EDUCATION AND SKILLS COMMITTEE

AGENDA

23rd Meeting 2019 (Session 5)

Wednesday 4 September 2019

The Committee will meet at 10.00 am in the Robert Burns Room (CR1).

1. **Declaration of interests**: Gail Ross will be invited to declare any relevant interests.

2. **Decisions on taking business in private**: The Committee will decide whether to take items 6 and 7 in private. The Committee will also decide whether to take future reviews of evidence on the Disclosure (Scotland) Bill in private.

3. **Disclosure (Scotland) Bill**: The Committee will take evidence on the Bill at Stage 1 from—
   - Kevin Lee, Disclosure Bill Manager, Disclosure Scotland
   - Gerard Hart, Director for Policy and Protection Services, Disclosure Scotland; and
   - Ailsa Heine, Senior Principal Legal Officer, Scottish Government.

4. **Subordinate legislation**: The Committee will consider the following negative instruments—
   - University of the West of Scotland Order of Council 2019 (SSI 2019/212)
   - Queen Margaret University, Edinburgh (Scotland) Amendment Order of Council 2019 (SSI 2019/213)

5. **European Union (Withdrawal) Act 2018**: The Committee will consider a proposal by the Scottish Government to consent to the UK Government legislating using powers under the Act in relation to the following UK statutory instrument proposal:
   - The European University Institute (EU Exit) Regulations 2019
6. **Disclosure (Scotland) Bill:** The Committee will consider the evidence it heard earlier in the meeting.

7. **Work programme:** The Committee will consider its work programme.

8. **Subject Choices inquiry (in private):** The Committee will consider a revised draft report.

Roz Thomson  
Clerk to the Education and Skills Committee  
Room T3.40  
The Scottish Parliament  
Edinburgh  
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The papers for this meeting are as follows—

**Agenda item 3**

Submissions pack

SPICE briefing paper

Letter from Minister

**Agenda item 4**

Paper by the clerk

Paper by the clerk

**Agenda item 5**

Paper by the clerk

PRIVATE PAPER

**Agenda item 7**

PRIVATE PAPER

**Agenda item 8**

PRIVATE PAPER
This pack contains the submissions that the Committee has received after issuing a call for views which ran in July and August. These will inform the evidence sessions on the Disclosure (Scotland) Bill Inquiry.

- Business in the Community (BITC)
- CELCIS
- Centre for Youth and Criminal Justice (CYCJ)
- Children and Young People’s Commissioner Scotland
- Children in Scotland
- Clan Childlaw
- Coalition of Care & Support Providers in Scotland (CCPS)
- Colleges Scotland
- Community Justice Scotland
- Connect
- COSLA
- Criminal Justice Voluntary Sector Forum (CJVSF)
- East Lothian Council
- General Teaching Council for Scotland (GTCS)
- Howard League Scotland
- Interest Link Borders
- Law Society of Scotland
- Graham McCulloch
- NHS Education for Scotland (NES)
- NHS Healthcare Improvement Scotland
- Recruit With Conviction
- Release Scotland
- Ross of Mull and Iona Community Transport Scheme (RoMICTS)
- Royal Blind and Scottish War Blinded
- Royal Yachting Association Scotland
- Scottish Children’s Reporter Administrator (SCRA)
- Scottish Social Services Council
- Scottish Women’s Aid
- Scripture Union Scotland (SU Scotland)
- Shared Lives Plus
- Social Work Scotland
- Who Cares? Scotland
Business in the Community

About us

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

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

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

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

Business in the Community and Ban the Box

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

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

Responsible business perspective

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

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

Ban the Box is a meaningful way that employers can indicate their willingness to open up their mainstream recruitment practices to people with criminal convictions. It is aligned to the rehabilitation aspect of the proposed Disclosure (Scotland) Bill.
We would encourage the Scottish Government to adopt the Ban the Box commitment and promote it as part of the Disclosure (Scotland) Bill and surrounding communications. This could be done through signposting by organisations such as Scottish Enterprise, Highlands and Islands Enterprise and the South of Scotland Enterprise agencies.

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

Response to specific aspects of the bill

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

Replacing the concept of ‘doing regulated work’ with a list of core activities giving rise to ‘regulated roles’ that trigger mandatory PVG scheme membership (voluntary and paid). ‘Regulated roles’ will be synonymous with roles holding power or influence over children or adults who are vulnerable as a result of receiving a service;

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

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

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

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

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

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

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

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

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

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

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

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

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

CELCIS is Scotland’s Centre for excellence for children’s care and protection, based at the University of Strathclyde. We welcome the opportunity to provide evidence to the Education & Skills Committee to inform the scrutiny of the Disclosure (Scotland) Bill at Stage 1. In addition to strengthening and simplifying the disclosure system to ensure the protection and safeguarding of children and vulnerable adults, the Bill’s provisions advance the fairness of the disclosure system and, wherever possible, enable people with past convictions to move on in life, and access education, training and work. Proposals to transform the approach to childhood convictions constitute a significant step in the ongoing work of the Scottish Parliament to advance children’s rights. As such, we strongly support these provisions, which have been informed by a wide range of stakeholders and supported by a robust evidence base.

The disclosure of childhood information disproportionately affects young people and adults with care experience, who are more likely to have had contact with the police, and to have been involved in formal processes which lead to recording of behaviour. They are more likely to be criminalised, and accrue convictions for minor matters which, in other circumstances, would more likely be dealt with by parental sanctions.1 The complexity of the current disclosure system can exacerbate existing barriers faced by people with care experience when seeking to access opportunities. As corporate parents (under Part 9 of the Children and Young People (Scotland) Act 2014) Scottish Ministers, Disclosure Scotland and Police Scotland, together with other public bodies, have statutory duties to looked after children and care leavers, which they must uphold across all areas of their work. These include responsibilities to be alert to matters which adversely impact on these individuals, promote their interests, and enable them to make use of supports and services provided by corporate parents.2 As such, particular attention must be paid to the needs and views of those with care experience when considering changes to Scotland’s disclosure system.

We support the general principles of the Bill and agree that its proposals positively advance the current system. To secure truly progressive change, some provisions would benefit from further strength and additional scrutiny, particularly in relation to upholding the rights and meeting the needs of children and young people in need of care and protection, and those with care experience. We draw particular attention to four key areas:

- Improving Scotland’s approach to childhood convictions
- Ensuring ‘Other Relevant Information’ (ORI) provisions protect children’s rights
- Reducing system complexity
- Regulated roles and kinship care

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Improving Scotland’s approach to childhood convictions

It is internationally accepted that further effort is required to prevent the criminalisation of children.\(^\text{3}\) Article 40 of the United Nations Convention on the Rights of the Child (UNCRC) (which the Scottish Government is currently seeking to incorporate into Scotland’s domestic law) is clear that young people should receive child-friendly justice. The UNCRC and the 2010 Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice both state those under 18 years of age should be treated as children. Disclosure of childhood criminal records has wide ranging and damaging effects, particularly in relation to factors which are critical in reducing reoffending, such as accessing employment, education and housing, and experiencing stigma. The impact of these effects is felt disproportionately by certain children. A high proportion of children involved in frequent or serious offending have had multiple experiences of adversity, including neglect, abuse, bereavement and deprivation, and their offending behaviour is increasingly acknowledged to indicate unmet wellbeing needs.\(^\text{4}\) The brain continues to develop until individuals are in their mid-twenties, and significant changes take place in early adolescence, often leading to individuals engaging in impulsive and risk-taking behaviours.\(^\text{5}\) For some young people with care experience, issues such as disrupted care placements, disrupted education, loss, mental health difficulties and other adverse childhood experiences can compound to leave individuals struggling to cope on a daily basis. Experience of neglect, abuse and exposure to domestic violence (for example) all impact on how a child develops emotionally and psychologically, and how they learn to adapt and survive. Care experienced children and young people may communicate their needs through disruptive or offending behaviour, and require a supportive response, rather than one which inappropriately criminalises them or threatens their access to opportunities later in life.

We strongly support provisions in the Bill which propose to end the automatic disclosure of convictions accrued by children under the age of 18, and if such behaviour must be disclosed, that it will be listed separately from convictions accrued when aged 18 and over. Such reform brings Scotland into line with the majority of jurisdictions internationally, and reflects an understanding of: the distinction between offences committed by children and adults; the developmental trajectories and needs of children and young people (particularly those who have experienced trauma and

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\(^\text{4}\) CYCJ (2016) *Key messages from the Centre for Youth and Criminal Justice*. Glasgow: CYCJ

other adverse childhood experiences); and the need for individualised responses.6 Throughout their engagement activities, Disclosure Scotland have been clear that the default position and policy aim is against the disclosure of childhood information. It is important that this position is clear, and we are concerned that the language in the Bill and accompanying documents does not always reflect this.7 Going forward, this must be more clearly emphasised in legislation and accompanying guidance.

We recognise the requirement for provisions to enable disclosure in relation to very serious offending by children aged under 18, under certain circumstances, and for the purposes of protection. The Bill allows for the disclosure of childhood information where relevant and necessary, following consideration and an initial decision made by Disclosure Scotland. Applicants will be informed of the reasons for decisions, and such decision can then be subject to independent review if requested, and further appealed to a sheriff (on a point of law). We welcome the provisions enabling applicants to understand, challenge and appeal decisions, and the capacity to involve an independent reviewer. The consideration of factors which will be taken into account in decision making are noted within the Bill’s Policy Memorandum to 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” (para 101). The structured and individualised approach to decision making is welcome, as an important feature of a system which protects an individual’s right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR).

However, further clarity is required in relation to:

- How, and to what extent, the context of the behaviour resulting in the conviction information will be considered. Contextual factors such as care experience, trauma, and progress in relation to risk and rehabilitation will vary significantly and require specialist knowledge (particularly in relation to care experience and corporate parenting) and skilled assessment. The Bill proposes provisions allowing Disclosure Scotland to gather information from relevant persons to assist them in their decision-making but does not require them to do so. Dialogue with the individual concerned, their advocate or other representations should form an important part of decision-making.

- How transparency and consistency in decision-making will be achieved and assured. The lack of detail of a decision-making framework is concerning, and should be included in statutory guidance going forward, both in relation to decisions made by Disclosure Scotland, and those made by an independent reviewer. This is particularly important to ensure individuals are able to

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7 E.g., paragraph 99 of the Bill’s Policy Memorandum states “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...but only after the applicant has been given the chance to make representations”
understand, in advance, what the implications of any childhood convictions will be for their disclosure information.

We recognise and fully support provisions within the Bill to prevent the release of any information to a third party (such as an employer) until the applicant has seen their information and had the chance to request an independent review. Concerns remain in relation to the potential of lengthy timescales to prejudice applications, where third parties may form negative assumptions about disclosures which take longer to process. Maximum timescales for decision-making should be given further consideration.

More broadly, we continue to hold concerns in relation to the treatment of children’s information from Scotland’s Children’s Hearing System as ‘convictions’. From its inception, the Kilbrandon Report\(^8\) made clear that the focus of this system should be on children’s needs, not deeds. The fact that children who come into contact with the care system and Children Hearings process can still be disproportionately criminalised, accrue offences and be disadvantaged into adulthood for childhood behaviour is a cause for great concern. Scotland’s welfare-based system recognises the primacy of upholding children and young people’s rights and wellbeing, and responding to their needs in a supportive, holistic manner. This is reflected in overarching policies such as Girfec, and the Whole Systems Approach to young offending. Yet interactions with the Children’s Hearings System can lead to a child or young person acquiring a criminal record, even in a setting designed to be informal where decisions are taken based on whether they are in the child’s best interests. It is extremely concerning that children and young people are routinely placed in such a position, without being fully informed of their rights or the potential long term consequences of accepting offence grounds, often without the advice of a solicitor. A 2016 study found 90% of legal aid work in children’s hearings was undertaken on behalf of parents, not children and young people.\(^9\)

**Ensuring Other Relevant Information (ORI) provisions protect children’s rights**

ORI refers to information (other than convictions) which is held on police records about an individual’s behaviour. Decisions to include ORI in disclosure information are made by the chief officer of a police force. We welcome provisions within the Bill to end the process of ORI being disclosed to third parties before applicants have the opportunity to challenge this, and to provide for independent review (and subsequent appeal to a sheriff on a point of law) of ORI. We also welcome the proposal to issue statutory guidance in relation to the disclosure of ORI, which is vital to achieve transparency. We support the suggestion made by the Centre for Youth and Criminal Justice (CYCJ) that such statutory guidance should include a specific section concerning the particular considerations for ORI related to childhood behaviours.

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\(^8\) HMSO (1964) *The Kilbrandon Report*, Edinburgh: HMSO

\(^9\) CELCIS (2016) *The Role of the Solicitor in the Children’s Hearing System*, Glasgow: CELCIS
We continue to hold more fundamental concerns about the use of ORI, which we believe should only be disclosed under exceptional and extreme circumstances. Whilst it is recognised that Scottish Ministers are confident that Police Scotland exercise utmost rigour before deciding to include ORI, the situation remains that it is possible for non-conviction information, including childhood information, (i.e. information which is not necessarily accepted or proven to true) about an individual to be disclosed, indefinitely. Published guidance which clarifies the types of ORI likely to be shared is currently lacking, making it impossible for individuals to foresee any consequences. These are rights issues of particular relevance to care experienced individuals who, as noted earlier, are more likely to have contact with formal systems where their behaviour and histories are recorded. Additionally, the onus remains on the individual to appeal against the release of this information, rather than a system whereby the police make an application to retain the information. This differs from provisions under the Age of Criminal Responsibility (Scotland) Act 2019 (the ACR Act) regarding ORI in relation to children under the age of 12, which is automatically subject to independent review.

In relation to all decision-making and review processes provided for within the Bill, we agree with CYCJ that consideration should be given to whether the Independent Reviewer (whose role is established under Section 11 of the ACR Act) should be the first line of decision-making in respect to all childhood conviction information, and ORI. This could enhance consistency in justice across similar matters which are governed by different pieces of legislation and assure independence in all decision-making.

Reducing system complexity
The complexity of the disclosure system has been an ongoing cause of significant concern, as reflected across responses to the 2018 Scottish Government consultation on the Protection of Vulnerable Groups and Disclosure of Criminal Information.10 To ensure a rights-based, simple and accessible system, clarity is required in order for individuals to be able to understand, from the outset: what information must be disclosed; how long it must be disclosed for; what ORI may be disclosed in addition; how to appeal such decisions; and what the implications of disclosure are. With limited understanding (even by professionals and advocates) of the disclosure system, and a backdrop of a lack of consistent, accessible information and individualised, case-specific support, navigating the system is challenging and can be overwhelming for individuals. Such complexity can exacerbate existing barriers faced by care experienced people seeking to access opportunities and raises concerns about the extent to which the system protects and respects human rights, particularly children’s rights. Specifically, whether the system holds the best interests of children as a primary consideration

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(Article 3, UNCRC), and whether children’s rights to privacy (Article 16, UNCRC) and a fair trial (Article 6, ECHR) are respected.

It is clear that attempts have been made through the Bill to reduce the complexity of the system (for example, by reducing the number of disclosure products), to increase fairness (e.g. by reducing disclosure periods, improving the process for removing/applying to remove convictions, and strengthening review/appeal provisions), and to enable more individualised responses (e.g. by ending the automatic disclosure of childhood convictions). However, we are concerned that the resulting system remains too complicated, and outcomes will continue to be unpredictable. In addition to limited clarity about decision-making regarding the inclusion of conviction information and ORI in relation to childhood behaviour, we are concerned about the continued use of two separate lists of offences (List A and List B) with differing and arbitrary rules applying to disclosure and the removal of spent convictions in relation to each. The use of two lists with different rules is confusing for individuals. A lack of readily available, clear information compounds this confusion and can lead to individuals disclosing matters which they are not obliged to or avoiding the process altogether.

To be a just and fair system, individuals need to understand their rights. As such, the provision of accessible guidance, information and support is vital. This should include legal advice to children, as well as free, accessible advice and support in navigating the disclosure system (for professionals, advocates and applicants themselves), including face to face support where this is required. Those providing advice require an understanding of issues discussed earlier, particularly care experience and corporate parenting. How this will be achieved is an area which would benefit from the Committee’s scrutiny.

Regulated roles and kinship care

We support the new concept of ‘regulated roles’ which trigger mandatory PVG scheme membership. This is a more straightforward approach than previous categorisation of regulated work and focuses on the capacity or opportunity of an individual to exert significant power or influence over a child or protected adult. Under Schedule 3 of the Bill, foster carers are required to register under the PVG scheme, whilst kinship carers (whether formal or informal) are not. Instead, kinship carers would be subject to a Level 2 Disclosure check. This distinction recognises the special nature of kinship care, which (even in formal arrangements involving looked after children) differs from foster care and does not differentiate between kinship carers and other family caring roles. Kinship care recognises the unique strengths of the extended family network to which the child belongs to meet their particular needs. This differs from foster care, where carers are assessed on their suitability to provide a more general placement to a child out with their family/friendship network. By not mandating PVG membership for kinship carers, the importance of the wider, comprehensive, process of assessment for kinship carers is acknowledged. Kinship carers whom social workers assess as best able to meet the needs of children will not be prevented from doing so for bureaucratic reasons. The

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histories of carers can be varied, and careful consideration should be given to past convictions and/or concerns, with contextual information. However, misdemeanours in the past should not preclude individuals from a caring role for a child or young person. It should also be recognised that, in a minority of cases, these checks may reveal concerning behaviours that would place a child or young person at risk of harm. Therefore, there is a role for appropriate criminal record checks to ensure the suitability of kinship carers, and we agreed that this can be achieved under the Level 2 Disclosure check.

**About CELCIS**

CELCIS is a leading improvement and innovation centre in Scotland. We improve children’s lives by supporting people and organisations to drive long-lasting change in the services they need, and the practices used by people responsible for their care.
Centre for Youth & Criminal Justice
The Centre for Youth & Criminal Justice (CYCJ) is dedicated to supporting improvements in youth justice, contributing to better lives for individuals, families and communities. Our vision is a Scotland where all individuals and communities are safe and flourish; and where Scottish youth justice practice, policy and research are internationally renowned and respected. We contribute to this by developing, supporting and understanding youth justice practice, policy and research in Scotland, and through seeking and sharing learning internationally. CYCJ are pleased to respond to the current call for views by the Scottish Parliament's Education and Skills Committee, with disclosure an area we have long raised concerns about and advocated the case for change (see Nolan, 2018; CYCJ, 2018). The Bill is a progressive step forward and it is evident that cognisance has been taken of the contributions made during the consultation and engagement activities. Overall, we welcome the provisions of the Bill and deem it important that this opportunity to radically reform Scotland’s approach to disclosure is maximised. We have chosen to limit our submission to those areas in which we feel we have a particular contribution to make or deem improvement could be made.

Childhood convictions
In respect of childhood convictions, CYCJ have long argued the need for a different approach to the disclosure of offending behaviour that occurred during childhood and to limit the disclosure of information relating to children. The provisions in the Bill that such convictions are treated as a separate category distinct from other convictions and to end the automatic disclosure of convictions accrued by an individual while aged 12 to 17 years old are positive and supported by the evidence that:

- Children are not mini adults, they have different developmental needs and legal status and as such require unique approaches (Nolan, 2018; SCYJ, 2017).
- The failure to distinguish between the treatment of criminal records accrued in childhood has been at odds with virtually every other approach we take to children and adversely affects our ability to achieve the aims for, and to fulfil our legal and policy requirements to, children and children’s rights (Nolan, 2018).
- Offending in childhood and adulthood differs, with childhood offending predominantly low level, a common feature of childhood as children grow and test boundaries which most children “grow out” of with maturation, and is a poor indicator of future behaviour as an adult (CYCJ, 2016; SCYJ, 2017; Children’s Commissioner for England, as cited by House of Commons Justice Committee, 2017).
• Distinguishing between child and adulthood records is done in the majority of jurisdictions internationally and, it has been concluded, is an essential component of a child-friendly disclosure system (Sands, 2016; Nolan, 2018). Similarly, the crucial aim of the Bill to end the automatic disclosure of childhood convictions is supported by:

• The recognised wide ranging and particularly destructive effect of disclosing childhood criminal records (see for example House of Commons Justice Committee, 2017; Carlile, 2014; Sands, 2016). Criminal records can adversely affect access to employment, education, training, volunteering opportunities, housing, insurance and visas for travel (House of Commons Justice Committee, 2017; SCYJ, 2017). Many of these factors are recognised as critical in reducing reoffending (and therefore preventing future potential harm and victims of offending); supporting reintegration which should be promoted in accordance with the UNCRC; promoting desistance; and in children's development into adulthood (Nolan, 2018). These are areas where children often already face disadvantages, for example by virtue of their age, the common prevalence of school exclusion, poorer educational outcomes, lack of networks and lack of previous employment, training or experience (CYCJ, 2016).

• The above affects disproportionate impact on certain children. It is well established that a high proportion of children involved in frequent and/or serious offending are amongst the most vulnerable, victimised and traumatised children in society (CYCJ, 2016). These children have often had multiple experiences of childhood adversity; neglect; abuse; loss and bereavement; inequality and deprivation; experiencing physical and mental health needs; speech, language and communication needs; and learning disabilities, with offending increasingly recognised to be an indicator of wellbeing need (CYCJ, 2016). Moreover, the behaviours of looked after children are more likely to have been reported to the police, including for minor offences and trauma-related behaviours - thereby attracting a criminalising state response - than Scotland’s child population in general, and care leavers are overrepresented in the justice system (Scottish Government, 2018). Therefore “while a conviction is not a protected characteristic, the ways in which it intersects with protected characteristics means that barriers relating to convictions have an impact on equalities” (Thomson, Laing and Lightowler, 2016, p.iii). We would echo conclusions of the House of Commons Justice Committee (2017) that the disclosure regime can cause secondary discrimination to certain already stigmatised and discriminated groups of children.

• The disclosure of criminal record information is inherently anxiety-provoking for individuals with convictions, often being experienced as traumatic, stigmatising and embarrassing, which can result in the limiting of horizons, avoidance of
accessing opportunities such as volunteering, education and employment or a mismatch between attainment and abilities, as well as detrimentally impacting on an individual’s wellbeing and identity (Thomson et al., 2016). The above factors combine to bring real and psychological barriers to improving life chances and outcomes, causing significant issues for children at key transition points and just when they are trying to change and turn their lives around (Children’s Commissioner for England, as cited by House of Commons Justice Committee, 2017; SCYJ, 2017). It is therefore important children have the right to “move on” from offending behaviour and to put offences committed in childhood behind them (Nolan, 2018).

Ending the automatic disclosure of childhood convictions should therefore contribute to reducing these negative impacts.

We welcome that the provisions in the Bill apply to all childhood convictions (including those of now adults) in the interests of fairness and equity, and the listing of childhood conviction information under a separate heading to distinguish this from adult offending as this conveys an important message. In addition, measures to enable the date of offence (as opposed to date of conviction) to be used in determining a childhood conviction are important, given that practice and lived experience indicates there can be significant system delays between the time of offence and the time of conviction. Failure to include this provision would unfairly disadvantage those children who have committed an offence in childhood but owing to delays in the system, may not become a conviction until adulthood.

While welcomed, this provision differs to the Management of Offenders (Scotland) Act where provisions for under 18s are based on the date of conviction. This is indicative of a wider concern that we have expressed previously regarding the approach to reform of the disclosure system, given the system is impacted on, and underpinned, by various pieces of legislation and policy, which have been reformed in a piecemeal manner. This underlines the importance of ensuring the policy intentions and provisions within the recent legislative amends - including the Age of Criminal Responsibility (Scotland) Act 2019 (ACR Act), Management of Offenders (Scotland) Act and Disclosure (Scotland) Bill, all of which impact on disclosure - are connected and the provisions in one piece of legislation do not adversely affect another. A further example of this is in respect of the fact that the Disclosure (Scotland) Bill governs state disclosure and other legislation (such as the Management of Offenders (Scotland) Act) governs self-disclosure. We have a concern that under current provisions there may be situations whereby a child requires to self-disclose something, which within the provisions of the Disclosure (Scotland) Bill the state may decide not to disclose, therefore meaning the benefits provided by the proposed changes have little impact. Further amends similar to those required in the ACR Act may be worth considering. Likewise, whilst we welcomed some of the provisions under the Management of
Offenders (Scotland) Act in respect of the Children’s Hearings System, we remain concerned that under the proposed changes, this information will still be considered as a childhood “conviction” and as such disclosable which we deem to be inappropriate for various reasons, not least due to the incompatibility of this position with the welfare-based Children’s Hearings System (see SCRA, 2018). It is crucial that the Disclosure (Scotland) Bill does not further complicate an already complex landscape, with the disclosure system poorly understood and complex to navigate almost universally, but particularly for children and young people.

We welcome the introduction of a case-by-case, structured approach to any decision to include childhood conviction information on level 1 and 2 products. This is important in balancing the rights to public protection with upholding the rights of individuals with conviction information, with it having been suggested that schemes without flexibility to permit to use of discretion and individual assessment cannot be compliant with Article 8 of the ECHR protecting an individual’s right to respect for private and family life (House of Commons Justice Committee, 2017; Nolan, 2018). Given the far-reaching implications of these decisions, to promote consistency and transparency of decision making and understanding of what might be disclosed, readily available and accessible guidance will be important, although we retain concerns about how easy this will be to achieve in practice. We also believe it is important that this decision is based on independent assessment and in terms of streamlining provisions, question if it would be more appropriate to align this decision-making process with the ACR Act, with the independent reviewer being the first line of decision making. In informing the inclusion of conviction information, we understand the factors that will be taken into account in informing such decisions (such as amount of time elapsed, the number of offences) and the rationale behind the test for inclusion differing on level 1 and 2 disclosures. We would however suggest that further attention should be given to the context of offending, in particular trauma, mental health and care experience, and any progress in terms of risk and rehabilitation that had been made since the time of the offence (Nolan, 2018; see Who Cares? Scotland evidence submission). With all of the frameworks/guidance to inform decision making on the inclusion of information or review, we would like to propose further consideration of the inclusion of this information within the Bill or statutory guidance. The provisions for explaining why such information has been included, right of appeal, review and representation are improvements and key components of a rights compliant system, as discussed further below (Nolan, 2018). In respect of disclosure of childhood convictions (and the use of the above provisions), we would like to see provisions built into the Bill (or associated documents) for monitoring and evaluation of the frequency of childhood convictions being disclosed and for this information to be made publically available. This could provide valuable information for considering the further extension of the approach adopted to childhood conviction information to (for example) young adults and adults,
as we argued for in our previous submission (and as also highlighted in Howard League Scotland evidence submission).

**Other relevant information (ORI)**

As summarised in Nolan (2018) and our previous consultation submissions, CYCJ have raised concerns about the use of ORI. The provisions in the Bill to rights of review and appeal and the development of statutory guidance in relation to the disclosure of ORI should address some of the concerns raised regarding the ability to challenge information, the onus being on the state to evidence and explain why such information should be included, and transparency. In developing the statutory guidance, the principles and tests as outlined by Grace (as cited by Weaver, 2018) may be useful and we would suggest, in maintaining the ethos of the Bill that there is a specific section relating to the additional considerations for ORI related to behaviours in childhood. We still however retain concerns about the use of ORI in terms of rights as detailed elsewhere (see for example Nolan, 2018; Howard League Scotland evidence submission); the potential for children who are under greater scrutiny, such as looked after children, to have more information that could be disclosed as ORI, which may result in the provisions of the Bill to reduce disclosure having lesser impact; the extent of what can be included as ORI; and the potential unpredictability of what could be included as ORI, which makes it difficult to appropriately advise and support young people in regards to this.

**Representation, review and appeal**

CYCJ welcome the provisions within the Bill relating to reviewable information including rights of review, representation, and appeal; efforts to streamline these processes and mechanisms; and the commitment to make guidance available. In order to be utilised and fulfil individual's rights of participation, it is crucial that these measures are clearly communicated; individuals are equipped with the tools, knowledge, information and appropriate support to be enabled to exercise these rights; processes should be as easily understood and as simple as possible; and timescales should be set for how long this process should take to avoid unnecessary delays and the resulting impact on opportunities. This is essential if these provisions are to become real opportunities, improvements and rights, not just rights in law that are extremely difficult to exercise in reality and indeed are inaccessible to many (Nolan, 2018). In doing so, we would urge further consideration of building further provisions into the Bill (or associated statutory guidance) for monitoring and evaluation of the frequency of such provisions being utilised and the experience of those utilising such measures, with this information being made publically and readily available. With all reviews, we question if making the Independent Reviewer the first line of review and appeal in all cases, and indeed the first line of decision making in respect of childhood convictions and ORI, would be beneficial in terms of independence, simplicity,
streamlining processes and ensuring the same standards of justice are achieved across the different pieces of legislation. Within all provisions it is beneficial that no disclosure will be issued to a third party until the individual agrees/request requests this, has the opportunity for review and all the review processes are complete.

**Removable and non-disclosable convictions**

It is a necessary and welcome improvement that the Bill makes provisions for reducing the periods after convictions can become non-disclosable or an application for removal can be made and amends the process for asking for convictions to be removed, given the significant challenges detailed in the Consultation paper. We remain concerned about the lengthy 11 and 5-year 6-month time frame, and although the periods are shorter for under 18s, these represent a greater proportion of a child’s life than those applying to adults (House of Commons Justice Committee, 2017). We would like to propose further consideration of the evidence in establishing these timeframes based on Time to Redemption studies (see for example Weaver, 2018). With regards to the process for removal, we would echo comments made elsewhere in terms of the potential to streamline and simplify processes; that this is still placing onus on the individual; the need to ensure individuals can be supported to exercise these rights; and that there should be no fee for this application. As detailed in our previous submission, we question the rationale behind having two different lists and deem if the desire exists to simplify the system and promote consideration of individual circumstances, then consideration should be given to developing one list of offences coupled with an individualised and nuanced approach that requires specific consideration in each case. We welcome the move of Section 38 Criminal Justice and Licensing (Scotland) Act 2010 threatening or abusive behaviour to List B, given that this covers a wide range of offences and is one that children, particularly those in care, may accrue for fairly minor behaviours or those rooted in trauma. However, we are concerned about the positioning of wilful fire-raising as a List A offence.

**Complexity**

CYCJ welcome the reduction in the number of disclosure products, the use of digital opportunities but retaining non-digital options, and the increased individual control over the use and sharing of disclosure data. However, as detailed above the complexity of the disclosure system lies not only in the number of products available. We understand that a level of complexity will be unavoidable but consider it important that in respect of the Bill and the disclosure system as a whole, guidance, information and support, including resources specifically aimed at children and young people, is made available. It is crucial that such information and support is independent, individualised, free, in-person (either face-to-face or by phone) and available to everyone, whatever stage of their disclosure journey they are at. Many good supports are already available, which we suggest should be built upon and efforts made to ensure such support is
consistently available. We would suggest further consideration should also be given to any adjustments, specific support, or entitlements for young people with additional needs or vulnerabilities, for example children with additional support needs; learning disabilities; speech, language and communication needs; and those with care experience (including in respect of corporate parenting duties). The requirements for self-disclosure of criminal information, which we acknowledge are out with the scope of the bill, still place full onus on the individual and remain extremely difficult for individuals to understand (and indeed for those professionals supporting people with potentially disclosable information), with significant costs of over or under-disclosure (Nolan, 2018). As detailed in our previous submission, we deem the Bill provides an opportunity to enable the provision of clear, accessible, usable information to individuals, free of charge, which clearly label individual convictions as unspent, spent, and protected, along with dates showing when the status of the conviction will change. Some suggestions for how this could be achieved included the development of an online portal where individuals can access this information; making the calculation algorithm for establishing timeframes more readily available; or introducing the provision for doing so on free Subject Access Requests. This would support individuals with disclosable information, and those supporting them, to better understand what needs to be disclosed and for how long. Moreover, where the onus is on the individual (for example in respect of removable convictions) they are being asked to do so within the context of a system that is difficult to understand. Many of these individuals are frequently disenfranchised, their motivation to fight the system has often been lost and it may be difficult for them to see the benefits of doing so, meaning such provisions may not have the intended positive impact.
Commissioner for Children and Young People Scotland

Evidence for the Scottish Parliaments Education and Committee on the Disclosure (Scotland) Bill

August 2019

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights. The Commissioner is fully independent of the Scottish Government and Parliament.

Recommendations

• Disclosure of information relating to children’s behaviour before the age of 18 should be exceptional and rare and in compliance with human rights standards;
• Disclosure should only take place where there are sound and well evidenced public protection or best interest grounds to do so.
• The legal definition of convictions should preclude information and orders made, relating to any of the Section 67 Grounds in the Children’s Hearings System;
• There should be no disclosure of information proposed to be defined as ‘other relevant information’ (ORI) relating to children’s behaviour before the age of 18;
• The introduction of the independent reviewer should be accompanied by sufficient advice and support and comply with the principles of accessibility, quality and adequacy for children and young people.

Introduction

We welcome the Bill purpose which is to make changes to the system of criminal record checks in order to modernise and improve the proportionality of the State disclosure system in Scotland. We are pleased to see that the proposals contained in the Disclosure (Scotland) Bill simplify what has been a complex system. However, we continue to have concerns in relation of the proportionality of it in relation to children and the application of the best interest of the child when decisions are made by Disclosure Scotland.

In August 2018, in response to the Scottish Government’s consultation on the PVG scheme, we wrote to the Minister for Children and Young People asking the government to conduct a thorough review based on human rights principles. In particular we were concerned that both the PVG and wider disclosure system may result represent a disproportionate interference with the rights of children and young people.  

Human Rights Context

The Protection of Vulnerable Groups (PVG) and Disclosure system is an important part of the protections the State has in place to fulfil its obligations to keep children safe. It serves to meet the State’s obligations to take steps to protect children from violence and abuse (article 19 of the UNCRC).

In legislating, the State must however balance the protective role of any Disclosure system, with the need to ensure respect for children’s rights, including privacy and family life (article of the 16 UNCRC and article 8 of the European Convention on Human Rights (ECHR)) and pay particular attention to the children’s best interests as a primary consideration in all matters concerning them (article 3 of the UNCRC). Furthermore, article 40 of the UNCRC requires the State to recognise the right of children in conflict with the law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth… and which takes into account the child’s age, the desirability of promoting their reintegration and their assuming a constructive role in society.

Any interference with article 8 of the ECHR must be lawful, proportionate and necessary. Lawfulness refer to the requirement that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting their rights under the Convention. Lawfulness also requires that there be adequate safeguards to ensure that an individual's article 8 rights are respected. Proportionality is a key element of the necessity of infringe this right. In order to determine whether an infringement on article 8 is “necessary in a democratic society”, it should be balanced the interest of the Member State in discussion against the right of the applicant. The European Court of Human Rights has clarified that “necessary” in this context does not have the flexibility of such expressions as “useful”, “reasonable”, or “desirable”, but implies the existence of a “pressing social need” for the interference in question.2

Children and adults are entitled to protection of their rights to a fair trial (article 6 of the ECHR) which should be read in conjunction with article 14 of the International Covenant on Civil and Political Rights: “In the case of juvenile persons, the procedure shall be such as will take account of their age, and the desirability of promoting their rehabilitation.”

The UNCRC provides additional safeguards to children in conflict with the law, including the presumption of innocence; clear and prompt information of the charges against them, and to the right to have legal assistance in the preparation of any defence (article 40.2(b)(i) and (ii) of the UNCRC).

In addition, The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as the ‘Beijing Rules’) clearly state that any juvenile justice system should be designed to promote the wellbeing of the young person and that any response to a child or young person’s actions should be proportionate to what they have done.

2 The Sunday Times v United Kingdom (Series A No 30), European Court of Human Rights (1979-80) 2 EHRR 245, 26 APRIL 1979
The Bill

As mentioned above, we are supportive of the policy intent which underpins the provisions within the Disclosure (Scotland) Bill which is to strike the appropriate balance between safeguarding and providing for rehabilitation of children in conflict with the law. However, there persists to exist concerns about the new system when assessed against the human rights principles outlined above. We provide three examples below when this happens. We also highlight some concerns in relation to the Independent Reviewer.

**Offence grounds accepted at a children’s hearing, or established in court, will continue to be classed as convictions.**

This is at odds with the welfare-based nature of the Children’s Hearings System. The unique nature of the Children’s Hearings System is, as an independent, quasi-judicial decision-making forum whose purpose is not, unlike a Criminal court to determine evidential matters in fact and law. Rather, the welfare-based system, requires holistic consideration of whether ‘compulsory measures of supervision’ are necessary for the protection, guidance, treatment or control of a child, irrespective of the ground upon which the child was referred to the Children’s Hearing.

The Children’s Hearings System in Scotland is therefore distinguishable from the criminal justice system whereby ‘convictions’ are determined in Criminal court proceedings. Even if the Sheriff Court makes a finding that a child has committed an offence, and the Ground is established, the Children’s Hearing is not empowered to make a punitive decision when making any orders in the best interests of the child.

As we have stated before, there are particular issues with accepted grounds, where the evidence has not been tested and the child may not have been legally represented or able to understand the consequences of accepting grounds. There are limits to the Children’s Reporters’ or Panel Members’ abilities to resolve this issue. It must be considered in terms of the child’s rights under article 6 of the ECHR and article 40 of the UNCRC.

We note that in the recent case of N H v Her Majesty’s Advocate, the Crown sought successfully to rely on accepted grounds as evidence to prove a criminal case, against contrary legal advice. This suggests that considerable care must be taken where a child is being advised on whether to accept or refute Section 67 Grounds to prevent infringements of their human rights.

While it would be possible to provide every child appearing before a hearing on offence grounds with a solicitor, or independent legal advisor, or for every section 67(2)(j) offence ground to have to go to the Sheriff Court for proof, we consider that a more rational and proportionate approach would be to legislate for a presumption that accepted or established grounds would not count as convictions.

3 Within the meaning of section 83 of the Children’s Hearings (Scotland) Act 2014
4 Section 67(2)(j) of the Children’s Hearings (Scotland) Act 2014
5 (2019)C 46
In exceptional circumstances, where it is considered by a multi-agency group that a child continues to present a risk of harm to themselves or others which cannot be mitigated through an order for compulsory measures of supervision, provision could be made for application to the Sheriff Court for the grounds to be classed as a conviction. This would provide a more proportionate approach as it would place the burden on the State to justify retention and disclosure of the information related to the behaviour.

