



The Scottish Parliament  
Pàrlamaid na h-Alba

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## Education and Skills Committee Comataidh Foghlam is Sgilean

# Stage 1 report on the Disclosure (Scotland) Bill

Bill (SP Bill 50) as introduced in the  
20 June 2019

DISCLOSURE (SCOTLAND) BILL

EXPLANATORY NOTES

Section 2A of the Parliament  
Act 1978 (as amended) shall  
apply to the Disclosure  
Bill as introduced on 20 June 2019.

Explanatory documents  
accompanying the  
Disclosure Bill (SP Bill 50-FN)

Explanatory documents  
accompanying the  
Disclosure Bill (SP Bill 50-PN)

Explanatory documents  
accompanying the  
Disclosure Bill (SP Bill 50-J)

### Disclosure (Scotland) Bill [AS INTRODUCED]

#### CONTENTS

Section

#### PART I

#### DISCLOSURE OF CRIMINAL HISTORY AND OTHER INFORMATION

##### Level 1 disclosures

- 1 Level 1 disclosure
- 2 Provision of Level 1 disclosures
- 3 Applications by accredited bodies on behalf of
- 4 Provision of Level 1 disclosure to third parties
- 5 Level 1 disclosures: childhood conviction information

##### Level 1 disclosure

- 6 Level 1 disclosure: application for review
- 7 Review of accuracy of information
- 8 Review of childhood conviction information
- 9 Independent review
- 10 Notification
- 11 Appeal
- 12

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# Contents

<b>Introduction</b>	<b>1</b>
Overview of the Bill	1
<b>Education and Skills Committee consideration</b>	<b>4</b>
<b>Consideration by other committees</b>	<b>5</b>
<b>Reforming the disclosure system</b>	<b>6</b>
Other legislation	8
<b>Role of the independent reviewer</b>	<b>12</b>
<b>Disclosure - the two-part test</b>	<b>15</b>
Scottish Government position	17
<b>Other Relevant Information (ORI)</b>	<b>21</b>
<b>Changes to the PVG scheme</b>	<b>26</b>
Removing under 16s from the PVG scheme	28
Accredited bodies	32
Regulated roles	35
<b>Disclosure of offences</b>	<b>39</b>
Lists of offences	41
Childhood offences	44
<b>Financial Memorandum</b>	<b>49</b>
<b>General principles of the Bill</b>	<b>52</b>
<b>Annex A - Extracts from the minutes</b>	<b>53</b>
<b>Annex B - written and oral evidence</b>	<b>56</b>
<b>Bibliography</b>	<b>59</b>

# Education and Skills Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Education and Skills.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/education-committee.aspx>



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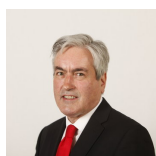
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# Introduction

1. The Disclosure (Scotland) Bill was introduced in the Scottish Parliament by the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP, on 12 June 2019.
2. The Policy Memorandum accompanying the Bill states:
  - ” The provisions of this Bill will deliver a range of positive and proportionate reforms to the disclosure regime in Scotland whilst also strengthening the barring service to maintain the Scottish Government’s ability to protect the most vulnerable in society. <sup>1</sup>

## Overview of the Bill

3. During the passage of the Protection of Vulnerable Groups (Scotland) Act 2009, the Scottish Government committed to review the Protection of Vulnerable Groups scheme ("PVG scheme") established by the Act once it had been implemented and after a period of operation. As the scheme has been in place since 2011, and with the recent passage of Acts related to disclosure such as the Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019, the Scottish Government decided to review and update the wider disclosure scheme, including the PVG scheme, through the Disclosure (Scotland) Bill ("the Bill").
4. The Bill is split into two parts. Part 1 "creates the legislative framework for the new disclosure products for criminal history and other information", while Part 2 "makes a number of amendments and insertions into the PVG Act" <sup>2</sup>. A 'Keeling schedule' was provided by the Scottish Government to assist the Committee in understanding where these changes would be made.
5. The Policy Memorandum sets out what the Scottish Government considers to be the main policy changes included in the Bill. It describes these changes as follows:
  - 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;
  - introducing a mandatory PVG Scheme for people working with vulnerable groups;
  - replacing the concept of 'doing regulated work' with... 'regulated roles' that trigger mandatory PVG scheme membership (voluntary and paid);
  - ending life-time PVG scheme membership and replacing it with a renewable five year membership, while still preserving scope for free checks for volunteers in qualifying voluntary organisations who work with children or protected adults;

- reforming the provision of police ‘Other Relevant Information’ (“ORI”) to end the current process of disclosures being issued to employers before the applicant has had an opportunity to challenge the disclosure of ORI. Applicants will be given the right to make representations to the police about whether ORI should be included on a disclosure, before it is issued to a third party. This will be followed by a right to apply for review by an independent reviewer if police decide to disclose ORI, and from there an appeal to a sheriff on a point of law;
  - recognising adolescence as a unique phase of life by ending the automatic disclosure of convictions accrued while aged between 12 and 17 years and introducing an assessment by Disclosure Scotland acting on behalf of Ministers as to whether convictions ought to be disclosed, with a subsequent right of review by the independent reviewer (followed by an appeal to the sheriff on a point of law) prior to disclosure to a third party;
  - changing the period after which an application for removal of a conviction for an offence on schedule 8A of the 1997 Act can be made (now re-stated and amended in List A of schedule 1 in the Bill). In relation to spent convictions for offences currently listed on schedule 8B of the 1997 Act (re-stated and amended in List B, set out in schedule 2 of the Bill), the disclosure period will be shortened to 11 years. The process for asking for convictions to be removed from a disclosure will be in the form of an internal application to Disclosure Scotland for removal, followed by a right to apply for review by the independent reviewer and from there an appeal to the sheriff on a point of law;
  - establishing clear procedures for the registration of accredited bodies who can countersign Level 2 applications, including provisions to ensure the protection of individuals’ criminal history information;
  - providing clarity on disclosure arrangements for individuals directly employing a PVG scheme member for, for example, personal care or home tuition of children;
  - enabling the Scottish Ministers to impose standard conditions where appropriate on any individual who is under consideration for inclusion in one or both of the lists held under section 1 of the PVG Act, i.e. the children’s list or the adult’s list, and permitting Ministers to give notice that a person is under consideration for listing and of their barred status; and
  - providing new referral powers for Police Scotland and Scottish councils and integration joint boards.<sup>3</sup>
6. In the Policy Memorandum for the Bill, the Scottish Government sets out the pre-introduction engagement undertaken by Disclosure Scotland with organisations with an interest in this area, which included three rounds of engagement before the formal consultation on the Bill was published in April 2018 and circulated to over 3,000 bodies. Once the consultation was published, the Scottish Government held 38 engagement events during the consultation period.
7. In the Policy Memorandum for the Bill, the Scottish Government provided the following summary of consultation views:

- there was significant support from consultation respondents for a reduction in disclosure products offered under the 1997 Act and the PVG Act;
- that the complexity of the disclosure system lies not only in the number of products available, but in a lack of understanding of the underpinning legislation and difficulty in navigating the system;
- there was significant support for placing a minimum age of 16 years on obtaining a criminal record check;
- respondents strongly supported moving Disclosure Scotland's services online but it was important to provide a non-digital alternative to avoid precluding those unable or unwilling to use services online;
- stakeholders have expressed support for increasing the applicant's ownership of and giving them greater control over with whom they share that information;
- a singular theme from consultation responses is that change is needed in the disclosure of childhood offending behaviour;
- there was broad support found in the consultation results and our stakeholder engagement that the disclosure period for certain convictions should be reduced from 15 years;
- that the current system for disclosure applicants making an application to a sheriff for removal of certain convictions was complex and difficult to navigate;
- there was strong support for replacing the concept of 'doing regulated work' with something easier for users to understand;
- a majority of respondents agreed that the current lifetime membership for the PVG Scheme should end and should be replaced with a recurring time limited version;
- there was strong support for new powers of referral for Police Scotland and councils or integration joint boards; and,
- stakeholders supported proposals to give Disclosure Scotland new powers to impose certain conditions on people under consideration for listing.<sup>2</sup>

8. The Committee notes the extensive engagement work undertaken by the Scottish Government in advance of the introduction of the Bill and throughout its consultation period. The Committee welcomes the extent to which the Scottish Government sought the views of those with a direct interest in advance of the introduction of the Bill and encourages further engagement, particularly on the issues raised later in this report.

# Education and Skills Committee consideration

9. The Education and Skills Committee was designated as lead committee for Stage 1 consideration of the Bill. The Committee issued a call for views on 28 June 2019, with a closing date of 20 August 2019. The Committee received 38 responses to its call for views, which can be viewed on the Committee's webpage for the Bill.

10. The Committee took formal evidence on the Bill at five meetings. Full witness details can be found in Annex A, but the following organisations gave evidence at the meetings:

[4 September 2019](#): Officials from the Disclosure (Scotland) Bill team

[9 October 2019](#): Clan Childlaw, COSLA, Law Society of Scotland, Disclosure Scotland, and the Scottish Social Services Council

[6 November 2019](#): Shared Lives Plus, Coalition of Care and Support Providers in Scotland (CCPS), Church of Scotland, Scottish Youth Football Association, and the Scottish Volunteering Forum (Panel 1); Recruit with Conviction, Community Justice Scotland, Business in the Community, and Howard League Scotland (Panel 2)

[13 November 2019](#): Scottish Children's Reporter Administration, Connect, Centre for Youth and Criminal Justice, Children in Scotland, and Who Cares? Scotland

[20 November 2019](#): Maree Todd MSP, Minister for Children and Young People ("the Minister"), and Bill team officials.

11. The Committee's engagement work on the Bill consisted of two focus groups on 12 November and 13 November 2019. The focus group on [12 November](#) consisted of representatives from organisations and employers who use disclosure products, while the focus group on [13 November](#) explored issues faced by care-experienced young people. Notes of these focus groups can be found on the Committee's website and in Annex B of this report.

## Consideration by other committees

12. The Finance and Constitution Committee issued a [call for evidence](#) on the Financial Memorandum for the Bill, with a closing date of 20 August 2019. [One response](#) was received. The Education and Skills Committee sets out its views on the financial provisions [later in this report](#).
13. The Bill contains a number of delegated powers provisions. The Delegated Powers and Law Reform (DPLR) Committee published its [report](#) on the Delegated Powers Memorandum to the Bill on 2 October 2019. The DPLR Committee highlighted that there were over 50 delegated powers provisions in the Bill, and reported that it was content with these.

# Reforming the disclosure system

14. One of the aims of the Bill is to reform the current suite of disclosure products to simplify the range of disclosure products for applicants. Currently, there are four types of disclosure checks: Basic, Standard, Enhanced, and PVG. The Bill proposes replacing these with a Level 1 Disclosure, which will be the equivalent of a Basic Disclosure, and a Level 2 Disclosure, which would replace the other types of disclosure and provide different information depending on the purpose of the disclosure. PVG checks<sup>i</sup> would be included as a particular type of Level 2 disclosure.

## Current products and proposed products

Current product	Proposed product
Basic Disclosure	Level 1
Standard Disclosure	Level 2
Enhanced Disclosure	Level 2
Enhanced Disclosure with working with children suitability	Level 2 with suitability
Enhanced Disclosure with working with protected adults suitability	Level 2 with suitability
Enhanced Disclosure with working with both children and protected adults suitability	Level 2 with suitability
PVG Scheme Record	Level 2 with PVG
PVG Scheme Record Update	Level 2 with PVG

15. The Bill also makes provision for applying for and receiving disclosures digitally. It is envisaged that this will simplify the process for individuals and organisations alike compared to the current paper-based system. However, the Minister for Children and Young People, Maree Todd MSP ("the Minister") noted in her Ministerial Statement to Parliament on the Bill that the paper-based system would still exist to ensure those without the means to go online were not left out<sup>4</sup>.
16. This reflects the views of those who took part in the Scottish Government consultation, which found that respondents strongly supported moving Disclosure Scotland's services online but it was important to provide a non-digital alternative to avoid excluding those unable or unwilling to use services online.
17. The Policy Memorandum confirms that a move to digital services will be part of these reforms, but will not fully replace non-digital means of applying:
- ” It is Disclosure Scotland's intention to have simple and accessible digital services so that people who would prefer to do so can carry out their disclosure tasks online, including making applications and viewing disclosures. Disclosure Scotland are mindful of the need to provide a non-digital alternative to avoid precluding those unable to or unwilling to use services online. This is very important; people experiencing poverty and exclusion have much reduced digital access and Disclosure Scotland is committed to finding the right ways to make products accessible.<sup>2</sup>
18. Stakeholders generally welcomed this, while emphasising the need to retain an alternative paper-based system. Business in the Community said:

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<sup>i</sup> "PVG check" is used in this report as shorthand for the current PVG Scheme Record and PVG Scheme Record Update disclosure products and, in relation to the proposed system, a Level 2 with PVG disclosure product.

