

# **Protection of Vulnerable Groups and the Disclosure of Criminal Information**

## **A consultation on proposals for change**

**April 2018**

## Ministerial Foreword



I am delighted to launch the Scottish Government's consultation on the disclosure regime in Scotland.

The Scottish Government has a clear and enduring commitment to making Scotland a safe and nurturing place for all of us; children and adults alike. We also have an equal and determined commitment to the social inclusion of our most marginalised and stigmatised groups, including those who have convictions.

These aspirations can be seen throughout our current legislative programme. We are taking legislation through the Scottish Parliament to raise the age for criminal responsibility from 8 to 12 and another bill will bring forward new legislation that will reform the rehabilitation of offenders legislation, making sure that, where appropriate, people with convictions can move on more quickly from mistakes made earlier in life to secure employment and make a good contribution to society.

This PVG Review consultation is therefore part of a bigger coherent theme; the PVG Scheme and disclosure system generally must continue to offer world-class protection and safeguarding but also play its part in helping people get into work. A disclosure regime fit for 21<sup>st</sup> century Scotland must strike the right balance between protecting the public from those whose past offending may indicate unsuitability for a specific post or role while also enabling those people with previous criminal activity to enter the workforce and make a positive economic and personal contribution to society. These are not contradictory ambitions, we must achieve both.

I hope that you will take the time to respond to this consultation. It is a real opportunity to be heard and we want to extend out to as wide an audience as possible. The PVG Scheme is a success; you have told us that and about how much you value it. Let's make it even better.

A handwritten signature in grey ink that reads "Maree Todd".

**Maree Todd**  
**Minister for Childcare and Early Years**

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## About

Responding to the consultation: We are inviting responses to this consultation by 18 July 2018.

Please respond to this consultation online [here](#) or on the Scottish Government's consultation hub on Citizen Space.

You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date.

If you are unable to respond online, please complete the Respondent Information Form (see 'Handling your Response' below) and send it with your written response to:

The Scottish Government  
Disclosure Scotland  
1 Pacific Quay  
Glasgow  
G51 1DZ

## Handling your response

If you respond using Citizen Space, you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form attached with this document as this will ensure that we treat your response appropriately. If you ask for your response not to be published, we will regard it as confidential and will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the said Act for information relating to responses made to this consultation exercise.

## Next steps in the process

After the consultation has closed, we will analyse the responses received and these will inform the decision making process for how the Bill will operate. Where respondents have given permission for their response to be made public, we will publish these responses and, thereafter, publish a report of the analysis of the consultation responses.

If you have any questions please contact: Joyce Kelly, Policy Officer, Disclosure Scotland, 1 Pacific Quay, Glasgow G51 1DZ or [joyce.kelly@gov.scot](mailto:joyce.kelly@gov.scot)

## Aim of this consultation

This consultation is split into seven sections.

Each section provides information and discusses policy options and then asks the respondent to answer questions on matters relating to the possible options for change. We have designed the questions to give the Scottish Government an indication of the change that you want to see.

We promise to take your answers very seriously and use them to help us chart the right path for a modern and even more effective disclosure system in Scotland.

**Section 1** introduces the background to the disclosure of criminal history in Scotland, the reason for this consultation and the current Scottish Government policy position on disclosure. It sets out the case for change.

**Section 2** discusses policy proposals for how Disclosure Scotland can offer a range of products that improve customer experience, reduce complexity and ensure that the right products get used for the right purposes.

**Section 3** sets out policy ideas about how the PVG Scheme may evolve and change to reflect the demands of 2020 and beyond, building on extensive stakeholder consultation, emerging digital possibilities, a changed landscape for the provision of care services and seven years of learning from the operation of the Scheme to date.

**Section 4** sets out policy proposals and ideas for how the barring service in Scotland should evolve and change, reflecting stakeholder feedback, the importance of enabling people with convictions to live fruitful lives and experience rehabilitation whilst maintaining a sharp focus on the need to exclude unsuitable people from paid or unpaid work with vulnerable groups.

**Section 5** provides a background on the reform of the disclosure system by the introduction of schedules 8A and 8B into the Police Act 1997 in 2015. It poses questions on the offences that are included on each of the lists and also discusses self-disclosure. This section sets out proposals for a reduction in the disclosure periods for offences on schedule 8B from 15 and 7.5 years, in line with the changing policy on rehabilitation of offenders. The system for the removal of spent convictions from disclosure certificates is also detailed and possible alternative options offered.

**Section 6** sets out proposals for reforms to the provision of 'Other Relevant Information' (ORI) on disclosures. We will propose that Police Scotland should have to seek representations from any person about whom they intend to give ORI prior to the inclusion of that information on a scheme record, or an enhanced disclosure, and also to consider those representations and have regard to them. Proposals are also made in relation to provisions for 12-17 year old children and the disclosure of convictions accrued in childhood and specific questions are asked on this.

**Section 7** deals with the need for comprehensive guidance and training where necessary on the processes and duties, specifically the duty to refer.

The aim is for respondents to focus on what changes are required to make disclosure of criminal convictions fit for the 21<sup>st</sup> century. Some changes that may be identified might be

better pursued through non-legislative means. Others may require to be looked at in terms of wider Scottish Government policy.

Our pre-consultation engagement brought out the complex nature of the present disclosure system. It also brought out the high degree of value and trust that people invest in Disclosure Scotland and all of its products, but particularly the PVG Scheme. The disclosure system is complex and one of our aims must be to make sure that this is simplified as much as possible to make it truly customer-focused so that we can deliver a better system suitable for the next 10 years and beyond.

