

DISCLOSURE (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Disclosure (Scotland) Bill ("the Bill"), introduced in the Scottish Parliament on 20 June 2019.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 50–FM);
 - a Policy Memorandum (SP Bill 50–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 50–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Explanatory Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE BILL

5. The Bill reforms the system of disclosure of criminal records administered by the Scottish Ministers through their executive agency Disclosure Scotland. Disclosure functions are currently performed under Part 5 of the Police Act 1997 ("the 1997 Act") and Part 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act"). The Bill proposes to repeal and replace Part 5 of the 1997 Act, amend the PVG Act and make provision for new disclosure products. It will also make amendments to the provisions in the PVG Act under which the barring service and the Protecting Vulnerable Groups Scheme ("the PVG Scheme") operate, and for connected purposes.
6. The Bill also allows scope for digital processes to improve safeguarding and accessing disclosure so that people who would prefer to do so can carry out their disclosure tasks online, including making applications and viewing disclosures.

THE BILL: AN OVERVIEW

7. The Bill repeals Part 5 of the 1997 Act as it applies in Scotland, and amends the PVG Act in a number of ways. Provision is made for new Level 1 and Level 2 disclosures that replace the basic, standard and enhanced disclosures under the 1997 Act and the PVG scheme record and short scheme record under the PVG Act. The Bill makes membership of the PVG Scheme mandatory for anyone in a ‘regulated role’ (the new concept to replace regulated work). Changes are also proposed with regard to Ministers’ barring functions under Part 1 of the PVG Act.

8. If enacted, the Bill will:

- reduce the number of disclosures from four main levels (basic, standard, enhanced and PVG) with ten products to two main levels (Level 1 and Level 2) with four products (sections 1-4 and 13-22), plus ‘confirmation of scheme membership’ as a replacement for ‘statement of scheme membership’ (section 84),
- end the automatic disclosure of convictions accrued by an individual while aged 12 to 17 years old (sections 5, 6, 8 to 12, 17, 23, 25, 30 to 34 and 41),
- reform and streamline the process to have certain spent convictions removed from Level 2 disclosures (sections 28 to 34),
- provide Level 2 disclosure applicants with a right to comment on proposed other relevant information (“ORI”) prior to that information being issued to a third party (sections 26 to 27 and 31 to 34),
- establish clear procedures for the registration of accredited bodies who can countersign Level 2 applications, including provisions to ensure the protection of individuals’ criminal history information (sections 47 to 57),
- provide clarity on disclosure arrangements for individuals directly employing a PVG scheme member for, for example, personal care or home tuition of children (section 57),
- end life-time membership of the PVG Scheme and replace it with a five-year membership period (sections 72 and 73),
- make it a requirement that anyone carrying out a regulated role (paid, or unpaid and voluntary) must be a member of the PVG Scheme (section 74),
- replace the concept of ‘regulated work’ in the PVG Act with ‘regulated roles’ (sections 75 to 76 and schedules 3 and 4),
- enable Scottish Ministers to impose standard conditions where appropriate on any individual who is under consideration for inclusion in one or both of the lists held under section 1 of the PVG Act i.e. the children’s list or the adults’ list, and to permit Ministers to give notice that a person is under consideration for listing and of their barred status (sections 77 to 80),
- provide new referral powers for Police Scotland and Scotland’s councils and integration joint boards (sections 81 and 83), and

- restate and amend the lists of offences in schedules 8A and 8B of the 1997 Act (schedules 1 and 2).

THE BILL: SECTION BY SECTION COMMENTARY

PART 1

DISCLOSURE OF CRIMINAL HISTORY AND OTHER INFORMATION

Level 1 disclosures

Section 1: Level 1 disclosure

9. Section 1 defines the content of a Level 1 disclosure, replacing the basic disclosure offered under the 1997 Act. This includes information about unspent convictions (other than childhood convictions) from the Criminal History System and Police National Computer. An unspent conviction is one which is not spent under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). A Level 1 disclosure will also include information about any childhood conviction which the Scottish Ministers have decided to include by applying the test under section 5(1). It will also confirm whether the applicant is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003. In this Part “conviction” has the same meaning as in the 1974 Act (see section 70 of the Bill). “Childhood conviction” of a person means a conviction for an offence committed when the person was under the age of 18 (see section 70). By virtue of amendments to be made by the Age of Criminal Responsibility (Scotland) Act 2019 (“ACR Act”)¹, a conviction of a person for an offence committed while the person was under the age of 12 will no longer be treated as a conviction for the purposes of the ACR Act and, consequently, for this Bill.

Section 2: Provision of Level 1 disclosures

10. Section 2 sets out the circumstances in which a Level 1 disclosure must be provided. For applicants aged 16 years or over, the Scottish Ministers must provide a Level 1 disclosure to anyone who makes an application. Ministers also have the power to provide a Level 1 disclosure to an applicant 12 years of age or over but under 16 years, if they consider it appropriate to do so. This might be appropriate where, for example, a fifteen year old applied for a job shortly before their sixteenth birthday and their employer requested sight of a Level 1 disclosure as a condition of employment. Subsection (3) allows Ministers to decline to provide a Level 1 disclosure if they conclude the application should have been sent to a different UK disclosure service.

Section 3: Applications by accredited bodies on behalf of individuals

11. Section 3 allows accredited bodies (as defined in section 47) to make a Level 1 disclosure application on behalf of an individual, but only with the individual’s consent. Ministers must refuse to consider such an application if the individual has not given their

¹ The Age of Criminal Responsibility (Scotland) Bill was passed by the Parliament on 7 May and, as at the date these Notes were prepared, had not yet received Royal Assent.

consent. Ministers must treat an application from an accredited body as if it had been made by the applicant, and must therefore provide the Level 1 disclosure directly to the individual and not the accredited body. The individual may then consent to their disclosure being made available by Ministers to a third party in terms of section 4 if the Level 1 disclosure was provided electronically. If the Level 1 disclosure was provided to the applicant in paper form then the applicant is free to share it with whomever they wish.

12. Ministers can refuse to provide a Level 1 disclosure to an individual where the application has been made by an accredited body and Ministers consider that the accredited body, or its lead signatory or any countersignatory, has not complied with the code of practice published under section 56.

Section 4: Provision of Level 1 disclosure to third parties

13. An applicant who receives a Level 1 disclosure by electronic communications has the choice, within a period to be prescribed² by regulations subject to the negative procedure³, either to share that disclosure with a third party, or to make an application for review under section 6. Ministers must make the disclosure available to a third party on request by the applicant.

14. Subsection (3) allows an individual to change their mind in cases where they have indicated an intention to seek a review. To do so they must make a request before the end of the prescribed period for Ministers to share their Level 1 disclosure with a third party.

15. If the individual takes no action and does not notify Ministers of their decision either to share the disclosure or seek a review, the disclosure lapses at the end of the prescribed period and nothing more may be done with it. However, subsection (5) makes it clear that a failure to act in relation to a Level 1 disclosure does not prevent the individual from applying for another Level 1 disclosure. If the provisions in this section are not followed, Ministers are not otherwise permitted to make the disclosure available to the accredited body or any other person.

16. This section does not apply to Level 1 disclosures provided in paper form.

Section 5: Level 1 disclosures: childhood conviction information

17. This section requires Ministers, before providing a Level 1 disclosure to an applicant, to find out if the applicant has any childhood convictions, and if so, to decide if information about those convictions ought to be included in the disclosure. If they so decide, Ministers must include in the disclosure such information as they consider appropriate about any childhood conviction of the applicant, and in such form as they consider appropriate. When providing the Level 1 disclosure to an applicant containing information about childhood

² 'Prescribed' means prescribed by regulations made by the Scottish Ministers.

³ 'Negative regulations' means regulations subject to the negative procedure (see section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010) i.e. a type of secondary legislation that is made by the Scottish Ministers and then laid before the Scottish Parliament for a period during which they may be annulled. Information about secondary legislation in the Scottish Parliament can be found here: <https://www.parliament.scot/parliamentarybusiness/26510.aspx>

convictions, Ministers must explain their decision and advise the applicant of their right to make an application for review by the independent reviewer. This marks a change from basic disclosures issued under the 1997 Act, where there is no separate category of childhood convictions distinct from other convictions, and therefore no prior consideration of whether it is appropriate to include them in a basic disclosure.

Level 1 disclosures: review applications

Section 6: Level 1 disclosure: application for review

18. The applicant can, within a period to be set by regulations subject to the negative procedure, request a review of the content of their Level 1 disclosure for: (a) accuracy of any information included, or (b) the inclusion of childhood conviction information. In the case of Level 1 disclosures provided electronically, the applicant can only seek a review where they have first notified Ministers of their intention to do so. Applications for review are to be known as a “Level 1 review applications”.

Section 7: Review of accuracy of information by the Scottish Ministers

19. This section makes similar provision to the corrections process provided for under section 117 of the 1997 Act. The corrections process is now integrated with the new review procedure for childhood convictions (see sections 8 to 11 below). Where a Level 1 review application seeks a review of the accuracy of any information in the disclosure, Ministers must carry out the review and must decide whether the information in question is accurate. They must notify the applicant of their decision. Subsection (5) makes it clear that a review as to the accuracy of information in a Level 1 disclosure cannot take place where the information in question relates to a childhood conviction, for which there is a separate review mechanism under section 8.

20. There is no provision for a further review by the independent reviewer on the grounds of inaccuracy. This is because an accuracy review under section 7 is administrative in nature to enable the correction of the content of the disclosure, for example an error in the applicant’s name, date of birth, address, or if the applicant has provided evidence to rebut the age presumption (see section 41). In this sense it is different to the review process for childhood convictions under sections 8 and 9, which involve an exercise of judgment as to whether such information ought to be included in a Level 1 disclosure.

Section 8: Review of childhood conviction information by the independent reviewer

21. Where a Level 1 review application seeks a review of the inclusion of information about a childhood conviction, Ministers must arrange for a review by the independent reviewer. The independent reviewer means the independent reviewer to be established by the ACR Act (see section 70 of this Bill). The independent reviewer must decide whether the childhood conviction ought to be included in the disclosure. Any finding of fact on which a conviction was based cannot be challenged in the course of a review.

Section 9: Independent reviewer: information and representations

22. Section 9 makes provision for powers of the independent reviewer to gather information for a review. The independent reviewer must invite representations from the applicant, and can require information from certain persons listed in subsection (2), within such time as the reviewer may specify. The Scottish Ministers are under a duty to provide the independent reviewer with a statement of reasons for their own decision which is the subject of the review. The chief constable cannot provide information to the independent reviewer if doing so would harm the interests of the prevention or detection of crime. The independent reviewer must take account of any representations, statement of reasons or information received when carrying out a review.

Section 10: Notification of independent reviewer's decision

23. The independent reviewer must notify the applicant and Ministers of the outcome of a review and the reasons for the decision.

