

# Disclosure (Scotland) Bill

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Disclosure (Scotland) Bill introduced in the Scottish Parliament on 12 June 2019.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 50-EN).;
- a Financial Memorandum (SP Bill 50-FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 50-LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### Background

4. The Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act") was the Scottish Government's response to Sir Michael Bichard's Inquiry Report<sup>1</sup> of June 2004 into the murders at Soham. The policy principles enshrined in the then PVG Bill were that:

- there should be two regulated workforces - one for doing regulated work with children and the other for doing regulated work with adults;
- there should be two barred lists (a children's list and an adults' list);

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<sup>1</sup> [Bichard Inquiry Report](#)

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- it should be an offence for a person to do regulated work of the type from which they are barred;
- the PVG Scheme should be set up for those who doing or intending to do regulated work with children, adults or both groups;
- scheme membership should be for life unless the scheme member left the Scheme or was barred from doing regulated work;
- scheme members should be subject to ongoing monitoring (to ensure that new information that arises is checked to ensure the individual has not become unsuitable); and
- it should not be an offence for a person to do regulated work even if they are not a scheme member as long as they are not barred from doing that work (in other words, it is not mandatory for a person doing regulated work to be a member of the Scheme).

5. As of 28 April 2019 there were 1,239,241 scheme members and 6,619 individuals barred from doing regulated work. The number of barred individuals includes those convicted in courts for offences that automatically lead to barring, such as a rape (of any person – adult or child) or the murder of a child.

6. The PVG Scheme is operated in practice by Disclosure Scotland, an executive agency of the Scottish Ministers, which exercises Ministers' functions under the PVG Act. Disclosure Scotland also exercises the disclosure functions of the Scottish Ministers under the Police Act 1997 ("the 1997 Act").

7. During the passage through the Parliament of the PVG Act, the Scottish Government made a commitment to review the legislation after it had been implemented and in operation. It is has been just over eight years since the PVG Scheme commenced in 2011. Given that Disclosure Scotland also administers disclosures under the 1997 Act, a decision was taken not just to review the operation of the PVG Scheme but the whole disclosure system to determine whether it was still fit for purpose. With the moving policy landscape in relation to childhood offending, the passing of the Age of Criminal Responsibility Bill and the changes proposed within the Management of Offenders Bill, it is appropriate that the disclosure regime fits with today's landscape and also that it can deliver an even more

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assured and customer-focused PVG Scheme that better serves employers, volunteering organisations and individuals alike.

## The current legal framework

8. The Rehabilitation of Offenders Act 1974 (“the 1974 Act”) as it applies in Scotland provides for a system of protection to individuals with previous convictions not to have to self-disclose their convictions in certain circumstances. Without the 1974 Act, the common law position would require people to answer, truthfully, any questions about their offending history.

9. Under the existing terms of the 1974 Act, subject to certain exclusions and exceptions provided for in secondary legislation, anyone who has been convicted of a criminal offence and sentenced to custody for a period of 30 months or less can be regarded as ‘rehabilitated’ after a specified period has passed, provided he or she receives no further convictions. After that period has expired, the conviction is treated as ‘spent’. A person can also become rehabilitated after receiving an alternative to prosecution (AtP), such as a fiscal warning or a fiscal fine. After the specified rehabilitation period has passed, the original conviction is considered to be spent.

10. The rehabilitation period (that is, the period until a conviction becomes spent) depends on the disposal imposed in respect of the conviction. The general rule is that, once a conviction is spent, that individual does not have to reveal it and cannot be prejudiced by it. This means that if a person’s convictions are all spent and they are asked, for example, on a job application form, at a job interview or on a home insurance form whether they have a criminal record, they do not have to reveal or admit its existence. Moreover, even if such information is disclosed, this information could not be relied upon. For example, an employer cannot refuse to employ someone or dismiss someone because of a spent conviction and an insurance company cannot increase premiums on the basis of a spent conviction.

11. The central policy behind the 1974 Act is that people should be able to move on from their previous offending behaviour after sufficient time has elapsed and where their behaviour was not of a severity that it must be disclosed forever. Such an approach should allow those individuals to reintegrate into their community and obtain suitable employment. All

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disclosures made by Disclosure Scotland are impacted by the self-disclosure rules in the 1974 Act.

12. It is recognised, however, that the protection provided by the 1974 Act could not and should not apply in all circumstances. To deal with this, the Scottish Ministers have a power to make certain exclusions and exceptions to that general protection. The effect of the Rehabilitation of Offenders Act 1974 (Exclusion and Exceptions) (Scotland) Order 2013 (“the 2013 Order”) is that in certain cases, depending on the type of job or employment, a person cannot deny the existence of certain spent convictions. It is permissible to ask questions to assess an individual’s suitability for specific roles or professions – known as ‘exempted questions’ in the legislation. It is in these cases that ‘higher level disclosures’ are available.

13. The disclosure system backs up this duty on the individual to be honest about their convictions in line with the law; it verifies that the person, having taken account of the 1974 Act, has told the truth when disclosing previous convictions. Where the protection provided by the 1974 Act does not apply because the type of job or employment is included in the 2013 Order and a person is asked about previous convictions, they should treat the question as follows:

- if a person has an unspent conviction for any offence, the person must treat the question as referring to that conviction and must self-disclose it;
- if a person has a spent conviction for an offence not listed in schedule 8A or 8B<sup>2</sup> of the 1997 Act, the person can treat the

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2 In 2015 the system of higher level disclosures was reformed so that only relevant convictions (including relevant spent convictions) would be disclosed. Two lists of offences were created in schedules 8A and 8B inserted into the 1997 Act. Schedule 8A offences are considered to be so serious and/or relevant that they must always be disclosed, unless a sheriff orders otherwise. Schedule 8B offences are less serious but demonstrate concerning behaviour which may be relevant. Schedule 8B offences can vary in relevancy taking into account factors in relation to the length of time since conviction, age of individual at time of conviction and sentence received. Under the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, as amended these schedules are called A1 and B1 of that Order.

question as not referring to that conviction which is protected by law and the person does not need to self-disclose it. The person cannot be prejudiced in law for the non-disclosure;

- if a person has a spent conviction for an offence listed in schedule 8B of the 1997 Act and it is a 'protected conviction' (meaning the disposal was an admonition or absolute discharge, or that a certain period of time has passed since the date of the conviction), the person can treat the question as not referring to that conviction and the person does not need to self-disclose it. The person cannot be prejudiced in law for the non-disclosure;
- if a person has a spent conviction for an offence listed in schedule 8B of the 1997 Act and it is not a protected conviction, the person does not have to treat the question as referring to that conviction until it is disclosed by Disclosure Scotland to a third party such as a prospective employer;
- if a person has a spent conviction for an offence listed in schedule 8A of the 1997 Act and 7 years and six months have elapsed from the date of conviction if under 18 on the date of conviction, or 15 years have elapsed from the date of conviction if aged 18 or over on the date of conviction, the person does not have to treat the question as referring to that conviction until it is disclosed by Disclosure Scotland to a third party such as a prospective employer;
- if a person has a spent conviction for an offence listed in schedule 8A of the 1997 Act and the relevant periods of time have not elapsed from the date of conviction, the person must treat the question as referring to that conviction and it must be self-disclosed.

14. As detailed below, some types of disclosure allow for certain spent convictions to be included. These are commonly called 'higher level disclosures'. However, even in a higher level disclosure there are filters to make sure only relevant spent convictions are included. The vast majority of spent convictions are relatively minor and will not be disclosed on higher level disclosures, but some are more serious and will be disclosed for a period of 15 years (or 7 years and six months for convictions accrued under the age of 18) after conviction, even when otherwise spent, and some are so serious that they must always be disclosed unless a sheriff directs otherwise. The Scottish Government publishes lists of the types of

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convictions that are to be disclosed for the relevant periods and those that are disclosed forever unless a sheriff directs otherwise.

15. Disclosures made under the 1997 Act are:

- basic,
- standard (a higher level disclosure) and
- enhanced (a higher level disclosure).

16. The first one of these, basic disclosure, is available to anyone for any purpose. It contains only unspent convictions; it does not list convictions that the 1974 Act says are spent and that the person does not need to disclose anymore. It tends to be used for general employment purposes, but not for jobs with access to high value assets or for work with vulnerable groups.

17. The standard disclosure is used for certain roles where the applicant has access to valuable resources, for example financial services roles. It can also be used where there is an expectation of integrity, for example in the security industry. It is also used when someone is applying to become a member of various professions, such as solicitor or accountant.

18. A standard disclosure can list unspent convictions, unspent cautions (from England, Wales and Northern Ireland), certain spent convictions, and whether the individual is subject to the notification requirements in Part 2 of the Sexual Offences Act 2003. The employer or organisation asking for a standard disclosure about someone must be registered with Disclosure Scotland to be able to countersign the application and the job or role must qualify for the lawful disclosure of otherwise spent convictions.

19. An enhanced disclosure is typically used where there is a high degree of sensitivity in the role or activity the person is being considered, such as for prospective adoptive parents, employment in the Crown Office or obtaining a gambling licence. The enhanced disclosure lists unspent convictions, unspent cautions (from England, Wales and Northern Ireland), certain spent convictions, will say whether the individual is subject to the notification requirements in Part 2 of the Sexual Offences Act 2003, and has the possibility that the police will include text on the disclosure detailing non-conviction information. An example of this might be if the police credibly suspected the individual had committed serious offences relevant

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to the post they were applying for but had not been convicted of these. If the police provide this information Disclosure Scotland must include it; Ministers have no discretion to remove or alter any text provided by the police.

20. The PVG Act set up the PVG Scheme with effect from 28 February 2011. The basic purpose of the PVG Scheme was to provide for a system of disclosures for individuals doing 'regulated work' with children or with protected adults (as defined in the PVG Act). Previously such individuals would have been entitled to enhanced disclosures under the 1997 Act. So, in effect, the PVG Act set up a separate system of disclosures for persons doing regulated work with children or protected adults and removed them from the scope of the 1997 Act provisions.

21. Disclosures made under the PVG Act are:

- statement of scheme membership (contains no vetting information),
- PVG scheme record disclosure (a higher level disclosure), and
- PVG short scheme record (contains no vetting information).

22. When an individual applies to join the PVG Scheme, Disclosure Scotland check the police criminal history systems and also check if the person is barred from working with children or protected adults anywhere in the UK. A barred person cannot join the PVG Scheme to do regulated work with the vulnerable group they are barred with – children, protected adults or both groups.

23. The information contained on a PVG scheme record is called 'vetting information' but it is the same information as contained in an enhanced disclosure (plus confirmation that the individual is a member of the PVG Scheme). The major difference between 1997 Act disclosures and the PVG Scheme is that after someone first applies for PVG scheme membership, Disclosure Scotland will continuously update and monitor their scheme record for as long as they remain a member. If new vetting information is added to the scheme record, for example convictions or police information, Disclosure Scotland will learn about this and can consider whether the new information means that it may be appropriate to bar the person from working with children, protected adults or both groups, depending on which group they are a scheme member for.

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24. As with 1997 Act disclosures, PVG disclosures are made only when strict rules are met:

- the scheme member must apply for a disclosure and authorise Disclosure Scotland to provide the information in relation to one or both types of regulated work to a registered person who qualifies to see the information, usually a regulated work provider;
- the scheme member requesting the disclosure is a member of the PVG Scheme for that type of regulated work (i.e. with children or protected adults, or both);
- the person to whom the disclosure is to be made declares that the disclosure is requested for the purpose of enabling or assisting the person to consider the scheme member's suitability to do that type of regulated work;
- the person to whom the disclosure is made (the employer for instance) is a registered person under the 1997 Act.

25. When checking the person's criminal record, Disclosure Scotland might find information about past convictions or cautions, or the police may have provided information. In these circumstances Disclosure Scotland will decide if the information means that it may be appropriate to add the individual to the list of people barred from regulated work with children, protected adults or both groups. This part of the process is called 'consideration for listing'.

26. If Disclosure Scotland, following rules set out in the PVG Act and associated regulations, decides that it is appropriate to consider an individual for listing (barring) they will place the individual in the formal status of being under 'consideration for listing'. Any PVG scheme record disclosure made within six months of this decision for the type of regulated work concerned will state that the individual is under consideration for listing. Disclosure Scotland can go to the court and ask for the period of six months to be extended so that the information that a person is under consideration for listing can remain on the disclosure for longer, if they think that is necessary. Even if the ability to disclose the fact that the individual is under consideration for listing expires without such an extension, the individual remains under consideration and Disclosure Scotland retains all its powers to gather information pertinent to the consideration.

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27. Disclosure Scotland can use powers under Part 1 of the PVG Act to gather information about the individual concerned and decide whether the individual is unsuitable for the type of regulated work for which they are being considered. The individual is entitled to see all of the information that Disclosure Scotland relies on to make its decision and they can make representations about why they ought not to be barred. If Disclosure Scotland decides to bar the individual, then they are also barred across the whole of the UK and would commit a serious criminal offence if they sought to do regulated work with the groups from which they are barred, or if they actually did such work.

28. It is also a serious offence for an employer to employ a barred person to do regulated work. The only way that an employer can be sure that someone is not barred is to do a PVG check; this incentivises the use of the PVG Scheme but it does not mean that the Scheme is mandatory.

## Recent case law and legislative changes

29. Since the PVG Act came into force, the legislation in relation to disclosure has been amended twice. On 18 June 2014, in the case *R (on the application of T and another) (FC) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35 (“the T case”), the United Kingdom Supreme Court (“UKSC”) declared that sections 113A and 113B of the 1997 Act as they applied in England and Wales were incompatible with Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (“the Convention”). This was because the provisions required blanket disclosure of all spent convictions on higher level disclosures. In Scotland, similar provisions of the 1997 Act applied to the issue of higher level disclosure certificates, meaning that details of every spent conviction of an individual would be disclosed automatically, regardless of how minor or old the conviction was.

30. In light of the UKSC ruling, the Scottish Ministers assessed the operation of the 1997 Act in Scotland and concluded that changes should be made to the 1997 Act and PVG Act to ensure that they struck a fair balance between an individual’s right to respect for their private life and the interests of public protection.

31. The change in the law was delivered initially by the Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (“the 2015 Order”), which came into force on 10 September 2015.

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The 2015 Order was then subject to a 60-day period for written observations. Thereafter, Ministers took account of the written observations received and finalised the reforms in the Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (“the (No. 2) 2015 Order”). The (No. 2) 2015 Order came into force on 8 February 2016, and at that date the 2015 Order was revoked. Corresponding changes were made to the self-disclosure system by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 and subsequently the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016. The effect of these changes was to introduce offence lists similar to what are now schedule 8A and 8B in the 1997 Act, the concept of ‘protected conviction’ and periods of time after which certain spent convictions that would otherwise have been disclosable forever no longer had to be disclosed. The most serious offences still had to be disclosed indefinitely.

32. Subsequently, there was a judicial review in the Court of Session which challenged the operation of the PVG Act as amended by the (No. 2) 2015 Order. In the case *P v Scottish Ministers* [2017] CSOH 33, Lord Pentland declared that, insofar as they required automatic disclosure of the petitioner’s conviction before the Children’s Hearing (which featured on the ‘always disclose’ list) with no opportunity for challenge or review, the provisions of the PVG Act as amended unlawfully interfered with the petitioner’s rights under Article 8 of the Convention. The effect of the court order (except in relation to the petitioner) was suspended under section 102 of the Scotland Act 1998 for nine months (until 17 February 2018) to allow Ministers to remedy the legislation.

33. The Scottish Ministers subsequently made the Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018, which introduced a right of application to a sheriff to have schedule 8A offences removed from a person’s disclosure certificate or PVG scheme record after prescribed periods of time had passed since the date of conviction. Schedule 8A of the 1997 Act now lists serious offences for which spent convictions must be disclosed unless a sheriff orders otherwise. In these cases, where an individual notifies Disclosure Scotland of an intention to make an application to the sheriff, this prevents a higher level disclosure from being issued to the person who countersigned the disclosure application or request until that application to the sheriff is finally determined.

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34. Similar, but not identical, remedial legislation was made in England, Wales and Northern Ireland following the *T* case to remedy the defects in the 1997 Act as it applied in England, Wales and in Northern Ireland. That remedial legislation included a requirement that, where an individual had more than one conviction, those convictions must always be disclosed (‘the multiple conviction rule’), and a rule that certain offences designated as particularly serious must always be disclosed - that latter aspect (the ‘serious offence rule’) is of particular relevance to the system in Scotland. This English, Welsh and Northern Irish legislation has also subsequently been challenged in a number of cases. A Northern Irish case, *Re Gallagher* [2016] NICA 42 was given leave to appeal to the Supreme Court, at the instance of the NI Department of Justice. Similar English cases were decided by the Court of Appeal on 3 May 2017 – *R (on the application of P and others) v Secretary of State for the Home Department* [2017] EWCA Civ 321 and the Secretary of State also obtained leave to appeal to the Supreme Court. The cases were conjoined and heard together in *Re an application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (P, G & W) v Secretary of State for the Home Department; R (P) v Secretary of State for the Home Department* [2019] UKSC 3. The Scottish Government does not consider that the judgment has significant consequences for the disclosure and rehabilitation regime in Scotland. The disclosures that took place in the English/Northern Irish cases would either not have taken place in Scotland, or at least would not have happened automatically or without the opportunity for review. It is therefore not intended to make any further amendments to the 1997 Act or PVG Act in light of this most recent decision of the UKSC.

## Policy objectives of the Bill

### Overview

35. The policy of the Bill focuses on safeguarding children and vulnerable adults, whilst balancing an individual’s right to move on from offending and get on with their life.