**An approach based on lists of offences is a blunt instrument which does not allow for a proper assessment of risk of future harm and.**

The proposed List A and List B is at odds with the principle that disclosure of childhood convictions should be exceptional and rare. The disclosure of information should be proportionate, relevant and justifiable. Therefore, we suggest the Bill to adopt a similar approach to the one adopted for retention of DNA and other forensic information in the Criminal Justice and Licensing (Scotland) Act 2010, where a separate list of offences for children is available. Furthermore, placing the burden on the State, based on a multi-agency discussion and an application to the court would allow for more holistic and risk-based decision-making.

a. When Other Relevant Information (ORI) is disclosed, there is no formal process to challenge the accuracy of the information recorded.

We are concerned that there is no formal process to establish fact or to challenge the accuracy of the information recorded in cases of ORI. This seems to be based on the fact that ORI is not subject to the same legal tests as conviction information and unlike conviction information. Therefore, there is a higher risk to violate article 8 of the ECHR and 16 of the UNCRC by disclosing information under this heading. If a child has been assessed as not meeting the legal thresholds for either prosecution by the Crown or to require compulsory measures of supervision in the Children’s Hearings System, then there is no legal basis for interference in the child’s rights of privacy, no matter their age. This conforms to the added protections afforded in the processing of data and information relating to children by the Data Protection Act 2018.

It is our view that if ORI is to be disclosed in terms of the proposed scheme, it should be subject to additional scrutiny and more rigorous human rights protections prior to disclosure, not less. Accordingly, the disclosure of any ORI relating to the behaviour of children under the age of 18 should be subject to review by the Independent Reviewer before it is recorded. We note that at present ORI is disclosed on only 1% of enhanced disclosures or PVGs. This statistic should be monitored to ensure it does not increase, with statistics disaggregated by age.

**The Independent Reviewer and Access to Justice**

The Bill introduces an independent review of disclosure information, through which individuals can challenge the inclusion of both conviction and ORI in a disclosure. While we welcome the intention behind providing individuals with a right to challenge disclosure of information, this does present issues in terms of timing, access to justice and representation.

We are concerned that the proposed review and appeal processes, which are different for disclosure and ORI, are excessively complex and this is likely to prevent a barrier to young people exercising their rights. In particular, we are concerned that looked after
children, whilst being disproportionately likely to have conviction or ORI information recorded, may face particular barriers in seeking review of disclosure information.

In order to be effective, the review process needs to be made accessible and adequate for young people (child friendly). Furthermore, the Scottish Government will need to provide sufficient funds to ensure advice and support is available to children and young people.

We are also concerned that the costs in the scheme could present a barrier to access to justice. Therefore, we recommend that fees for review and appeal should be waived for children aged 16 and 17 as well as care-experienced young people, in line with Scottish Government and Disclosure Scotland’s corporate parenting duties (6).

It is our experience that some young people whose previous interactions with the police have been distressing, will find particularly difficult to approach the police service with regard to ORI challenge. Therefore, we would prefer the Bill to adopt a single process for challenging both types of information (Disclosure Scotland and the independent reviewer).

6 In terms of the Children and Young People (Scotland) Act 2014
Children in Scotland

Children in Scotland is the national network for improving children’s lives. Giving all children in Scotland an equal chance to flourish is at the heart of everything we do. By bringing together a network of people working with and for children, alongside children and young people themselves, we offer a broad, balanced and independent voice. We create solutions, provide support and develop positive change across all areas affecting children in Scotland. We do this by listening, gathering evidence, and applying and sharing our learning, while always working to uphold children’s rights. Our range of knowledge and expertise means we can provide trusted support on issues as diverse as the people we work with and the varied lives of children and families in Scotland.

Children in Scotland is pleased to be able to respond to the call for evidence on the Disclosure (Scotland) Bill by the Education and Skills Committee. Children in Scotland is interested in the Bill from two perspectives. We believe that the Disclosure system is essential for safeguarding purposes and the Bill will be a key piece of legislation in defining how we support and protect children and young people. The way the system operates also has a key role in the justice system for many children and young people. The Bill will also impact on Children in Scotland in a practical sense as all of our staff are subject to a Disclosure Scotland check.

Our response will be focused on high level issues and will not address the technicalities of the Disclosure (Scotland) Bill. We will focus on the proposed simplifications to the system and also how the proposed new scheme can ensure that experience with the criminal justice system in childhood and adolescence does not disproportionately impact on job opportunities later in life.

General Comments

Children in Scotland is pleased to see thought being given to the Disclosure system to ensure it fulfils its role in safeguarding. However, it is important to remember that this is only one part of safeguarding for vulnerable groups. It is essential that employers working with vulnerable groups have a clear safeguarding system within their organisation that includes, but is not limited to, undertaking disclosure checks. This system must begin before potential employees undergo a disclosure check by confirming identification and following up on all references.

Children in Scotland is pleased to see that a range of engagement work has been carried out with groups who access services that are covered under the Disclosure scheme. It is important that their views are reflected within the system. However, we are disappointed to see there does not appear to have been any direct engagement with children and young people. This would have provided valuable insight into the views and perspectives of children and young people on what they want from the workforce. We would encourage the Education and Skills Committee to explore findings from our Children and Young People’s Evidence Bank for their reports to identify the views of children and young people in this area.

1 https://evidencebank.org.uk/
Scheme Simplification

Children in Scotland believes that proposed changes to the scheme to simplify the system are welcome. We agree that the current system can be too complex and can cause confusion around what prior issues may appear on a disclosure check.

Partners across the children’s sector such as Clan Childlaw have highlighted in previous consultations on changes to the Disclosure system that the present system makes it very hard to explain to children and young people involved in Children’s Hearings what the impact of behaviour may be on a PVG or Disclosure check in the future, and the impact this may have on their employment. Simplification of the system to clarify what information can be passed on about a child or young person (and what offences will be considered) will help to rectify this issue.

We also agree with the assessment made by CELCIS that reforms to the system in and of themselves will not go far enough. More must be done to support children and young people to understand the system and employers to understand the changes. We would refer the committee to CELCIS’s response to the pre-legislative consultation for further information.

Children in Scotland believes that replacing the current definition of ‘doing regulated work’ with a list of core activities or ‘regulated roles’ is helpful. This will allow employers in sectors that do not work with vulnerable groups as part of their core work to understand when a disclosure or PVG is required.

We also agree with the assessment from the Scottish Children’s Reporter Association and the NSPCC in the pre-legislative consultation that making the Disclosure scheme mandatory for all carrying out ‘regulated roles’ is an appropriate change that will support the safeguarding of children and young people. In their response to the pre-legislative consultation the NSPCC also provided a list of roles that should be considered as ‘regulated work’. We believe this list presents a valuable starting point from which the new Disclosure system should work. We appreciate it may not be possible to prepare an exhaustive list of ‘regulated roles’ and it is therefore important that clear guidance is provided to employers and potential employees about what other roles may fall under this list.

In response to the pre-legislative consultation the Scottish Children’s Reporter Association highlighted that they would like to see the Disclosure system underpinned by a set of principles. We would be interested to see how such a system would work and would encourage consideration of this as the Disclosure (Scotland) Bill passes through the Scottish Parliament.

Children in Scotland is a member of the Independent Care Review workforce strand. As part of this strand of work the importance of relationships has been identified, as has the need for a value-based workforce in the children’s sector. Consideration of a widely implemented values-based recruitment framework could be helpful for assessing whether people are suitable to work with children and young people, and indeed other vulnerable groups. An example of this could be the SSSC ‘Right values, right people: recruitment toolkit’.

We also agree with the proposals to maintain free disclosure checks for volunteers from qualifying voluntary organisations. Volunteers are a vital part of the workforce in the
children and young people’s sector and must be supported to continue to engage in volunteering with no financial restrictions in this area.

**Criminal Record Checks**

Children in Scotland agrees with partners across the sector who have clearly and consistently argued for the need to ensure that the disclosure system does not disproportionately disadvantage children and young people who have been involved in childhood offending. The current system makes it difficult for people with a conviction in childhood or adolescence to gain employment with vulnerable groups, despite the fact that offences may not be reflective of current behaviour.

Children in Scotland believes it is unjust for minor offences in childhood to continue to have a long-term effect on the life changes and opportunities in adulthood. We are pleased to see that the Disclosure (Scotland) Bill aims to take steps to rectify this.

Evidence clearly shows that childhood offending is socially patterned. As CELCIS argued in their response to the pre-legislative consultation, care experienced young people are more likely to be formally involved with the police and have behaviour recorded in relation to this. They are also more likely to be criminalised than their peers. Evidence has also shown that children and young people living in residential care are also more likely to receive a criminal record for minor issues.

We agree with the assessment of partners across the sector that childhood offending must be treated as distinct from adult offending. As the brain develops through childhood and adolescence, children and young people can be more prone to risk taking behaviour, while having less capacity to assess such risk. A recent paper by Augusberger and Elbert highlights a range of reviews that have shown that exposure to trauma can be connected to increased levels of risk taking. It is important to have a wider system that supports children and young people to manage and regulate this behaviour rather than a justice and disclosure system that punishes them disproportionately for it.

The Disclosure system must reflect this and as such we are pleased to see that the Disclosure (Scotland) Bill proposes to exclude offences committed between 12-17 from disclosure records except in specific cases. We are pleased that this takes account of the recent increase to the age of criminal responsibility as laid out in the Age of Criminal Responsibility (Scotland) Bill. We agree with the assessment of partners such as Clan Childlaw that these changes will emphasise the best interests of the child and align the system more closely with the Children’s Hearing system.

We would also encourage the Scottish Government to give deeper consideration to suggestions by CELCIS that convictions up till the age of 25 should be considered for a 5-year period before applications can be made to have these discounted. CELCIS has argued that brain development continues further into the twenties and as such people may still engage in risk taking behaviour that could end up on their record.

3 The Howard League of Penal Reform, 2016, Criminal Care
5 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3445337/
6 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5428957/
Children in Scotland does not have a firm position on reducing the application time for removing convictions up to the age of 25 but believes it is worthy of consideration as the Bill passes through Parliament.

It is worth identifying here that Children in Scotland is supportive of increasing the age of criminal responsibility to at least 14 and believes consideration should be given to raising this to 16. This would have implications for proposals within the Disclosure (Scotland) Bill. This should be considered as the Bill is passing through the Scottish Parliament.

Children in Scotland believes that there are certain instances where it will be clear and obvious that there is a public safety issue related to previous offending and where this must be disclosed. We believe a proportional system should be used to define what sorts of offences may need to be passed on employers. A clear risk assessment process should be used that allows a decision to be made on a case by case basis.

It is also worth highlighting that employers currently have responsibilities to potential employees under The Police Act 1997 in relation to the recruitment of ex-offenders. Changes to the system for disclosure checks and the information that can be passed on from this should not impact on the action taken by employers to ensure that ex-offenders feel comfortable applying to a role and understand the process that will be taken to ensure their suitability for it.

We also agree with the assessments of partners across the sector in relation to the provision of “Other Relevant Information” (ORI’s). The ORI system allows the police to provide information to employers that identifies behaviour that may influence an employer’s view on the employability of a candidate.

We have concerns that the provision of ORI on these grounds could undermine the new system of discounting convictions between the age of 12-17. Provision of ORI could allow employers to access information that relates to convictions without giving access to the convictions themselves. Similarly, to discount convictions between the age of 12-17 we believe that ORI’s should only be granted in situations that relate to public protections. We agree with Clan Childlaw’s assessment that a high threshold should be set, and risk assessments should be used to identify when it is appropriate to pass on information. We also share concerns raised by CELCIS that information about engagement with the police that could not result in criminal prosecution due to the increased age of criminal responsibility could be passed on by ORI. This is not in keeping with the Scottish Governments proposed approach to youth criminal justice.

We are pleased that the proposals contained within the Disclosure (Scotland) Bill will give applicants the right to make representations to the police about the provision of ORI’s. However, we believe this could go further to entirely restrict the provision of ORI’s except in a case of public protection based on a risk assessment. Such a system would be more in keeping with the rights-based approach to youth justice that the Scottish Government has articulated a commitment to.

Amy Woodhouse, Head of Policy, Projects and Participation
CLAN CHILDLAW

Clan Childlaw is a unique legal outreach service for children and young people. Our dedicated child-centred legal service gives practical effect to Article 12 of the United Nations Convention on the Rights of the Child, enabling children to participate in decision-making processes which affect them and allowing their voices to be heard.

We believe that:

- every child and young person should have the opportunity to express their views freely in all matters affecting them and that their views should be listened to and taken account of;
- every child and young person should have the opportunity to be heard and represented in any judicial and administrative proceedings affecting them. We believe that children and young people who need legal advice and legal representation should be able to have their own lawyer;
- children and young people and those who work with them should know their rights and should be able to access information and guidance about their rights and how to exercise them;
- people should be able to move away from childhood mistakes and not be prejudiced later in life by disproportionate disclosure of childhood offending behaviour designated as criminal convictions; a rights and welfare-based disclosure system recognises and accounts for the very different nature of childhood offending and the circumstances in which ‘convictions’ can be accrued. Offending behaviour being addressed within the Children’s Hearings System should not be disclosable.

We improve children and young people’s life chances by using our legal skills and expert knowledge to help young people take part in decisions that affect them and by making sure that children’s rights are realised in Scots Law.

Our evidence is informed by our practice representing children and young people, often within the Children’s Hearings System. We represent children who are the subject of a referral to a children’s hearing on offence-based grounds and who are asking what the consequence will be for them in later life, in relation to disclosure. We are also consulted by young people who are about to apply for a job and are asking if anything will appear on their disclosure. Because of this experience, in 2018 we intervened as a third party in the public interest in Supreme Court cases on the treatment of childhood convictions in England and Wales. (12)

We support the Scottish Government in their policy objective to safeguard children and vulnerable adults whilst achieving a better balance between disclosures in the public interest and protecting an individual’s right to move on with their lives. The Scottish Government recognises involvement in offending behaviour in childhood constitutes a form of adversity that young people have the right to move on from in adulthood. We welcome its commitment to a distinct disclosure system for childhood behaviour and its recognition that care experienced people are disproportionately affected by disclosure (the evidence submitted by Who Cares? Scotland details the far-reaching and lasting effects of this). The particularly destructive effect of disclosing childhood criminal records and the evidence base for distinguishing between child and adulthood records are well documented (the evidence submitted by the Centre for Youth

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12 In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland), R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants), R (on the application of P) (Appellant) v Secretary of State for the Home Department and others (Respondents) [2019] UKSC 3. Our intervention assisted the court with details of the Scottish system and is published here.
and Criminal Justice summarises this). Our youth justice system is designed to address childhood difficulties through a whole system approach to children's welfare and a children’s rights-centred disclosure system is a key element of this.

We welcome the opportunity to simplify, modernise and rebalance the disclosure regime the Disclosure (Scotland) Bill (“the Bill”) presents. Together with the recently enacted Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019, the Bill is a significant milestone in the development of a distinctive disclosure regime for childhood offending.

In recent years, reforms to the disclosure regime have been piecemeal and largely in response to court judgments on article 8 privacy rights - finding automatic indiscriminate disclosure, which does not take into account individual circumstances, incompatible with article 8 rights - and it is right that the whole system is now under review to ensure it is accessible, joined-up and respects those rights, allowing people to move on from past mistakes.

In our response to the 2018 Scottish Government consultation on PVG and the Disclosure of Criminal Information we set out our concerns about the current system and its treatment of childhood offending and our evidence here is confined to the aspects of the Bill relating to childhood offences. Whilst welcoming the progressive nature of the Bill, particularly the proposed regime for treating childhood (aged 12-17 years) convictions separately from adult convictions, ending automatic disclosure of childhood conviction information, we have a number of concerns about the proposals and how they will work in practice.

Before setting out these concerns, and due to the complexity of the proposed scheme read along with current legislation, we have attempted to summarise the implications of childhood offending in the table below:

### Level 1 Disclosures

<table>
<thead>
<tr>
<th>Under 18s</th>
<th>Unspent</th>
<th>Spent</th>
<th>Other Relevant Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Convictions” in Children’s Hearings System</td>
<td>Not Applicable, as under the Management of Offenders (Sc) Act 2019 these are spent immediately.</td>
<td>NO</td>
<td>NO</td>
</tr>
<tr>
<td>Conviction in adult court for under 18</td>
<td>YES – Included if Disclosure Scotland think ought to be; have right to independent reviewer process and then appeal to sheriff on point of law</td>
<td>NO</td>
<td>NO</td>
</tr>
</tbody>
</table>

### Level 2 Disclosures

<table>
<thead>
<tr>
<th>Under 18s</th>
<th>Unspent</th>
<th>Spent</th>
<th>Other Relevant Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Convictions” in Children’s Hearings System</td>
<td>Spent immediately under Management of Offenders (Sc) Act 2019</td>
<td>List A</td>
<td>YES – if Chief Constable thinks relevant and ought to be disclosed; applicant can ask for review: first review is</td>
</tr>
</tbody>
</table>

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The proposed system for disclosing childhood behaviour builds in the following notable welcome safeguards:

- An active decision must be taken by Disclosure Scotland that childhood conviction information ought to be disclosed. Childhood convictions cannot be automatically disclosed.
- Applicants have the right to seek review of that decision by an Independent Reviewer and then a Sheriff on a point of law.
• Applicants have the right to know the reasons for a decision to disclose and must be informed of their right to apply for independent review. They have the right to give their representations to the Independent Reviewer and must be notified of that right.
• No disclosure will be given to a third party until all the review processes are complete and the individual had requested disclosure to a third party.
• Information on childhood convictions will be listed separately on a disclosure certificate.
• In relation to List A convictions, there is no longer an initial period during which Disclosure Scotland cannot consider whether a conviction ought to be disclosed. A List A childhood conviction will be subject to the review procedure for childhood convictions rather than the removable convictions process applicable to adults (who must wait 11 years to seek removal).
• Other Relevant Information will be regulated and decisions by Police Scotland to disclose are subject to review. We have long been concerned about Other Relevant Information, which currently creates huge difficulties in advising children and young people, because in a Children’s Hearing even if offence grounds are not established, there is a risk that the behaviour could appear on a higher level disclosure. The proposal in the Bill to place duties on the Scottish Ministers to issue guidance to Police Scotland and for them to have regard to such guidance is therefore welcome. Very significantly, the applicant now will see any Other Relevant Information before it goes to an employer or other third party.
• The relevant date for classification as a childhood conviction is the date of offence rather than the date of conviction, meaning individuals who committed an offence aged 17 but who were convicted after their 18th birthday will not be penalised. We note in contrast that in the Management of Offenders (Scotland) Act 2019 the relevant date is the date of conviction.

We have the following significant concerns however:

**Complexity**

The way the Bill is presented and its place as just one of several relevant pieces of legislation, makes the system complex to understand. Clear information and guidance will be imperative to allow applicants for disclosure to access their rights. Because there are different consequences for children depending on whether the conviction is from a children’s hearing or a court, whether non-conviction information is retained by police as Other Relevant Information, or whether the offence is a List A, List B or an unlisted offence, continues to make it impossible to advise a child with any certainty as to the long-term consequences of offending behaviour. A system so complex as to mean there is the lack of foreseeability, is at risk of being incompatible with Article 8 ECHR.

**Offending Behaviour addressed within the welfare-based Children’s Hearings System should never be disclosed**

Offending behaviour within the Children’s Hearings System can be disclosed in Level 2 disclosures which is not in-keeping with the ethos of the welfare-based system. Children who are charged with offending behaviour are considered having regard to their welfare and best interests and not on a punitive basis. Allegations of offending behaviour, including the most serious offending, are addressed in the context of the whole circumstances of the child, and often there are wider family issues that are best addressed at the same time, being considered simultaneously under a number of the grounds listed in section 67 of the Children's Hearings
(Scotland) Act 2011. On this basis, we consider it completely inappropriate that any offences established in the Children’s Hearings System are disclosable. We would indeed argue that referring at all to the term "conviction" is inappropriate within this system given the focus on the needs of the child rather than the alleged offending behaviour.

The disproportionate negative effects of disclosure on care experienced people, who are more likely to have contact with police and accrue convictions particularly whilst being part of the Children’s Hearings System which is making decisions about their wellbeing and has corporate parenting duties, could at least partially be addressed by rendering all Children's Hearings ‘convictions’ as non-disclosable.

In our response to the 2018 consultation (Q.94), we supported applying the same disclosure system the Age of Criminal Responsibility (Scotland) Act 2019 has created for children under 12 to childhood offending by those over 12. We proposed this system should apply to all convictions accrued up to the age of 25. This would be accessible and understandable to children and young people and, in line with the principle that the welfare of the child is paramount, would stop the behaviour being treated as a conviction.

Unpredictability of long-term implications of Childhood Behaviour

Within the proposed scheme, it is impossible to advise a young person of the long-term implications of accepting statement of grounds referring to offending behaviour, apart from to say that there may be implications. This is because it could appear on any Level 2 disclosure or as Other Relevant Information. In our current practice, we often make the argument to the Reporter to the Children’s Hearings that behaviour be addressed under conduct grounds rather than offence grounds, in order to minimise any potential future disclosure. This difficulty remains within the proposed scheme.

The Need for Legal Advice and Legal Aid

Within the proposed scheme, as conviction and non-conviction information could be disclosed, children being presented with a Statement of Grounds relating to offending behaviour in the Children’s Hearings System will still, given the potentially serious implications of future disclosure as a result of accepting offences, require access to legal advice and representation from a solicitor and legal aid. Currently the legal aid duty scheme does not extend to statements of grounds in relation to offending behaviour. This means that a young person may not have a solicitor to explain the system to them.

Onus on Applicant to seek Review

The onus will be on the applicant to seek review of a Disclosure Scotland decision or of the Chief Constable’s decision that information ought to be disclosed. This contrasts with the Age of Criminal Responsibility (Scotland) Act 2019, where pre-12 behaviour Other Relevant Information is automatically reviewed by the Independent Reviewer before it can be disclosed. The onus is not on the applicant to apply for review. We understand that Disclosure Scotland will make the application process as seamless as possible, but our view is that this burden should not rest with the applicant.

No framework for Decision-making by Disclosure Scotland or Independent Reviewer
The Policy Memorandum sets out the intention that 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.” Disclosure Scotland can gather information from relevant persons to assist them to determine whether a childhood “conviction” ought to be disclosed.

However, there is no framework for decision-making on the face of the Bill beyond the ‘ought to be disclosed’ and ‘relevant’ tests. This limits transparency and the basis for legal challenge to decisions. Decisions by the Independent Reviewer can only be appealed on a point of law. It would be more appropriate to further define the basis on which decisions will be made in the Bill itself. These should include the context of the childhood offending, in keeping with the approach of the Children’s Hearings System which looks at the whole circumstances of the child. We understand guidance will be drafted by Disclosure Scotland, but this would not be legally binding. The Guidance issued by the Scottish Ministers about the exercise of the Independent Reviewer’s functions pursuant to section 17 of the Age of Criminal Responsibility (Scotland) Act 2019 will also be of relevance.

It is imperative that clear, accessible information on processes and rights are made available and accessible. Applicants for review may well need access to legal advice, given the implications of such decisions. Their representations to the independent reviewer are likely to be strengthened through the advice of a solicitor.

**Offences Lists**

As already explained, our view is that there should be no need for “Lists” at all, in relation to Childhood Offending behaviour as these should not be disclosed. However, if the “Lists” are to remain applicable to children, there should be separate offence lists for children and young people than from those for adults. The issue is highlighted in relation to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening or abusive behaviour) which has now been moved from List A to List B. This is welcomed in relation to children as convictions under this section can often be accrued by young people within the care system, particularly for example within residential units for relatively minor offending behaviour. We also note that fire-raising, an offence which when committed in childhood should be distinguished from adult offending, is to now be a List A offence. This emphasises the need for a different approach to childhood offending and would be resolved by our already outlined position of non-disclosure.

**Protection against Self-disclosure**

The Bill does not include provisions equivalent to those in the Age of Criminal Responsibility (Scotland) Act 2019 to protect individuals against self-disclosure. There is a risk under current proposals that there may be situations whereby a person is required to self-disclose something which within the provisions of the Bill, the State may in fact decide not to disclose.

**Review of the Police “Weeding” System**

Although we understand that this issue is out with the scope of this legislation, it is important to acknowledge that the system for deciding what information is or is not retained on police records also needs urgent review.
CCPS - Coalition of Care Support Providers in Scotland

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

Summary

1. Fees
   Further clarity is required on how fees work for disclosure checks and the Protection of Vulnerable Groups (PVG) scheme, and size of the fees involved, as we are concerned that this will result in barriers to entry for people looking to work in the third sector as care providers, both as volunteers and paid staff.

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

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

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

4. Impact of ORI and Review of Decisions on Recruitment
   The opportunity for individuals to request reviews on disclosure statements is welcome, but the process described is likely to impact on recruitment, potentially acting as a disincentive to apply.

5. S.50 - considering a signatory/counter-signatory for role of Suitable Person
   We were concerned that one of the factors to be considered, ‘other information held by Ministers’, was too broadly defined and may have privacy implications although dialogue with Disclosure Scotland (DS) indicates that guidance should address this.

   These points are expanded in the following pages.
1. Fees
   a) Under S.62(2), fees may be charged for changing prescribed details of accredited bodies’ signatory/counter-signatory (e.g. addresses if they move), and also for nominating a signatory/counter-signatory. This doesn’t happen currently and will be an unnecessary additional cost for the voluntary sector providers of social services.
   b) Fees are charged for reviews of level 1 and level 2 applications. In addition to noting that this process presents a challenge for recruitment (see point 4 in this document), these fees are a further disincentive for people to apply to work in regulated roles.
   c) It’s not clear from the legislation or the policy memorandum whether volunteers will be expected to pay for disclosure, nor whether volunteers will continue to have fees waived to be members of the PVG scheme. The annual CCPS workforce survey, covering almost half of the voluntary sector workforce, showed that in 2018/19 ninety two percent of respondents used volunteers and use is increasing. Forty five percent reported an increase in the use of volunteers compared to the forty two percent reporting this in 2017/ 18. We would like confirmation that volunteers will not be expected to pay for disclosure nor to be members of the PVG scheme, as otherwise it imposes a significant barrier to volunteering and a cost to our members.
   d) Another area which hasn’t been addressed since our submission to the consultation is whether volunteers would be expected to pay to be on the PVG scheme upon becoming paid staff. Given the high number of volunteers working within the sector, this remains a significant concern.

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

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

4. **Impact of ORI and Review of Decision on Recruitment process**
   a) The legislation lays out a review process for the information in the disclosure in S.7-12 and S.23-33. This review can be requested, then submitted for independent review and finally, if on a point of law, reviewed by a sheriff.
   b) PVG enrolment will be compulsory for regulated roles, requiring employers to build extra time into the recruitment process to potentially allow for review.
   c) This is likely to impact on members in two ways. Firstly, roles dependent on external funding cannot start as quickly, so projects that have received such funding must complete the work in a shorter time. If conditions of funding insist on posts starting by a certain date, it potentially requires our members to make a choice between a swift recruitment to comply with funding conditions and running a recruitment process that is procedurally fair to all applicants.
   d) Secondly, the time required by the review process may act as a disincentive to apply for work within the sector for applicants with previous convictions. They may be concerned that any delay to receiving a disclosure statement could prejudice employers against them. Furthermore, review also requires applicants to pay for it, which is another barrier. Finally, some members have reported that lived experience of the justice system can be of value when delivering voluntary sector social services and that this might be lost if applicants with previous convictions decide not to apply for posts in our sector.
   e) It is unclear from the legislation how many times an applicant might have to go through this process when applying for jobs that are considered regulated.
   f) Given that social care recruitment is currently facing well-evidenced recruitment and retention challenges, we are keen that this legislation avoids creating further barriers to employment.

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

a) Under S.50(1)(g) the Ministers must have regard to 'any other information held by Scottish Ministers' when considering if someone is a suitable person to receive disclosure information. This is a broadly-defined term and does not indicate what other information they consider, where it comes from within government, what permissions were associated with its use, what the original intention for use of that information was.

b) There is a concern that members cannot tell their employees what checks they can expect to have run as to their suitability for the role of signatory or counter-signatory, since they have no way of knowing what 'other information' DS would be making use of.

c) DS have assured us in correspondence that this broad definition is not their intention and it should only relate to information already held by DS in relation to its functions under S.47-57. They have said that explanatory notes will make clear that this is not a wide-ranging power. We welcome this and hope it addresses our concerns that the legislation, as it currently stands, might impact on the Article 8 right to privacy and possibly be non-compliant with both the European Convention of Human Rights (ECHR) and the General Data Protection Regulation (GDPR).

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

**19 August 2019**

**CCPS – Coalition of Care & Support Providers in Scotland**

About CCPS-Coalition of Care & Support Providers in Scotland

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

CCPS membership comprises over 80 of the most substantial care and support providers in Scotland’s third sector, providing high quality support in the areas of community care for adults with disabilities and for older people, youth and criminal justice, addictions, homelessness, and children’s services and family support.

Our members support over 206,000 people and their families; employ approximately 43,000 staff and work with approximately 5000 volunteers in providing services. They work in all 32 of Scotland’s council areas.

CCPS is a company limited by guarantee registered in Scotland No. 279913, and as a Scottish Charity registered with the Office of the Scottish Charity
Colleges Scotland

Introduction

Colleges Scotland is the collective voice for the college sector in Scotland, representing its interests and ensuring that colleges are at the heart of a world class education sector that is recognised, valued and available to all. Colleges Scotland, as the membership body, represents all 26 colleges in Scotland, which deliver both further education and around 26% of the provision of all higher education in Scotland.

As an organisation we welcome the call for evidence on the Disclosure (Scotland) Bill and the opportunity to respond to the Scottish Government’s consultation on potential improvements.

Background

The Scottish Parliament’s Education and Skills Committee is seeking views on the Disclosure (Scotland) Bill introduced by the Scottish Government on 12 June 2019. The Bill will make changes to the system of criminal record checks which is administered by Disclosure Scotland.

Disclosure means sharing sensitive personal information. Disclosure Scotland checks and shares information about people’s criminal records. This helps organisations to employ the right people for certain types of work, like working with children or protected adults.

The Committee is considering whether the Parliament should agree to the general principles of this Bill and, if so, what improvements could be made to it.

Consultation Response

Colleges Scotland has consulted with its members on the proposed changes and forms a sector response which is set out below.

- We welcome the reduction in the four main levels of disclosure (basic, standard, enhanced and PVG) to two (Level 1 and Level 2) offered under the 1997 Act and the PBG Act. However, the complexity of the disclosure system lies not only in the number of products available, but in the lack of understanding of the underpinning legislation and difficulty in navigating the system;
- The introduction of a mandatory PVG Scheme for people working with vulnerable groups;
- We welcome the replacement of 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);
- We welcome the intention to end the lifetime 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;
We welcome the 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;

We welcome the establishment of 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;

Colleges Scotland
August 2019
Community Justice Scotland (CJS) welcome the opportunity to comment on the Disclosure (Scotland) Bill (the Bill). As Scotland’s national body for community justice, we have a strong interest in supporting improvements to systems and processes that can help foster people’s rehabilitation and reintegration into their communities, helping make Scotland safer. Access to employment, learning and volunteering are all routes to providing people with the opportunity to reintegrate successfully, to aid their rehabilitation and ultimately to reduce the likelihood of further offending.

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

Supporting people’s rehabilitation journey

As we have outlined previously, we subscribe to the view that work (paid or unpaid) is a key factor in desistance; as identified in a range of academic studies on the subject. Employment in and of itself does not automatically lead to desistance but being in a job, other form of work or other meaningful activity can influence a person’s sense of self-worth/esteem and contributes to the idea that one has a stake in society, as shown in our Second Chancers campaign.

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

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

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

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16 Second Chancers Campaign, Community Justice Scotland, 2018 [https://secondchancers.tv/](https://secondchancers.tv/)
of vulnerable people while helping to reduce the stigma that people with convictions may face.

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

**Reduced periods for Disclosure**

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

**Applicants seeing their disclosure first and routes to appeal**

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

**Disclosure of childhood convictions**

We strongly support the move to not automatically disclose convictions that happened when a young person was under the age of 18. This is in line with the positive progress Scotland has made in bringing legislation into line with evidence and best practice about young people who offend, including the planned incorporation of the United Nation’s Convention of the Rights of the Child into Scots law. This at a stroke would reduce the likelihood that people will experience discrimination based on events that happened when they were a child, which have no reflection on their current or future potential to work or study as fully rehabilitated adults. Acknowledging rehabilitation in our justice system is important. As stated in the submission by the Centre for Youth and Criminal Justice (CYCJ), it is also important that ‘children have the right to “move on” from offending behaviour and to put offences committed in childhood behind them’.17

We do have a note of caution – we recognise that there is a necessity for a mechanism to disclose conviction or non-conviction information of an extreme or exceptional nature, as is afforded by the ability to disclose information as Other Relevant Information (ORI). We are concerned however that without clear and rigorous guidelines relating to balancing public protection with the rights of the individual, this mechanism is open to encouraging over-disclosure. Any consideration for listing (barring), disclosure, or appeal must be taken by professionals highly trained in risk assessment and the evidence base for association between previous offending and future risk.

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17 Submission from Centre for Youth and Criminal Justice, University of Strathclyde, to Scottish Parliament Education & Skills Committee, August 2019.
As evidenced in the CYCJ submission, the fact that childhood convictions (including those of now adults) will be listed under a separate heading to distinguish from adult offending conveys an important message. Young people aged under 18 at the time of offence are often over 18 when their cases are considered and dealt with in court so age at the date when an offence was committed should be the determining factor.

Other relevant information (ORI)

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

Representation Review and appeal

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

Proposed criminal penalty

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

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

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

Potential lack of consistency with existing Government policy

The proposed penalty of a new offence with a custodial sentence of up to 12 months in cases when people fail to renew their PVG (Protecting Vulnerable Groups) scheme membership every 5 years is inconsistent with the recent extension of the Presumption Against Short Sentences (PASS) approved by the Scottish Parliament. It is also out of step with PASS’s policy objective that the most appropriate use of custody is primarily for cases where the crime committed has caused serious harm. Not only may this not always be the case when people fail to keep their paperwork up to date, the proposal will have the
consequence of net-widening criminality when the existing practice (lifetime monitoring) effectively ensures that this would not happen.

**Fees**

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

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

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

**Unnecessary requests for disclosure**

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

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

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

**Community Justice Scotland**

**August 2019**

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Connect

Connect (SPTC) is a long-standing independent parents’ organisation and the only Scottish charity which is dedicated to supporting parental engagement in education and learning. We provide membership services to Parent Councils and PTAs, as well as offering advice and information to individual parents about any aspect of the education of their child, or the wider education system. We support education professionals in developing their skills and understanding around effective partnership working with families and the wider community.

Connect welcomes the opportunity to respond to the Scottish Parliament’s Education and Skills Committee’s call for views on the Draft Disclosure Bill. As SPTC we were closely involved in the development of the initial legislation, with specific regard to its impact on parents/parent groups in education settings. At that time, we expressed concern about the potential for both confusion and misuse, and the impact this would have on the numbers of individuals on the Scheme.

Since the Protecting Vulnerable Groups (PVG) Scheme was introduced we have been providing training, information and advice to our members about the Scheme and effective child protection, and for the last two years Connect has been an Intermediary Body with Volunteer Scotland for those member groups that wish to process PVG applications for entitled volunteers.

1. Background

We have followed the development and implementation of the PVG Scheme and its impact on parent groups from the outset, and found the following issues with the current system:

- Defining Regulated Work is not straightforward and is open to interpretation. This particularly relates to the types of activities parents and parent groups may be involved in.
- Individuals joining the Scheme and the organisations for which they work do not understand the membership nature of the Scheme, resulting in numbers on the Scheme growing steeply and far exceeding the Government’s own expectations.
- PVG (as disclosures before them) are perceived as a mechanism which protects children in any and every circumstance, rather than being one part of a raft of child protection measures. This has resulted in over-use and manipulation. For instance, we have worked with parents who have been told by their Local Authority/school that they must join the Scheme if they want any active roll on the parent group. We have also heard of parents being required to join the Scheme by the Local Authority, so they could take part in a ‘Stay and Play’ activity with their child, which was particularly aimed at vulnerable families.

Connect’s response to the Scottish Government and Disclosure Scotland 2018 consultation on proposed changes highlighted the following:

- How many parent groups find the concept of Regulated Work difficult to understand within the context of the occasional volunteering/participation roles they may have.
Agenda Item 3

- Parent groups can be pressured by the school and Local Authority to have all members join the PVG Scheme, even though they are not carrying out Regulated Work
- That any changes should make it clearer who needs to be on the Scheme, and who doesn’t; it should be more accessible for everyone who needs to join; and there should be a set term of membership, so people are not left on the Scheme for life
- The risk of policy conflict between the risk averse nature of schools and LAs and the drive for greater parental engagement and involvement in the life and work of schools and education settings.  

2. The Draft Bill

We welcome the intention to simplify the Disclosure process, with PVG Scheme Records and PVG Scheme Record Updates to be combined under the one Disclosure product of Level 2 PVG. In our experience the difference between Scheme Record and Record Update has caused confusion for a number of parent groups. We are also glad to see membership will now require renewal after five years, meaning individuals will not be left unknowingly on the Scheme for life. However, we would like more clarity on the following points.

1. 2.1 Regulated Roles as defined in the Draft Bill

We are concerned the concept of Regulated Roles and the corresponding legal test could be as confusing as Regulated Work has proven to be. To us, it appears Regulated Roles are a half way measure between Regulated Work and the list of Protected Roles proposal from the consultation, setting out a legal test where a role is designated as Regulated if it includes one of the activities listed in the Bill as a ‘necessary part of the role’.

From the perspective of parents involved with their school or Parent Council/PTA, we see the key phrases which would define Regulated Roles are ‘day-to-day supervising’ and ‘holding significant power or influence over children’. Parent groups are generally representative or fundraising focussed and do not involve day to day supervision of children nor holding significant power or influence over children, so parent group members should not be in a Regulated Role as set out in the Bill.

Where parent groups run dedicated clubs and activity groups for children, such as after-school or sports clubs, it would be mandatory that club volunteers hold PVG. We agree with this, and currently offer our services as a Volunteer Scotland Intermediary Body to support our members with PVG applications for this purpose.

While the activities the Bill defines as being a Regulated Role do not form the core part of parent group activities, many do run occasional activities for the school community including children, so we feel this remains open to interpretation. With the Scheme to become mandatory, this could cause an increase in the current trend where parent groups decide, or are pressured by the school, to have their members join the PVG scheme just in case. While these would be caught by the new application process as unsuitable for PVG if the new system works as intended, this would still result in time being wasted by parent groups. Some groups

have little admin capacity due to being dependant on a small pool of volunteers and so may be discouraged from holding activities and events due to uncertainty.