## Section 1 – Introduction

### What is Disclosure Scotland?

Disclosure Scotland is an Executive Agency of the Scottish Government. It exercises the functions of the Scottish Ministers under the Police Act 1997 (“the 1997 Act”) and the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) to issue both basic and higher level disclosures<sup>1</sup> in Scotland.

### What are the statutory powers and functions of Disclosure Scotland?

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

Under the existing terms<sup>2</sup> of the 1974 Act, subject to certain exclusions and exceptions provided for in secondary legislation made under the 1974 Act, anyone who has been convicted of a criminal offence and sentenced to custody for a period of 30 months or less can be regarded as rehabilitated after a specified period has expired, provided he or she receives no further convictions. After that period has expired, the conviction is treated as ‘spent’. A person can also become rehabilitated after receiving an alternative to prosecution (AtP), such as a fiscal warning or a fiscal fine. After the specified rehabilitation period has passed, the original conviction is considered to be spent.

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

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

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, Scottish Ministers have a power to make

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<sup>1</sup> ‘Higher level disclosures’ are: the standard disclosure and the enhanced disclosure under the Police Act 1997 (“the 1997 Act”), and the scheme record disclosure under the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”).

<sup>2</sup> On 22 February 2018 the Scottish Government introduced a Management of Offenders (Scotland) Bill in the Scottish Parliament. This Bill includes progressive reforms to the 1974 Act in Scotland which includes proposals to reduce the period of time a person is required to disclose their conviction before becoming spent. <http://www.parliament.scot/parliamentarybusiness/Bills/107731.aspx>

certain exclusions and exceptions to that general protection. The effect of the Rehabilitation of Offenders Act 1974 (Exclusion and Exceptions) (Scotland) Order 2013 (“the 2013 Order”) is that in certain cases, depending on the type of job or employment in question, a person cannot deny the existence of certain spent convictions. It is in these cases that ‘higher level disclosures’ are available.

The disclosure system backs up this duty on the individual to be honest about their convictions in line with the law; it verifies that the person, having taken account of the 1974 Act, has told the truth when disclosing previous convictions.

Where the protection provided by the 1974 Act does not apply because the type of job or employment is included in the 2013 Order and a person is asked about previous convictions, they should treat the question as follows:

- if a person has an unspent conviction for any offence, the person must treat the question as referring to that conviction and must self-disclose it;
- if a person has a spent conviction for an offence not listed in schedule 8A or 8B<sup>3</sup> of the 1997 Act, the person can treat the question as not referring to that conviction which is protected by law and the person does not need to self-disclose it; the person cannot be prejudiced in law for the non-disclosure;
- if a person has a spent conviction for an offence listed in schedule 8B of the 1997 Act and it is a protected conviction, the person can treat the question as not referring to that conviction and the person does not need to self-disclose it; the person cannot be prejudiced in law for the non-disclosure;
- if a person has a spent conviction for an offence listed in schedule 8B of the 1997 Act and it is not a protected conviction, the person does not have to treat the question as referring to that conviction until it is disclosed by Disclosure Scotland to a third party such as a prospective employer;
- if a person has a spent conviction for an offence listed in schedule 8A of the 1997 Act, and 7 years and six months have elapsed from the date of conviction if under 18 on the date of conviction, or 15 years have elapsed from the date of conviction if aged 18 or over on the date of conviction, the person does not have to treat the question as referring to that conviction until it is disclosed by Disclosure Scotland to a third party such as a prospective employer;
- if a person has a spent conviction for an offence listed in schedule 8A of the 1997 Act, and 7 years and six months have not elapsed from the date of conviction if under 18 on the date of conviction, or 15 years have not elapsed from the date of conviction if aged 18 or over on the date of conviction, the person must treat the question as referring to that conviction and it must be self-disclosed.

As detailed below, some types of disclosure allow for certain **spent** convictions to be included. These are commonly called ‘higher level disclosures’. However, even in a higher level disclosure there are filters to make sure only relevant spent convictions are included.

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<sup>3</sup> Under the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, as amended these schedules are called A1 and B1 of that Order.

The vast majority of spent convictions are relatively minor and will not be disclosed on higher level disclosures; but some are more serious and will be disclosed for a period of 15 years (or 7 years and six months) after conviction, even when otherwise spent, and some are so serious that they must always be disclosed. The Scottish Government publishes lists of the types of convictions that are to be disclosed for 15 years (or 7 years and six months) and those that are disclosed forever unless a sheriff directs otherwise.

Disclosures made under the 1997 Act are:

- Basic
- Standard (a higher level disclosure)
- Enhanced (a higher level disclosure)

The first one of these, **Basic Disclosure**, is available to **anyone for any purpose**. It contains only unspent convictions; it does not list convictions that the 1974 Act says are spent and that the person does not need to disclose any more.

It tends to be used for general employment purposes, but not for jobs with access to high value assets or for work with vulnerable groups.

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

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

An **Enhanced Disclosure** is typically used where there is a high degree of sensitivity in the role the person is being considered for, for example, for prospective adoptive parents, employment in the Crown Office or obtaining a gambling licence. The Enhanced Disclosure lists unspent convictions, unspent cautions (from England, Wales and Northern Ireland), certain spent convictions, will say whether the individual is subject to the notification requirements in Part 2 of the Sexual Offences Act 2003, and has the possibility that the police will include text on the disclosure detailing non-conviction information. An example of this might be if the police credibly suspected the individual had committed serious offences relevant to the post they were applying for but had not been convicted of these. If the police provide this information Disclosure Scotland must include it; it has no discretion to remove or alter any text provided by the police.