” 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 [paper-based system].<sup>5</sup>

19. The Scottish Volunteering Forum highlighted the importance of paper-based systems for voluntary organisations:

” A report published by Citizens Advice Scotland in February this year found that a third of their clients who responded to a survey had difficulty using a computer, or cannot use one at all. In addition, one in 5 respondents who accessed the internet only did so using a smartphone. Given that volunteer participation is significantly lower in areas of multiple deprivation, where digital literacy is likely to be lower, it is important that a paper application form remains in place.<sup>6</sup>

20. The Policy Memorandum sets out how this non-digital alternative would operate:

” Regulation-making powers will be used to provide a non-digital alternative for applicants joining the Scheme who are unable to access membership via the digital service. The power to make provision about the administration of the Scheme under section 72(1) of the PVG Act will be used to enable Ministers to issue scheme membership cards to those individuals and to determine the content of those cards. It is envisaged that the membership cards will give the individual’s name, scheme membership number, workforce(s), and membership renewal date. It is intended to provide ease of access to key details about scheme membership to people who do not have an online account with Disclosure Scotland.<sup>2</sup>

21. In their joint written submission, Royal Blind and Scottish War Blinded highlighted the importance of non-digital alternatives for those with sight loss. As an additional measure to assist those with accessibility requirements, Royal Blind and Scottish War Blinded also supported the introduction of PVG membership cards and asked the Scottish Government to set out any plans to charge fees for cards and the timescale for their introduction.<sup>7</sup>

22. The Criminal Justice Voluntary Sector Forum said that it was important that these changes were clearly communicated:

” 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.<sup>8</sup>

23. The Committee generally supports the reforms within the Bill, and the intention to simplify and update the disclosure system.

24. The Committee welcomes reassurances that non-digital means of seeking disclosures will remain, but urges the Scottish Government to continue to engage with stakeholders to ensure that smaller organisations or organisations without access to digital platforms remain fully supported in their use of disclosure products.

## Other legislation

25. The Bill can be viewed as one of three recent pieces of legislation intended to reform the treatment of convictions. As the SPICe briefing on the Bill highlights, elements of the Management of Offenders (Scotland) Act 2019 and the Age of Criminal Responsibility (Scotland) Act will interact with the policy intentions of this Bill.<sup>ii</sup>

26. A number of witnesses highlighted what they perceived as contradictions or discrepancies between the current proposals in this Bill and other pieces of legislation. The Centre for Youth and Criminal Justice highlighted one example:

” The provisions in the bill talk about the date of offence... However, the Management of Offenders (Scotland) Act 2019 speaks about the date of conviction; that is, the provisions that are for under-18s are made only if the person was under 18 at the time that they were convicted, and not at the time that they committed the offence.

That is one of the anomalies in the potentially piecemeal approach that is being taken to reform of the disclosure system. There are three key pieces of legislation, all of which will impact on whether a child needs to disclose something. If those three pieces of legislation are not fully aligned, we run the risk of the benefits not being realised. The anomaly around whether we use the date of conviction or the age at the time of the offence is a prime example of that.

Source: Education and Skills Committee 13 November 2019 [Draft], Debbie Nolan, contrib. 9<sup>9</sup>

27. The Centre for Youth and Criminal Justice raised another discrepancy in its written submission:

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<sup>ii</sup> 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.

” 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. <sup>10</sup>

28. Social Work Scotland urged the Scottish Government to communicate to stakeholders how these pieces of legislation would interact:

” 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... 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. <sup>11</sup>

29. This was echoed by Community Justice Scotland:

” 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. <sup>12</sup>

30. In her letter to the Committee in August 2019, the Minister acknowledged the need to align these different pieces of legislation:

” [T]he 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. <sup>13</sup>

31. In oral evidence, Disclosure Scotland set out some of the challenges in aligning the legislation:

” Right now, the self-disclosure regime, which is covered by the Rehabilitation of Offenders Act 1974, and the state disclosure regime, which is governed by the Police Act 1997 and the PVG scheme, are broadly aligned. The real issue is the treatment of childhood convictions, because the bill says that they will be assessed on a case-by-case basis. If we did nothing to the 1974 act as it applies at the moment, the act would compel a person to disclose a conviction from under the age of 18 while it is unspent, yet the bill proposes that the state will take a case-by-case approach. Therefore, we could have a situation in which a person is required to disclose under ROA, but the conviction is not disclosed by the state. The provisions in the bill would be of no use to that person in those circumstances, and that is the issue that we need to fix.

It is a complicated area, because although the Rehabilitation of Offenders Act 1974 is not in our policy area, it has necessary connections with what we are doing under the bill. Work is on-going with our justice colleagues to resolve the issue and to prepare amendments, and we will make the committee aware of them at as early a stage as we can.

Source: Education and Skills Committee 20 November 2019 [Draft], Kevin Lee, contrib. 67<sup>14</sup>

32. The Scottish Government also confirmed that consequential amendments will be required to recently passed pieces of legislation:

” A number of consequential amendments are required to the Age of Criminal Responsibility (Scotland) Act 2019. The disclosure mechanisms that were introduced for under-12s’ behaviour were based on the provisions of the Police Act 1997 being in force, so the 2019 act will require to be updated.

Source: Education and Skills Committee 20 November 2019 [Draft], Gemma Grant, contrib. 74<sup>15</sup>

33. The Minister committed to providing the Committee with details of these changes ahead of Stage 2:

” ...the Government is taking a cohesive approach across the three pieces of legislation to try to solve some of the challenging issues that have taxed and vexed us all for many years. I am actively working on all those issues and I will provide details of the amendments as timeously as I can. I want the committee to understand and be able to scrutinise what we are doing, but I could not provide that detail before the two bills were enacted.

Source: Education and Skills Committee 20 November 2019 [Draft], Maree Todd, contrib. 78<sup>16</sup>

34. The Committee has written to the Scottish Government to seek confirmation of these amendments before the Stage 1 debate takes place.

35. The Committee is very concerned by some discrepancies between this Bill as currently drafted and related Acts recently passed by the Parliament. The Committee is further concerned, regardless of how complex the area of law may be, that such discrepancies are present in primary legislation introduced by the Scottish Government in the same parliamentary year.

36. The Committee expects the Scottish Government to address these discrepancies at Stage 2, or to explain how the discrepancies highlighted during Stage 1 will otherwise be addressed. Should the Committee remain concerned by these discrepancies, the Committee may choose to take further evidence at Stage 2.
37. Given the likelihood of proposed future legislation, such as legislation incorporating the United Nations Convention on the Rights of the Child, interacting with measures in the Bill, it is also vital that there are no discrepancies which could arise in the future. The Committee invites the Scottish Government to confirm that the measures within the Bill have been drafted in line with the policy intent of legislation which it is anticipated will be introduced later this session on children's rights.

## Role of the independent reviewer

38. One of the reforms relevant to the disclosure system introduced by the Age of Criminal Responsibility (Scotland) Act 2019 is the establishment of an independent reviewer. The Bill proposes three functions for the independent reviewer:
- review of childhood conviction information included under sections 5 and 17,
  - review of relevant police information provided by the chief constable under section 18, and
  - review of removable convictions included in terms of section 14.<sup>3</sup>
39. The Bill proposes the following processes for review:
- *Review for accuracy*: Disclosure Scotland reviews, no further review mechanism.
  - *Review seeking to remove a removable conviction (adult)*: Disclosure Scotland reviews, second review by independent reviewer, final appeal to a sheriff on a point of law.
  - *Review seeking to remove a childhood conviction*: Independent reviewer, final appeal to a sheriff on a point of law.
  - *Review seeking to remove ORI*: Police review, second review by independent reviewer, final appeal to a sheriff on a point of law.
40. As this report's section on the [Financial Memorandum](#) sets out, it is anticipated that the review process will be one of the areas contributing to an expected increase in costs.
41. Broadly, the changes to the processes for reviewing the content of disclosure were welcomed by respondents to the Committee's call for evidence. The Law Society of Scotland acknowledged that the proposed processes are, to an extent, less complex than the current regime, but it nonetheless had concerns. It argued that further appeals to a sheriff should not be only on points of law, particularly as the system beds in. It also raised questions about the procedure for reviews: timescales, whether oral representations might be made, and the possibility that the individual may be well-advised to obtain legal advice which would have implications for legal aid. The Law Society argued that time periods in relation to reviews should be set out in the Bill rather than by regulations.
42. CELCIS expressed concerns about how such decisions would be made in practice:
- ” 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 understand, in advance, what the implications of any childhood convictions will be for their disclosure information.<sup>17</sup>

43. The intention of the Bill is to simplify the system of reviews. The Policy Memorandum stated:

” The policy intention is that in unifying the appeal mechanisms, so that the independent reviewer is responsible for all types of appeal (for Level 2 disclosures in particular), it will make the system as simple and coherent as possible for applicants and stakeholders.<sup>2</sup>

44. The Scottish Government also highlighted how the independent reviewer could consider the context of information:

” As far as the provisions in the bill on providing context are concerned, representations will be at the heart of all the review mechanisms, so individuals will have the opportunity to provide that context themselves. There are also wide information-gathering powers for ministers in exercising their functions under the bill and for the independent reviewer to ask third parties to provide context-specific information.

Source: Education and Skills Committee 20 November 2019 [Draft], Gemma Grant, contrib. 61<sup>18</sup>

45. The impact of potential delays caused by reviews was raised by some respondents to the Committee, such as the Coalition of Care & Support Providers in Scotland:

” 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.<sup>19</sup>

46. Some witnesses suggested methods by which delays could be avoided, which in their opinion would also result in a fairer system. For example, Howard League Scotland questioned whether the independent reviewer ought to undertake all first stage reviews, rather than the first stage review being undertaken by the organisation that made the decision initially.<sup>20</sup>

47. A connected issue was how many reviews could be made for childhood offences. The Age of Criminal Responsibility (Scotland) Act 2019 was amended to allow the possibility of further appeals to the independent reviewer should the first review of information pertaining to childhood offences on List A fail. However, the Bill as currently drafted does not allow for this.

48. Some witnesses, such as Robert Dorrian, Who Cares? Scotland, felt that there was a lack of clarity on how such information could be challenged:

” Particularly with regard to the independent reviewer role, the bill has scope to simplify the manner in which a person can challenge information on their certificate. It also has a provision for an assumption against disclosure of offences that were committed prior to the age of 18. However, the language that is used around that is still ambiguous

Source: Education and Skills Committee 13 November 2019 [Draft], Robert Dorrian, contrib. 65<sup>21</sup>

49. Others, such as the Children and Young People's Commissioner Scotland, highlighted the need for appropriate support mechanisms to be in place for those seeking to challenge the contents of a disclosure:

” Last year we received an enquiry from a young person who wished to challenge the contents of a disclosure. Despite making a number of phone calls over several days, we were unable to find a solicitor with the appropriate knowledge and experience to assist them. There seems to be a lack of appropriate legal and advocacy support for young persons in this area. <sup>22</sup>

50. The Committee welcomes the extended role of an independent reviewer for applications to remove certain information from an individual's disclosure record.
51. The Committee notes the suggestions made by stakeholders on measures which could improve the efficiency of the review process, such as the independent reviewer undertaking all first stage reviews. The Committee recommends the Scottish Government explores this option with a view to introducing the necessary amendments at Stage 2.
52. The Committee believes it is vital that appropriate support is provided to individuals seeking reviews, particularly in relation to childhood offences. The Committee recommends that the Scottish Government ensures appropriate support services are available, and that these are available by the time the provisions of the Bill come into force.
53. The Committee is concerned that an unsuccessful review of a List A offence cannot be reviewed for the same purpose a second time, and that this may result in these offences being disclosed for the remainder of the individual's life. The Committee recommends that the Scottish Government should introduce an amendment at Stage 2 to ensure consistency with the Age of Criminal Responsibility (Scotland) Act 2019.
54. More generally, the Committee notes the uncertainty among stakeholders regarding how review processes will work and how individuals can engage with the process. The Committee recommends that the Scottish Government works with appropriate stakeholders to draft guidance which will clearly set out the review process.
55. The Committee would welcome confirmation from the Scottish Government of whether, in light of these suggested changes, it would expect an increase in the anticipated costs set out in the Financial Memorandum linked to the role of the independent reviewer.