36. The key policy changes are:

- reducing four main levels of disclosure (basic, standard, enhanced and PVG) to two (Level 1 and Level 2). The ten products, that is different types of disclosure certificate with varying information, offered under the current structure that contain vetting information will be reduced to four within the new two level structure, plus

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‘confirmation of scheme membership’ as a replacement for the ‘statement of scheme membership’;

- introducing a mandatory PVG Scheme for people working with vulnerable groups;
- replacing the concept of ‘doing regulated work’ with a list of core activities giving rise to ‘regulated roles’ that trigger mandatory PVG scheme membership (voluntary and paid);
- ending life-time PVG scheme membership and replacing it with a renewable five year membership, while still preserving scope for free checks for volunteers in qualifying voluntary organisations who work with children or protected adults;
- reforming the provision of police ‘Other Relevant Information’ (“ORI”) to end the current process of disclosures being issued to employers before the applicant has had an opportunity to challenge the disclosure of ORI. Applicants will be given the right to make representations to the police about whether ORI should be included on a disclosure, before it is issued to a third party. This will be followed by a right to apply for review by an independent reviewer if police decide to disclose ORI, and from there an appeal to a sheriff on a point of law;
- recognising adolescence as a unique phase of life by ending the automatic disclosure of convictions accrued while aged between 12 and 17 years and introducing an assessment by Disclosure Scotland acting on behalf of Ministers as to whether convictions ought to be disclosed, with a subsequent right of review by the independent reviewer (followed by an appeal to the sheriff on a point of law) prior to disclosure to a third party;
- changing the period after which an application for removal of a conviction for an offence on schedule 8A of the 1997 Act can be made (now re-stated and amended in List A of schedule 1 in the Bill). In relation to spent convictions for offences currently listed on schedule 8B of the 1997 Act (re-stated and amended in List B, set out in schedule 2 of the Bill), the disclosure period will be shortened to 11 years. The process for asking for convictions to be removed from a disclosure will be in the form of an internal application to Disclosure Scotland for removal, followed by a right to apply for review by the independent reviewer and from there an appeal to the sheriff on a point of law;

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- establishing 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;
- providing clarity on disclosure arrangements for individuals directly employing a PVG scheme member for, for example, personal care or home tuition of children;
- enabling the Scottish Ministers to impose standard conditions where appropriate on any individual who is under consideration 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 adult's list, and permitting Ministers to give notice that a person is under consideration for listing and of their barred status; and
- providing new referral powers for Police Scotland and Scottish councils and integration joint boards.

37. The provisions of this Bill will deliver a range of positive and proportionate reforms to the disclosure regime in Scotland whilst also strengthening the barring service to maintain the Scottish Government's ability to protect the most vulnerable in society.

## Consultation

### Pre-consultation engagement

38. Disclosure Scotland carried out three rounds of engagement before publishing a formal consultation in April 2018. To ensure a high level of stakeholder engagement, it used a number of channels and methods throughout the pre-consultation process, including:

- individual interviews,
- group participation sessions,
- telephone interviews,
- online survey, and
- stakeholder conference.

39. Disclosure Scotland collated the results and feedback, analysing them after each round of engagement so that progressively more specific questions were asked at each stage.

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40. A wide range of participants took part in the pre-consultation engagement. Disclosure Scotland engaged in person with over 350 organisational representatives and individuals throughout Scotland and received feedback from many more through an online survey. Examples of organisations that have taken part include:

- local authorities,
- NHS boards,
- sport governing bodies,
- educational institutes,
- church groups, and
- third sector organisations.

41. The online survey generated 848 responses from a wide range of participants. It comprised 20 questions which covered the same themes as those in the face to face engagement events. The evidence gathered during this intense period of engagement assisted Disclosure Scotland in the development of proposals for formal consultation. Throughout this process stakeholders were almost universal in their support for the PVG Scheme and the disclosure regime in relation to it providing information to assist safe recruitment decisions and preventing unsuitable people from doing regulated work. However, there was a clear identified need for a simpler system with fewer disclosure products and services to be provided online, with non-digital alternatives for accessibility.

## Formal consultation

42. Disclosure Scotland published the consultation paper<sup>3</sup> on 25 April 2018. This was distributed widely to a large number of stakeholders, including over 3,000 registered bodies. There were 353 responses, 269 from organisations and 84 from individuals. There were responses from a range of stakeholders with varying backgrounds including judicial bodies, the legal sector, local government, voluntary organisations, the health sector and individual scheme members.

43. There was extensive engagement with stakeholders during the consultation period. This included group discussions and meetings with individual groups or organisations, in total 38 engagement sessions took

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<sup>3</sup> [consultation paper](#)

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place during the formal consultation period. During this time Disclosure Scotland User Researchers also engaged with a variety of stakeholders. Since April 2016 the user research team have carried out a significant amount of research, which has included a range of users, such as:

- individuals with and without experience of using Disclosure Scotland's services,
- individuals with convictions,
- care experienced people,
- people with disabilities, including blind participants, deaf participants, people with low cognitive skills, dyslexia, dyspraxia,
- organisations – including various roles e.g. HR, admin staff, countersignatories,
- charities, and
- voluntary organisations.

44. To ensure a deep understanding of users' needs, a variety of methods were used, including: 1:1 interviews, focus groups, sense-making workshops, usability testing, accessibility testing and contextual visits in people's homes and workplaces. As a result of the research the team elicited over 200 user needs and created a customer experience map. The map evidences the steps a user may go through when using Disclosure Scotland's services. In addition to understanding current pain points the user research team have also gathered a list of opportunities for improvement from users.

45. The results of the consultation have informed further development of the policy and Bill provisions. Summaries of the consultation responses are provided below in relation to specific aspects of the Bill. The key outcomes from the consultation are:

- there was significant support from consultation respondents for a reduction in disclosure products offered under the 1997 Act and the PVG Act;
- that the complexity of the disclosure system lies not only in the number of products available, but in a lack of understanding of the underpinning legislation and difficulty in navigating the system;
- there was significant support for placing a minimum age of 16 years on obtaining a criminal record check;

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- respondents strongly supported moving Disclosure Scotland's services online but it was important to provide a non-digital alternative to avoid precluding those unable or unwilling to use services online;
- stakeholders have expressed support for increasing the applicant's ownership of and giving them greater control over with whom they share that information;
- a singular theme from consultation responses is that change is needed in the disclosure of childhood offending behaviour;
- there was broad support found in the consultation results and our stakeholder engagement that the disclosure period for certain convictions should be reduced from 15 years;
- that the current system for disclosure applicants making an application to a sheriff for removal of certain convictions was complex and difficult to navigate;
- there was strong support for replacing the concept of 'doing regulated work' with something easier for users to understand;
- a majority of respondents agreed that the current lifetime membership for the PVG Scheme should end and should be replaced with a recurring time limited version;
- there was strong support for new powers of referral for Police Scotland and councils or integration joint boards; and,
- stakeholders supported proposals to give Disclosure Scotland new powers to impose certain conditions on people under consideration for listing.

## Bill content

46. The Disclosure (Scotland) Bill is structured in the following parts:

- Part 1 – creates the legislative framework for the new disclosure products for criminal history and other information. In particular it establishes the new disclosure products (Level 1 and Level 2) and new review procedures for childhood conviction information, relevant police information and removable convictions and the functions of the independent reviewer under the Bill. Part 1 sets out the form and manner of applications and provision of disclosures to allow for a future system to increase the extent to which applicants and employers may interact digitally with

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Disclosure Scotland. It also sets out duties on the Scottish Ministers to issue guidance to Police Scotland and for them to have regard to such guidance when exercising their functions under the Bill. Part 1 covers the accreditation system for persons who are considered suitable to receive disclosure information and extends accreditation to cover bodies which make applications for Level 1 disclosures on behalf of individuals. It restates powers from the 1997 Act so that Ministers can use personal data and fingerprints to check applicant's identity. In addition, schedule 5 makes modifications in consequence of Part 1, including repealing Part 5 of the 1997 Act and a number of consequential amendments to the PVG Act.

- Part 2 – makes a number of amendments and insertions into the PVG Act. It establishes compulsory scheme membership for people aged 16 years or over working with vulnerable groups, sets out the duration of scheme membership and creates new offences to support the mandatory scheme. It replaces the concept of 'doing regulated work' with 'regulated roles' that trigger mandatory scheme membership. Provision is made to bring activities carried out outside the United Kingdom, the Channel Islands and the Isle of Man into scope of regulated roles, where the individual is ordinarily resident in the United Kingdom and the organisation or personnel supplier has a place of business in Scotland in which their functions in relation to the activity are principally exercised. Part 2 of the Bill also covers new powers for Ministers, as Disclosure Scotland, to impose conditions on scheme members under consideration for listing and the role of the sheriff for confirmation of conditions. In addition, amendments are made to the arrangements for individuals withdrawing from the scheme and stopping considerations for listing. It also sets out the new referrals powers for Police Scotland and councils or integration joint boards and ends the court referrals system. The meaning of "protected adult" in section 94 of the PVG Act is also modified.
- Part 3 – makes provision for regulation making powers, ancillary provisions, consequential and minor modifications, interpretation and Crown application.
- Schedules 1 and 2 – restate and amend the lists of offences which are currently in schedules 8A and 8B of the 1997 Act.

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- Schedules 3 and 4 – define what is meant by regulated roles, substituting the existing schedules for regulated work with children and with adults currently in schedules 2 and 3 of the PVG Act.
- Schedule 5 – makes consequential amendments and minor modifications in consequence of Part 1 of the Bill and the new concept of regulated roles.

## Part 1 - disclosure of criminal history and other information

### Level 1 disclosures – sections 1 to 5

#### Policy objectives

47. This part of the Bill concerns the reform of the basic disclosure product currently offered by Disclosure Scotland under section 112 of the 1997 Act. The overriding policy objective is to simplify the range of disclosure products for applicants. There are currently over ten different varieties of disclosures. A central feature of the policy in relation to this Bill is to create two broad levels of disclosure. A new age limit on the disclosure system is to be imposed, and greater use of digital technology is planned in the application for and delivery of the new disclosure product.

48. A Level 1 disclosure will replace the current basic disclosure. It will continue to disclose only unspent convictions or state that there are no such convictions. There are, however, intended to be some differences between a basic disclosure and a Level 1 disclosure.

49. It will only automatically include unspent convictions accrued when the applicant was aged 18 or over. Section 1 of the Bill makes provision for the inclusion of information about any childhood convictions of the individual that is to be included following consideration by Ministers under section 5 that it ought to be included. A childhood conviction is defined in section 70 as a conviction for an offence committed when the individual was under 18 years of age but over the age of 12<sup>4</sup>. There is a rebuttable

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<sup>4</sup>The Age of Criminal Responsibility (Scotland) Act (“the ACR Act”) will increase the age of criminal responsibility to 12, meaning that any behaviour which took place before a person’s twelfth birthday will not be disclosable as a conviction but as a form of relevant police information.

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presumption in section 41 that a person was the same age at the date of conviction as at the date of commission of the offence. If there is no such childhood conviction information the Level 1 disclosure will include a statement to that effect.

50. In addition, provision is made so that if the individual is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003, a Level 1 disclosure will now state that fact. Similar provision was made in section 78(1) of the PVG Act to amend section 112 of the 1997 Act. That amendment would have allowed information about a notification requirement under the 2003 Act made following an application by a chief constable to be included on a basic disclosure. The amendment was never brought into force and this Bill seeks to remedy this.

51. There is currently no minimum age requirement for making an application for a basic disclosure. The policy intent of section 2 of the Bill is that nobody under 16 should have access to the state disclosure system. However, provision is made to permit discretion to issue a Level 1 disclosure to those aged 12 to 16 if Ministers consider it appropriate in the circumstances of a specific case. The age of 12 has been chosen as the lower limit, as this is the age of criminal responsibility in the ACR Act.

52. Provision is also made under section 2 to refuse to provide a Level 1 disclosure to an individual if it appears to Ministers from the information contained in the application that the disclosure could be more appropriately be obtained from another person, for example the Disclosure and Barring Service for England and Wales or Access Northern Ireland. There are no equivalent provisions in the 1997 Act and jurisdictional issues have until now been addressed under a Memorandum of Understanding between the partner agencies. Section 2 now puts these arrangements on a firmer legal footing.

53. Section 3 allows for an accredited body (see paragraph 177 for more detail on accredited bodies) to make an application on behalf of an individual. Disclosure Scotland currently offers businesses the chance to obtain basic disclosures for a large number of job applicants using special

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Such pre-12 information is also not to be included in new provisions on the Level 1 disclosure.

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arrangements that allow for bulk applications. This is known as Business 2 Business, or B2B for short. Under the Bill a B2B service will continue to be offered for Level 1 disclosures to organisations that require it but these organisations will be brought within the scope of accredited bodies, as is the case just now for organisations who can see standard, enhanced and PVG disclosures, replacing the current non-statutory definition of 'responsible body' for B2B customers. The law governing how B2B works is tightened under the Bill to assure the protection of personal data as the service moves onto new digital platforms, whilst still allowing for the efficient delivery of the service.

54. Stakeholders have expressed support for increasing the applicant's control over who they share their disclosure information with. As such Disclosure Scotland will continue to accept bulk applications for Level 1 disclosures, but the practice of returning disclosures in bulk to the accredited body will end. The Level 1 disclosure will be issued to the applicant only with the individual then having control, in terms of section 4, over sharing the Level 1 disclosure with a third party by electronic communications. In cases where a paper Level 1 disclosure certificate is issued, only one will be sent to the applicant who will have control over the sharing of that disclosure. More information about digital delivery can be found at paragraph 162.

55. Section 5 makes provision for information about childhood convictions to be included in the Level 1 disclosure and sections 6 to 12 create the legal framework for applications to the independent reviewer and the sheriff in relation to the disclosure of such information. This gives the individual the opportunity to challenge a decision by Ministers that childhood conviction information ought to be included in a Level 1 disclosure.

56. The policy intention behind childhood convictions covers Level 1 and Level 2 disclosures and more information can therefore be found separately from paragraph 89.

## Alternatives

57. Do nothing. No changes would mean that important information about notification requirements under the Sexual Offences Act 2003 would be absent from Level 1 disclosures. In addition, criminal record checks would continue to be available for children under the age of 16 years, leaving the

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disclosure regime in Scotland out of step with the rest of the United Kingdom. It would also be possible for employers to have access to childhood conviction information in the most basic level of disclosure, without any consideration by Ministers of whether such information ought to be disclosed. This would continue to make it harder for people to move on as adults from wrongful behaviour carried out in adolescence.

58. Modify disclosure rules for childhood convictions. Amend legislation to provide that no conviction, regardless of how recent, may be disclosed on a Level 1 disclosure when the offence was accrued when the individual was under the age of 18 years. This would mean that recent, unspent convictions for harmful offending behaviour could never be disclosed on Level 1 disclosures.

59. Blanket prohibition on Level 1 disclosures for people under the age of 16. This would prevent any individuals aged under 16 requesting any level of disclosure. Although it is considered to be generally inappropriate for under 16s to be the subject of a disclosure it is also recognised that a blanket prohibition could have a detrimental impact on, for example, a fifteen year old seeking to undertake a college course for which disclosure is required.

## Consultation

60. At present, Disclosure Scotland offers all types of criminal record checks regardless of the age of the applicant. That is not the case elsewhere in the United Kingdom. Ministers in those jurisdictions state that it is generally inappropriate for children under 16 to apply for criminal record checks as they should not have an unsupervised role where they are, for example, caring for other children or protected adults on behalf of an organisation or employer. The consultation asked if the practice of not having a lower age limit should continue. Of those who responded to the question the majority of respondents agreed with the proposal to place a lower age limit on applicants for criminal record checks.

61. The consultation asked whether provision should be made to bring into force the amendment described in paragraph 50 in relation to notification requirements under the 2003 Act. Respondents were overwhelmingly in favour of this option.

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62. The consultation asked if it was appropriate to regulate organisations in relation to B2B applications. The vast majority of consultation respondents supported this approach, commenting that, given the new data protection laws in place, organisations requesting disclosures from a large volume of employees should be formally accredited and their processing and storage of personal data regulated.

63. The consultation also asked about the treatment of convictions incurred while a person was under the age of 18. This is also relevant to Level 2 disclosures, so the consultation responses have been analysed from paragraph 107 below.

## Level 2 disclosures – reduction in number of higher level disclosure products – sections 13 to 22

### Policy objectives

64. The overriding policy objective of the Bill is to simplify the range of disclosure products for applicants. There are currently over ten different varieties of disclosures. A central feature of the policy in relation to this Bill is to create two broad levels of disclosure.

65. Alongside this broad policy aim, other changes to the disclosure system will be made, including:

- imposing a minimum age restriction for Level 2 disclosures;
- defining the content of Level 2 disclosures;
- amending aspects of the disclosure process, including for PVG scheme members;
- supporting the implementation of a new digital delivery system.

66. As outlined above, the present state disclosure system under both the 1997 Act and PVG Act allows for four main levels of disclosure:

- basic,
- standard,
- enhanced, and
- PVG.

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67. Within the latter three (referred to as higher level disclosures) there are variations in level of detail of disclosure, determined by the role that the individual is seeking to do and, in the case of PVG, the scheme membership status of the individual. There are also restrictions based on the identity of the third party with whom the disclosure product is to be shared. This results in ten different possible types of disclosure, leading to confusion for applicants and employers.

68. The replacement of the current basic disclosure with the new Level 1 product has already been addressed above.

69. Higher level disclosures will be replaced by Level 2 disclosures. There will no longer be a direct equivalent of the existing standard disclosure. The amalgamation of products will see standard and enhanced disclosures abolished with 3 types of Level 2 disclosure available:

- Level 2,
- Level 2 with further information for certain purposes for non-PVG scheme members, and
- Level 2 for PVG scheme members.

70. Rather than consider these as separate products, they are to be seen as a single product which discloses different information depending on the reason for which it was requested and the identity of the ultimate recipient. The design principle is that customers should only need to know the role that they intend to do and the system should take care of guiding them to the appropriate disclosure product. This will be done by designing a digital system that allows information input about the job or role to lead to a clear outcome for the customer. There will be alternative provisions for those with no access to digital or who face other challenges using it. These alternatives will be further developed with relevant stakeholders, but will include paper-based disclosure certificates.