Disclosures made under the 2007 Act are:

- Statement of scheme membership (contains no vetting information);
- PVG scheme record disclosure (a higher level disclosure);
- PVG short scheme record (contains no vetting information).

The 2007 Act set up the PVG Scheme with effect from 28 February 2011.

The basic purpose of the PVG Scheme was to provide for a system of disclosures for individuals doing ‘regulated work’ with children or with protected adults (as defined in the 2007 Act). Previously such individuals would have been entitled to Enhanced Disclosures under the 1997 Act. So, in effect, the 2007 Act set up a separate system of disclosures for persons doing regulated work with children or protected adults and removed them from the scope of the 1997 Act provisions.

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

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

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

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

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

## **What is consideration for listing under the PVG Scheme?**

If Disclosure Scotland, following rules set out in the 2007 Act and associated regulations, decides that it is appropriate to consider an individual for listing (barring) they will place the individual in the formal status of being under ‘Consideration for Listing’. Any PVG scheme record disclosure made within six months of this decision for the type of regulated work concerned will state that the individual is under consideration for listing. Disclosure Scotland can go to the court and ask for the period of six months to be extended so that the information that a person is under consideration for listing can remain on the disclosure for longer, if they think that is necessary. Even if the ability to disclose the fact that the

individual is under consideration for listing expires without such an extension, the individual remains under consideration and Disclosure Scotland retains all its powers to gather information pertinent to the consideration.

Disclosure Scotland can use powers under Part 1 of the 2007 Act to gather information about the individual concerned and decide whether the individual is unsuitable for the type of regulated work for which they are being considered. The individual is entitled to see all the information that Disclosure Scotland relies on to make its decision and they are facilitated to make representations about why they ought not to be barred. If Disclosure Scotland decides to bar the individual, then they are also barred across the whole of the UK and would commit a serious criminal offence if they sought to do regulated work with the groups from which they are barred, or if they actually did such work.

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

## Why are we proposing changes to the current system?

Since 2011, Disclosure Scotland has received numerous applications for PVG disclosures and there are 1,141,167 scheme members. There are 5,295 individuals barred from doing regulated work. The number of barred individuals includes those convicted in courts for offences that automatically lead to barring, such as a rape (of any person, adult or child) or the murder of a child.

The 2007 Act was the Scottish Government's response to Sir Michael Bichard's Inquiry Report of June 2004 into the murders at Soham. The policy principles enshrined in the then PVG Bill were that:

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

It is has been just over seven years since the PVG Scheme commenced. During this time, Disclosure Scotland has communicated with stakeholders and customers and has identified a number of areas where the PVG Scheme can operate more effectively or where modernisation measures are appropriate. The time is right to review the legislation and determine whether it still fits with today's landscape and also whether developments in digital technology can deliver an even more assured and customer-focused PVG Scheme that better serves employers, volunteering organisations and individuals alike.

## Pre-consultation engagement

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

- Individual interviews
- Group participation sessions
- Telephone interviews
- Online survey
- Stakeholder conference

We collated the results and feedback, analysing it after each round of engagement so that we asked progressively more specific questions.

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

- Local Authorities
- NHS Boards
- Sport Governing Bodies
- Educational Institutes
- Church Groups
- Third sector organisations

Our online survey generated **848 responses** from a wide range of participants. It comprised 20 questions which covered the same themes as those in the face to face engagement events.

The evidence gathered during this intense period of engagement has assisted us in the development of our proposals going forward.

## **What do we need you to tell us?**

The consultation seeks your views on potential changes to legislation relating to:

- Disclosure Scotland products
- Application for the removal of conviction information
- The length of time spent convictions will be disclosed
- Barring and listing functions
- Fee structure
- The duration of PVG scheme membership
- Mandatory nature of the PVG Scheme
- The disclosure of convictions of under 18s
- Changes to Other Relevant Information
- The scope of regulated work

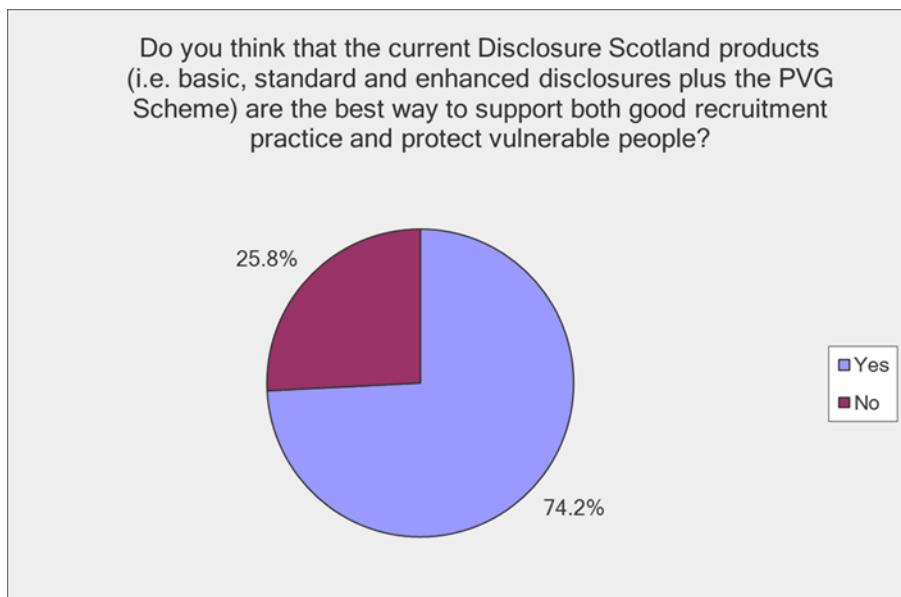
## Section 2 – Disclosure Products

Disclosure Scotland provides the public and employers with disclosure products relevant to recruitment in Scotland and also to the safeguarding of assets and, most importantly, children and protected adults.