2. 2.2 Difference between school-led and parent group-led volunteering
There is no explicit mention of volunteering in schools in the Draft Bill or the accompanying memos and notes, or of the difference between establishment and Parent Council/PTA-led volunteering. However, church volunteering, such as for Sunday school or youth church activities, is specifically mentioned. We are unsure why government has chosen to be so specific regarding this type of volunteering when a wide range of community and voluntary groups rely on volunteers, and this is potentially unhelpful as such a blanket application in this scenario may lead others to also adopt a blanket approach.

We believe it is important the Bill recognises the difference between parents volunteering in the classroom/school establishment on behalf of the school (and so under school authority) and that done on behalf of the parent group, which is independent from the school.

3. In Conclusion
We understand Disclosure Scotland will evaluate role descriptions according to the activities listed in the Bill and will maintain a list of Regulated Roles. We would argue this evaluation process should be as transparent as possible, with explanations as to why a role has been deemed to be Regulated or not qualifying.

It is also of utmost importance Local Authorities act consistently with regard to parent groups and volunteers and receive support and guidance from Disclosure Scotland and COSLA to do so. Most importantly, PVG must be recognised as only one aspect of child protection. It can only identify an individual unsuitable to work with children if they have been identified by the system, and so must be accompanied by robust and common-sense child protection policies and practices.

Eileen Prior
Executive Director
20 August 2019
**COSLA**

**Background**

1. COSLA welcomes the opportunity to respond to the call for views for the Disclosure (Scotland) Bill and we trust our response will be of assistance to the Education and Skills Committee in their considerations.

**Principles of the Bill**

2. We welcome the broad principles of the bill to simplify the process of applying for disclosure and the continued importance of retaining the balance between ensuring that children and protected adults are safeguarded and providing individuals the opportunity to take the next step after a conviction and enter employment, education or training.

3. Employment is considered as one of the most strongly correlated predictors of reduced reoffending and entering employment, education on training allows individuals with previous convictions to re-integrated back into their communities and wider society.

4. For individuals where the nature of the conviction is less serious, this may address some of the recruitment challenges currently being experienced by local authorities, other public sector partners and businesses, which have the potentially to be compounded by Brexit.

**Comments on Key Policy Changes Within the Bill**

- **Reducing four main levels of disclosure to two.**

  Simplifying the number of disclosure products available is a welcome step. However, the products and processes will remain complex. The new process for establishing which type of Level 2 Disclosure appears closely linked to the development of a new digital system, which has the possibility of requiring greater input from local authorities (in their role as accredited bodies) during the application process than at present.

  We would expect that support will be available to both local authorities and individuals to navigate the new disclosure products and the digital system during implementation, and that any resource required to interface with the new system will be met.

- **Introducing a mandatory PVG Scheme**
- **Creating ‘regulated roles’ that trigger mandatory PVG scheme membership as opposed to ‘doing regulated work’**
- **Ending life-time PVG scheme membership**
- **Enabling the Scottish Ministers to impose standard conditions individuals who are under consideration for inclusion in one or both of the lists held under section 1 of the PVG Act**
We are supportive of the changes to the PVG Scheme, including:

- Making the scheme mandatory, which would ensure children and protected adults are safeguarded and public confidence in the system is strengthened.

- Ending life-time membership of the PVG scheme and replacing with a requirement to renew every 5 years, which should decrease the financial burden on Disclosure Scotland and remove the unnecessary monitoring of individuals who are no longer doing regulated work. However, if the renewal process requires any additional input for local authorities, resourcing this must be met by the Scottish Government.

- A move to ‘regulated roles’ (from ‘regulated work’) which should provide greater clarity on who requires PVG Scheme membership. We are broadly in agreement with the descriptions of ‘regulated roles’ under Schedule 2 and Schedule 3 provide a clear overview of which what jobs should be covered by the PVG scheme.

- Allowing Disclosure Scotland to impose temporary limitations and conditions for individuals being considered for listing, as this should ensure safeguarding concerns are addressed.

- **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.**

As set out in the Policy Memorandum for the Bill less than 1% of PVG applications include Other Relevant Information (ORI). We are broadly supportive of allowing applicants to see and challenge the relevance of ORI before it is shared with third parties and providing guidance for police chief officers in relation to the disclosure of ORI.

- **Ending the automatic disclosure of convictions accrued while aged between 12 and 17 years and introducing an assessment by Disclosure Scotland as to whether these convictions are disclosed.**

COSLA has supported the principle of raising the Age of Criminal Responsibility to 16, recognising that in many cases convictions accrued during this period could not be considering in the same light as convictions accrued as an adult, and that involvement with the justice system at a young age was associated with poorer outcomes later in life. Therefore, we are supportive of the provisions within the Disclosure (Scotland) Bill to remove the automatic disclosure of these convictions. We welcome the role of Disclosure Scotland in assessing if convictions should be disclosed, and the proposed independent review process, to ensure that public protection is safeguarded in relevant cases. COSLA and our member authorities are happy to work with Disclosure Scotland.
and other interested parties to ensure this is implemented consistently in the spirit of the Bill.

- **Changing the period after which an application for removal of a conviction for an offence can be made.**

  We are supportive of the proposal for individuals to apply for a conviction to be removed 11 years after the date of conviction and the proposed measures to simplify the processes of removing convictions. These processes outlined in the bill will ensure that individuals are not unnecessarily held back from making progress in their personal development following certain convictions.

- **Establishing clear procedures for the registration of accredited bodies who can countersign Level 2 applications.**

  We are supportive of increased clarity around the role of accredited bodies and believe the proposed code of practice should be developed with in partnership with accredited bodies, included local authorities.

- **Providing new referral powers for Scottish councils and integration joint boards.**

  The provisions within the Bill for local authorities and integration joint boards to have new referral powers to reflect the changes in adult social care since the introduction of self-directed support require further consideration. At its core self-directed support is aimed at empowering individuals to take control of their care arrangements including acting as an employer directly. This means that the local authority does not have a role in the direct provision of care for these individuals, in some cases Councils do not hold any information on those employed directly by SDS budget-holders. As such we are concerned that:

  i) this provision creates the expectation that the local authorities will act as a sort of regulatory body for those employed through self-directed support within their area, which is not consistent with the aims of SDS and we would be concerned of the possible liabilities that this may place upon local authorities.

  ii) The practical operation of the proposal in light of information available to local authorities on those employed through self-directed support and the possible challenges of sharing information with local authorities to make referrals in light of GDPR regulations.

  We expect further engagement with the Scottish Government on the provision ahead of consideration of the Bill at Stage 2.

**Resources**

5. The Financial Memorandum for the Bill estimates that the impact on local authorities will be relatively small, with an increase of £25 per Local Authority to register in their
role as an accredited body and a possible increase of £5 per disclosure for local authorities who opt to fund the disclosure for employees.

6. We would expect Scottish Government to meet any additional resources required for local authorities to discharge the new referral powers and would look for this to be reviewed after a full year of operation.

7. Whilst the costs identified so far are relatively minor increase in fees, they must be set against the significant ongoing financial constraints which Councils are currently working within, especially in relation to reductions in core funding.

Other Considerations

8. The Bill contains a number of mechanisms to review and challenge the inclusion of information and convictions. There should be regular monitoring and evaluation of the use of these mechanisms and this information to should be available publicly.

9. We welcome the intention of the Bill to update and simplify the legal framework for disclosures. It is helpful that the List A and List B Offences are clearly defined for ease of reference.

10. As care-experienced individuals are likely to have a different perspective on convictions and their impact, the Education and Skills committee should consider engaging with the Independent Care Review on the intentions and provisions within the Bill.

11. Noting that the proposed new system of disclosure appears to be driven by a new digital system, we welcome the recognition within the Policy Memorandum that other methods of delivery and payment will be retained to ensure that the disclosure process remains open to all.
Criminal Justice Voluntary Sector Forum

Introduction

The Criminal Justice Voluntary Sector Forum and its members welcome this opportunity to provide evidence in response to the Education and Skills Committee’s call for views on the Disclosure (Scotland) Bill. This response has been developed through discussions with our membership and draws on their experiences both as employers and as service providers working with those in the justice system.

The Criminal Justice Voluntary Sector Forum (CJVSF) is a national network of voluntary sector organisations working in criminal and community justice in Scotland. CJVSF is hosted by the Coalition of Care and Support Providers in Scotland and, with the help of its members, aims to:

- Support voluntary sector collaboration in justice
- Strengthen the third sector’s role in local Community Justice processes
- Strengthen the involvement of the third sector in national community justice, penal policy and legislative development
- Support third sector organisations to continually improve their own practice and contribute to the development and sharing of good practice

CJVSF Support for the General Principles of the Bill

CJVSF members support the general aim of this Bill to introduce a more individualised and proportionate approach to the disclosure of previous criminal convictions and safeguarding under the Protection of Vulnerable Groups Scheme.

As the Scottish Government have recognised in their National Strategy for Community Justice, being able to access employment, education and housing are key in ensuring that people with criminal convictions are able to re-establish their lives and to become contributing members of society as they put their past offending behind them. Research shows that employment in particular can be a key factor in ensuring that people in contact with the justice system are able to achieve their potential and to lead lives free of crime.

A criminal record, however, particularly one that involves a period of imprisonment, can be a barrier to people establishing productive lives and people can suffer considerable stigmatisation as a result of having to disclose previous criminal convictions. Evidence would suggest, for example, that employers are less likely to hire a person once they become aware of their criminal record. These negative effects are especially serious for children and young people, who may receive a conviction early in life that then follows them for the rest of their lives despite their best efforts to put their offending behind them as they grow older.

The current system makes these problems worse as it does not distinguish between relevant and irrelevant convictions. Disclosure checks and the PVG Scheme record currently reveal all unspent convictions and, in some instances, any spent convictions on the Schedule 8a or 8b lists. The system at present also allows the sharing of non-conviction information, called Other Relevant Information, which is passed on by Police Scotland through certain disclosure checks.
and through the PVG scheme monitoring processes. The system also provides people with very limited opportunities to challenge or review what is disclosed about them and the current process of application to a sheriff to challenge the disclosure of information is slow and expensive to pursue. This means that people are having to disclose previous criminal convictions that may have no bearing on their current situation and which may unfairly prevent them from accessing employment or education that would help them to make a positive contribution to society.

The changes introduced by this Bill, however, offer an opportunity to move towards a more proportionate and balanced system of disclosure that limits the unnecessary sharing of a person’s criminal record. CJVSF members were particularly supportive of the introduction of changes that limit the disclosure of criminal convictions for those under the ages of 18 and the introduction of new review mechanisms to allow people to challenge the unnecessary disclosure of irrelevant convictions. We believe that the changes in this Bill will support more people to build positive and productive lives as they put their offending behaviour behind them and enter into employment or education, whilst still allowing for the disclosure of criminal conviction information to ensure that vulnerable children and adults are protected.

**CJVSF Members Views on the Proposals in the Bill**

The views of CJVSF members on specific aspects of the Bill are set out in the sections below.

*Changes to the disclosure of criminal convictions received between the ages of 12 and 17*

CJVSF members support the introduction of changes to disclosure for those convictions obtained by people aged 12-17 at the time of their conviction. Evidence is clear that offending behaviour by children and young people requires a different approach to that of adults and that the negative effects of the justice system on children and young people are profound. CJVSF members therefore support the proposals in the Bill to greatly reduce the amount of information automatically revealed about childhood convictions whilst retaining the ability to disclose those serious convictions that may be relevant to future checks.

Whether the proposals included in the Bill are successful or not will depend on the internal processes and guidance developed by Disclosure Scotland to determine whether a conviction obtained between the ages of 12 and 18 should be disclosed. The current tests set out in Paras. 102 & 103 of the Policy Memorandum lack clarity and risk a broad interpretation that could lead to little change from current practices. Developing comprehensive guidance on what constitutes a relevant offence and on the frameworks that should be used by Disclosure Scotland in determining whether to disclose a criminal conviction will be vitally important. To do this effectively Disclosure Scotland will need to ensure that they engage with a range of stakeholders, including with people who have received convictions when young.

CJVSF members also stressed the need to ensure that a decision to include a childhood conviction as part of a disclosure check is not seen by employers as being determinative of an individual’s suitability for a role. There is a risk that employers will take Disclosure Scotland’s decision to disclose a criminal conviction as an assessment that the person they are considering is not a suitable or safe candidate by virtue of the decision that a previous conviction “ought” to have been disclosed. Disclosure Scotland will therefore need to ensure
that sufficiently clear explanations of why a conviction is being disclosed are provided to employers. This will also need to be reflected in the training Disclosure Scotland provides to employers.

**Disclosure Scotland review of convictions and role of independent reviewer**

CJVSF members welcomed the proposals in the Bill to introduce an internal review process for the disclosure of relevant convictions obtained between the age of 12 and 17 and for the review of disclosure of Schedule 8a and 8b convictions. Members also supported expanding the role of the independent reviewer created by the Age of Criminal Responsibility Act to allow individuals to appeal against the inclusion of criminal conviction information on their disclosure and PVG scheme records.

These are considerable improvements on the current processes, which provide no right of appeal for the disclosure of the majority of criminal convictions and allow only limited rights of appeal through the courts for those convictions on the 8a and 8b lists.

The processes surrounding the internal Disclosure Scotland reviews and the independent reviewer will, however, be key to ensuring that the system is fair and effective when considering appeals. CJVSF members expressed concerns that the Financial Memorandum proceeds on the assumption that the independent reviewer will be engaged for around 4 days’ work per month to process any appeals that follow the internal Disclosure Scotland review process. CJVSF members were concerned that this may lead to delays in processing review applications and therefore in the late return of disclosure checks.

CJVSF members observed that, particularly for those leaving prison, gaining access to employment quickly can be of vital importance in helping people to desist from criminal behaviour and to rebuild their lives. Many jobs are also time sensitive and employers may not be willing or able to keep them open while awaiting the results of a prolonged disclosure check. Inefficient appeal processes could cause delays and if a check takes considerably longer than normal this risks making employers aware of previous criminal convictions, undermining the whole purpose of an appeal process. It is therefore essential that Disclosure Scotland and the independent reviewer establish efficient processes to ensure that all appeals are processed quickly, and backlogs are avoided.

CJVSF members were also concerned that the proposals for review do not allow for the permanent removal of conviction information from a person’s record, only the removal of previous convictions from individual disclosure checks. It is our understanding that there will be only a limited number of circumstances in which a determination to remove a conviction from disclosure check will have a lasting effect (i.e. where a determination has been made that a previous conviction should be removed from a Level 2 check and the person later moves to a new job in a similar role). It seems contrary to the intent and purpose of the Bill that a conviction that has previously been judged irrelevant to a person’s current circumstances should continue to follow them every time they have to make a disclosure check and that they should have to pay every time to challenge it. The legislation should therefore allow for the possibility of permanently removing historic convictions that no longer bear any relevance on an individual’s behaviour.
Online by Preference

CJVSF members agree with the general principle of establishing an online system for disclosure and the PVG scheme. This will facilitate easier access and applications for a majority of people.

It is important, however, that the system is still able to process paper applications to ensure that everyone is able to use the system. This is particularly important given that people in prison are not able to access the internet but may still need to apply for disclosure checks before they can start a new job upon their release. Any changes to the system will need to ensure that people are not prevented from entering employment because they are unable to access the online platform.

CJVSF members also noted that any future system will need to be easily accessible and understandable by the people using it. A considerable body of evidence suggests that people in the justice system are more likely to have speech, language and communication needs, lower educational attainment and higher rates of learning difficulties and disabilities than the general public. Any new system will need to provide easy read versions of information and processes to ensure it is accessible for everyone.

Fees

CJVSF members were concerned that current fee proposals put forward by Disclosure Scotland are prohibitively expensive, particularly given that many people coming through the justice system face considerable financial disadvantage. Those in receipt of benefits or leaving prison with only a small liberation grant may not be able to afford the fees required to make applications or to appeal decisions to disclose their criminal convictions. To deny them the opportunity of employment or education on the grounds that they cannot afford to pay a fee to Disclosure Scotland would be perverse. Any changes to fees will therefore need to include the possibility of fee waivers to ensure that no one is prevented from accessing a disclosure check because they have insufficient funds to do so.

Training, Guidance and Support for People with Convictions and Employers

CJVSF members stressed that the success of these changes will depend largely on how Disclosure Scotland can engage with people with convictions and employers to help them to understand the new system of disclosure and PVG checks. While the changes set out in the Bill do simplify the system these will need to be communicated clearly to those affected by them. Engaging the voluntary sector and people with convictions in developing that training and guidance will be vital in ensuring it is effective. More generally, it will be important for Disclosure Scotland to continue to engage with employers to help them to understand disclosure and how to properly consider previous criminal convictions.
East Lothian Council

Level 2 Disclosure
The proposed level 2 Disclosure covers the current PVG scheme and incorporates Disclosure checks beyond Basic i.e. Standard or Enhanced. As there are 2 products in this level and one is a ‘one off’ product, the other a membership scheme. ELC would highlight the benefit and clarity of grouping all one off products under Level 1 Disclosures. With Level 2 the ‘PVG membership’ product, as this would make it clearer to employers and members.

38 Regulations about review procedure (p22)
ELC welcome the option of a review procedure through Disclosure Scotland and feel that this will enable and encourage individuals to make application and are hopeful that this will deliver the spirit of the legislation by removing barriers to employment.
- ELC would highlight that the time period for review requests and for reviews to be conducted will be a consideration to potential employers where the individual is making application to modify disclosure information, as such these applications should be a priority and timescales kept to a minimum so as not to discourage applications from individuals or loss of offer of employment.

62 Fees (p39)
ELC understand that the provision of this service is vital to protect our vulnerable individuals but would highlight the need for this to be balanced with the impact on those individuals whose chosen career requires membership of a ‘PVG scheme’ and the cost to manage the service.
- Under the current scheme the individual is a lifetime member of the scheme. However, going forward if this scheme is to be a time limited membership this could see an individual paying for membership 11 times during their career (from study to retirement) Whilst this may not be an issue for those within higher paid roles, this will be a significant impact on those within the part time workforce and / or those on the lower salary / national minimum wage, who will predominately be female workers. ELC would recommend that consideration be given to offering a repayment scheme to members.
- ELC would recommend that there is an option for employers to pay by invoice to allow them to be able to support employees in times of financial hardship.
- ELC would welcome a review of : The 2010 Regulations prescribe fees for applications for scheme membership and disclosure requests under the Protection of Vulnerable Groups (Scotland) Act 2007 but provide for the waiver of the fees payable by certain qualifying voluntary organisations. Regulation 2 amends the definition of qualifying voluntary organisation in regulation 7(2) in order to exclude from the definition any voluntary organisation which falls within the definition of school under the Education (Scotland) Act 1980 (c.44) but which solely provides early learning and childcare within the meaning of Part 6 of the Children and Young People (Scotland) Act 2014. As this exclusion means that all qualifying parent helpers and host parents require PVG membership to be paid by the Local Authority and is contrary to the English DBS service which is free of charge to parent helpers in schools - https://www.gov.uk/guidance/dbs-check-requests-guidance-for-employers:volunteer-applications
72 Duration of Scheme membership (p44 - 45)

ELC understand the need for the management of membership numbers to ensure that only those involved in ‘regulated roles’ are members and under constant monitoring to ensure the privacy of individuals and the ability of Disclosure Service to provide a quality service.

- The duration of the scheme should be such that consideration of cost to the individual is key and a recognition that membership will be required of those in part time and minimum wage which will predominantly be female workers over their entire working lifespan.
- The introduction of a membership duration has considerable impact on employers as it will require the introduction of the management and tracking of memberships along with the enforcement of HR policies where membership renewal is delayed.
- ‘Real Time’ membership information must be available in order to ensure that employees are not negatively impacted where renewal is on or around the membership renewal date.

73 Failure to apply for renewal of Scheme membership (p45)

ELC are supportive of the continued monitoring of individuals who do not renew membership. However, it should be made clear that whilst this ‘discretionary membership period’ is in place the individual is not legally able to work with vulnerable groups and escalation of non-payment is made to all interested parties.

77 Conditions imposed on scheme members under consideration for listing (p49 - 50)

ELC welcome the introduction of conditions and would encourage a clear communication regarding those who can work under supervision and consideration is given to smaller organisations / charities where this option may not be possible.
General Teaching Council for Scotland

1. Introduction

The General Teaching Council for Scotland (GTCS) is the statutory body established by the Public Services Reform (General Teaching Council for Scotland) Order 2011 (the 2011 Order). Its general functions include, among other things, keeping a register of teachers, establishing the standard of education, training, conduct and competence of registered teachers and investigating the fitness to teach of individuals who are, or are seeking to be, registered. The assessment of a registered teacher’s fitness to teach is made both at the point at which they join the register and their fitness to teach is then regulated throughout their registration with GTCS.

A key factor in determining a registered teacher’s fitness to teach is what, if any, criminal convictions they have, as well as any other relevant information. GTCS relies heavily on information provided by criminal justice agencies including Police Scotland, The Crown Office and Procurator Fiscal Service, Scottish Courts and Tribunals Service and Disclosure Scotland. GTCS notes with interest the proposed changes contained within the Disclosure (Scotland) Bill 2019 and our response is contained herein.

The areas that GTCS wishes to comment on at this stage are as follows: the simplification of the Disclosure products, including the introduction of Level 1 & 2 Disclosures, proposed limitations on the information shared via PVG, changes to the length of Scheme membership, the issuing of disclosure certificates, conditions imposed on Scheme members under consideration for listing and wider information sharing concerns.

2. Introduction of Level 2 Disclosures and Proposed Online System

GTCS notes that section 13 of the proposed Bill will replace standard and enhanced disclosures and short PVG Scheme records with a new disclosure product, a Level 2 Disclosure, which would contain much of the same information currently provided in a Standard Disclosure and PVG Scheme Record (albeit subject to some limitations discussed below).

In principle, the change in form from a Standard Disclosure/PVG Scheme Record to a Level 2 Disclosure poses no particular concern, as long as the relevant information is still being provided to regulatory bodies. GTCS accepts that the wide range of disclosure products currently available can be confusing to those using the disclosure system and a degree of clarity is welcomed.

It is also noted that it is proposed that much more information will be shared electronically. GTCS welcomes this, however it may be of assistance if regulatory bodies are consulted as to how this will be implemented in practise, well in advance, to ensure compatibility with existing processes so as to avoid any unnecessary technical difficulties.

3. Changes to Length of PVG Scheme Membership

Currently when a person joins the PVG Scheme they remain a member of the Scheme until and unless they are removed from the Scheme or they withdraw from the Scheme. The new Bill
would limit Scheme membership to five years from the date of entry to the Scheme, or from the date of renewal. At the end of the five-year period the member would have to renew their membership or have their membership withdrawn.

GTCS understands that the purpose behind this change is principally twofold.

To prevent Disclosure Scotland interfering with the privacy of persons who are no longer employed in regulated roles.

To reduce the administrative burden on Disclosure Scotland by reducing the number of persons subject to monitoring who no longer require to be monitored.

Whilst these are laudable aims, GTCS is concerned about how this would work in practise. The proposed change creates a significant administrative burden for individuals, employers and regulators in ensuring that PVG memberships for all of their staff/registrants are renewed. It also imposes an additional financial burden on organisations and individuals.

This is especially concerning given the fact that many of those who are currently members of the Scheme are either working in a voluntary capacity or in low paying/minimum wage roles. There is also a concern that the vast majority of Scheme Members, who are law abiding members of society, are being asked to renew every five years, imposing a financial and administrative burden on persons who otherwise have no interaction with Disclosure Scotland.

There is also the matter of the memberships of those who are already Scheme members. It is currently unclear how the existing members of the PVG Scheme ‘start dates’ would be calculated. Given that they have already paid for what was, at the time, a permanent lifetime membership, the GTCS is concerned that it is unclear what existing Scheme members will be entitled to at the start of the new Scheme, i.e. will they be entitled to an initial five-year membership on the basis or will all existing Scheme members be expected to re-apply to the new Scheme.

If there is a large cohort with similar, or identical, start dates this is likely to cause a significant administrative burden not only on Disclosure Scotland but also on employers, professional regulators and others. Further, those who are already Scheme members will have, reasonably, anticipated that the fee paid by them on joining the Scheme was a one off, lifetime membership fee. Therefore, it would not be unreasonable to expect that those who will now have to pay additional fees could be dissatisfied with this amendment to the Scheme.

Finally, there is the matter of individuals who are registered with professional bodies but not in current practise. There are many professionals who choose to maintain their registrations when not in a regulated role. The GTCS is concerned that limiting membership to those in a regulated role at the point of renewal will result in persons registered with regulated bodies whilst no longer being Scheme members. This could result in regulators being unaware of concerning behaviour by registered professionals and could undermine public faith in the profession.

GTCS would ask that alternative approaches are considered, such as increased efforts in raising awareness among Scheme members of the ability to remove themselves from the Scheme when they no longer carry out regulated work, or failing this, that the process of
renewing is simplified as far as possible in order to ensure that it does not constitute a significant administrative burden on organisations and individuals.

4. Limitations on Information Shared via PVG

Currently when GTCS receives a PVG Scheme Record the following information is provided:

- Convictions cautions or other alternatives to prosecution, which are not spent in terms of the Rehabilitation of Offenders Act 1974, whether the person was a child or an adult at the time of conviction.

- Convictions which are spent but fall on the A1 list of offences (previously offences which must always be disclosed). These offences must always be disclosed for 15 years (or 7.5 if the accused was under 18 at the time of conviction) after conviction, after 15 years the offences may be removed if the person to whom the disclosure relates successfully seeks an order from a Sheriff removing the information from their record.

- Convictions which are spent but fall on the B1 list of offences (offences which must be disclosed subject to rules), as long as the following conditions are met.
  - The disposal was not an admonition or absolute discharge; and,
  - The conviction is less than 15 years old; or,
  - The accused was under 18 at the time of conviction and the conviction is less than 7.5 years old.

These convictions can be removed from someone’s record in advance of the time limits above if they successfully seek an order from a Sheriff removing the information from their record.

- Other Relevant Information (ORI) provided by the Police.
- Notification under Part 2 of the Sexual Offences Act 2003, whether an adult or child.

The new Bill proposes significant changes to the type of information which will be shared automatically, and to the circumstances in which other information will be shared. The following information will continue to be shared without the right to review:

- Unspent adult convictions and cautions.
- Offences on List 1 (previously A1), unless 11 years have elapsed since the date of conviction.

With the exception of the above, the sharing of information by Disclosure Scotland will be conditional, either in that the subject of the disclosure may challenge the inclusion of the information, or that Disclosure Scotland will *ex proprio motu* determine whether the information included is relevant to the disclosure and, if so, whether it ought to be included.

The latter category of information relates to convictions when the accused was under 18, including unspent convictions, spent List 1 convictions and spent List 2 convictions which are
less than 5.5 years old and did not result in an admonition or absolute discharge (or the equivalent from a Children’s Panel). Unspent childhood cautions will not be included.

Whilst GTCS welcomes efforts to ensure that young people are given every opportunity to be rehabilitated, and to not be unfairly defined by prior convictions, GTCS is concerned about the lack of clarity as to how the decision will be made to include childhood conviction information.

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Whilst GTCS welcomes efforts to ensure that young people are given every opportunity to be rehabilitated, and to not be unfairly defined by prior convictions, GTCS is concerned about the lack of clarity as to how the decision will be made to include childhood conviction information. being anonymised, if necessary) where the disclosure is being sought for the purposes of joining a professional register. This would allow a regulatory body, such as GTCS, to present its position in relation to a particular conviction and why it considers, in the context of the profession over which it has regulatory functions, such conviction is (if that is the case) relevant and ought to appear on an individual’s – who, in GTCS’ case, is seeking registration as a teacher – disclosure.

Failing this, GTCS would propose that the input of professional regulatory bodies is sought to develop guidance in respect of what constitutes relevant convictions for each profession. This is something that is likely to vary somewhat between different professions and therefore it will be important that Disclosure Scotland engages with the professional bodies to ensure not only consistency but transparency in the process.

GTCS would also suggest that a degree of transparency in the operation of the review process would be welcome. This could either be in the form of the publication of anonymised decisions, or in the form of annual reports setting out the number of reviews, what the reviews related to and what number of these reviews were successful at each stage. This would help ensure public confidence that the legal tests are being applied appropriately.

As with the provisions for childhood convictions, GTCS is concerned that the tests set out in the legislation lack specificity. Again, there is no indication of how these tests will be applied. There is no indication of whether formal thresholds will be established or whether the test will be a subjective one. If the test is subjective GTCS would be concerned about the possibility of it being applied inconsistently. GTCS would expect that there would be formal guidance provided, developed together with the relevant stakeholders, to ensure transparency and consistency in the process.
5. Issuing of Disclosure Certificates

Currently where an individual applies for a standard or enhanced disclosure, or short Scheme record, the document is provided to the individual for a short period before being sent to the registered body (i.e. the employer or regulatory body). During this period the individual has the opportunity to challenge the inclusion of certain information. If they do not intimate a wish to challenge the information, then the information is shared with the registered body as a matter of course.

In the new Bill it is proposed that the information is only shared after the individual has expressly confirmed that they are willing for the information to be shared. If, after receiving the proposed Disclosure Certificate, they do not respond then the information will not be shared. GTCS is concerned that this measure may be disproportionate. Whilst GTCS understands that the inadvertent disclosure of sensitive information is to be avoided, it is appears that the approach taken is excessively cautious and may result in significant practical problems.

Firstly, when an individual applies for disclosure they provide current contact details, the likelihood that these details will change in the intervening days is small. The risk that the information has therefore not been supplied to the correct individual is also small. Additionally, by applying for a Disclosure Certificate they have indicated a willingness for the information to be shared with the regulatory body, it would be fair to presume that, in the absence of evidence to the contrary, the person still wishes for the information to be shared.

Secondly, there is a considerable risk that individuals will ignore follow up communication from Disclosure Scotland, or otherwise fail to respond. This will result in the disclosure application lapsing and a further application for disclosure being made. This may result in significant delays in the processing of applications for registration with regulatory bodies, and an unintended consequence of this may also be that offers for employment are withdrawn where a PVG certificate has not been provided. There is the possibility of significant prejudice to individuals applying for disclosures.

GTCS would suggest that the prior system of presumed consent be maintained. This would still allow persons with concerns about the information contained within the disclosure certificate to challenge the information, whilst avoiding the significant administrative problems inherent in the proposed system.

Failing this, GTCS would ask that where disclosures contain no prejudicial information (i.e. where the required checks have resulted in a ‘clean’ disclosure) these are automatically disclosed following the prescribed period, so as to avoid inadvertent delays where there is no risk of prejudice to the individual.

6. Conditions Placed on Scheme Members Under Consideration for Listing

It is noted that the new Bill allows for certain conditions to be placed on Scheme members by Scottish Ministers where they are under consideration for listing, including conditions preventing them from carrying out regulated roles.
In principle, GTCS is supportive of this as it provides further public protection. However, GTCS is concerned that the current proposals are lacking in detail, there is little of indication of how these decisions will be reached and by whom, and whether these decisions could be subject to appeal. It is also unclear how these proposed conditions would affect interim/temporary orders sought by regulatory bodies.

It is noted that whilst the fact of a decision to impose a condition, and the details of the condition, may be shared with regulatory bodies, including GTCS, the reasons for doing so are only shared with the individual. However, GTCS considers that any allegation which is serious enough to warrant the imposition of conditions by Scottish Ministers is likely to be serious enough to warrant the imposition of a Temporary Restriction Order on the GTCS Register of Teachers to provide further protection for the public and the reputation of the profession whilst the matter in question is investigated. Therefore, GTCS considers that there would be a significant public interest in the sharing of the reasons for the suspension with regulatory bodies. This would be in line with GTCS' position that there ought to be enhanced information sharing generally among criminal justice agencies and regulatory bodies, as discussed below, and this would be a step towards improved information sharing to better ensure public protection.

7. Wider Information Sharing Concerns

GTCS considers that currently wider concerns exist around difficulties with information sharing between criminal justice agencies, including Disclosure Scotland, and professional regulatory bodies.

Whilst protection of the public is at the heart of what Disclosure Scotland and professional regulatory bodies do, there have been growing difficulties in respect of information sharing between the various bodies which, in turn, create difficulties in each body fulfilling its obligations. GTCS commends recent efforts on the part of Disclosure Scotland to work more closely with regulatory bodies and welcomes ongoing engagement to develop appropriate policies and strategies for information sharing. However, GTCS considers that this Bill offers an opportunity to establish clear and effective guidelines around information sharing, to allow both regulatory bodies and Disclosure Scotland to more effectively carry out their roles, and ultimately better protect the public and public confidence in regulated professions.

GTCS suggests that provision should be made to ensure that Disclosure Scotland shall share any new information which is added to the Scheme record of an individual carrying out a regulated role, with the relevant regulatory body, at the point at which it is added.

As it stands, the only points at which GTCS is informed that new information is added is when a new disclosure is requested (i.e. when someone changes employment). This means that years can pass between checks and that GTCS is otherwise reliant on registrants themselves disclosing any relevant charges and convictions. This has the potential of placing the public at a continuing risk of harm and undermining the overarching aim of public protection. This is unlikely to be remedied by measures such as amending the length of Scheme membership to a five-year period, as GTCS would suggest that receiving information about a Scheme member once every five years is unlikely to provide sufficient reassurance and may prevent GTCS from taking timeous action.
Further, even where a Scheme member is placed under consideration for listing, the information provided to GTCS is limited to the fact that they are under consideration and in rare cases the source of the information. This is simply insufficient to allow GTCS to carry out its function of protecting the public and public faith in the profession as there is often very limited scope to identify routes of investigation to allow GTCS to commence a meaningful investigation.

By allowing information to be shared at the point at which it is added to the Scheme member’s record Disclosure Scotland would not be sharing any more information than would otherwise be shared at the point when an application for disclosure is submitted. By joining the PVG Scheme a member consents to their suitability for Scheme membership being monitored, it would not be disproportionate to expand this to include consent to sharing information with other relevant bodies.

It may be helpful to have regard to the difference in roles between employers and professional regulatory bodies when considering the issue of data sharing. Professional regulators act as gatekeepers for the professions and are entrusted by the public to protect vulnerable members of the public and to maintain public faith in the profession. They are in most instances established through statute and have clearly defined roles acting in the public interest. As public bodies professional regulatory bodies are required to act in a lawful manner, in compliance with the Human Rights Act 1998, and having regard to a wider duty of fairness. Decisions made by regulatory bodies in respect of fitness to teach/practise are subject to a right of appeal.

All of these factors suggest that the role carried out by regulatory bodies is fundamentally different to that carried out by employers. It is the position of GTCS that given that professional regulatory bodies act in the public interest there is a stronger argument for sharing relevant information in a timeous manner than there might be for employers, or other interested parties. It may be advisable to create a distinction within the legislation between ordinary registered bodies (such as employers) and professional regulatory bodies if this would allow for greater information sharing.

Conclusion

GTCS welcomes the broad aims of the legislation and recognises that the current system is in need of reform. However, as detailed above, GTCS remains concerned that there is a lack of clarity in respect of some of the key aspects of the proposed legislation. Whilst the rights to privacy of individual Scheme members are clearly a compelling concern, they must be balanced against wider public interest in ensuring that the most vulnerable members of Scottish society are not exposed to unnecessary risk. GTCS is concerned that the Bill, as currently drafted, may have tipped the balance to create a system which could be said to overly protect the rights of individual Scheme members at the expense of the wider public interest and protection of those covered by the vulnerable groupings.

August 2019
Howard League Scotland (HLS)

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

Childhood Convictions Individualising Disclosure

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

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

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

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

Other Relevant Information (ORI)

HLS has concerns about the use of ORI. This allows for the disclosure of any material which the Chief Officer ‘reasonably believe[s] might be relevant’ for the purpose of the disclosure. This Other Relevant Information (ORI), also known as ‘soft information’, is supplied by the Chief Constable of a relevant police force. In practice, ORI or ‘soft’ information can include allegations, records of arrest and/or charge and/or prosecution, statements by witnesses, cautions, convictions, records of penalty notices for disorder, sentencing reports and so on (Grace, 2014\(^\text{21}\)). The practice of disclosing ‘soft information’ has been criticised (e.g. Baldwin 2012\(^\text{22}\)), and judicially challenged with reference to issues of human rights, specifically under Article 8 of the European Convention on Human Rights (ECHR). Baldwin (2012) cites evidence that this has included unsubstantiated claims including information which ultimately resulted in the individual being released without charge; details of a non-applicant’s criminal family history (even though the individual was never suspected of any offence); and details of cases which proceeded to court but resulted in an acquittal. Critically, Appleton (2014\(^\text{23}\)) reports that 37% of job offers were withdrawn based on such ‘non-conviction information’. We recognise that Disclosure Scotland intend to issue some guidance to inform ORI decision-making and disclosure but, as discussed in Weaver (2018\(^\text{24}\)), the mere presence of information can be a barrier in terms of employers operating on a blanket policy of a clean record, rather than weighing up the information against the nature of the employment. Thus, if ORI is to be disclosed, the implications of the information disclosed need to be carefully evaluated in terms of proportionality and necessity to the ends of public protection, against individuals’ rights under the ECHR.

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\(^{20}\) European Court of Human Rights in *MM v United Kingdom* (24029/07), cited in Larrauri Pijoan (2014), n 6 infra


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

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

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

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

**Representation, Review and Appeal**

HLS welcomes the provisions in the Bill relating to reviewable data including rights of review, representation and appeal; and the commitment to publish guidelines to enhance consistency in decision-making. With regard to the review processes, while we welcome measures to include representation from the applicant, HLS would like to propose that further consideration is given to providing for an Independent Reviewer on first request for review, rather than a review initially being undertaken by the body whose decision is to be reviewed. For example, where a review is sought in relation to the ORI provided by the Chief Constable, proposed provisions suggest that the application be referred back to the Chief Constable for review to ‘decide whether the chief constable still reasonably believes that the information is relevant to the purpose of the disclosure and that it ought to be included’ (S.26 Explanatory Notes). It is not clear to HLS why referring back to the body making the initial decision is necessary, even if different personnel might undertake the review. HLS would suggest that, if this does not in itself discourage the applicant from pursuing review, this is likely to result in additional and unnecessary delays to the extent that such a significant delay in disclosure is likely to signal to prospective employers that something is amiss. It would seem to us that in the interests of expediency, justice and independent scrutiny, the first line of review in each instance in which a review is sought should be undertaken by the Independent Reviewer, and that clear time-

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scales for review should be issued. In our view, this would allow for a greater level of independent scrutiny of decision-making.