71. Individuals will continue to need to have their application for a Level 2 disclosure countersigned by an accredited body, who should confirm the purpose for the disclosure, and that the purpose of the disclosure is related to the situations where an 'exempted question' can be asked due to the disclosure being for a purpose for which the 1974 Act is excluded by the 2013 Order (see paragraph 12 above). In common with the provisions for Level 1 disclosures it will be available to an individual aged 16 and over as

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of right, but with a power to provide certain types of Level 2 disclosure to individuals aged 12 to 16.

72. With standard disclosures abolished, the lowest higher level disclosure that will be available will be a Level 2 (as defined by section 13 of the Bill). This means that all higher level disclosures can include ORI, which is a departure from previous practice. This product will replace all standard disclosures and some enhanced disclosures issued under the 1997 Act. The policy intention is therefore to allow individuals to request the new product where the application of the 1974 Act has been excluded by the 2013 Order.

73. The next Level 2 disclosure available is a Level 2 disclosure with further information for certain purposes: non-PVG scheme members (see section 19 of the Bill). This disclosure product will replace certain enhanced disclosures available under the 1997 Act. The information contained in this product will be the same as Level 2 disclosures, but with additional information relating to the children's and adults' lists maintained by the Scottish Ministers under section 1 of the PVG Act, and information of every prescribed civil court order in effect in respect of the individual or a statement that no such order is in effect.

74. The final Level 2 disclosure available is a Level 2 for PVG scheme members (see section 20 of the Bill). This type of disclosure will replace the PVG scheme record and the short scheme record. There will no longer be an equivalent of the short scheme record. The information contained in this new product will be the same as the Level 2 disclosure with further information for certain purposes: non-PVG scheme members, but in place of any barring information it will include a statement confirming that the individual participates in the PVG Scheme in relation to a regulated role with either children, adults or both. Details of any consideration for listing will also be provided. This type of disclosure will not be available to anyone under the age of 16, since there is now to be a minimum age limit of 16 for becoming a member of the PVG Scheme. It will be an offence for an organisation or personnel supplier to offer any type of regulated role unless they have received a Level 2 for PVG scheme members.

75. There will continue to be an equivalent to the statement of scheme membership, which will be available under section 54 of the PVG Act, rather than sitting with the disclosure products on the face of this Bill. It will be known as a 'confirmation of scheme membership'.

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## Alternatives

76. No changes. The review of the PVG Scheme early engagement identified the need to reduce the number of disclosure products available and generally to simplify the disclosure system. Respondents felt that the current system had too many options leading to confusion about the type of application that should be made. The Early Engagement Report<sup>5</sup> noted that stakeholders were almost universal in their desire for a simpler system with fewer products. To remedy this, the consultation proposed a policy option to simplify the disclosure regime to two levels and this was met with resounding support from respondents.

77. Variations in the content of the Level 2 disclosure product. The content of standard and enhanced disclosures is the same in terms of conviction information. The differences in content relates to ORI provided by the police, information about inclusion in one or both of the barred lists held under the PVG Act, and information about prescribed civil orders. The challenge in creating a new product is to strike the correct balance between the reasonable expectation that employers have about useful disclosure content and the rights given to the disclosure subject under Article 8 of the Convention (the right to respect for private and family life). The Scottish Ministers presented three credible options for the content of the Level 2 disclosure product in the consultation and this is discussed further below.

## Consultation

78. The consultation specifically highlighted the higher disclosure system as a source of confusion among stakeholders. The vast majority of respondents again supported reducing the number of disclosure products. In particular, it was expressed that the current products on offer are insufficiently differentiated and there is uncertainty surrounding the employment and roles eligible for each type of higher level disclosure.

79. On what the content of the proposed Level 2 disclosure should be, a large majority of respondents opted for the proposed product that disclosed the most information, noting that they felt it necessary for employers to make informed recruitment decisions and to assess the suitability of an individual for a role. A minority of respondents expressed support for the options which disclosed less information, with a small number of respondents expressing concern about the use of ORI and that disclosing

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<sup>5</sup> [Early Engagement Report](#)

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too much information can hinder the ability of people to move on from past offending. However, it is recognised that the “normal” Level 2 product cannot disclose more information than would be appropriate for the role or circumstances for which the disclosure is applied for. This is why it is considered necessary to maintain the ability to disclose more or less information within the same Level 2 product, depending on the specific circumstances.

80. The consultation also proposed the introduction of a minimum age for obtaining Level 2 disclosures. Respondents supported this and agreed that state disclosure should be restricted for those under the age of 16.

81. The Scottish Ministers’ view is that it is inappropriate for the state disclosure system to be used for children. The approach in the rest of the UK is that disclosure checks are not permitted for children under the age of 16.

82. The Scottish Ministers recognise however that there may be some exceptional cases where disclosure checks on young people may be in the public interest. One example would be where a foster family had a 15 year old child in the household. Therefore, the policy is that in these exceptional cases it should still be possible to obtain a Level 2 disclosure, but the child should not be able to become a member of the PVG Scheme. This exception will, however, be subject to a minimum age of 12, which has been chosen to align with the new age of criminal responsibility under the ACR Act.

## Amending the disclosure process for Level 2 disclosures – sections 16 and 21 to 22

### Policy objectives

83. Under the current system, when an applicant makes a disclosure request under the 1997 Act or PVG Act, they in effect at the same time request that their information be disclosed to a third party. This means that they could find out about information they had not expected to see on their disclosure, for example ORI, at the same time as or even after their employer or potential employer. The overall policy intention behind sections 16 and 21 to 22 of the Bill is that the application for a disclosure request by an individual and the individual’s request to Disclosure Scotland to make that information available to a third party will be separated out into

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two stages. This is an important improvement on the current process and will give control over the use and sharing of disclosure data to disclosure applicants.

84. While applications for a Level 2 disclosure will be submitted by an individual and only accepted for processing if correctly countersigned by an accredited body, the disclosure requested will only be delivered, in the first instance, to the individual applicant, either digitally or physically, giving them a chance to review and potentially challenge the contents before the accredited body has any information disclosed to them.

85. Once an individual has been sent their disclosure by Disclosure Scotland they should be able to decide whether or not to request that the completed disclosure certificate is to be sent to the accredited body that countersigned the application in a manner determined by Ministers. If a paper disclosure has been requested, this will be posted to the accredited body directly following the request to release. Alternatively, instead of authorising release of the disclosure, the individual will in some cases have the opportunity to challenge the content of the disclosure (see paragraph 152 for review applications) and, if they choose to use that opportunity for challenge, then the disclosure to the accredited body that countersigned the application can only happen once such a process has been completed.

#### Alternatives

86. No changes. A theme coming out of the Early Engagement Report was that stakeholders wanted individuals to have greater control over their own application and managing their scheme member account. Separating the application and sharing of disclosure information processes supports the policy objective of giving more control to the applicant about whom they share disclosure information with. No changes would also mean no remedial action is taken to allay concerns raised by stakeholders about the fairness of having the possibility of information disclosed to a third party when that information could have been removed following a successful application by the individual Consultation.

87. In view of the findings of the Early Engagement Report the consultation did not specifically ask whether an application for a disclosure request by an individual and the sharing of that product with a third party should be separated out into two stages. This policy has also been refined during the development of the provisions for “childhood convictions” and

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“removable convictions”. However, the consultation did ask if respondents agreed with proposals to allow for representations to the chief constable before disclosure of ORI to a third party and for providing the individual with the option to appeal to an independent reviewer before ORI is disclosed.

88. The Scottish Ministers decided that it was appropriate to change the point at which the individual becomes aware of all information which may be reviewed under section 23 so that they have the opportunity to provide representations before it is included on the disclosure for onward sharing with employers or other third parties.

## Disclosure of childhood convictions accrued during childhood (offences accrued while aged under 18 years) – sections 5, 17 and 41

### Policy objectives

89. Neither the 1997 Act nor the PVG Act contain any specific provisions relating to the disclosure of information about convictions accrued by people when they were children. There are nevertheless some protections in place for offences committed while a child.

90. For instance, the Lord Advocate has issued ‘Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children’. This sets out different categories of offences, depending on their seriousness, which should be jointly reported to the procurator fiscal and referred to the children’s hearing system. Cases which fall outside the Guidelines should normally only be referred to the children’s hearing system.

91. A child over the age of criminal responsibility who is referred to a children’s hearing on the offence ground will, where that ground is accepted or established, still obtain a conviction which is disclosable on a disclosure certificate in the same way as any other conviction, including (in the case of higher level disclosures) after the conviction becomes spent.

92. The 1974 Act does make provision for different periods of rehabilitation (and hence disclosure) for sentences given in relation to convictions of persons under the age of 18. The rehabilitation periods for certain sentences given to under 18s are half the length of the rehabilitation periods for adults under section 5 of the 1974 Act.

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93. The 2015 and 2018 Remedial Orders introduced a system whereby the content of higher level disclosures (currently standard, enhanced and PVG) is filtered to ensure that:

- minor spent convictions do not appear at all;
- less serious spent convictions (listed in schedule 8B of the 1997 Act) appear for 7.5 years after the date of conviction if the individual was aged under 18 on the date of conviction (15 years if the individual was 18 or over on the date of conviction); and
- spent convictions for serious offences (listed in schedule 8A of the 1997 Act) appear indefinitely, unless a sheriff orders otherwise – individuals have the right to apply to a sheriff for removal of these spent convictions 7.5 years after the date of conviction if they were under 18 on the date of conviction and 15 years after the date of conviction if they were 18 or over on the date of conviction.

94. The 2015 and 2018 Remedial Orders operate alongside the 2013 Order as amended by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Orders of 2015, 2016 and 2018 which provide for associated changes to the system of self-disclosure of previous criminal convictions by an individual.

95. The existing protections afforded to convictions accrued by people under the age of 18 have contributed to a system that helps people to move on from past childhood offending. The Scottish Government is however committed to affording everyone a better chance to overcome early adversity, including involvement in offending behaviour, to allow people to become productive and fulfilled citizens in adulthood. A further package of reforms is therefore in the process of being introduced.

96. The Management of Offenders (Scotland) Bill was introduced in Parliament on 22 February 2018 and will, if enacted, shorten the period for which most convictions remain unspent, with measures to shorten further the unspent period for most offences where the offender was under the age of 18 on the date of conviction. This will impact both basic (future Level 1) and higher level (future Level 2) disclosures and reduce disclosure by both the state and the individual.

97. The ACR Act provides that a child under 12 years cannot commit a criminal offence. If the ACR Act is enacted in its current form, behaviour by children under the age of 12 will not be labelled as criminal and will not

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result in a conviction. A clear line is drawn at the age of 12 in the ACR Act with regard to revised disclosure provisions for children because that is the proposed new age of criminal responsibility and all of the provisions in the Bill support that change. In relation to the disclosure system, pre-12 behaviour (whether it occurred before or after the new ACR coming into force) will only be capable of being disclosed as ORI from Police Scotland, and only after an independent review. However, under the proposals laid out in the ACR Act, there remains the possibility of conviction and subsequent disclosure for offences accrued while aged 12 to 17.

98. In the 2016-17 'Programme for Government: A Plan for Scotland', Ministers gave a commitment to "look afresh at the disclosure of early childhood offending to enable young people to move beyond early mistakes". During the preparation of the 2016 Report on the Age of Criminal Responsibility Advisory Group, members of its Disclosure Sub-Group reached a clear consensus that the issue of disclosure of conduct occurring when the individual was aged between 12-17 merited early consideration and reform. This issue was identified as something to be taken forward as part of the Disclosure Bill.

99. The Disclosure Bill ensures that convictions for an offence committed when the individual was under the age of 18 years will be disclosed on all disclosure products (Level 1 and Level 2), and should continue to be treated as convictions for the purposes of the 1974 Act, but only *after* the applicant has been given the chance to make representations about the proposed disclosure, and to have that proposed disclosure independently reviewed. The information would not be listed along with any other convictions, but would fall under a separate heading to distinguish offending behaviour within this age range from adult offending.

100. In both cases (Level 1 and Level 2) there will be a two-step process before such information would be disclosed, involving an initial decision by Ministers (in practice exercised by Disclosure Scotland), with a subsequent right of referral to the independent reviewer (see paragraph 152 for more detail on the role of the independent reviewer under this Bill). The applicant may also appeal to a sheriff against the independent reviewer's decision but on a point of law only. The Scottish Ministers consider these proposals strike a fair balance between a system that protects young people's rights to move on with their lives, but still allows for disclosures that are in the public interest.

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101. The factors to be taken into account will include the amount of time elapsed, the number of offences, whether a pattern of offending behaviour has continued into adulthood, and the seriousness of any childhood convictions. Section 66 allows Ministers to gather information from relevant persons to assist them to determine whether information about the childhood conviction ought to be disclosed.

102. In relation to Level 1 disclosures, section 5 ensures that only unspent convictions, which would ordinarily be eligible for inclusion on a Level 1 disclosure, may be considered by Ministers for disclosure, and requires that a childhood conviction can only be disclosed after assessment by Ministers. Given the broad scope of Level 1 disclosures and the fact that no particular purpose is needed before an individual can apply for one, the test is whether information about the childhood conviction ought to be included in the disclosure.

103. In relation to Level 2 disclosures, section 17 ensures that only the following information about childhood convictions may be included: (a) an unspent conviction within the meaning of the 1974 Act, and which (b) is not a non-disclosable conviction (as defined in section 14 of the Bill), and requires that a childhood conviction can only be disclosed after assessment by Ministers. For decisions relating to Level 2 disclosures, Ministers will also take account of any ORI disclosed by the chief constable to avoid unnecessary duplication of information being provided on the Level 2 disclosure. The test for Level 2 disclosures is whether the childhood conviction is relevant for the purpose of the disclosure and whether information about it ought to be included. This two tiered test is appropriate and varies from Level 1 disclosures because there will always be a declared purpose for Level 2 disclosure applications.

104. Section 41 sets out that for the purposes of exercising their functions under this Part, the Scottish Ministers may, in the absence of information to the contrary, presume a person convicted of an offence was of the same age at the time when the offence was committed as the person was at the date of the conviction. The presumption is required because the Ministers have minimal information available to them when vetting an applicant to establish their age at the time of the offence. If that presumption turns out to be false, the applicant would be able to request a review on the grounds of accuracy under sections 6 or 24 of the Bill and produce evidence to rebut the age presumption.

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105. On providing a Level 1 or Level 2 disclosure to an individual that contains childhood conviction information, the Scottish Ministers must notify the individual of their reasons for their determination that the information ought to be included in the disclosure, and the right of an application for independent review. No disclosure will be issued to a third party until all the review processes are complete and the individual had requested disclosure to a third party.

106. More information about the role of independent reviewer in childhood conviction information (and other “reviewable information”) can be found at paragraph 153.

### Alternatives

107. Do nothing. No changes to the existing system would mean that convictions accrued from under the age of 18 years would remain in the same position as now, which means that they are disclosed whilst unspent on all levels of disclosure, and disclosed whilst spent on higher level disclosures if not a non-disclosable conviction.

108. Modify disclosure rules for childhood convictions. Amend legislation to provide that no conviction, regardless of how recent, may be disclosed on a state disclosure when the offence was accrued when the individual was under the age of 18 years. However this protection would be set aside where the conviction is listed on schedules 1 or 2 of the Bill or where the conviction is of a type that cannot become spent under ROA. The consequence of this is that more serious offending would continue to be automatically disclosed but unspent convictions for minor offences, for example theft by shoplifting, would never be disclosed. There would be no option for an individual to challenge the disclosure of a more serious conviction, other than by using the usual review mechanisms for adult convictions.

### Consultation

109. A key theme emerging from pre-consultation engagement by Disclosure Scotland and the responses to the consultation itself was that there should be a different approach to the disclosure of offending behaviour that occurred during childhood. It was recognised that there was a real need to consider how the disclosure system worked for people with convictions from the age of criminal responsibility to an upper age limit to

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ensure that it is fair to all, protecting the life chances of individuals who may have committed offences as children but who now lead law-abiding lives.

110. Section 6 of the consultation asked for views on how the disclosure of convictions accrued in childhood should be handled. Ministers proposed three options: no changes, a special regime for childhood convictions involving a case-by-case assessment, or changing the disclosure rules which would result in no disclosure of childhood convictions except for the most serious spent convictions. Respondents to the consultation were generally supportive of specific provisions to reduce the possibility of state disclosure of criminal convictions accrued above the age of criminal responsibility, and most respondents favoured the special case-by-case regime for childhood convictions.

111. The consultation sought views on what the upper age limit for the special treatment of childhood convictions should be, with six different age ranges proposed. The majority of respondents favoured the age range of 12-17, recognising that young people are generally viewed as adults when they reach the age of 18, with a corresponding higher level of maturity and increased levels of responsibility.

## Removable convictions – sections 23 and 28

### Reducing the disclosure periods

#### Policy objectives

112. The legislation on higher level disclosures until 10 September 2015 required self-disclosure of all convictions however old and/or minor they were, that is, self-disclosure covered all spent convictions. In addition, the legislation required Disclosure Scotland to include all convictions (spent or unspent) on the higher level disclosures issued.

113. As already referred to in paragraph 29 above, in June 2014, the UK Supreme Court, in a judgment relating to the disclosure of cautions issued by the police in England and Wales for minor offences, found that the system under the 1997 Act as it applied in England and Wales breached a person's Article 8 rights under the Convention. Although the court fully accepted the need for additional scrutiny of a person's background if they wanted to work with vulnerable groups or in other sensitive roles, it indicated that the automatic indiscriminate requirement for disclosure of all convictions was not proportionate as no assessment was undertaken of the

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relevance of the information disclosed to the purpose for which the disclosure was required.

114. As a result of that judgment in the balancing of competing rights and interests, the Scottish Government considered the higher level disclosure system as it operated in Scotland and concluded that reforms should be made to it.

115. A new reformed system restricted the requirement for disclosure so that not all spent convictions would be routinely disclosed. Convictions would be disclosed in line with rules set out in the legislation which was designed to ensure that only relevant convictions (including relevant spent convictions) would be disclosed on higher level disclosures.