Section 11: Appeal against independent reviewer's decision

24. This section allows the applicant to appeal to a sheriff on a point of law only against a decision of the independent reviewer. The "point of law" ground would include an appeal on many of the grounds which might be the subject of an application to the court for judicial review. For instance, an appeal may be taken if the applicant claimed that there had been procedural unfairness in the process before the independent reviewer, or if the independent reviewer's decision was said to be incompatible with the applicant's ECHR rights.

25. An appeal must be made within three months of the independent reviewer notifying the applicant of the reviewer's decision. If the applicant notifies Ministers of an intention not to appeal to the sheriff before the end of that three month period, the right to appeal is lost. Notifying Ministers sooner of an intention not to appeal will allow the process under section 12 for providing a new Level 1 disclosure to begin sooner (see section 12(6)(b)).

26. The role of the sheriff in an appeal is to confirm or overturn the independent reviewer's decision. Any finding of fact on which a conviction was based cannot be challenged in the course of an appeal. The sheriff can hear the appeal in private. The sheriff can allow an appeal in part where it relates to two or more convictions. The sheriff's decision in an appeal is final.

Section 12: Provision of new Level 1 disclosure on conclusion of review proceedings

27. Once proceedings on a Level 1 review application have finally concluded (according to the definition in subsection (6)), Ministers must provide a new Level 1 disclosure to the applicant. The applicant is treated as having made a new application for a Level 1 disclosure on the date on which proceedings finally concluded. Ministers are required to give effect to the final outcome of the proceedings (as defined by subsection (7)), for instance by correcting any inaccurate information or by excluding information about any childhood convictions which the independent reviewer or sheriff has determined ought not to be included. Where an application for review of childhood conviction information was

unsuccessful, the applicant cannot make a Level 1 review application about the same information when their new Level 1 disclosure is issued to them at the end of the review process, nor can they apply for review of that information where it appears on any subsequent Level 1 disclosure provided in respect of the original disclosure application. They could make a future review application about the information following any subsequent application for a Level 1 disclosure.

Level 2 disclosures

Section 13: Level 2 disclosure

28. Section 13 defines the content of a Level 2 disclosure, which replaces standard and enhanced disclosures under the 1997 Act and scheme records under the PVG Act (collectively known as ‘higher level disclosures’). It includes a criminal disposal (defined by subsection (3) to include spent convictions and unspent cautions), information about a childhood conviction, information provided by the chief constable, and confirmation of whether the applicant is subject to the notification requirements under the Sexual Offences Act 2003. It is also to include additional information where sections 19 or 20 apply (see below).

29. Information that was previously removed from a Level 2 disclosure under section 34(4) following a successful review application (see below), must not be included in a Level 2 disclosure if it appears to Ministers that the subsequent Level 2 disclosure has been requested for the same purpose as the previous Level 2 disclosure.

Section 14: Non-disclosable convictions

30. Section 14 defines the term “non-disclosable conviction”. A non-disclosable conviction will not be included in a Level 2 disclosure. To be non-disclosable, a conviction must be spent. It must also either (i) be for an offence that does not appear on either List A or List B (schedules 1 and 2 of the Bill), or (ii) be for an offence that appears on List B and meet one of three conditions. The conditions are that: (a) the disposal was an admonition or absolute discharge (as defined by subsection (3)); (b) the conviction was a childhood conviction and at least 5 years and 6 months have passed since the date of conviction; (c) the conviction was not a childhood conviction and at least 11 years have passed from the date of conviction. Ministers can modify the offence lists in schedules 1 and 2 by regulations. Section 87(2) specifies that these are to be made by regulations subject to the affirmative procedure.⁴

Section 15: Provision of Level 2 disclosures

31. Section 15 sets out the circumstances in which a Level 2 disclosure is provided to the applicant. Ministers must provide a Level 2 disclosure where the applicant is over 16 years and makes an application which is countersigned by an accredited body and is for a

⁴ ‘Affirmative regulations’ means a type of secondary legislation that must be approved by the Scottish Parliament before it is made. Information about secondary legislation in the Scottish Parliament can be found here: <https://www.parliament.scot/parliamentarybusiness/26510.aspx>

permitted purpose (countersigning and permitted purpose are both further explained in section 16). Ministers also have discretion to provide a Level 2 disclosure to an applicant 12 years of age or over but under 16 years if they consider it appropriate to do so. There may be some exceptional cases where this is justified such as, for example, where a foster family had a 15 year old child in the household. The application must still comply with section 16 and the child will not be able to become a member of the PVG Scheme. Ministers can refuse to provide a Level 2 disclosure if they conclude that the person who countersigned the application or certain other persons connected with the application (listed in subsection (4)) have not complied with the code of practice issued by Ministers under section 56.

Section 16: Level 2 disclosure applications: countersigning and purposes

32. Section 16 requires a Level 2 disclosure application to be countersigned by an accredited body, and to include a statement from that body about the purpose for which the disclosure is needed. The purpose must be one in relation to which the usual rules in sections 4(2)(a) or (b) of the 1974 Act⁵, about not having to self-disclose spent convictions when asked about criminal history, have been excluded by an order made by the Scottish Ministers.⁶ This ensures that Level 2 disclosures (which can include details of spent convictions) may only be requested in circumstances where a person would be required to self-disclose certain spent convictions. References to the purpose of a Level 2 disclosure are to be understood in this way throughout Part 1 of the Bill.

Section 17: Level 2 disclosures: childhood conviction information

33. Before providing a Level 2 disclosure to an applicant, Ministers must find out if the applicant has any childhood convictions that are not non-disclosable convictions. If there are any such childhood convictions, Ministers must decide if they are relevant to the purpose of the Level 2 disclosure, and if the childhood conviction information ought to be included in the disclosure. Ministers may request information under section 66 from the persons listed in subsection (3) of that section. If Ministers decide to include information about any childhood conviction in the disclosure, they must include such information as they consider appropriate and in such form as they consider appropriate. They are also required to notify the applicant of the reasons for their decision and advise the applicant of their right to make an application for review of the inclusion of that information by the independent reviewer. This marks a change from higher level disclosures issued under the 1997 Act and PVG Act, where there is no separate category of childhood convictions distinct from other convictions,

⁵ The central policy behind the 1974 Act is that people should be able to move on from their previous offending behaviour after sufficient time has elapsed and where their behaviour was not of a severity that it must be disclosed forever. It is recognised, however, that the protection provided by the 1974 Act could not and should not apply in all circumstances. To deal with this, the Scottish Ministers have a power to make certain exclusions and exceptions to that general protection.

⁶ The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 made under section 4(4) of the 1974 Act sets out the circumstances in which an individual cannot deny the existence of a spent conviction. Article 3 of the order excludes the application of section 4(1) in relation to proceedings specified in schedule 1 of the Order and in respect of any proceedings relating to a decision mentioned in Part 1 of schedule 2. Article 4 excludes the application of section 4(2) in relation to the questions listed in schedule 3. These are questions asked to assess the suitability of an individual for a variety of occupations, positions, licences and registrations. Finally, article 5 excepts from section 4(3) a number of professions, offices, employments, occupations and decisions listed in schedule 4 and Part 1 of schedule 2.

and therefore no prior consideration of whether it is appropriate to include them in a basic disclosure.

Section 18: Provision of relevant police information

34. Before providing a Level 2 disclosure to an applicant, Ministers must ask the chief constable if the chief constable (defined in section 70 as the chief constable of the Police Service of Scotland) has any information the chief constable reasonably believes to be relevant for the purpose of the disclosure, and which in the chief constable's opinion ought to be disclosed. The chief constable is required to comply promptly with a request from Ministers under this section, but need not provide information which the chief constable thinks would be contrary to the interests of the prevention or detection of crime. It is expected that similar provision in relation to the other relevant police forces will be made by order under section 104 of the Scotland Act 1998.

Section 19: Further information for certain purposes: non-PVG scheme members

35. Section 19 provides for further information to be included in a Level 2 disclosure in cases where the disclosure is for a prescribed purpose. The purposes to which this section applies will be set out by regulations subject to the negative procedure and will relate to children and protected adults (but will be roles which fall short of regulated roles for which PVG scheme membership would be mandatory). Where one of the prescribed purposes applies, Ministers must include on the disclosure any further information about the individual, in addition to the information which must always be included in a Level 2 disclosure in terms of section 13.

36. The further information which must be disclosed is: whether the applicant is barred from carrying out a regulated role with either children or adults (as relevant to the purpose of the disclosure) and, if barred, information about why; whether Ministers are considering the applicant for listing under the PVG Act and, if they are, whether any standard conditions have been imposed on the applicant under the new section 13A to be inserted into the PVG Act by section 77(2) of the Bill; and whether any prescribed civil court orders are in force against the applicant.

Section 20: Further information for certain purposes: PVG scheme members

37. Section 20 provides for further information to be included in a Level 2 disclosure in cases where the applicant is a PVG scheme member and the purpose of the disclosure is to enable or assist another person to consider the applicant's suitability to do a regulated role. Consideration of suitability is further defined by section 69 (see below). Ministers must include on the disclosure any further information about the individual, in addition to the information which must always be included in a Level 2 disclosure in terms of section 13.

38. The further information which must be disclosed is: confirmation that the applicant is a scheme member for the regulated role of the type to which the Level 2 disclosure relates; whether Ministers are considering the applicant for listing under the PVG Act and, if they are, whether any standard conditions have been imposed on the applicant; and whether any prescribed civil court orders are in force against the applicant.

39. In cases where a scheme member participates in the Scheme for both types of regulated role, but the purpose of the disclosure only relates to one type, the Level 2 disclosure must not include information that is only relevant to the other type of role.

Section 21: Provision of Level 2 disclosure to accredited bodies

40. An applicant who receives a Level 2 disclosure has the choice, within a period to be prescribed by regulations subject to the negative procedure, either to ask Ministers to share a copy of the disclosure with the accredited body that countersigned the application, or to notify Ministers of an intention to seek a review under section 23. Ministers must make the disclosure available to the accredited body on request by the applicant.

41. The individual can change their mind in cases where they have indicated an intention to seek a review. To do so they must make a request before the end of the prescribed period for Ministers to share their Level 2 disclosure with the accredited body. If the individual takes no action and does not notify Ministers of their decision either to share the disclosure or seek a review, the disclosure lapses at the end of the prescribed period and nothing more may be done with it. However, a failure to act does not prevent the individual from making another Level 2 disclosure application for the same purpose.

42. If the provisions in this section are not followed, Ministers are not otherwise permitted to make the disclosure available to the accredited body or any other person. This is a change from the current law for standard and enhanced disclosures under the 1997 Act, and the PVG scheme record under the PVG Act, which are usually provided to the accredited body without the need for a further request by the applicant that disclosure should take place.