**Removable and Non-Disclosable Convictions**

HLS welcome the provisions contained in the Bill for reducing, by four years for adult convictions and two years for childhood convictions, the period after which a conviction may become non-disclosable or an application for removal by the subject can be made. We do however have a number of points of query relating to this process. Firstly, we remain concerned about the 11-year time frame, and how this was arrived at. For example, in the Bill, List B convictions acquired as an adult will be disclosed for 11 years, becoming non-disclosable thereafter. ‘Time to Redemption’ studies empirically investigate the period of time when people with convictions can statistically be considered as exhibiting the same risk of reconviction as people with no convictions. The key question that these studies seek to answer is this: How many years of non-offending does it take for a person with convictions to resemble a person without convictions in terms of his or her probability of offending? Key to this is establishing that the base-line risk level of a non-convicted person is not zero because they have a certain probability of offending (Soothill and Francis, 2009). Non-convicted persons are those who have never been convicted, which is different to saying that they have never committed an offence. Moreover, the absence of convictions does not preclude the potential to commit a crime and acquire a conviction in the future (e.g. Soothill, Ackerley and Francis, 2004; Soothill and Francis, 2009). Taken together, these studies conservatively estimate that in general after an average of 7-10 years without a new arrest or conviction, a person’s criminal record essentially loses its predictive value (Blumstein and Nakamura, 2009; Bushway, et al., 2011; Kurlychek et al., 2006; 2007; Soothill and Francis, 2009; for a detailed review of this research, see Weaver, 2018). This raises questions around the disclosure of spent convictions, ostensibly for the purposes of public protection, in circumstances where the evidence would suggest that the individual is statistically no more likely than members of the non-convicted population to commit crimes in the future. While noting that in Europe spent convictions are not disclosed (see Weaver, 2018), HLS therefore suggests that the 11-year time scale should at least be reduced to reflect the evidence.

Secondly, and building on the above, if an adult obtains a conviction for Theft, a List B offence Sch.2 part 1 under the Bill, and is sentenced to a Community Payback Order, comprising a 12-

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month Supervision Requirement, that conviction will become spent on conclusion of the Supervision Requirement, at 12 months, under the Management of Offenders (Scotland) Bill, as passed. The rehabilitation period, now disclosure period, is concluded and the individual is no longer required to disclose this under the Act; it is spent. What then is the rationale for continuing to disclose this conviction under the Disclosure arrangements if there is scope for it to be removed before then under the new provisions of the Bill (s.14), e.g., ten years earlier, and if the sentence accompanying the conviction is intended, at least, to convey the severity of the offence? Not only does this uniform approach to extending the disclosure period appear to be at odds with the ECHR and with recent reforms to the Rehabilitation of Offenders Act, 1974, but it further highlights the need to ensure that the Bill makes provision and issues statutory guidelines for a more individualised and nuanced approach to the disclosure of spent convictions. Here, then, we refer again to the guidance document issued by the US Equal Employment Opportunity Commission (EEOC) in 2012. While this document was designed to clarify standards and provide ‘best practice’ on how employers may check criminal backgrounds without violating prohibitions against employment discrimination under Title VII of the 1964 Civil Rights Act (EEOC 2012), it has much to commend it in relation to considerations surrounding the disclosure of spent convictions. It proposes that employers are provided with information on criminal records on an individualised basis, considering factors such as the nature of the crime, the time elapsed since it was committed, and the nature of the job (Lageson, Vuolo, Uggen, 201532), and to which we would add, the disposal attached to the conviction which is assumed, under the ROA, to reflect the severity of the offence. While we recognise that such an approach is likely to increase workloads and responsibilities for Disclosure Scotland, the issuance of related guidelines that allow for both an individualised and consistent framework to inform decisions to disclose would allow Scotland to progress more closely towards a system that is in keeping with other European practices (on which see Weaver, 2018), and the ECHR, and circumvent the need for two different lists of offences, A and B, which, in part, undermines the aspirations of the proposed reforms to reduce the complexity of the disclosure system, for employers and applicants.

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

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

**Concluding Comments**

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

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

As Project Co-ordinator of Interest Link Borders’s volunteer befriending service for children, young people and adults with learning disabilities, I am writing regarding the draft provisions re under-16s in regulated roles.

1. Context
We have around 60 volunteers of school age, all of whom support children and young people with learning disabilities.

Although they are supervised, their work is classed as regulated under the existing Protection of Vulnerable Groups (Scotland) Act 2007 because (Sch2. Para 4.) they are teaching/instructing children and/or (Sch2. Para 7.) providing advice or guidance to children.

Schedule 3 Part 2 of the Bill arguably increases the range of roles in which supervision is not a factor in assessing whether the role is regulated: Para 8. Teaching, instructing or delivering training to children. Para 10. Holding power or influence over a child for the purpose of an activity in which the child is taking part. Para 26. Being engaged in the provision of cultural, leisure, social or recreational activities for children.

So, all our young volunteers require PVG membership under both Act and Bill.

2. The effect of the Bill on Volunteers aged 12-15
Most of our volunteers are aged 16 and over, but some fall into the 12-15 age range. Under the Bill those aged 12-15 will not be able to apply for PVG membership (Para 71: 45 (1)), but Para 74: 45C(3)(b) provides they will not be committing an offence if they carry out a regulated role. Para 74: 45D(3)(b) provides Interest Link Borders will not be committing an offence by offering them regulated roles.

So, the Bill appears to allow volunteers aged 12-15 to undertake regulated roles without a PVG check even though they might have a criminal record.

However, volunteering organisations like ourselves will not involve anyone who might have a criminal record in regulated roles unless they have PVG membership.

So, the actual result of the Bill will be to prevent those under 16 being in regulated roles.

3. Why did the Bill take this approach?
Looking at the Policy Memorandum accompanying the Bill, the only reasoning put forward for the minimum age for PVG membership appears to be that those under 16 should not have an unsupervised role with children. (Para 60.) However, as noted above, there are many supervised roles which are still regulated, so this is not a sound reason for a blanket ban.
In the **Consultation** preceding the Bill:

- Q81 asked if there should be a minimum age for checks. 73% of respondents said yes, but they were not asked for their reasons for doing so.
- Q82 asked “In what circumstances should a criminal record check for a child under 16 be permitted? The Consultation Report noted that “those responding to question 82 generally supported exceptions to permit people under 16 to undertake roles working with vulnerable people, particularly around the voluntary sector”.

The response from Volunteer Centre Borders to the consultation Q82 sums this up well: “We have volunteers under the age of 16 working with vulnerable adults and children. As above, people do not only start to commit crimes when they are 16 and it is essential to know if an under-16-year-old is barred from working with vulnerable adults/children.”

- Q94 asked “Please tell us about any potential impacts, either positive or negative; you feel the proposals in this consultation document may have on children?” Respondents commented that “Removing the ability of children to take on protected roles/regulated work was viewed as damaging to opportunities and development for children and young people.”

So Q82 & Q94 are the only places where there has been discussion of the minimum age, and in both cases the weight of responses appears to raise significant concerns over a minimum age.

**The discussion of these responses in Part 2 of the Consultation Report** (pp56-57) gives no coherent line of argument to justify a ban on under-16s. It seems to be as much concerned with wanting to protect under-16s’ by preventing their convictions being revealed by a check as with the suitability of them performing regulated roles.

It seems to be this combination of reasoning that has led to the Bill effectively providing that under-16s can perform regulated roles without needing a PVG check. This puts the safety of children in second place to the rehabilitation of young offenders, which seems an inappropriate compromise.

4. **Conclusion**

The entirely well-intentioned attempt to reconcile the conflicting interests of volunteers and children has led to an unsupportable and self-defeating result in the Bill. I would suggest that the current system with no minimum age does manage to strike the right balance and should be retained.

However, the consultation responses and evidence from other UK jurisdictions indicate a general view that under-16s should be supervised in their regulated work/roles with children and protected adults. I think the vast majority of organisations involving under-16s (including Interest Link) would agree with this, and it could still be provided for in the Bill without compromising supervised roles.

Andrew Findlay
16/08/2019
**Law Society of Scotland**

**Introduction**

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Education and Skills Committee call for evidence on the Disclosure (Scotland) Bill. We have the following comments to put forward for consideration.

**General Comments**

We are a professional body statutorily required to represent the interests of the solicitor profession and the interests of the public in relation to the profession. We are also required to have regard to regulatory objectives:

- supporting the constitutional principle of the rule of law and the interests of justice;
- protecting and promoting the interests of consumers and the public interest generally;
- promoting access to justice and competition in the provision of legal services;
- promoting an independent, strong, varied and effective legal profession;
- encouraging equal opportunities within the legal profession;
- and promoting and maintaining adherence to the professional principles.

How disclosure operates in Scotland directly engages this statutory and regulatory framework. The disclosure scheme is integral to how we promote and maintain professional principles as a regulator - on admission to the profession, re-entry to the profession or as part of our anti-money laundering regulation. Conducting these checks is one of the ways that we protect and promote the interests of consumers, ensuring that legal services are provided only by those people fit and proper to do so. The balance of the disclosure regime - between the right to privacy for an individual and the right to protection for the public – also involves issues around the interests of justice and the public interest.

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33 Solicitors (Scotland) Act 1980, section 1
34 Legal Services (Scotland) Act 2010, section 1
35 The professional principles are set out in section 2 of the 2010 Act and include the principles that persons providing legal services should support the proper administration of justice, act with independence (in the interests of justice), act with integrity, act in the best interests of their clients, meet obligations under professional rules, act in conformity with professional ethics and comply with duties owed to the court
We do believe that the current system of disclosure would benefit from simplification, as the current system is difficult to navigate. We appreciate that a degree of flexibility may be required, particularly as disclosure regimes across the UK have been tested in court in recent years. We also appreciate the rationale for the change in policy around offences committed before the age of 18. Our response to the Committee’s call for evidence, though, is primarily from the perspective and with the experience of acting as regulator of the solicitor profession in Scotland. Lord Sumption highlighted the importance of certainty in a recent Supreme Court judgment and we believe that more may be needed before the Disclosure (Scotland) Bill meets that need. We have raised issues around the Bill (and particularly its practical implementation) with Disclosure Scotland and received some assurance.

‘Fit and proper’

This role operates in very different ways to the employer and employee relationship involved in many disclosure checks. We have a statutory responsibility to ensure that anyone who seeks to become a Scottish solicitor is a ‘fit and proper person’. That requirement is engaged on entry to the profession, admission as a solicitor, or where seeking reinstatement to the roll, where a standard disclosure under the current regime would be sought. A basic disclosure under the current regime is also sought when an applicant seeks the Society’s approval (as supervisory authority) to be a BOOM under Reg 26 of the AML Regulations 2017.

Solicitors occupy a privileged position, trusted by the public with their most confidential concerns, their most valuable assets and most important interests. They are trusted by the justice system to fulfill duties to the court and uphold the rule of law. Solicitors must meet the highest standards of honesty, integrity and professionalism in order to deserve that trust. A fair and just society and thriving and competitive economy require that individuals and businesses can have confidence that Scotland’s legal and regulatory system will support them by providing appropriate protection of their rights and interests, whether in the commercial or personal sphere. That confidence is eroded if those providing legal services do not meet the highest standards of competence and ethics.

Admission

Should matters be disclosed as part of the admissions process, these will be considered by our Admissions Sub-committee. All matters disclosed relating to fitness and properness are assessed in line with guidance published on the Society’s website by regulatory sub-committees. At least 50% of the members of such sub-committees must be non-solicitors and the assessment (like any regulatory function of the Society) must be carried out in a way which aims to promote achievement of the regulatory objectives.

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36 Re an application by Lorraine Gallagher for Judicial Review (Northern Ireland) [2019] UKSC 3 (paras 51-55)
37 Solicitors (Scotland) Act 1980, section 6
38 If the Society is authorised to act as an approved regulator in terms of the Legal Services (Scotland) Act 2010 then the Society would also require standard disclosure reports as part of the process of fit and proper testing non-solicitor investors, Heads of Practice and/or members of any Practice Committee of a licensed provider licensed by the Society under that Act
39 Beneficial owner, officer or manager
40 The Money Laundering, Terrorist Financing and Transfer of Funds (information on the Payer) Regulations 2017
If we are to discharge our duties properly, we need the information required to enable us to make a full, considered and reasoned assessment of each individual’s circumstances. We seek to be informed of anything which could lend weight (either positively or negatively) to the consideration of any application. Applications are considered based on our own established processes and tests. Each is considered on its own merit and any mitigating circumstances will be considered. It may be that previous convictions can be safely disregarded subsequently through demonstrable patterns of behaviour. The published guidance clearly sets out our processes and procedures, which are unique to the role of solicitor, and takes into account the position of trust in which solicitors are placed, both in terms of financial matters but also in the administration of justice. It is essential to us that we continue to fully regulate the solicitor profession using the requirements which have been uniquely developed for that profession. Our decisions around suitability for admission may be appealed internally and our decision-making around suitability for admission is also subject to the supervisory jurisdiction of the courts.

Complaints and compensation

We are also responsible - along with the Scottish Legal Complaints Commission - with dealing with regulatory breaches and misconduct by solicitors. Both of these undertakings require significant resources which are paid for, in both cases, by solicitors. In addition, we administer a statutory fund - known as the Client Protection Fund or Guarantee Fund - to compensate those who suffer loss as a result of the dishonesty of a solicitor. That fund is entirely paid for by solicitors. The solicitor profession demands rigorous honesty. Misconduct by one can lead to costs for all – not just as a result of reputational damage and loss of public trust – but directly by increasing the costs of regulation, insurance and contributions required to the Client Protection Fund. Few, if any, other industries require that participants pay so directly for the dishonesty of their competitors.

Officers of the court

The responsibilities of solicitors extend beyond those to their client but into the wider community. Confidence in the justice system is crucial to the rule of law; such confidence is, to a large extent, the aggregate of the confidence in the individuals involved in this system. As the leading text on legal ethics in Scotland states, “the solicitor is a key player in the justice system with obligations not simply to clients, fellow professionals, witnesses and other third parties, but also to the court… These duties to the court are derived from the common law and are owed not to the judges or the courts in which a solicitor chooses to practice, as such, but rather to the wider community because of the public interest in the proper administration of justice.” Courts are often required to make decisions that have life-changing impacts on individuals, and on the communities in which they live. Ensuring that the people involved in this process are ‘fit and proper’ is one of the ways to ensure that justice is done and seen to be done.

Portability


Ensuring that solicitors meet ‘fit and proper’ requirements is also relied upon in other circumstances. Admission to the roll as a solicitor is used as an exemption, for instance, to the requirements for providing immigration advice under the Office of the Immigration Services Commissioner regime. Standing as a Scottish solicitor can also provide some exemption or credit to qualification in other jurisdictions as a regulated legal professional.

Key views

We therefore have a duty, primarily to the public but also to our members, to do all we can to ensure that those seeking to become and remain solicitors are ‘fit and proper’ for the onerous responsibilities they will face. Indeed, the existing legislation and disclosure scheme recognises that we, as the gatekeeper acting to protect the public, have a legitimate interest in seeking a higher level of disclosure in respect of solicitors and prospective solicitors. In our discharge of this responsibility, we have these key views around the Bill:

- **Level of detail**: There are a range of details including processes, timescales, and notification procedures providing the framework for the new proposed disclosure system where sufficient details have not been included at the stage of the Bill’s introduction. We appreciate that regulatory powers providing necessary flexibility are included within the provisions of the Bill. There are several issues where more detail should be provided now in order to provide the necessary transparency and inherent fairness of the processes and knowledge as to the relevant timescales in which reviews and appeal must be made.

- **Draft guidance**: Paragraph 291 of the Policy Memorandum commits Disclosure Scotland to providing more guidance and training (our emphasis). Given the significant discretion being afforded to Disclosure Scotland to decide whether information in providing Level 1 or Level 2 disclosure is to be included depends on how the respective tests of “ought to be included” and “relevant for the purposes of disclosure” are to be interpreted. What this means in practice is that there needs to be much greater clarity specifically on how the role of Disclosure Scotland as gatekeeper in deciding whether to make disclosure will operate (for instance, it is not clear from the Bill whether information must meet either or both of the “ought to be included” and “relevant for the purposes of disclosure” tests).

With our regulatory role, we seek assurance that there will be no reduction in our ability to determine who is admitted or stays in the profession. We would welcome early engagement in how the relationship may work in the future to ensure that convictions are disclosed which may be pertinent for us to in performing our functions.

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43 And, if the Society is authorised to act as an approved regulator of licensed legal services providers (LLSPs), non-solicitors who seek to hold certain interests or roles in such LLSPs

44 Section 87 of the Bill

• **Experience**: The Policy Memorandum refers to the current experience and expertise of Protection Services within Disclosure Scotland. Disclosure Scotland, of course, deals with 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 that experience and expertise on which Disclosure Scotland will rely in seeking to assess the facts and decide whether a “spent conviction” is relevant to the position applied for, and consequently whether it should be disclosed on a Level 2 disclosure. Exactly what the expertise comprised was mentioned in our response to the 2018 consultation46. Clarification as to how that experience will equip Disclosure Scotland to consider relevance in the context of entry to certain professions, such as the solicitors’ profession, will be important.

• **Legislation**: The law on ‘self-disclosure’ and “state-disclosure” reflects the Rehabilitation of Offenders Act 1974 and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (as amended)) (the amended 2013 Order). The Bill does not appear to amend the amended 2013 Order to bring it into line. We would welcome clarification.

• **List A and List B offences**: the Bill revises the List A, or always to disclose offences and the List B, to be disclosed until they become non-disclosable offences. Though these lists largely replicate the categorization of offences under the current regime, we question the differential treatment of embezzlement (List A) and fraud (List B). There are also several other offences involving dishonesty which are not included in List A, such as attempt to pervert and attempt to defeat the ends of justice (the latter not included at all). Our concerns particularly relate to offences of dishonesty because of their potential impact on an individual’s suitability to be in a position of trust. Though there is the power to amend these lists by regulations, resolving such inconsistencies at Bill stage may be more appropriate.

• **The role of regulator**: Any regulator, by its nature, has a role which differs to that of an employer. Not only does a regulator have processes and procedures in place which mean that every case is looked at in its own merit, but there is a clear appeal process for any person affected by a decision taken. The decisions taken by the regulator are relied on by organisations when employing an individual to provide legal services, whether to the employer or the public. The Law Society’s members and the public, quite reasonably, have the expectation that a person deemed to be a fit and proper person to be a solicitor has been through the regulator’s rigorous checks and is therefore suitable for employment.

Conclusion

We support the development of a simplified regime for disclosure in Scotland, balancing an individual's right to privacy with protection of the public interest. The current disclosure regime is complex and can be difficult to navigate. We also appreciate the reasons for changing the way in which offences committed before the age of 18 are treated.

The Bill proposes significant changes to the disclosure system which, if enacted, may restrict the information which will be disclosed to us through future disclosure certificates. Whether a particular conviction will be disclosed may depend on the offence; the age of the offender at commission; the amount of time which has elapsed since the conviction; and an assessment (initially by Disclosure Scotland but reviewable – at the instance of the subject of the certificate only - by an independent reviewer and the sheriff) as to whether the conviction is “relevant” for the purpose for which the certificate is sought and “ought to be disclosed”. Because of the importance of our professional principles and the robustness of our admissions process, which may be appealed internally and is subject to the supervisory jurisdiction of the courts – we believe that an approach recognising the distinctiveness of the role of professional regulators is required.

We have included more detailed comments on the Bill in Annex A to this response and are very happy to provide any additional information that the Committee may find helpful in its scrutiny of the Bill.
Annexe A Additional Comments on Disclosure (Scotland) Bill

Level 1 Disclosures

Section 1- 5 deal with Level 1 disclosures which replaces the current basic disclosure. It will include:

unspent convictions accrued when the applicant was aged 18 or over,

where there is any childhood conviction determine that information about a childhood conviction ought to be included in the disclosure and

if the individual should be subject to notification requirements under Part 2 of the Sexual Offences Act 2003

Online disclosure

For Level 1 disclosures, online delivery is envisaged. The integrity and security of data in setting up such a system needs to be carefully safeguarded with appropriate authentication processes embedded within it. A Code of Practice is to be produced regarding the standards of performance of the accredited bodies that will need to include reference to data standards: this will provide and promote confidence for the users of the integrity of the system. As the policy memorandum notes, there will also need to be alternatives to that online delivery, to ensure that the disclosure system remains accessible to all.

Prescribed periods

The disclosure process requires particular actions to be taken within a “prescribed period”. This period is not defined within the Bill, instead being determined by subsequent regulations. Depending on the prescribed period set by regulations, this may impact on an applicant when requesting that electronic communications is to be sent or require a review (section 6 of the Bill does not permit any discretion if a time period is missed). Time periods provided must be sufficient to allow adequate time for an applicant to consult. The process also needs to be as straightforward as possible. The Bill needs to be clear on such points for purposes of transparency and fairness.

Childhood convictions

Section 5(2) of the Bill provides discretion to the Scottish Ministers as to information and the form disclosed regarding childhood convictions. More clarity on the form and notification process for these would be helpful, particularly guidance on when such a disclosure will be made and what information will be included. There are implications arising from section 5(3)(a) of the Bill as applicants require time applicants to understand and potentially to consult. There may also be implications for legal aid, if advice was required around the disclosure.

Level 1 disclosures- review application

Sections 8 – 12 of the Bill refer to an Independent Reviewer to be set up under section 11 of the Age of Criminal Responsibility (Scotland) Act 2019. In our response to the Scottish

47 Conviction for an offence committed when the individual was under 18 years of age (section 70 of the Bill)
Government consultation, we expressed concerns about the review mechanism. Appeals should not be restricted only to points of law. This is not consistent with other rights of appeal in public law decision making processes. Appeals should be allowed for procedural irregularities and Wednesbury unreasonableesseness. A restriction on the appeal process would not be desirable until such time as all this new system of disclosure can be tested operationally. Section 9 of the Bill refers to representations (which is an issue common to other sections of the Act). It is unclear whether this would include both written and oral representations, though because of the significance of the issues involved, provision for the latter may be required.

**Level 2 Disclosures**

Sections 13-22 of the Bill deal with Level 2 disclosures. The approach taken to simplification seems sensible in treating Level 2 disclosures as a “single product... [disclosing] different information depending on the reason for which it was requested and the identity of the ultimate recipient.” Level 2 disclosures are more complex with various categories where disclosure may be made including:

- childhood convictions (section 13(1) (b) of the Bill)
- information provided by the Chief Constable (section 13(1) (c))
- further information for members and non-members of the PVG scheme (section 13 (1) (d) and (e))

Section 21 of the Bill affords control to the applicant whether the disclosure is made available to others and the above comments regarding Level 1 disclosures also apply to the process for Level 2 disclosures. Indeed, these are more salient given that these types of disclosure have significant implications for entry to regulated professions.

We question the allocation of resources given the potential number of these applications to be processed and/or the implications where such applications are subject to review. There may be a significant effect for employers and job offers if they do not receive such information timeously. This arises too in connection with section 18(2) of the Bill (police information) that states “as soon as practicable.” We prefer specification of a time period as well as assurance regarding training, rather than to have this delegated to regulations.

There is no indication of how Level 2 disclosure is to be given. Though there are regulatory powers to decide how disclosure is to be made, this seems to assume a paper-based system at the outset. If online delivery is intended in future, there may be capacity to include the legislative provisions for online disclosure included in the Bill for Level 1 disclosures.

**Level 2 disclosure review process**

Sections 23 – 34 of the Bill deals with the review and appeal processes. There are several different for processes which differ. Though these processes are, at least in part, less complex than the current regime, there may be need for public information around which process is to be used and how. We reiterate our views around review for Level 1 disclosures, indeed more

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49 Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223

50 Section 11 of the Bill

51 Defined in section 13(1) of the Bill

52 Paragraph 70 of the Policy Memorandum of the Bill
so for Level 2 disclosures as these are complex, may well require time to obtain legal advice and have implications for legal aid.

**Regulation making Provisions**

Sections 35- 41 of the Bill deal with various miscellaneous provisions. Section 38 of the Bill includes powers to make provisions regarding time periods. We have highlighted that these should form part of the Bill to allow scrutiny to ensure that it is both fair and transparent. Section 39 of the Bill deals with possible modifications of Level 1 and 2 disclosures. Though these are subject to affirmative procedures and may assist in future-proofing the disclosure process under the new regime, we believe that getting the initial process right in primary legislation is important.

**Offences**

Sections 42- 46 of the Bill deal with a range of offences. Though the implications of unlawfully disclosing a level 2 disclosure is made an offence under section 43(3) of the Bill, there is no equivalent offence for level 1 disclosures which seems inconsistent. The offence seems to be committed by the individual who discloses. Additional provision could be included to provide protection for individuals in situations of accidental disclosure, such as Disclosure Scotland’s staff.

**Accredited bodies**

Sections 47- 57 of the Bill refer to the legal framework and the setting up of accredited bodies. These replace the higher-level disclosures currently requested and received by “registered persons.” Sections 48(8) and 51(4) of the Bill about making representations remain unclear as to the form that this takes. Notification is set out under section 54 of the Bill and a review mechanism is included. No further details are provided though regulatory making powers are included under section 55(2) (g) of the Bill. Section 56 of the Bill deals with the Code of Practice. Given the substantial level of detail to be included potentially in that Code of Practice, we would consider that there should be a requirement for draft to be laid for the purposes of consultation prior to any Code being published.

**Protection of Vulnerable Groups (PVG)**

Sections 71- 74 of the Bill set out a new framework for participation in the PVG scheme which is compulsory for those undertaking regulated roles with children or protected adults and includes the proposed duration of membership. These represent significant changes to the way in which the scheme operate as it will no longer involve lifetime membership and introduces a time-limited membership for five years. These changes have the benefit principally of clarification since the PVG scheme was not well understood by the public. Review of the system too is important and timely as various high-profile cases have illustrated problems including:

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53 Paragraph 198 of the Policy Memorandum
54 Section 72 of the Bill
55 Paragraph 218 of the Policy memorandum
- Children in sport which was highlighted by the Independent Review of Sexual Abuse in Scottish Football concern specified a need “to reduce risk to young people and to ensure their protection and not to supersede this with the reputational interest of the organisation, club or individual. Organisational culture, processes and practices must change to ensure that the protection of young people and the reduction of risk are...the paramount considerations.\(^{56}\)
- Adults with disabilities, as has been shown by recent prosecutions for abuse.

Where changes follow, these need to be accompanied by high-level publicity to ensure that any organisations concerned with PVG membership are aware of the requirements of the PVG scheme and that those individuals affected are aware of requirements and implications arising from scheme membership.

Those affected may include volunteers who could be convicted of an offence under section 73 of the Bill if they fail to renew their five-year membership. There is also liability upon organisations under section 90 of the Bill. This may be a deterrent to volunteering, though it seems that the major consideration must be the safety of those children and adults. The possibility of risk of harm must be minimised and their future protection secured. There may need to be transitional arrangements be to ensure members of the relevant groups avoid inadvertent breaches.

Regulated roles will be set out in accordance with the legal test set out under section 75(2) of the Bill\(^{57}\), which will provide certainty as to what roles and circumstances require regulation and membership of the PVG scheme. These will be where it is identified that there is a “potential for an unsuitable person to harm a child or protected adult.” These outweigh the requirement for them to register on the PVG scheme. Section 76 (1) of the Bill provides a definition of “protected adult” to help bring clarity to those roles working with adults may create an opportunity to harm.

There has been recent media adverse publicity regarding abuse of children abroad in relation to the international aid sector. Changes are welcomed which make it clear under Schedule 4 paragraph 1(4) of the Bill that the provisions and offences will apply to activities carried out with the United Kingdom\(^{58}\), where an organisation has its place of business or personnel in Scotland\(^{59}\) and its functions are principally carried out at that place of business\(^{60}\). This provides safeguarding abroad to the standards required in Scotland.


\(^{57}\) Including schedules 3 and 4

\(^{58}\) Paragraph 1(4)(a) of Schedule 4 of the Bill.

\(^{59}\) Paragraph 1(4)(b) (i) and (ii) of Schedule 4 of the Bill

\(^{60}\) Paragraph 1(4)(c) of Schedule 4 of the Bill
Schedules 1 and 2 of the Bill

Section 14(1) (b) of the Bill deals with non-disclosure convictions which are pertinent when considering Level 2 disclosures. Non-disclosure convictions are not included in Level 2 disclosures which are defined as being a “spent” conviction and either:

(i) an offence that does not appear on either List A or List B of the relevant schedules or

(ii) an offence that does appears on List B and that one of the following three conditions are satisfied:

- The disposal was one of admonition or absolute discharge
- The conviction was a childhood conviction and at least 5 years and 7 months have elapsed since the date of conviction
- The conviction was not a childhood and at least 11 years have passed from the time of conviction

Though lists were always included, the Bill is proposing to substitute new lists for the previous List 1 and List 2. Much of the earlier content remains but offences have been moved from one list to the other or dropped altogether, having the effect that these “spent” convictions will no longer be disclosed. Though recognizing the need for review, there are some questions arising in relation to these changes:

- Omitted from List A includes fraud, perjury, attempt to pervert and attempt to defeat the ends of justice (which is not included at all) and other serious offences involving dishonesty.
- Embezzlement has been moved from List B to List A. Though embezzlement is serious, it seems that the same criminal components may be involved in many frauds. The nature of the conviction depends largely on the decision made by COPFS regarding prosecution remains similar. The scope exists to charge Department of Work and Pensions as either a fraud or embezzlement, but the criminality is the same. Similarly, fraud can range in scale and severity. While the lack of disclosure of one minor fraud conviction might not be too significant, we would be concerned that a course of criminal conduct including various frauds was not included.
- There is duplication under paragraph 1 (a) and paragraph 8 of false accusation of a crime.
- Changes can be made by regulations to these schedules, though we believe that consideration of these issues at Bill stage is important. There may also need to be future-proofing in terms of new – such as under the Counter-Terrorism and Border Security Act 2019 - or future offences, to ensure consistency of approach.

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61 As defined in the Rehabilitation of Offenders Act 1974
Equalities

There are very significant equality impacts from this new disclosure regime, both in terms of individuals seeking disclosure who may have particular vulnerabilities, or disclosures to protect people who have particular vulnerabilities. Depending on the time determined for the “prescribed period” under the Bill, this may create concerns for vulnerable people, and their ability to respond. As noted above, there is not discretion to disapply these periods.

We also have concerns around the definition of “protected adult” under section 76 of the Bill, amending section 94 of the PVG Act. This amendment risks having a morass of different definitions and assessment criteria across the range of legislation around vulnerable people. For instance, under the definition proposed in the Bill, an individual could qualify for Personal Independence Payment and need a carer to meet assessed needs but still not be considered a “protected adult” for the purposes of this legislation. Further, we believe that the section overall provides far too much legislative discretion; at most, there should be discretion only to extend the definition, but there surely needs to be parliamentary approval or at least scrutiny. The use of the term “significantly impaired”, without wider definition, is likely to create uncertainty and delay, or potentially result in litigation (as in the recent PIP case in the Supreme Court).

Publicity

The changes to the disclosure regime contemplated by the Bill are wide-reaching. We have highlighted a number of areas where we believe that greater clarity will be needed. We also believe that, not least as the changes might see offences committed by individuals or organisations who, for instance, fail to comply with the new PVG regime, there needs to be adequate publicity of these changes. Some users of the disclosure system, such as public bodies and financial services organisations, may be better placed to communicate these changes to relevant staff. Communicating the changes to the voluntary sector, though, where organisations operate on a smaller scale - 54% of charitable organisations across Scotland have incomes of less than £25,000 – and raising awareness would be an important element to the successful implementation of the Bill.
Graham McCulloch

I fully support the general principles of the Bill and proposals to modernise and improve the state disclosure system in Scotland in a way which will simplify the system and agree that there is a need to strike an appropriate balance between strengthened safeguarding of the public and addressing the proportionality of impact of the legislation.

While recognizing that proposals such as a five-year term of membership may indeed reduce the number of people registered as PVG scheme members there is also the need to consider whether a range of measures need to be part of the legislation to prevent misuse of the new system by the submission of inappropriate, blanket applications by employers. The initial approach should of course be to raise awareness of the criteria around regulated roles and PVG scheme membership through information, education of recruiters and employers. There may however require to allow Disclosure Scotland to have the ability to inspect, investigate complaints and in the most serious examples of misuse, impose conditions or sanctions.

There is a danger that the extensive range of job titles identified as requiring to be regarded as “regulated roles” during the consultation process might reflect an inability to properly consider whether carrying out the normal functions of these roles in an appropriate manner can actually allow the conditions where the post holder does have the capacity to exert significant power or influence over a child to develop.

The PVG scheme is not an easy alternative to appropriate standard operating procedures, supervision and staff training. As the National Guidance for Child Protection in Scotland 2014 put it “Procedures and guidance cannot in themselves protect children; a competent, skilled and confident workforce, together with a vigilant public, can.”

Similarly, as part of the recruitment of staff, publishing a list of roles for typically-encountered positions for which PVG scheme membership would be mandatory cannot automatically improve child safeguarding unless steps are taken by employers to ensure that safety is integral to services for children right through to the point of delivery.

(In a personal capacity as the timing and timescale for responses has not afforded the Board of the voluntary sector youth and children’s work organisation I work for with the opportunity to fully consider their response)
NHS Education for Scotland (NES)

Further to the call for evidence for the Disclosure Bill, please note the following feedback from NHS Education for Scotland (NES).

**Lifelong Member Removal**

NES provides a Once for Scotland PVG service for all doctors in training across NHS Scotland Health Boards. The removal of lifelong membership means trainees will only have membership for a maximum of 5 years. This will result in an increased cost to NHS Scotland for those doctors in training for over 5 years, this increase in cost would come not only from the £18 fee for each additional application, but also from the cost of associated administration and digital processes, included additional tracking of renewals.

**Applicant reuest to review information on certificate**

Whilst NES understands that the ability to review certificates will only be for those who have ‘other relevant criteria’ as provided by Police Scotland recorded on the certificate, it remains unclear as to when in the application process this may happen and if this will impact on processing times, potentially leading to delays. Delays in these processes for doctors in training can ultimately impact on service provision in NHS Boards.
NHS Healthcare Improvement Scotland response

Healthcare Improvement Scotland (HIS) is responsible for regulating independent hospitals, voluntary hospices, private psychiatric hospitals and independent clinics in Scotland.

HIS started to regulate independent clinics in April 2016. Independent clinics are defined in the National Health Service (Scotland) Act 1978 as clinics that are not part of a hospital and from which a medical practitioner, dental practitioner, registered nurse, registered midwife or dental care professional (clinical dental technician, dental hygienist, dental nurse, dental technician, dental therapist, orthodontic therapist) provides a service, which is not part of the National Health Service. The term ‘service’ includes consultations, investigations and treatments.

We would like to draw the committee’s attention to the requirements of the Healthcare Improvement Scotland (Requirements as to Independent Healthcare Services) Regulations 2011. These regulations set out the standards independent healthcare services have to comply with in order to maintain their registration. These regulations impose a duty on HIS and the providers of independent healthcare to check the backgrounds of anyone who provides, manages or is employed in an independent healthcare service.

In particular regulation 9 states:

(1) A person who is listed in the children’s list in the Protection of Vulnerable Groups (Scotland) Act 2007(1) must not provide, manage or be employed in an independent health care service which provides care for children

(2) A person who is listed in the adults’ list in the Protection of Vulnerable Groups (Scotland) Act 2007 must not provide, manage or be employed in an independent health care service

In order that both HIS and the providers of independent healthcare services can discharge their duty under this regulation, it is important that they can establish the listed status of individuals that act as providers, managers or employees in independent healthcare services using the PVG scheme.

The Protection of Vulnerable Groups (PVG) (Scotland) Act (2007) was recently amended to allow HIS to undertake suitability checking of providers of independent healthcare services as part of the registration process and it is important that these arrangements are maintained under any new scheme.

The current PVG scheme also allows the providers to enrol their employees in the scheme if they are undertaking regulated work within the service. It does not, however, permit them to check the listed status of every employee and therefore their suitability for employment. This
restricts their ability to comply with regulation 9 above. It would be helpful if the ability of providers to undertake a check in this way was considered as part of any new scheme.

We would also highlight that within the independent healthcare sector there are a number of mechanisms to ‘employ’ people in a service in addition to direct employment, for example healthcare professionals can be granted practicing privileges within a registered service or employed on a sessional basis. In order to ensure that a provider can comply with regulation 9 it is important that all methods of engagement are considered employment for the purposes of checking listed status.

August 2019
Recruit With Conviction

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

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

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

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

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

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

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

Widening of membership

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

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

This “offender stereotype” anxiety leads to many recruiting staff perceiving risk as far outweighing any potential benefits as they do not have the requisite understanding of the individual and their convictions. This normally results in those with any disclosure of information not being offered employment and undermines the principles of Fair Work in Scotland.

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

**Access to information**

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

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

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

**Removal of historic convictions**

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

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

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

**Delays of information**

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

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

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

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

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

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

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

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

Dughall Laing
Director
Recruit With Conviction
19/8/19
Release Scotland

About Us

Release Scotland was created as a joint initiative by business and Scottish Government. Release Scotland enjoys the ongoing support of Disclosure Scotland and Scottish Government and features businesses such as Virgin Trains, REED, and Greggs. Release Scotland recently supported a Disclosure Scotland event on the Disclosure Bill and spoke to employers such as Royal Mail, TSB, Arnold Clark, and Aviva. Release Scotland are concerned with championing business voice in the important debate on ethical recruitment for people with convictions. This includes emphasising to business that this debate really is a business matter and matters to business. Our role includes encouraging more businesses to recruit people with convictions and our aim is to devise a simple framework by business, for business on how to recruit safely and fairly in the interests of both the individual and the organisation.

Maree Todd MP summarised the situation as follows: “For most offenders, the passage of time and the adoption of a crime-free lifestyle provide a basis for their accessing work and making a greater contribution to society. However, we recognise that the situation can be very difficult for employers. That is why I encourage employers who are wary of employing people with convictions to sign up to Release Scotland...”