116. Two lists of offences were created. One list, set out in schedule 8A of the 1997 Act (schedule A1 of the 2013 Order), contained convictions for offences considered so serious and/or relevant that they must always be disclosed. The second list, set out in schedule 8B of the 1997 Act (schedule B1 of the 2013 Order), contained convictions for offences that may be relevant with factors in relation to the length of time since conviction, age of offender at time of conviction and sentence received determining whether disclosure should take place.

117. In February 2017 the Court of Session ruled on a judicial review brought in relation to the disclosure of a previous conviction on the petitioner's PVG scheme record. The court found that, insofar as they required automatic disclosure of the petitioner's convictions before the Children's Hearing, the reforms made in 2015, which continued to allow automatic disclosure of the most serious offences without the possibility of review, amounted to an unlawful and unjustifiable interference with the petitioner's Article 8 rights.

118. Amendments were made to further refine the system of higher level disclosures so as to bring a benefit to individuals who have a conviction for an offence listed in schedule 8A of the 1997 Act (schedule A1 of the 2013 Order). The reforms provided the possibility of the disclosure recipient making an application to a sheriff for removal of spent conviction information from the disclosure provided certain criteria are met. The practice of automatically and indefinitely disclosing spent convictions by the state for offences on schedule 8A of the 1997 Act ended.

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119. Offences that do not appear on either list will not be disclosed after they become spent. In developing these lists of offences careful consideration was given to the attributes required for roles requiring higher level disclosure. Such roles place the individuals filling them in a position of power and responsibility. A conviction for a criminal offence that:

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

is evidence that a person's conduct has caused harm to an individual and/or is evidence of misconduct in a position of authority. The protection of vulnerable groups and of sensitive assets must be balanced against any presumption that spent convictions ought not to be disclosed.

120. If an individual is convicted of a schedule 8A offence they can apply to the sheriff to have the conviction removed from their disclosure if the following rules are met –

- the conviction for a schedule 8A offence is spent, and–
  - (a) where the person was aged under 18 at the date of conviction, 7 years and 6 months have passed since the date of the conviction; or
  - (b) where the person was aged 18 or over at the date of conviction, 15 years have passed since the date of the conviction.

121. If an individual is convicted of a schedule 8B offence they can apply to the sheriff to have the conviction removed from their disclosure where the conviction for the schedule 8B offence is spent.

122. A conviction for an 8B offence will no longer be included in a disclosure certificate if the following rules are met –

- the conviction for a schedule 8B offence is spent, and –

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- (a) where the person was aged under 18 at the date of conviction, 7 years and 6 months have passed since the date of the conviction;
- (b) where the person was aged 18 or over at the date of conviction, 15 years have passed since the date of the conviction; or
- (c) the sentence imposed in respect of the conviction was an admonition, an absolute discharge or a discharge from a children's hearing where the referral was on offence grounds.

123. When making a decision on an application for the removal of schedule 8A and/or schedule 8B convictions from a disclosure, a sheriff will consider whether or not the spent conviction is relevant to the type of regulated work for which a PVG scheme record has been requested, or to the purpose for which the standard or enhanced disclosure was requested. If the sheriff decides that the conviction is not relevant to the type of regulated work or the purpose of the disclosure, the conviction would be removed before the disclosure is issued to a third party such as an employer.

124. The periods of 15 and 7.5 years currently used within the definition of protected conviction and within section 116ZA of the 1997 Act/section 52 of the PVG Act have been derived within the context of current rehabilitation periods under the 1974 Act and the retention periods operated by Police Scotland for its Criminal History System ("CHS")<sup>6</sup> so as to strike a balance between the rights of the individual and the rights of those they are seeking to work with. Under section 5 of the 1974 Act, currently the longest period that must elapse before a conviction resulting in any sentence of less than 30 months imprisonment can become spent is 10 years where the offender was aged 18 years or over at the date of conviction (and 5 years where the offender was aged under 18 years at the date of conviction). The current disclosure periods of 15 and 7.5 years for higher level disclosures avoid the possibility that a person applying for a basic level disclosure could have more information included on their certificate than a person applying for a higher level disclosure. The Management of Offenders Bill will, if passed, make changes to the current rehabilitation periods. Since the provisions of

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<sup>6</sup> The Scottish Criminal History System (CHS) is the database used to hold details of criminal justice disposals and criminal conviction information in Scotland.

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the 1997 and PVG Acts relies on the current rehabilitation periods in the 1974 Act the Scottish Ministers considered it sensible to review those provisions so that they continue to take into account the provisions of the 1974 Act.

125. If the Management of Offenders Bill is passed, the longest period of disclosure for someone aged 18 or over receiving a custodial sentence would continue to be ten years – that would be for a 4 year sentence. The proposed ‘disclosure period’<sup>7</sup> is length of sentence plus 6 years, so for a 4 year sentence the disclosure period would be 10 years, which is the same as the maximum current rehabilitation period. However, the overall policy intention set out in the Management of Offenders Bill is to reduce the period of disclosure for custodial sentences up to and including 48 months. Under the current legislation a sentence of 4 years is entirely excluded from rehabilitation; the maximum length of sentence currently eligible for rehabilitation is 30 months.

126. In the Bill, the rules for disclosure for List B offences (formerly 8B convictions) are to continue with some modification. Under section 23 of the Bill an applicant will be have the right to apply for the removal of a List B conviction from their certificate once spent. But the conviction will become non-disclosable after a period of 11 years since the date of conviction and will at that point be automatically filtered from the applicant’s disclosure. The rules for disclosure of List A offences (formerly 8A convictions) are to continue with some modification. That means a List A conviction will never become non-disclosable, but an individual will as at present will, after a period of time has elapsed, be able to apply to have the List A conviction removed from their disclosure. The period which must elapse before an individual can apply to have a conviction removed are to mirror the periods set out in relation to List B convictions for them to become non-disclosable. Therefore an applicant will only be able to apply for the removal of a List A conviction once the conviction is spent and 11 years have passed since the date of conviction. There is only one period (in contrast to the current periods for offences committed when a person was aged over or under 18 years), since a List A childhood conviction will be subject to the review procedure for childhood convictions, rather than the removable convictions process.

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<sup>7</sup> The Management of Offenders Bill proposes renaming ‘rehabilitation periods’ as ‘disclosure periods’.

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## Reforming the system for removable convictions

127. During Disclosure Scotland's early engagement with stakeholders ahead of the formal consultation it was clear that the current system in relation to protected convictions and removal of convictions was deemed to be complex and applicants for disclosure found it difficult to navigate. A number of stakeholders still considered the legislation to be disproportionate due to the length of time that certain convictions are still being disclosed and due to the types of convictions being disclosed. Disclosure Scotland has also been reviewing the offence lists in schedules 8A and 8B of the 1997 Act to ensure the proportionate disclosure of offences relevant to the purpose of the disclosure and under this Bill the lists will continue to be kept under review to ensure the inclusion of an offence on either list remains appropriate (see paragraph 278 for more information).

128. Since 10 September 2015, 605 applicants have intimated to Disclosure Scotland their intention to apply to a sheriff for the removal of a conviction from their disclosure. Only 48 of those applicants have actually proceeded to make an application to a sheriff. In seven cases the sheriff has ordered convictions removed from the disclosure. In five cases the sheriff has ordered that convictions should not be removed because they were still relevant. Out of these 48 cases where an application has been made to a sheriff, ten have yet to be decided by the sheriff. It can be seen that despite over 600 individuals notifying Disclosure Scotland of an intention to apply to the sheriff the number doing so is very modest. It seems clear from these figures that the current arrangements certainly do not seem to encourage people to make applications to the sheriff.

129. The policy intention is to simplify the process and reduce costs to the applicant by introducing an internal application to Disclosure Scotland for removal, followed by a right to apply for review by the independent reviewer. Ministers believe an internal assessment will be simpler for applicants to understand and cheaper for applicants as legal representation would not be required. Section 62 of the Bill sets out that there will be a prescribed fee for this application.

130. Protection Services within Disclosure Scotland already considers organisational and court referrals as well as conviction information to decide whether individuals should be barred from working with children or protected adults. It is considered that this experience and expertise would suitably equip Disclosure Scotland to assess the facts and decide whether

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or not a spent conviction is relevant to the position applied for and consequently whether it should or should not be disclosed on in future on a Level 2 disclosure.

131. Section 66 of the Bill gives Disclosure Scotland powers to gather relevant information from specified persons to support a defensible and reliable decision on whether or not convictions should be removed from the disclosure. Under the process outlined in section 28 of the Bill, individuals would be able to provide representations in support of their application to have the conviction removed from their disclosure. In reaching a decision in the review, the Scottish Ministers must take into account any representations received from the applicant. In addition, the provisions require the Ministers to notify the applicant of their decision and the reasons for the decision and, if they decide the removable conviction is relevant for the purpose of the disclosure and details of it ought to be included in the disclosure, the right to request a review by the independent reviewer.

132. More information about the role of independent reviewer in removable convictions (and other “reviewable information”) can be found at paragraph 153.

#### Alternative approaches

133. No change to disclosure periods or reduce by somewhere between 15 and 11 years. The consultation asked if it was appropriate to reduce the disclosure periods from 15 and 7.5 years and, if so, to what extent between 11 and 15 years was appropriate for disclosure. The Scottish Ministers considered whether a more conservative approach to reducing the disclosure periods was appropriate, for example by shortening the disclosure periods from 15 years to 13 years. However the disclosure period of 11 years mirrors arrangements elsewhere in the UK whilst allowing for a significant extended disclosure of relevant spent convictions on Level 2 disclosures. This also follows on from the broad support in the consultation results and stakeholder engagement that the period should be reduced from 15 years. This change is also supported by emerging research in relation to certain convictions types and reoffending.

134. No change to the current system and all applications for removal of convictions would continue to be made to a sheriff. Given the issues

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described in paragraph 127 and 128 doing nothing would not address the need to make the system more accessible for individuals.

135. Applications to the Scottish Tribunals. The Tribunals (Scotland) Act 2014 (“the 2014 Act”) created a new, simplified statutory framework for tribunals in Scotland, bringing existing tribunal jurisdictions together and providing a structure for new jurisdictions. The 2014 Act created two new tribunals, the First tier Tribunal for Scotland (First-tier Tribunal) and the Upper Tribunal for Scotland (Upper Tribunal), known collectively as the Scottish Tribunals. In some cases, appeal functions were transferred to allow the first-tier tribunal to hear Scottish cases instead of using a sheriff. Examples of the issues that tribunals handle include the compulsory care and treatment of people with mental health disorders; disputes between tenants and landlords; disputes involving land and property; and cases concerning children and young people with additional support needs. An application for removal of convictions could be made to the Scottish Tribunals instead of to a sheriff.

136. Advantages of a Tribunal:

- like courts, tribunals find facts, apply the law and make independent, reasoned, binding decisions;
- cheaper (less formal, speedier proceedings);
- more accessible (don’t need legal representation; no fees);
- freedom from technicality (simpler procedures);
- take a more investigative approach (will help to draw out the key issues from unrepresented parties to get to the correct outcome);
- specialist decision makers – tend to comprise a legally qualified chair and lay experts.

137. Disadvantages of a Tribunal:

- can be costly and time consuming to establish (will require legislative change and a statutory basis; statutory rules of procedure; may require appointment of judiciary if an existing jurisdiction cannot deal with the matter; development of case management systems etc.);
- legal aid is generally not available at first instance which can deter people from submitting a claim;

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- the lack of fees may result in ill-founded or speculative claims;
- procedures and rules can be complex depending on the jurisdiction making the process challenging for unrepresented parties;
- time consuming – cases not completed any quicker than a sheriff if it is a complex case.

## Consultation

138. In the consultation on the ‘Protection of Vulnerable Groups and the Disclosure of Criminal Information’, it was proposed to simplify, while still ensuring the proportionality of, the current system by reducing the periods during which certain convictions would be disclosed as well as introduce a simplified process for applying for removal of convictions from a disclosure prior to its issue to a third party. Stakeholders expressed strong support for a reduction in the time periods for disclosure of convictions now listed in schedules 1 (List A) and 2 (List B), with a majority supporting a reduction to between 11 and 14 years for disclosure. They also expressed support for an alternative to the application to the sheriff, with the majority preferring an internal appeal to Disclosure Scotland.

## Other relevant information – section 18 and section 64

### Policy objectives

139. ‘Other relevant information’ (ORI) is information currently provided by the chief officer of a police force to the Scottish Ministers for inclusion in an enhanced disclosure or PVG scheme record. ORI may reveal allegations held on local police records about the applicant’s criminal or other behaviour which have not been tested at trial or led to a conviction. If the information held by the police satisfies certain criteria, then the police can decide that it should be included in the enhanced disclosure certificate or PVG scheme record issued by the Scottish Ministers. Ministers have no role in determining the content of such information. If the police provide the information after assessing its relevance, then this information must be included within the disclosure record.

140. The Scottish Government considers ORI to be important for public protection. It allows for the disclosure of non-conviction information and is a direct response to past tragic cases where information was known about serious offenders but not disclosed. The Bichard Report, following the

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Soham murders on 4 August 2002, and the Cullen Inquiry that followed the Dunblane massacre on 13 March 1996, both highlighted the importance of managing better what is known about individuals who are of interest to the police and about whom there are valid safeguarding concerns.

141. In response to the Cullen Inquiry, the 1997 Act introduced the ability for Disclosure Scotland to ask the chief officer of any relevant police force to provide information about the applicant for inclusion on the enhanced disclosure. And in enacting the PVG Act (the Scottish Ministers' response to the Bichard Report), the Scottish Parliament provided for the possibility of ORI being disclosed on the PVG scheme record.

142. The Scottish Ministers are confident that Police Scotland and other UK police forces exercise utmost rigour before deciding to include ORI. Less than 1% of enhanced and PVG scheme record disclosures in Scotland, 766 in total from 2016 to 2017, contain such information. However, the law in Scotland governing ORI differs from the rest of the UK. In England and Wales the police forces work to Home Office guidance governing ORI and the law provides chief officers with a power to seek representations from disclosure applicants. It also affords applicants the right to apply for an independent review of the ORI to have it removed or changed prior to disclosure. Police Scotland have advised that, to the extent that it can be done, this Home Office Guidance is largely followed by them when considering a request to provide ORI. Case law has also provided guidance to chief officers on how to determine when ORI should be disclosed.

143. If a police force holds information about a disclosure applicant, the chief officer must decide they reasonably believes that it is relevant to the purpose of the disclosure requested, and whether it ought to be disclosed. The chief officer can also provide ORI to Disclosure Scotland as part of the continuous monitoring arrangements that are in place for PVG scheme members. It is not the intention of the Scottish Ministers to erode this vital power, which can lead to barring under PVG as well as disclosure to an employer or prospective employer.

144. In a small number of cases, where the PVG scheme member or enhanced disclosure applicant is entitled to make an application to a sheriff for removal of a spent conviction, the individual will see any ORI before it is seen by a third party. However, in more typical circumstances, the ORI will be disclosed to the employer and the individual at the same time.

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145. Irrespective of whether there is a right to apply for removal of spent convictions, individuals can make a request to Disclosure Scotland for a review of ORI included on an enhanced disclosure or a PVG scheme record. In most cases though the ORI will already have been disclosed to an employer before the request to review can be made.

146. When such a request for review is made, Disclosure Scotland asks the chief officer to look again at the ORI to assess if they still reasonably believe that it is relevant either to the type of regulated work the scheme member does or to the purpose of the enhanced disclosure, and if it still ought to be disclosed. The chief officer's decision is final, subject only to judicial review.

147. Section 18 of the Bill regulates the provision of ORI by the chief constable of Police Scotland to Ministers. Sections 15 and 21 of the Bill alter the point at which the individual disclosure subject becomes aware of the chief constable's intention to disclose ORI in the Bill. This provides the individual with the opportunity to challenge ORI and have it removed or adapted before it is disclosed to a third party. In addition section 64 sets out that Ministers must issue statutory guidance in relation to the disclosure of ORI and, in so doing, consult the chief constable before issuing such guidance.

#### Alternative approaches

148. No changes. ORI plays an important role in safeguarding. The Scottish Ministers intend that it must continue to be available to protect the public. These proposals aim to put ORI on a firmer and more proportionate footing so as to ensure that it serves a vital purpose for years to come. It is presently used very infrequently; certificates containing ORI are a tiny fraction of all higher level disclosures. However, the Scottish Ministers consider changes are necessary to avoid the unsatisfactory process of individuals becoming aware of ORI at the same time, or possibly after, as employers or potential employers.

#### Consultation

149. Respondents regarded ORI as playing an important role in safeguarding which is only used sparsely as a proportion of all disclosures. However, concerns were raised about the fairness of having the possibility of ORI disclosed, and a perceived lack of transparency in the process. Some expressed a view that it was difficult for individuals to foresee

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whether ORI would be included in their certificate, and what they could do about it if they felt the inclusion of ORI was unfair.

150. Section 6 of the consultation considered proposals for reforming the process of disclosing ORI. Following consultation analysis, Ministers agreed that the following proposals should be taken forward as part of this Bill:

- to bring the law governing ORI in Scotland into line with the process followed in the rest of the UK;
- to give Ministers the power to issue statutory guidance to Police Scotland on the process governing the generation and disclosure of ORI within Level 2 disclosures;
- to provide applicants with the right to make representations to Police Scotland about ORI held by the police force;
- to give applicants the opportunity to request a review of the decision to include ORI, to be conducted by an independent reviewer, with a final right of appeal to a sheriff on a point of law.

151. The intention is that the new processes will address the concerns expressed in the consultation about the fairness of the process.

## Reviewable information and the role of the independent reviewer – sections 6 to 12 and 23 to 34

### Policy Objectives

152. These parts of the Bill create the legal framework for the various types of review application to ensure they are closely aligned as they progress through the various stages, including the final outcome and reissuing of a disclosure certificate. The process developed will be as streamlined as possible to ensure ease of understanding and as little onus on the applicant as possible, particularly where the applicant is pursuing reviewable information under more than one section of the Bill.