This section sets out in detail what these products are and introduces the stakeholder feedback that we have had about them during the pre-consultation phase.

Stakeholder feedback leaves no doubt that they value Disclosure Scotland's products and that these fulfil an important role in Scottish life, assisting employers and other decision-makers to take better informed decisions. But there is also an appetite for change; stakeholders need Disclosure Scotland to embrace new technology and to rethink how products meet user needs and requirements.

The diagram below shows how widely supported all of the products are by stakeholders, but a sizeable minority have reservations that these products are no longer the best way to deliver the outcomes.



During our engagement, customers and stakeholders told us that Disclosure Scotland's products are too similar and therefore insufficiently distinct from each other. We presently offer ten different products. Under the 1997 Act, the basic disclosure, standard disclosure, enhanced disclosure, enhanced disclosure with children's suitability check, enhanced disclosure with adults' suitability check and enhanced disclosure with both suitability checks. And under the 2007 Act, the scheme record, the short scheme record, the statement of scheme membership and disclosure of the statement of scheme membership.

The fact that PVG scheme membership involves continuous updating of the scheme record is a source of surprise and confusion for many. This is regrettable because the system of ongoing monitoring of PVG scheme members is a unique feature of the PVG Scheme and a major investment in public safety.

Disclosure Scotland have long required a team of staff to check paper disclosure application forms to ensure that the customer has used the right form for the right product and asked for

the right type of disclosure. We believe this evidences that the disclosure system is too complex and the forms provided to customers to access it are insufficiently accessible.

Customers told us that they did not generally wish to have to differentiate between complex products and told us that they would welcome assistance and support in finding which level and type of disclosure is right for them. One way to reduce the complexity of the system is to reduce the number of products offered to customers and stakeholders.

We believe that there are essentially three logical and sensible levels of disclosure:

- Current basics level where only unspent convictions are disclosed and there is no other information included on the disclosure
- Current enhanced level which is tailored for a specific post or role and which includes unspent convictions, certain spent convictions, and which permits the police to include non-conviction information, and
- The current PVG Scheme which can disclose unspent convictions, certain spent convictions when the law requires, permits the inclusion of police non-conviction information and provides for the continuous updating of the scheme record. It is for those who are in positions of trust and power with children and protected adults.

We propose that in the future these should be referred to as disclosure levels 1 and 2 and PVG level products.

We believe that reducing the number of products to three, with clear branding, will allow for easier customer understanding of the system and preserve the utility and safeguarding integrity of the disclosure system generally.

Level 2 disclosures will be available for certain roles and PVG level disclosures will as now be available for people wanting to do regulated work with children or protected adults, or both. Level 1 disclosures will remain available to everyone for any purpose. PVG scheme members will be subject to ongoing monitoring, as now.

Level 2 disclosures will therefore encompass current standard and enhanced disclosures, but this level, because it is post-specific, will be tailored to the particular context of the disclosure and particular post. PVG membership will be discussed fully in section 3.

We aspire to a digital system that helps guide applicants to the right disclosure type.

Scottish Ministers propose to continue to issue a code of practice about the handling of and the use of disclosure products.

***Question 1: Do you agree that reducing the disclosure products will simplify the system?***

**Yes  No**

***Question 1a: If you have answered no, what do you think will simplify the system?***

## Level 1 Disclosures

Under the current legislation, an individual can apply for their own basic disclosure for any reason. There is no need for an employer or other party to countersign the application. A basic disclosure contains only unspent convictions held on central police records, or it states that there are no such convictions.

The content of the proposed Level 1 disclosure will be aligned with that of the current basic disclosure, (subject to a question about Notification Requirement under Part 2 of the Sexual Offences Act 2003 which is discussed [below](#)) but with some changes in relation to price, method of delivery and availability to those under the age of 16. Later in this paper, there will be discussion of special provisions for disclosure of offending conduct between the ages of 12 and 17. Depending on the outcome of the proposals, there could be consequential changes to the content of the Level 1 product.

The table below is a comparative overview of the basic disclosure with the proposed Level 1 disclosure. Following this is further information breaking down the proposed options for price, method of delivery and age restrictions as well as questions on your preference among these options.

	Basic	Level 1
Price	£25	£25
Method of Delivery	Certificate posted to applicant	Digital service
Age restriction	None apply	Not available to those under 16
Authentication of Identity	Upload documents or send in scanned documents	Possible online identification and verification

**Question 2: As we are trying to simplify the system, do you have any views on what this product should be called?**

**Basic  Level 1  Other (please state)**

**Question 3: As an applicant, do you have any concerns with this approach?**

**Yes  No**

## So what might change?

### Fees

Under the current legislation the cost of a basic disclosure is £25. This cost is incurred every time an individual applicant applies for a basic disclosure. The cost options for a Level 1 disclosure are set out below:

Proposal	Fee
Option 1	£25, cost will be incurred each time a Level 1 disclosure is required.
Option 2	£30 for first or one-off application. If applicant creates account which results in identification and verification being required once then future Level 1 applications will cost £17. If an applicant does not create an account then they will pay the full fee on each occasion.

Option 2 allows those individuals who may require a number of Level 1 disclosures to save money. It will also reduce the inconvenience of having to complete personal information with each application. This option will benefit those individuals who are in temporary work or short term contracts and switching employers.