Overview of Response

This response is given in the context of the rise of the gig economy and development of complex supply chains which has made the labour market a far more complicated structure than ever before. With more people finding work through job boards, social media platforms such as LinkedIn, recruitment agencies, and gig platforms the employment relationship is changing. Many new employment models have sprung up such as Direct Engagement, zero hours, Gig platform models such as Upwork, and innovative new recruitment platforms. The complex nature of supply chains has further compounded the lack of standardisation on how organisations recruit and compounded the confusion for individuals when going through a job application process.

This response focuses on the business voice in the debate with the aim of ensuring wider take up across the business community for ethical recruitment in a way that is deemed safe and fit for purpose for business. Release Scotland believe the hiring of people with convictions is not business doing good, but it is good for business.

There are 3 core sections to the response:

1. Ensuring Safety is Not Compromised
2. Ensuring Simplicity for Business
3. A Solution to Ethical Recruitment

Ensuring Safety is not compromised

Overall Release Scotland is positive about, and highly support of, the Disclosure (Scotland) Bill but recognises the greatest barrier to business normalising the recruitment of people with convictions is the perceived threat posed to that business of something going wrong. This barrier should not be overlooked, and the best way to achieve greater recruitment of people with convictions is to work with business to alleviate those concerns.
Renewable 5-year membership to PVG is a sensible idea insofar as it will reduce active numbers of people in the scheme and ensure the scheme is directed towards those most relevant to it, but the system needs to be clear to employers. This needs to include rules around lapsed renewals for those in employment, and the process for individuals applying for a regulated role whose renewal has previously expired (what is the likely length of time required to resolve the issue, what would an employer do in the short term, can employers pay for this directly?). Will the legal position facing employers hiring or employing a person with a lapsed registration be clear - will this be an offence by the employer, is an individual allows their registration to lapse in employment?

Release Scotland is positive about Scottish Government ending the court referral process as this will make things simpler for business, along with the obvious benefit for individuals.

With regard to the sharing of information by Police Scotland extending the scope beyond those already in the PVG scheme is a very positive safeguarding move. What would the expectations be of employers who have hired those individuals? Would they have committed an offence in doing so and would this be acted on, or would Disclosure Scotland simply notify the organisation for action? Who would take up a possible case against an employer, would it be Police Scotland or Disclosure Scotland? In the case of recruitment agencies would this also be an offence under the Conduct Agency Regulations and referred to the Employment Agencies Standards Inspectorate?

Under plans for Local Authorities able to make referrals would this include about individuals who are not employees? What if the worker was employed by a recruitment agency? In these cases, it would also be important to ensure the employee’s rights are properly upheld, with the legal duty sitting with the employing organisation but the safeguarding investigation conducted by the Local Authority.

Whilst Release Scotland agree with the opportunity for individuals to challenge ORI, we believe an employer must be notified to ensure appropriate controls can be implemented during the hiring process.

Many businesses in the UK recruit across England and Scotland and therefore the increasing disparity between criminal record regimes is posing a very real challenge to business who may not be able to employ an individual in one location but could in another. Release Scotland understand the difference and importance of the separation between governments but urge Scottish Government and Disclosure Scotland to engage DBS and UK Government on this issue with the opportunity of leading this debate.

Ensuring Simplicity for Business

To answer this part of the consultation Release Scotland engaged the Criminal Records Trade Body (CRTB) which is the trade body for the largest criminal record check processing organisations in the UK. The trade body works closely with the Disclosure and Barring Scheme (DBS) and Disclosure Scotland.

Release Scotland believe the move to core activities giving rise to regulated roles (roles holding power or influence) from doing regulated work is innovative, responsive to the current climate, and the right thing to do. However, how this is made clear to businesses will be very important to ensure compliance and appropriate safeguarding. The majority of organisations are very committed to safeguarding and to ensure compliance with the law, so this system
would need to be straightforward for businesses to understand. It is also important that it does not become possible for individuals who are unsuitable to circumvent the system and obtain work in these settings through other means, such as extended supply chains. For example, is it possible that certain roles in one organisation would meet this test but not in another organisation?

Release Scotland support the proposed simplification of the Disclosure regime to two main levels to better simplify the employment landscape for businesses. The eligibility criteria, minimum legal duty, and process will be key for businesses to understand to ensure clarity and the desired simplicity. Release Scotland urge Scottish Government and Disclosure Scotland to work with employers when designing the regime in more detail.

The business community will strongly agree with online. In December 2018 the Home Office introduced online as part of the statutory defence when employing non-UK nationals, and both UK GOV and Scottish Government are designing digital identity strategies meaning the majority of recruitment in future will be conducted digitally, at least outside of the actual interview itself. For Disclosure Scotland to remain a paper-based process will limit the opportunities from digitalisation open to business and harm the Scottish economy. Since the introduction of digital systems in England and Wales (the DBS “e-Bulk” scheme) hiring times have vastly reduced enabling individuals to begin work sooner and therefore earn, as well as enabling businesses to be more productive. However, the proposed Digital Certificate must be easy for individuals to share and be resistant to fraud. Where employers have previously been able to assure themselves directly, they will be reliant on individuals in the new system. Therefore this process must be robust. The consent process must also be simple for individuals and businesses and not put unnecessary barriers into what should otherwise be a more streamlined process than the one in existence today. The third party may not always be clear in the modern gig economy, so whilst it is a principle of GDPR for consent to be specific, it must avoid being a burden in the process.

Time to hire is consistently one of the main concerns for businesses, therefore if the application process can only be enacted by an individual there needs to be a way for this to be monitored and/or facilitated by employers. Ideally, the process should still be led by business with consent from an individual.

A Solution to Ethical Recruitment

Release Scotland wholeheartedly agree with establishing clear procedures for the registration of accredited bodies. We believe this should include ensuring employers meet best practice standards when recruiting people with convictions as well as ensuring compliance with legal obligations. This is an opportunity for Scottish Government to consider a world-leading framework co-designed by business to ‘normalise’ the recruitment of people with convictions and should be broadened to every organisation processing Level 1 as well as Level 2 disclosures. We believe this opportunity should not be missed by narrowing it to only those signing Level 2 applications. By working with business to promote an ethical recruitment framework which could, in time, broaden out beyond people with convictions to other under-represented groups, Scotland could implement, via the Disclosure (Scotland) Bill, a cultural norm for businesses employing individuals. However, on either just Level 2 signatories or across both, it should be considered how this would be upheld and/or monitored?
Ross of Mull and Iona Community Transport Scheme (RoMICTS)

Introduction
This statement has been prepared by the Coordinator of The Ross of Mull and Iona Community Transport Scheme (RoMICTS) and endorsed by RoMICTS Convenor. We welcome the opportunity to inform consideration of the Disclosure (Scotland) Bill by the Education and Skills Committee of the Scottish Parliament, concerned to highlight significant implications for our charitable community enterprise of some relatively minor details of text.

Summary
The wording of some provisions in Part 2 of Schedule 4 of the Bill leaves some scope for doubt as to whether or not mandatory measures proposed would necessarily apply to RoMICTS. We appeal for clarity, with a considered preference for inclusion of our organisation within the scope of revised legislation. The long-term integrity of Safeguarding measures applicable to RoMICTS activities may otherwise depend upon the uncertain capacity and motivation of future Trustees to oversee less formal or discretionary vetting arrangements for fellow Board Members and other RoMICTS personnel. RoMICTS exclusion from provisions of the Bill could be to the potential detriment of consistent high standards of assurance which our service users have come to expect of our organisation.

Context
In 2016, RoMICTS adopted formal policies for the protection of children and vulnerable adults, which specified i.a.: No one will be accepted as a volunteer driver unless they are willing for an application to be made to join the PVG scheme.

As newly appointed Coordinator I was responsible for recruitment of drivers, so sought management support and guidance on options for putting this policy into practice. Before practical steps were approved to implement necessary arrangements, 2 years passed (during which time a complete turnover of Board Members occurred).

Initial advice supplied by Volunteer Scotland Disclosure Services in 2018 concerning PVG checks for RoMICTS volunteer drivers was effectively contradicted by instructions subsequently received from Disclosure Scotland a few months later. Although a few PVG scheme memberships had been processed for some RoMICTS drivers through the Scottish Ambulance Service in 2015, (as an adjunct to an agreement to provide island transport for SAS patients, on occasion) and also by the Mull and Iona Community Trust in 2018, (as an 'accredited umbrella body'), Disclosure Scotland intervened to advise that no further applications should be submitted by RoMICTS. PVG scheme membership was officially deemed unnecessary and inappropriate for RoMICTS volunteers. Disclosure Scotland further advised that it was potentially an offence for RoMICTS to require PVG scheme membership of our prospective volunteers.

RoMICTS policy for protection of children and vulnerable groups thus proved unworkable in practice. An alternative (but weaker) Safeguarding policy (requiring letters of reference rather than PVG scheme membership for vetting purposes) has since been adopted by the RoMICTS Board. Meanwhile, as a matter of good practice in the circumstances, most RoMICTS driving duties are generally allocated to volunteers who are known or assumed to hold PVG scheme membership. Following Disclosure Scotland's unexpected ruling on the issue, recruitment and induction of new volunteers to participate in RoMICTS work with vulnerable people has generally been on hold for a year. One consequence of this has been that continuing high standards of assurance (as locally expected of RoMICTS) has depended upon a small number
of fully approved drivers sharing up to 100 hours of unpaid driving duties per month. Such high levels of personal commitment may prove unsustainable.

**Background**

Our small charitable community enterprise was established as a SCIO in 2012 to help meet local travel needs throughout our sparsely populated and widely dispersed neighbourhoods, where public bus services are very limited.

Exceptionally committed founding Trustees and other local volunteers assumed unpaid responsibilities to successfully establish safe, legal, friendly, reliable and solvent operations providing affordable Community Transport journeys, bookable on request. Principal beneficiaries have always included isolated residents who might otherwise face challenges getting out and about. Successions of volunteer drivers (operating under Section 19 permits) have facilitated inclusive access to health and medical services, shops, social occasions and community events for over 7 years.

Initially, volunteers used their own cars to provide journeys for individuals (some still do), but early donation of a minibus allowed for development of group travel opportunities. Some elderly residents appreciated shared outings to attend church, coffee mornings, lunch clubs, ceilidhs and podiatry clinics together. The minibus also enabled primary school children to attend swimming lessons, recreational facilities, sports fixtures, films, plays and music lessons, conveniently and economically. Dozens of visiting youth groups have also enjoyed use of RoMICTS (twice replaced and upgraded) minibus in recent years, as well as parties of wedding guests, young naturalists, walkers, choirs, stranded holidaymakers and the local Pipe Band, amongst others.

Capacity to meet all kinds of local travel needs more cost effectively was significantly enhanced in 2015, when our dedicated MPV came into service, purchased new with Scottish Government funding support. This 7-passenger vehicle (or 6 if one is in a wheelchair) has since provided over 1768 requested journeys for almost 5000 passengers, serving as RoMICTS daily 'workhorse'. Around 30% of these trips have been for health-related purposes, benefitting folk who can't drive themselves to fetch prescriptions or attend appointments. In June 2019, eight local residents in their 80's or 90's accounted for 29 community transport bookings, equating to over 70% of all MPV journeys provided during that busy (but not untypical) month.

Elderly, frail and vulnerable people have always been amongst RoMICTS' most frequent passengers. Some, with impaired mobility, ailing faculties or mental health challenges, routinely depend on the service up to three times a week or more. By reliably meeting virtually every request received for a journey which might otherwise be impractical or impossible, community transport positively supports the personal independence of isolated and elderly residents and extends the socially inclusive quality of local island life.

RoMICTS is not, however, exclusively dedicated to this particular group of service users, it being estimated that around 250 residents of south west Mull and Iona have used community transport on at least one occasion in recent years, equating to over a third of the total local population of our operational area.

RoMICTS currently generates income for our charity by offering affordable journeys to all for a suggested donation, if travel would otherwise be impractical. If RoMICTS carried only 'protected' passengers, donations might not always cover fuel costs, let alone vehicle maintenance, insurance, administration, volunteers' expenses etc. RoMICTS capacity for
charitable activity (including provision of affordable local journeys for disadvantaged residents) thus depends in practice upon other sources of financial support, including donations from other passengers using the service.

Safeguarding

It was recognised as early as 2011 that prospective volunteer drivers might require 'Disclosure Scotland status' but in RoMICTS' early days, contact details for two Referees willing to vouch for the suitability of candidates for driving duties sufficed to get the organisation up and running on the road. By 2014, however, no such formalities applied to my own recruitment as an occasional volunteer driver, even though associated duties in practice entailed being in sole charge of delivering groups of primary school age children to attend music tuition 45 miles away, and driving them home again, some hours later, on 3 separate occasions.

As a RoMICTS volunteer driver for the past 5 years, I have had regular occasion to enter the homes of a number of vulnerable local residents, and to assist them with preparations for going out. I routinely help some to put on coats and look for their purses, sticks or keys. Some appreciate a supportive arm to assist them to and from the vehicle. I carry bags and fasten seat belts as necessary, and handle cash transactions on their behalf, on request. In practice, RoMICTS volunteer duties can often extend to escorting very frail people through the door at their destination (be it hospital waiting room, shop, church, cafe, ceilidh or a friend's kitchen) and generally serving as a trusted companion. Opportunities to befriend vulnerable people can thus be implicit to the role of RoMICTS volunteers, over time.

A small number of elderly people routinely account for a high proportion of RoMICTS trips, so some physical contact and 'overall control' might reasonably be considered integral (rather than incidental) to the unpaid work of a volunteer driver. In this light, provisions for required vetting of personnel involved in regulated activity, as set out in some clauses of the Bill (notably Schedule 4 Part 2, sub-paragraphs 21 and 22, headed 'Miscellaneous') seem unsatisfactory, on the basis of highlighted text and comments below:

21 Driving or escorting protected adults in connection with transport services provided exclusively or mainly for use by protected adults.

Comment RoMICTS welcomes this acknowledgement of our specific field of activity (albeit termed 'miscellaneous') but our constitution currently commits our organisation to meeting transport needs of people within a particular geographic area, rather than on the basis of their personal characteristics or legally defined status. In this light, RoMICTS cannot claim to 'exclusively' nor necessarily 'mainly' serve protected adults, despite our dedication to routinely meeting journey requirements of vulnerable people several times every week. RoMICTS trusts that consideration of local circumstances might helpfully inform adjustment of the wording of this policy detail to allow for our volunteer scheme to be included rather than excluded from the scope of the Bill's provisions. Just as the formality of a license check is recognised by volunteers as a perfectly reasonable prerequisite for driving on behalf of RoMICTS, so too were PVG checks readily accepted as sensible and appropriate by prospective RoMICTS volunteers themselves (including some who have only recently arrived to take up residence in our communities and are keen to develop local contacts through RoMICTS).
Comment: It might be argued that a primary function of our organisation is to provide benefits 'for or to protected adults' but RoMICTS purposes are set out in our constitution as follows:

1. To meet the transport needs of the people on the Ross of Mull and Iona.
2. To promote the participation of residents of the Ross of Mull and Iona in activities and events where transport would normally be a barrier.
3. To promote a reduction in social isolation and exclusion in vulnerable groups in the community of the Ross of Mull and Iona.
4. To advance the ability of residents of the Ross of Mull and Iona to access medical appointments when transport would normally be a barrier.
5. To promote a service which will enable community groups to access an affordable vehicle.

On this basis, provision of 'benefits for or to protected adults' is evidently not the main purpose of our organisation, as defined. Given that driving and escort duties for vulnerable people account for such a high proportion of overall RoMICTS volunteer activity and time, however, it seems incongruous that RoMICTS staff and office bearing Trustees might be excluded from vetting requirements.

It would be regrettable if the small matter of a few words precluded RoMICTS personnel from applying for disclosure of personal credentials commensurate with our respective roles in the organisation. We recognise that RoMICTS volunteers hold positions of responsibility in relation to the wellbeing of all of our passengers, but most especially for 'protected people'.

Conclusion
RoMICTS aspires to excellence as a Community Transport provider and recognises Safeguarding responsibilities as integral to our Duty of Care for the welfare of vulnerable people who regularly depend on our services.

It is unfortunate that implementation of associated policies has been set back and undermined by conflicting guidance received from different authorities regarding PVG checks.

It is very much hoped that the Disclosure (Scotland) Bill will take local circumstances of our small charity into account, and clearly prescribe practical ways forward to keep vulnerable members of our communities safe as 'protected people' in the context of our community transport operations.
Royal Blind and Scottish War Blinded

Royal Blind and Scottish War Blinded welcome the publication on the Disclosure (Scotland) Bill and the opportunity to respond to the call for evidence from the Education and Skills Committee to inform Stage 1 consideration of the Bill.

Royal Blind is Scotland's largest vision impairment organisation. Our vision is to see a community in which blind and partially sighted people, including those who have other disabilities, are fully included and lead fulfilling lives. We care for, educate and employ blind and partially sighted people from across Scotland and the UK. We support people of all ages - from babies and toddlers at our pre-school playgroup, children and young people at the Royal Blind School and Kidscene after school club, young adults through our supported accommodation and respite care, employees with vision impairment at the Scottish Braille Press and older people in our care homes. Our sister charity Scottish War Blinded provides a free service supporting individuals who have served in the armed forces and currently live with a vision impairment.

Royal Blind and Scottish War Blinded broadly welcome the Disclosure Scotland Bill to ensure a robust and efficient legislative framework for safeguarding young people and protected adults in Scotland. We believe the proposals will be beneficial in making the system accessible, simpler and proportionate. There are a number of specific issues we wish to draw to the attention of the Committee which are of particular interest to us in relation to the work of our charity and the needs of people living with vision impairment.

Membership of the Protection of Vulnerable Group Scheme for Charity Trustees

Royal Blind and Scottish War Blinded welcome the Bill as an opportunity to close a loophole in existing legislation identified by Disclosure Scotland. This was identified by Disclosure Scotland during a sample check on eligibility in relation to applications for our charity trustees to join the Scheme.

There are virtually identical definitions in respect of charity trustee in Part 4 of Schedules 2 and 3 of the Protection of Vulnerable Groups Act (2007). These state that regulated work with children is where the charity’s main purpose is to provide benefits for children, and that regulated work with protected adults is where the charity’s main purpose is to provide benefits for protected adults. The consequence of this is that the charity can only have one “main purpose” in relation to these provisions, and therefore the trustees are only eligible for either the children’s workforce or the protected adult’s workforce, but not both. If the charity is providing benefits to both children and protected adults equally, then the trustees are not eligible for a PVG check at all.

It has been accepted that this was an unintended consequence of having two separate types of regulated work, and clearly our view as a charity is that it is important that we are able to request PVG checks for both our work for children and young people as well as for our work with protected adults for our trustees.

We have been informed by Disclosure Scotland that the revised definitions of regulated work in the Disclosure Scotland (Bill) will close the loophole relating to charity trustees of charities who deal equally with both children and protected adults. Given there are a significant number of charities who work with both groups, we welcome this matter being addressed through the
new legislation. We believe further detail on how this is being achieved in the Bill would also be beneficial. Our reading of the Schedules to the Bill indicate that this is achieved by trustees of charities providing benefits to protected adults no longer having to join the Scheme, but further detail on this matter would be welcome.

**Equality of access to the new Scheme**

We recognise the consultation process for the Bill found strong support for a simpler system with fewer disclosure products and also for services to be provided online, and that this will make accessing the scheme easier for many of those using it, including employers. However, it is important that this should not result in a “digital by default” approach as non-digital alternatives are important for many people, including those with sight loss. As a charity which provides accessible media for people with vision impairment, we welcome the Policy Memorandum stating that non-digital alternatives will be made available.

The Policy memorandum refers to the potential for introducing membership cards, to a more limited extent than had been proposed in the consultation, so that they are available to scheme members who cannot interact digitally with Disclosure Scotland. The provision of membership cards may therefore be important for people with vision impairment, but their introduction is not on the face of Bill, with the Policy Memorandum stating that this will be achieved through regulation-making powers under section 72(1) of the PVG Act. The Policy Memorandum does not state whether there will be a fee for a membership card, which would potentially see additional costs imposed on those employees who couldn't access the scheme digitally. We believe this would create an inequality in the system for those with access requirements. Therefore, we believe further clarity would be welcome on how a membership card will be introduced, whether there are any plans to charge fees for cards and the timescale for their introduction. We also believe there is a case for statutory instruments for the arrangements for membership cards to be considered though the affirmative procedure.

**Voluntary sector organisations and the new system**

As a member of the Coalition of Care and Support Providers, Royal Blind is aware of a number of concerns the organisation has raised in relation to impacts of proposals for the new system set out in the Bill. We would urge the Committee to consider carefully the issues highlighted in that submission which sets out a number of priorities for third sector organisations. These include the need to for process changes to Disclosure to minimise the risks of time delays and increased costs which are likely to be seen as further barriers to employment in a sector which already faces significant challenges in recruitment and retention. Additionally, we believe further detail and consideration should be given to the potential cost impacts of third sector employers of moving to a recurrent five-year scheme membership, and the additional administrative burden. We understand the strong policy drivers for this proposal, and that it reflects the most popular option from the consultation. However, a number of voluntary sector organisations will pay for their employees’ membership of the scheme. This is of particular importance for third sector organisations working in areas such as the care sector where there are already concerns over low pay. The financial memorandum provides an example indicating that for some individuals, or organisations paying membership fees on their behalf, costs could rise from £59 to £236. Either for individual employees in low pay sectors or third sector organisations employing large numbers of staff, the financial impact is potentially not insignificant. Consideration should be given to how additional costs for such employees or third sector providers can be minimised.
Richard Baker, Policy Manager
August 2019
Royal Yachting Association Scotland

Introduction
RYA Scotland is the recognised governing body in Scotland for all forms of dinghy and yacht racing, motor and sail cruising, RIBs and sports boats, windsurfing, canal boats, and personal watercraft. We refer to these disciplines collectively as ‘boating’.

Our purpose is ‘to promote and protect safe, successful and rewarding boating in Scotland’. We represent a community of about 70,000 people actively engaged in boating activity in Scotland, over 20,000 of whom are volunteers and members of RYA affiliated clubs. We support nearly 300 local clubs and RYA recognised training centres, the majority of which are within Scotland’s coastal communities and inland waterways.

RYA Scotland is volunteer-led, with up to 30 volunteers engaged in our committee structure at any one time and has a professional staff of 12.

Background
The community we represent draws interest from people of all social and economic backgrounds for whom boating is their sport, recreation or business. These boating interests encompass vessels of many forms whether this be a large motor yacht in a marina, a small sailing dinghy maintained in the garden or a canal boat based in one of Scotland’s inland waterways. Together these interests contribute to the club infrastructure of Scottish sport, the growth of an established industry around marine trades, marine tourism and the economy of the country.

Our affiliated clubs can be found across the country, from Solway to Shetland, Lewis to Loch Lomond, Stonehaven to Cumbernauld, Oban, Largs, Montrose, Barra or Plockton. Wherever they are located, our clubs rely on an enormous volunteer workforce, many of whom deliver instruction or coaching to new participants or learners in our sport. In common with many sports and recreational activities, the activities our volunteers are engaged in include those that are considered ‘regulated’ and require individuals to have membership of the PVG scheme.

This workforce includes young people under the age of 16, developing leadership skills and experience as Assistant Instructors, working towards formal qualifications.

We value highly the contribution of young people to our activities and the development of others in our sport. We see our role as providing a safe and supportive environment for these young people to develop as successful learners, confident individuals, responsible citizens and effective contributors within the immediate community of their club and in a wider sense as they become young adults engaged in broader community activity. Our investment in their development opportunities helps bring new participants to our sport, secures the future volunteer workforces of our clubs and provides the volunteers of the future for our own governance and programme delivery at a national and international level.

Whilst RYA Instructor and Coach qualifications have a minimum age of 16, the site-specific role of Assistant Instructor, which is open to people of any age who are already competent sailors, enables young people to assist in teaching younger or less experienced children under the
supervision of another qualified Instructor. They gain valuable experience which will help them to progress to becoming qualified instructors or coaches when they are 16 or over, leadership skills that are highly valued across other award schemes such as Duke of Edinburgh’s Awards and confidence in working with teams and groups of other people.

We believe the opportunities for developing life skills prevalent in club structures of all sports and particularly those of sailing and boating clubs, have greater and longer lasting impact than those provided through formal education.

Overview

RYA Scotland welcomes the opportunity to offer comment on the Disclosure (Scotland) Bill. We agree with the entirety of the Bill and the sentiment of its introduction.

Our concerns lie with;

- The position of volunteers under the age of 16, specifically the contradiction between the requirement to ensure that a volunteer is a Scheme member if the role is regulated, and an under 16 undertaking a similar role not being permitted to join the Scheme and
- the lack of a definition of supervision.

Comment

Schedule 3, Part 2, of the Bill lists as Regulated Roles with Children under ‘Leisure Activities’:

- Being engaged in the provision of cultural, leisure, social or recreational activities for children
- Coaching children in relation to sports or physical activity.

These Roles would clearly include those providing instruction or coaching in sailing, windsurfing and powerboating, or organising activities, whether in a paid or voluntary capacity, at RYA affiliated clubs and RYA recognised training centres.

It is clear from the proposals that membership of the PVG Scheme will become mandatory for individuals engaged in roles which are regulated and RYA Scotland is in agreement with this.

It is currently also proposed that a person age under 16 will not be permitted to join the PVG Scheme, or to obtain a Disclosure at any level except in exceptional circumstances where Ministers will have discretion to allow a Disclosure to be issued to a person aged 12 or over. We have concerns that this implies and will be most likely to be interpreted to mean, young people under 16 cannot undertake regulated roles.

It is also suggested in the Q&A documentation provided by Disclosure Scotland that the Bill will not apply to those under 16, the implications of which were not discussed at the Disclosure Scotland presentation to sport governing bodies in July 2019 but would suggest that there is no intention to preclude those under 16 from undertaking regulated roles. **This is by no means obvious.**

There is a lack of clarity in the messages from the information being promoted. We believe the contradiction between a club being required to ensure that a volunteer is a Scheme member if the role is regulated and an under 16 undertaking a similar role not being permitted to join the
Scheme will create confusion. This could well deter clubs from involving young volunteers and, as a consequence, adversely affect the opportunities for young people instructing and coaching in our club-based activities as well as those of other sports with similar developmental roles.

We believe a much clearer and supportive statement is required to ensure young people under the age of 16 are not precluded from undertaking volunteer roles which would be regulated for those over 16.

Further – the application of ‘supervision’ for occasional volunteer roles and those under the age of 16, such as Assistant Instructors, is a regular component of many club-based activities and not unique to our sport or sector. The Bill and the information around it does not provide enough detail on what should be considered ‘direct supervision’.

The Bill needs to provide clarity on what is considered to be ‘direct supervision’, do so in terms that are sufficiently flexible to encompass the breadth of activity that includes a range of outdoor sports and pursuits and allow for ‘experiential learning’ to be genuine.

James Allan - Chief Executive Officer
Jackie Reid – Safeguarding and Equality Manager
Liza Linton – Development Manager

19 August 2019
Scottish Children’s Hearing Administration (SCRA)

SCRA welcomes the opportunity to provide written evidence to the Education & Skills Committee.

INTRODUCTION

The Children’s Hearings System is Scotland’s distinct statutory system, in which concerns about a child’s circumstances (whether about the care or treatment of the child by adults or the behavior of the child) are considered by Children’s Reporters and then by panel members in a Children’s Hearing, who make a decision about whether there needs to be compulsory professional involvement with the child and family.

In the Children’s Hearings System:

- the needs of children or young people are addressed through one holistic and integrated system which considers all the circumstances of the child and the child’s welfare
- the welfare of the child remains at the centre of all decision making and the child’s best interests are paramount throughout
- the child’s engagement and participation is crucial to good decision making
- the rights of children and families are respected

The role and purpose of SCRA is to

Make effective decisions about a need to refer a child/young person to a Children’s Hearing

1. Prepare for and participate in court proceedings where statement of grounds or Hearings findings are appealed and ensure the wellbeing of children and young people – particularly vulnerable witnesses – are protected throughout the court process
2. Support Panel Members (though we are not involved in making Hearing decisions) and ensure fair process in Hearings
3. Support children, young people and families to participate in Hearings
4. Disseminate information and data to influence, inform and reassure
5. Provide premises for Hearings to take place
6. Work collaboratively with partners to support and facilitate the Getting it Right for Every Child (GIRFEC) agenda

SCRA’s vision of service is that:

We operate within Scotland’s Children’s Hearings System to protect and support the country’s most vulnerable and at-risk children and young people identified as requiring the full protection of the law due to difficulties, challenges and risks they face.

1. Scotland has focused on the needs and deeds of individual children in their specific set of circumstances through the statutory intervention of the Children’s Hearing System since 1971. However, we have not been able to take the same approach to the way in which the offending of children and young people is captured, recorded and then used when children reach adulthood. The Rehabilitation of Offenders Act 1974 has layered a response developed for the criminal justice system on top of the Children’s Hearing, which is a welfare system, not a punitive criminal justice system. This has always been incongruous and at odds with the ethos and approach of the Children’s Hearing. SCRA agree with the Policy Memorandum for the bill, at section 36, 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’.

2. We continue to believe that the approach of the Children’s Hearing to the offending behavior of young people is an approach that works. In the Children’s Hearing System all of the adversity faced by young people who behave in a way contrary to the criminal law is assessed and a plan to address the adversity is developed and ratified by the Children’s Hearing as a statutory decision maker. This holistic approach does not differentiate between offending behavior or neglect / abuse (for example) as a presenting adversity – and we have always believed that the outcome of involvement in the Children’s Hearing should, for the vast majority of children, not ‘come back’ to a young person later in life. We also recognise that there are some children and young people whose behavior during childhood and adolescence is such that, given certain circumstances, they may continue to pose a risk – and this ongoing risk requires to be assessed and determined in order to keep the public, other children and the individual safe.

We are pleased that our key concerns have been addressed in the Disclosure Bill.

We are hopeful that the future vision of the approach to the disclosure of offending for children and young people in Scotland as laid out in the Disclosure Bill will allow the very real chance for young people who experience adversity in their childhood to change and to have positive futures.

PART 1
Level 1 Disclosure:

3. The Management of Offenders (Scotland) Act 2019 has altered the situation in relation to the relevant disclosure period for cases dealt with in the Children’s Hearing System, so that there is no longer any relevant disclosure period. Once implemented, the act will mean there is no longer any relevant disclosure period regardless of whether the accepted or established grounds are discharged by a children’s hearing or the children’s hearing makes a CSO.

Consequently, Children’s Hearing information will no longer appear in Level 1 Disclosures.

4. However, SCRA think that the proposed level 1 and Level 2 tiers for disclosure is clear and transparent. We agree with the specification on age (applicants over 16, can be given between 12-16 if there is a need) and we agree with accredited body applications.

5. SCRA support the move towards the use of electronic communications and think that this approach is clearly described.
6. We would ask that the information “recorded in central records” (section 5(1)(a) by Police Scotland should be clearly and simply stated online – in respect of record keeping timescales and weeding and retention policies. This area of work has been complicated for a long time and it is important that the changes which have been made are clearly explained for people.

7. SCRA are pleased that there is no longer any automatic disclosure of childhood ‘conviction’ information. The approach outlined to the inclusion of childhood conviction data based on a case by case assessment is well developed and thorough. We are in full support of the review process as set out and we fully support the creation of the Independent Reviewer post.

8. We are hopeful that Scotland's approach to any inclusion of childhood conviction information will become more systematic, rigorous and consistent. The transparent review process makes sense and the appeal process also makes sense. We would want to see a presumption that childhood conviction information will not be included unless Scottish Ministers are able to demonstrate why information is relevant and ought to be included and we would want to see this clearly stated in either the bill or in the guidance to be developed as part of the Bill implementation. We do not believe that childhood conviction information should be included in disclosure certificates unless there is a justified need to do so – the process as delineated means that such justification has to be given.

**Level 2 Disclosure:**

9. SCRA are pleased that there is an alteration to the timescales in relation to conviction and that these timescales (5 years 6 months from the date of a child hood conviction; 11 years from the date of any other conviction) recognize that desistance for children and young people cannot be understood in the same way as adult desistance from offending.

**Common Provisions:**

10. The approach outlined in section 30 – of a single review being carried out by the Independent Reviewer if an individual applies for review under more than one relevant section of the Bill makes sense, and we think that this ‘single review’ approach needs to be maintained in all applicable circumstances in the Bill – for example where there is a need to look at conviction information for pre / post 12 behavior in a single case. SCRA also think that the ‘single review’ approach should be taken if there is a need for conviction and other relevant information (ORI) to be included in a Disclosure. We are not sure whether this process is clear enough.

11. We support the concepts of lawful and unlawful disclosure of level 1 and level 2 disclosure information – it is absolutely right that the information is used for the stated and intended purpose and not for other things and that there are clear consequences if the level 1 or 2 disclosure information is used in any other way.

**Accredited bodies:**

12. We support the register of accredited bodies and the management of persons with access to the disclosure information. We also support the electronic approach – which gives an individual access to and rights over their own information held by Disclosure Scotland. We fully support the code of practice.
We accept that identity checks will require to be done but have some reservations about the use of biometric data in relation to these checks – and would want to have clear and stated restrictions on the retention of, for example, fingerprint data used to establish identity. We accept that checks carried out by Disclosure Scotland carry a fee – but question whether the same fee should apply to public bodies as to individuals, and wonder whether the movement of public money around public agencies can be entirely justified. This argument we would extend to the fee to be charged for the work of public agencies to mine information from data systems to assist Disclosure Scotland in their work.

PART 2
PVG Scheme:
13. SCRA agree that the PVG scheme should not apply for young people under the age of 16 and that the level 1 or 2 disclosures will provide assurance for this group should it be required. We think that the ending of ‘lifetime’ membership makes sense, even though we have some reservation about the increased workload for organisations (particularly organisations in the public sector) and the increased cost burden.

Regulated roles:
14. SCRA agrees that people carrying out work in regulated roles require to be members of the PVG scheme and that this provides the strongest protection for Scotland’s vulnerable groups. This does have an impact on recruitment timescales and employment procedures and we think this should be recognised nationally.

Consideration for listing:
15. We think this approach makes sense and is in the best interest of vulnerable people and the individual being considered for listing.

Barred status:
16. This process is well explained and is required.

PART 3
General:
17. SCRA have no comments to make.

FINAL COMMENTS
18. We welcome the review process and the post of Independent Reviewer. It can be quite difficult to ‘see’ how the post will work, without being able to see all of the guidance / information in relation to the role / work of the Independent Reviewer.

19. We would, however, say that we think the processes put in place by the Independent Reviewer will require to be quick. Recruitment practices will need to recognise this additional step and may need to factor in extra time for all recruitment – so that if the Independent reviewer does become involved that does not become obvious and therefore prejudicial for a candidate in any recruitment exercise.

20. In respect of List A and List B we remain of the view that these offence ‘lists’ are quite difficult to explain to young people and their families. We are pleased that the offences on the
lists have been restated and amended in Schedule 1 & 2 of the Bill, but we would still prefer an approach which considers each offence on its own merits, rather than relying on a binary list.

21. Section 38 offences of threatening and abusive behavior (Criminal Justice and Licensing (Scotland) Act 2010) have moved from the current 8A list to the new schedule 2 list. SCRA welcomes this move in relation to section 38 offences committed by children – and would ask that if there are any proposals to move it to schedule 1, then there should be an exception for section 38 offences that are childhood convictions. We still feel that the inclusion on the schedule 2 list of many offences ‘commonly’ committed by young people may increase the likelihood of childhood conviction information being disclosed (any assault, any theft, breach of the peace). We would therefore ask that the test applied before the offence is included is a high test – and, as previously indicated, that the presumption should be that childhood conviction information is not included unless the Scottish Ministers can demonstrate that it should be.

22. We support the end of the ‘lifetime’ PVG membership and think that a renewal every 5 years gives more of a chance for people to move on from their past offending behavior.

CONCLUSION

23. SCRA welcomes the progressive approach of the Disclosure Bill towards the disclosure of offending behavior which has occurred during childhood and adolescence and we think that the Bill will genuinely allow young people to move on from their past to fulfilled and meaningful adult lives, whilst also providing robust and consistent protection from risk for Scotland’s most vulnerable people. We would ask the committee to support the Disclosure Bill.

SCRA Practice Policy Team 2019.
Scottish Social Services Council

Introduction

The Scottish Social Services Council welcomes the opportunity to respond to the Committee’s call for evidence on the Disclosure (Scotland) Bill (the Bill). As a progressive regulator, we consider that the Bill presents an opening to revitalise disclosure and learn from the past with a view to enhancing public safeguarding for the future.

The Scottish Social Services Council (SSSC) is the regulator for the social service workforce in Scotland. Our work means the people of Scotland can count on social services being provided by a trusted, skilled and confident workforce.

We protect the public by registering social service workers, setting standards for their practice, conduct, training and education and by supporting their professional development. Where people fall below the standards of practice and conduct we can investigate and take action.

We also have a responsibility for workforce data and intelligence. We produce workforce data, information and intelligence for employers and other customers to support the development of the sector. We develop and publish Official Statistics and National Statistics on the social service workforce, including on people employed as Mental Health Officers (MHOs) by local authorities.

Every worker on our Register is carrying out regulated work and we expect them to be PVG Scheme members.

We have considered the Bill and acknowledged in our response areas that provide clear improvements as well as those aspects that we believe require clarification.

Comments from the Scottish Social Services Council

The Bill sets out multiple policy objectives. We welcome mandatory membership of the PVG Scheme for anyone undertaking work with vulnerable groups, and the requirement for Police Scotland to make referrals when they have detected a person unlawfully working with vulnerable groups. This approach complements and reinforces our requirement that registered workers be PVG scheme members.

Engagement with stakeholders has identified confusion around what ‘type’ of disclosure they require for their role. We therefore also welcome that the Bill proposes a reduction in the number of disclosure products available and recognises the benefits of simplifying the range.

Information and data sharing

We note the proposals that allow Disclosure Scotland to assess what information to include in disclosures.

With specific reference to our Fitness to Practise proceedings, we need to receive all information that may affect a registered worker’s fitness to practise and will make targeted requests to Disclosure Scotland for specific material where necessary. Where Disclosure Scotland considers a worker for inclusion on the children’s list or adults’ list, we have on
occasion been unable to secure the release of information concerning why the worker is being considered for inclusion. This means that we are not in possession of all necessary information. In consideration of this and in the event that the above proposals are taken forward, we would welcome Disclosure Scotland adopting an approach that encouraged data sharing where it is in the public interest to do so, for example to assist with regulatory proceedings which have public protection implications.