153. It is intended that Ministers will rely on the existing guidance-making provisions in the ACR Act in providing guidance to the independent reviewer about their functions relating to decisions about reviewable information. Guidance will also be developed for the individual and support would be available to help enable them to engage in the process.

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154. Under these parts the independent reviewer will have a number of functions. These functions are:

- review of childhood conviction information included under sections 5 and 17,
- review of relevant police information provided by the chief constable under section 18, and
- review of removable convictions included in terms of section 14.

155. In carrying out the review, the independent reviewer will be required to consider representations from the applicant and will have the power to gather information from:

- Police Scotland,
- the Scottish Ministers,
- the Scottish Courts and Tribunals Service, and
- any other person he/she considers is necessary to determine the application.

156. The policy intention is that in unifying the appeal mechanisms, so that the independent reviewer is responsible for all types of appeal (for Level 2 disclosures in particular), it will make the system as simple and coherent as possible for applicants and stakeholders. Under the new system an appeal to a sheriff would be available to the applicant (or to the police in relation to ORI) from the decision of the independent reviewer on point of law only.

157. Sections 21 and 23 through to 34 make it clear that although the overall review process still encompasses a number of different types of review carried out variously by the Scottish Ministers, the police and the independent reviewer, it all proceeds on one application (“the review application”). The end point of the process could vary depending on what is being reviewed and how far down the review process it goes. But section 34 provides for a single re-vetting process at the end point when a fresh disclosure will be issued to the applicant (section 12 is the equivalent provision for Level 1 reviews).

158. In all cases the review application will go to the Scottish Ministers who then have to arrange for the carrying out of the review by whoever is required to carry it out. Section 30 makes it clear that the reviews by the independent reviewer in respect of the same review application are to be

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dealt with together as a single review and that this can't start until any earlier "first stage" reviews by the Scottish Ministers or the chief constable have been completed.

159. In common with all types of reviewable information, the independent reviewer will apply the same test as the Scottish Ministers or the chief constable apply in their first stage review. The Scottish Ministers must provide the independent reviewer with a statement of their reasons or the chief constable's reasons, for their determination. In addition, the independent reviewer must give the applicant the opportunity to make representations. On concluding a review the independent reviewer must notify the applicant and the Scottish Ministers. In addition, if the review relates to information provided by the chief constable, the independent reviewer must also notify the chief constable.

### Alternatives

160. Do nothing. The policy intention for using the independent reviewer for removable convictions is discussed earlier at paragraphs 127, 128 and 133 to 137. Provision for the independent reviewer being responsible for reviewing the inclusion of childhood conviction information is a logical extension of that policy intention. Ministers could do nothing to the current process in terms of challenging the inclusion of ORI but that would mean the chief constable's decision is final, subject only to judicial review, and does not address the policy intention of having a simple and coherent review system for applicants and stakeholders.

### Consultation

161. As discussed earlier at paragraphs 109 to 111, 138 and 149 to 151, the major theme coming through the consultation was that a change is needed to the process that an applicant must follow to challenge the disclosure of criminal history and other information. Respondents emphasised the need for a system that should be easy to understand and as simple as possible, welcoming proposals to streamline the system which many felt would have a positive impact for individuals.

## Form and manner of applications and provision of disclosures – sections 35 to 39 and 61

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## Common provisions relating to Level 1 and Level 2 disclosures

### Policy objectives

162. It is Disclosure Scotland's intention to have simple and accessible digital services so that people who would prefer to do so can carry out their disclosure tasks online, including making applications and viewing disclosures. Disclosure Scotland are mindful of the need to provide a non-digital alternative to avoid precluding those unable to or unwilling to use services online. This is very important; people experiencing poverty and exclusion have much reduced digital access and Disclosure Scotland is committed to finding the right ways to make products accessible.

163. As with the policy objectives relating to Level 1 disclosures, it is the policy that the majority of applications, processing and issuing of Level 2 disclosures will be performed digitally. This includes allowing the creation of an account in order to allow access to the Disclosure Scotland platform, through which individuals will be able to make applications and view their disclosures, both at Level 1 and Level 2.

164. In practice, applicants for disclosure will be guided digitally to the right product for their role or prospective role. Applicants will be able to make a request for Disclosure Scotland to digitally disclose information to third parties. As outlined above, the extent of that information will depend on the accreditation status of the third party to whom the information is to be disclosed.

### Alternative approaches

165. Introducing scheme membership cards. During pre-consultation engagement many stakeholders expressed support for the introduction of physical scheme membership cards. Stakeholders thought that such cards would confer a greater sense of ownership over individuals' scheme membership. As a result of this support a question on the introduction of scheme membership cards was included in the consultation and received strong support from respondents.

166. Despite the overall support for introducing membership cards, there were some reservations from stakeholders surrounding the usefulness of the cards with some stating that many scheme members tend not to retain their scheme records and that a card may not be treated differently.

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167. The policy on membership cards has been refined from the consultation and it is now proposed that these cards should be available only to scheme members who cannot interact digitally with Disclosure Scotland and will continue to utilise non-digital channels. The system of membership cards which is proposed is therefore more limited than was originally planned.

168. Regulation-making powers will be used to provide a non-digital alternative for applicants joining the Scheme who are unable to access membership via the digital service. The power to make provision about the administration of the Scheme under section 72(1) of the PVG Act will be used to enable Ministers to issue scheme membership cards to those individuals and to determine the content of those cards. It is envisaged that the membership cards will give the individual's name, scheme membership number, workforce(s), and membership renewal date. It is intended to provide ease of access to key details about scheme membership to people who do not have an online account with Disclosure Scotland.

169. For the avoidance of doubt, this is not equivalent to a statement of scheme membership (or the new equivalent – 'confirmation of scheme membership'); the card is simply intended to offer ease of access to membership details. A scheme member would still need to apply for a confirmation of scheme membership if they wished to make disclosure to a third party.

## Consultation

170. While there was very broad support for moving Disclosure Scotland's services online, many respondents to the consultation mentioned the need to retain other methods of delivery and payments. Disclosure Scotland will ensure that there will be alternatives available to those who are unable or do not wish to use online services. These alternatives are essential if the new membership scheme is to be inclusive, given the diversity of Scotland's people, and the organisations with whom they work and / or volunteer.

171. However, there will be scope for the digital and non-digital systems to be combined in a single case. For instance, the individual might request a paper copy, but when they consent to disclosure to their employer the information may be shared digitally, if their employer has set up a digital account.

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## Offences relating to Level 1 and Level 2 disclosures – sections 42 to 46

172. This part of the Bill updates the existing offence provisions in sections 123 and 124 of the 1997 Act and sections 65 to 69 of the PVG Act and ensures that there are continued equivalent offences for the purposes of the new disclosure regime in the Bill.

173. At present, the disclosure offence provisions in the PVG Act (in sections 65 to 68) refer to falsification or unlawful disclosure of and unlawful requests for “scheme records”. Under the new system, the scheme record itself will not be capable of being disclosed, so any offences attaching to the handling of scheme records fall away.

174. The existing offence provisions in sections 65 to 68 of the PVG Act are retained, but their application is now restricted to statements of scheme membership (now called confirmation of scheme membership) which will henceforth be the only ‘disclosure’ product under the PVG Act (albeit that this is not disclosure in a real sense, as a confirmation of scheme membership will not contain any vetting information).

175. Under the Bill, section 42 makes it an offence to falsify a Level 1 or Level 2 disclosure. Sections 43 and 44 deal with lawful and unlawful disclosure of Level 2 disclosures. The policy intention is that it should still be an offence for a Level 2 disclosure of any type to be further disclosed beyond the initial third party to whom they are lawfully disclosed under the new procedure, subject to the existing exceptions applying to employees, office holders, members etc. It should continue to be that any such disclosure to another employee etc. must be in the course of the duties of the person sharing the information. It should also be continue to be clear that the sharing of a Level 2 disclosure can only be for the same purpose as the original purpose for which the disclosure has been requested (so that would in effect mean the consideration of the suitability of a person for employment or appointment that is covered by the 2013 Order). The offence provisions are aligned with the rules on accredited bodies acting as umbrella bodies and assessing the suitability of an individual on behalf of a personal employer – further detail on this is provided below.

176. The existing offence of unlawful request for and use of a scheme record in section 67 of the PVG Act will be extended to cover all Level 2 disclosures in the Bill (under section 45).

## Accredited bodies – sections 47 to 57

### Policy objectives

177. Currently, higher level disclosures (standard, enhanced and PVG scheme records/short scheme records) can only be requested and received by ‘registered persons’. Under section 113A(2) of the 1997 Act, an application for a criminal record certificate (i.e. a standard disclosure) must be countersigned by a registered person and must also be accompanied by a statement by the registered person that the certificate is required for the purposes of an ‘exempted question’ in terms of the 2013 Order. Under section 113B(2) of the 1997 Act, an application for an enhanced criminal record certificate (i.e. an enhanced disclosure) must be countersigned by a registered person and must also be accompanied by a statement by the registered person that the certificate is required for a prescribed purpose<sup>8</sup>. Section 55 of the PVG Act sets out the disclosure conditions A to D which must be satisfied if Disclosure Scotland are to disclose a scheme record under section 52 or a short scheme record under section 53. Disclosure condition D is that the person to whom the disclosure is to be made is a registered person for the purposes of Part 5 of the 1997 Act. Therefore the register of registered persons under the 1997 Act is used both for disclosures under the 1997 Act and the PVG Act. No distinction is made within the register for those registered for 1997 Act or PVG Act purposes; some registered persons will request disclosures under both Acts.

178. The policy is to continue a registration system as it is important that higher level disclosures are issued to persons who are considered suitable to receive potentially sensitive information. However, as part of the consultation, Disclosure Scotland consulted on some changes to the system.

179. One key change is that the registration system should be extended, as stated in paragraph 54, to cover bodies which make bulk applications on behalf of potential employees for Level 1 disclosures. This will tighten the

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<sup>8</sup> The purpose is prescribed by regulation 9 of the 2010 Criminal Records Regulations as for the purpose of an exempted question asked in relation to various matters set out in regulations 9(2) and (3) e.g. certain gambling licences or a person seeking appointment with Crown Office. Further purposes for enhanced disclosures with suitability information are prescribed in regulations 10 and 12.

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law governing how B2B works to assure the protection of personal data as the service moves onto new digital platforms, whilst still allowing for the efficient delivery of the service.

180. In future all persons/bodies which are required to register with Disclosure Scotland for the purpose of receiving disclosures should be called 'accredited bodies' instead of 'registered persons'. As under the current system, a person applying to become an accredited body must be a body corporate or unincorporate, statutory office-holder or an individual who employs others in the course of a business.

181. This part of the Bill therefore sets out the legal framework for a registration system similar to that operated under the 1997 Act, including maintenance of the umbrella bodies system (whereby accredited bodies can countersign applications for Level 2 disclosures on behalf of non-accredited body employers, and even assess the suitability of the applicant on behalf of a private individual employer) and powers to refuse an accredited body and remove accredited bodies from the register. It is also covers the duty on Ministers to issue a Code of Practice for accredited bodies and sets out that it will apply to all accredited bodies regardless of the level of disclosure sought and to those that umbrella bodies act on behalf of. In addition, Ministers continue to be able to refuse to issue a disclosure if they believe that the accredited body has failed to comply with the Code of Practice. It also includes detailed provisions about the nomination of lead signatories and countersignatories to act on behalf of accredited bodies and sets down what information the Scottish Ministers are to take into account when determining if such individuals are suitable persons to have access to disclosure information.

### Crown employment

182. Under the 1997 Act at present, standard and enhanced disclosures which are requested by:

- a Minister of the Crown,
- a member of the Scottish Government,
- any other office holder in the Scottish Administration, or
- a nominee of any person mentioned in the bullet points above,

are issued under sections 114 and 116 of the 1997 Act. The effect of these separate provisions is that there is no requirement that any of those

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persons should be registered persons under the 1997 Act. Under the PVG Act, any request for disclosure of PVG scheme record/short scheme record by any of the above persons is covered by section 56 which states that, despite the requirement for disclosure condition D to be met (i.e. that the disclosure is to be made to a registered person) Ministers may issue the disclosure. So the practical effect is the same and currently the above persons do not need to be registered persons to receive any PVG disclosures. The policy on this remains unchanged and any of the above persons requesting disclosures in future should continue to be able to receive all Level 2 disclosures without being an accredited body. Section 22 makes provision for Level 2 disclosures obtained in connection with Crown employment. Subsection (5) states that any reference to an accredited body in Part 1 of the Bill is to be read as a reference to the person who made a statement that the disclosure was required to consider the applicant's suitability for appointment by or under the Crown.

### Accredited bodies acting on behalf of others – acting as “umbrella body”

183. Under the 1997 Act registered persons may countersign applications for standard or enhanced disclosures or make declarations in relation to PVG disclosure requests on behalf of other organisations. These are so-called ‘umbrella bodies’. Umbrella bodies countersigning these applications on behalf of others must satisfy themselves that those on whose behalf they intend to countersign applications are entitled to receive disclosure information by virtue of that organisation or person being able to ask an ‘exempted question’.

184. There are various umbrella bodies registered under section 120 of the 1997 Act and a list of these appear on the Disclosure Scotland website. The Bill maintains the ability for accredited bodies to countersign applications for Level 2 disclosures on behalf of other organisations. There are umbrella bodies covering all types of business across the whole of Scotland and indeed across the whole of the UK but by far the most utilised are umbrella bodies processing applications on behalf of voluntary organisations. Volunteer Scotland Disclosure Services, for example, acts as an umbrella body for over 4,000 organisations throughout Scotland.

185. The Scottish Ministers acknowledge the utility of umbrella bodies, who remove much of the administration from organisations themselves and its significance for voluntary organisations who might otherwise not have the resources and therefore be disproportionately impacted by the

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disclosure application process. The Scottish Ministers have therefore decided that the system of umbrella bodies should continue and this is catered for in section 57.

### Umbrella bodies: personal employment / self-directed care

186. Another key policy change relates to the provision of vetting information to personal employers (namely private individuals who are not acting in the course of a business). It is currently not possible for an individual who privately employs another person (for example as a nanny, a carer or a music tutor) to register with Disclosure Scotland for the purpose of receiving disclosures about that other person. At present an individual employing a social care personal assistant or a parent arranging music tuition could lawfully ask for disclosure of their prospective carer's / tutor's "statement of scheme membership". A statement of PVG scheme membership includes details of the type(s) of regulated work the person is a PVG scheme member for, confirmation that the person isn't barred from doing that work, and whether the person is under consideration for listing for that type of regulated work. A PVG statement of scheme membership, however, does not contain any vetting information<sup>9</sup>.

187. The policy intention behind section 57(1)(b)(ii) and (4) is to provide for a system where accredited bodies can countersign applications for a Level 2 disclosure at the request of an individual but only for the purposes of the accredited body providing advice based on the vetting information contained in the Level 2 disclosure. This means that an accredited body could provide suitability advice to individuals who are in the process of recruiting or using a self-employed worker, such as a music tutor, nanny or carer. However, the accredited body is prevented from sharing disclosure information with private individuals. In addition, Scottish Ministers have considered the possibility of private individuals being exploited by unscrupulous businesses who may seek to charge unreasonable and excessive fees for this service. As such subsection (5) allows for Scottish Ministers to make, by regulations, provision about the fees that may be charged by accredited bodies in connection with countersigning an application for a Level 2 disclosure of this type.

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<sup>9</sup> Vetting information includes information about the scheme member's unspent convictions and certain spent convictions, as well as ORI.

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## Alternatives

188. Revert to framework in place before the PVG Act. This would mean accredited bodies could countersign Level 2 disclosures on behalf of individuals who are in the process of recruiting or using a self-employed worker. In delivering the PVG Scheme and through the consultation process Disclosure Scotland has listened to groups, including those advocating on behalf of supported persons making social care arrangements, who have said that this omission of vetting information can lead to them having to make recruitment decisions in the absence of potentially relevant information. It was highlighted that prior to the commencement of the PVG Act, personal employers were entitled and permitted to access and view vetting information on enhanced level disclosures and called for the Bill to fix this. It was acknowledged by the administration of that time that less information was effectively being made available for personal employers than they could have under the 1997 Act but the new (as it was then) PVG statement of scheme membership was intended to counterbalance this perceived weakness in the PVG Act.

189. The Scottish Ministers have considered requests for direct access to vetting information for personal employers in order for them to make better informed recruitment decisions. They took into account the practical effect of such steps which would include, for example, requiring private individuals to become an accredited body. With this, private individuals would be subject to vetting by Disclosure Scotland (as all other accredited bodies receiving Level 2 disclosure are) and would need to comply with regulations, the Code of Practice and the offence provisions surrounding the handling of Level 2 disclosures. Scottish Ministers are also required to take into account the fact that the disclosure of vetting information engages Article 8 rights (right to a private life) as information about spent convictions or police ORI will form part of a person's private life. Any interference with that Article 8 right needs to be lawful and proportionate. This is why the 1997 Act and the PVG Act currently rely on the system of 'registered persons' who are subject to various requirements in relation to their handling of vetting information.

## Consultation

190. The consultation asked whether organisations requesting disclosures from a large volume of employees should be formally accredited and their processing and storage of personal data regulated. The vast majority of consultees who responded to this question agreed that bodies submitting bulk applications for Level 1 disclosures should be formally accredited.

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191. In response to feedback from stakeholders gathered in delivering the PVG Scheme, the consultation asked whether people making arrangements with self-employed workers to do regulated work (as defined in the PVG Act) with children or protected adults should have access to vetting information when considering the self-employed workers suitability. A significant number of respondents thought that parents and personal assistant employers should have access to conviction information and ORI when selecting nannies, music teachers or carers for protected adults. But respondents also acknowledged that personal employers would need advocacy and support to ensure that a personal employers understands the vetting information and is able to use it to make an informed choice, particularly where cognitive abilities may be a concern. It was also suggested by responders that if vetting information could not be provided directly to personal employers, that a mechanism should be put in place for this information to be sent to appropriate bodies with the necessary skills and knowledge who could offer suitability advice to private individuals.