The proposed costs will be subject to review once the final consultation outcome is known. It is our intention to review costs periodically.

### ***Question 4: Which option do you prefer? And why?***

### ***Level 1 Bulk Applications and Registered bodies***

Currently when an employer decides to use standard or enhanced disclosure, or the PVG Scheme, as part of their recruitment process, they usually apply to become a 'registered body' to allow them to countersign higher level disclosure applications. Based on the legislative eligibility criteria for these higher level disclosures, Disclosure Scotland assess whether the organisation are able to register. Providing employers have one position that is eligible for standard or enhanced Disclosure, or PVG scheme membership, the organisation can be accepted as a registered body. All organisations are subject to a minimum annual charge of £75 for being a registered body. All registered bodies are bound by the Code of Practice about the handling of and the use of disclosure products. An organisation that does not register directly with Disclosure Scotland and which uses higher level disclosures in its recruitment process can use an umbrella body (which is an organisation that is a registered body) to have its higher level disclosures applications countersigned.

Each registered body must have a lead signatory in place at all times. They are the person who signs the registration application for the organisation and who is expected to be the main point of contact between the organisation and Disclosure Scotland. They will be the main person responsible for making sure any disclosure information the organisation receives is handled properly. In addition to the lead signatory, there can also be a number of countersignatories.

Disclosure Scotland will carry out criminal records checks on any individual nominated as a lead signatory or a countersignatory to ensure that they are not unsuitable to receive disclosure information in that role. After being accepted as a lead or countersignatory, individuals are subject to regular suitability checks.

When an organisation decides to use basic disclosures as part of their recruitment process, they can enrol with Disclosure Scotland as a 'responsible body' which simply means that they are provided with a credit facility which they are entitled to use. There is no fee for becoming a responsible body and, as basic disclosures can be used for any purpose, there is no need for Disclosure Scotland to assess whether an employer is eligible to become a responsible body.

An organisation wishing to become a responsible body can nominate individuals as 'financial authorisers' who can submit basic disclosures on behalf of the responsible body.

Bulk applications for basic disclosures (B2B) arise when, typically, a large company regularly takes on lots of new workers and has a policy that these individuals should have a basic disclosure done as a pre-recruitment check. They submit a data file detailing a large number of applicants. Disclosure Scotland processes the checks from the data file and issues the certificates. There is an Operational Processing Agreement (OPA) between Disclosure Scotland and these organisations to ensure that consent has been provided by the applicant and to ensure that there is no abuse of the facility. Contained within the OPA is a clause stating that Disclosure Scotland will audit the organisation to improve the quality of their submissions and assure the appropriate handling and disposal of applicants' certificates.

Disclosure Scotland presently provides this bulk application service at no cost to enrolled organisations.

All B2B customers currently benefit from a monthly invoice facility which allows them the freedom to submit many applications but pay once, boosting administrative efficiency. We propose to continue to offer a B2B service for Level 1 disclosures to organisations that require it. However to assure the protection of personal data as the service moves onto new digital platforms we also believe that the law governing how B2B works requires to be tightened whilst still allowing for the efficient delivery of the service. We propose:

- An organisation who wishes to use B2B has the legal status of '**Level 1 Registered Body**'. It may only become such a Registered Body after successful application to Disclosure Scotland.
- A new Level 1 Registered Body must nominate a **Registered Person** whom Disclosure Scotland will vet to ensure that there is no information in their background that would mean they are unsuitable to fulfil that role. Finally the Level 1 Registered Body will be required to pay a fee to cover the administrative costs to Disclosure Scotland of providing the service. This cost will be £90 annually.
- The person being nominated as a Registered Person must be at least 18 years old.
- An organisation wishing to register as a Level 1 Registered Body with Scottish Ministers must confirm as part of its application that it will only send Scottish Ministers disclosure applications on behalf of individuals who have given explicit consent and who are seeking employment or volunteering opportunities in Scotland.
- It would be an offence for the Level 1 Registered Body to seek to make a disclosure application where such explicit consent is absent.
- An organisation wishing to register as a Level 1 Registered Body with Scottish Ministers must confirm that it will not act on behalf of any other organisation or person outside the terms of its registration.

- In addition, Ministers would propose to issue a Code of Practice to Level 1 Registered Bodies.

This Code of Practice will be based on the current Code of Practice that deals with the obligations about the use of the disclosure information with which recipients of disclosure information must comply. Examples of the topics covered by the Code of Practice are:

- the fair use of disclosure information;
- the handling of information; and
- assurance and audit.

More information about the current Code of Practice can be found [here](#).

It is our intention that registered bodies will be treated the same regardless of the level of disclosure required. Any amendments to the current provisions regarding registered bodies will be mirrored here.

***Question 5: Do you agree that it is appropriate to regulate registered bodies in relation to B2B applications?***

Yes  No

***Delivery***

Under the current system individuals can apply online for a basic disclosure certificate. There are digital channels available for individual customers (basic disclosure online) and for corporate customers that require a large number of checks undertaken for recruitment (the B2B system) but these offer only simple digital application facilities and require a lot of manual processing by Disclosure Scotland to validate and vet applications and result in a printed certificate, building-in an additional time-lag.

In the future, we want the individual when applying for a Level 1 disclosure to be able to apply online and provide all the information needed for their application. We think that this digital information should be owned by the individual who will be able to securely route or share it with any employer or any other person they choose to provide it to, for example, a voluntary organisation.