In relation to conditions, it is sensible that individuals who are being considered for listing be subject to conditions. We note that the Bill requires notification to the regulator of the fact and details of the condition, but not of the information leading to the imposition of the condition. If it remains the position that this information is not to be shared with regulators, their ability to regulate effectively and protect members of the public is potentially compromised. As such, we again advocate for increased data sharing in the public interest.

Tests for inclusion
We consider that clarity is required regarding the tests that will be applied to determine the inclusion of information and the factors that will be taken into account. Specifically:

- Is it proposed that relevance would be assessed differently depending on the Scheme member’s profession and regulator?

- Would a pattern of behaviour be taken into account when assessing relevance?

- In the context of the SSSC, would the wider public interest in effective regulation and confidence in social services be taken into account?

- How would the regulators be involved in developing and reviewing the criteria?

- If information is deemed relevant, how would Disclosure Scotland assess whether it ‘ought to be disclosed’?

Offence Lists
We note the lists accompanying the Bill. In consideration of these as a regulator, we would welcome clarification or guidance on the rationale behind the inclusion and exclusion of offences from the lists.

For example, we note that embezzlement has been categorised as a List A offence, but fraud is not.

Renewals
The Bill states that Disclosure Scotland are allowing a four-week discretionary period for renewal of membership. Disclosure Scotland will advise Members three months in advance of renewal about the need to renew. In our experience of processing renewals, we feel it is helpful to state that the introduction of this discretionary period could encourage and result in late applications for renewal.

Section 7 (4) states that Disclosure Scotland will advise employers when someone has failed to renew and is no longer a Scheme member. It is our position that a further essential step is
to also notify regulatory bodies to allow them to consider the removal and determine if any interim action is necessary to protect the public.

**Regulated roles**

Whilst on our Register and fit to practise, social workers are available to carry out regulated work and as such, must be PVG Scheme members. In light of this, we consider that the Bill should contain provision to ensure that Scheme membership for social workers continues. We are also responsible for regulating and registering Care Inspectors and their seniors. We would welcome clarification regarding whether the term ‘regulated roles’ covers these workers. Our position in relation to these roles is the same as our stance on social workers. Specifically, that the Bill should ensure that those employed in these register parts continue to be eligible for Scheme membership.

**Catriona Campbell**

**Policy Adviser**
Scottish Women’s Aid

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

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

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

Section 76 - Meaning of Protected Adult and Schedule 4 - Regulated Roles with Adults
The current PVG Scheme looks at activities and certain defined types of service received by an individual, as opposed to any particular disability or impairment making the adult vulnerable. The existing definition of “protected adult,” under section 94 of the Protection of Vulnerable Groups (Scotland) Act 2007 (“POVG Act”), is expressed with reference to the nature of the services accessed by that adult, namely as “…an individual aged 16 or over who is provided with—
(a) a service by a person carrying on—
   (i) a support service, (ii) an adult placement service, (iii) a care home service, or
   (iv) a housing support service, which is registered under [F1 Part 5 of the 2010 Act],
(b) a prescribed service—… “(c) a community care service…
(d) a prescribed welfare service… welfare service” includes any service which provides support, assistance, advice or counselling to individuals with particular needs.”

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

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

“76-Meaning of “protected adult”

(1) Section 94 (meaning of “protected adult”) of the PVG Act is amended as follows.
(2) In subsection (1) for the words from “an individual” to the end of that subsection substitute “(a) an individual aged 18 or over who, by reason of physical or mental disability, illness or old age—

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

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

(b) in relation to a regulated role with adults that involves the carrying out of activities mentioned in one or more of paragraphs 6 to 12 of Part 2 of schedule 3 (health care), an individual aged 18 or over who is being provided with a prescribed health service.”.
(3) Subsections (3) to (5) are repealed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 23- Level 2 Disclosures- Application for review.
We would reiterate our response to the question in the earlier consultation paper seeking views on the reduction in the disclosure periods from 15 and 7.5 years, to 11 and 5.5 years, respectively. Our comment was that, given the nature of the offences listed in Schedule 8A and the need to protect the public, particularly vulnerable adults and children, from those who have carried out these offences, a reduction in these periods is not appropriate and the existing periods of 15 and 7.5 years should be maintained.

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

The current proposed Disclosure (Scotland) Bill has many positive changes. SU Scotland as a voluntary organisation recognise that the proposed legislation will involve some additional administration and communication to volunteers. However, we can see that this additional work will effect improvement.

The one area which causes us concern is the proposed 5 yearly update requirement. Our understanding is that if someone doesn’t update their information they will lose their PVG membership and it will be an offense for them to continue in a regulated role. In this circumstance someone for whom there is no safeguarding concern may find them facing prosecution. This seems excessive.

We have also been communicating that the benefit of the PVG system is that you only need to register with us once at the start of volunteering. If the regulations change we will need to change that message, but I don’t believe our volunteers will perceive any associated benefit. Furthermore, an explanation that they will be breaking the law if they don’t do it and continue in the role they have been volunteering in for many years will cause great upset and loss of volunteers.

SU Scotland are fully committed to safeguarding. We are also committed to valuing and supporting volunteers.

I believe that this new update requirement will be detrimental to the volunteering experience without effecting any improvement in safeguarding.
Shared Lives Plus welcomes the opportunity to respond to the Education and Skills Committee’s Call for Evidence on the Disclosure (Scotland) Bill. Shared Lives Plus is the UK membership organisation for Shared Lives carers, Shared Lives schemes and Homeshare organisations. All 15 Shared Lives schemes in Scotland are members of Shared Lives Plus, as are many Shared Lives carers. Last year, over 430 people in Scotland used Shared Lives, and this number is growing.

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

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

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

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

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

Shared Lives Plus has previously made representations on the importance of the families of Shared Lives carers being subject to at least an enhanced background check. Although not contracted to deliver care, other members of the Shared Lives carer’s household have privileged access to vulnerable people, with one-to-one contact in a private environment, and
bonds of trust being developed. We have argued that the privileged position of paid carers’ family members living with the vulnerable adult means that they require a level 2 disclosure.

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

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

It should be noted that there are drawbacks to this approach, namely:

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

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

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

Social Work Scotland is the professional body for social work leaders, working closely with our partners to shape policy and practice within social services. We are grateful for this opportunity to comment on the Disclosure (Scotland) Bill at Stage 1, and to offer our strong support for the policy aims and its general principles. The extent of consultation, engagement and deliberation which has fed into these proposals is evident, and while some details remain unclear, the Bill’s provisions reflect a considered, evidence-based effort to bring the disclosure system up to date, balancing public safeguarding and individual human rights.

At this stage we limit our comments to a few key areas.

Principles behind the Bill’s central reforms

Throughout the development of these reforms Social Work Scotland has articulated a view that the current disclosure system is overly complex and punitive, negatively impacting on individual’s prospects for reintegration and employability. Like many other organisations, we also highlighted the specific issues relating to children and young people (particularly those with care experience), where disclosure rules appeared out of step with both the evidence and Scotland’s broader, children’s rights-based policy programme. We urged the Scottish Government not to squander the opportunity of reform by making minimal changes, or by adopting measures which increase complexity with no obvious benefit in terms of public protection.

We are pleased that the Bill confronts these issues robustly, setting out bold yet proportionate reforms, coherently connecting in with or building on a wider legislative agenda (e.g. Age of Criminal Responsibility, Management of Offenders, etc.). Underpinning these separate elements is a commitment to human rights, and a progressive view that we should attend to individual’s needs and current circumstances, rather than their past. This is not to say, however, that public safety is secondary. As a profession in the front line of keeping people safe, social work is uniquely well placed to attest to the importance and value of an effective disclosure system. But the operation of such a disclosure system does not have to run counter to the evidence that people have the capacity to change, and that with the right support and opportunity, much to contribute to society at large. The proposals in the Bill appear to bring the disclosure system in line with this understanding, while at the same time enhancing its central function of protecting vulnerable groups.

Coherence across legislation policy implementation

The Disclosure (Scotland) Bill is being considered in parallel with, or soon after, legislation relating to the Age of Criminal Responsibility and Management of Offenders. There are also important, relevant policy developments in relation to sentencing, support for victims, human rights. All of these are interconnected, and to a significant degree, interdependent, shaping the context within which the others are to be implemented. It is critical that Scottish Government and its agencies have a coherent and comprehensive understanding of how all these parts piece together, with systems in place for managing risks, tensions and overlaps.
In the progress of this Bill we would encourage officials to share this map / plan with stakeholders, to provide reassurance that appropriate links are being made.

**Childhood convictions**

We strongly support provisions in the Bill which propose to end the automatic disclosure of convictions accrued by children under the age of 18, and if such behaviour must be disclosed, that it will be listed separately from convictions accrued when aged 18 and over.

**Other Relevant Information**

We welcome provisions within the Bill to end the process of Other Relevant Information (ORI) being disclosed to third parties before applicants have the opportunity to challenge it. The introduction of the process of independent review is also very welcome. However, as we noted in earlier submissions on reform of disclosure, employers are likely to view any delay in information being provided (such as cases in which ‘other relevant information’ is being sought) as suggestive of wrongdoing, reducing the likelihood of a job offer being made. This may be stigmatising and defeat the ends of reintegration and rehabilitation, in many cases (given some of the offences listed) having little benefit in terms of public protection. We appreciate the commitment to developing statutory guidance and have been reassured by Disclosure Scotland’s determination to address the issue, but hope that the legislative process is an opportunity to identify satisfactory solutions.

**Financial Impact**

In the financial memorandum accompanying the Bill, it is estimated that the reforms will present only a ‘minimal cost’ for local authorities. We appreciate how difficult it is to assess and quantify the impact of such changes, and we agree with the underlying logic that the impact is likely to be relatively small, and over time potentially money saving. However, a ‘minimal cost’ is not nothing, and when many separate ‘minimal costs’ are add up together the financial (as well as human) impact can be significant. In line with the comments made above about coherence across legislation, it is important that these changes to the disclosure system are scrutinised alongside the many other changes which local authorities and their partners must, or may have to, make. The pace and weight of change is considerable at the moment, demanding time and attention, placing new burdens of existing services which are already stretched. Even if each individual change was small and welcome, the cumulative effect merits closer attention.

**New referral powers for Scottish councils and Integration Joint Board**

The Bill sets out new powers for local authorities and Integration Joint Boards, enabling them to make referrals to Disclosure Scotland where they become aware that a referral ground has been established. Broadly we are supportive of this development, recognising as it does the key safeguarding role which both organisations play. However, we take this opportunity to draw attention to concerns raised by COSLA colleagues; principally that the new powers create an expectation that local authorities will ‘police’ all those employed by individual’s
under self-directed support arrangements, and related liabilities which may follow. Social Work Scotland members have articulated similar concerns, and we would welcome further discussion with Scottish Government and Disclosure Scotland throughout the legislative process.

**Ben Farrugia**  
Director, Social Work Scotland
Who Cares? Scotland

Who Cares? Scotland [WC?S] is an independent advocacy and influencing organisation working with people who have experience of the care system. We provide direct advocacy to children and young people with care experience, as well as opportunities for local and national participation. WC?S aims to provide care experienced people in Scotland with knowledge of their rights. We strive to empower them to positively participate in the formal structures and processes they are often subject to solely because of their care experience. At WC?S we ensure the voice of the care experienced population of Scotland informs everything we do as an organisation.

Introduction

We welcome the new Disclosure (Scotland) Bill as a chance to radically change the way disclosure works and to remove the barriers it can currently create for Care Experienced people with a criminal record. As a named corporate parent, this Bill also offers an important opportunity for Disclosure Scotland to fully realise their duties to the Care Experienced population in Scotland, as legislated for in the Children and Young People (Scotland) 2014 Act.62 We must ensure that the disclosure system we adopt allows those who have convictions to be supported to move on and achieve the success and happiness in their lives which they deserve.

Why this Bill is important for Care Experienced people?

We are campaigning for a lifetime of equality, respect and love. We know that those who experience care have a higher chance of becoming criminalised and entering the justice system in Scotland. We also know that because of this, the current complex system of disclosure, which exposes criminal convictions, specifically adds to the poor outcomes of Care Experienced children and young people.63

Statistics show that Care Experienced young people and adults are overrepresented in the criminal justice system in Scotland and although those who have been in care only make up an estimated 0.5% of the general population, they make up 33% of Scotland’s youth offender population and 31% Scottish adult prisons.64 In 2014, 50% of prisoners in Scotland identified as having been in care at some point in their life.65 Unfortunately, many people do not recognise that they are Care Experienced or in many cases, they wish to disassociate with their Care Experience. This coupled with the fact that most statistics rely on self-reporting of care status, means that even these statistics may underrepresent the problem.

Children and young people in care are recognised as experiencing a form of 'double jeopardy' as by being placed in care they are often exposed to further risk factors which make them vulnerable to criminalisation.66 These risk factors include: unnecessary over-involvement with the police; felt and experienced stigmatisation by the Police; increased scrutiny and punitive

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62 Corporate Parents are defined in law, to promote the interests of care experienced people by Part 9 of the Children and Young People (Scotland) Act 2014.
65 Broderick. R, McCoard. S & Carnie, J (2014), Prisoners who have been in care as ‘looked after children’.
responses to unmet mental health needs, sometimes expressed through challenging behaviour; and frequent participation in formal processes such as reviews and Children’s Hearings.

There is strong evidence of the consequential, destructive effect of childhood and teenage criminal records on the rest of an individual’s life.\(^{67}\) We know from speaking to our Care Experienced members, that a criminal history can prevent Care Experienced people from moving on from their past and making the most of their potential.

‘Still terrified about having to share about convictions - can still come back to haunt me and causes me issues - experience of care still impacts me in my adult life.’

WC?S Member

There is extensive evidence which shows conviction disclosure is inherently anxiety-provoking for those who have convictions.\(^{68}\) The process of disclosure is experienced as traumatic, stigmatising and embarrassing and often results in the avoidance of accessing opportunities such as volunteering, education and employment.\(^{69}\) Care Experienced people with criminal convictions are therefore forced to deal with the stigma of being labelled as criminals, along with the stigma they already face due to their care identity.

**Change of approach to childhood convictions**

We are supportive of many of the changes proposed in the Bill to mitigate the effects of disclosing criminal records, especially the presumption against disclosing childhood convictions received when under 18. As stated by the Centre for Youth and Criminal Justice (CYCJ) in their response, ‘the failure to distinguish between the treatment of criminal records accrued in childhood has been at odds with virtually every other approach we take to children and adversely effects our ability to achieve the aims for, and to fulfil our legal and policy requirements to, children and children’s rights (Nolan, 2018).’

The presumption against disclosing convictions received when under the age of 18 shows how the Bill is taking a positive step forward in designing a disclosure system which automatically rules out unnecessary information. However, we understand the need for a structured approach to understand which information is relevant on a case-by-case basis, when dealing with more complex or extreme types of criminal convictions. We are unclear how this presumption against disclosing convictions received when under 18 may be overturned in some cases, as this detail is not obvious on the face of the Bill. If there is a process in place which could lead to the presumption being potentially overturned and a conviction for an under 18 being disclosed, this needs to be very clearly laid out. We understand that there might be need to show information about an incident which happened when an individual was under 18, but we would hope this to happen only in the most serious cases, where risk to children and young people has been clearly demonstrated and relevance to the role being applied for is proven in order to make the disclosure. We urge the committee to explore in more detail how this will work in practice.

\(^{67}\) Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court, chaired by Lord Carlile of Berriew CBE QC. June 2014 quoted in House of Commons Justice Committee (October 2017), Disclosure of youth criminal records, First Report of Session 2017–19HC 416.


\(^{69}\) Ibid.
We support the statement by CYCJ that using a case-by-case approach allows for the rights to public protection to be balanced with upholding the rights of individuals with conviction information. It has also been suggested that schemes ‘without flexibility to permit the use of discretion and individual assessment cannot be compliant with Article 8 of the ECHR that protects an individual’s right to respect for private and family life.’ It is important that work is carried out by Disclosure Scotland to remove unnecessary information from a disclosure certificate in order to protect an individual’s right to privacy, which does not feel respected within the current Disclosure process. WC?S members have consistently expressed concern over the need for certain types of information to be passed on in disclosure processes. We hope the committee will support the Bill to appropriately balance the privacy rights of individuals with the need for public protection.

We are also still greatly concerned about the emphasis being placed on ‘Other Relevant Information’ (ORI), as another source of information able to display criminalised behaviours on disclosure certificates. We would like to see the committee consider this form of information held on a criminal record when scrutinising the Bill, as we are unclear how the risk of this being used as an alternative method to criminalise individuals will be safeguarded agains. We are also under the impression that ORI can be used to pass on information about a conviction, even if the conviction itself is not shown on a disclosure certificate and would like the committee to consider the implications of this. We understand ORI may be necessary in extreme cases where there are risks to public protection, however, the process must be extremely clear about how this function can be used by Police Scotland and Disclosure Scotland. We are also unsure if challenging ORI by making contact with Police Scotland is a process which all individuals with a criminal history would want to take up in order to contest information shown on their disclosure, due to the contact with police being the reason for that criminal record.

Alongside Clan Childlaw, we are also concerned that convictions accrued via the welfare-based Children’s Hearing System will still be considered for disclosure. We support this statement provided by Clan Childlaw in their response to the 2018 consultation on the Bill: ‘Allegations of offending behaviour are addressed in the context of the whole circumstances of the child, and often there are wider family issues that are best addressed at the same time. The Children’s Reporter may have a choice as to whether to bring offence grounds or welfare grounds. If the decision is taken to bring offence grounds because it is in the best interests of the child, it appears unfair that there could be repercussions for the young person affecting their life chances when they are older, unless they are of a particularly serious nature. Referring at all to the term "conviction" is wholly inappropriate within this system given the focus on the needs of the child rather than the alleged offending behaviour.’ This is of particular importance to the Care Experienced population who are much more likely to have had contact with the Children’s Hearing System. We also know that when accepting grounds for a hearing, young people might not know this will lead to a conviction on their criminal record.

The need for context in decision-making around disclosure

We also welcome the introduction of an ‘independent reviewer’ role that can provide accountability for Disclosure Scotland’s processes. It is vital that this new role, alongside the Disclosure Scotland workforce which will now have greater power in associated decision-

70 CYCJ (2019), Education and Skills Committee, Disclosure (Scotland) Bill, Submission from Centre for Youth and Criminal Justice.
71 Clan Childlaw (2018), Response to Protection of Vulnerable Groups and Disclosure of Criminal Information.
making, are made up of individuals that have a thorough understanding of corporate parenting duties and the context of care experience.

This is because WC?S members consistently tell us that behaviours which have been criminalised, must be viewed in full context. There can be ongoing cases of trauma and abuse from a person’s childhood, which have not been fully understood or discussed until the disclosure process brings it into focus. They may have been too young at the time of the crime to understand what has happened and the implications this has on their criminal record. Especially in a Care Experienced person’s life where they may have had little support of this kind.

‘Take the whole situation into consideration when a child commits a crime i.e. family, home conditions.’

WC?S Member

Yet the current process does not allow for this context to come to light, in fact there is simply a list of information created to pass to employers with no explanation at all. It is then up to the individual to explain to the employer the circumstances around the convictions – which is could be extremely distressing and uncomfortable for many Care Experienced people. Members also tell us that it is extremely difficult to have to repeat their personal stories to those that need to know the context about their background.

‘There’s reasons behind a crime, we need to understand that…being arrested, that could make things worse.’

WC?S Member

We welcome the fact that individuals will now see their disclosure certificates before they are sent to employers, as we called for this in our consultation response. However, the information being considered for the certificate should identify: the age at which a crime was committed; the reasons behind the crime; whether the conviction was gained via the Children’s Hearing System and if the young person was in a time of crisis. Young people have told us that context around mental health, disability and whether the person had experienced trauma, should also all be considered when judging a criminal conviction. There must also be a way that the PVG process allows for context of care to be identified when information is being reviewed as relevant or not.

‘When I was 16 I thought I knew what I was doing and looking back I thought I didn’t know anything. Alcohol has so much to do with it, you genuinely don’t know what you’re doing, I’ve seen myself and waking up in the polis station and not even knowing why you’re there. I’ve got a load of charges which I genuinely don’t know how I got.’

WC?S Member

Support employers to understand the purpose of disclosure

Although we welcome the changes in the Bill which will allow applicants to see their disclosure certificate before employers receive a copy, and be able to challenge the information shown, there will of course still be cases where it is appropriate and relevant for conviction information to be shown to employers. It is therefore important that alongside the Bill there is a continued national effort to engage employers and HR professionals in how to utilise the information they

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are provided with on a disclosure certificate, so they can sensitively support applicants and make proportionate decisions about the risk a person may cause in the role they are applying for.

‘Something came up on my disclosure and my local authority (employer) didn’t let me volunteer anymore until an investigation was carried out and in that time, they pressured me to resign. I carried on in my role but had to have ‘1-1 support’, which I felt was just surveillance. However, I was confused because I had been doing this role for a year already without any issues.’

WC?S Member

In some instances, corporate parents are faced with recruitment barriers when they attempt to employ adults who have a Care Experience which has resulted in a criminal charge. This can be especially frustrating for Care Experienced adults, who feel that their corporate parents should be able to better support their inclusion in the labour market. There is much more that needs to be done alongside reforming the disclosure process, around the understanding of employers who offer opportunities to those who have a criminal record.

We welcome the ‘Scotland Works for You’ project, which we feel is a step in the right direction in educating employers about what disclosed criminal history means and combats the discriminatory practice that creates barriers to those with criminal histories gaining employment. The existence of a criminal record should never mean a person is automatically discounted from a job role, without a proper assessment of risk being carried out. However, the disclosure process itself should include a full suite of training and guidance specifically designed for all employers that have access to the disclosure system going forward.

‘Educating people about the changes is a must, the decision NOT to apply for a job is often taken because of criminal charges, there is a presumption (one perpetuated by some working in the sector – I know I was told I would never get a job and I've heard similar stories more recently) that criminal charges inhibit you from working in certain jobs.’

WC?S Collective Member

As an organisation, we also have valuable learning from employing individuals with a criminal history and feel we have developed a supportive approach based on honesty, transparency and lack of judgement. However, this process has been created using pre-existing tools from other third sector organisations and is influenced by our values and culture. There is currently a lack of clear national guidance on how employers should assess risk when considering a Disclosure certificate.

We would like to see a mandatory, standardised framework created for all employers to use when making recruitment decisions based on disclosure, using a series of logic questions that ensure employers look beyond the conviction and realistically consider the risks posed. Alongside this standardised set of tools, there must be emphasis on the need for employers to sensitively engage with applicants to understand the implications their disclosure might have for the role. This process could be aided by the risk assessment tool, to show the applicant the thought process of the organisation when considering their disclosure certificate. These tools

73 Corporate Parents are defined in law, to promote the interests of care experienced people by Part 9 of the Children and Young People (Scotland) Act 2014.
could potentially be influenced by the materials Disclosure Scotland already utilise when making barring decisions. We know these resources are greatly needed for employers to be encouraged to undertake this process, as there is recruitment practice which exists that automatically rules out applicants with convictions, rather than trying to understand the relevance of their criminal history to the related job role.

‘It is without doubt a stress for people to know that they must discuss their criminal past with several people, that some within their workplace will know of their history. The more who know the more likely it is that someone will divulge that information to a colleague, a partner, a friend etc. irrespective of data protection rules, this is the reality.’

WC?S Collective Member

Support applicants to navigate the disclosure process

The Bill must consider the resources necessary to operationalise the changes proposed, in order to make the most positive impact on those applying for disclosures. This is especially important to ensure applicants fully understand their rights to appeal, challenge and remove information held about them. We support CYCJ’s position that support provided to applicants must be ‘independent, individualised, free, in-person (either face-to-face or by phone) and available to everyone, at whichever stage of their disclosure journey they may be at.’

It is promising that the opportunity to make representation and appeals has been removed from a formal court process in the first instance, however, this could unintentionally lead to a less clear understanding of the legal rights an individual has in these types of processes. We would also like to support CYCJ’s statement that the Bill (or associated documents) should allow for ‘monitoring and evaluation of the frequency of such provisions being utilised and the experience of those utilising such measures and for this information to be made publicly available.’ This is vital in understanding how accessible these processes are to individuals making applications.

The proposals in the Bill ultimately still accept that individuals applying will be expected to understand complex processes and be able to provide specific types of information. We would like to highlight that this continues to place a burden of responsibility on the individual applying for disclosure, which could create barriers to successfully gaining a disclosure certificate and/or securing a desired job role.

Our members have told us how difficult it is to experience the disclosure process on their own, when they have criminal convictions that they need to declare. Currently, disclosure processes depend on individuals being aware of and using legal processes, for example when having to make representation when under consideration for listing. As mentioned, this places responsibility of being properly informed with the individual, yet Care Experienced people are often deprived of information and control over their own lives in the care system, and these processes add yet another barrier which they must navigate. We would urge Disclosure Scotland to continue to consider how vulnerable people or those who experience disadvantage in Scotland are able to navigate any processes or systems they put in place.

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74 CYCJ (2019), *Education and Skills Committee, Disclosure (Scotland) Bill, Submission from Centre for Youth and Criminal Justice.*
75 Ibid.
We would also like to suggest that there should be a process for individuals to access their disclosable information before they apply for a job role, via Disclosure Scotland. As mentioned above, there are cases where individuals are not aware of having accrued charges and do not have access to the information which is contained on their criminal record. Being able to access this information would allow individuals to pro-actively understand what could be displayed in a disclosure when they do decide to apply for a role that requires it, rather than waiting to apply for a job before undertaking this process. Time would then be available for an individual with convictions and other disclosable information to prepare a supporting letter and think about what they would say to an employer when discussing the information on their disclosure. It would also give more time for an individual to be supported to challenge any information that may be disclosed, guarding against the time delays that may be involved in challenging this information when an employer is waiting for a disclosure to be made available.

We also urge the committee to consider the impact of the potential conditions imposed on scheme members when under consideration for listing. Although this a process controlled by Disclosure Scotland, we feel that an employer knowing that an individual is being considered for listing, could lead to an extreme reaction of removing them completely from their role either temporarily or permanently. Where conditions are imposed, these need to be proportionate and should be subject to the same scrutiny and decision-making as any other decision to suspend or restrict duties would be and should be made in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures. While restriction of duties or suspension is not considered to be ‘punitive’ or an assumption of guilt, it is often perceived this way. Conditions therefore have the potential to further add to the sense of criminalisation and stigmatisation experienced by those with Care Experience. We would also like to bring to the committee’s attention that an individual should be able to withdraw from the listing process if they decide to no longer work in a regulated role and will not be planning to in the future, at the moment we have been told this is not possible. This has impacted directly on an individual we work with, who is now stuck in a listing process even though they are no longer working in a regulated role and do not intend to do so in the future.

Furthermore, our members consistently tell us that processes involved in challenging disclosure information, such as removing convictions from a disclosure and making representations to prevent being listed, can also be difficult and drawn out for those involved.

One WC?S Alumni Member reflected that although they successfully appealed in both cases they chose to take up, their success was due to the support of the professionals they worked and studied with. They commented that they would have found it extremely difficult to go through appeals processes alone. They also reflected that they were in a stable place in their personal life, with a considerable period having passed since they were in crisis when the convictions were accrued. If a young person who is trying to find their first job must go through this process, without a person to support them - it is inconceivable how they are supposed to navigate such a system. If the process itself is to continue placing responsibility on individuals...
to understand the various processes involved, WC?S calls for resources to be provided that create individualised support, particularly for the PVG process.

The need for support to be provided, to navigate through the current disclosure process, shows that the system itself is not designed to be easy to understand for individuals who have criminal records. The Bill offers a route to simplifying the products on offer and we welcome the new ideas around digital access, however, there must be a user-led approach at every stage of re-designing the system within the Bill and the resources needed to make it accessible for all individuals applying.

**Corporate Parenting duties**

Disclosure Scotland and Scottish Ministers are named corporate parents in the Children and Young People (Scotland) Act 2014. This means they have specific duties in legislation towards the Care Experienced population in Scotland, including pro-actively promoting their interests and improving its services specifically for the needs of this group.\(^{76}\)

Currently the Bill does not name these duties and for corporate parenting to be truly embedded within the new disclosure system, these must be recognised in the face of the Bill. We have also created some specific asks to be considered on behalf of Care Experienced people in Scotland, to ensure the new disclosure system realises corporate parenting duties:

1. Waive fees for Care Experienced people applying for disclosures of any type.
2. Ensure funding is available to support Care Experienced people to gain legal advice on matters relating to their disclosure, if needed.
3. Afford Care Experienced people special protections in disclosure processes, allowing for a self-declaration tick-box in the process so that a tailored approach can be followed and specialist, trained advisors can provide support if needed.
4. Create a clear point of contact and tailored information available online for Care Experienced people.
5. Ensure the independent reviewer and those working in Disclosure Scotland making decisions about individual disclosures, are trained in corporate parenting and commit to understanding the context of care experience.
6. Continue to work with employers to end discriminatory practice against those with convictions and Care Experience, introduce ways to monitor the way disclosure is being utilised in recruitment decision-making processes.
7. Recognise corporate parenting duties in the Bill\(^ {77}\) and legally enshrine the need for the new disclosure process to take these into account.

**Concluding statement**

Although the Bill is positive in a number of the policy intentions and changes proposed, we would also like to echo the concerns of CYCJ and others around the multiple pieces of policy and legislation which impact the disclosure system that seem be disconnected. It is of vital importance that the policy intentions and provisions within the Age of Criminal Responsibility (Scotland) Act 2019, Management of Offenders (Scotland) Bill and Disclosure (Scotland) Bill are connected and do not adversely affect each other.

\(^{76}\) Corporate Parents are defined in law by [Part 9 of the Children and Young People (Scotland) Act 2014.](https://www.legislation.gov.uk/ukpga/2014/13/contents)

\(^{77}\) Corporate Parenting duties are defined in law, [by Part 9 of the Children and Young People (Scotland) Act 2014.](https://www.legislation.gov.uk/ukpga/2014/13/contents)
We would like to work with the committee to ensure that this Bill is utilised to create a disclosure process that is not risk averse to a level that adversely affects some of the most disadvantaged people in Scotland. Our goal is to ensure that a disclosure system exists which safeguards children and protected adults – yet at the same time allows those trying to move on from a criminalised past to live fulfilled and happy lives.

“I was a shop lifter to survive – got caught aged 17 – have convictions which appear on disclosure now. This was one of the most difficult periods in my life and I had no support or care whatsoever from anyone, other than myself.”

WC&S Alumni
The Disclosure (Scotland) Bill was introduced on 12 June 2019 and makes changes to the disclosure system and Protection of Vulnerable Groups scheme. This briefing sets out the background to the legislation, an overview of the current system, and the key changes the Bill seeks to make.
Contents

Executive Summary ........................................................................................................... 4
Background ......................................................................................................................... 7
  What is disclosure? ........................................................................................................... 7
  A brief overview of the current system ........................................................................... 8
    Rehabilitation of Offenders Act 1974 ........................................................................ 8
    Police Act 1997 ............................................................................................................. 8
    Protection of Vulnerable Groups (Scotland) Act 2007 ............................................... 9
Legal challenges ................................................................................................................ 9
  2015 Remedial Order ..................................................................................................... 9
  2018 Remedial Order ..................................................................................................... 10
Part of a legislative package ............................................................................................ 11
  The Management of Offenders (Scotland) Act 2019 .................................................. 11
  The Age of Criminal Responsibility (Scotland) Act 2019 ........................................... 11
What the Bill does ............................................................................................................ 13
Range of products and services ...................................................................................... 14
  Current system ................................................................................................................ 14
  Proposed new disclosure products ................................................................................ 16
  Current vs New ............................................................................................................... 17
  What this might mean for individuals and organisations ............................................. 17
Disclosable Offences and Lists ....................................................................................... 18
  Current system ................................................................................................................ 18
  The Bill ............................................................................................................................. 19
    Offences on Lists A and B ........................................................................................... 19
    Time periods .................................................................................................................. 20
    What this means for individuals and organisations .................................................. 21
Other Relevant Information ............................................................................................. 22
  Current system ................................................................................................................ 22
  The Bill ............................................................................................................................. 23
Childhood offences ......................................................................................................... 24
  Recent legislation ........................................................................................................... 24
  The Bill ............................................................................................................................. 24
  Options for childhood convictions ............................................................................... 25
  What this means for individuals and organisations .................................................... 27
Reviews .............................................................................................................................. 28
Executive Summary

The Disclosure (Scotland) Bill ("the Bill") seeks to amend the law governing how the state discloses previous offending behaviour and the Protecting Vulnerable Groups ("PVG") scheme.

Current system

Current system and PVG scheme have developed over a number of years and are complicated. The system has developed gradually and has been amended following successful court challenges. These court challenges focused on whether the state's interference with individuals' right to privacy by disclosing past convictions was lawful.

The Disclosure (Scotland) Bill is also part of a package of recent reforms contained within the Management of Offenders (Scotland) Act and the Age of Criminal Responsibility (Scotland) Act.

More information on the current system and its development can be found here.

Range of products and services

A key aim of the Bill is to simplify the system for users and organisations. The Bill proposes to reduce the number of disclosure products to two: Level 1 and Level 2. Level 1 disclosures would include mainly basic information on unspent convictions; Level 2 disclosure could include certain spent convictions and other information depending on the purpose of the disclosure. This is a development from the current basic, standard, enhanced and PVG scheme disclosures. Standard and enhanced disclosures and PVG scheme memberships are known as "higher level" disclosures.

More information on the range of products and services can be found here.

Disclosable offences and lists

One of the consequences of court challenges to the disclosure systems in the UK was that the Scottish Government introduced lists of convictions for offences that would be disclosed in higher level disclosures once spent. The Bill seeks to make changes to these lists and how long these spent convictions could be disclosed.

More information on disclosable offences and lists can be found here.

Other relevant information

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

More information on ORI can be found here.

Childhood convictions

Offending behaviour in childhood and subsequent convictions have been the subject of reforms in the Management of Offenders (Scotland) Act 2019 and the Age of Criminal
Responsibility (Scotland) Act 2019. The Bill provides for Disclosure Scotland to assess in each case whether information about childhood convictions ought to be disclosed. The Scottish Government's proposals have developed since the consultation that led to the Bill.

**More information on childhood convictions can be found here.**

**Reviews**

The Bill provides for disclosures to be provided to the individual before being shared with a third party. This provides an opportunity for an individual to seek an independent review of the content of the disclosure before it is seen by a prospective employer, for example. The Bill provides for new review processes. The types of information that can be reviewed are certain spent convictions, ORI, and childhood convictions.

**More information on reviews can be found here.**

**Protection of Vulnerable Groups**

Part two of the Bill seeks to amend the Protection of Vulnerable Groups (Scotland) Act 2007 and therefore changes to the PVG scheme. The main proposed changes to the PVG Act are:

- a list of activities which give rise to regulated roles which replace the concept of regulated work
- the current lifetime membership of the PVG scheme to be replaced by 5-year membership
- to allow Ministers to impose conditions on individuals who are being considered for barring (i.e. being barred from working with a vulnerable group)
- PVG membership to become mandatory.

**More information on the proposed changed to the PVG Act can be found here.**

**Fees**

The Bill maintains the powers for Ministers to set out the fees for the disclosure system and PVG scheme in regulations.

**More information on fees can be found here.**

**Key policy considerations**

- Ensuring the correct balance between protecting vulnerable groups, providing information for appointments to sensitive roles, respecting individuals' rights to privacy, and allowing individuals to move on from offending behaviour.
- Ensuring the proposed system is user-friendly for both organisations and individuals.
- Ensuring the appropriate differentiation between adolescent and adult offending.
- Making the disclosure system easier to understand, particularly in relation to regulated work/roles.
• Considering how the package of legislation, including other Acts, will work together.
Background

What is disclosure?

Disclosure is the system where employers or others can ask the state about an individual's previous convictions. Normally this will be in relation to employment or volunteering opportunities.

A fundamental aim of the disclosure regime is to balance protecting the public with ensuring that the rights of individuals to a private life are respected and that they have ability to move on from offending behaviour. The system has developed taking account of findings of public inquiries into tragic and high-profile cases, such as the Cullen Inquiry into the Dunblane massacre and the Bichard Inquiry into the Soham murders. The regime initially disclosed all conviction information held on the police national databases, regardless of how old or minor the conviction in higher level disclosures. The state disclosure of such information in the UK has been successfully challenged a number of times in the courts and legislation has been adapted and updated in response.

The Minister for Children and Young People, Maree Todd MSP, told the Parliament:

“ The Scottish Government is committed to policies that balance public protection with the right to move on from past offences. Those are not contradictory aims; both can be achieved.”

Scottish Parliament, 2019

There are different levels of disclosure. At its basic level an individual's "unspent" convictions will be disclosed. For particular types of roles more information may be disclosed, such as "spent" convictions or other information the police may hold.

The purpose of disclosure is to support organisations to make informed decisions about individuals. This is often because the prospective role will have an element of responsibility. This could be financial responsibility or caring responsibilities. The type of information and "disclosure product" will vary depending on the reason for seeking the information.

Working with, and having responsibility for, children or vulnerable groups has an added layer of protection. People working in these roles are normally expected to be members of the Protecting Vulnerable Groups ("PVG") scheme. Over 1.2 million people are members of the PVG scheme in Scotland. Members of this scheme are monitored and if information comes to light that they should not work with vulnerable groups they can be barred from doing so. Non-members can also be barred from working with vulnerable groups by Scottish Ministers.

Disclosure by the state is provided for in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007. The Rehabilitation of Offenders Act 1974 is also relevant, see the A brief overview of the current system section.

The system is maintained by Disclosure Scotland, an executive agency of the Scottish Government. Disclosure Scotland undertakes the duties of Scottish Ministers in relation to providing information under the 1997 and PVG Acts and maintaining the PVG scheme.
Disclosure Scotland undertook the Consultation that led to the development of the Bill ("the Consultation"). The Consultation found that people consider the current system complicated.

A brief overview of the current system

The current system of disclosure relies mainly on three Acts: The Rehabilitation of Offenders Act 1974; the Police Act 1997; and the Protection of Vulnerable Groups (Scotland) Act 2007.