Section 22: Level 2 disclosures: Crown employment

43. This section excludes the requirement for an application for a Level 2 disclosure to comply with section 16 where it is needed in connection with Crown employment. Instead of being countersigned by an accredited body, the application must be accompanied by a statement of the purpose for which the disclosure is required (which, as under section 16, must be one in relation to which the protections against self-disclosure of spent convictions have been disapplied (see paragraph 32)). It must also be accompanied by a statement that it is required to consider the applicant's suitability for a Crown appointment. Subsection (3) lists the persons who may make the necessary statement to accompany the application. Provision is made in subsection (5) so that any reference to the accredited body that countersigned an application for a Level 2 disclosure in the rest of Part 1, or to the accredited body to whom a Level 2 disclosure is made available, is to be read as a reference to the person making the statement under subsection (1). Subsection (6) ensures that references to the purpose of the disclosure in Part 1 are to be read as the purpose mentioned in the statement that accompanied the disclosure.

Level 2 disclosures: review applications

Section 23: Level 2 disclosure: application for review

44. Where a Level 2 disclosure is provided to an applicant, the applicant can, within a period to be set by regulations subject to the negative procedure, request a review of: (a) the accuracy of any information included in the disclosure, or (b) the inclusion of any reviewable information. Reviewable information is: information about a childhood conviction; information provided by the chief constable for inclusion in the disclosure; and details of a removable conviction. A removable conviction is a spent conviction that is not a childhood conviction, either for an offence in List A where at least 11 years have passed since the date of conviction, or for an offence in List B that is not a non-disclosable conviction (as defined in section 14.)

45. The applicant can only seek a review where Ministers were given prior notice of the applicant's intention to apply for review, in line with the process described in section 21. The applicant must specify in the review application the information that the applicant wishes to be reviewed. This is important as there are separate provisions for each of the four possible reviews: sections 24, 25, 26 and 28. An application for review (of whatever type, including combined reviews) is known as a "Level 2 review application".

Section 24: Review of accuracy of information by the Scottish Ministers

46. This section makes similar provision to the corrections process provided for under section 117 of the 1997 Act and section 51 of the PVG Act. The corrections process is now integrated with the new review procedures provided for in sections 25 to 33 below. Where a Level 2 review application seeks a review of the accuracy of any information in the disclosure, Ministers must carry out a review and must decide whether the information in question is accurate. They must notify the applicant of their decision. A review of the accuracy of information in a Level 2 disclosure cannot take place where the information in question relates to reviewable information, for which there are separate review mechanisms under sections 25, 26 or 28. An accuracy review is also excluded where the information could be reviewed under section 18 of the ACR Act, i.e. where it relates to information that has been provided by the police about a person's behaviour while they were under the age of 12.

47. There is no further review by the independent reviewer under section 24. An accuracy review under section 24 is administrative in nature to enable the correction of the content of the disclosure, for example an error in the applicant's name, date of birth, address, or if the applicant has provided evidence to rebut the age presumption (see section 41). This is in contrast to the other review procedures under sections 25, 26 or 28, which involve an exercise of judgment as to whether information ought to be included in a Level 2 disclosure.

Section 25: Review of childhood conviction information by the independent reviewer

48. Where a Level 2 review application seeks a review of the inclusion of information about a childhood conviction, Ministers must arrange for a review by the independent reviewer of Ministers' decision to disclose the childhood conviction. The independent

reviewer must decide whether the childhood conviction is relevant for the purpose of the disclosure and whether information about it ought to be included in the disclosure. Any finding of fact on which a conviction was based cannot be challenged in the course of a review. Section 31 makes further provision on the procedure for reviews carried out by the independent reviewer.

Section 26: Review of relevant police information by the police

49. Where a Level 2 review application seeks review of the inclusion of relevant police information that has been provided by the chief constable of the Police Service of Scotland, Ministers must refer the application to the chief constable for a review. The chief constable must decide whether the chief constable still reasonably believes that the information is relevant to the purpose of the disclosure and that it ought to be included in the disclosure. The chief constable must invite representations from the applicant when carrying out the review and have regard to them. It is necessary that the initial review is carried out under the authority of the chief constable, as the person whose duty it is to provide ORI. In practice, however, as a matter of good administrative practice, it is expected that the review would be carried out by members of police staff who have not previously been involved in the original disclosure process. It is expected that similar provision for review of relevant police information provided by the chief officers of other relevant police forces will be made by order under section 104 of the Scotland Act 1998.

50. On completion of the review, the chief constable must notify Ministers of the decision and reasons for it, and in turn Ministers must notify the applicant of the outcome and reasons. In cases where the chief constable has decided the relevant police information should remain on the disclosure, Ministers must advise the applicant of the option to have the chief constable's decision reviewed by the independent reviewer under section 27.

51. No review application may be made under this section if the information could be reviewed under section 18 of the ACR Act (which relates to information provided by the police about pre-12 years behaviour which can no longer amount to a criminal conviction).

Section 27: Review of relevant police information by the independent reviewer

52. This section gives an applicant the right to request a review by the independent reviewer following a review of relevant police information under section 26 by the chief constable. If a request for review is made within the prescribed period, Ministers must arrange for a review by the independent reviewer. The independent reviewer's role is to decide whether the police information is relevant for the purpose of the disclosure and whether it ought to be included. Section 31 makes further provision on the procedure for reviews carried out by the independent reviewer.

Section 28: Review of removable convictions by the Scottish Ministers

53. Where a Level 2 review application seeks review of the inclusion of details of a removable conviction, Ministers must carry out a review and decide whether the conviction is relevant to the purpose of the disclosure and whether details of it ought to be included. Ministers must give the applicant an opportunity to make representations and may request

information under section 66 from the persons listed in subsection (3) of that section. Ministers must take account of any representations or information received before reaching their review decision. Any finding of fact on which a conviction was based cannot be challenged in the course of a review. Ministers must notify the applicant of their decision, and in cases where the review outcome is that information about a removable conviction should remain on the disclosure, the reasons for that decision, and the applicant must be advised of the option to have the Ministers' decision reviewed by the independent reviewer under section 29.

Section 29: Review of removable convictions by the independent reviewer

54. This section gives an applicant the right to request a review by the independent reviewer following a review of removable conviction information under section 28 by Ministers. If a request for review is made within the prescribed period, Ministers must arrange a review by the independent reviewer. The independent reviewer's role is to decide whether the removable conviction is relevant for the purpose of the disclosure and whether it ought to be included. Any finding of fact on which a conviction was based cannot be challenged in the course of a review. Section 31 makes further provision on the procedure for reviews carried out by the independent reviewer.

Section 30: Combination of reviews by the independent reviewer

55. Where a Level 2 review application has been made seeking review of more than one type of reviewable information and, as a result, more than one review is to be carried out by the independent reviewer, Ministers must arrange for the independent reviewer to bring them together and treat them as a single review. This will avoid duplication of effort, for example, two requests for information being sent to the same person. It will also ensure a single, streamlined outcome for the applicant. There are provisions to ensure that where one or more of the strands of review requires a prior decision by either the chief constable or Ministers, the single review by the independent reviewer cannot begin until any such earlier reviews are completed and the prescribed period for the applicant to request a review by the independent reviewer has expired (either with or without a request for review having been made). Where there is more than one type of earlier review, the independent review process can only proceed when all prior reviews are complete.

Section 31: Independent reviewer: information and representations

56. Section 31 gives the independent reviewer powers to gather information in connection with the review. The independent reviewer must invite representations from the applicant, and can require information to be provided by certain persons listed in subsection (2), within such time as the reviewer may specify (subject to any time periods set by Ministers in regulations made under section 38(2)(c)). The Scottish Ministers are under a duty to provide the independent reviewer with a statement of reasons for their own decision or the chief constable's decision which is the subject of the review (the chief constable has to notify Ministers of the reasons for the chief constable's decision under section 26(7)). The chief constable cannot provide information to the independent reviewer if doing so would harm the interests of the prevention or detection of crime. The independent reviewer

must take account of any representations, statement of reasons or information received when carrying out a review.

Section 32: Notification of independent reviewer's decision

57. The independent reviewer must notify the applicant and Ministers of the reviewer's decision and the reasons for it. Notification must also be given to the chief constable where a decision by the chief constable was under review.

Section 33: Appeal against independent reviewer's decision

58. This section allows an appeal to a sheriff on a point of law only against a decision of the independent reviewer. The "point of law" ground would include an appeal on many of the grounds which might be the subject of an application to the court for judicial review. For instance, an appeal may be taken if the applicant claimed that there had been procedural unfairness in the process before the independent reviewer, or if the independent reviewer's decision was said to be incompatible with the applicants ECHR rights.

59. An appeal may be taken by the applicant or, where a decision by the chief constable was under review, the chief constable. An appeal must be made within three months of the independent reviewer's decision, starting on the date on which the decision was notified to the applicant. If the applicant notifies Ministers of an intention not to appeal to the sheriff before the end of that three-month period, the right to appeal is lost. Notifying Ministers sooner of an intention not to appeal will allow the process under section 34 for providing a new Level 2 disclosure to begin sooner (see section 34(6)(c)).

60. The role of the sheriff in an appeal is to confirm or overturn the independent reviewer's decision. Any finding of fact on which a conviction was based cannot be challenged in the course of an appeal. The sheriff can hear the appeal in private. The sheriff can allow an appeal in part where it relates to more than one decision or information about two or more convictions. The sheriff's decision in an appeal is final.

Section 34: Provision of new Level 2 disclosure on conclusion of review proceedings

61. Once proceedings on a Level 2 review application have finally concluded (according to the definition in subsection (6)), Ministers must provide a new Level 2 disclosure to the applicant. The applicant is treated as having made a new application for a Level 2 disclosure on the date on which proceedings finally concluded. Ministers are required to give effect to the final outcome of the proceedings (as defined by subsection (7)), for instance by correcting any inaccurate information or by excluding reviewable information which the final decision maker in the review process (be that Ministers, the chief constable, the independent reviewer or the sheriff) has determined is not relevant for the purpose of the disclosure and ought not to be included.

62. Where an application for review of reviewable information was unsuccessful, the applicant cannot make a Level 2 review application about the same information when their new Level 2 disclosure is issued to them at the end of the review process, nor can they apply

for review of that information where it appears on any subsequent Level 2 disclosure provided for the same purpose as the one for which the review was unsuccessful.

63. Where information is excluded from the new Level 2 disclosure provided to the applicant, and the applicant is a PVG scheme member, Ministers must also exclude the information from a scheme member's PVG scheme record where the purpose of the disclosure related to the type of regulated role for which the individual is a scheme member. Consequential amendments are made in schedule 5 of the Bill to section 51 of the PVG Act, which makes provision for corrections to a person's scheme record.