# Disclosure - the two-part test

56. The Bill provides for a two-part test to be applied by the Scottish Ministers (in practice exercised by Disclosure Scotland) in a number of situations related to Level 2 disclosures. For example, when determining if any childhood convictions relating to an applicant are to be disclosed under section 17, and where an individual makes a Level 2 review application in respect of removable convictions under section 28. The test is whether the childhood conviction is "relevant for the purpose of the disclosure", and whether information about the childhood conviction "ought to be included in the disclosure".
57. Under section 18, the same test is to be applied by the chief constable in relation to other relevant information ("ORI") as well as under section 26 (Review of relevant police information by the police) where the chief constable, having regard to any representations made by the applicant, must reapply the test.
58. Finally, the test will be applied in reviews to be carried out by the independent reviewer under sections 25, 27 and 29 in relation to childhood conviction information, removable convictions and ORI proposed for inclusion by the Scottish Ministers and the chief constable, respectively.<sup>23</sup>
59. The test for Level 1 disclosures where the applicant has childhood conviction information is simpler: "whether information about the childhood conviction ought to be included in the disclosure".<sup>24</sup>
60. In relation to decisions regarding disclosure of childhood convictions, the Policy Memorandum explains that the factors to be taken into account will include "the amount of time elapsed, the number of offences, whether a pattern of offending behaviour has continued into adulthood, and the seriousness of any childhood convictions". In addition, section 66 allows Ministers to gather information from relevant persons to assist them to determine whether information about the childhood conviction ought to be disclosed.<sup>3</sup>
61. This report's sections on [Disclosure of offences](#) and [childhood offences](#) explores further these proposed changes and their impact on young people, and care-experienced young people in particular.
62. In its written submission, Clan Childlaw was critical of the absence of a "framework for decision-making on the face of the Bill beyond the 'ought to be disclosed' and 'relevant' tests". It argued that it "would be more appropriate to further define the basis on which decisions will be made in the Bill itself".<sup>25</sup> Expanding on the issue in oral evidence, Alison Reid of Clan Childlaw told the Committee that the law has to be understood and be foreseeable, but:

” without the detail of what the tests are, it is really hard to be able to advise young people, or any person, about what will actually be disclosed. I therefore think that more detail around those tests is required.

Source: Education and Skills Committee 09 October 2019 [Draft], Alison Reid, contrib. 19<sup>26</sup>

63. In its submission, the Law Society of Scotland argued that there needed to be much greater clarity about the role of Disclosure Scotland in deciding whether to make disclosure:

” 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.”<sup>27</sup>

64. Asked whether, some high-level principles should be included in the Bill to provide greater clarity, Andrew Alexander, of the Law Society of Scotland responded:

” It is a difficult area and there might need to be a degree of flexibility. We do not know whether the jurisprudence around how to deal with that balance will shift over time, not just in Scotland but across the rest of the UK, and we want to maintain consistency. It would be helpful to have guidance that could be scrutinised at this stage. Alternatively, there is the prospect of including high-level principles in the bill, with the potential of using regulations to amend them through a negative or affirmative process, should those principles find themselves out of touch with emerging jurisprudence at a later stage.

Source: Education and Skills Committee 09 October 2019 [Draft], Andrew Alexander, contrib. 33<sup>28</sup>

65. Cynthia Marks of Business in the Community commented:

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

Source: Education and Skills Committee 06 November 2019 [Draft], Dr Marks, contrib. 98<sup>29</sup>

66. Alistair Hogg, Scottish Children's Reporter Administration ("SCRA"), told the Committee:

” The interpretation and application of the tests is crucial not just in terms of deciding when disclosure is appropriate, but in making the foreseeability of that clearer. Guidance on application of the tests will be critical; we need realistic examples to show under what circumstances the tests would be applied in one direction or another. It is crucial to have readily available and accessible guidance that people understand.

Source: Education and Skills Committee 13 November 2019 [Draft], Alistair Hogg, contrib. 12<sup>30</sup>

67. Debbie Nolan, Centre for Youth and Criminal Justice, echoed this and sought greater clarity:

” We agree that any further guidance or information about the tests that can be made available will be helpful in respect of what factors will be taken into account and how we will determine whether something is relevant and ought to be disclosed. We would like to see that in the bill or in statutory guidance, to enable greater weight to be given to that information, to make it clearer and to enable legal challenge, if required.

Source: Education and Skills Committee 13 November 2019 [Draft], Debbie Nolan, contrib. 13<sup>31</sup>

68. Brian Houston, Who Cares? Scotland, spoke about care-experienced people excluding themselves from roles in the caring professions because of the current disclosure system. He called for better communication about decisions, and:

” Clarity on the guidance and around self-disclosure is important for young people as they develop into adults. They have experienced situations in which they did not know that they needed to disclose information, then found out that they needed to do so, so the view that was taken, because they did not disclose immediately, was to be suspicious of them. Important and detailed discussions need to take place about how it is communicated to people that they might benefit from the bill. That is fundamental if we are to liberate people to feel that they could play a part in the caring professions.

Source: Education and Skills Committee 13 November 2019 [Draft], Brian Houston, contrib. 21<sup>32</sup>

## Scottish Government position

69. In oral evidence on 4 September Disclosure Scotland was asked to respond to concerns raised by stakeholders about the two-part test. Kevin Lee, Scottish Government Bill Team Leader and Disclosure Scotland, acknowledged that stakeholders including the Law Society of Scotland had strong views about how decisions will be made. He stated:

” We are committed to working in collaboration with stakeholders to develop a robust decision-making framework, so that their views are heard and so that what we deliver is in the best possible condition for stakeholders.

Source: Education and Skills Committee 04 September 2019, Kevin Lee, contrib. 35<sup>33</sup>

70. Gerard Hart, Bill Team member and Director of Protection Services and Policy at Disclosure Scotland, told the Committee that his team had more than 15 years' experience of making decisions about the meaning of people's past criminal behaviour and police information:

” There is a lot of experience of weighing things up and making decisions. We do that using a structured judgment protocol, and we intend to use that experience, skill and knowledge, as well as appropriate guidance and structured decision-making frameworks, to ensure that the process is fair, consistent and reliable.

Source: Education and Skills Committee 04 September 2019, Gerard Hart, contrib. 36<sup>34</sup>

71. Following the evidence session with stakeholders, including the Law Society of Scotland, held on 9 October 2019, and prior to her own oral evidence, the Minister wrote to the Committee to provide more information about the basis for the two-part test.

- ” The two-part test is well-established and has been approved and applied by multiple decisions of the UK Supreme Court. In particular, it was approved by Lord Neuberger in the case of *R(L) v Commissioner of Police of the Metropolis*. In that judgement, the court gives examples of the factors that may be pertinent to a decision by the chief officer of what “ought to be included” as other relevant information. Judicial commentary like this already informs decisions made under this two-part test, as do other well-established principles of public and administrative law that apply to public bodies when exercising a decision-making function. Accordingly, any guidance issued, statutory or otherwise, will require to conform to and be informed by these existing legal rules and principles.<sup>23</sup>
72. For decisions to be made by Disclosure Scotland when exercising Ministers’ functions under the Bill, the Minister explained that non-statutory guidance will be developed in collaboration with stakeholders. Her letter continued:
- ” All decision making by Disclosure Scotland officials must also follow the case law and public law principles mentioned previously. Therefore, in applying this same two-part test under the provisions in the Bill, Disclosure Scotland’s decision-making will also be informed by the existing case law.<sup>23</sup>
73. Finally, the Minister's letter explained that decision making by Disclosure Scotland, when exercising Ministers' functions, would be informed by guidance developed in collaboration with stakeholders, and informed by existing case law. The letter highlighted the importance of guidance to implementation of the Bill:
- ” The availability of statutory guidance will make the likely outcome of any assessment or review processes more foreseeable and accessible to disclosure applicants and accredited bodies. It would also set a standard against which decisions could be reviewed, so failure to comply with the guidance could give rise to an appeal on a point of law. In relation to any non-statutory guidance (e.g. internal guidance for Disclosure Scotland), while that would not be binding, a failure to follow it may give rise to lack of fairness in the process which could be the basis for an appeal on a point of law.<sup>23</sup>
74. Invited to comment on the Minister’s letter, the Law Society of Scotland wrote to the Committee on 14 November 2019. The response focused in particular on its role as the regulator of solicitors in Scotland, where the disclosure process forms part of the admissions and other processes:
- ” We welcome the confirmation by the Minister that guidance will be developed in collaboration with stakeholders and that this guidance, whether statutory or non-statutory, may allow for appeal on a point of law. This guidance will assist organisations reliant on the disclosure process and provide clarity to applicants through this process.
75. The Law Society of Scotland, emphasising its role as a professional regulator, also expressed its hope that guidance could reflect considerations about the scope of relevance around the statutory tests and indicated its willingness to assist Scottish Government, Disclosure Scotland or others in the development of guidance that supports the implementation of the Bill.

76. The Faculty of Advocates was also asked by the Committee to comment on the Minister's letter and the two-part test. In its response, the Faculty said that it agreed with the general terms of the Minister's letter. Citing the case of *R(L) v Commissioner of Police of the Metropolis* ([2009] UKSC 3), the Faculty explained that the second part of the test requires that proper consideration is given to the impact on the individual of the disclosure. Quoting the judgement, it stated:

” The proportionality of the disclosure will inevitably require balancing the rights of individuals with the potential risk to members of society ... this balancing act is ‘of the greatest public importance’.<sup>35</sup>

77. Citing a more recent judgement, *R (on the application of P) v Secretary of State for the Home Department and others* ([2019] UKSC 3), the Faculty noted that the requirement to have regard to statutory guidance, “means that the decision maker is subjected to carefully drawn constraints that themselves have the quality of law”. The Faculty concluded:

” Given the challenge involved in weighing up whether information ought to be disclosed or not, we believe that there must be full and wide-ranging consultation with interested stakeholders prior to developing and issuing any guidance.<sup>35</sup>

78. Responding to questions about the practical application of the two-part test, in oral evidence the Minister confirmed that it would apply to three separate categories of information: ORI; childhood conviction information; and removable convictions.

” Although the same wording applies, the test will be applied in different contexts, depending on the information in question, the stage in the review and who is making the decision—the chief constable, ministers or the independent reviewer.

79. The Minister invited her legal adviser to outline for the Committee the case law which informs the two-part test. Quoting the judgement of Lord Neuberger in *R(L) v Commissioner of Police of the Metropolis*, Gemma Grant explained:

” Lord Neuberger gave examples of factors that would be considered as part of a decision about what ought to be included; they include:

“the gravity of the material involved, the reliability of the information on which it is based, whether the applicant has had a chance to rebut the information, the relevance of the material to the particular job application, the period that has elapsed since the relevant events occurred, and the impact on the applicant of including the material”.

A decision maker who is applying the tests must comply with those established principles, to ensure that the decision is lawful and proportionate.

80. Asked about the planned engagement with stakeholders in order to ensure clarity of guidance for those making decisions and advising others, Gerard Hart, Disclosure Scotland, explained that a quality assurance framework, similar to that used in England and Wales would be prepared to provide a structure for decision making in Scotland. He also explained that another guide, *Scotland Works for You*, would be further developed to:

” engage employers across the country to talk about how they can use disclosure information effectively to make balanced and proportionate decisions about allowing people with previous convictions safely back into work.

81. Asked about the issue of self-disclosure by individuals and state disclosure of conviction and other relevant information not always matching, the Minister acknowledged the issue and told the Committee that the Government was "working on solutions, particularly with regard to children". Gerard Hart committed to "stakeholder engagement and online work to make clear the process". He stated:

” the individual will not be in an adverse position in terms of having to disclose things that they might not have to disclose later if they were successful in an appeal against having to disclose a conviction.