192. In view of the competing issues described above Scottish Ministers have decided that there is a better way to assist private individuals to make informed recruitment decisions without compromising Article 8 rights. They consider this enhanced role for accredited bodies acting as umbrella bodies will allow them to offer advice and assist people who are considering the suitability of personal employees / potential carers etc.. The Scottish Ministers also believe this arrangement compliments the new referral powers described in paragraphs 258 and 272 given to Police Scotland and Councils / Integration Joint Boards.

## Part 2 – protection of vulnerable groups

### Scheme membership – sections 71-74

#### Key information – compulsory scheme membership

193. The PVG Scheme sits alongside the general disclosure regime under the 1997 Act. It has been in operation since 28 February 2011. Previously individuals doing such work would have been entitled to enhanced disclosures under the 1997 Act. In effect, the PVG Act set up a separate system of disclosures for persons doing regulated work with children or protected adults and removed them from the scope of the 1997 Act provisions. The PVG Scheme also aims to ensure that people whose behaviour makes them unsuitable to work with children or protected adults cannot do “regulated work” with those vulnerable groups.

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194. Individuals who are not barred from doing regulated work can apply to join the PVG Scheme, under which information about individuals who do, or wish to do, regulated work with children or protected adults, is collated and disclosed in accordance with Part 1 of the PVG Act.

195. Section 45 of the PVG Act provides that an individual may apply to join the Scheme in relation to regulated work with children, regulated work with adults, or both types of regulated work. Ministers must allow an individual to become a scheme member in relation to a type of regulated work if the individual is not barred from doing that type of work.

196. There is no specific legal requirement for an individual to be a member of the PVG Scheme in order to carry out regulated work with children, protected adults or both. Instead, the PVG Act created a number of offences (under sections 34 to 36) relating to doing regulated work, or employing someone else to do regulated work, while barred. This incentivises the use of the PVG Scheme, but it does not mean that the scheme is mandatory. However, many organisations treat the Scheme as mandatory already and the public perception is that it is necessary to be a scheme member to carry out roles with vulnerable groups. Once a person has joined the Scheme, they typically remain a member for life even if they are no longer doing regulated work (unless they specifically apply for removal from the Scheme).

### Policy objective

197. Sections 71 to 74 of the Bill insert provisions into the PVG Act, setting out the new framework for participation in the Scheme, that it is compulsory for those doing regulated roles with children or adults, and the duration of membership.

198. The overall policy intention behind this part of the Bill is in response to recent public events involving sexual abuse in sport and other spheres of life that impact on children and young people, which have raised public consciousness about the importance of a safeguarding scheme that removes unsuitable individuals from working with children. There have also been a number of high profile cases involving the abuse and exploitation of protected adults. Examples include people with disabilities becoming the victims of harmful behaviour and exploitation; and the targeting of members of the public, rendered vulnerable because they were using health services, by unscrupulous professionals, such as the widely publicised case in 2017 where a reputable surgeon had performed many

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unnecessary operations on members of the public. This serves to remind that the PVG Scheme is there to protect all of us at various stages of our lives and in circumstances where we have no intrinsic vulnerability but may become especially vulnerable to harm at certain times.

199. In addition the Health and Sport Committee's Report on Child Protection in Sport, published on 26 April 2017<sup>10</sup>, voiced strong support for a mandatory PVG Scheme. The Committee considered the PVG Scheme and other safeguarding measures in place to protect children in light of allegations of historical child sexual abuse in football. The Report noted that there is a compelling case for the PVG Scheme to be mandatory and voiced the Committee's concerns that a voluntary scheme undermined Disclosure Scotland's safeguarding role.

200. Section 75 of the Bill sets out that there are two types of regulated roles: regulated roles with children and regulated roles with adults and makes it clear the PVG Scheme and associated disclosure system is not concerned with individual jobs.

201. As stated in paragraph 60 a child is not be able to become a member of the PVG Scheme and this is provided for at section 71(3)(b).

## Duration of scheme membership

### Key information

202. The current (non-mandatory) PVG Scheme is a lifetime membership scheme, with minimal scope to leave. Disclosure Scotland carried out customer research in recent years which showed that large numbers of scheme members are no longer doing regulated work with children or protected adults. It is estimated that as many as 20% of the current scheme membership of over 1.2 million members falls into this category.

203. Section 58(1) of the PVG Act currently requires Ministers to remove a member from the Scheme, only when the person is barred from regulated work. Scheme members can ask to be removed from the Scheme if they stop doing regulated work, but very few do apply for removal. The results

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<https://digitalpublications.parliament.scot/Committees/Report/HS/2017/4/26/Child-Protection-in-Sport#Introduction>

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of a customer survey revealed that 35% of those asked did not know that they could leave the Scheme and 44% had never considered leaving, even if they were no longer doing regulated work. Disclosure Scotland attempted to contact thousands of inactive scheme members in 2016 and 2017 to make them aware of the process of applying for removal, but the response rate was very low.

204. Stakeholder feedback over the years of operation of the PVG Scheme has made clear that many scheme members are unaware that they are monitored on a continual basis, and that even if they are no longer doing regulated work they will continue to be subject to that monitoring if not removed from the Scheme. Individuals remaining in the Scheme when no longer doing regulated work impacts on the size of the Scheme and its administration, which at over one million members has inflated far beyond its intended size. This leads to unnecessary public cost and also amounts to a disproportionate intrusion into individuals' private lives.

### Policy objective

205. The number of members of the PVG Scheme, in its present format with indefinite membership, will simply continue to increase and will become increasingly expensive for little safeguarding return. In order to address these concerns sections 72 and 73 of the Bill introduce provisions into the PVG Act to replace the current lifetime membership arrangements with a renewable time-limited membership of five years. Scottish Ministers consider that the introduction of renewal periods (and associated fees for scheme members) will incentivise those no longer doing a regulated role to exit the Scheme, thus helping to better manage its size. This will also make operation of the disclosure regime in Scotland more financially sustainable, as it will generate a regular income stream over each 5 year cycle.

206. It is envisaged that the new system will operate by allowing those no longer in regulated roles at the time their membership lapses simply not to apply for renewal. Disclosure Scotland will carry out employer checks to ensure they are not in a regulated role. If someone did try to leave while still in a regulated role, the system would not allow that and the individual would be required either to leave the role or renew their membership. If they continued in the role without renewing their membership, they would be guilty of an offence (due to the introduction of mandatory scheme membership for regulated roles).

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207. The Scottish Ministers consider that a mandatory scheme is only possible if supported by an offence to ensure individuals, employers and personnel suppliers verify that PVG Scheme membership is in place before work in a sensitive role with vulnerable groups is carried out. Section 74 of the Bill provides for this.

### Alternatives

208. Do nothing. Given the non-mandatory nature of the PVG Scheme there could be individuals carrying out regulated roles who are not scheme members. This in itself could be seen as a safeguarding gap which the policy is intended to address.

209. Disapply offence provisions in relation to volunteers. There was some concern from stakeholders around the creation of a new criminal offence linked to the mandatory scheme. This was of particular concern to those doing regulated work through volunteering. Some stakeholders felt that criminalising an individual for failure to join the Scheme or renew their membership when doing something for the benefit of society would be disproportionate. On the other hand, Disclosure Scotland's experience in operating the barring system is that individuals in the voluntary sector do sometimes engage in conduct which clearly makes them unsuitable for regulated work. For instance, in relation to the allegations of historical child sexual abuse in football considered by the Health and Sport Committee, a substantial amount of that abuse is likely to have been committed by people acting in a voluntary capacity. Scottish Ministers therefore considers the creation of a mandatory scheme with a linked offence provision to be applied in all circumstances to be a proportionate approach.

### Consultation

210. The proposal to introduce a mandatory PVG Scheme was explored with a wide range of stakeholders during three rounds of pre-consultation engagement. Key stakeholder groups included local authorities, NHS Boards, sport governing bodies, educational institutions, church groups and third sector organisations. During this early engagement there was clear support for making scheme membership mandatory for certain types of roles.

211. The second stage of engagement involved an online survey which generated 848 responses. This survey included a question on whether the PVG Scheme should be mandatory for people engaged in regulated work. 94% of respondents agreed with this proposal.

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212. Section 3 of the consultation set out proposals in relation to a mandatory PVG Scheme. Due to the clear and widespread stakeholder support for a mandatory scheme from pre-consultation engagement, the consultation did not expressly seek views on whether the Scheme should become mandatory. Instead, the consultation paper sought stakeholder views on how this could be achieved.

213. Respondents to the consultation expressed support for moving away from a lifetime scheme to a time-limited scheme with five yearly renewals. Some pointed out the negative practical impact for individuals and organisations of periodic renewal. Disclosure Scotland will address this through awareness raising.

## Regulated roles – section 75 and schedules 3 and 4

### Key information

214. The intention behind the PVG Act was to ensure that those who have regular contact with vulnerable groups as a result of their work (either paid, unpaid or in a voluntary capacity) are not unsuitable for that type of work. Ministers wished to ensure that regulated work with children or protected adults was no more or less expansive than was needed to capture positions where the potential for an unsuitable person to harm a child or protected adult was significantly greater than positions falling outside the Scheme.

215. Since the inception of the Scheme in February 2011, the definition of regulated work and the roles and circumstances to which it applies have been criticised by stakeholders as being difficult to understand in practice. This confusion has led to the team within Disclosure Scotland which deals with new applications having to check that applications to join the Scheme have been properly made in relation to a role that meets the definition of regulated work and for which scheme membership is appropriate.

216. That team, the Disclosure Scotland customer engagement team, rejects approximately 1,700 ineligible applications per year. Even with this sifting process however, it is still possible that some existing members of the Scheme are not doing and have never done regulated work. This is because the customer engagement team cannot always assess from the job title and description of a role whether or not it falls under one of the categories of regulated work. It is desirable to reduce scope for such confusion in practice, particularly as it is an offence to request a PVG disclosure for work that is not regulated work.

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217. Disclosure Scotland conducted a large scale customer research exercise in 2015, which confirmed the confusion around regulated work and also about the consequences of applying for PVG scheme membership and disclosure. Many individuals were unaware that they were signing up for lifelong membership of the Scheme and ongoing monitoring of their criminal record, as well as the possibility of becoming barred even where they were no longer doing any form of regulated work.

218. Disclosure Scotland undertook pre-consultation work with stakeholders and a consistent piece of feedback was the need for greater clarity about who can and should become a member of the PVG Scheme. Discussions with stakeholders on the definition of regulated work indicated that many felt this should be simplified. A consistent theme throughout was that the creation of a mandatory scheme reinforces the need for clarity on the roles which trigger the duty to become a scheme member, particularly as this will be supported by various offence provisions for individuals and employers.

### Policy objectives

219. The overall policy intention behind sections 75-76 and schedules 3 and 4 are to provide a legal test which brings greater certainty to which roles are eligible for PVG scheme membership. Regulated work as a concept will be discontinued and substituted with 'regulated roles'. There will also be a clearer definition of "protected adult", as the existing definition in section 94 of the PVG Act has been criticised for being difficult to understand.

220. The Scottish Ministers consider that roles for which PVG membership is a mandatory requirement should have at their core the capacity or opportunity to exert significant power or influence over a child or protected adult. Both schedules provide a list of activities as core characteristics of regulated roles, as a key feature of the replacement for regulated work which refocuses the Scheme to ensure that individuals in such positions are properly checked. The policy aim is to make the central feature of this new system the holding of power over children or protected adults as the critical factor in determining whether or not someone should be required to join the PVG Scheme. But it is equally vital that the activity must be a core part of the role in question, rather than simply something which is ancillary, to ensure that the PVG Scheme is appropriately targeted and proportionate in its scope.

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221. Applicants for disclosure products will be assisted in making the decision about which product is right for their role through the new digital delivery system. This digital system should assist stakeholders and applicants to understand the new approach. In this way we can fulfil our principal commitment to provide the right disclosure for the applicant with the only pre-requisite being that the applicant understands what the new job or position involves. The applicant will not need to understand the types of disclosure products. The presence or absence of specific activities as core characteristics in the role will determine the disclosure type.

## Alternatives

222. The consultation proposed to replace regulated work with a list of roles eligible for scheme membership. These were referred to as “protected roles” in the consultation, although for the reasons explained below the Scottish Ministers decided there was a better way of approaching this.

223. Moreover, the preference was to avoid using the word “protected” in this context. The use of “protected” could create scope for confusion, as this word arises in a number of different contexts under the PVG Act and wider disclosure regime. For instance, there is the concept of “protected adult” under the PVG Act, and the Management of Offenders Bill proposes to introduce a new concept of “protected person”. Scottish Ministers decided that the term “regulated role” was preferable. Although the terminology is close to the existing concept of “regulated work”, it is the treatment of regulated roles in schedules 3 and 4 of the Bill that marks an important policy shift in the approach to defining eligibility for PVG scheme membership.

## Consultation

224. A majority of respondents supported the proposal to replace regulated work with protected roles. There were nevertheless concerns about the scope of work in a protected role, with many respondents noting the need for clarity about the extent of roles especially due to the criminal offence supporting the mandatory PVG Scheme. The risk of organisations simply re-labelling jobs to fall within the scope of protected roles was raised. This would bring people into the PVG Scheme inappropriately and negate the policy intention of having a proportionate and targeted Scheme. It was suggested the way to avoid this would be to revert to some sort of assessment of what people actually do in their role on a daily basis.

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225. The Scottish Ministers agree with comments made during the consultation: a list of specific roles does not provide sufficient certainty as to what amounts to a regulated role, particularly as job titles are constantly changing to suit sectoral trends. Moreover, as mentioned by respondents, organisations could manipulate the job titles given to roles to ensure that the roles fall within the list. So section 75 and schedules 3 and 4 in the Bill provide a legal test. It is Disclosure Scotland's intention to publish a list of roles for typically-encountered positions for which PVG scheme membership would be mandatory to save applicants' time in auditing their role against the core activities. For roles that do not appear on this list it will be possible to apply the core characteristics during the application process to determine if the person carrying out the role needs to be a member of the PVG Scheme.

## Regulated roles outside Scotland

### Key information

226. The PVG Act currently allows employers (such as aid agencies) sending people abroad to work to request disclosures of PVG scheme records for some activities (including teaching and caring for children) which, if done in Scotland, would be regulated work. The Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Purposes for the Consideration of Suitability) Regulations 2010 (SSI 2010/381) make provision for this. Regulation 2(b) provides that for the purposes of section 73(g) of the PVG Act, consideration of suitability to do regulated work in Scotland includes consideration of an individual's suitability to do or be offered or supplied to do, work outwith the United Kingdom that would, if done in Scotland, be (i) regulated work with children by virtue of paragraph 1(a) of part 1 of schedule 2 of the PVG Act, or (ii) regulated work with adults by virtue of paragraph 1(a) of part 1 of schedule 3 of the PVG Act.

227. However, due to the definition of regulated work in section 91 of the PVG Act as read with schedules 1 and 2, the offence provisions in sections 34 to 36 of the PVG Act only apply to regulated work that is done in Scotland. So a person could be barred in Scotland and do the equivalent regulated work abroad and the organisation would not be committing an offence if they decided to continue to employ that individual.

228. Another issue is that the existing duties on employers to refer inappropriate conduct of PVG scheme members does not extend to organisations which have scheme members working abroad. This means

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that a Scottish NGO, funded by the Scottish Government, could theoretically remove a scheme member from employment in relation to sexually abusive behaviour perpetrated against a young girl. The scheme member could come back to Scotland and start working with children in, for example a pre-school nursery, and Disclosure Scotland and the new employer would not know about the inappropriate sexual conduct and be able to take protective action such as barring them from regulated roles.

### Policy objectives

229. Section 4 of the consultation considered the scope for extending the PVG Scheme to protect children and adults who come into contact with PVG scheme members working overseas.

230. This topic has attracted significant media and political attention in the past year. At the start of 2018, the media exposed allegations of exploitation and abuse in the international aid sector. There was commentary and views from current and former aid workers that these stories reflected a culture of 'abuse and impunity' in the challenging environments in which humanitarian assistance was provided. To compound the perception of a sector in crisis, evidence existed to indicate that the sexual exploitation and abuse of aid recipients by aid providers and peacekeepers was by no means a new issue. There was also concerning evidence around the incidence of sexual harassment and abuse within aid sector organisations and allegations of poor standards of process and governance in the way some of these cases had been dealt with.

231. The Scottish Government's Minister for International Development took immediate action at that time, by writing to all international development/humanitarian organisations that receive SG funding to seek assurances that they had sufficient safeguarding policies in place to protect vulnerable groups. Changes were also made to international development fund grant conditions the International Development team issued a new Safeguarding Policy Statement. The Scottish Government has also been working closely with other regulators, including OSCR and DfID.

232. Going forward the policy is that overseas work which would be a regulated role, if done in Scotland, should be a specified regulated role so that such work benefits from the same level of safeguarding as regulated roles done in Scotland. Paragraph 1(4) and 1(5) of schedule 2 (inserted by schedule 3 of the Bill) and paragraph 1(4) and 1(5) of schedule 3 (inserted by schedule 4 of the Bill) have the effect of putting overseas activities,

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including training or study, on an equal footing with regulated roles done in Scotland so that the offence provisions inserted into the PVG Act by section 74 of this Bill apply, in addition to section 3 (reference following disciplinary action etc.) and section 34-36 (offences relating to regulated roles) of the PVG Act.

## Alternatives

233. Do nothing. The globalised and often chaotic nature of aid work presents challenges to robust employment screening. It is recognised that there are significant limitations to the implementation of policy in this area. The criminal justice systems of many countries in the world vary considerably from that of Scotland and the rest of the United Kingdom, both in terms of the range and content of criminal offences and the manner in which prosecution and sentencing operates. There is no method by which the criminal history of a person living and working in most countries in the world can become automatically known to UK authorities. Measures do exist between law enforcement organisations across the world to share information and resources to prevent and detect serious crime and these can result in information being passed to UK authorities about the conduct of UK nationals abroad. But the current information sharing arrangements could not support the ongoing monitoring of PVG scheme members working abroad in the same way that the UK criminal records databases support the ongoing monitoring of PVG scheme members who live and work in Scotland.