Common provisions relating to Level 1 and Level 2 disclosures

Section 35: Form and manner of provision of disclosures

64. Ministers must determine the form and manner in which Level 1 and Level 2 disclosures are to be provided. The disclosure can be provided by electronic communications, but there must be scope for them to be made available in a written or a printed document where the applicant so requests. Ministers can make different determinations as to the form and manner of disclosures for different disclosures or different purposes, and they must publish the determinations as they see fit. Level 1 and Level 2 disclosures have to specify the date on which they were provided to the applicant.

Section 36: Reclassification of applications

65. Ministers can treat an application received for any type of disclosure as an application for any other disclosure where it appears to them that another type of disclosure would be more appropriate in the circumstances. There are provisions allowing them to adjust the level of fees accordingly.

Section 37: Regulations about procedure for disclosure requests

66. Ministers have the power to make regulations subject to the negative procedure with regard to: the making of Level 1 or Level 2 disclosure applications; the provision of disclosures to applicants; and the provision of disclosures to persons who are not applicants.

Section 38: Regulations about review procedure

67. Ministers have the power to make regulations subject to the negative procedure in connection with the procedure for any of the possible reviews under Part 1 of the Bill. The regulations can cover any aspect of the procedure relating to a review, including specifying time periods for issuing notices, making representations, and providing statements of reasons.

Section 39: Power to modify definitions of Level 1 disclosure and Level 2 disclosure

68. Ministers can make regulations by the affirmative procedure to modify the provisions which define the content of Level 1 and Level 2 disclosures, including to enable

information held outside the United Kingdom to be included on a Level 1 or Level 2 disclosure provided under the Bill.

Section 40: Childhood information: power to modify other enactments

69. Ministers can make regulations by the affirmative procedure to modify any other disclosure enactment (except the Bill, when enacted) to ensure that childhood convictions or other criminal disposals incurred in childhood are not required or allowed to be disclosed by another person unless that information has been disclosed on a Level 1 or Level 2 disclosure provided under the Bill. This is to ensure that the rules in the Bill which prevent automatic disclosure of childhood convictions are not undermined by any other disclosure enactment that provides for the release of such information.

Section 41: Presumption as to age in relation to convictions

70. This section allows Ministers to make a presumption about a person's age when the person committed an offence. It may not always be clear to Disclosure Scotland from conviction information how old the convicted person was at the time of the offence. This is important for determining whether an applicant's conviction is a "childhood conviction" because it is the age of the applicant at the date of the offence rather than the date of conviction that is relevant for that purpose. Ministers can presume that the applicant's age as at the date the offence occurred was the same as at the date of conviction. Evidence to rebut the presumption can be provided and would lead to a review on accuracy grounds under either section 7 (for a Level 1 disclosure) or section 24 (for a Level 2 disclosure).

Offences relating to Level 1 and Level 2 disclosures

Section 42: Falsification of a Level 1 or Level 2 disclosure

71. Section 42 replicates the falsification offences in section 123 of the 1997 Act and section 65 of the PVG Act in respect of the new Level 1 and Level 2 disclosure products. It is an offence under subsection (1) for a person, with intent to deceive, to make a false Level 1 or Level 2 disclosure. It is an offence for a person to change or amend a Level 1 or Level 2 disclosure. It is also an offence for a person to use, or allow another person to use, a Level 1 or Level 2 disclosure in a way that suggests it relates to a person other than the individual who is the subject of the disclosure. Where a barred individual falsifies a disclosure record to access a regulated role, that individual would be committing this offence *and* the offence under section 34 of the PVG Act. Subsection (2) makes it an offence for a person to knowingly make a false or misleading statement so that they or another person can obtain a Level 1 or Level 2 disclosure. Subsection (3) sets out the penalties for an offence committed under this section.

Section 43: Unlawful disclosure of a Level 2 disclosure

72. This section makes it an offence for a person to whom a Level 2 disclosure is made available or disclosed to unlawfully disclose it to another person. Subsection (2) provides that lawful disclosure occurs in the circumstances permitted under section 44 and will

otherwise be unlawful. It is also an offence for a person to whom an unlawful disclosure was made to disclose the Level 2 disclosure to another person. These offences are needed to ensure that sensitive information contained in Level 2 disclosures is not shared unnecessarily. Subsection (4) sets the penalties for an offence committed under this section.

Section 44: Lawful disclosures of Level 2 disclosures

73. This section sets out the circumstances in which it is not an offence to disclose a Level 2 disclosure. This section recognises that it may be necessary to share Level 2 disclosures with other employees, members and office-holders within an organisation, or where the disclosure has been requested on somebody else's behalf. This section removes such sharing from the scope of the offence in section 43.

74. Disclosure under this section is only allowed in so far as (a) the disclosure is made in the course of the functions of the person sharing the disclosure, (b) for the same purpose as the purpose for which the Level 2 application was originally made, and (c) where the disclosure application has been made on another person's behalf, further sharing of the information in the disclosure by the accredited body who countersigned the application is permitted by section 57(3) or (4) (see below). This is important to ensure that disclosure information is only shared for legitimate purposes and with appropriate persons.

Section 45: Unlawful request for and use of a Level 2 disclosure

75. Section 45(1) makes it an offence for a person to request, or otherwise seek sight of a Level 2 disclosure for a purpose other than a permitted purpose. "Permitted purpose" for this offence is defined as a purpose for which the usual rules under section 4(2)(a) or (b) of the 1974 Act (about not having to self-disclose spent convictions) have been disapplied by virtue of an order made under section 4(4) that Act including, in the case of a Level 2 disclosure for a PVG scheme member, for the purpose of considering the suitability of the person for regulated roles (matching the purpose referred to in section 20(1)(b)). This is to prevent anyone from attempting to see a disclosure record other than to check an individual's suitability for the various offices or employment for which the normal protections against self-disclosure of spent convictions (see paragraph 32) are disapplied. Section 45(3) separately makes it an offence to use a Level 2 disclosure for a purpose other than a permitted purpose. In relation to this offence, the only permitted purpose for use is the same purpose as the purpose for which the disclosure was applied for. Subsection (5) provides the penalties for an offence committed under this section.

Section 46: Offences under sections 43 and 45: supplementary provision

76. Section 46 makes exceptions to the offences under sections 43 and 45. Subsection (1)(a) and (b) makes clear that it is not an offence for the subject of the disclosure to share a Level 2 disclosure that relates to them, nor is it an offence where the subject of the disclosure consents to their disclosure information being shared. Subsection (1)(c) to (e)

provides further circumstances in which the offence in section 43 is disapplied. Ministers have the power to prescribe further circumstances under subsection (1)(f).

77. Subsection (2)(a) and (b) has a similar effect of disapplying the offence under section 45 where the use of the disclosure is by the subject of the disclosure or by another person with the consent of the subject of the disclosure. Subsection (2)(c) to (e) provides further circumstances in which the offence at section 45 is disapplied. Ministers have the power under subsection (2)(f) to prescribe other circumstances in which it will not be an offence to disclose or use a Level 2 disclosure.

Accredited bodies

Section 47: Register of accredited bodies

78. This section requires Ministers to maintain a register of accredited bodies, and also contains the definition of “accredited body” and what is meant by “registration”.

Section 48: Registration in the register of accredited bodies

79. To make applications for a Level 1 disclosure on behalf of individuals, or to countersign applications for Level 2 disclosures, a person must be registered as an accredited body. Registration can be for one of those purposes or both. This section sets out who can apply to be included in the register of accredited bodies upon Ministers being satisfied that the application has been made to act in connection with disclosure requests. For accredited bodies acting in relation to Level 2 disclosures, Ministers must be satisfied that each relevant individual, defined by subsection (6), is suitable to have access to disclosure information. Suitability is assessed under section 50.

80. An application by an individual who employs others in the course of a business (a “sole business proprietor”) must be accepted where the individual is aged 18 years or over and meets the registration condition in subsection (4) and, if the individual is seeking registration to be able to countersign Level 2 disclosures, the condition in subsection (5). The condition in subsection (4) is that the individual satisfies Ministers that the individual is likely to be making applications for Level 1 disclosures and/or countersigning Level 2 disclosures (depending on the type of registration sought). The condition in subsection (5) is that Ministers are satisfied that the individual is a suitable person to receive information contained in a Level 2 disclosure.

81. Furthermore, an application by a body corporate or unincorporated or a person appointed to an office by virtue of an enactment must be accepted if the person satisfies the condition mentioned in subsection (4) and, where the person is seeking registration to be able to countersign Level 2 disclosures, that Ministers are satisfied that the person’s lead signatory (and, if applicable, countersignatory (or countersignatories)) (see section 52) are suitable persons to have access to information contained in Level 2 disclosures (this is the condition in subsection (5)).

82. Ministers also have discretion to register an individual aged 16 or 17 years who is a sole business proprietor and meets the condition in subsection (4) and, where the individual will act in relation to Level 2 disclosures, the condition in subsection (5).

83. If Ministers are considering refusing an application for registration, they must give the applicant the opportunity to make representations. Refusal may be partial, if the person is seeking registration to act in relation to both Level 1 and Level 2 applications.

Section 49: Protection of information: removal of registration

84. This section sets out the factors that Ministers can take account of when deciding whether to remove a person from the register of accredited bodies because a “relevant individual” is not a suitable person to have access to disclosure information. A “relevant individual” is, in the case where the accredited body is an individual who is a sole business proprietor, that individual and, in the where the accredited body is a body corporate or unincorporated or a person appointed to an office by virtue of an enactment (a “body corporate accredited body”), the body’s lead signatory or any countersignatory.

85. Subsections (5) and (6) ensure that criminal conviction information about an individual giving rise to concern about the individual’s suitability to have access to information contained in a Level 2 disclosure is not disclosed to anyone other than that individual. This means that both the relevant person who Ministers consider may not be a suitable person to have access to that information and, where the accredited body is a body corporate accredited body, the accredited body, are entitled to make representations before a decision to remove the accredited body. But a body corporate accredited body will not be permitted to know the reasons for the proposed removal where the reasons relate to criminal conviction information of the accredited body’s lead signatory or countersignatory. A decision to remove an accredited body on the ground that a relevant individual is unsuitable can only be made in relation to the body’s registration to countersign applications for Level 2 disclosures; any registration relating to the making of applications for Level 1 disclosures on behalf of an individual would not be affected (see subsection (7)).

Section 50: Suitable persons to have access to disclosure information

86. This section sets out the information Ministers may have regard to for determining whether an individual is suitable to have access to disclosure information for the purposes of section 48(5) or 49(2). “Individual” in this context refers to the sole business proprietor applying to be (or registered as) an accredited body or, in the case of body corporate applicants or accredited bodies, the lead signatory or countersignatory (or nominee for that position).