82. The Committee explored with the Minister whether it would be appropriate to include in the Bill a set of principles or decision making criteria that would apply to the "ought to be included in the disclosure" test. Such principles or criteria could be amendable through use of delegated powers, thus ensuring flexibility is balanced by scrutiny. In response, the Minister said that the Scottish Government was, "open to dialogue about whether codification could improve the clarity".

83. The Committee welcomes the commitment given by the Minister for Children and Young People that, to support the application of the two-part test for disclosure, guidance will be developed in collaboration with stakeholders, and informed by existing case law.

84. The Committee considers that consultation on draft guidance should be widely publicised and adequate time given for responses. Ultimately, the final guidance should be made widely accessible in a range of formats in order to support both decision makers and others who need to understand and provide advice to individuals about the effect of the law.

85. However, in light of the evidence received about the two-part test for disclosure contained in the Bill, the Committee is concerned that it does not set out a sufficiently clear legal test for decision makers.

86. The Committee considers that the Law Society of Scotland's suggestion of the inclusion in the Bill of a set of guiding principles or criteria, which should apply to all decision making whether at first instance or through review, would provide greater legal certainty about the decision making process and improve the foreseeability of outcomes. The Committee recommends, as suggested by the Law Society of Scotland, that any such principles should be amendable through secondary legislation.

## Other Relevant Information (ORI)

87. 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. <sup>36</sup>
88. One of the principal policy objectives of the Bill is to reform the provision by the police of ORI. According to the Policy Memorandum to the Bill, currently, disclosures are issued to employers before the applicant has had an opportunity to challenge the contents, including disclosure of ORI. However, under proposals in the Bill, 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 (section 26). Applicants will then have a right to apply for review by an independent reviewer if police decide to disclose ORI (section 27), and from there an appeal to a sheriff on a point of law (section 33). <sup>1</sup>
89. In the Policy Memorandum, the Scottish Government expressed confidence that Police Scotland and other UK police forces "exercise utmost rigour before deciding to include ORI". It explained that less than 1% of enhanced and PVG scheme record disclosures in Scotland, 766 in total from 2016 to 2017, contain such information. <sup>1</sup> The Policy Memorandum also explained that although the law in the rest of the UK is different it informs practice in Scotland:
- ” In England and Wales the police forces work to Home Office guidance governing ORI and the law provides chief officers with a power to seek representations from disclosure applicants. It also affords applicants the right to apply for an independent review of the ORI to have it removed or changed prior to disclosure. Police Scotland have advised that, to the extent that it can be done, this Home Office Guidance is largely followed by them when considering a request to provide ORI. Case law has also provided guidance to chief officers on how to determine when ORI should be disclosed. <sup>3</sup>
90. Section 18 of the Bill specifies the process for provision of relevant police information in response to a Level 2 disclosure request. This includes the two-part test discussed earlier in this report.

” 18. Provision of relevant police information

(1) Before providing a Level 2 disclosure to an applicant, the Scottish Ministers must request the chief constable to provide any information relating to the applicant which—

(a) the chief constable reasonably believes to be relevant for the purpose of the disclosure, and

(b) in the chief constable’s opinion ought to be included in the disclosure.

(2) The chief constable must comply with any request made under subsection (1) as soon as practicable after receiving it.

(3) The chief constable must not provide information by virtue of a request under subsection (1) if the chief constable thinks that disclosing the information would be contrary to the interests of the prevention or detection of crime.<sup>24</sup>

91. Section 64 creates a duty on Scottish Ministers to issue guidance to the chief constable on provision of this information, the conduct of reviews (under section 26) and other matters. The Explanatory Notes (paragraph 34) indicated that the Scottish Government expects to make similar provision for other relevant police forces under s.104 of the Scotland Act 1998.<sup>36</sup>
92. The Bill expands the situations where ORI may be included to all Level 2 disclosures, including circumstances where currently a standard disclosure would be made. Currently a standard disclosure does not include ORI.
93. The Bill also makes provision for review of relevant police information by the [independent reviewer](#) (section 27) as discussed earlier in this report.
94. In oral evidence, Sheena Brennan, Information Manager for Police Scotland, provided more information about the guidance currently followed by Police Scotland staff, acting on behalf of the Chief Constable:

” We are already working with the Home Office quality assurance framework. We hope that, if the bill is passed, we would then have a set of Scottish guidelines that would probably be based on the ones that are already in existence. Such a change came about in the guidance that was issued in 2015 following recommendations made by Sunita Mason in her review of the criminal records regime. It said that the criterion should change from information that an officer thinks might be relevant to information that the officer “reasonably believes to be relevant” and which “ought to be” disclosed. If we could have such guidance set out in the bill, that might reassure those who are concerned about the relevancy tests that are undertaken. It would also be pertinent to our own piece of legislation and relevant to information that is retained here.

Source: Education and Skills Committee 09 October 2019 [Draft], Sheena Brennan, contrib. 35<sup>37</sup>

95. The intention to develop an equivalent Scottish quality assurance framework was confirmed by Gerard Hart, Disclosure Scotland, in oral evidence.<sup>38</sup>

96. One concern raised with the Committee has been that the criminal behaviour of a person aged between 12-17 years that would not be disclosed as a conviction might instead be included in ORI. Children in Scotland’s submission stated that a high threshold should be set for the disclosure of ORI:

” “We have concerns that the provision of ORI ... could undermine the new system of discounting convictions between the age of 12-17. Provision of ORI could allow employers to access information that relates to convictions without giving access to the convictions themselves.” <sup>39</sup>

97. In its written submission, Howard League Scotland expressed concerns about the use of ORI. Citing academic research, Howard League Scotland explained that information could include the criminal history of family members or details of cases which proceeded to court but resulted in an acquittal. <sup>40</sup>

98. In oral evidence, Alison Reid of Clan Childlaw discussed the compatibility of disclosing ORI with ECHR:

” It has to be proportionate and, given that the information is not proven information, we think that a very high bar will need to be set around the other relevant information. In addition, there should be a really close link between the disclosure and the risk that it is trying to protect against, in order for it to be compatible.

Source: Education and Skills Committee 09 October 2019 [Draft], Alison Reid, contrib. 19<sup>26</sup>

99. Alistair Hogg, SCRA, told the Committee:

” The concept of “other relevant information” is understandable, but disclosure of it, particularly in relation to behaviour that has happened during childhood or adolescence, needs a very high threshold.

Source: Education and Skills Committee 13 November 2019 [Draft], Alistair Hogg, contrib. 34<sup>41</sup>

However, he recognised that the Bill introduces a range of checks and reviews, which he hoped would “lead to other relevant information being disclosed only in exceptional situations in which that is genuinely necessary”. <sup>41</sup>

100. Asked whether it would help if the Bill clarified in law some of the key issues regarding the two-part test, Mr Hogg replied:

” That could help. It would bring greater clarity, and clarity brings a greater opportunity to understand and then, if necessary, to challenge. It could bring that benefit.

Source: Education and Skills Committee 13 November 2019 [Draft], Alistair Hogg, contrib. 37<sup>42</sup>

101. Brian Houston, Who Cares? Scotland, expressed concerns about disclosure of other relevant information because of the process that young people experience in the hearings system:

” If there are offence grounds, the thoughtful discussion and careful consideration that happen in the hearing are about welfare. We want to get beyond the discussion about the offence to understand the context and the circumstances that created the conditions for it to occur. To get to that discussion, the young person is asked whether they accept the offence grounds. In that moment, we ask the young person for an admission of guilt when they do not have the normal supports that any citizen of this country would expect to have at such a time.

Source: Education and Skills Committee 13 November 2019 [Draft], Brian Houston, contrib. 45<sup>43</sup>

He explained that there were "real and significant risks" associated with decisions about ORI taken without information about the context of the offence, "the young person's actual experience—their trauma and difficulty—and how that expresses itself within their life".<sup>43</sup>

102. Debbie Nolan, Centre for Youth and Criminal Justice, drew attention to the work of many organisations which support people with conviction information to understand the process and go through the system. However, she argued that there was a need for more and better support:

” The bill will reduce some of the complexity of the system, which should make it easier, but there is still a grey area around where people can go for support and how we can ensure that good quality support is consistently and readily available to everyone.

Source: Education and Skills Committee 13 November 2019 [Draft], Debbie Nolan, contrib. 43<sup>44</sup>

103. Debbie Nolan also highlighted the potential for individuals to have the opportunity to contextualise their disclosure information, which is more fully explored [later](#) in this report.

104. In oral evidence the Minister confirmed that through implementation of the Age of Criminal Responsibility (Scotland) Act 2019, which raised the age of criminal responsibility, behaviour under the age of 12 can be disclosed only as other relevant information. The Minister also provided information about recent numbers of disclosures and PVG certificates which included childhood conviction information or ORI:

” Last year, only 600 disclosure certificates contained information relating to convictions accrued between the ages of 12 and 17. Further, of the 275,200 PVG certificates that were issued in 2018, only 401—that is, 0.15 per cent—contained ORI. Only a small number are affected by the two-part test.

Source: Education and Skills Committee 20 November 2019 [Draft], Maree Todd, contrib. 26<sup>45</sup>

105. Gerard Hart, Disclosure Scotland, explained that Disclosure Scotland post-processes information received from the police criminal history system, the police national computer, to which they apply disclosure rules. He told the Committee:

” The police would still hold the information, but they have their own weeding and retention rules, which are commonly referred to as the 20:40:70 proportionality rules; it is the chief constable who applies those. The information that we process is drawn from the police systems. The police would therefore still know about a conviction, unless they had weeded it, but it would not be disclosed by the state on a disclosure.

Source: Education and Skills Committee 20 November 2019 [Draft], Gerard Hart, contrib. 48<sup>46</sup>

106. The Committee notes the evidence from the Scottish Government about the very low percentage of PVG certificates which contain other relevant information under the current system. The Committee also notes that the Bill expands the situations where other relevant information may be included to all Level 2 disclosures, including circumstances where currently a standard disclosure would be made.
107. The Committee is concerned about the potential for the disclosure of other relevant information held by the police to undermine one policy objective of the Bill, which is to allow individuals to move on from past offending behaviour. This concern is most strongly held in connection with childhood offending and for care-experienced people.
108. The Committee welcomes the implementation of the Age of Criminal Responsibility (Scotland) Act 2019, which means that any behaviour which took place before an individual's twelfth birthday will not be considered to be criminal. However, it notes that offences committed when the individual was aged between 12 and 17 will continue to be treated as convictions and may be disclosed even when deemed spent. The Committee supports the inclusion in the Bill of provisions which will create a right of review of childhood conviction information by the independent reviewer. However, the Committee notes that such a review must be initiated by the individual concerned making an application, which may constitute a significant barrier for some people.
109. The Committee is also concerned about the possibility that disclosure of other relevant information by the chief constable could allow employers to access information related to a conviction despite the conviction itself being withheld. This concern applies generally, but particularly, given the intent of the Bill, to ORI relating to incidents that occurred in adolescence and childhood.
110. The Committee therefore invites the Scottish Government to give further consideration to the processes set out in the Bill regarding disclosure of other relevant information in order to strengthen opportunities for review and challenge by an applicant prior to disclosure to a third party.

## Changes to the PVG scheme

111. The PVG scheme was established by the Protection of Vulnerable Groups (Scotland) Act 2009 to provide for a system of disclosures for individuals doing "regulated work" with children or with protected adults<sup>47</sup>. As of 28 April 2019, 1,239,241 individuals were members of the scheme, and 6,619 people are barred due to the nature of their convictions.
112. One of the major changes proposed by the Bill is to end lifetime membership of the PVG scheme and replace it with a renewable five year membership which is mandatory for those in regulated roles. Currently membership of the PVG scheme is for life, but 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 by Ministers to determine whether the individual is carrying out a regulated role.<sup>36</sup>
113. Disclosure Scotland provided some context for the reasons behind this move:

” The PVG scheme has now been in operation for eight years. In that time, we have seen it become inflated beyond the size that it was originally thought that it would be. There are more than 1.2 million people in the scheme right now, and our research tells us that as many as 20 per cent of them are no longer doing regulated work. As such, we have a situation in which Disclosure Scotland is monitoring those individuals daily with no safeguarding return. That is the thinking behind time-limited membership...carrying out the monitoring comes at a cost. However, there is also intrusion into people's lives when there is no need for it, because they are not doing regulated work.