Rehabilitation of Offenders Act 1974

Until the Rehabilitation of Offenders Act 1974 ("the 1974 Act"), the common law position was that an individual would have to truthfully declare any convictions in certain circumstances, for example, when an individual agreed a contract of employment. Not doing so would be grounds for the employer or provider to terminate the contract without penalty.

The 1974 Act introduced the concept of a rehabilitation period. This provided for certain convictions which attracted a sentence of 30 months or less to be "spent" after a further period. Spent convictions are not usually required to be disclosed. Part 2 of the Management of Offenders (Scotland) Act 2019 provides for convictions leading to longer sentences, up to 48 months, to be spent and changes to rehabilitation periods.

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 provides for exceptions where individuals should disclose spent offences in certain circumstances.

Police Act 1997

The 1997 Act provides for Scottish Ministers to provide criminal record checks. Disclosure Scotland exercise the Scottish Ministers’ powers under the 1997 Act. Disclosures under the 1997 Act fall into three broad categories:

- **Basic Disclosure.** This is available to anyone following an application for any purpose and will show an individual applicant's unspent convictions.

- **Standard Disclosure.** In addition to information on unspent convictions, a standard disclosure will show unspent cautions, certain spent convictions, and information from the Sex Offenders Register. This service is available only to organisations who are registered with Disclosure Scotland and for a job or role where this level of disclosure would be suitable (and lawful). These jobs can be, for example, an accountant, solicitor, allied health professions, taxi/private hire driver, and most roles governed by the Financial Conduct Authority.

- **Enhanced Disclosure.** In addition to the information disclosed in a Standard Disclosure, an enhanced disclosure will include other relevant information ("ORI") provided to Disclosure Scotland by the police, and certain court orders. In some cases details on whether an individual has been barred from working with vulnerable groups...
will be included. As with standard disclosures, enhanced disclosures can only be provided to organisations who are registered with Disclosure Scotland and for specific roles. This type of disclosure could be for a potential adopter, to obtain a gambling licence, or to work in a prison.

Standard disclosures and enhanced disclosures (along with PVG scheme membership) are commonly known as "higher level disclosures".

**Protection of Vulnerable Groups (Scotland) Act 2007**

The PVG Act introduced a number of new features to the disclosure system in relation to those working with vulnerable groups. It defined the concept of Regulated Work: work, whether paid or unpaid, with children or protected adults.

The PVG Act provided for Scottish Ministers to maintain lists of individuals who are barred from undertaking this work (one each for work with children and work with protected adults). The PVG Act also provided for Ministers to maintain a membership scheme whereby members are continually monitored on their suitability to undertake regulated work. This ongoing monitoring is the key difference between PVG membership and an enhanced disclosure.

It is not currently mandatory to be a member of the PVG scheme to undertake regulated work. However, it is an offence to offer regulated work to an individual barred from regulated work. Under the PVG Act, certain organisations can seek a PVG Scheme Record, which includes the same information as an enhanced disclosure.

More details on the current and proposed disclosure products can be found in the *Range of products and services* section of this briefing.

**Legal challenges**

The disclosure scheme has been amended twice in the past few years by Remedial Orders. Remedial Orders are made under a power in section 12 of the Convention Rights (Compliance) (Scotland) Act 2001. This power allows the Scottish Ministers to make changes to legislation in order to remedy an incompatibility with rights protected by the European Convention on Human Rights.

The first was the Scottish Government's response to a successful legal challenge in relation to the system in England and Wales and the second was made following a successful legal challenge in Scotland.

The fact that previous regimes have been subject to successful legal challenge illustrates the importance of ensuring the correct balance is found between the protection of the public and individuals' rights.

**2015 Remedial Order**

Prior to 2015, all spent conviction information held on the police national database would be disclosed on an enhanced, standard or PVG scheme record disclosure made under the
1997 Act or PVG Act. In 2014, the UK Supreme Court found\(^1\) that similar practice in England and Wales was unlawful and incompatible with Article 8 of the European Convention of Human Rights - the right to respect for private and family life.\(^2\)

The Supreme Court held that the disclosure system then in place was incompatible because "the cumulative effect of the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the absence of any mechanism for independent review of a decision to disclose data" and therefore was not in accordance with the law. The Supreme Court also held that this interference did not meet the requirement of being "necessary in a democratic society", and was therefore not a legitimate interference of rights under Article 8. Lord Reed commented in the judgement that there was a lack of "any rational connection between dishonesty as a child and the question of whether, as an adult, the person might pose a threat to the safety of children with whom he comes into contact".\(^2\)

The Scottish Government's response was to introduce two lists of offences to the 1997 Act by adding schedules 8A and 8B. The offences listed on these schedules are of particular relevance to Standard and Enhanced disclosures and PVG scheme record disclosures.

Schedule 8A is a list of offences which should always be disclosed because of their seriousness, even after they become spent. Schedule 8B is a list of offences that can be disclosed for a certain period of time after becoming spent. These periods of time are fifteen years from the time of conviction if the individual was convicted as an adult, and seven and a half years if the individual was under 18 at the time of the conviction.

The disclosure of these offences would be in cases where the individual would be undertaking certain specific roles which typically involve a level of power or responsibility. The Scottish Government stated that the lists of offences were ones that would evidence conduct that "caused harm to an individual and/or is evidence of misconduct in a position of authority".\(^3\)

These reforms also allowed for individuals to be able to apply to a Sheriff to have a spent offence listed in schedule 8B removed from their disclosure certificate before the specified period.

### 2018 Remedial Order

In a Scottish case heard in the Court of Session in 2017,\(^3\) Lord Pentland declared that the amended scheme which included the use of Schedules 8A and 8B of the 1997 Act had unlawfully interfered with the petitioner's Article 8 rights. The petitioner had a conviction from a Children's Hearing for behaviour dating from when he was 14, nearly 28 years earlier.

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\(^1\) In R (On the application of T and another) (Respondents) v Secretary of State for the Home Department and another (Appellants)

\(^2\) ECHR ARTICLE 8: Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

\(^3\) P v Scottish Ministers [2017] CSOH 33, 28 February 2017,
Subsequently, the Scottish Government laid a further remedial order. The effect of the second remedial order was more limited than the first. It provided for an individual to make an application to a Sheriff for the removal of information relating to a conviction included in schedule 8A from a higher level disclosure after a period of time. The time periods replicated those for the disclosure of convictions listed on schedule 8B, namely: fifteen years for a conviction as an adult, and seven and a half years for a conviction dating from when the individual was under 18 years of age.

**Part of a legislative package**

The Bill can be considered as part of a package of reforms to the management of offenders and the treatment of convictions of individuals under 18 years of age. The policy intentions of the Bill interact with two other Acts passed recently by the Scottish Parliament, the *Management of Offenders (Scotland) Act 2019* and the *Age of Criminal Responsibility (Scotland) Act 2019*. At the time of writing (August 2019) neither Act is in force.

Summaries of these Acts are set out below.

**The Management of Offenders (Scotland) Act 2019**

- The Management of Offenders (Scotland) Act 2019 will reduce disclosure periods significantly. This will shorten the period before a conviction becomes spent for almost all sentences.

- All children's hearings convictions will be spent immediately, and as such will no longer be disclosed on a basic disclosure.

- The shortening of disclosure periods will mean that an applicant for a higher level disclosure (with a spent conviction for an offence included on schedule 8B of the 1997 Act) will be able to make an application (currently to a sheriff) for that information not to be disclosed at an earlier date.

**The Age of Criminal Responsibility (Scotland) Act 2019**

- The Age of Criminal Responsibility (Scotland) Act 2019 increases the age of criminal responsibility in Scotland from 8 to 12. This will mean that offences cannot be committed before that age.

- Disclosure of information about behaviour from before the age of criminal responsibility would only be possible after an independent review of a police decision to include it as "Other Relevant Information" on a higher level disclosure.

- This Act provides for an independent reviewer to undertake this task. As part of that independent review process the individual will have the opportunity to provide representations in relation to the information before the decision is made on whether it

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iv The list of offences in schedule 8B of the 1997 Act are proposed to be replaced by Schedule 2 of the Disclosure (Scotland) Bill.
should be disclosed to an employer or another third party. The independent reviewer will have the power to gather relevant background information to help set the information in context.

• The independent reviewer also has a key role in the proposed review procedures provided for in the Disclosure (Scotland) Bill.
What the Bill does

The Disclosure (Scotland) Bill ("the Bill") was introduced on 12 June 2019 by Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP.

On 26 June 2019, the Parliament agreed that the Education and Skills Committee be the lead committee for the Bill at Stage 1. Details of the Committee's work on the Bill can be found on its website.

The purpose of the Bill is to reform how the state provides information on individuals' past behaviour, typically in situations when an individual is seeking employment or volunteering. The Bill also proposes a number of changes to Protecting Vulnerable Groups ("PVG") scheme, notably updating the definition of the type of activities for which membership of the PVG scheme would be appropriate and making membership mandatory in these cases.

The Bill has two substantive parts.

- Part 1 provides for the disclosure of unspent criminal convictions and other information that may be relevant. The Bill repeals and will broadly replace provisions of Part 5 the Police Act 1997, insofar as it applies to Scotland. 6

- Part 2 makes amendments to the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act").

The remaining sections of this briefing summarise and analyse the main areas of reform. Where appropriate, the briefing will identify impacts on individuals and organisations of these reforms. The briefing does not seek to replicate the policy memorandum or other accompanying documents prepared by the Scottish Government. Those documents are published alongside the Bill.
Range of products and services

A key aim of the Scottish Government's reforms to the disclosure system is to make it easier to understand and to simplify the system for users. The Bill proposes to reduce the number of products and services Disclosure Scotland provide.

Current system

Currently there are four types of disclosure checks: Basic, Standard, Enhanced and PVG. The latter three are sometimes grouped together and termed "higher level" disclosures. There is also a ‘statement of scheme membership’ which allows people to confirm that an individual is a PVG scheme member, but does not include any other information.

The tables below provide details of products currently available.
## Disclosures under the Police Act 1997

<table>
<thead>
<tr>
<th>Product</th>
<th>Details</th>
</tr>
</thead>
</table>
| **Basic Disclosure** | Anyone can apply for a Basic Disclosure relating to their own information. It can be used for any purpose. If a request is from an employer, then the applicant's consent is required. Only one certificate is provided. The information is disclosed is:  
  - unspent convictions under The Rehabilitation of Offenders Act 1974. |
| **Standard Disclosure** | Standard disclosures can be for:  
  - certain ‘exempted’ professions (accountant, solicitor, allied health professions, taxi/private hire driver, most roles governed by the FCA)  
  - any employment concerned with the provision of a care service  
  - any employment concerned with the provision of health service where role involves contact with patients etc.  
  An application can only be completed in paper format and must be countersigned by an organisation authorised by Disclosure Scotland, known as a Registered Body.  
  A certificate is provided to both the applicant and the Registered Body.  
  The information is disclosed is:  
  - unspent convictions  
  - relevant spent convictions  
  - sex offenders notification requirements  
  - unspent cautions. |
| **Enhanced Disclosure** | Enhanced disclosure can be for:  
  - people who carry out work in a prison (wholly or partly)  
  - individuals being assessed as suitable for adopting a child  
  - adult residents in same household as foster carers or child-minders.  
  A certificate is provided to both the applicant and the Registered Body.  
  The information is disclosed is:  
  - unspent convictions  
  - certain spent convictions  
  - sex offender notification requirements  
  - ‘other relevant information’ (ORI)  
  - any prescribed court order & sex offender notification requirements  
  - information about being from regulated work barred under the PVG Act  
  - certain civil orders.  

There are four types of Enhanced Disclosure:  
- Enhanced Disclosure.  
- Enhanced Disclosure with working with children suitability.  
- Enhanced Disclosure with working with protected adults suitability.  
- Enhanced Disclosure with working with both children and protected adults suitability.
Disclosures under the Protection of Vulnerable Groups (Scotland) Act 2007

<table>
<thead>
<tr>
<th>Product</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>PVG Scheme Record</td>
<td>Individuals undertaking regulated work can apply.</td>
</tr>
<tr>
<td></td>
<td>A PVG Scheme Record application can only be completed in paper format and must be countersigned by an organisation authorised by Disclosure Scotland, known as a Registered Body.</td>
</tr>
<tr>
<td></td>
<td>A certificate is provided to both the applicant and the Registered Body.</td>
</tr>
<tr>
<td></td>
<td>Information disclosed is the same information as Enhanced Disclosure. Additionally, a PVG Scheme Record confirms scheme membership in relation to children/adults or both. The individual is subject to ongoing monitoring.</td>
</tr>
<tr>
<td>PVG Scheme Record Update</td>
<td>Existing PVG members can apply (for same group, i.e. children and/or protected adults).</td>
</tr>
<tr>
<td></td>
<td>Only issued if no convictions or Other Relevant Information are present.</td>
</tr>
<tr>
<td></td>
<td>If convictions or Other Relevant Information were/are present a PVG Scheme Record will be issued.</td>
</tr>
</tbody>
</table>

Proposed new disclosure products

The Bill proposes to reduce the number of products and services that Disclosure Scotland provide. From the users' point of view, it is intended that there will be two disclosure products; Level 1, which will be the equivalent of a Basic Disclosure, and Level 2 which will be the equivalent of the higher level disclosures. Level 2 Disclosures will provide different information depending on the purpose of the disclosure.

<table>
<thead>
<tr>
<th>Disclosure Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Level 1</td>
<td>This product will replace the current basic disclosure under the 1997 Act.</td>
</tr>
<tr>
<td></td>
<td>Available to any individual aged 16 and over(^v), for any purpose on payment of the prescribed fee.</td>
</tr>
<tr>
<td></td>
<td>This product will include notification requirements under Part 2 of the Sexual Offences Act 2003.</td>
</tr>
<tr>
<td>Level 2 (e.g. for a gaming licence)</td>
<td>This disclosure product will replace all standard disclosures and some enhanced disclosures under the 1997 Act.</td>
</tr>
<tr>
<td></td>
<td>Available to an individual aged 16 and over for a prescribed purpose, where that purpose is connected to an accredited body, and on payment of the prescribed fee.</td>
</tr>
<tr>
<td>Level 2 with suitability information (e.g. prospective adoptive parents)</td>
<td>This disclosure product will replace certain enhanced disclosures under the 1997 Act.</td>
</tr>
<tr>
<td></td>
<td>Available to an individual aged 16 and over for a prescribed purpose, where that purpose is connected to an accredited body, and on payment of the prescribed fee.</td>
</tr>
<tr>
<td>Level 2 PVG Disclosure (e.g. for a school teacher)</td>
<td>This type of disclosure will replace the PVG scheme record and short scheme record.</td>
</tr>
<tr>
<td></td>
<td>Available to an individual aged 16 and over and mandatory for those working with vulnerable groups.</td>
</tr>
</tbody>
</table>

\(^v\) Available for younger individuals in exceptional circumstances.

There will remain a 'confirmation of scheme membership' which is proposed to replace the 'statement of scheme membership'.
Current vs New

While there are some substantive differences between the current products and the products proposed in the Bill, there are some clear similarities between the two sets of products. How the current products map to the proposed products is set out below.

<table>
<thead>
<tr>
<th>Current Product</th>
<th>Proposed Product</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic Disclosure</td>
<td>Level 1</td>
</tr>
<tr>
<td>Standard Disclosure</td>
<td>Level 2</td>
</tr>
<tr>
<td>Enhanced Disclosure</td>
<td>Level 2</td>
</tr>
<tr>
<td>Enhanced Disclosure with working with children suitability</td>
<td>Level 2 with suitability</td>
</tr>
<tr>
<td>Enhanced Disclosure with working with protected adults suitability</td>
<td>Level 2 with suitability</td>
</tr>
<tr>
<td>Enhanced Disclosure with working with both children and protected adults suitability</td>
<td>Level 2 with suitability</td>
</tr>
<tr>
<td>PVG Scheme Record</td>
<td>Level 2 with PVG</td>
</tr>
<tr>
<td>PVG Scheme Record Update</td>
<td>Level 2 with PVG</td>
</tr>
</tbody>
</table>

The intention of the Scottish Government is to move away from paper-based systems for disclosures, both in terms of applications and the provision of information. Both will be available to be administered digitally.

What this might mean for individuals and organisations

The Government's aim is to make the system simpler for individuals to understand and to be more user friendly. The intention is that the customer only need know the role and the system will guide them to the correct disclosure. 7

By applying and receiving disclosures digitally, the process is expected to be faster. The individual will have more control over the process, receiving the information prior to a third party, such as a potential employer, and will have to release the information to the third party. This will allow the individual to seek a review of the information disclosed before the third party received it. More detail on the proposed reviews is set out in the Reviews section of this briefing.

Moving towards a digital system is intended to reduce the need for organisations to spend time ordering, completing, scanning and mailing paper forms. Organisations will receive disclosure information only after the disclosure applicant has seen it and chosen to share it with the organisation.

While the age limit to obtain Level 1 disclosures is proposed to be 16, the Bill makes provision for individuals aged 12 to 15 to use the service in exceptional circumstances (s. 2(2)). The kinds of exceptional circumstances envisaged are, for example, for a young person taking up a place at college at 15 on a course that requires a criminal record check.
Disclosable Offences and Lists

This section looks at disclosable offences. For higher level disclosures, there are references to lists and schedules. The Bill provides for Schedules 8A and 8B of the Police Act 1997 to be replaced by Lists A and B in Schedules 1 and 2 of the Bill. This is explained in more detail below.

References to similar lists with different names is potentially confusing. The terminology used in this briefing and bill documents will differ depending on whether they are referring to the current system or the proposed system. To avoid confusion, the table below illustrates the read-across of the lists.

<table>
<thead>
<tr>
<th>Current system</th>
<th>Proposed system</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police Act 1997</td>
<td>Disclosure (Scotland) Bill</td>
</tr>
<tr>
<td>Schedule 8A</td>
<td>List A (included in Schedule 1)</td>
</tr>
<tr>
<td>Schedule 8B</td>
<td>List B (included in Schedule 2)</td>
</tr>
</tbody>
</table>

**Current system**

*Rehabilitation of Offenders Act 1974* introduced the concept of rehabilitation periods for offences. These are periods of time after a conviction that certain offences would be disclosable. Once that period had elapsed, an individual would no longer have to disclose the conviction to a potential employer, for example. The rehabilitation periods depend on the disposal of the court, and under the 1974 Act any prison sentence of over 30 months would never become spent and would always need to be disclosed.

The *Management of Offenders Act 2019* reduces the length of time most people with convictions have to disclose them. It also extends the range of custodial sentences covered by the provisions of the 1974 Act. Under the 2019 Act, convictions leading to a custodial sentence of more than 48 months will always need to be disclosed.

There are categories of offence that despite being spent, would appear in higher level disclosures. These are currently listed in Schedules 8A and 8B of the 1997 Act. Schedule 8A lists offences that will always be disclosed, unless the conviction is removed upon application to a sheriff. Schedule 8B is lists offences which will be disclosed for a period of time, unless conviction is removed upon application to a Sheriff.

For disclosure purposes, there are four types of convictions.
<table>
<thead>
<tr>
<th>Category of conviction</th>
<th>Disclosure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unspent conviction, or a conviction that does not have a rehabilitation period.</td>
<td>Must disclose, would appear in all disclosure products which list offences.</td>
</tr>
<tr>
<td>Spent convictions that do not appear in schedules 8A and 8B of the 1997 Act.</td>
<td>No need to disclose, would not appear in any disclosure products.</td>
</tr>
<tr>
<td>Spent conviction listed in schedule 8A of the 1997 Act</td>
<td>Not disclosable on a basic disclosure but would appear in higher level disclosure products. Can apply to a Sheriff for the conviction to be removed from any disclosure certificate after the relevant period. The relevant periods are:</td>
</tr>
<tr>
<td></td>
<td>• 15 years from the date of the conviction where the individual was 18 or older at the time of the conviction</td>
</tr>
<tr>
<td></td>
<td>• 7.5 years from the date of the conviction where the individual was under 18 at the time of the conviction or offence grounds accepted at a children’s hearing.</td>
</tr>
<tr>
<td>Spent conviction listed in schedule 8B of the 1997 Act</td>
<td>Not disclosable on a basic disclosure but would appear in higher level disclosure products for the duration of the relevant period. The relevant periods are again:</td>
</tr>
<tr>
<td></td>
<td>• 15 years from the date of the conviction where the individual was 18 or older at the time of the conviction</td>
</tr>
<tr>
<td></td>
<td>• 7.5 years from the date of the conviction where the individual was under 18 at the time of the conviction or offence grounds accepted at a children’s hearing.</td>
</tr>
<tr>
<td></td>
<td>An individual can apply to a Sheriff for the spent conviction to be removed from any disclosure certificate at any time.</td>
</tr>
</tbody>
</table>

There are however some circumstances not covered in those four categories. For example, if the court’s disposal for a conviction of an offence listed in schedule 8B of the 1997 Act was an admonition or absolute discharge, it will not be disclosed on a higher level disclosure.

**The Bill**

The Bill replicates the approach of two lists of offences in Schedules 8A and 8B of the 1997 Act in Schedules 1 and 2 of the Bill. The Bill proposes a number of changes to:

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

This section will look at the first two of the bullets above. The final bullet is examined in the Review section of this briefing.

**Offences on Lists A and B**

As set out in the introduction to this briefing, the Scottish Government stated that the lists of spent convictions of offences that would be disclosed in higher level and PVG disclosures were ones that would evidence conduct that “caused harm to an individual and/or is evidence of misconduct in a position of authority”. The offences are ones that:

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

The Bill provides for a number of new offences to be included in both lists and some offences to move between the lists. The Policy Memorandum accompanying the Bill sets out these changes in paragraphs 278 to 290.

The use of these lists began in 2015 and followed a legal challenge in England. Prior to that, all previous convictions were disclosed in higher level disclosures both in England & Wales and Scotland. The Policy Memorandum states:

“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.”

A number of suggestions to changes in the lists were made during the Consultation and these suggestions have largely been included in the new lists in Schedules 1 and 2 of the Bill. For example, theft, abduction and fraud. The common law offence of murder is not specifically listed. However, the Murder (Abolition of Death Penalty) Act 1965 provides for a mandatory life sentence for murder; such a conviction will never become spent and always be disclosable.

Some respondents to the Consultation argued that the lists ought not be used at all or not in some cases. The summary of consultation responses noted that some responders argued that "the use of the 8A and 8B lists could create conflict with the aims of rehabilitation" and "all spent convictions should be removed from a disclosure unless the state makes a case to disclose it".

**Time periods**

The Bill makes provision (s.14(2)) to reduce the periods during which a List B offence would be disclosed to 11 years, if the individual was an adult when convicted, and 5 years and 6 months, if the individual was under the age of 18 when convicted. The period after which an individual could apply for a conviction of a List A offence to be removed from a higher level disclosure would also be 11 years. The Policy Memorandum notes that:

“ 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 change is also supported by emerging research in relation to certain convictions types and reoffending.”

Disclosure (Scotland) Bill, Policy memorandum (para 113), n.d.
The inclusion of a childhood conviction for a List A offence on a Level 2 Disclosure would be first decided by the Scottish Ministers (s.17), with the opportunity of a review of that decision by the independent reviewer. The separate review procedures for childhood convictions are discussed further in the Childhood offences section of this briefing.

The Policy Memorandum stated:

“ 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. ”

Disclosure (Scotland) Bill, Policy Memorandum, (para 138), n.d. 11

The report on the Consultation indicated that there were mixed views on the matter, particularly for adult convictions. In answer to a question on whether "the rules for disclosure in the current form of 15 years and 7.5 years provide appropriate safeguarding and privacy protections", 148 (out of 193) agreed. Conversely, in answer to a further question on whether the periods should be reduced, 125 (out of 191) agreed. The Consultation gave options for the period of disclosure and a plurality of those that answered the question supported maintaining the period at 15 years; the results were:

<table>
<thead>
<tr>
<th>11 years</th>
<th>12 years</th>
<th>13 years</th>
<th>14 years</th>
<th>15 years</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>59</td>
<td>33</td>
<td>11</td>
<td>1</td>
<td>70</td>
<td>6</td>
</tr>
</tbody>
</table>

What this means for individuals and organisations

Including offences from Schedule 8B of the Police Act 1997 to List A in the Bill could mean that a spent offence not currently disclosed on a higher-level disclosure could become disclosable on a Level 2 disclosure.

The reduction in the relevant time periods would mean that individuals will potentially be able to move on from offending behaviour earlier than previously. Consequently, organisations wishing to check disclosures may not have access to the same amount of conviction information on individuals.
**Other Relevant Information**

**Current system**

Other Relevant Information ("ORI") is information which currently can only be disclosed in enhanced disclosures or full PVG Scheme Record checks. ORI may include allegations held on local police records about the applicant's criminal or other behaviour which may not have been tested at trial or led to a conviction. The Age of Criminal Responsibility (Scotland) Act 2019 provides that offending-type behaviour of a child under the age of 12 may, after a review, be disclosed as ORI.

Disclosure Scotland can ask the chief officer of any relevant police force to provide information about the applicant for inclusion on the enhanced disclosure or PVG check. 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. This could lead to an individual being barred from certain types of work.

There is Home Office guidance for Chief Officers in England and Wales in relation to the disclosure of ORI. The Consultation indicated that Police Scotland currently follows this guidance "to the extent that it can be done". In England and Wales, chief officers have a power to seek representations from applicants, and applicants have the right to apply for an independent review of the ORI before disclosure. In Scotland, ORI is disclosed to a third party at the same time as the individual.

The provision of non-conviction information has been subject to some debate and judicial consideration. In October 2009, the Supreme Court held that police should consider two questions when deciding whether to disclose non-conviction information: first, whether the information is reliable and relevant; and second, in light of the public interest and the likely impact on the applicant, whether it is proportionate to disclose the information. The Supreme Court also held that the factors to be considered in assessing proportionality include:

- the gravity of the information;
- its reliability and relevance;
- the applicant's opportunity to rebut the information;
- the period that has elapsed since the relevant events; and
- the adverse effect of the disclosure.

The Supreme Court also held that "if disclosure may be: (i) irrelevant; (ii) unreliable; or (iii) out-of-date, the applicant should be given the opportunity to make representations prior to the decision to disclose".
The Bill

A key change proposed in the Bill is that individuals will see their disclosure before it is provided to a third party. The Bill provides for a different process of how an individual can apply for ORI to be removed from their disclosure and this is set out in the Reviews section of the briefing.

The Bill also provides for Scottish Ministers to create statutory guidance to the Chief Constable of Police Scotland in relation to what information to disclose under ORI.

The Bill continues to apply a two-stage test before the chief constable can provide ORI (s.18). First that they reasonably believe the information to be relevant to the purpose of the disclosure, and second that, in their opinion it, ought to be included. Section 64 provides for a duty on Scottish Ministers to issue guidance to the chief constable on this and other matters. The Explanatory Notes (para 34) indicated that the Scottish Government expects to make similar provision for other relevant police forces under s.104 of the Scotland Act 1998.

The Policy Memorandum set out the Scottish Government's reasons for supporting the continued use of ORI:

"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 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."

Disclosure (Scotland) Bill, Policy Memorandum, (para 140), n.d. 17

In relation to consultation on ORI, the Policy Memorandum noted that:

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

Disclosure (Scotland) Bill, Policy Memorandum, (para 149), n.d. 18

The Policy Memorandum (para 151) stated that the new processes are intended to address these concerns.
Childhood offences

The Bill continues the Scottish Government’s focus on how childhood offending is managed and addressed. Childhood offences also featured in judgements which led to amendments to the disclosure scheme through Remedial Orders (discussed in the Legal challenges sub-section above). The Bill seeks to reform how offences committed by young people aged between 12 and 17 years are disclosed.

Recent legislation

The Age of Criminal Responsibility (Scotland) Act 2019 raises the age of criminal responsibility from 8 to 12 years of age. This Act provides that existing record of criminal offences of children under 12 can only be included as Other Relevant Information on a higher level disclosure certificate and only after the information has been approved for inclusion by the independent reviewer, a role which the Act establishes.

The Management of Offenders (Scotland) Act 2019 provides that any offence ground established or accepted through the Children's Hearing System, which can be treated like a conviction, becomes spent immediately. That Act will also reduce the disclosure periods for young people who have been dealt with by a criminal court.

The Bill

The Bill provides for childhood conviction information to be assessed by Scottish Ministers (in practice, Disclosure Scotland) who will determine whether this information ought to be disclosed. The individual has the right to challenge the inclusion of any conviction information from when they were under 18 by applying for a review by the independent reviewer.

Under the Bill, Level 1 Disclosures will include only unspent convictions and any notification requirements under the Sexual Offences Act 2003 Part 2. Level 2 disclosures (see the tables in Range of products and services section) will potentially include spent convictions of List A or List B Offences. The Bill sets out the test against which Scottish Ministers must determine whether to disclose conviction information. The tests differ for Level 1 and Level 2 disclosures. For Level 1, the test is "whether information about the conviction ought to be included" (s.5). For Level 2, the test is two-fold: "whether the childhood conviction is relevant for the purposes of the disclosure" and "whether information about the conviction ought to be included" (s.25).vi The Policy Memorandum provides a rationale for the difference between the tests:

“ 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. ”

Disclosure (Scotland) Bill, Policy Memorandum, (para 103), n.d.19

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vi This is similar to the proposed test for the Chief Constable providing ORI (see the section on Other Relevant Information).
One of the policy objectives of the Bill, listed in the Policy Memorandum, is the recognition of adolescence "as a unique phase of life" and therefore "ending the automatic disclosure of convictions accrued while aged between 12 and 17 years".  

The Consultation noted that youth crime "places a significant burden on society" and stated that while typically those involved in youth crime will desist by their mid-twenties, for some it is the start of a wider pattern of behaviour. The Consultation also noted that care experienced young people's behaviour would be more likely to accrue convictions than their peers who had behaved similarly but had not been in care. Furthermore, the Consultation argued that the adverse childhood experiences of some care experienced young people could "draw children into harmful behaviours and lead to contact with the police that simply would not have occurred had the child not had to negotiate the care system".

The Consultation stated:

"Scottish Ministers consider that we have a duty to help young people move on from early harmful or criminal behaviour and live productive lives when they are ready to do so, whilst simultaneously ensuring that the disclosure system addresses those who pose risks of serious harm to the public."

Scottish Government, 2018

**Options for childhood convictions**

The Consultation set out three options and also asked what the upper limit of the age range options should apply to.

The three options are set out below.

- Option 1: no change to the current system. Convictions are treated the same as adult convictions, albeit with differing time limits on when offences are spent and in respect of disclosure of Lists A and B offences (currently schedules 8A and 8B in the 1997 Act) in Level 2 (currently higher level) disclosures.

- Option 2: no disclosure of convictions in Level 1 disclosures; conviction information could only appear as ORI in Level 2 disclosures after a review. This option mirrors the disclosure of offending-type behaviour for under-12s in the Age of Criminal Responsibility (Scotland) Act 2019.

- Option 3: no conviction information disclosed unless it is for an offence included in Lists A or B or is excluded from rehabilitation under the 1974 Act. Protected convictions would not be disclosed in Level 2 disclosures (e.g. where the time period had elapsed for a List B conviction). ORI relating to other offending might still be included in Level 2 disclosures.

The proposal in the Bill allows for any unspent convictions to be disclosed, subject to Ministers determining that the information ought to be disclosed.

Responses to the Consultation's questions on the three options did not provide a clear indication of which was most strongly favoured.
Question 75 asked whether there should "be specific provisions reducing the possibility of the state disclosure of criminal convictions accrued by young people 12 years or older on all types of disclosure". Of those that answered, 145 agreed that there should be and 43 disagreed. It is not clear if those that agreed included any that thought that existing specific provisions in relation to childhood convictions are sufficient in this regard (i.e. shorter time frames before convictions became spent and disclosed in relation to List A and B offences).

Questions 76 and 77 asked about options 2 and 3 respectively. Of those that answered these questions, a majority agreed with both options and the numbers were similar for both questions. 99 responses supported Option 2 and 70 respondents opposed; 103 responses supported Option 3 and 61 opposed. There appears to have been some overlap between those that supported Option 2 and Option 3.

The Policy Memorandum provides a narrative of the Consultation and the reasons for the final proposal in the Bill but does not make it clear that the specific proposals in the Bill were not included in the Consultation.

The Policy Memorandum described the three options as "no changes, a special regime for childhood convictions, or changing the disclosure rules which would result in no disclosure of childhood convictions" and continues to say "most respondents favoured the special case-by-case regime for childhood convictions". This appears to imply that Option 2 was the most favoured option. This is not clear from the report on the Consultation and, as noted above, Option 3 appears to have received greater support. A reader might also assume that the Bill's provisions mirror the option set out in the Consultation.

SPICe sought the Scottish Government's views on this apparent discrepancy. The Government's position is that while the policy has been refined, the key policy aim of moving away from automatic disclosure of childhood offences has remained intact. The Government stated that the majority in favour of "special case-by-case regime for childhood convictions" refers to the responses to Question 75, not any specific option. The Government described the proposals in the Bill as a development of both options 1 and 2 in the Consultation. (Personal Communication)

In terms of the age range where any special provisions should apply, the Consultation gave a number of age ranges for respondents to choose from. It was not clear however whether the upper age-ranges were inclusive or exclusive. For example, whether the option 12-18 meant up to the 18th or 19th birthday.

The Policy Memorandum stated "the majority of respondents favoured the age range of 12-17" for special provision to made. As seen in the table below, there was a plurality (43 out of 140 that answered) for the option of 12-18 years.

<table>
<thead>
<tr>
<th>Age Range</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>12-14</td>
<td>7</td>
</tr>
<tr>
<td>12-15</td>
<td>17</td>
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<tr>
<td>12-16</td>
<td>27</td>
</tr>
<tr>
<td>12-17</td>
<td>16</td>
</tr>
<tr>
<td>12-18</td>
<td>43</td>
</tr>
<tr>
<td>12-21</td>
<td>30</td>
</tr>
<tr>
<td>No Answer</td>
<td>212</td>
</tr>
</tbody>
</table>

Subsequent correspondence between SPICe and the Scottish Government indicates that at least 15 of those respondents that chose 12-18 option meant up to the 18th birthday. Just accounting for those responses would change the option that gained the highest number of responses to 12-17.
The Policy Memorandum appears to have taken a different approach to analysing the responses to this question to the responses in relation to the period of time before convictions of List B offences are disclosed. In this example, the Policy Memorandum appears to focus on the plurality whereas it does not in the example regarding disclosure periods (see the subsection Time periods).

What this means for individuals and organisations

Given that the effect of the Management of Offenders (Scotland) Act 2019 will be to reduce the number of unspent convictions, the main impact will be on those individuals who have adolescent convictions of offences listed in List A or B which could be included in a Level 2 disclosure. Therefore, for an individual, it will be less likely that adolescent offending behaviour will be disclosed to organisations entitled to ask about spent conviction information.

From the perspective of an organisation countersigning a disclosure, the intention is that Disclosure Scotland will still disclose relevant convictions for List A and B when the disclosure satisfies the two-part test. However, there will be some circumstances where an third party disclosure recipient will have less information than under the current regime, particularly taking into account the effect of the Management of Offenders (Scotland) Act 2019.
Reviews

Current system

The current system allows individuals to apply to a Sheriff to have a conviction of a list 8B offence removed or a list 8A offence removed after certain time periods have lapsed. Under section 117 of the 1997 Act, an individual may apply to the Scottish Ministers to have the accuracy of the information on their disclosure certificate reviewed if they consider it to be inaccurate; similar provisions in section 51 of the PVG Act apply for PVG checks.

An individual can also ask that the information provided by the police through ORI be reviewed. This is undertaken by the chief officer of the relevant police force. This decision is final and can only be challenged through judicial review.

The Bill

The Bill amends and expands opportunities for individuals to review the disclosure of both convictions and ORI.

One of the key changes to how disclosures will be administered is that the individual will receive the disclosure certificate before it is sent to a third party. Currently, the certificate is normally issued to the individual and the employer or service provider at the same time, making an application for information to be removed of limited immediate value.

The Bill proposes that an individual can apply for the disclosure of conviction information to be removed from disclosures by application for a review by Disclosure Scotland or the independent reviewer. This can be to review:

- accuracy
- the inclusion of childhood conviction information
- the inclusion of a "removable" conviction
- the inclusion of ORI.

Under the Bill, a removable conviction is a spent conviction of an offence that appears on Lists B or a conviction of an offence on List A from over 11 years previously.

Reviews of Level 1 disclosures can only cover the first two bullets; reviews of Level 2 disclosures could include any of the four bullets. An initial review of accuracy or the inclusion of a removable conviction would be carried out by Disclosure Scotland. The police would carry out the initial review of ORI.

vii As noted in the Disclosable Lists and Offences section of this briefing, the lists of offences in Schedules 8A and 8B are amended and called Lists A and B in the Bill.
The inclusion of childhood conviction information is determined by Disclosure Scotland before any disclosure is provided to the applicant. Reviews of the inclusion of this information would be considered by the independent reviewer.

A review on the grounds of accuracy has no further mechanism of review. The Explanatory Notes indicate that it is intended for mainly administrative errors. A review on these grounds may also look at cases where an individual claims that a conviction when they were an adult related to offending behaviour when they were under 18 and should be treated as a childhood conviction.

In terms of the bottom two bullets, individuals who are not satisfied with the outcome of a review by Disclosure Scotland or the police could seek a second review by the independent reviewer.

The role of independent reviewer is provided for by the Age of Criminal Responsibility (Scotland) Act 2019 (s.11). Under that Act, the role of the independent reviewer is to review any ORI relating to offending-type behaviour of a child under 12 which may be subject to disclosure in the future. It was also envisaged that the role of the independent reviewer may be extended and this Bill does that.

The Bill provides for a final stage of appeal against a decision of the independent reviewer to a Sheriff. Such an appeal can only be on a point of law.

The appeal mechanisms for different aspects of information included in disclosures are similar. The Scottish Government's response to the report on its consultation stated:

“ We believe that unifying the appeal mechanisms, so that the independent reviewer is responsible for all types of appeal, will make the system as simple and coherent as possible for applicants and stakeholders. There will also be arrangements in place for dealing with combination reviews for circumstances when an applicant pursues a review for more than one type of information, for example childhood information and the removal of spent convictions.”