87. Subsection (1)(a) to (g) sets out the information Ministers may have regard to, including prescribed details of criminal disposals, information from the barred lists, representations made by the individual concerned, and information requested by Ministers from the chief officer of any relevant police force under subsection (2). Ministers have the power under subsection (5) to prescribe relevant police forces by regulations subject to the negative procedure, and subsection (7) lists various bodies which constitute a police force

for this purpose, in addition to the UK police forces covered by the general definition in section 70. Under subsection (3), the chief constable (defined in section 70 as the chief constable of the Police Service of Scotland) is required to comply promptly with a request from Ministers under this section, but need not provide information which the chief constable thinks would be contrary to the interests of the prevention or detection of crime. It is expected that similar provision in relation to the other relevant police forces will be made by order under section 104 of the Scotland Act 1998.

88. Subsection (6) allows Ministers to have regard to the individual's removal from or refusal of an equivalent registration in England and Wales or Northern Ireland.

Section 51: Removal of registration on other grounds

89. This section sets out the grounds on which Ministers may remove an accredited body from the register other than the suitability of individuals to have access to disclosure information. Subsection (2)(a) to (c) specifies the grounds on which removal of registration may occur, including that the accredited body is no longer likely to act in relation to the type of disclosure request they are registered for, the accredited body has breached any condition imposed on them, or failure to comply with the code of practice published by Ministers under section 56. Where an accredited body is registered in relation to both making applications for Level 1 disclosures and countersigning applications for Level 2 disclosures, Ministers may remove the accredited body in relation to either or both (see subsection (3)).

90. Before removing an accredited body from the register, Ministers must notify the accredited body that they are considering whether to remove them, provide the reasons for considering that removal and give the accredited body the opportunity to make representations (see subsection (4)).

Section 52: Lead signatories and countersignatories

91. This section sets out rules about what the different types of person making an application for inclusion in the register must do in relation to the nomination of a lead signatory and countersignatories (see definitions in subsection (10)). A person seeking registration as a body corporate accredited body must nominate a lead signatory (see subsection (1)). Where that person is seeking registration to countersign applications for Level 2 disclosures, that person must also nominate one or more countersignatories (who may be the same individual who is nominated as the lead signatory – see subsection (9)). Subsection (2) relates to the nomination of a substitute lead signatory or a substitute or additional countersignatory by a body corporate accredited body.

92. Where the accredited body application is made by a sole business proprietor in relation to the countersigning of applications for Level 2 disclosure, that person may nominate one or more countersignatories (see subsection (3)). Where an accredited body is a sole business proprietor and is registered to countersign applications for Level 2 disclosures, the accredited body may nominate one or more countersignatories (see subsection (4)). Ministers may make regulations, subject to the negative procedure, under subsection (5) prescribing the details that must be included in an application nominating a

lead signatory or countersignatory. Any accredited body must advise Ministers of any changes in those prescribed details of its lead signatory or any countersignatory (see subsection (7)).

93. Subsection (11) provides that an individual may not act as the lead signatory or countersignatory of an accredited body unless their details are included in the entry for the accredited body in the register of accredited bodies (and Ministers will include these details if they accept a nomination - see subsection (6)).

Section 53: Lead signatories and countersignatories: acceptance or refusal of nomination and removal from the register

94. This section places certain duties on Ministers to accept the nomination of an individual as the lead signatory or a countersignatory of an accredited body. Ministers must accept the nomination of someone over the age of 18 who is employed or appointed directly by the accredited body, or employed by someone acting on the accredited body's behalf (see subsection (1)).

95. But under subsection (2), where the accredited body's registration relates to countersigning Level 2 disclosure applications (either alone or in conjunction with the making of Level 1 disclosures) Ministers may refuse to accept the nomination of an individual as a lead signatory or countersignatory if, in their opinion, the individual is not a suitable person to have access to information contained in a Level 2 disclosure (see definition of "disclosure information" in section 70).

96. Subsection (3) allows Ministers to remove all of the prescribed details of a lead signatory or countersignatory if that individual is not a suitable person to have access to information contained in a Level 2 disclosure, or if they have failed to comply with the code of practice published under section 56. In determining whether an individual is a suitable person to have access to disclosure information, Ministers may have regard to any of the information mentioned in section 50(1) and any representations made by the individual who is (or is nominated as) the lead signatory or a countersignatory of the accredited body concerned.

97. Subsection (5) requires Ministers to notify the individual whose nomination as lead signatory or countersignatory of an accredited body they are considering whether to refuse that they are so considering and of the reasons for doing so, and give the individual an opportunity to make representations. Subsection (6) replicates the procedure for those individuals already in the register who may become unsuitable at a later point in time of their registration for reasons under subsection (3)(a) or (b).

98. Subsection (7) provides that, in relation to an applicant seeking, or an accredited body with, mixed registration to make applications for Level 1 disclosures and countersign applications for Level 2 disclosures, the refusal of the nomination of an individual as lead signatory or the removal of a lead signatory from the register on the grounds that the individual is not a suitable person to have access to Level 2 disclosure information does not affect the individual's ability to act in relation to Level 1 disclosures.

Section 54: Notification and review of decisions: removal from register or refusal of registration or nomination

99. This section places certain duties on Ministers should they refuse an application for inclusion in the register, or remove a person from it (and subsection (2) provides for partial or whole removal from the register of an accredited body which is registered both to make applications for Level 1 disclosures and to countersign applications for Level 2 disclosures).

100. Ministers must notify the affected person(s) (see subsection (4)) and give reasons for their decision. The person so refused or removed can apply for a review of Ministers' decision if they consider that the information on which it was based may have been inaccurate (see subsection (6)). Ministers may make regulations subject to the negative procedure under section 55 (see subsection (2)(g)) in connection with those reviews.

Section 55: Regulations about registration

101. This section gives Ministers a power to make regulations about the register of accredited bodies and registration in the register. The regulations will be subject to negative procedure in the Scottish Parliament and can cover aspects such as: information to be provided on application; the content of the register; imposing conditions on accredited bodies; the process for refusing and removing registration; and re-application following refusal or removal.

Section 56: Code of practice

102. Ministers must publish a code of practice and lay it before the Scottish Parliament as soon as possible after publication. They can revise the code of practice if necessary (see subsection (6)). Subsection (4) lists the persons who must comply with the code of practice. Failure to comply with the code can lead to Ministers imposing a condition in relation to the registration of an accredited body (see subsection (7)) or refusing to provide a Level 2 disclosure (see section 15(3)).

Section 57: Sharing of Level 2 disclosure information by accredited bodies

103. Section 57 applies to accredited bodies, and allows them to countersign a Level 2 disclosure application under section 15 on their own behalf, or on behalf of other persons. When they are acting on behalf of others, this is often referred to by Disclosure Scotland as an 'umbrella body' service.

104. The persons on whose behalf an accredited body can act must either be someone who would be eligible in terms of section 48(3) to become an accredited body (but who is not registered as an accredited body), or an individual who employs other persons but not in the course of a business. The ability to act on behalf of another person is subject to the condition that the person is asking a question about the individual who is the subject of the disclosure for the purpose of the disclosure, which may, for example, be in connection with recruitment into paid or voluntary work.

105. In cases where the accredited body acts on behalf of a person of the type eligible to become an accredited body (i.e. bodies corporate or unincorporated, statutory office-holders or sole business proprietors), the accredited body may share the Level 2 disclosure with that other person if it is satisfied that the information will be shared only with those who need to see it for the purpose of the disclosure (i.e. assessing the individual's suitability for a particular office or employment) (see subsection (3)).

106. In cases where the accredited body acts for an individual seeking to employ or engage the services of another individual in a personal capacity, the accredited body cannot share the Level 2 disclosure or disclose its content. The accredited body can, however, provide advice to the individual in relation to how any information in the disclosure might affect the decision for which the Level 2 disclosure was requested (see subsection (4)). This means that an accredited body could provide suitability advice to individuals who are in the process of recruiting or using a self-employed worker, such as a music tutor, nanny or carer. Ministers may, by regulations subject to the negative procedure, set a maximum fee that an accredited body may charge an individual for acting on their behalf in this way (see subsection (5)).

Evidence of identity

Section 58: Evidence of identity

107. Ensuring that an identity presented is an actual person, and that the individual presenting the identity is entitled to use the identity on an application, are critical to avoid misuse of disclosures, such as a disclosure being issued to someone in an identity that is not their own. Section 58 allows Ministers to require an applicant to provide evidence that they are who they say they are, and Ministers do not need to consider an application if that evidence is not forthcoming, or other requirements set by Ministers are not met, or if they are not satisfied by the evidence as to the applicant's identity.

Section 59: Power to use personal data to check identity

108. Section 59 supports Ministers' powers to verify an applicant's identity by enabling enquiries to be made of a number of public bodies, including the Registrar General for Scotland, the Keeper of the Records of Scotland and Ministers in certain UK Government Departments. Subsection (2)(d) gives Ministers a power by regulations, subject to negative procedure, to prescribe other organisations to support the authentication of the identity of disclosure applicants.

Section 60: Power to use fingerprints to check identity

109. Section 60 gives Ministers the option of using fingerprints to verify the identity of an applicant. This power will only be used in cases where other means of authentication have been unsuccessful, for instance where the Scottish Ministers cannot otherwise match an applicant to a criminal record held in central records. The process will be governed by regulations subject to the negative procedure. Ministers can refuse to consider a disclosure application in cases where the applicant refuses to provide fingerprints. Ministers must

ensure the destruction of fingerprints taken for assisting the authentication of identity, once that task is completed.

General

Section 61: Form and manner of applications and notices

110. Section 61 allows Ministers to determine the form and manner of applications (which includes any documents accompanying the request or application). This includes a determination for applications to be made electronically. Ministers must allow applications to be made in printed or written form, except when an accredited body makes the application for a Level 1 disclosure on behalf of an individual (using the process in section 3). For Level 1 disclosure applications made on behalf of an individual, Ministers can determine how to evidence the individual's consent. Ministers can make different determinations for different purposes. They must publish them in such manner as they see fit. Ministers need not deal with an application unless it is made in accordance with the appropriate determination. The section also allows Ministers to make similar provision in relation to the giving of notices or notifications.

Section 62: Fees

111. This section allows Ministers, by regulations subject to the negative procedure, to prescribe fees for the exercise of their functions under Part 1. For example, fees may be imposed by regulations in connection with applications relating to accredited bodies, disclosure products, disclosure requests, and related applications (such as for removal of a conviction). The regulation-making powers allow for different fees, including annual or recurring fees, to be prescribed for different purposes, and for the reduction, refund or waiver of the prescribed fee in prescribed circumstances (see subsection (3)). Ministers need not consider any application unless the fee that is provided for by regulations in relation to the application is paid in the manner provided for in the regulations (see subsection (5)).

Section 63: Fees for provision of information by the chief constable

112. Section 63 requires Ministers to pay the Scottish Police Authority an appropriate fee for information received from the chief constable of the Police Service of Scotland (see definition of "chief constable" in section 70) in connection with Ministers' functions under Part 1 of the Bill.