Source: Education and Skills Committee 04 September 2019, Kevin Lee, contrib. 10<sup>48</sup>

114. Disclosure Scotland also confirmed that it had tried other methods to reduce numbers in the PVG scheme, such as writing out to individuals, but that this had limited success. Disclosure Scotland considered it important for the reputation of the PVG scheme that its membership accurately reflects the number of people undertaking regulated roles in Scotland.<sup>49</sup>
115. Disclosure Scotland also said that the change to a five year membership matches what some organisations already do:
- ” In respect of having to do the checks every five years, we have seen that organisations have already introduced their own recurring checks. The Care Inspectorate recommends that it is good practice that organisations do a check every three years. We can see from our data that organisations, including voluntary organisations, are doing that.

Source: Education and Skills Committee 04 September 2019, Kevin Lee, contrib. 16<sup>50</sup>

116. Some stakeholders welcomed this change to a five year membership scheme. The Scottish Catholic Safeguarding Service said it would assist the work of their

safeguarding personnel that there would be automatic notifications for renewal, and also said:

” the extended and then discretionary periods for renewal will place an additional emphasis on the importance of safe recruitment which is an important strand in our current safeguarding training on prevention. <sup>51</sup>

117. The five-year PVG scheme membership proposed by the Bill will be mandatory for those working with vulnerable groups. This was welcomed by Police Scotland:

” ...the fact that the scheme will become mandatory for identified post holders or job holders addresses what we see as a shortfall in the existing legislation.

Source: Education and Skills Committee 09 October 2019 [Draft], Sheena Brennan (Police Scotland), contrib. 5<sup>52</sup>

118. Some stakeholders also raised the potential criminalisation of those who forget to renew. Community Justice Scotland said:

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

Source: Education and Skills Committee 06 November 2019 [Draft], Rose McConnachie (Community Justice Scotland), contrib. 71<sup>53</sup>

119. This concern was addressed in oral evidence by the Scottish Government:

” The bill sets out extended membership period procedures to cover cases in which someone fails to renew but we are aware that they are still performing a regulated role. They would not simply drop out of the scheme exactly five years later. It would be possible to extend their membership, and the process that is set out in the bill would be gone through.

Source: Education and Skills Committee 04 September 2019, Ailsa Heine, contrib. 66<sup>54</sup>

120. Others, such as the Church of Scotland, had concerns about how the transition from a lifetime membership to a renewable five year membership would be managed:

” The Church of Scotland has in excess of 38,000 individuals registered with Disclosure Scotland. It is unlikely that all of these people are still undertaking regulated work but the final number is likely to run into the thousands. We would ask that there is a significant ‘lead in’ time for the transition and that the transition is staggered so as to be manageable in the first instance and for subsequent renewal of registration. <sup>55</sup>

121. The Committee supports the principle of proposed mandatory membership of the PVG scheme, and the move from lifetime membership to a renewable 5 year membership of the scheme. The Committee believes this will reduce the burden of constant monitoring of those who no longer require this, while also securing the right to privacy for those who no longer require to be part of the scheme.
122. The Committee welcomes the grace periods contained within the Bill, which should minimise the risk of employees and employers failing to hold PVG membership where necessary. However, the Committee remains concerned that some individuals and organisations might, through administrative errors, fail to renew scheme membership or realise they need to do so, and therefore potentially be subject to criminal sanctions. Additionally, the Committee notes that the proposed penalty of a short custodial sentence runs contrary to the current presumption against short sentences. The Committee therefore recommends the Scottish Government reconsiders the sentencing provisions associated with non-renewal of scheme membership.
123. The Committee recommends that the Scottish Government clearly sets out how the transition from lifetime membership to a five-year membership will be managed for current PVG scheme members, and for those who will join in the period between the potential passage of the Bill and its subsequent implementation.

## Removing under 16s from the PVG scheme

124. Currently, there is no age limit on who can request a disclosure check. The Bill proposes that those under the age of 16 will no longer be eligible to join the PVG scheme. In addition, they will have their access to other disclosure products restricted other than in exceptional cases - for example, where a 15 year old may be applying to a college course, or where a foster family has a 15 year old in the household.<sup>36</sup>
125. Gerard Hart, Disclosure Scotland set out some of the reasoning behind this proposed change:

” The policy thinking is that, in most circumstances, a child who has something in their background or their circumstances that would lead them to be under consideration for barring under the age of 16 or who was involved with the police in a significant way would already be managed under the getting it right for every child process. The police, social workers and other organisations would link up to provide the care and welfare of that person, as well as the management of any offending behaviour risk.

It was felt that it would not be proportionate to allow young people to come into the PVG scheme and have on-going monitoring overhead when considered against the risk of not allowing that to happen and relying instead on the very robust procedures that are in place for young people’s behaviour when they commit criminal or harmful behaviour. The latter approach allowed us to strike a balance that is consistent with the approach in the rest of the United Kingdom.

Source: Education and Skills Committee 04 September 2019, Gerard Hart, contrib. 49<sup>56</sup>

126. A number of witnesses giving evidence to the Committee had concerns about what this would mean for volunteering rates among young people, and other potential unintended consequences. Sarah Latto of the Scottish Volunteering Forum highlighted that 2014 research from Volunteer Scotland showed that over 50 per cent of school age children volunteered. She set out her concerns should the proposed change be adopted:

” Our concern is that, if we removed that [ability for under 16s to obtain PVG scheme membership], given that there is also the proposal to make being a PVG scheme member mandatory for doing regulated roles, a lot of organisations would interpret that as meaning that people under the age of 16 would no longer be able to do any voluntary work with vulnerable groups. We think that that would be a real shame and that it would not reflect current circumstances and roles that young volunteers fulfil.

Source: Education and Skills Committee 06 November 2019 [Draft], Sarah Latto, contrib. 25<sup>57</sup>

127. Interest Link Borders, a small voluntary group, concurred with this reasoning in its written submission, stating:

” 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. <sup>58</sup>

128. The Royal Yachting Association Scotland shared these concerns about the change to PVG scheme membership for under 16s and the potential confusion this could cause:

” 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.<sup>59</sup>

129. Lindsay Law, Convener of Connect, made the point that not all volunteering roles need to go through the disclosure system:

” I would say that people who are under 16 might not be in a position to perform the full suite of functions in a particular role, so they might not do things for which disclosure is required. Voluntary organisations need clarity on that, because some things do not need to go through the disclosure system. For example, it would be bizarre if somebody who was attending school as part of a normal school day had to undergo a disclosure check if they went to a primary school to read to other young people, but some schools are imposing that on parents and young people because they are not clear about the difference between regulated work and volunteering that is supported by someone who is doing regulated work.

Source: Education and Skills Committee 13 November 2019 [Draft], Lindsay Law, contrib. 50<sup>60</sup>

130. Some witnesses felt that removing under 16s from the PVG scheme would not be a restrictive move. Adam Dillon from the Church of Scotland's Safeguarding Committee said:

” I do not think that there would be a significant impact. We do not have a huge number of people under 18 who are PVGed, simply because we take the view that people under 18 are children and what we understand to be regulated work is reserved for an older age group. That does not preclude children from being involved in highly significant work, but that is an understanding of regulated work. We have concerns about people who are under 18 making mistakes or behaving in a way that would result in their being reported through the disclosure system and about the impact that that might have on their later lives. We take the view that children are children.

Source: Education and Skills Committee 06 November 2019 [Draft], Adam Dillon, contrib. 27<sup>61</sup>

131. Similarly, the Scottish Youth Football Association confirmed that all of their volunteers are over 16 years old, and that this change would therefore not have an impact on their work.<sup>62</sup>

132. COSLA felt that this change struck the right balance, as did Police Scotland, who said:

” When a person under 16 has behaviour that is concerning, they will be known to a number of professionals, who will ensure that the young person does not work or volunteer—in most cases, it will be volunteering—in certain areas. You could look at that and think that there is a potential gap. However, organisations have their own safeguarding responsibilities, and if people under the age of 16 work for or volunteer with them, they will place restrictions to ensure that those who do not have a PVG certificate cannot work one to one with vulnerable children or whatever. It is a partnership-working scenario. The Scout Association works all around the United Kingdom, and it addresses its safeguarding responsibilities.

It would be unusual for an individual under the age of 16 who had behaved in such a manner to be in that situation. If they have committed an automatic barring offence, Disclosure Scotland will have to automatically disclose the offence as a duty of care.

Source: Education and Skills Committee 09 October 2019 [Draft], Sheena Brennan, contrib. 13<sup>63</sup>

133. Disclosure Scotland highlighted that only 300 under-16s a year have entered the PVG scheme since 2015, suggesting that this would be a minor issue:

” Since 2015, around 300 under-16s a year have entered the PVG scheme. The bill will not stop under-16s performing regulated roles; it will disapply the offence provisions that exist in relation to the PVG scheme being mandatory for individuals and organisations.

Source: Education and Skills Committee 04 September 2019, Kevin Lee, contrib. 51<sup>64</sup>

134. Interest Link Borders felt that there was "no coherent line of argument to justify a ban on under-16s", suggesting that

” 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<sup>58</sup>

135. Gerard Hart, Disclosure Scotland, set out how young people could still obtain disclosures:

” The bill provides for children who cannot join the PVG scheme to get what will, in effect, be an enhanced disclosure, so it will still be possible to get a check done. However, because of the protections that I have just mentioned, that should be necessary in only a very small number of cases. The idea is that, in normal circumstances, children ought not to be subjected to that kind of state scrutiny unless there is a really good reason, and even then it should be as an enhanced disclosure or a lower, level 2 disclosure rather than a PVG disclosure.

Source: Education and Skills Committee 20 November 2019 [Draft], Gerard Hart, contrib. 87<sup>65</sup>

136. The Minister also responded to these worries:

” I understand the concern that an unintended consequence of setting a minimum age for disclosure might be that organisations avoid taking on volunteers who are under that age. In England, Wales and Northern Ireland, children under the age of 16 cannot obtain state disclosures, but that has not affected the many United Kingdom-wide organisations that offer opportunities to children. I will ensure that Disclosure Scotland and the Government more widely communicate effectively on that issue to make sure that children are not disadvantaged in obtaining volunteering opportunities.

Source: Education and Skills Committee 20 November 2019 [Draft], The Minister for Children and Young People (Maree Todd), contrib. 3<sup>66</sup>

137. The Committee recognises that the proposal to prevent those under the age of 16 joining the PVG scheme is based on the Scottish Government's views on children's rights. However, the Committee believes that this proposal on its own could unintentionally contribute to a decline in volunteering opportunities for young people depending on how organisations interpret the legislation and their wider safeguarding measures.
138. The Committee therefore recommends that the Scottish Government sets out the ways in which it will support organisations to continue to offer volunteering opportunities to under 16s, including through the promotion of safeguarding measures or alternative disclosure products.
139. The Committee also recommends that, after an initial period of operation, the Scottish Government conducts a review of this change to measure whether there has been a negative effect on volunteering rates among under-16s.
140. Whether or not the Scottish Government decides to amend the current proposals within the Bill to bar under 16s from joining the PVG scheme, the Committee believes it is vital that specific guidance is developed to explain the implications of the disclosure system for young people.

## Accredited bodies

141. 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 (a "registered person"). 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.
142. 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, and typically the organisations using umbrella bodies are small charities or companies.

143. Section 57 of the Bill provides for accredited bodies to act as umbrella bodies. Such an umbrella body can share information either with a body that could become an accredited body 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 (e.g. somebody employing a music tutor or utilising self-directed support), it cannot share the content of a disclosure statement but can provide advice on the suitability of the individual. 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.<sup>36</sup>

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

” Recruiters or employers should consider the following:

- whether the conviction or other matter(s) revealed on the disclosure is relevant to the position in question;
- the nature of any offence or other matter(s) revealed;
- whether the person is barred from working with particular vulnerable groups;
- the length of the time since the offence or other relevant matter(s) occurred;
- whether the individual has a pattern of offending behaviour or other relevant matters; and
- whether the individual’s circumstances have changed since the offending behaviour or the other relevant matters.<sup>47</sup>

145. The Bill also establishes new powers for local authorities with regard to PVG scheme membership referrals:

” local authorities will be able to make referrals to Disclosure Scotland within the context of their normal adult and child protection roles when there is no employer involved that can make a referral under the Protection of Vulnerable Groups (Scotland) Act 2007. That addresses the safeguarding gap that exists in the care environment, where, in particular, self-directed support has been much more widely used since 2007.