***Question 6: What impacts, if any, do you foresee from moving from a paper based system to a digital system?***

### ***Apostille***

**An apostille is a stamp added to disclosures to verify authenticity, or a paper attached to the original document under a forthcoming EU Regulation.**

In some circumstances, for example, working abroad or applying for a visa, you may need to have your basic disclosure verified or confirmed as genuine. This service is provided by Disclosure Scotland. Currently Disclosure Scotland does not charge for this service. There is a separate proposal about apostilles that affects EU Member States and which is due to come into force on 16 February 2019. The EU Regulation aims to simplify the requirements for presenting documents in the European Union by abolishing the need for apostilles within the EU. Under this proposal, which will affect the basic or Level 1 disclosure, an individual who is asked to present a disclosure certificate from their home country to an authority in another Member State can, instead of an apostille, request a standard template. That standard template, which will be attached to the basic disclosure, will be translated (by Disclosure Scotland) into the language of the requesting authority, and confirm that the applicant does not have a criminal record or set out their criminal convictions if they have any. This will be a new service and Disclosure Scotland propose to charge a fee for it. If this new service proposal is not continued once the UK leaves the EU, the service will continue as it currently does for both EU and non EU member states.

In future it is our intention to charge an administration fee to cover the cost of both apostilles for EU and non EU member states. The cost of this service will be **£10**.

***Questions 7: Do you agree with our proposed fee for this service?***

**Yes  No**

***Question 7a: If not, what do you think the fee should be?***

## Level 2 Disclosure

A Level 2 disclosure will be a new product with similarities to both the current standard and enhanced disclosures.

The table below compares standard and enhanced disclosures with the proposed Level 2 disclosure. There is further information setting out proposals for price, proposed Level 2 disclosure product content and method of delivery.

	Products currently available		Proposed product
	Standard	Enhanced	Level 2
<b>Fee</b>	£25	£25	From £30 but with options for reduced payment for future applications
<b>Vetting information</b>	Unspent and relevant spent convictions, sex offenders registration, unspent cautions	Unspent and relevant spent convictions, sex offenders registration, unspent cautions, 'other relevant information', information about barred lists (in some cases) and prescribed civil orders	Option to include all of the information currently available on standard and enhanced disclosures with a children and/or adult suitability information check
<b>Delivery method</b>	Paper application form then certificate posted to individual and countersignatory	Paper application form then certificate posted to individual and countersignatory	Online application process and possible online access to vetting information
<b>Authentication of identity</b>	ID documents checked by countersignatory	ID documents checked by countersignatory	Possible online identification and verification
<b>Who can apply</b>	Any person	Any person	Any person aged 16 or over if the relevant employment conditions are met.

We propose that Level 2 disclosure should be available for employment and roles that are covered by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 ("the 2013 Order"). These are listed in [Annex A](#).

**Question 8: Are there any professions/roles that are not included that should be on the list?**

Yes  No

**Question 8a: If you have said yes, please note what these are.**

**Question 9: Are there any professions/roles you think should be removed from the list?**

Yes  No

**Question 9a: If you have said yes, please note what these are.**

## Foster Carers/Kinship Carers

Under the current disclosure regime all foster carers, and certain kinship carers for looked after children are able to apply to join the PVG Scheme. (In Scotland, a child is 'looked after' if a local authority has responsibilities to ensure the child's wellbeing.)

The position of foster carers and certain kinship carers is different to prospective adoptive parents who are not able to apply to join the PVG Scheme. In cases where an individual's suitability to be an adoptive parent is being assessed, an enhanced disclosure with a children's suitability check under the Police Act 1997 is used.

Feedback from organisations and advocacy groups in the fostering and kinship care sectors is that it is disproportionate that individuals wishing to foster or to be a kinship carer should be subject to PVG scheme membership and ongoing monitoring.

Looking after a child is a big responsibility, and fostering providers and carers of looked after children have to be confident that individuals are suitable for the role. We believe that a criminal record check is essential to show whether a prospective foster/kinship carer has any criminal convictions that would make them unsuitable to care for children. We are proposing that foster/kinship carers will be required to obtain a Level 2 check; this is similar to the check in England and Wales. This will mean that individuals applying to do either fostering, or kinship care in respect of a looked after child, will not be subject to the ongoing monitoring of a membership scheme for the rest of their lives.

**Question 10: Do you agree with the proposal to remove certain kinship carers and all foster carers from a membership scheme?**

Yes  No

The current position for kinship care in relation to children who are **not** looked after is as follows; there is entitlement for a basic disclosure if the arrangements place the child with a person(s) with whom the child has a family relationship. Care provided in the context of a family relationship is not eligible for a disclosure under the 2007 Act.

If, however, the kinship care arrangements place children who are **not** looked after with carers who are **not** relatives, and if those arrangements last for more than 28 days, then it will be regarded as private fostering. The meaning of relative is defined in section 21(1) of the Foster Children (Scotland) Act 1984:

“relative” in relation to a child, means a grandparent, brother, sister, uncle or aunt whether of the full blood or half blood or by affinity

Where private fostering arrangements are being made with individuals who are not relatives, the parents of the child can ask the prospective foster carer to apply to join the PVG Scheme. But as this is a private arrangement only a statement of PVG scheme membership would be available to the parents, and so no vetting information would be provided to the parents.

**Question 11: Do you think that the two types of kinship arrangements should continue to be treated differently under the future arrangements?**

Yes  No

It is proposed that any member of the fostering / kinship household aged 16 or over will be required to have a Level 2 check. This also includes any members of the fostering/kinship family, friends or relatives who regularly stay overnight in the foster home.

