal with changing circumstances as the mandatory PVG scheme and time-limited membership is established. New section 45DA closely follows the wording of section 35(2) to (4) of the PVG Act. It is intended that regulations made under this section will take an approach similar to regulations made under section 35 of the PVG Act. This means the prohibition will take effect only where an organisation has been notified by Disclosure Scotland either that the individual was not in the scheme or that the individual's membership had lapsed (under the procedure in section 45D) and the organisation had been required by Ministers to remove that individual from a regulated role.

### **Choice of procedure**

20. The regulation making power in section 45DA(1) is subject to the negative procedure. There is an unintended discrepancy between this and the regulation making power in section 35(2) of the PVG Act on which section 45DA is based. Section 100(4) of the PVG Act makes regulations made under section 35(2) subject to affirmative procedure. The Scottish Government consider that both section 35(2) and the new section 45DA(1) should be subject to the same form of procedure. To remedy this, the Scottish Government will bring forward an amendment at stage 3 to make the power in new section 45DA(1) subject to the affirmative procedure. This will be done by amending section 100(4) of the PVG Act to add regulations made under section 45DA(1) to the list of regulations which are to be subject to affirmative procedure.

This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

**Section 76(2) – amending section 94 of the PVG Act – power to prescribe services which if provided to an individual aged 18 or over means they are a “protected adult”**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** negative

## **Provision**

21. The definition of “protected adult” provided by section 94 of the PVG Act is amended by section 76 of the Bill. Subsection (1)(c) as substituted into section 94, introduced at Stage 2, provides the Scottish Ministers with a regulation making power to prescribe various services reflecting those currently set out in section 94 of the PVG Act. An individual aged 18 or over in receipt of any services prescribed under the new paragraph (c) will be brought within the meaning of protected adult. It should be noted that the Scottish Ministers intend to bring forward an amendment at Stage 3 to provide definitions for terms used in subsection (1)(c) by reference to the existing definitions in section 94 of the PVG Act for the types of services that may be prescribed, for instance a community care service.

## **Reason for taking power**

22. The powers introduced by section 76(2) as amended provide the Scottish Ministers with a degree of flexibility to respond to changing or unforeseen circumstances. This will ensure sufficient coverage is provided by the PVG Scheme to individuals when accessing certain services. These are the same type of services currently provided for under section 94 of the PVG Act.



This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

## **Choice of procedure**

23. Section 76(2) as amended reintroduces an existing power conferred on the Scottish Ministers by section 94(1) of the PVG Act. Regulations made under that section are subject to the negative procedure (by virtue of section 100(3) of that Act). The power under the amendments introduced by section 76(2) of the Bill simply preserves the status quo. This is considered appropriate given the level of detail to be prescribed in regulations made under section 76(2). The Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Services) (Protected Adult) Regulations 2010 (SSI 2010 No 161), for instance, made under section 94(1) of the PVG Act contains a level of detail that would be inappropriate for the face of the Bill. Negative procedure is considered appropriate because these are matters of administrative detail for which affirmative procedure would be disproportionate.

## **Section 85B – inserting new section 84A into the PVG Act – requirement to issue guidance for chief constable**

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: none

## **Provision**

24. Section 64(1) of the Bill places a duty on the Scottish Ministers to issue guidance to the chief constable about the chief constable's functions under Part 1 of the Bill. Section 85B, inserting section 84A(1) into the PVG Act, places the same requirement on the Scottish Ministers in relation to guidance to be issued to the chief constable about the exercise of the chief constable's functions under Parts 1 and 2 of that Act.

25. Section 84A(2) provides that the Scottish Ministers may from time to time revise guidance. Subsection (3) states that the Scottish Ministers must consult the chief constable before issuing guidance under this section. Subsection (4) places the chief constable under a duty to have regard to the guidance when exercising function under Parts 1 and 2 of the PVG Act.

This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

### **Reason for taking procedure**

26. The guidance issued by the Scottish Ministers will cover the provision of police information for the purpose the PVG Act. As noted in the original Delegated Powers Memorandum, the guidance is to be a flexible and responsive resource to assist the chief constable.

### **Choice of procedure**

27. There is no parliamentary procedure. It is considered to be an operational resource that will include detail far beyond that which ordinarily be found in either primary or secondary legislation and as such should not take up parliamentary time



This document relates to the Disclosure (Scotland) Bill (SP Bill 50A) as amended at Stage 2

# Disclosure (Scotland) Bill

[As Amended at Stage 2]

## Supplementary Delegated Powers Memorandum

□ Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -

[www.scottish.parliament.scot](http://www.scottish.parliament.scot)

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:  
[www.scottish.parliament.scot/documents](http://www.scottish.parliament.scot/documents)