Source: Education and Skills Committee 04 September 2019, Kevin Lee (Disclosure Scotland), contrib.  
8<sup>67</sup>

146. This measure was welcomed by Social Work Scotland, but with significant caveats:

” 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.<sup>11</sup>

147. Social Work Scotland alluded to COSLA's concerns about this new power, which were explored further in COSLA's submission:

” 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.<sup>68</sup>

148. COSLA also stated that it expected the Scottish Government to meet any additional resources required by local authorities to discharge these referral powers.

149. Police Scotland welcomed its proposed new referral powers:

” We do not want somebody to avoid doing something that is mandatory because of a cost implication. Under the bill, Police Scotland would become a referral agency, so if we identified that somebody who was doing regulated work was not a scheme member, we would have the opportunity to refer. That is a new provision in the bill, which we welcome....We think that, under the bill, when membership of the scheme becomes mandatory, it will be an offence for someone to do regulated work without the relevant certificate. Police Scotland would then have an opportunity to refer the case to Disclosure Scotland. Many organisations already have that referral opportunity, but we do not have it at the moment.

Source: Education and Skills Committee 09 October 2019 [Draft], Sheena Brennan, contrib. 67<sup>69</sup>

150. The Committee welcomes the proposed extension of referral status to other public bodies such as local authorities, but it is important the Scottish Government addresses the concerns raised by COSLA and others about how this could be interpreted in relation to self-directed support. The Committee invites the Scottish Government to respond to these concerns.

## Regulated roles

151. Another aspect of the Bill is the discontinuation of regulated work as a concept, to be substituted with 'regulated roles'. 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<sup>36</sup>

152. The move from regulated work to regulated roles received a mixed response from respondents to the Committee's consultation. COSLA's submission argued that the proposed change would provide greater clarity and stated that it is broadly in agreement with the descriptions of regulated roles in the Bill.<sup>68</sup>

153. However, in its written submission, Business in the Community raised several practical points for consideration:

” 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.<sup>5</sup>

154. The Bill provides lists of activities when working with children and protected adults (schedules 3 and 4) that may constitute a regulated role. A regulated role is one where the activity is a necessary part of the role and is within the normal duties of the individual or the duties of someone an individual supervises day to day. A key aspect of a regulated role is that the individual would be in contact with the child or protected adult.<sup>36</sup>

155. In the case of regulated roles for children, activities in an education institution, hospital, nursery, day care premises, hospice, residential care setting or secure accommodation for children, must give the individual carrying them out the opportunity to have unsupervised contact with children before they would be considered a regulated role. In other settings, the same activities which include contact with children, supervised or not, would constitute a regulated role.<sup>36</sup>
156. A number of organisations who provided evidence were concerned that aspects of their own work or certain roles would appear to fall outwith the definition. Indeed, written submissions from Shared Lives Plus, the Scottish Social Services Council, NHS Healthcare Improvement Scotland, and Ross of Mull and Iona Community Transport Scheme all raised issues relating to their activities.
157. Shared Lives Plus, for example, felt that the role filled by their carers should be explicitly listed in the Bill:
- ” ...being a shared lives carer is not identified as a regulated role, although shared lives is clearly covered by some of the activities as defined. In comparison, foster care, which is an analogous type of service, is defined as a regulated role. The analogy is that, in both cases, care and support is provided in people’s private homes and within family life over a long time.
- Source: Education and Skills Committee 06 November 2019 [Draft], Ben Hall (Shared Lives Plus), contrib. 6<sup>70</sup>
158. Some witnesses felt that the definition of a protected adult currently included in the Bill could or should be expanded to cover other vulnerable groups. The Scottish Volunteering Forum provided a useful overview in its written submission:
- ” The proposed definition of vulnerability when identifying protected adults is also problematic because it focuses primarily on health, and doesn’t reflect other common vulnerabilities such as asylum seeker status, homelessness or old age. It also doesn’t take into consideration the vulnerability that arises when an individual comes into contact with certain types of regulated role, particularly advice roles. The imbalance of power resulting from knowledge, and the potential to exploit people, creates a vulnerability in individuals who might not otherwise be considered vulnerable.<sup>71</sup>
159. Scottish Women's Aid also provided a discrete example of where the current definition could be improved:

” 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.<sup>72</sup>

160. This was backed up by the Law Society of Scotland, which felt that the definition could better match those used in other items of legislation:

” When we looked at the bill, members of our mental health and disability committee raised the point that the definition of “protected adult” in section 76 was somewhat different to that in other legislation for vulnerable people. We specifically highlighted that an individual could qualify for a personal independence payment, or disability assistance as it will be in future, and need a carer to meet their assessed needs but still not be considered to be a protected adult for the purposes of the legislation.

Source: Education and Skills Committee 09 October 2019 [Draft], Andrew Alexander, contrib. 71<sup>73</sup>

161. The current provisions which delineate between regulated work with adults and regulated work with children and ask for one “main purpose” for a PVG check have created an unintended consequence whereby trustees of charities working with both adults and children are unable to be PVG checked for both. The Royal Blind and Scottish War Blinded are therefore supportive of the proposal in this Bill to close this loophole:

” 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.<sup>7</sup>

162. The Minister accepted that improvements could be made to the definition:

” I acknowledge that there is a question around whether the definition of protected adults is appropriately scoped. My officials have met Scottish Women’s Aid to discuss its concerns about the new definition and we are reflecting on any gaps that it might have created...I cannot tell you now exactly what we will do at stage 2, but we are considering our approach.

Source: Education and Skills Committee 20 November 2019 [Draft], Maree Todd, contrib. 93<sup>74</sup>

163. The Committee highlights the concern and confusion it has heard from a variety of organisations over the implications of the Bill’s proposals to move PVG membership from lists of jobs and workplaces (regulated work) towards a description of the work undertaken (regulated roles). The Committee believes the Scottish Government should engage with volunteering organisations and those who raised concerns with the Committee ahead of Stage 2 to identify ways in which further clarity can be provided on this change.
164. The Committee welcomes the Scottish Government’s willingness to consider how the definition of a protected adult could be improved, and its commitment to engage with stakeholders ahead of Stage 2.

# Disclosure of offences

165. As well as considering how information could be disclosed and to whom it should be disclosed, the Bill sets out which convictions should be disclosed. There was a debate between witnesses about the extent of disclosure.
166. Although most of the evidence received by the Committee focused on what was included in the Bill, some witnesses argued in favour of measures not currently included to help meet the Bill's aim to help people move on from past offending.
167. For example, Business in the Community highlighted its "Ban the Box" campaign, which 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.<sup>5</sup>
168. An individualised approach was also suggested by Sarah Latto:

” A suggestion has come from one of our volunteers, who has a conviction. When she approached us to start volunteering, she was barred from working with vulnerable groups, and she successfully appealed that decision. She has suggested that, when conviction information comes through, it would be helpful if there was a free text box where people could share the circumstances surrounding their conviction history. She and a number of other volunteers have reported that continuously having to share their stories when they are trying to move on from the mistakes that they have made in the past can be quite traumatic as it involves constantly reliving the trauma.

We think that what that volunteer has suggested would be very helpful.

Source: Education and Skills Committee 06 November 2019 [Draft], Sarah Latto, contrib. 45<sup>75</sup>

169. The Minister pointed to measures in the Bill designed to help people move on from previous convictions:
- ” One thing that we have not highlighted so far in our evidence is the fact that the bill will enable those with childhood convictions to provide representations that include details about the wider context of their previous behaviour to ministers before any disclosure to a third party is made. That is a significant change from the current system, and I think that it improves proportionality and privacy for individuals who need to use the disclosure system.

Source: Education and Skills Committee 20 November 2019 [Draft], Maree Todd, contrib. 54<sup>76</sup>

170. Howard League Scotland argued an individualised approach was vital for human rights considerations:

” Leaving to one side that spent convictions are not disclosed in continental Europe, there is scope in the bill to deal with the matter. A discretionary approach is taken to the disclosure of childhood convictions. What is the rationale for not adopting such an approach with adult convictions? An individualised approach would allow a case-by-case, structured approach to decisions to disclose, and that is really important in balancing rights to public protection and upholding the rights of individuals with conviction information. It has been suggested that schemes without the flexibility to permit that level of discretion cannot be compliant with article 8 of the European convention on human rights.

Source: Education and Skills Committee 06 November 2019 [Draft], Beth Weaver, contrib. 94<sup>77</sup>

171. Previously, the disclosure system has been challenged on human rights grounds under article 8 of the ECHR. As required, the Bill received statements of legislative competence from the Scottish Government and the Presiding Officer; which means, among other things, that in their view the Bill as introduced does not conflict with the Human Rights Act 1998.

172. The submission from the Children and Young People's Commissioner Scotland provided a useful summary of some of the human rights considerations. He said:

” 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)....

” 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. <sup>22</sup>

173. However, others felt that there was a risk the Bill was prioritising individual rights over the wider public interest. The GTCS said:

” 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. <sup>78</sup>

174. This was supported by Scottish Women's Aid, which stated:

” 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. <sup>72</sup>

175. Gemma Grant, Scottish Government, set out why the Bill is compliant with the ECHR:

” I can certainly confirm that, in order for laws to be compatible with the ECHR, their effects need to be foreseeable. That means that they need to be accessible to the people who are affected by them and must not be arbitrary. If a piece of legislation gives a decision maker discretion, there has to be sufficient clarity about the way in which that discretion will be exercised. What the case law does not say, though, is that decision makers and public bodies are not permitted to have such discretion in making decisions; it is just a question of having a set of parameters that are based on guidance or already known and established legal principles so that the application of those rules is reasonably foreseeable in practice.

The Scottish Government’s position is that what is set out in the existing legislation and in the bill is sufficiently foreseeable, and that that will also be informed by the guidance that is to be developed in consultation with stakeholders.

Source: Education and Skills Committee 20 November 2019 [Draft], Gemma Grant, contrib. 50<sup>79</sup>

176. The Committee believes that the system for disclosing offences proposed by the Bill strikes the correct balance between public protection and individual rights. However, the Committee believes offering individuals the opportunity to provide contextual information about any disclosed offences would be a positive step, and recommends that the Scottish Government considers how individuals can be given this opportunity at the appropriate juncture in the disclosure system.

## Lists of offences

177. One of the aims of the Bill is to make changes to how convictions are treated as part of the disclosure system. The Rehabilitation of Offenders Act 1974 provides criteria for convictions to become "spent" - in other words, no longer required to be disclosed - in order to allow individuals to be rehabilitated and to move on from their offending. Under the 1974 Act, any prison sentence over 30 months would never become spent and would always need to be disclosed.

178. However, this does not apply in all cases, and Schedules 8A and 8B of the Police Act 1997 set out certain spent convictions which must be disclosed. Schedule 8A lists offences that will always be disclosed, unless the conviction is removed upon application to a sheriff. Schedule 8B lists offences which will be disclosed for a period of time, unless conviction is removed upon application to a Sheriff.<sup>36</sup>

## Types of convictions and current disclosure process

Category of conviction	Disclosure
Unspent conviction, or a conviction that does not have a rehabilitation period.	Must disclose, would appear in all disclosure products which list offences.
Spent convictions that do not appear in schedules 8A and 8B of the 1997 Act.	No need to disclose, would not appear in any disclosure products.
Spent conviction listed in schedule 8A of the 1997 Act	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: <ul style="list-style-type: none"> <li>• 15 years from the date of the conviction where the individual was 18 or older at the time of the conviction</li> <li>• 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.</li> </ul>
Spent conviction listed in schedule 8B of the 1997 Act	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: <ul style="list-style-type: none"> <li>• 15 years from the date of the conviction where the individual was 18 or older at the time of the conviction</li> <li>• 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.</li> </ul> An individual can apply to a Sheriff for the spent conviction to be removed from any disclosure certificate at any time.

179. The Bill proposes replacing Schedules 8A and 8B with two lists - List A and List B. The Bill also proposes some changes to the offences included in each list, and reducing the time periods in relation to disclosure of convictions and for an application for removal of convictions from a disclosure certificate.