**Question 12: Do you agree with this proposal?**

Yes  No

It is also proposed that a Level 2 check can be undertaken on anyone in the foster/kinship carer’s network who supervises or care for the children.

**Question 13: Do you agree with this proposal?**

Yes  No

**Question 13a: Do you think that anyone else in the foster/kinship carer’s network needs to be checked? If so, who and why?**

## Independent Schools

The Scottish Council of Independent Schools has noted that it is currently not possible for individuals over the age of 16 residing in a residential school setting (for example, spouses of house parents), but who do not have specific responsibilities, to obtain an enhanced disclosure. The Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 lists those who are eligible for an enhanced disclosure in the context of child-minders/guardians but this does not explicitly cover those residing on school premises as family members of house staff. The Care Inspectorate indicated that they would expect individuals in this position to have an enhanced disclosure, and schools would want to carry out this level of check. We want to make disclosures available to such people and propose that these individuals should be eligible for checks and included in the list in [Annex A](#). This will also require a change to the 2013 Order.

**Question 14: Do you believe that this is the correct approach going forward?**

Yes  No

## The content of the Level 2 Disclosure Product

The content of standard and enhanced disclosures is the same in terms of conviction information. The differences in content relates to other relevant information, information about inclusion in one or both of the barred lists held under the 2007 Act, and information about prescribed civil orders.

The challenge in creating a new product is to strike the correct balance between the legitimate expectation that employers have about useful disclosure content and the rights given to the disclosure subject under article 8 of the European Convention on Human Rights (the right to respect for private and family life).

There are three credible options for the content of the Level 2 disclosure product:

	Option 1	Option 2a	Option 2b
Unspent convictions from UK central records and unspent cautions from police forces in England, Wales and Northern Ireland	✓	✓	✓
Certain spent convictions from UK central records	✓	✓	✓
Notification requirements under Part 2 of the Sexual Offences Act 2003	✓	✓	✓
Other relevant information provided by the chief officer of a relevant police force		✓	✓
Whether the subject of the disclosure is listed in one of the barred lists held under the 2007 Act			✓
Whether the subject of the disclosure is subject to one or more prescribed orders			✓

Option 1 is equivalent to the current standard disclosure.

Option 2a is equivalent to the current enhanced disclosure without a suitability information check.

Option 2b is equivalent to the current enhanced disclosure with a suitability information check.

The different options may result in more or less information being disclosed on a Level 2 disclosure than currently is on a standard or enhanced disclosure.

Your decision with regard to the options listed above should take account of the fact that the PVG Scheme products may also be changed. There will be discussion about this later in this paper.

**Question 15: Which option should be the content of the Level 2 disclosure product be based upon? Please provide the reason for your choice.**

**Option 1  Option 2a  Option 2b**

### **Fee**

Under the current legislation the cost of both the standard and the enhanced disclosure is £25. This cost is incurred every time an individual applicant applies for a basic disclosure. The cost options for a Level 2 disclosure are set out below:

<b>Proposal</b>	<b>Fee</b>
Option 1	£30, cost will be incurred each time a Level 2 disclosure is required
Option 2a & 2b	£35 for first or one-off application. If applicant creates account which results in identification and verification being required once then future Level 2 applications will cost £23.

Options 2a and 2b allow those individuals that may require a number of Level 2 disclosures to save money. It will also reduce the inconvenience of having to complete personal information with each application. This option will benefit those individuals who are in temporary work or short term contracts and switching employers, or those whose employers carry out periodic checks.

#### ***Question 16: Which price option do you prefer for the Level 2 product?***

**Option 1  Option 2**

The proposed costs will be subject to review once the final consultation outcome is known. It is our intention to review costs periodically.

### **Fee Waivers**

Under the current system for standard and enhanced disclosures certain positions for volunteers for certain qualifying voluntary organisations are entitled to free checks. Scottish Ministers meet the cost of these checks to support the voluntary sector.

#### ***Question 17: Is it proportionate that the free checks should continue for volunteers who obtain Level 2 disclosures?***

**Yes  No**

### **Method of delivery**

Under the current system individuals cannot apply online for a standard or an enhanced disclosure certificate. Once processed, Disclosure Scotland sends a paper certificate to the individual's address and in most cases a copy is sent to the person such as the employer who countersigned the disclosure application. If there are certain convictions for which the individual has a right to apply to a sheriff for removal from the disclosure and they do not use that right (either by telling Disclosure Scotland or allowing a prescribed period of time to pass without intimating to Disclosure Scotland their intention to make an application to a sheriff),

the disclosure is then subsequently sent to the countersigning person such as an employer. If an individual does use their right to apply to a sheriff for removal of a conviction, the person who countersigned the disclosure application will not see a copy of it until the sheriff has decided whether or not the conviction should be removed.

In the future, we want the individual when applying for a Level 2 disclosure to be able to apply online and provide all the information needed for their application. They will then receive the disclosure. We think that this digital information should be owned by the individual who will be able to securely route or share it with any employer or any other person they choose to provide it to i.e. voluntary organisation.

However, unlike with a Level 1 disclosure, only those employers who are lawfully entitled to see the Level 2 information may do so, which would require them to be registered with Disclosure Scotland as a Level 2 Registered Body with their credentials established and entitlement to see Level 2 information fully assured. The Level 2 disclosure applicant would then be able to securely share their vetting information with the prospective employer, who would only be able to electronically receive it if all of the requirements were satisfied. This puts the sharing of the information with a third party in the hands of the individual who applied for the disclosure. If they choose not to do so, they may not get the job or role but the decision to share or not share the information has been theirs.