Section 64: Guidance for chief constable

113. This section allows Ministers to issue guidance to the chief constable of the Police Service of Scotland about the chief constable's functions under Part 1 of the Bill. Guidance can only be issued after Ministers have consulted the chief constable. The guidance can be reviewed as necessary. Guidance must include provision for any review process under section 26 and the chief constable must have regard to the guidance when exercising any functions under Part 1 of the Bill (including where any review is being carried out).

Section 65: Sharing of information with the chief constable

114. Section 65 gives Ministers a power to share information with the chief constable of the Police Service of Scotland. It applies to information held in connection with Ministers' functions under this Part of the Bill, but all that may be shared is the name, address and date of birth of an individual, and other information to enable the Police Service of Scotland to satisfy itself of a person's identity. When Ministers disclose information to the chief constable it is to be used only by constables of the Police Service of Scotland in connection with the chief constable's functions under Part 1 of the Bill, or for law enforcement purposes as defined in section 31 of the Data Protection Act 2018.

115. This power may, for example, be exercised by the Scottish Ministers when as a result of searching central records in connection with an application made for a disclosure, it appears that Ministers hold a more current residential address than that in central records for an applicant who is wanted by the police in relation to an arrest warrant.

Section 66: Sources of information

116. Ministers are entitled to access information held in central records (as defined by section 70) to assist with Ministers' functions. Ministers can also require certain persons to provide them with information which they believe the person holds and which they consider necessary to carry out their functions under this Part of the Bill, for example gathering information to enable them to make a determination under section 17. The chief constable cannot provide information if disclosing it would be contrary to the interests of the prevention or detection of crime. Ministers cannot be held liable for any inaccuracy in information provided to them under Part 1 of the Bill by a third party.

Section 67: Delegation of functions of Scottish Ministers

117. Section 67 allows Ministers to delegate their functions under the Bill, except functions which involve making regulations, issuing and revising guidance to the chief constable, publishing the code of practice under section 56 and laying it in the Scottish Parliament, determining the form and manner of applications and disclosures under this Part of the Bill, and setting fees. A delegation may be revoked or varied at any time. Subsection (4) protects a person to whom a function is delegated from proceedings in cases where inaccurate information is provided to that person by another party who provides information to Ministers under Part 1 of the Bill.

Section 68: Saving: disclosure of information and records

118. Section 68 prevents the state disclosure system from prejudicing any other power which exists elsewhere to disclose information or make records available. For instance, the Bill does not affect the police's common law powers to make a community disclosure to a parent, carer or guardian of a child who is requesting information about someone involved

in their family life, specifically if they are concerned that the person might be a child sexual offender.⁷

Section 69: Definition of consideration of suitability

119. This section replicates the effect of section 73 of the PVG Act. It explains what is meant by references to consideration of the suitability of a person for a type of regulated role for the purpose of provisions relating to Level 2 disclosures for PVG scheme members (see sections 20(1)(b) and 45(2)). It captures people appointing someone to a regulated role directly, people supplying an individual to someone else to carry out a regulated role, and accredited bodies acting as ‘umbrella bodies’ assessing the suitability of individuals on behalf of another person. There is also a power under paragraph (d) to prescribe other purposes.

Section 70: Interpretation of Part 1

120. Section 70 provides the meanings for certain words and phrases used in Part 1 of the Bill

PART 2

PROTECTION OF VULNERABLE GROUPS

Scheme membership

Section 71: Participation in Scheme

121. Section 71 substitutes a new section 45 (Participation in Scheme) into the PVG Act. The new section 45(1) provides that an individual aged 16 or over may apply to participate in the PVG Scheme (the “Scheme”), or if already a scheme member apply to renew their membership. This is read with section 45(2) which sets out the type of regulated roles in relation to which an individual can participate in the Scheme i.e. individuals may participate in the Scheme in relation to regulated roles with children, regulated roles with adults, or both types of regulated role. The new section 45(3) states that Ministers must allow membership unless the person is under the age of 16, or barred from carrying out the type of regulated role to which their application to join, or renew their membership of, the Scheme relates.

Section 72: Duration of Scheme membership

122. Section 72 inserts a new section 45A (Duration of Scheme membership) into the PVG Act. Section 45A(1) sets the length of PVG scheme membership at five years. Section 45A(3) requires Ministers to contact the persons mentioned in subsection (4) (namely, the scheme member and each organisation and personnel supplier for which they know the

⁷ <https://www2.gov.scot/Resource/0047/00470296.pdf>

scheme member is carrying out a regulated role) three months before membership is due to expire to alert them that expiry is approaching.

123. Section 45A(5) and (6) work together to ensure that information about a scheme member who participates in the Scheme for both types of regulated roles but notice of expiry relates to only one of those types of regulated role. In that case, the notice to the organisation (see definition in section 97(1) of the PVG Act) or the personnel supplier in relation to that type of regulated role must not disclose information about the scheme member's participation in the Scheme in relation to that other type of regulated role (or the fact that the scheme member participates in the Scheme in relation to that other type of regulated role).

124. In cases where a scheme member has applied for renewal of membership before the date of expiry, and where Ministers have not determined the application, then membership must continue until Ministers' determination of the renewal application occurs (see subsection (7)).

Section 73: Failure to apply for renewal of Scheme membership

125. Section 73 inserts a new section 45B (Failure to apply for renewal of Scheme membership) into the PVG Act. This section sets out the rules around what happens when a scheme member fails to apply to renew membership before the expiry date. Ministers cannot end scheme membership unless they are satisfied that the scheme member is no longer carrying out a regulated role. So membership is extended by 4 weeks, referred to as the "extended membership period", to enable Ministers to satisfy themselves of that fact (see subsection (2)).

126. If Ministers cannot be so satisfied before the extended membership period lapses, they may extend membership for six months – referred to as the "discretionary membership period" (see subsection (3)(b)). Where Ministers do this, they must notify the scheme member and any organisation or personnel supplier for whom they know the scheme member is carrying out a regulated role. If during that discretionary membership period the scheme member does not apply to renew their membership and Ministers are satisfied that the scheme member is no longer carrying out a regulated role then the individual can be removed from the Scheme (see subsection (5)).

127. If the scheme member does not apply to renew their membership of the scheme and Ministers believe that the scheme member is still carrying out a regulated role they may place the individual under consideration for listing on the list relevant to the type of regulated role in which they participate in the Scheme (see subsection (6)).

128. Where an application is made by a scheme member to renew their membership to continue to participate in the Scheme during either the extended or discretionary membership period, Ministers must allow ongoing participation in the Scheme until the application is determined by them. Ministers can refuse to consider an application by an individual for a Level 2 disclosure (or a confirmation of scheme membership under section 54) that is made by the scheme member during any discretionary membership period (see

subsection (10)). It is intended that this will encourage individuals who require to remain in the Scheme to do so by renewing their membership at the appropriate time. An application for a Level 2 disclosure made by a scheme member during the discretionary membership period may be disregarded in which case the individual would not be able to share a Level 2 disclosure or confirmation of their membership with, for example, an employer. This could prevent them from performing or continuing to perform a regulated role.

Section 74: Compulsory Scheme membership

129. Section 74 inserts four new sections: sections 45C, 45D, 45E and 45F into the PVG Act. The new section 45C (Individuals must be scheme members to carry out regulated roles) makes it an offence under subsection (1) for an individual to carry out, or to seek or agree to carry out, a regulated role if not a scheme member. It is a defence if the person did not know they were carrying out a regulated role, or if they did not know that their membership had not been renewed. The offence does not apply to any individual who is barred from the type of regulated role in question (although the offence under section 34 of the PVG Act may be triggered), or who is under the age of 16 years of age.

130. The new section 45D (Organisations not to use individuals for regulated roles without confirming scheme membership) makes it an offence for an organisation to offer a regulated role to a person unless the organisation has first had PVG scheme membership confirmed by Disclosure Scotland issuing a Level 2 disclosure to them. It is a defence if the organisation can prove that it did not know, and could not be expected to have known, that the person was not a scheme member. An organisation which had offered a role conditional on receipt of a disclosure does not commit an offence. The offence also does not apply in relation to any individual who is barred from the type of regulated role in question (although section 35 of the PVG Act may apply), or who is under the age of 16 years of age.

131. Section 45E (Personnel suppliers not to supply individuals for regulated roles without confirming scheme membership) makes provision, in relation to personnel suppliers offering an individual to carry out a regulated role for an organisation. A personnel supplier commits an offence by offering or supplying a person for a regulated role in an organisation unless the personnel supplier has first had PVG scheme membership confirmed by Disclosure Scotland issuing a Level 2 disclosure to them. The offence does not apply in relation to any individual who is barred from the type of regulated role in question (but see section 36 of the PVG Act), or who is under the age of 16 years.

132. The new section 45F (Penalties for offences relating to regulated roles by individuals not in Scheme) sets out the penalties for the offences introduced by sections 45C, 45D and 45E.

Regulated roles

Section 75: Regulated roles

133. Section 75 substitutes a new section 91 (Regulated roles) into the PVG Act to replace the concept of regulated work in the current section 91. Schedules 3 and 4 in the Bill set out the meaning of “regulated roles with children”, and “regulated roles with adults”,

substituting the existing schedules 2 and 3 of the PVG Act. Part 2 of schedule 5 of the Bill makes various consequential amendments arising from the substituted concept of regulated roles.

Section 76: Meaning of “protected adult”

134. Section 76 amends the meaning of ‘protected adult’ in section 94 of the PVG Act. There is a move away from the previous lengthy and complex definition to a narrower range of issues affecting a person’s wellbeing, capabilities and capacity. Individuals accessing health services provided by certain registered health professionals (to be prescribed by Ministers by regulations subject to the negative procedure) will also be protected adults while being provided with those services. Also, the age a person must have attained to be regarded as a protected adult is changed from someone aged 16 or older, to someone aged 18 or older. This is to prevent an overlap between the children’s and protected adult’s workforces under the PVG Scheme.

Scheme members under consideration for listing

Section 77: Conditions imposed on scheme members under consideration for listing

135. Section 77 inserts three new sections into the PVG Act. The sections relate to Ministers’ new powers to impose conditions on a person who is under consideration for listing. New section 13A (Conditions imposed on scheme members under consideration for listing) contains powers for Ministers to impose prescribed conditions on scheme members who are under consideration for listing. The conditions are to be prescribed in regulations subject to the negative procedure in the Scottish Parliament. Ministers will also be able to use their powers under section 42(1)(c) of the PVG Act to make further procedure about the procedure which is to be followed before making a decision to impose conditions on a scheme member who is under consideration for listing.

136. The conditions that Ministers impose can be based only on the information that led them to place the scheme member under consideration for listing, information gathered under section 18 to 20 of the PVG Act, or information gathered while performing their functions relating to the PVG Scheme.