180. Generally, witnesses felt that these proposed changes were fair, although some believed that further, small changes could be made to the lists. For example, in its written submission, the Law Society of Scotland highlighted some potential improvements:

” ...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.<sup>27</sup>

181. This was echoed in evidence by the Scottish Social Services Council:

” We identified that fraud has been taken off list A and put on to list B, while embezzlement remains on list A. From our perspective, those offences share the same characteristics of dishonesty. That is a real concern for us as a regulator that assesses people's suitability to work with vulnerable people.

Source: Education and Skills Committee 09 October 2019 [Draft], Cheryl Campbell, contrib. 119<sup>80</sup>

182. Some offences were highlighted as being of varying severity depending on whether they were committed in childhood or adulthood, and these are covered in the [childhood offences](#) section of this report

183. One area discussed with witnesses was the proposed reduction in the time periods before spent convictions on List A can be subject to an application for removal and spent convictions on List B no longer need to be disclosed.
184. As drafted, for List A offences, an application could take place 11 years from the date of conviction where the individual was 18 or older at the time of conviction, with no time limit for List A offences for under 18s. Currently, the time period is 15 years for adults, and 7 years and 6 months for Schedule 8A offences for those under 18 at the time of conviction.
185. For List B offences, the time period proposed in the Bill is 11 years from the date of conviction when the individual was 18 or older at the time of conviction, and 5 years and 6 months from the date of conviction for under 18s. Currently, the time period is 15 years for adults, and 7 years and 6 months for Schedule 8B offences for those under 18 at the time of conviction.
186. Howard League Scotland believed that the onus for removal of certain convictions should rest on the authorities rather than on individuals:
- ” Ought not the responsibility properly reside with Disclosure Scotland to review the relevancy of continued disclosure of spent convictions? That the subject is required to pay a fee for consideration of removal of the conviction puts yet another barrier in the way of people with very limited means.
- Source: Education and Skills Committee 06 November 2019 [Draft], Beth Weaver (Howard League Scotland), contrib. 72<sup>81</sup>
187. Recruit with Conviction questioned whether the reduction was based on evidence:
- ” ...the arbitrary period of 15 years for an adult does not reflect the information. The reduction by four years is welcome, but my understanding is that it is purely because of the reduction of four years relating to the bulk of offences under the Management of Offenders (Scotland) Act 2019 and that first level of disclosure. It becomes a bit arbitrary. I suppose our question is whether there is more scope to ensure that the period reflects the evidence
- Source: Education and Skills Committee 06 November 2019 [Draft], Dughall Laing, contrib. 119<sup>82</sup>
188. The Centre for Youth and Criminal Justice raised a similar concern for childhood offences contained within list B:
- ” We appreciate that there will be shorter timescales for children but, when we consider list B, they would still have to disclose the information for five and a half years, which is a significant proportion of a child’s life. The timescales appear to be based on those in the Management of Offenders (Scotland) Act 2019. There is concern that they are not based on the evidence that is available in the time to redemption research
- Source: Education and Skills Committee 13 November 2019 [Draft], Debbie Nolan, contrib. 61<sup>83</sup>
189. 'Time to Redemption' research was cited by Howard League Scotland in its written submission as a reason to reduce these timescales:

” ‘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....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<sup>20</sup>

190. However, not all stakeholders supported this reduction. Scottish Women's Aid, for example, supported the retention of the current periods:

” 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.<sup>72</sup>

191. The Committee supports the continuing existence of lists of offences to be disclosed when otherwise spent. However, the Committee considers that improvements can be made to ensure confidence in this system. For example, the Committee notes the example of embezzlement and fraud, two offences rooted in dishonesty, being on different lists, and recommends that the Scottish Government re-examines its proposed lists ahead of Stage 2 to ensure that offences of a similar nature are treated similarly.

192. The Committee notes the differing views on the appropriate timescales for review and disclosure of offences, and that the timescales given appear to be designed to fit with other legislation in this area rather than on an evidential basis. The Committee recommends that further consideration is given to whether these timescales meet the Scottish Government’s stated aim to balance public protection with the right to move on from past offences and would welcome further exploration of the basis for the proposed eleven year period at Stage 2.

## Childhood offences

193. The Bill seeks to reform how offences committed by young people aged between 12 and 17 years are disclosed. One of the policy goals of the Bill is to recognise:

” adolescence as a unique phase of life by ending the automatic disclosure of convictions accrued while aged between 12 and 17 years and introducing an assessment by Disclosure Scotland, acting on behalf of Ministers, as to whether convictions ought to be disclosed<sup>3</sup>

194. Debbie Nolan, Centre for Youth and Criminal Justice, welcomed the end of automatic disclosure:

” We see the bill’s approach as being evidence based, which is crucial and is also a key component in a child-friendly disclosure system that promotes children’s rights and supports Scotland’s whole-system approach to children, including those involved in offending. That is vital if we are to reduce the effects of disclosure of childhood conviction information, which we know are potentially devastating and destructive.

Source: Education and Skills Committee 13 November 2019 [Draft], Debbie Nolan (Centre for Youth and Criminal Justice), contrib. 4<sup>84</sup>

195. This was also supported by Community Justice Scotland:

” 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. <sup>12</sup>

196. A theme of policy discussions in this area is how care-experienced young people are particularly susceptible to becoming involved with criminal justice agencies. Who Cares? Scotland’s submission highlighted that, although those who have been in care make up an estimated 0.5% of the population, they make up 33% of Scotland’s youth offender population and 31% of Scottish adult prison populations. <sup>85</sup>

197. CELCIS’ submission argued that the circumstances of care-experienced young people made them more susceptible to interaction with disclosure of childhood offences:

” 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. <sup>17</sup>

198. Howard League Scotland provided further evidence on this point:

” One of the difficulties is that people who are looked after or care experienced often have arrested development and less opportunity to move on in life compared to somebody who is perhaps engaged in an isolated offence at the age of 13. We also know that our prisons disproportionately rehouse, for want of a better word, a lot of people who are care experienced. Therefore, the likelihood of care-experienced people going on to develop a pattern of adulthood offending means that they are precisely the people whose childhood convictions, by implication, will be disclosed.

Source: Education and Skills Committee 06 November 2019 [Draft], Beth Weaver, contrib. 122<sup>86</sup>

199. One care-experienced witness, Robert Dorrian, said:

” We know from our members that care-experienced individuals often self-exclude, which cannot be quantified or put in front of the committee as statistics. Because of the disclosure process, those individuals often self-exclude from volunteering roles, or roles that involve working with vulnerable groups. Our members have told us that childhood convictions have prevented them from moving on from their past. That needs to change, and the bill is an opportunity for that change.

Source: Education and Skills Committee 13 November 2019 [Draft], Robert Dorrian (Who Cares? Scotland), contrib. 7<sup>87</sup>

200. Although witnesses generally welcomed the presumption against disclosing convictions received when under the age of 18, it was felt that further steps could be taken to include contextualised information about childhood offences as part of a disclosure. Who Cares? Scotland said:

” 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. <sup>85</sup>

201. Witnesses pointed to some listed offences which, in their experience, would be committed in a different context during childhood. Clan Childlaw said:

” We are pleased that the offence in relation to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which is about threatening and abusive behaviour, has been moved from list A to list B. That offence has been used a lot for relatively minor offending behaviour by children in residential units, but the offence is really serious in the adult world.

Source: Education and Skills Committee 09 October 2019 [Draft], Alison Reid, contrib. 120<sup>88</sup>

202. This was also raised by Debbie Nolan, Centre for Youth and Criminal Justice:

” I know that section 38 offences have been moved to list B, but it still covers numerous offences that are committed by children. We have done a lot of work on the unnecessary criminalisation of looked-after children, and we know that many of those offences fall into that section 38 category. That is a prime example of something that flies in the face of our ability to improve the system for children.

Source: Education and Skills Committee 13 November 2019 [Draft], Debbie Nolan, contrib. 61<sup>83</sup>

203. Alastair Hogg, SCRA, highlighted another:

” One of the most pertinent examples is wilful fire-raising, which I think appears in list A. As children’s reporters, we see that offence quite frequently, as young people are referred to us for it. It is reflective of childhood behaviour and reactions to difficult circumstances, rather than being an offence that needs to appear on a high-tariff list.

Source: Education and Skills Committee 13 November 2019 [Draft], Alistair Hogg, contrib. 60<sup>89</sup>

204. Some witnesses suggested the creation of a separate list altogether for offences committed in childhood. The CYPCS said:

” 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<sup>22</sup>

205. Clan Childlaw supported removing all childhood offences from lists:

” I do not think that we should be getting involved in lists. The scheme should not involve convictions for under-18s, especially those in the children’s hearings system. There is a route to further information through the relevant information, with a high bar set on that relevant information.

Source: Education and Skills Committee 09 October 2019 [Draft], Alison Reid, contrib. 107<sup>90</sup>

206. However, Nicola Dickie, COSLA, felt that introducing another list would run contrary to one of the aims of the Bill:

” If we create a specific list for children and young people, we will add another layer of complexity, and we are trying to strip out that complexity to a degree. There is a delicate balance to be struck between the arbitrary nature of the issue and the rights of children and young people more generally.

Source: Education and Skills Committee 09 October 2019 [Draft], Nicola Dickie, contrib. 117<sup>91</sup>

207. In oral evidence, the Minister said she was not minded to introduce another list specifically for childhood offences:

” We are aware that some of the respondents to the consultation on the bill, and some witnesses to the committee, have suggested that there should be different lists for children. However, that would increase complexity, which we want to avoid. All that the lists do is act as a filter. They remove from the scope convictions that are irrelevant for state disclosure.

For convictions that are automatically non-disclosable, as a result of that filtering process the inclusion of childhood conviction information is subject to case-by-case assessment, first by ministers and then, if necessary, by an independent reviewer. We consider that tailored approach to be much more proportionate than introducing a separate list of offences in relation to childhood convictions.

Source: Education and Skills Committee 20 November 2019 [Draft], Maree Todd, contrib. 34<sup>92</sup>

208. The Committee welcomes the end of automatic disclosure of childhood offences committed between the ages of 12 and 17. However, the Committee agrees that more could be done to provide opportunities for any information relating to childhood offences included on a disclosure to be set in context. This is particularly important for care-experienced people, given their disproportionate level of engagement with the justice system.
209. The Committee notes the proposal that childhood offences on Lists A and B should have no time limit for review and a shorter period for disclosure respectively which differs from offences committed as an adult, as well as calls for a separate list entirely for childhood offences. Given the Scottish Government's opposition to creation of a separate list for childhood offences, the Committee recommends that it explores with stakeholders how childhood offending can be better assessed within these two lists.

# Financial Memorandum

210. The Financial Memorandum ("FM") accompanying the Bill states that it anticipates an overall increase in costs which will reduce over time due to efficiencies. It estimates that the changes proposed in Part 1 of the Bill will incur costs of £1,712,907, and those in Part 2 will incur costs of £333,437.
211. The FM expects costs to arise in five categories: vetting, introduction of the independent reviewer (the independent reviewer was established under the Age of Criminal Responsibility Act 2019 (the "ACR Act")), review applications, accredited bodies and digital delivery.
212. Only one submission, from Shetland Islands Council, was made to the Finance and Constitution Committee regarding the FM. While it welcomed the transition to digital process(es) as a cost-saving measure in its submission, Shetland Islands Council said its main concern was the impact on employer's costs:
- ” The majority of our Council’s costs relate to PVG Scheme membership fees and administration. Currently we pay all costs associated with our employee’s membership. We require all post holders requiring a Police Act Disclosure or PVG Scheme membership to renew every 3 years. Moving to 5 yearly renewals will reduce staff time and would potentially reduce membership costs. However as the financial memorandum provides no clarity on the proposed fee structure for PVG Scheme we are unable to assess the impact or comment on this with any certainty.<sup>93</sup>
213. Shetland Islands Council's comments on the fee structure complement evidence received by this Committee in the course of its scrutiny of the Bill. The disclosure system attracts fees for different purposes. Section 62 of the Bill provides for regulations to be made to determine fees in connection with a number of activities. For example:
- undertaking a disclosure check, including PVG
  - registering as an accredited body
  - reviews.
214. Section 70 of the PVG Act provides for Ministers to make regulations on fees in respect of the PVG Scheme, such as membership and disclosures. Some details of possible fee structures for non-PVG scheme fees are intimated in the FM.
215. 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.
216. The FM notes the intention to increase the annual registration fees for accredited bodies from £75 to £100. In terms of PVG, currently the scheme membership costs £59 for a life membership and £18 for each subsequent short scheme record sought. The Consultation intimated that a five year membership scheme could cost £65 and with a £10 fee for each disclosure.