234. In the circumstances, the policy intention is to build upon the existing provisions in the PVG legislation that give access to PVG scheme records to organisations employing people to work overseas in what would be regulated work in Scotland. Rather than rely on the criminal justice system in the host country to provide information to Disclosure Scotland when inappropriate conduct occurs, it is believed that this should be the responsibility of the organisation employing the PVG scheme member.

235. These proposals should be regarded as an incremental step within the context of:

- the wider work that the Scottish Government itself has proactively been taking forward on safeguarding in the international development and humanitarian sectors, following on the February 2018 media reports;

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- the specific commitments made by the Scottish Government as a donor at the October DFID International Summit: including working towards “Strategic Shift 1: Ensure support for survivors, victims and whistle-blowers; enhance accountability and transparency; strengthen reporting; and tackle impunity”; which includes (para 3) “Review, and where necessary, renew efforts within and between aid agencies and across governments and the wider international system, to avoid the hiring and recirculation of perpetrators in the aid sector, and to hold them to account, including by helping to bring them to justice, when appropriate, all in line with due process and relevant legal obligations”; and
- the longer term aspirations of the UK government and partners to create a global register of individuals who are unsuitable for employment in the Aid Sector.

## Consultation

236. A clear majority of the consultation responses supported the proposal for PVG scheme members in a regulated role overseas or organisations employing PVG members to do a regulated role. The majority of those who responded to the proposal also supported the offence proposals. In addition to the proposals above, respondents thought that there should be an offence for barred individuals offering to undertake a regulated role overseas.

## Protected adults – section 76

### Policy objectives

237. The PVG Act introduced the receipt of a service as the basis for the definition of protected adults to avoid labelling adults as vulnerable due their having a condition, illness or disability. Experience of operating the PVG Scheme has highlighted challenges with this approach. There is a lack of clarity about what services are included in the various categories. A further point of difficulty is that any adult can be a protected adult on a transient basis, for example when receiving dental treatment. But in other cases full-time services provided to adults by a self-employed individuals are excluded from the meaning of regulated work, if they fall outside the remit of statutory services.

238. However, with the development of the new approach to defining regulated roles, it is considered the definition of protected adults will in

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large part become obsolete with the introduction of a list of core activities, even although there will still be a recognised workforce relating to adults, and those adults will still need to be identified as having some sort of protected status. The approach taken in section 76 of the Bill ensures that individuals providing appropriate services are scheme members while at the same time avoiding a return to labelling adults.

239. The age element of the protected adult definition will also be removed, with the intention of resolving the ambiguity which currently means that 16-17 year olds can be both children and adults. Instead, only the definition of child will be made with reference to age (under the age of 18). There does still need to be a delineation between the two groups because the two barred lists for the different workforces are being retained.

## Consultation

240. The consultation did not explicitly ask about removing the definition of protected adult. Instead it asked whether the list of services was wide enough to reflect the current state of community care and welfare services, especially with increasing numbers of service users opting for self-directed support. The majority who replied to this question favoured adding services. A small number said the definition was fine. A number of respondents said that more clarity was needed around the existing definition if it was to be retained. No one suggested removal of a service.

241. It was suggested by some that informal groups should be considered as being brought within scope because these community-run bodies had minimal checking of providers, and they could attract vulnerable individuals. Examples of the types of services included befriending, higher and community education, sport and physical activity services linked with health and wellbeing outcomes, housing support, humanitarian aid, counselling and self-help. However it was recognised there was a balance to be struck as putting onerous requirements in place might be a deterrent. Respondents stated a person accessing these types of services would likely have a need or incapacity which could be either chronic or temporary. It was highlighted that the important protection point was that the service delivered should be properly screened before being allowed to engage with someone who may be vulnerable albeit in some cases for only a short period of time.

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## Barring service: scheme members under consideration for listing – sections 77-79

### Conditions imposed on scheme members under consideration for listing - section 77

#### Policy objectives

242. Under the current system, a person who is under consideration for listing can still continue lawfully to work with children or protected adults until a final listing decision is made. This is particularly likely where the individual under consideration is self-employed, as there would be no employer or statutory authority to take steps to constrain or limit their exposure to vulnerable groups under the outcome of the consideration. For example, a self-employed football agent with a previous conviction for grooming children in order to engage in sexual activity with them could choose to join the PVG Scheme in relation to regulated work with children. There would be no employer to notify of the consideration for listing status and during that period the individual might have unsupervised access to children. Another example would be where a teacher was subject to restrictions by the General Teaching Council for Scotland in relation to serious sexual misconduct but was able to persuade those engaging them in another setting, such as a voluntary youth leader, that they posed no risk and was allowed to continue in their role pending a decision by Disclosure Scotland.

243. To address these concerns, the policy intention is to allow Disclosure Scotland to impose limitations and conditions to manage any identified risks presented during the period of consideration. These conditions need to balance safeguarding with fairness and proportionality. They are a significant extension of the power of the state in relation to persons being considered for listing, but the necessity for them arises because of the abolition of referrals of convicted persons from courts (see paragraph 265), as well as from the experience of Disclosure Scotland in having operated the barring system, encountering many cases where the ability to impose such conditions would have benefitted public safety. In cases where a person being considered for barring is also a member of a regulated workforce, for example the teacher described in the previous paragraph, the regulatory body may have already imposed conditions that manage risk whilst they carry out their investigatory functions. This is not available for the many PVG scheme members who do not belong to a regulated

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profession or indeed where the risk arises away from the professional area that the regulatory body can control.

244. It is intended that conditions should be applied on an interim basis from the date on which Ministers decided to impose them, but with a requirement for Ministers to apply to a sheriff within a prescribed period of time to confirm the temporary conditions pending a final decision on listing. The most important reason for its existence is to mitigate or eliminate identified risk in relation to the most vulnerable in society. As such, conditions cannot be thwarted by any delay in obtaining representations. Scottish Ministers regard it necessary for conditions to apply from the date on which they decided to impose them and, in order to provide for procedural fairness, Ministers need to apply to the sheriff for approval of conditions.

245. It is considered that a failure by an individual or employing organisation to comply with conditions imposed by Scottish Ministers would be a serious matter which needs to be supported by the creation of a new offence. Scottish Ministers regard this offence to be comparable with the offences relating to regulated roles (sections 34 to 37 of the PVG Act) and failure to refer (section 9 of the PVG Act) as they concern individuals who have been identified as a higher risk of harm to vulnerable groups through their work, something which the PVG Act is designed to prevent. This is provided for at section 77 of the Bill, which inserts new provisions into the PVG Act.

246. In order for the offence to be workable the new section 13A of the PVG Act requires Scottish Ministers to notify the scheme member, employing organisations, relevant regulatory bodies and Police Scotland that conditions have been imposed. Disclosure Scotland already shares information with Police Scotland relating to the name of each individual who participates in the Scheme and each individual included in the barred lists (section 76 and 38 of the PVG Act respectively), both of which can be used by the police for the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders. The intention behind making such information available to Police Scotland equally applies to conditions imposed on scheme members, particularly in light of the new powers available to the police under section 81 (see below).

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## Alternatives

247. Do nothing. The Scottish Government could opt to make no provision in this area. However, this would undermine the policy objectives of abolishing the court referral system and leave the safeguarding risks described in paragraph 242 unresolved.

## Consultation

248. The consultation sought views on whether Ministers should be given such new and significant powers, with a proposal to impose a strict supervision restriction on any person under consideration for listing where it was deemed necessary to do so. It was suggested that this may amount to standard or tailored conditions imposed on the individual, for example that they may not work without direct supervision of a scheme member or that they may not work with a specific age group or in a specific context.

249. The responses to the consultation indicated strong support for new imposable conditions, with 94% of those who responded to this proposal being in favour of it. Respondents welcomed the additional level of protection this would provide to ensure children and the vulnerable are protected from harm. Organisations also stated it would help them better manage risk on a case-by-case basis. In addition the vast majority of respondents agreed to the introduction of a criminal offence to support the new provisions. While respondents were overwhelmingly supportive of creating a new offence there were concerns about the impact this might have on volunteering in Scotland, some thinking it could place too much responsibility on volunteers and therefore have an inhibiting effect.

250. Scottish Ministers welcome the broad support received for this proposal. It is recognised that conditions should only be imposed in the most serious of cases and care must be taken to ensure transparency, proportionality and fair use of such powers. This area is complex and work will be required in collaboration with a wide range of stakeholders to develop a framework which is practical and is underpinned by principles of proportionality and safeguarding.

## Withdrawal from Scheme when under consideration for listing – section 79

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### Policy objectives

251. The effect of the duties imposed on Ministers under sections 15 and 16 of the PVG Act means that they must proceed to make a determination on listing in all cases; they cannot terminate the listing process where a person's circumstances have changed. For instance, even if a PVG scheme member intimated that they wished to withdraw from the Scheme under section 59 on the basis that they were no longer doing a regulated role, Ministers would still need to proceed with the full consideration for listing process. This often results in people who are not doing, and who may never again do, regulated roles being considered for barring, creating unnecessary expense and regulation which is not required for public protection.

252. With the introduction of the new mandatory scheme, under which it will be unlawful to do a regulated role without scheme membership, the policy intention is for Ministers to be able to allow the individual to leave the PVG Scheme under section 59 without having to then proceed with the consideration for listing. Ministers should, however, retain the opportunity to consider the information which led to the consideration afresh should the individual apply for scheme membership again at a future date. The matter would essentially lie in abeyance unless and until the individual tried to rejoin the PVG Scheme.

### Consultation

253. No formal consultation was undertaken on the policy behind section 79.

## Barring service: permitting ministers to notify employers of a person's barred status – section 80

### Policy objectives

254. At present, there is no specific provision in the PVG Act which allows Ministers to notify an organisation that a person who has applied for scheme membership has already been barred. In terms of section 45(2) of the PVG Act, Ministers must allow an individual to become a scheme member (following an application to join) in relation to a type of regulated work if the person is not barred from that type of work. Under the current provisions then, if Disclosure Scotland write to an organisation to say that their application for scheme membership had been refused, the employer

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could then infer that the reason for this was that the individual had been barred.

255. Section 80 of the Bill adds a new section 46A of the PVG Act allowing for Disclosure Scotland to inform organisations of a person's barred status in these circumstances. It is considered this is a proportionate approach. One consequence is that organisations will in effect be informed that an individual has committed an offence (since seeking to do a regulated role while barred constitutes an offence under section 34 of the PVG Act). There will therefore be Article 8 implications. However, the purpose is to plug an identified safeguarding risk of ensuring that organisations do not inadvertently employ someone who has been barred. While this risk is significantly mitigated by the creation of a mandatory scheme, the view is that notification of barred status is nevertheless a justifiable interference with a person's right to private life.

### Alternatives

256. Do nothing. The Scottish Government could opt to make no provision in this area. However, this would leave the risk of organisations inadvertently employing someone who has been barred.

### Consultation

257. The consultation sought views on whether it would be appropriate for organisations to be informed of a listing individual's barred status. A significant majority of respondents supported this proposal and no concerns were highlighted.

## Barring service: reference by Police Scotland – section 81

### Policy objectives

258. In terms of major policy changes the mandatory scheme has a profound impact on the question of who must be able to refer under the PVG Scheme. At present UK police forces have certain functions with regard to the PVG Act. Under Part 1, the police are required to respond to a request from Disclosure Scotland under section 18 for information to assist them in their consideration about whether to list someone. Under Part 2, the police are required to respond to a request from Disclosure Scotland under section 47(1) for vetting information about new scheme members. Additionally, under section 47(2) police forces can, of their own choice, provide vetting information to Disclosure Scotland about existing

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scheme members for inclusion in the scheme member's scheme record. This latter provision of vetting information is one aspect of the continuous updating arrangements that apply to scheme members.

259. The chief constable does not have a power under Part 1 of the PVG Act to make a referral in the way that regulatory bodies can. Forces must rely on the continuous updating provision if they have a concern. But as that possibility only arises when the individual is a scheme member, there is currently a potential gap in protection.

260. Under the current rules, the chief constable cannot provide any information to Disclosure Scotland about a person who is not a PVG scheme member (unless Disclosure Scotland have requested vetting information about someone applying to become a member). For example if someone was working as a self-employed music tutor, but was not a PVG scheme member, in the event of them being suspected of sexual offences the chief constable could not inform Disclosure Scotland of this and the individual would not be considered for listing. With the creation of a mandatory scheme, everyone working with vulnerable groups will have to be a scheme member, so the existing duty of the chief constable to provide ORI on scheme members will mean that the chief constable will, under the amended legislation, be able to provide ORI on anyone working with vulnerable groups.

261. Safeguarding gaps do nevertheless remain. There was agreement from stakeholders through pre-consultation engagement, the consultation itself and other channels to do more to close the safeguarding gap by further widening the powers available to Police Scotland so that they can provide information about people who are not but should be scheme members.

262. The policy intention is therefore to close the gap where Police Scotland have a concern about a person whom they believe to be doing a regulated role but who is unlawfully not a scheme member. What is proposed is the creation of a new referral duty for the police in circumstances where the police believe that an individual has been working in a regulated role without being a PVG scheme member. The police may even have charged the person with the offence of doing a regulated role without being a scheme member, but this new referral duty on Police Scotland would be in addition to any prosecution that might follow because the individual was in a regulated role without joining the PVG Scheme.

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## Alternatives

263. Do nothing. This would not meet the policy objective which is to do more to close the safeguarding gap discussed above where a person, should they be so inclined, chooses to evade the mandatory scheme.

## Consultation

264. The consultation asked if it was appropriate to create new referral powers for the police, with respondents overwhelmingly in favour of this approach. Respondents agreed there is a gap in the current legislation which could be exploited by people, should they be so inclined.

Respondents also agreed the new referral powers should be limited to situations where the police have a concern about a person whom they believe to be doing a regulated role but who is unlawfully not a scheme member.

## Barring service: removal of reference by court – section 82

### Policy objectives

265. The existing provisions under section 7 of the PVG Act are necessary primarily because the non-mandatory PVG Scheme means that individuals convicted of “relevant offences” could theoretically go on to do regulated work lawfully without joining the Scheme, despite having past serious convictions for sexual or physical abuse of children. Without a system of court referrals, Disclosure Scotland would not learn of conviction information about non-scheme members which would lead them to consider an individual for listing. The rationale behind the court referral process was to ensure that those convicted of serious offences against children, even if non-scheme members, would be referred to Disclosure Scotland to be considered for listing and pre-emptively listed if need be. But the court referral system also has the disadvantage of requiring Disclosure Scotland to consider for listing individuals who are not doing and who may never seek to do regulated work.

266. As stated earlier the Bill establishes a mandatory PVG Scheme for all individuals in regulated roles. Under the mandatory scheme it will no longer be lawful to do a regulated role without first being a PVG scheme member. Upon application to join, any previous relevant conduct or convictions would become known to Disclosure Scotland as vetting information and would, if sufficiently serious, trigger a consideration for listing. It is considered that, going forward, this is sufficient protection for

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vulnerable groups in relation to those convicted of what are currently 'relevant offences' or of other serious offences as they will not lawfully be able to enter a regulated role without first applying for PVG scheme membership.

267. If a PVG scheme member is convicted of an offence, this would be routinely detected through ongoing monitoring arrangements, without any requirement for a referral from the convicting court – this is the case at the moment as well so that the court referral process may involve the same information coming to Disclosure Scotland as vetting information added to the scheme record and a court referral under section 7 of the PVG Act.

268. These provisions dispense with the current duty on convicting courts to refer those convicted of relevant offences specified in schedule 1 of the PVG Act, and also remove the provision for courts to make discretionary referrals.

## Alternatives

269. Maintain the status quo. Removing the system of court referrals is considered to make the system more proportionate, as it avoids unnecessary considerations for listing. Individuals will only be barred from regulated roles when they actually seek to carry one out. It is considered that leaving the section 7 referrals process in place once the mandatory scheme takes effect would amount to an unnecessary safeguarding intervention. Since the PVG Act came into force in 2011, more than 2,200 people have been listed on the children's list as a result of a section 7 court referral who were not PVG scheme members.

## Consultation

270. There was strong support in the consultation responses for this policy proposal, with stakeholders agreeing that the PVG Scheme should only interfere with the privacy of those who are actually doing or seeking to engage in regulated roles.

271. Nevertheless, Ministers have agreed that the PVG Scheme should retain the provisions in section 14 of the PVG Act which provide for automatic listing to prevent the most dangerous criminals, such as child murderers and rapists, entering the PVG Scheme. The Automatic Listing Order made under section 14 under the PVG Act will also be retained in that Act. The consultation did not seek views on whether the automatic

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listing provisions should be retained but did ask if there were offences missing from the Automatic Listing Order that should be included. The vast majority of respondents thought that no change was necessary to the Automatic Listing Order.

## Barring service: reference by councils or integration joint boards – section 83

### Policy Objectives

272. The existing provision in section 8 of the PVG Act allows for professional regulatory bodies to make referrals to Disclosure Scotland where they become aware that a referral ground has been established, but where there is no employer to make a referral, or where the employer cannot, or negligently does not, make a referral in respect of a registered professional. For instance, if several education authorities raised concerns with the General Teaching Council for Scotland (GTCS) about a locum teacher, the GTCS may make a referral on the basis of all the information available to them.

273. However, there remains a safeguarding gap in the care environment in particular, where self-directed support has been introduced since 2007. In these situations there is often no employer involved to make a referral, and the PVG Act does not provide for referrals by personal employers. The bodies most closely involved in self-directed support arrangements are generally local authorities or integration authorities. There was strong support in the consultation for these bodies to have referral duties equivalent to those which already exist for professional regulatory bodies.