137. Any conditions imposed last for an initial period to be prescribed by regulations subject to the negative procedure to be made by Ministers. They can be extended beyond that period subject to confirmation by a sheriff on application by Ministers under section 13B. The conditions will lapse at the end of the initial period prescribed by regulations unless they are confirmed by a sheriff.

138. Section 13A(5) requires Ministers to notify the persons listed in subsection (6) of the fact that conditions have been imposed, and what those conditions are. Ministers must inform the scheme member only of the reasons why the conditions are being imposed.

139. The new section 13B (Application to sheriff for confirmation of conditions) allows Ministers to apply to a sheriff to have conditions imposed by them approved by a sheriff.

The scheme member on whom conditions have been imposed is entitled to be a party to proceedings before the sheriff (subsection (8)). An application must be made before the prescribed period under section 13A(4) expires. In cases where the application is made, the prescribed period extends until the sheriff determines the application (see new section 13B(3)). The application is to be made when it is lodged with the sheriff clerk (see subsection (10)). A sheriff can hear the application in private (see subsection (11)).

140. Subsections (4) to (7) specify the decisions that a sheriff may make on an application; that any variation of a condition or imposition of a new condition cannot go beyond what Ministers could have imposed under section 13A; that if the sheriff approves the application (with or without variation, or imposition of a new condition) the conditions will remain in place while Ministers are considering whether to list the scheme member in the adults' list or the children's list (as they case may be); and, where the sheriff removes that condition imposed by Ministers, that removal takes effect from the date of the sheriff's decision. The persons to be notified of a sheriff's decision are set out in subsection (9), and they are the same persons as were notified under section 13A(6).

141. The new section 13C (Breach of conditions: offences) makes it an offence for a scheme member to fail to comply with a condition imposed. It is also an offence for a person for whom the scheme member carries out, or seeks to carry out, a regulated role to fail to take action to prevent a condition imposed being adhered to. It is a defence for a scheme member or any employer that they did not know, and could not reasonably be expected to have known, that a condition was imposed. The penalties for the offences are set out in subsection (4).

Section 78: Notice of consideration for listing

142. Section 78 inserts two new subsections (3A) and (3B) into section 30 of the PVG Act. Together, the subsections give Ministers a discretionary power to notify an individual who employs other persons but not in the course of business, for example a parent who is employing a music tutor to give their child piano lessons or an individual employing a carer within the context of self-directed care, that a scheme member is being considered for listing, and where appropriate give notice of any conditions imposed on the individual.

Section 79: Withdrawal from Scheme when under consideration for listing

143. Section 79 inserts a new section 59A (Withdrawal from Scheme when under consideration for listing) into the PVG Act. This new section is contingent on Ministers having removed an individual from the PVG Scheme under section 59 of the PVG Act (where the scheme member has applied to be removed from the register and Ministers are satisfied that the scheme member is not carrying out a regulated role), and the removal occurring while the individual was under consideration for listing in the children's list or the adults' list or both. Ministers can decide whether to continue with the consideration case after removal takes place. A decision under section 59A(2) is not a decision under section 30(4) of the PVG Act, meaning it does not amount to a decision not to list the individual.

144. Subsection (3) amends section 60 of the PVG Act to require that a notice under section 60(1), advising of removal from the Scheme, must give information about any decision under section 59A(2) where appropriate.

Notice of barred status

Section 80: Notice of barred status

145. Section 80 inserts a new section 46A (Notice of barred status) into the PVG Act. Section 46A(2) provides that Ministers must advise an accredited body that an individual has been refused scheme membership due to their being listed in either the children's list, the adults' list or both lists. This notification can be made only when Ministers know the person has sought or agreed to carry out a regulated role from which they are barred.

References in relation to the lists

Section 81: Reference by chief constable

146. Section 81 inserts a new section 6A (Reference by chief constable) into the PVG Act. This new power enables the chief constable of Police Service of Scotland to make a referral to Ministers if the chief constable considers an individual is or has been carrying out a regulated role without being a PVG scheme member (which will now be an offence under the new section 45C of the PVG Act). This power exists independently of the powers the chief constable has to investigate whether an offence has been committed by the individual. Subsection (3) inserts a new paragraph (aa) into section 10(1) of the PVG Act so that Ministers can take action on such a referral by the chief constable, and if appropriate place the individual under consideration for listing.

Section 82: Removal of references by court

147. Section 82 repeals a number of provisions in the PVG Act to bring to an end the requirement for court referrals upon conviction for a relevant offence. This process is no longer necessary in light of the new mandatory scheme requirement for all regulated roles.

Section 83: Reference by councils or integration joint boards

148. Section 83 extends the power to make a referral to Ministers to Scottish local authorities and integration joint boards. To achieve this, section 8 of the PVG Act is amended. The referrals can be made only in connection with issues that arise in exercise of certain statutory functions by these bodies. These functions are listed in subsection (3).

Confirmation of PVG Scheme membership

Section 84: Confirmation of scheme membership under the PVG Act

149. Section 84 substitutes two sections in the PVG Act: 46 (Statement of scheme membership), and section 54 (Disclosure of scheme membership).

150. The new section 46 requires Ministers to provide confirmation of scheme membership to each scheme member and sets out what the content is to be. The confirmation of scheme membership replaces what was previously a statement of scheme membership under the PVG Act. It is a form of disclosure which contains no vetting information (i.e. no details of criminal offences or police information). Under the new provisions, it can now also include information about conditions imposed on a scheme member who is under consideration for listing. The conditions are capable of being imposed under the new section 13A of the PVG Act which is being inserted by section 77 of the Bill. Subsection (3) provides that a confirmation of scheme membership will always be provided to the individual when joining the Scheme, unless the individual makes an application under section 15 for a Level 2 disclosure (to which section 20 of the Bill applies) at the same time.

151. The new section 54 requires Ministers, if requested by the applicant, to provide the confirmation of scheme membership to a third party. This must be for the purpose of enabling the third party to consider a scheme member's suitability to carry out a regulated role. When Ministers make a confirmation of scheme membership available to a third party, they may also send a copy of the confirmation to the scheme member, if requested.

Miscellaneous

Section 85: Retention of scheme records after removal

152. Section 85 inserts a new subsection (3) into section 61 of the PVG Act, so that if Ministers decide under section 59A(1) of the PVG Act not to continue with a consideration case, they can retain information about the scheme member who applied to be removed from the Scheme under section 59 while under consideration for listing.

Section 86: Meaning of “conviction”

153. Section 86 inserts a meaning for conviction into section 97(1) of the PVG Act, and also inserts the term into the Act's index in schedule 5. The meaning of conviction is derived from the Rehabilitation of Offenders Act 1974. This ensures that a consistent definition of conviction applies throughout the PVG Act (previously the definition only applied for the purposes of Part 2).

154. The meaning of conviction now applies throughout the PVG Act, and “convicted” is construed accordingly except in relation to section 14. A narrower definition is needed for section 14, which deals with automatic listing, so that it does not include disposals by way of absolute discharge – see section 247 of the Criminal Procedure (Scotland) Act 1995.

Part 3

GENERAL

Section 87: Regulations

155. This section sets out the extent of powers Ministers have to make regulations. Regulations under any of sections 14(4), 39(1) or 40(1) and regulations under section 88(1)

which amend any Act must be subject to affirmative procedure. Otherwise, negative procedure can be used. This section does not apply to commencement regulations made under section 93(2).

Section 88: Ancillary provision

156. Section 88 enables Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision relating to the Bill. The power can be used to modify any Act including the Act resulting from this Bill.

Section 89: Consequential and minor modifications

157. Section 89 introduces schedule 5, which is in three parts. Part 1 deals with amendments arising from Part 1 of the Bill, including repeal of Part 5 of the 1997 Act as it applies in Scotland, and the requirement on Ministers to provide the PVG scheme record and the PVG short scheme record. Part 2 contains amendments to various Acts as a result of Part 2 of the Bill (including the change from ‘regulated work’ to ‘regulated roles’ and various other amendments to the PVG Act itself). Part 3 sets out other consequential amendments and minor modifications to Acts, including the PVG Act.

Section 90: Individual culpability where organisation commits offence

158. Section 90 makes provision about offences under the Bill committed by legal entities, such as companies, partnerships and associations. Where an offence under the Bill is committed by a “relevant organisation”, this section provides that the relevant organisation and, in some cases, a “responsible individual” in that organisation are both to be held responsible. This ensures that those running legal entities who are responsible for the decisions leading to an offence under the Act can also be prosecuted for it.

Section 91: Meaning of “PVG Act”

159. Section 91 provides a meaning for “the PVG Act” in the Bill.

Section 92: Crown application

160. Section 92 prevents the Crown from being criminally liable under the Bill.

Section 93: Commencement

161. Section 93 makes provision for commencement of the Bill, including the power to bring provisions into force by regulations, which can include transitional, saving or transitory provisions, and which may make different provision for different purposes.

Section 94: Short title

162. Section 94 gives the Bill’s short title, namely, the Disclosure (Scotland) Act 2019.

Schedule 1: List A offences

163. This schedule contains the list of offences that must always be disclosed, unless removed following a successful review application to Ministers or the independent reviewer, or after an appeal to the sheriff. It has three Parts. Part 1 lists common law offences at paragraphs 1 to 16. Part 2 lists statutory offences at paragraphs 17 to 63, and statutory aggravations at paragraph 64. Part 3 covers common law aggravations (65 and 66), inchoate offences (67 and 68), superseded offences (69), combined offences (70), and corresponding offences from elsewhere in the UK or abroad (71). List A replaces and amends the list of offences in schedule 8A of the 1997 Act.

Schedule 2: List B offences

164. This schedule contains the list of offences that must be disclosed until they become non-disclosable within the meaning of section 14, or until removed following a successful review application to Ministers or the independent reviewer, or after an appeal to the sheriff. It has three Parts. Part 1 lists common law offences at paragraphs 1 to 20. Part 2 lists statutory offences at paragraphs 21 to 106, and statutory aggravations at paragraphs 107 and 108. Part 3 covers common law aggravations (109 and 110), inchoate offences (111 and 112), superseded offences (113), combined offences (114), and corresponding offences from elsewhere in the UK or abroad (115). List B replaces and amends the list of offences in schedule 8B of the 1997 Act.

Schedule 3: Schedule to be substituted for schedule 2 of the PVG Act

165. This schedule provides for the substitution of the existing schedule 2 of the PVG Act to deal with the change from “regulated work with children” to “regulated roles with children”.

Part 1: Preliminary

166. Paragraph 1(1) defines what is meant by a regulated role with children. To be carrying out a regulated role, a person must be carrying out one or more activities listed in Part 2 of the schedule. The activities must be carried out as a necessary part of the role and take place in Scotland (or take place outside the UK, the Channel Islands and the Isle of Man and be carried out by an individual who is ordinarily resident in the UK for an organisation or a personnel supplier with a place of business in Scotland, whose functions in relation to the carrying out the activity by the individual are principally exercised at that place of business – see paragraph 1(4)).