217. The Minister wrote to the Committee to set out the Scottish Government's position on fees:

” As stated in paragraph 39 of the Financial Memorandum, a final decision has yet to be made in relation to fees for Level 1 and Level 2 (non-scheme membership) disclosure checks. It was explained there are a number of factors which will determine the final level fee, for example efficiencies from digital delivery could result in changes to the fees. The Scottish Government will carry out a formal consultation on fees and it is therefore not possible to indicate which option Scottish Ministers are minded to endorse<sup>94</sup>

218. In the letter, the Minister also confirmed that her officials were engaging with stakeholders on fees, and highlighted that the Bill requires the Scottish Ministers to lay regulations for the charging of fees before the Scottish Parliament, subject to the negative procedure.<sup>94</sup>

219. When speaking about the change from a lifetime membership to a five year membership, Gerard Hart, Disclosure Scotland acknowledged there would be winners and losers in any fee structure:

” Some people would have one disclosure and never darken our door again for another disclosure. Under a five-year model, perhaps they would lose. However, because of the gig economy, people—including locum workers such as supply teachers, doctors and nurses—are increasingly changing their place of work and are using the scheme more and more often in a five-year period. On balance, those people will be winners. There will be swings and roundabouts with this model.

Source: Education and Skills Committee 04 September 2019, Gerard Hart, contrib. 30<sup>95</sup>

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

” There is a lack of clarity around volunteers. At present, PVG membership is free for people who are volunteering for a qualifying voluntary organisation. We feel that it is unfair to expect people to pay if, as a result of their volunteering, they move into employment, particularly given that, if someone moves into a role that is relevant to the volunteer role that they had previously, it is likely to be quite low paid and at quite a low grade to begin with. Expecting them to pay seems a bit unfair and it does not recognise the value that they added as a volunteer up to the time when they applied for paid employment.

Source: Education and Skills Committee 06 November 2019 [Draft], Sarah Latto, contrib. 52<sup>96</sup>

221. The SCRA also questioned whether public bodies should be subject to a fee, given that the result is “the movement of public money around public agencies”.<sup>97</sup>

222. The Minister reiterated her willingness to consult on the fees structure:

” I understand the concerns of individuals and organisations about the impact of changes to fees. Although the proposals in the bill could be delivered using the current fee structure, there is a question about whether we could find better ways forward. I have an open mind on the issue and I am committed to consulting fully on fee structures. However, I am clear that the fee waiver will continue for qualifying voluntary organisations.

Source: Education and Skills Committee 20 November 2019 [Draft], The Minister for Children and Young People (Maree Todd), contrib. 3<sup>66</sup>

223. The Committee notes the estimated costs in the Financial Memorandum, and understands the need for fees to be charged in relation to disclosure products. However, it is unclear what the fee structure could mean for these estimates, and the Committee recommends that the Scottish Government acts swiftly to assuage some of the concerns raised.
224. The Committee welcomes the Scottish Government’s intention to waive fees relating to the PVG scheme for volunteers. However, the Committee supports the Scottish Volunteering Forum’s call for all disclosure product fees to be waived for volunteers to prevent any barriers to volunteering in less affluent areas, and also asks the Scottish Government to consider how it can best support those in lower-paid jobs who require PVG checks.
225. Elsewhere in this report, the Committee explores the Bill proposal for the PVG scheme being open to individuals aged 16 years or older. One possible response could be that under 16s may be required to obtain other disclosure products in order to volunteer (e.g. a Level 1 disclosure<sup>iii</sup>). The Committee recommends that the Scottish Government consider waiving fees of any individual under-16 applying for a disclosure check where they are doing so to undertake volunteer work.

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iii Under the Bill, while an individual would not be able to be a member of the PVG scheme, they could access other disclosure products under certain circumstances. (See sections 2 and 15.)

# General principles of the Bill

226. The Committee supports the general principles of the Bill. However, the Committee believes that there are a number of areas within the Bill which will require further clarification and consideration at Stage 2 to ensure that the Bill delivers on its aims in full.

# Annex A - Extracts from the minutes

## 23rd Meeting, 2019 (Session 5), Wednesday 4 September 2019

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

**3. Disclosure (Scotland) Bill:** The Committee heard evidence on the Bill at Stage 1 from—

Kevin Lee, Disclosure Bill Manager, and Gerard Hart, Director for Policy and Protection Services, Disclosure Scotland;

Ailsa Heine, Senior Principal Legal Officer, Scottish Government.

**6. Disclosure (Scotland) Bill:** The Committee considered the evidence it heard earlier in the meeting and agreed to write to the Minister for Children and Young People on a number of points.

**7. Work programme (in private):** The Committee considered its work programme. The Committee considered witnesses for the Disclosure (Scotland) Bill.

## 27th Meeting, 2019 (Session 5), Wednesday 9 October 2019

**2. Disclosure (Scotland) Bill:** The Committee heard evidence on the Bill at Stage 1 from—

Alison Reid, Principal Solicitor, Clan Childlaw;

Nicola Dickie, Chief Officer – Children and Young People, COSLA;

Andrew Alexander, Head of Policy, Law Society of Scotland;

Sheena Brennan, Information Manager (Disclosure), Police Scotland;

Cheryl Campbell, Acting Director of Regulation, Scottish Social Services Council.

**3. Review of evidence:** The Committee considered the evidence it heard earlier

## 29th Meeting, 2019 (Session 5), Wednesday 6 November 2019

**2. Disclosure (Scotland) Bill:** The Committee heard evidence from—

Ben Hall, Scottish Development Manager, Shared Lives Plus;

Oisín Murphy-Lawless, Policy, Parliamentary & Programme Support Officer, Coalition of Care and Support Providers in Scotland (CCPS);

Adam Dillon, Convener Safeguarding Committee, Church of Scotland;

Florence Witherow, National Secretary, Scottish Youth Football Association;

Sarah Latto, Chair of the Scottish Volunteering Forum and Volunteer Development Manager, Shelter;

Dughall Laing, Director, Recruit With Conviction;

Rose McConnachie, Policy Development Lead, Community Justice Scotland;

Dr Cynthia Marks, Senior Manager- Operations and Policy, Business in the Community (BITC); and

Dr Beth Weaver, Vice Convener, Howard League Scotland.

Ross Greer declared an interest as he holds a PVG for the Church Of Scotland and Liz Smith declared that she has a PVG for school sports.

**3. Review of evidence (in private):** The committee considered the evidence it heard earlier on the Disclosure (Scotland) Bill.

### **30th Meeting, 2019 (Session 5), Wednesday 13 November 2019**

**1. Disclosure (Scotland) Bill:** The Committee heard evidence on the Bill at Stage 1 from—

Alistair Hogg, Head of Practice and Policy, Scottish Children's Reporter Administration;

Lindsay Law, Convener, Connect;

Debbie Nolan, Practice Development Advisor, Centre for Youth and Criminal Justice;

Amy Woodhouse, Joint Acting Chief Executive, Children in Scotland;

Brian Houston, Director of Operations, and

Robert Dorrian, Member, Who Cares? Scotland.

**2. Review of Evidence (in private):** The Committee considered the evidence it heard earlier

### **31st Meeting, 2019 (Session 5), Wednesday 20 November 2019**

**1. Decision on taking business in private:** The Committee agreed that the consideration of its draft report on the Disclosure (Scotland) Bill should be taken in private at future meetings.

**2. Disclosure (Scotland) Bill:** The Committee heard evidence on the Bill at Stage 1 from— Maree Todd MSP, Minister for Children and Young People, Scottish Government;

Kevin Lee, Disclosure Bill Team Leader, Disclosure Scotland

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

Gemma Grant, Lawyer, Legal Directorate, Scottish Government.

**3. Review of Evidence (in private):** The Committee considered the evidence it heard earlier. The Committee agreed to write to the Minister for Children and Young People.

**32nd Meeting, 2019 (Session 5), Wednesday 4 December 2019**

**1. Disclosure (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report. The Committee considered and agreed some changes, and will agree any final changes by correspondence or by meeting on 18 December

## Annex B - written and oral evidence

The Committee received the following written submissions in response to its call for views:

- [Business in the Community \(BITC\)](#)
- [CELCIS](#)
- [Centre for Youth and Criminal Justice \(CYCJ\)](#)
- [Children and Young People's Commissioner Scotland](#)
- [Children in Scotland](#)
- [Church of 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](#)
- [Emilytest](#)
- [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](#)
- [Police 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 Catholic Safeguarding Service](#)
- [Scottish Children's Reporter Administrator \(SCRA\)](#)
- [Scottish Social Services Council](#)
- [Scottish Volunteering Forum](#)
- [Scottish Women's Aid](#)
- [Scripture Union Scotland \(SU Scotland\)](#)
- [Shared Lives Plus](#)
- [Social Work Scotland](#)
- [STAF](#)
- [Who Cares? Scotland](#)

### **Focus groups**

The Committee held focus groups on 12 and 13 November to inform its scrutiny. Notes from these focus groups can be found below:

- [Read the 12 November focus group notes](#)
- [Read the 13 November focus group notes](#)

### **Correspondence**

The Convener of the Education and Skills Committee wrote to the Minister for Children and Young People in respect of the Disclosure (Scotland) Bill:

- [Read the letter to the Minister for Children and Young People, 22 July 2019](#)
- [Read the letter from the Minister for Children and Young People, 16 August 2019](#)

The Convener of the Education and Skills Committee wrote to the Minister for Children and Young People for additional information in respect of the Disclosure (Bill) Scotland:

- [Read the letter to the Minister for Children and Young People, 5 September 2019](#)
- [Read the letter from the Minister for Children and Young People, 19 September 2019](#)

The Convener of the Education and Skills Committee received correspondence from the Minister for Parliamentary Business and Veterans in respect of the Disclosure (Scotland) Bill and the Scottish Government's view on protected subject-matter:

- [Read the letter from the Minister for Parliamentary Business and Veterans](#)

The Committee received a submission from Fiona Drouet from the charity Emilyytest. This submission raised some points in respect of changes to procedures around PVG checks carried out by UCAS. The Committee wrote to both Universities Scotland and UCAS in this respect:

- [Read the letter from the Convener to UCAS, 16 September 2019](#)
- [Read the letter from the Convener to Universities Scotland, 16 September 2019](#)
- [Read the letter from UCAS, 26 September 2019](#)
- [Read the letter from Universities Scotland, 16 September 2019](#)

The Committee received correspondence from the Minister for Children and Young People regarding the test of "relevant for the purpose of the disclosure" and "ought to be included in the disclosure".

- [Read the letter from the Minister for Children and Young People, 21 October 2019](#)

The Committee received correspondence from the Minister for Children and Young People regarding the making of regulations concerning conditions imposed on scheme members under consideration for listing.

- [Read the letter from the Minister for Children and Young People, 15 November 2019](#)

The Convener wrote to the Law Society of Scotland and the Faculty of Advocates regarding the test of "relevant for the purpose of the disclosure" and "ought to be included in the disclosure".

- [Read the letter from the Convener to the Law Society of Scotland and the Faculty of Advocates, 19 October 2019](#)
- [Read the letter from the Law Society of Scotland, 14 November 2019](#)
- [Read the letter from the Faculty of Advocates, 19 November 2019](#)

The Convener wrote to the Minister for Children and Young People regarding amendments to the Disclosure (Scotland) Bill.

- [Read letter from the Convener to the Minister for Children and Young People, 22 November 2019](#)

### **Official Reports**

- [Official Report of 4 September 2019](#)
- [Official Report of 9 October 2019](#)
- [Official Report of 6 November 2019](#)
- [Official Report of 13 November 2019](#)
- [Official Report of 20 November 2019](#)

- [1] Scottish Government. (2019, June 12). Disclosure (Scotland) Bill Policy Memorandum. Retrieved from [https://www.parliament.scot/S5\\_Bills/Disclosure%20\(Scotland\)%20Bill/SPBill50PMS052019.pdf](https://www.parliament.scot/S5_Bills/Disclosure%20(Scotland)%20Bill/SPBill50PMS052019.pdf) [accessed 30 November 2019]
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