274. Local authorities and integration authorities consider that having a power to refer a person to Disclosure Scotland for the purposes of having them considered for listing would close safeguarding loopholes within the context of self-directed support and personal employment where there is often no statutory regulatory body involved. During formal child and adult protection investigations local authorities may have found evidence of physical, financial or sexual abuse of vulnerable people. The multi-agency nature of these investigations will highlight whether a referral has already been made to Disclosure Scotland. Should adverse circumstances develop in the context of a person receiving care via self-directed support arrangements there should be a new route for the individual to be referred

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to Disclosure Scotland by local authorities and health and social care partnerships.

## Alternatives

275. Allow referrals from members of public. The law does not provide for the personal employer to refer the employee to Disclosure Scotland even if they consider that one of the grounds in section 2 of the PVG Act has been met. That power is reserved for organisations engaging people in regulated work or regulatory bodies. There were good policy reasons behind this; referrals initiate a process that can have very serious consequences for those referred. It is important that coherent investigations of allegations must take place before a process as serious as consideration for listing can begin; it is not within the capability of Disclosure Scotland's Protection Services to conduct disciplinary or similar investigations from scratch. For this reason it is not proposed that personal employers should have a duty or a power to refer an individual to Disclosure Scotland.

## Consultation

276. The consultation asked if the proposal to extend the powers of referral to councils etc. would close the safeguarding gap highlighted above. The vast majority of respondents agreed that it would. Self-Directed Support Scotland (SDSS) members stated it was very important that personal assistant employers can make referrals to Disclosure Scotland, if not directly, then through police or their local authority. SDSS members thought these changes would ensure personal assistant employers could make better informed recruitment decisions. The Care Inspectorate supported this proposal but highlighted safeguarding for self-directed support will remain different from other forms of registered care and regulated work and that any changes should not run counter to the principles of self-directed support. In order to achieve a balance between autonomy and protection, the Care Inspectorate recommended that an option to obtain PVG and other disclosure checks, as well as referral powers, should be introduced for self-directed support.

277. The Scottish Ministers consider the creation of new referral powers for councils / integration joint boards, Police Scotland and the enhanced role for accredited bodies, described in paragraph 186, provide a comprehensive package of reforms to close safeguarding gaps within the context of personal employment.

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## Lists of offences in List A and List B – schedules 1 and 2

### Policy objectives

278. Schedules 8A and 8B were introduced into the 1997 Act on 10 September 2015, to address the operation of the 1997 Act in Scotland following a UK Supreme Court ruling about its operation in England and Wales (see from paragraph 29 above).

279. Ministers made a commitment to review the offence lists when the 2015 amendments were first introduced and the consultation set out proposals for the categorisation of new offences to reflect recent developments in legislation and the experience of operating the lists in practice in the context of the disclosure system. The vast majority of respondents were in favour of the proposed changes to the offence lists.

280. As Part 5 of the 1997 Act will be repealed, the offence lists are restated in the Bill, as schedules 1 and 2 and referred to as ‘List A’ and ‘List B’, with further amendments noted below. In order for a conviction to be eligible for disclosure for longer when otherwise spent, a conviction has to satisfy specific criteria. These are that the conviction:

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

281. When such a conviction exists consideration is given to whether the individual had a history of harmful or inappropriate behaviour sufficient for, in most cases, a justification for prolonged disclosure.

282. The new offences for inclusion in the new List A are as follows:

- under a new heading ‘computer misuse’:
  - an offence under section 3ZA of the Computer Misuse Act 1990 (unauthorised acts causing, or creating risk of, serious damage);
- under a new heading ‘domestic abuse’:

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- an offence under section 76 of the Serious Crime Act 2015 (controlling or coercive behaviour in an intimate or family relationship);
- an offence under section 1 of the Domestic Abuse (Scotland) Act 2018 (abusive behaviour towards partner or ex-partner);
- under the existing heading ‘human trafficking and exploitation’:
  - an offence under section 3A of the Female Genital Mutilation Act 2003 (failure to protect girl from risk of genital mutilation);
  - an offence under any of the following provisions of the Human Trafficking and Exploitation (Scotland) Act 2015:
    - section 1 (offence of human trafficking),
    - section 4 (slavery, servitude and forced or compulsory labour),
    - section 32(1) (offences),
- under a new heading ‘harassment’ an offence under any of the following provisions of the Protection from Harassment Act 1997:
  - section 2 (offence of harassment);
  - section 2A (offence of stalking);
  - section 4 (putting people in fear of violence);
  - section 4A (stalking involving fear of violence or serious alarm or distress)
- under the existing heading ‘sexual offences’:
  - an offence under section 67A of the Sexual Offences Act 2003 (voyeurism: additional offences);
  - an offence under any of the following provisions of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016:
    - section 2 (disclosing, or threatening to disclose, an intimate photograph or film);
    - section 24 (breaching a sexual harm prevention order),
    - section 34 (offence of breaching order),
    - section 37 (breach of orders equivalent to orders in Chapter 3 and 4).
  - an offence under any of the following provisions of the Sexual Offences Act 2003:
    - section 103I (breach of sexual harm prevention order),

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- section 122H (breach of sexual risk order or interim sexual risk order),
- an offence under any of the following provisions of the Sexual Offences (Scotland) Act 2009:
  - section 54 (incitement to commit certain sexual acts outside Scotland),
  - section 54A (offences committed outside Scotland),
  - section 55 (offences committed outside the United Kingdom),
- an offence under section 69 of the Serious Crime Act 2015 (possession of paedophile manual);
- under the existing heading 'statutory aggravations':
  - an offence to which section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 applies (offences aggravated where there is abuse of partner or ex-partner),
  - an offence to which section 5 of the Human Trafficking and Exploitation (Scotland) Act 2015 applies (aggravation of an offence due to connection with human trafficking activity).

283. The above offences have been included within List A as they clearly satisfy the criteria for inclusion. That is they are offences that could result in consideration for listing and barring. They are offences that show behaviour that is harmful or inappropriate.

## Schedule 8B offences to be moved to List A

284. The following common law offences are currently in schedule 8B but in relation to which, on review and taking into consideration the criteria for inclusion along with the severity of the offences, it is considered that they should be moved to List A in the Bill. These are offences that clearly meet the criteria set for the extended disclosure of certain convictions, they show behaviour that could result in harm to an individual. For example, offences of fraud and embezzlement highlight a course of conduct intended to deceive. A number of consultation respondents stated that they believed it was more appropriate that these offences should be included within schedule 8A. These include the common law offences of:

- wilful fire raising, and

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- embezzlement.

285. In addition, the following offences have moved to List A:

- under the new heading 'domestic abuse', an offence under section 2 of the Domestic Abuse (Scotland) Act 2011 (breach of domestic abuse interdict with power of arrest);
- under the existing heading 'forced marriage', an offence under section 9 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (offence of breaching order);
- under the new heading 'harassment':
  - an offence under section 9 of the Protection from Harassment Act 1997 (breach of non-harassment order)
  - an offence under section 234A of the Criminal Procedure (Scotland) Act 1995 (non-harassment orders);
- under the existing heading 'prostitution', an offence under the following provisions of Criminal Law (Consolidation) (Scotland) Act 1995:
  - section 9 (permitting girl to use premises for intercourse);
  - section 13(9) (living on the earnings of another from male prostitution);
- under the existing heading 'sexual offences':
  - an offence under section 51A of the Civic Government (Scotland) Act 1982 (extreme pornography).

#### Addition of new offences to List B (formerly schedule 8B)

286. In addition to the restatement of schedule 8B as List B in the Bill, the policy intention is to include the following further offences in List B, as they clearly satisfy the criteria for inclusion. These are serious offences posing such a risk of harm to individuals that they ought to be disclosed on a Level 2 disclosure for an extended period of time. The following offences added to List B:

- under a new heading 'computer misuse' any offence under the following provisions of the Computer Misuse Act 1990:
  - section 1 (unauthorised access to computer material);
  - section 2 (unauthorised access with intent to commit or facilitate commission of further offences);

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- section 3 (unauthorised access with intent to commit or facilitate commission of further offences);
- section 3A (making, supplying or obtaining articles for use in an offence under section 1, 3 or 3ZA);
- under the existing heading 'road traffic':
  - an offence under section 5A of the Road Traffic Act 1988 (driving or being in charge of a motor vehicle with concentration of specified controlled drug above specified limit);
- under the existing heading 'firearms':
  - an offence under section 31 of the Air Weapons and Licensing (Scotland) Act 2015 (false statements, certificates and permits);
- under a new heading 'taxation':
  - an offence under any of the following provisions of the Criminal Finances Act 2017:
    - section 45(1) (failure to prevent facilitation of UK tax evasion offences);
    - section 46(1) (failure to prevent facilitation of foreign tax evasion offences);
- under the existing heading 'drugs':
  - an offence under any of the following provisions of the Psychoactive Substances Act 2016:
    - section 5 (supplying, or offering to supply, a psychoactive substance);
    - section 7 (possession of a psychoactive substance with intent to supply);
    - section 8 (importing or exporting a psychoactive substance);
    - section 9 (possession of a psychoactive substance in a custodial institution);
    - section 48 (offences in relation to enforcement officers);
- under the existing heading 'public order', an offence under section 68(1) of the Criminal Justice and Public Order Act 1994 (aggravated trespassing);
- under the existing heading 'fraud and forgery':
  - an offence under the Fraud Act 2006;

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- an offence under section 993 of the Companies Act 2006 (offence of fraudulent trading).

### Schedule 8A offences to be moved to List B

287. There are a number of offences that are currently in schedule 8A, however on review and taking into consideration the criteria for inclusion along with the severity of the offences, it is considered that they should be moved to List B in the Bill. It is not considered proportionate that these offences be disclosed forever unless removed following an application for review. The offences are the common law offences of:

- hijacking,
- piracy,
- treason, and
- uttering threats.

288. In addition, the following statutory offences are moved to List B:

- all offences currently listed under the ‘aviation and maritime’ heading (paragraphs 20-23 of schedule 8A), including the heading itself (now under the new aviation, maritime and spaceflight heading);
- under the firearms heading, the following offences under the Firearms Act 1968 (as listed in paragraph 26(l), (m), (n), (o) and (p)):
  - section 28A(7) (certificates: supplementary);
  - section 29 (variation of firearm certificates);
  - section 30D(3) (revocation of certificates: supplementary);
  - section 39 (offences in connection with registration);
  - section 40 (compulsory register of transactions in firearms);
- all offences currently listed in paragraph 37 of schedule 8A under the heading of ‘Official Secrets Act’, and the heading itself;
- under a new heading of threatening and abusive behaviour, an offence under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening or abusive behaviour) – currently listed in paragraph 46(a) of schedule 8A).

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## Removal of offences from List B (formerly schedule 8B)

289. There are a number of offences removed from the new List B in the Bill, so that they will no longer be disclosed once spent. Although some of the offences appear to be serious in nature, they are not considered to meet the criteria for higher level disclosures. The disposal handed out by the court and the rules under the 1974 Act about when the convictions will become spent are deemed to be sufficient in determining the disclosure period for these offences.

290. The offences proposed for removal are the common law offence of mobbing and rioting and the following statutory offences:

- all offences currently listed under the heading of ‘animals’ (paragraphs 21 to 29 of schedule 8B) – the heading itself has also been omitted;
- the offence currently listed under the heading of ‘aviation’ in paragraph 36 of schedule 8B (the heading itself will now be replaced by the new aviation, maritime and spaceflight heading);
- the offence currently listed under the heading of ‘bomb hoaxes’ in paragraph 37 of schedule 8B and the heading itself;
- the following offences under the heading ‘immigration, etc.’:
  - all offences under the provisions of the Immigration Act 1971 which are currently listed in paragraph 69(a)-(i);
  - the following offences under the Immigration and Asylum Act 1999:
    - any offence under the following paragraphs of schedule 12 (listed in paragraph 70(d)(i)-(iv) of schedule 8B):
      - paragraph 3 (failure to submit to a medical examination);
      - paragraph 4 (assisting detained persons to escape);
      - paragraph 5 (bringing alcohol into a detention centre);
      - paragraph 6 (conveying articles into or out of a detention centre);
- the offence currently listed under the heading of ‘prisons’ in paragraph 96 of schedule 8B and the heading itself;

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- all offences currently listed under the heading of ‘vets’ in paragraph 107 of schedule 8B and the heading itself;
- the offence currently listed under the heading of ‘offensive behaviour’ in paragraph 89 of Schedule B and the heading itself.

## Implementation of the Bill

### Provision of guidance and training

291. Disclosure Scotland have made a commitment to providing more guidance and training. They are continually engaging with stakeholders to develop guidance and training that meets user needs and welcome views on how this can be achieved.

292. In recent years Disclosure Scotland have taken proactive steps to address gaps in stakeholder knowledge, both through their Customer Engagement Team delivering workshops and training sessions to a broad range of stakeholders, as well as providing individual stakeholder support.

293. Disclosure Scotland are also a leading member of the ‘Scotland Works for You’ alliance consisting of representatives from sport, academia, and public and private bodies. Together, the group have created online guidance which aims to support people with convictions by suggesting how to prepare for employment and how to discuss previous convictions. The guidance also supports employers on topics such as how to consider people with convictions for employment and how to interpret information provided on disclosure certificates - Disclosure Scotland have worked with partners to develop this element of the guidance into training for employers that Disclosure Scotland are currently piloting with several employers.

294. This commitment to supporting stakeholders is one that will continue during transition to a refreshed disclosure system and beyond.

### Communication strategy

295. Disclosure Scotland will mount a major communications exercise well in advance of go live to make individuals and stakeholders aware of transitional arrangements, including the mandatory scheme to make sure people are on-board before go-live to avoid committing an offence and how

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disclosure applications under existing law will be transitioned to the new system.

## Digital services

296. While there was very broad support for moving Disclosure Scotland's services online, many respondents mentioned the need to retain other methods of delivery and payments. Disclosure Scotland will ensure that there will be alternatives available to those who can't or won't use online services. These alternatives are essential if the new membership scheme is to be inclusive, given the diversity of Scotland's people and the organisations with whom they work and / or volunteer.

## Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

### Equal opportunities

297. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website.

298. The Scottish Government believes that the Bill does not discriminate on the basis of, maternity and pregnancy, marriage and civil partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation. The Bill will benefit individuals with convictions by enabling them to move on quicker from the impact of their offending behaviour as it proposes reduced disclosure periods. Children will benefit as the Bill proposes no automatic disclosure of childhood conviction information, this will be particularly beneficial to care experienced children. The Bill will provide for increased protection for protected adults accessing their own care services.

### Human Rights

299. Convention issues arise in relation to the Bill, but it is considered that the provisions of the Bill are Convention compliant. In particular, the Bill engages Article 6 and 8 rights in relation to the disclosure of spent conviction information and police ORI, the processing of other types of personal data by state authorities in administering the disclosure system,

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restrictions placed on working with vulnerable groups through the barring system and introduction of the mandatory scheme.

300. The barring system is not substantially changed by the Bill although Ministers will have new powers to impose restrictions on individuals working with vulnerable groups while they are being considered for listing. It is considered that these new powers and the safeguards included will ensure Convention compatibility. There will be clarity on the types of standard conditions that may be imposed and Ministers will require to have them confirmed by a sheriff, at which point the individual will have the opportunity to challenge them. It is considered that Ministers' new powers to impose conditions and to make further procedure are capable of being exercised compatibly with Article 6.

301. In relation to disclosure of spent conviction information and police ORI, the Bill builds upon the existing disclosure regime established under both the 1997 Act and the PVG Act. At the time of the PVG Bill, the legislation was considered to be within the competence of the Scottish Parliament. Recent observations of the Supreme Court on the equivalent disclosure systems in England, Wales and Northern Ireland support the conclusion that there are now adequate safeguards in our legislation to ensure proportionality and Convention compliance. The current system has already taken account of legal developments in case law and the changes which Scottish Ministers are including significantly enhance the rights of individuals to have information reviewed to ensure it is relevant before it is disclosed to any third party. In relation to 12 to 17 year olds there will no longer be automatic disclosure of any conviction information as Ministers will be required to consider whether the conviction is relevant to the purpose of the disclosure. The Bill also builds in a review mechanism to ensure that police ORI is only included where it is relevant to the purpose of the disclosure and ought to be disclosed. The review provisions in the Bill are also considered to comply with Article 6, ensuring the right to a fair hearing.

302. Making the PVG Scheme mandatory will also lead to personal data of any individual seeking to do a regulated role being disclosed to their employer. This will engage Article 8, but interference is considered to be justified. The mandatory scheme will make the legislation more accessible, and reflects the understanding that many stakeholders have of the current system. It pursues the legitimate aim of public protection, but making it even less likely that those who are unsuitable to work with children or

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protected adults can undertake a regulated role. It is a necessary and proportionate response to identified safeguarding gaps.

### Island communities

303. The Bill has no differential impact on island communities. The provisions will apply equally to all parts of Scotland. Some concerns were raised regarding access to digital services, however, Disclosure Scotland's Business Analysis team have looked at the digital assistance requirements for moving to a digital-by-preference disclosure regime under the current legislation. Based on the statistics available by postcode town, the estimated requirements for digital assistance across all disclosure types in Comhairle nan Eilean Siar and the Shetland Isles was 16 - 17% which is not disproportionate to mainland needs which ranged from 12 - 22%.

### Local government

304. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. Part 1 of the Bill does not provide for any additional responsibilities or duties for local authorities resulting in no additional cost to them, however, any additional change in fees to registration fees will result in a small increased cost for them. Part 2 of the Bill allows child and/or adult protection teams within local authorities to make referrals, although expected to be small in numbers could result in additional administrative burden for local authorities. The simplification of the disclosure regime, as well as the digital delivery, will make the system more streamlined and less administratively onerous on local authorities. It is expected that the new regime will streamline the disclosure process and provide an online facility for requesting and sharing information which should cut administration costs for local authorities. Any impact on the business of local authorities has been captured in the Financial Memorandum.

### Sustainable development

305. The Bill will have no negative impact on sustainable development. There will be a positive effect as the system will be simpler and easier to use, contributing to sustainable development in that it will be making it easier and quicker for individuals and employers accessing disclosure for employment purposes. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore

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exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

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# Disclosure (Scotland) Bill

## Policy Memorandum

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