167. In addition, carrying out the activities must give the person the opportunity to have contact with children (but, the carrying out of 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). “Contact with children” and “unsupervised contact with children” are defined by paragraph 3.

168. A person with day-to-day supervision or management of an individual carrying out a regulated role is also to be treated as being in a regulated role. Training or studying in Scotland for the activities mentioned in Part 2 of the schedule will also amount to a regulated role with children (as will training or study for one of those activities that is undertaken outside the UK, the Channel Islands and the Isle of Man by an individual who is ordinarily resident in the UK for an organisation or a personnel supplier with a place of business in Scotland, whose functions in relation to the carrying out the activity by the individual are principally exercised at that place of business – see paragraph 1(5)). For example, a person ordinarily resident in Glasgow going to Trinity College in Dublin to study medicine would not have to join the PVG scheme. However, the provisions bring into scope any training provided overseas where a person is doing a placement or secondment with a non-Scottish organisation, but their training is still subject to overall supervision and sign-off by a training provider in Scotland. Therefore, a Scottish-domiciled medical student at Glasgow University on exchange to Trinity College and working in a children’s hospital in Dublin would still need to be a scheme member for the period of the placement/exchange.

169. There are exceptions to regulated roles with children set out in paragraph 2 of the schedule. A person will not be carrying out a regulated role when the interaction with a child is a result of the child being in paid employment (see paragraph 2(1)(a)). This means, for example, that a shop manager recruiting or supervising children aged 16 or 17 as assistants (whether paid or unpaid) is not within the scope of regulated roles with children and does not need to become a member of the PVG Scheme. There is also an exclusion for activities carried out in the course of a family or personal relationship (see paragraph 2(1)(b)), which would exclude, for example, a friend providing paid childcare services to another friend. This will be wider than the existing exclusions from the definition of “work” in section 95(3) and (4) of the PVG Act (which are to be repealed), since it will no longer be necessary for there to be no commercial benefit. Scheme membership is considered to be unnecessary in circumstances where a relationship of trust already exists between the parties involved, even if the role being carried out is remunerated.

Part 2: Activities

170. Part 2 of schedule 3 lists the activities that give rise to a regulated role with children for which PVG scheme membership will be mandatory under the Bill.

171. Paragraph 4 covers all types of foster care, including private foster care arrangements. Paragraph 5 is relevant to care arrangements arranged by a local authority.

172. Paragraph 6 applies, for example, to scout leaders or safety and welfare officers at sports clubs.

173. Paragraph 7 covers social workers (including the Chief Social Worker Officer of a local authority), members of the Children’s Panel, Children’s Hearings Scotland or the Scottish Children’s Reporter Administration.

174. Paragraph 8 covers teaching, instructing or delivering training to children. This captures teaching of any subject, in an establishment such as a school or home-based tuition.

175. Paragraph 9 makes provision for education inspectors, the Chief Education Officer of a local authority, members of the governing body responsible for the management of a school or further education institution and the Registrar of Independent Schools in Scotland.

176. Paragraph 10 captures those who act on behalf of children where a power imbalance exists, for instance football agents and talent scouts. This matter was considered by the Scottish Parliament's Health and Sport Committee in their report *Child Protection in Sport*⁸.

177. Paragraph 11 covers individuals engaged in the provision of advice or guidance in relation to career development, employability or health and wellbeing, for example careers advisers.

178. Paragraph 12 makes provision to cover activities such as crèche workers where individuals will be in charge or caring for children.

179. Paragraphs 13 to 19 cover various health professionals who are actively practising and are not, for example, on a career break.

180. Paragraph 20 covers those providing domestic services (such as cleaning, food preparation, caretaking or maintenance roles) in establishments which are provided exclusively for children, such as schools, children's hospitals, nurseries or outdoor activity centres for children.

181. Paragraph 21 is qualified by paragraph 1(2)(b)(i) in Part 1 of the schedule so that the activities mentioned in paragraph 21 must give rise to the opportunity to have unsupervised contact with children (see paragraph 3 for the meaning of "unsupervised contact with children").

182. Paragraph 22 covers the provision of a care home service or independent healthcare service as defined by the interpretation section at paragraph 31.

183. Paragraph 23 makes provision for self-employed individuals providing personal care services.

184. Paragraph 24 covers individuals providing counselling, therapy or support services to children. Excluded from scope however are individuals providing such a service to a fellow prisoner in a young offenders institution for example. This exception will enable individuals who may be automatically barred from carrying out regulated roles with children due to the nature of their convictions to take part in peer to peer support services provided to other prisoners.

⁸<https://sp-bpr-en-prod-cdneq.azureedge.net/published/HS/2017/4/26/Child-Protection-in-Sport/3rd%20Report.pdf>

185. Paragraph 25 covers persons who have responsibility for the scrutiny or inspection, on behalf of a statutory body, of medical and healthcare services provided for children.

186. Paragraph 26 covers, for example, individuals providing entertainment or party services for children or photography services for children, or people running art classes or summer clubs for children.

187. Paragraph 27 covers for example individuals volunteering at Sunday school, youth church activities or chaplaincy services. This paragraph covers all denominations or religious beliefs.

188. Paragraph 28 covers individuals providing sports coaching or coaching of other physical activities to children.

189. Paragraph 29 makes provision for individuals engaging in the provision of transport services for children but is limited to those driving or escorting children, for example, on a school bus rather than a depot manager or individual arranging the scheduling for the transport service.

190. Paragraph 30 captures persons such as trustees of a children's charity and the Commissioner for Children and Young People in Scotland.

191. Interpretation is provided for certain terms and expressions used in schedule 3 by paragraph 31. Paragraph 32 gives Ministers a power (by regulations subject to the negative procedure) to amend the meaning of the expression "further education institution" but only for the purposes of this schedule.

Part 3: General

192. Paragraph 33 allows Ministers by regulations to modify schedule 3, by affirmative procedure. Paragraph 34 clarifies that Ministers' power to make regulations under paragraph 33 can include provision to disapply or otherwise modify the application of the offence provisions at sections 34 to 37 and sections 45C to 45F of the PVG Act.

Schedule 4: Schedule to be substituted for schedule 3 of the PVG Act

193. This schedule provides for the substitution of the existing schedule 3 of the PVG Act to deal with the change from "regulated work with adults" to "regulated roles with adults".

Part 1: Preliminary

194. Paragraph 1(1) defines what is meant by a regulated role with adults. A person must be carrying out one or more activities listed in Part 2 of schedule 4. The activities must be a necessary part of the role and take place in Scotland (or take place outside the UK, the Channel Islands and the Isle of Man and be carried out by an individual who is ordinarily resident in the UK for an organisation or a personnel supplier with a place of business in

Scotland, whose functions in relation to the carrying out the activity by the individual are principally exercised at that place of business – see paragraph 1(4)). In addition, the carrying out of the activities must give the individual the opportunity to have “contact with protected adults” (defined in paragraph 3 of the schedule).

195. A person with day-to-day supervision or management of an individual carrying out a regulated role with adults is also to be treated as being in a regulated role (see paragraph 1(3)(a)). Those involved in training or studying in Scotland for the activities listed in Part 2 will also be treated as carrying out a regulated role with adults (see paragraph 1(3)(b)) (as will individuals who are ordinarily resident in the UK who are undertaking training or study for a regulated role with adults outside the UK, the Channel Islands and the Isle of Man for an organisation or a personnel supplier with a place of business in Scotland, whose functions in relation to the carrying out the activity by the individual are principally exercised at that place of business – see paragraph 1(5)).

196. There are exceptions to regulated roles with adults set out in paragraph 2. An activity carried out in the course of a family or personal relationship is not a regulated role. This will be wider than the exclusions from the definition of “work” in section 95(3) and (4) of the PVG Act (which is to be repealed by the Bill), since it will no longer be necessary for there to be no commercial benefit. This means it will be possible for a paid care arrangements to take place between family members or friends which will not require the carer to become a PVG scheme member.

Part 2: Activities

197. Part 2 of schedule 4 lists the activities that give rise to a regulated role with adults.

198. Paragraphs 4 and 5 cover teaching, instructing, training or supervising protected adults, as well as the provision of advice or guidance in relation to education, training, career development, employability, health or wellbeing.

199. Paragraphs 6 to 12 cover various health professions who are actively practising and are not, for example, on a career break.

200. Paragraph 13 covers domestic service activities that may be provided exclusively to a protected adult, for example in a hospital, hospice, care home or adult placement setting. This could include such things as cleaning, maintenance and food preparation.

201. Paragraph 14 covers activities where an individual is in charge of protected adults, for instance someone leading a group or one-to-one activity with protected adults.

202. Paragraph 15 makes provision for self-employed individuals providing personal care services.

203. Paragraph 16 covers individuals providing counselling, therapy or support services to protected adults. Excluded from scope, however, are individuals providing such a service

to a fellow prisoner. This exception will enable individuals who may be automatically barred from carrying out regulated roles with protected adults due to the nature of their convictions to take part in peer to peer support services provided to other prisoners.

204. Paragraph 17 covers the Chief Social Work Officer of a local authority and persons who have responsibility for the scrutiny or inspection, on behalf of a statutory body, of medical and healthcare services provided for protected adults.

205. Paragraphs 18 covers individuals providing leisure, cultural, social or recreational activities for protected adults.

206. Paragraph 19 covers, for example, individuals volunteering at church activities or chaplaincy services. This paragraph covers all denominations or religious beliefs.

207. Paragraph 20 covers individuals providing sports coaching or other physical activities to protected adults.

208. Paragraph 21 makes provision for individuals engaging in the provision of transport services for protected adults but is limited to those driving or escorting protected adults, for example, rather than a depot manager or individual arranging the scheduling for the transport service.

209. Paragraph 22 includes individuals holding a position of responsibility in an organisation whose main purpose is to provide benefits for or to protected adults.

210. Interpretation is provided for certain terms and expressions used in schedule 4 by paragraph 23.

Part 3: General

211. Paragraph 24 allows Ministers by affirmative regulations to modify schedule 4. Paragraph 25 clarifies that Ministers' power to make regulations under paragraph 24 can include provision to disapply or otherwise modify the application of the offence provisions at sections 34 to 37 and sections 45C to 45F of the PVG Act.

Schedule 5: Consequential and minor modifications

212. This schedule is introduced by section 89. It repeals Part 5 of the Police Act 1997 (certificates of criminal records etc.) and makes various consequential and minor modifications to other Acts (including the PVG Act) as a result of changes to the disclosure system and the operation of the PVG scheme and barring service made by the Bill.

DISCLOSURE (SCOTLAND) BILL

EXPLANATORY NOTES

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