Scottish Government, 2019

Consultation

Removable offences

As noted at the beginning of this section, individuals may apply to the courts to have information on spent convictions of offences listed in schedules 8A or 8B of the 1997 Act removed from a disclosure certificate. The Consultation provided some detail on how the current system is working. At the time of that consultation (April 2018), 346 individuals intimated to Disclosure Scotland their intention to apply to a sheriff for the removal of a conviction from their disclosure. Of these, 27 proceeded to make an application to the sheriff and of these, four cases had been decided by a sheriff and 23 had not yet been decided. The Consultation stated:

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viii Reviews of this type of ORI are provided for in the Age of Criminal Responsibility (Scotland) Act 2019 and are not covered in this Bill.

ix The Policy Memorandum provides more recent figures at para 128.
A survey undertaken by Disclosure Scotland identified a number of reasons why individuals who had intimated that they would make an application to a sheriff do not then go on to do so. The reasons identified were: cost; time delay; and uncertainty of the process. 25

The Consultation made a number of proposals for reform: the introduction of an administrative review; the use of the independent reviewer; and the use of a tribunal. Of these most respondents favoured an internal review by Disclosure Scotland and the next most popular option was a review by the independent reviewer. The option to use a tribunal was supported by fewer than 15 respondents.

The process whereby Disclosure Scotland would undertake an initial review, followed by the possibility of applying to the independent reviewer, was not set out specifically in the Consultation document.

Other Relevant Information

The proposal that the independent reviewer be involved in reviewing ORI, after the relevant chief officer had considered the matter, was supported by a large majority of respondents to the Scottish Government’s consultation.

What this means for individuals and organisations

The key changes for individuals and employers is that individuals will see the disclosure product before it is provided to a third party. This removes the chance of information being revealed to potential employers without the individual knowing and gives the opportunity for the individual to apply for information to be removed.

The intention is that individuals will find the process of applying for changes to their disclosure simpler than at present.
Protection of Vulnerable Groups

Current system

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

There are three types of scheme membership: one for doing regulated work with protected adults; one for doing regulated work with children; and one for doing regulated work with both. Similarly an individual could be barred from working with either or both children and vulnerable adults. Courts, employers, employment agencies, and professional regulatory bodies have duties to refer certain individuals to the Scottish Ministers for consideration for listing. Anyone may be a member of the PVG scheme if they are not barred from doing regulated work (relating to the type of membership they are applying for).

An organisation that employs an individual to do regulated work cannot seek an Enhanced Disclosure. The organisation would instead need to ask for a PVG Scheme Record check which provides the same information as an Enhanced Disclosure.

The key difference between an enhanced disclosure and a PVG Scheme Record is that scheme members are subject to ongoing monitoring by Disclosure Scotland. Ongoing monitoring means that those who display harmful behaviour while doing regulated work can be assessed as and when the new information about that harmful behaviour is brought to Disclosure Scotland's attention. If appropriate, the scheme member can then be placed under consideration for listing, and, if listed, removed from regulated work so reducing the opportunity or risk of them doing harm. Without ongoing monitoring, this information would only come to the attention of Disclosure Scotland if an update was carried out on that scheme member by their employer. In practical terms, ongoing monitoring means that once an individual becomes a member of the PVG scheme, Disclosure Scotland will add any new vetting information (that is information about a new conviction, or information provided by a chief police officer) to their scheme record as and when it arises. Disclosure Scotland has procedures in place to identify that new information. The new vetting information is assessed by Disclosure Scotland on a case-by-case basis, and if it suggests that the scheme member may have become unsuitable to work with children or protected adults, a consideration for listing case will be started.

The Bill

Part 2 of the Bill makes amendments to the PVG Act. Some of the key changes are

- replacing the concept of "regulated work" with "regulated roles"
- changing the period of membership of the PVG scheme to 5 years and providing for 16 as a minimum age for membership
• providing for Scottish Ministers to put conditions on individuals who are being considered for listing (i.e. Ministers are determining whether to bar the individual from working with a vulnerable group)

• making scheme membership compulsory for doing regulated roles and providing for offences.

This is not an exhaustive list of the provisions of Part 2.

**Regulated roles**

Under the PVG Act, the PVG scheme membership and the barred lists relates to individuals doing regulated work. Regulated work with children and protected adults are defined in Schedules 2 and 3 of the PVG Act respectively.

These schedules define regulated work in a number of ways. Schedule 2 of the PVG Act defines regulated work in relation to the activity of an individual (e.g. work that includes having unsupervised contact with children), the workplace (e.g. a school), or a specific position (e.g. a foster carer).

The Policy Memorandum reports that the current definition of regulated work is considered confusing. Disclosure Scotland sifts applications and rejects approximately 1,700 ineligible PVG applications per year. The Bill attempts to move away from lists of jobs or workplaces and more toward a description of the type of work undertaken. The Bill replaces Schedules 2 and 3 of the PVG Act (see Schedules 3 and 4 of the Bill) and provides for a three-stage test to determine whether an individual is undertaking a regulated role:

• that the individual undertakes one or more of a list of activities;

• that the activities are "a necessary part of the role"; and

• that the activities include the opportunity to have contact with protected adults or children.

In addition, a supervisor of such an individual would be considered to be doing a regulated role, as would an individual who is undertaking training for a regulated role and who has the opportunity to have contact with vulnerable groups.

The Scottish Government has stated that it intends regulated roles to be "synonymous with roles holding power or influence over children or adults who are vulnerable as a result of receiving a service". The list of activities tend to be broadly drafted, e.g. "Coaching children in relation to sports or physical activity". Some however are more specific, e.g. "Acting as a foster carer".

The Consultation indicated that there was support for a shift away from job titles towards the activities undertaken in those jobs. This is reflected in the differences between the lists of jobs/roles in the Consultation and the lists of roles in the Bill.

While there was general agreement that the regulated roles approach would be an improvement to the current system of regulated work, the majority of respondents also

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x For roles in certain settings (e.g. a school) and which are not covered elsewhere in the list of activities, the test for regulated work for children is "unsupervised contact" (sch 3, para 1(2)(b)(i)).
believed that the proposed system would bring challenges, for example, in determining whether a particular job includes regulates roles. 28

The Scottish Government acknowledges these concerns and in its response to the report on the Consultation it said:

“ Disclosure Scotland will 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 characteristics.”

Scottish Government, 201929

Membership

The PVG scheme now includes over 1.2 million members, over a fifth of the population of Scotland. The table below shows the growth of scheme membership since its inception in 2011.

PVG Scheme Size From February 2011 to 31st December 2018

<table>
<thead>
<tr>
<th>Calendar Years</th>
<th>No. of PVG Scheme Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>134,600</td>
</tr>
<tr>
<td>2012</td>
<td>298,300</td>
</tr>
<tr>
<td>2013</td>
<td>528,000</td>
</tr>
<tr>
<td>2014</td>
<td>745,000</td>
</tr>
<tr>
<td>2015</td>
<td>916,000</td>
</tr>
<tr>
<td>2016</td>
<td>1,027,400</td>
</tr>
<tr>
<td>2017</td>
<td>1,126,500</td>
</tr>
<tr>
<td>2018</td>
<td>1,214,100</td>
</tr>
</tbody>
</table>

Disclosure Scotland (2019), personal communication.

Section 71 of the Bill amends the criteria for participation in the scheme. It provides for a minimum age for members of the scheme of 16 yearsxi. Previously there was no minimum age. Section 71 also provides explicitly for the renewal of membership of the scheme.

Currently membership of the PVG scheme is for life. The PVG Act provided for Ministers to make regulations which would "prescribe circumstances in which scheme members are to be removed from the Scheme" and the Explanatory Notes to the Act stated "this power could be used, for example, to set the lifetime of scheme membership at 10 years". 30 Ministers have not used this power for this purpose.

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

xi As seen in the Compulsory PVG membership subsection below, the mandatory nature of the PVG scheme does not apply to individuals under 16.
Disclosure Scotland estimates that around a fifth of members of the PVG scheme no longer do regulated work. An individual can choose to leave the scheme but, in practice, few do. A member of the PVG scheme will be continuously monitored, potentially unnecessarily if they are no longer doing protected work. The Consultation stated:

“The fact that PVG scheme membership involves continuous updating of the scheme record is a source of surprise and confusion for many. This is regrettable because the system of ongoing monitoring of PVG scheme members is a unique feature of the PVG Scheme and a major investment in public safety.”

Scottish Government, 2018

The Consultation stated that "better managing the PVG Scheme size is a critical outcome" of the reform of disclosure schemes. The response of the Information Commissioner's Office to the Consultation welcomed this aim but also suggested that Disclosure Scotland do more to ensure that individuals are not subject to the monitoring of PVG scheme membership unnecessarily. It said:

“The data protection principles require that personal data is kept in an identifiable form no longer than is necessary for the purpose. People who are no longer undertaking regulated work (or a protected role as it may become) and have no intention to do so in the near future should not be part of the scheme and subject to the monitoring requirements. As well as fixed membership periods, there are other ways which could also identify that a person no longer needs to be part of the PVG scheme. People could inform Disclosure Scotland that they will leave the scheme before a membership period expires as they are not involved with a vulnerable group anymore and have no immediate plans to do so. If take-up of the option has been low under the current framework, Disclosure Scotland should identify additional ways and opportunities to raise awareness of the ability to request removal.”

Information Commissioner’s Office, 2018

Barred lists

The Bill makes provision for Scottish Ministers to set interim conditions on individuals who are being considered for listing. Under the PVG Act, Scottish Ministers maintain barred lists of individuals who may not undertake regulated work with children, protected adults or both.

Listing

Certain offences may lead the individual to be barred from working with vulnerable groups, under the PVG Act. The Protection of Vulnerable Groups (Scotland) Act 2007 (Automatic Listing) (Specified Criteria) Order 2010 provides a list of offences where if an individual were to be convicted (or acquitted on grounds of insanity) they would be barred from working with children or protected adults. Scottish Ministers also have the power to place an individual on a barred list if they are satisfied by information relating to the individual's conduct that the individual is unsuitable to work with children or protected adults or both.

Employers, professional bodies and regulators, courts and others may make a reference to Scottish Ministers about an individual who is, has or will be doing regulated work.
References to Ministers can be on the grounds of an individual causing harm to a vulnerable person or putting them at risk of harm; inappropriate behaviour of a sexual nature; or giving them inappropriate medical treatment. In certain circumstances, for example where an individual has been dismissed on one of the referral grounds, it is an offence not to refer an individual to Scottish Ministers for listing.

Current process for when an individual is considered for listing

Currently, if Scottish Ministers receive a valid referral, they will consider the individual for listing. It is not an offence for an individual to continue to undertake regulated work while they are being considered for listing. Section 30 of the PVG Act provides that Scottish Ministers must notify an individual and their employer (if known) and any relevant regulatory body that an individual is being considered for listing or has been barred. The Explanatory Notes to the PVG Act stated, "it is expected that [the employer or regulatory body] will take any appropriate action to mitigate any risk" 35.

Conditions

Section 77 of the Bill provides for conditions to be imposed on individuals who are being considered for listing. The precise conditions will be prescribed in later regulations, but they may prevent the individual undertaking a regulated role or require them to be supervised while doing so. Restrictions will be time limited but the period could be extended after an application to a Sheriff. The time for which the restrictions may last are not set out on the face of the Bill.

The Policy Memorandum notes that there was strong support for this approach - 206 out of 220 respondents supported the proposal. The Consultation sought views on how long the conditions should last with two options: 3 months and 6 months. 74% of those that responded to the question preferred 6 months. 36

Compulsory PVG membership

Currently it is not compulsory for individuals undertaking regulated work to be members of the PVG Scheme. However, it is an offence to offer a role doing regulated work (including voluntary work) to an individual who has been barred from that type of work. In most cases, the only practical way to be sure that an individual is not barred from regulated work is to undertake a PVG check.

New offences

The Bill provides for a number of new offences in regard to PVG membership and carrying out regulated roles.

- An offence for an individual to carry out or seek to carry out any type of regulated role unless they have the appropriate scheme membership.

- An offence for an organisation to offer any type of regulated role to an individual unless it has received an appropriate Level 2 disclosure statement.
• An offence for a personnel supplier to knowingly offer or supply an individual to do any type of regulated role unless it has received an appropriate Level 2 disclosure statement.

In relation to the first offence listed, the Bill provides for a defence where "the individual did not know, and could not reasonably be expected to have known" the work was a regulated role or that their PVG membership had not been renewed for that type of work. Section 89 of the PVG Act provides that where an organisation commits an offence under that Act, in some cases, a senior individual in that organisation will also be held responsible. This would apply to the offences listed above.

None of these offences apply when the individual is under 16. Under the Bill (s.71), membership for the PVG scheme is also only for individuals 16 or over.

The Bill does not change the offence of offering an individual regulated work who is barred from doing that type of work, and the PVG Act does not have a minimum age limit for Ministers barring individuals. Potentially this may lead to a gap, for individuals who are under 16 and have been barred seeking to do a protected role. There have been very few (six) individuals who have been barred when under 16 years of age and in practice these children would be subject to close monitoring within their communities.

**Policy development**

The Scottish Government's consultation reported that "stakeholders have overwhelmingly supported that the PVG Scheme ought to be mandatory for people who want to work in sensitive roles with children and protected adults." The Policy Memorandum sets out the intention of making the scheme mandatory:

"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 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."

Disclosure (Scotland) Bill, Policy Memorandum, (para 198), n.d.

In 2017, the Health and Sport Committee held an inquiry into child protection in sport. One of its conclusions was:

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xii The PVG Act defines "organisation" at Section 97 and this includes "an individual who, in the course of a business, employs or otherwise gives work to other persons".

xiii An offer may be made subject to a satisfactory Level 2 Disclosure statement.
“We believe there is a compelling case for the PVG scheme to be made mandatory and ask the Scottish Government to consider our views and evidence as part of its review.”

Health and Sport Committee, 2017

The formal consultation focused on how the mandatory scheme should be established. The report on the Consultation noted that a common suggestion was that existing members should continue membership at no charge during the transition to the new arrangements. The report also raised concerns about the application of offences enforcing the mandatory scheme:

“A number of respondents suggested that the offence should be phased in, and there was also concern about the offence of working in a protected role when not a scheme member. It was felt that this could have a devastating impact on individuals and organisations. An alternative to prosecution should be the starting point for the offence of working in a protected role rather than a prosecution. A small number of respondents remain opposed to a mandatory scheme.”

Scottish Government, 2018

The Consultation explained the rationale in 2007 for not making PVG scheme membership mandatory initially.

“A non-mandatory scheme was therefore brought into being, with the primary benefit of it being that circumstances, which might otherwise be drawn into ‘regulated work’, such as a neighbour helping another neighbour in return for a small remuneration, could continue to occur without either party being potentially criminalised because the person helping out was not a member of the PVG Scheme.”

Scottish Government, 2018

Paragraph 2 of both Schedules 3 and 4 of the Bill provide for exceptions for activities that would be a regulated role where the role is carried out as part of a family or personal relationship. Paragraph 169 of the Explanatory Notes to the Bill elaborates:

“This will be wider than the existing exclusions from the definition of “work” in section 95(3) and (4) of the PVG Act (which are to be repealed), since it will no longer be necessary for there to be no commercial benefit. Scheme membership is considered to be unnecessary in circumstances where a relationship of trust already exists between the parties involved, even if the role being carried out is remunerated.”

Disclosure (Scotland) Bill, Explanatory Notes, (para 169), n.d.

What this means for individuals and organisations

The intention is that the definition of regulated roles will be easier to understand than regulated work. This would make it less likely that organisations and individuals would use the PVG scheme and disclosure unnecessarily.

Making membership of the PVG scheme time-limited may reduce the risk that individuals are continually monitored in the long-term unnecessarily. Individuals will have to renew membership and pay any associated fees.
The intention is that by having standard conditions employers will be clearer on what they should do to manage risks while an employee is being considered for listing.
Accredited bodies and individuals

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

Disclosure Scotland currently offers businesses the ability to obtain basic disclosures for a large number of job applicants using special arrangements that allow for bulk applications, this is known as B2B (business to business). Typically this is when a large company regularly recruits lots of people. One key change proposed is that these bodies are brought into the scope of accredited bodies. The Scottish Government explained its reasons for this:

“ We believe that the law governing how B2B works needs to be tightened 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. ”

Scottish Government, 2019

The Bill provides that an accredited body can be:

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

Companies or charities can use a third party to undertake disclosure checks on their behalf and the Bill makes provision for this to continue for Level 2 disclosures. These bodies are known as umbrella bodies, typically the organisations using umbrella bodies are small charities or companies. One example of an umbrella body is Volunteer Scotland Disclosure Service.

The Bill provides for accredited bodies to act as umbrella bodies (section 57). Such an umbrella body can share information either with a body that could become an accredited body (i.e. is one of the three bullets above) or an individual. In the first instance, the umbrella body may share the Level 2 disclosure statement.

Where the umbrella body is acting for an individual, it cannot share the content of a disclosure statement but can provide advice on the suitability of the individual. The intention is that this service for individuals would be used by people accessing Self-Directed Support or others employing a self-employed worker, for example a carer or music tutor. Individuals cannot seek a PVG Scheme Record check, but can seek a statement of scheme membership, which will confirm that an individual is a member of the scheme (and therefore is not barred). A PVG Scheme Record check does not provide conviction information or ORI.

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

The Financial Memorandum (“FM”) to the Bill stated:

“ It is anticipated that the provisions of the Bill will lead to an overall increase in costs, however these will reduce over time due to [expected efficiencies]. The expected costs fall into five categories: vetting, introduction of the independent reviewer ... review applications, accredited bodies and digital delivery.”

Disclosure (Scotland) Bill, Financial Memorandum, (Para 6), n.d.46

The efficiencies identified in the FM are through the reduction in staff following the intended move toward digital delivery. The FM states that these will eventually be £2.7m per year. 47

It identifies £1.5m of costs on the "initial phases of a programme which will work with stakeholders to produce detailed options on how the principles of the Bill can best be delivered" and estimates a "further minimum of £17.5m" will be needed for the delivery transformation programme. The FM argues that the additional £17.5m is not a direct consequence of the Bill and that around £4m of this funding will come from fee income. 48

Other costs for the Scottish Administration and agencies are in relation to dealing with childhood offences and reviews.

The FM anticipates an increase in fee income to the Scottish Administration. This in turn may pass on costs to other areas of the public sector, such as local authorities and health boards and to employers and individuals. The FM suggests that savings in administration costs will be realised from a move to digital delivery however and the overall costs will be "minimal".

There are a number of sources of fees: applying for disclosures, fees to become an accredited body, and PVG scheme membership. The specific fees are not set out in the Bill but it is intended that they will be set in secondary legislation.

The total cost relating to implementing the Bill is estimated as £2.0m. This figure does not include additional fee income, or the further costs or savings anticipated through the move to digital delivery (i.e. £17.5m further costs and £2.7m annual savings).
Fees

The disclosure system attracts a number of fees. Section 62 of the Bill provides for regulations to be made to determine fees in connection with a number of activities. For example:

- undertaking a disclosure check, including PVG
- registering as an accredited body
- reviews.

Section 70 of the PVG Act provides for Ministers to make regulations on fees in respect of the PVG Scheme, such as membership and disclosures. The Bill\textsuperscript{xiv} amends this power only insofar as to specify that fees can be charged for renewals of PVG membership.

The levels of fees are to be set in future regulations. Regulations laid under section 70 of the PVG Act are subject to the negative procedure; it is proposed that regulations under Section 62 of the Bill would also be subject to the negative procedure.

An issue flagged in the report on the Consultation was the need to ensure that reforms do not create onerous additional administrative costs.

Some details of possible fee structures for non-PVG scheme fees are intimated in the Financial Memorandum ("FM").\textsuperscript{xv} The FM sets out two possible models of fees for non-PVG disclosures: Model 1, the status quo where all disclosures are £25; and Model 2, whereby Level 1 disclosures cost £25 (or £30 initially and £17 for subsequent disclosures) and Level 2 are £30. The estimates of fee income in the FM are based on Model 2. The FM notes the intention to increase the annual registration fees for accredited bodies (currently known as registered persons) from £75 to £100.

In terms of PVG, currently the scheme membership costs £59 for a life membership and £18 for each subsequent short scheme record sought. The Consultation intimated that a 5-year membership scheme could cost £65 and with a £10 fee for each disclosure.\textsuperscript{49}

The Scottish Government's response to the Consultation indicated that its intention was that, under the new 5-year renewable membership, PVG members would be able to authorise disclosures to prospective employers without additional charges; it is unclear what impact this may have on the membership fee. The Government also stated:

"Further consultation will be required on fees (as the details are not provided for in the Bill) and stakeholder engagement is ongoing to determine proposals for appropriate fees and payment methods."

Scottish Government, 2019\textsuperscript{50}

The Scottish Government has also been clear that it intends to maintain free checks for volunteers.
Bibliography


Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Ned Sharratt on telephone number 85204 or ned.sharratt@parliament.scot.

Members of the public or external organisations may comment on this briefing by emailing us at SPICe@parliament.scot. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament’s Public Information Service at sp.info@parliament.scot. Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.
Education and Skills Committee

23rd Meeting 2019 (Session 5) Wednesday 4 September 2019

Disclosure (Scotland) Bill – Correspondence

The Committee received a letter from the Minister for Children and Young People in response to the letter from the Committee on 22\textsuperscript{nd} June 2019. Both letters are attached below.

- [Letter from the Minister for Children and Young People, 16 August 2019](#)
- [Letter from the Convener to the Minister for Children and Young People, 22 June 2019](#)
Thank you for your letter of 22nd July 2019 regarding the Disclosure (Scotland) Bill. A keeling schedule reflecting the amendments which the Bill seeks to make to the Protection of Vulnerable Groups (Scotland) Act 2007 has been provided to the Committee’s clerk under separate cover.

The Committee has requested that the Scottish Government informs the Committee as close to the start of Stage 1 scrutiny as possible of any amendments that the Government will lodge at Stage 2. The Government understands this will enable the Committee to consider the policy intention of any substantive amendments during Stage 1.

The Bill will require consequential amendments to be made to other legislation and the Government intends to address this at Stage 2. For instance, we intend to lodge amendments to the Bill in relation to the Rehabilitation of Offenders Act 1974. This Act provides for a system of protection to individuals with previous convictions not to have to self-disclose their convictions in certain circumstances. The 1974 Act will need to be amended to ensure there is consistency between ‘self-disclosure’ and ‘state-disclosure’ regimes, particularly in relation to the treatment of childhood convictions. In addition, the Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019 make changes to the self-disclosure system. There are currently no provisions in the Bill to make necessary consequential amendments to those Acts, as neither had received Royal Assent at the time of the Bill being introduced. Work on implementing those Acts is ongoing, as is the Government’s consideration of how to ensure the Bill operates alongside them effectively to ensure consistency between the self-disclosure and state-disclosure regimes.

More generally, the Government’s position on the existing provisions in the Bill will be shaped by stakeholder views and the Committee’s scrutiny of the Bill, and we will ensure that the Committee is aware of the Government’s plans for any further substantive amendments in sufficient time for the Committee to consider the policy intention behind them.
There will also be other technical and minor amendments lodged and the Government will make them known to the Committee in due course.

Yours sincerely

MAREE TODD
Dear Ms Todd

I am writing on behalf of the Committee in anticipation that scrutiny of the Disclosure (Scotland) Bill will be referred to the Committee following the Summer Recess. As you will be aware the Committee has issued a call for views on the Bill and will seek a briefing from Scottish Government officials in September. To aid the Committee in its Stage 1 scrutiny of the Bill, keeling schedules reflecting how the Bill seeks to amend existing legislation would be much appreciated. In addition, the Committee would request that the Scottish Government informs the Committee as close to the start of Stage 1 scrutiny as possible of any amendments that the Government will lodge at Stage 2. This enables the Committee to consider the policy intention of any substantive amendments during Stage 1. In addition, once Stage 1 commences it would be useful to receive any further updates of the Government’s intention to lodge amendments as and when the Government becomes aware of the need for further amendments.

I should be grateful for an initial response by Monday 19 August.

Yours sincerely

CLARE ADAMSON MSP
CONVENER
Introduction

1. This paper is to inform the Committee’s consideration of a Scottish Statutory Instrument (SSI)—
   
   University of the West of Scotland Order of Council 2019 (SSI 2019/212)

2. The instrument is subject to the negative procedure which means that it will come into force unless the Committee, and subsequently the Parliament, agrees a motion to annul the instrument. No motions to annul have been lodged for this instrument.

Purpose of the instrument

3. In the Policy Note for the instrument, the Scottish Government states that its purpose is to set out the governance arrangements for the University of the West of Scotland.

4. The Policy Note goes on to outline further the policy objectives of the instrument as follows:

   This Order sets out new provision for the governance arrangements of the University. This includes provision for the composition of the Court and Senate, which are required to comply with the requirements of the Higher Education Governance (Scotland) Act 2016 (“the 2016 Act”).

5. The Policy Note explains that the decision was made to make a new order rather than amend the initial 1993 order due to the number of changes being made, as well as to make it more accessible and to reflect the change in the institution’s name since the 1993 order.

6. The Higher Education Governance (Scotland) Act 2016 made a number of changes to the framework of higher education governance. A summary of the Bill passage can be found here, and details of the scrutiny and passage of this legislation can be found here.

Delegated Powers and Law Reform Committee


Timescales for this Committee

8. Should the Committee wish to report on this instrument, the deadline to do so is 23 September 2019.
Action

9. The Committee is invited to consider this instrument.
Introduction

1. This paper is to inform the Committee’s consideration of a Scottish Statutory Instrument (SSI)—
   Queen Margaret University, Edinburgh (Scotland) Amendment Order of Council 2019 (SSI 2019/213)

2. The instrument is subject to the negative procedure which means that it will come into force unless the Committee, and subsequently the Parliament, agrees a motion to annul the instrument. No motions to annul have been lodged for this instrument.

Purpose of the instrument

3. In the Policy Note for the instrument, the Scottish Government states that its purpose is as follows:

   To amend the Queen Margaret University (Scotland) Order of Council 2007 to reflect the requirements of the Higher Education Governance (Scotland) Act 2016.

4. The Policy Note goes on to outline further the policy objectives of the instrument as follows:

   The purpose of this instrument is to amend the 2007 Order to ensure that it complies with the requirements of the Higher Education Governance (Scotland) Act 2016, this includes appointing a senior lay member

5. The Higher Education Governance (Scotland) Act 2016 made a number of changes to the framework of higher education governance. A summary of the Bill passage can be found here, and details of the scrutiny and passage of this legislation can be found here.

Delegated Powers and Law Reform Committee


Timescales for this Committee

7. Should the Committee wish to report on this instrument, the deadline to do so is 23 September 2019.

Action

8. The Committee is invited to consider this instrument.
Introduction

This paper details a consent notification sent by the Scottish Government in relation to—

• The European University Institute (EU Exit) Regulations

The Committee is invited to consider the consent notification and agree whether it is content for the Scottish Government to give its consent for UK Ministers to lay the instrument.

Background

In anticipation of the UK leaving the EU, changes are required to devolved legislation by way of statutory instruments. Under the European Union (Withdrawal) Act 2018, and where the Scottish Government considers a UK-wide approach to the legislative changes would be appropriate (for example, to avoid duplication of effort, or where only technical or minor amendments are required), the UK Parliament can legislate on behalf of the Scottish Parliament.

For each UK statutory instrument which relates to a devolved matter, Scottish Ministers have undertaken to write to the Scottish Parliament setting out its proposed consent in a consent notification.

A protocol has been agreed which sets out the shared understanding between the Scottish Government and the Scottish Parliament on the process for obtaining the approval of the Scottish Parliament to the Scottish Ministers’ consent to the UK Parliament legislating on these devolved matters. The protocol states that the Scottish Parliament will normally have 28 days to consider a consent notification.

The protocol also categorises UK statutory instruments as category A (minor or technical amendments), category B (more significant policy decisions) or category C (matters which should be subject to the existing joint procedure (an SI laid in both the UK and Scottish Parliaments)).

Under the protocol, following its consideration of a consent notification, a committee can—

• Write to the Scottish Government confirming its agreement with the consent notification; or

• Report to Parliament and recommend that—
it is content for consent to be given for a UK SI to be made in the UK Parliament only.

It is not content with the Scottish Government granting its consent and that the proposals should be made by an SSI; or

It is not content with the Scottish Government granting its consent and that the proposals should be included as a UK SI made under the joint procedure.

Where a different way of dealing with EU withdrawal, or a different policy outcome, is required in Scotland, the Scottish Government will pursue Scottish statutory instruments in the Scottish Parliament.

The European University Institute (EU Exit) Regulations

The Minister for Further Education, Higher Education and Science wrote to the Committee in advance of the Summer Recess. This letter and the accompanying consent notification is attached at Annexe A for members’ information.

The notification highlights that as a result of the UK exiting the EU, all UK countries will no longer have access to rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the European University Institute Convention. A SPICe summary on the European University Institute is at Annexe B.

The notification states that the Scottish Government categorises the significance of the proposal as Category A, the lowest level of significance, describing it as “Removing redundant legislation from law; and ensuring continuity of law; and clear there is no significant policy decision for Ministers to make.”

For decision

The Committee is invited to consider the consent notification and agree whether it is content for the Scottish Government to give its consent for UK Ministers to lay following statutory instruments in the UK Parliament—

• The European University Institute (EU Exit) Regulations

If the Committee is content the Convener will write to the Minister for Further Education, Higher Education and Science to inform the Scottish Government of the Committee’s decision.
Dear Clare,

THE EUROPEAN UNIVERSITY INSTITUTE (EU EXIT) REGULATIONS
EU EXIT LEGISLATION - PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government's views on EU withdrawal. That letter also said that we must respond to the UK Government's preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a notification which sets out the details of the above SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in this SI. Please note, we are yet to have sight of the final SI and it is not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification.

I should highlight that the UK Government's view is that the subject matter of this SI is reserved, as it relates to international agreements. However, the UK Government has sought the Scottish Government's consent to the SI in recognition of its impact on the devolved matters of education and training. The Scottish Government
considers the subject matter of the SI to be at least partly devolved and therefore agrees that the normal protocol should be followed.

It is important to note that the nature of the UK’s future relationship with the European University Institute is subject to ongoing discussions between the UK Government, the European Commission and the Institute itself. The Scottish Government has made clear its position that we would wish to continue to benefit from participation as a contracting party. However, in the event the UK leaves the EU it would not be possible to immediately ensure a legal basis for continued participation, and this instrument therefore reflects the reality of that situation.

The Department for Education is the lead UK department for this SI, which is due to be laid in the UK Parliament either towards the end of July 2019 or September 2019 (final date to be confirmed).

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you in due course.

Best wishes

Richard Lochhead
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area

The European University Institute (EU Exit) Regulations 2019

A brief explanation of law that the proposals amend

The Regulations will have the effect that any rights, powers, liabilities, obligations, restrictions, remedies and procedures which –

(a) are derived from the Convention Setting up a European University Institute (“the EUI Convention”); and

(b) continue by virtue of section 4(1) of the European Union (Withdrawal) Act 2018, cease to be recognised and available in domestic law after exit day (and to be enforced, allowed and followed accordingly).

This legislation pertains to the United Kingdom’s participation as a contracting party in the European University Institute.

The EUI in Florence is an international centre for postgraduate and post-doctoral studies and research with a European focus. It is not an EU institution. The UK, as a signatory to the EUI Convention, participates in the governance of the Institute, contributes to the EUI’s operational budget and provides grants for up to 20 students at any one time to undertake postgraduate study at the Institute.

The UK’s membership of the EUI Convention will cease as a result of the UK exiting the EU, so the primary purpose of the instrument is to remove redundant legislation from the UK statute book and provide legal certainty.

Summary of the proposals and how these correct deficiencies

The Regulations are being made under section 8(1) of the European Union (Withdrawal) Act 2018 (EUWA) in order to address failures of retained EU law as a result of the UK leaving the EU.

The Regulations will remove on exit day any rights, powers, liabilities etc. from UK domestic law derived from UK’s membership of the EUI Convention. This is because the UK Government has said that the UK will automatically fall out of the EUI Convention upon exit day, meaning that these rights etc. will have no practical use and be redundant. The UK will no longer be a contracting party to the EUI.

1 OJ C 29, 9.2.1976, p1-17. The Convention Setting up a European University Institute (“the Convention”) was signed by its original six members – Belgium, France, Germany, Italy, Luxembourg and the Netherlands – on 19 April 1972. The United Kingdom became a Contracting State to the Convention on 24 February 1975. The European Communities (Definition of Treaties) Order 1975 (S.I. 1975/408) designated the Convention as an “EU Treaty” for the purposes of UK domestic law as defined in section 1 of the European Communities Act 1972 (c. 68).
Convention, so the SI will ensure that no remaining rights derived from the UK’s participation in the Convention are retained on the statute book after October 31st 2019.

An explanation of why the change is considered necessary

If no action was taken, the rules governing participation in the European University Institute, and the rights, powers, liabilities and obligations derived from the EUI Convention, would continue to form part of UK domestic law after exit day. The policy behind the Regulations is that any rights etc. relating to the Institute should no longer have direct effect or be enforceable in the UK after Brexit, as the UK will no longer be permitted to participate in the EUI as a contracting party without being an EU Member State.

Scottish Government categorisation of significance of proposals

Category A, with the following characteristics:

Removing redundant legislation from law; and ensuring continuity of law; and clear there is no significant policy decision for Ministers to make.

Impact on devolved areas

The Scottish Government has devolved responsibility for education. Given that the UK will be unable to continue to participate in the EUI Convention as a contracting party on existing terms after exit day, the regulations in themselves merely reflect this position – i.e. the UK will no longer be eligible to remain a contracting member to the European University Institute without further negotiations on future participation.

Summary of stakeholder engagement consultation

As the purpose is to remove redundant legal rights in UK domestic law which would have no effect or purpose if the UK ceased to participate in the EUI Convention, no further engagement or consultation has been undertaken.

Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation

Scotland’s participation in the European University Institute is part of a UK-wide basis for participation, and the deficiencies this proposal seeks to fix (redundant legislation as a by-product of the UK’s withdrawal from the EU) will be applicable to each of the four nations that constitute the UK in either a no deal scenario or at the end of a negotiated transition period – the two scenarios in which this proposal will be enacted.

There was previously some doubt as to whether the UK’s withdrawal from the EU would necessitate its withdrawal from the EUI Convention. The Scottish Government wrote to the UK Government requesting clarity on this issue, and in doing so made clear that its preference would be for continued participation in the EUI Convention under any scenario where ambiguity remained. The UK Government has since liaised with the European Commission regarding this, and the Commission has confirmed that if the UK were to leave the EU it would no longer be eligible to remain a contracting party to the EUI Convention under current terms.
In light of this the UK Government have confirmed that there are ongoing negotiations taking place between it, the Commission and the Institute to explore methods by which the UK can continue to engage with the EUI: the Scottish Government is strongly supportive of these discussions taking place.

In the meantime, however, the Scottish Government recognises that this SI is necessary to reflect the end of the UK’s existing status as a contracting party to the EUI Convention on exit day. Consenting to these Regulations does not affect the nature of the UK’s future participation and it is hoped that Scotland will continue to benefit from the EUI Convention after Brexit.

**Intended laying date (if known) of instruments likely to arise**

Intended date is yet to be confirmed but is predicted to be either late July 2019 or September 2019.

**If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister’s proposal to consent why not?**

The UK Government has not confirmed the specific laying date for this SI. Given this it has been decided to give the Scottish Parliament as much time as possible to consider the proposal in relation to the earlier proposed date of late July. Given parliamentary recess this means that, for this earlier proposed date, the full 28 days is not available. Any possible expedition of the consideration process would, therefore, be greatly appreciated.

**Are there any broader governance issues in relation to this proposal and how will these be regulated and monitored post-withdrawal?**

The Scottish Government received initial notification of this SI from the UK Government in February 2019. At that time, the UK Government did not intend to seek formal consent from the Scottish Government in line with the agreed protocol, because the UK Government considered the subject matter of the Regulations to relate to the reserved area of international relations. The Scottish Government’s view is that as the proposal is in the field of education, which is devolved, approval would be required as per the standard procedure agreed between both governments.

The Scottish Government raised this issue with the UK Government. While the UK Government still considers this SI to relate to international agreements, it has since recently written to the Scottish Government requesting formal consent in line with the agreed protocol.

**Any significant financial implications?**

No significant financial implications have been identified or are foreseen.
ANNEXE B Background on the European University Institute (EUI)

The European University Institute (EUI) is an international centre for postgraduate and post-doctoral studies and research with a European focus. While it is not an EU institution, it was established under a Convention - an international agreement, that sets out details on the structure, administration and finances of the Institute. The UK became a contracting state to the Convention in February 1976.

Under the terms of the EUI Convention¹, only EU member states can be contracting states. It is not possible for a non-EU member state to be a signatory to the Convention or participate in the EUI’s programmes. Given this, when the UK leaves the EU it will no longer be party to the Convention.

In the event of no-deal, that means the UK will no cease to be a member of the EUI at that date. In the event of a deal, the UK will continue to be covered by the terms of the Convention during the implementation period.

The notification from the Scottish Government notes that the UK, as a signatory to the EUI Convention, participates in the governance of the Institute, contributing to EUI operational budget and providing grants to up to 20 students at any one time to undertake postgraduate study at the Institute.

The EUI offers students from EU member states access to the postgraduate programmes in law, economics and political and social sciences. They gain access to funded places (which covers tuition fees, a monthly living cost stipend, return travel to the home country and insurance during the period of study).

For PhD studies, the living cost stipend for the first three years, plus travel and insurance costs are covered by the relevant member state. The fourth year of study and the tuition costs are covered by the EUI. The Scottish Government (SAAS) pays the costs for Scottish domiciled students who attend the EUI.²

¹ OJ C 29, 9.2.1976, p1-17. The Convention Setting up a European University Institute ("the Convention") was signed by its original six members – Belgium, France, Germany, Italy, Luxembourg and the Netherlands – on 19 April 1972. The United Kingdom became a Contracting State to the Convention on 24 February 1975. The European Communities (Definition of Treaties) Order 1975 (S.I. 1975/408) designated the Convention as an "EU Treaty" for the purposes of UK domestic law, as defined in section 1 of the European Communities Act 1972 (c. 68).
² This information was gleaned from a combination of information laid out in the link above along with communication from a Scottish Government official.
Scottish participants at EUI

Since 2008 there have been 8 Scottish students to have completed studies with the EUI. The table below provides brief details on each.

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</tbody>
</table>

There are currently four students enrolled who have not yet completed their studies. Two started in 2015 (PhD – law); one in 2018 (PhD – law); and one is due to start (PhD - history and civilisation) in 2019, transferring from LLM entry in 2018-19.

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3 Data provided by the European University Institute