This would change to a limited extent the current arrangements that employers typically have for countersigning higher-level disclosures. There will still be a requirement to have staff who have been vetted by Disclosure Scotland within Level 2 Registered Bodies to receive the information shared by the individual.

It will be unlawful for any employer or any other person to request access to an individual's account in order to circumvent proper checks on their legal entitlement to see higher level disclosure information – the only permitted way will be via the appropriate electronic sharing of the information with accredited parties.

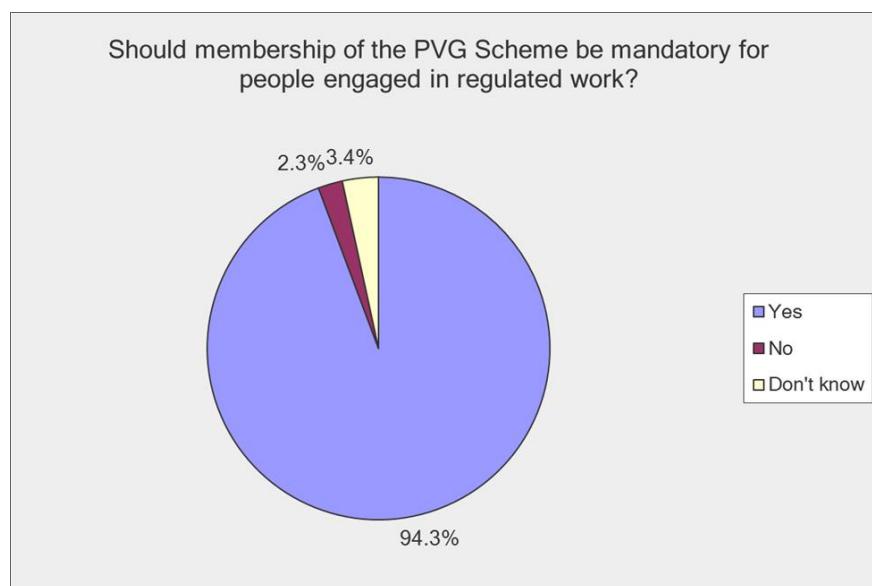
***Question 18: What issues, if any, do you foresee with a move to a digital service?***

## Section 3 – Reforming the policy underpinning the PVG Scheme

Recent public events involving sexual abuse in sport and other spheres of life that impact on children and young people have raised public consciousness about the importance of a safeguarding scheme that removes unsuitable individuals from working with children. There have also been a number of high profile cases involving the abuse and exploitation of protected adults. Examples include people with disabilities becoming the victims of harmful behaviour and exploitation; and the targeting of members of the public, rendered vulnerable because they were using health services, by unscrupulous professionals, such as the widely publicised case in 2017 where a reputable surgeon had performed many unnecessary operations on members of the public. This serves to remind that the PVG Scheme is there to protect all of us at various stages of our lives and in circumstances where we have no intrinsic vulnerability but may become especially vulnerable to harm at certain times.

Our stakeholders almost universally recognise the importance of retaining the PVG Scheme and improving the ways that it can help keep Scotland's people safer. This consultation will not therefore ask whether there should be a PVG Scheme but rather about how it may improve, and we will present some policy ideas about which we would like to hear your views.

Stakeholders have overwhelmingly supported that the PVG Scheme ought to be mandatory for people who want to work in sensitive roles with children and protected adults.



Scottish Ministers agree and we have therefore decided that the consultation in this area will be about how and not whether a fully mandatory PVG Scheme is brought into existence.

The current scheme was designed to strike a balance between robust public protection and the avoidance of unintended consequences. The 2007 Act created offences for persons barred seeking and doing regulated work. It was also made an offence for employers to take on a new person to do regulated work if that person was barred or continue to employ someone to do regulated work if barred whilst in post. Thus, there was an incentive for employers to avoid this risk of committing a criminal offence and to ask potential employees to obtain PVG Scheme membership. A non-mandatory scheme was therefore brought into being, with the primary benefit of it being that circumstances, which might otherwise be

drawn into ‘regulated work’, such as a neighbour helping another neighbour in return for a small remuneration, could continue to occur without either party being potentially criminalised because the person helping out was not a member of the PVG Scheme.

***Question 19: How should a mandatory PVG Scheme be introduced and how should it work?***

**Replacing the idea of regulated work with a clear list of ‘protected’ roles (Voluntary and Paid)**

Creating a mandatory PVG Scheme brings additional responsibility to ensure that the Scheme works proportionately and protects the freedoms we all expect living in a democratic society. Under the current system the definition of regulated work in the 2007 Act allows for generic criteria to be applied to a wide spectrum of jobs and roles and it is an employer’s decision as to whether the role is regulated work. In simple cases, such as that of a school teacher, the decision about scheme membership was straightforward but, for other roles, the question – ‘is this regulated work?’ - has proved more vexing. Many of our stakeholders expressed that they understood what was meant by ‘regulated work’ but, on closer examination, this knowledge often proved superficial and subject to error.

Disclosure Scotland has had a customer engagement / compliance team throughout the period of the PVG Scheme which has rejected many applications for PVG scheme record disclosures because the role the applicant was going to do was not within regulated work. Our customer engagement team reject about 1700 ineligible applications per year. It is still possible though that, due to unclear descriptions of prospective roles, a significant minority of the more than one million scheme members joined the Scheme when their prospective roles did not actually constitute regulated work, despite it being a criminal offence to request a PVG disclosure for work that is not regulated work. It is therefore necessary for the refreshed PVG legislation to look at who is in the Scheme now, who should be drawn into the Scheme in the future and to strike the right balance.

Based on stakeholder feedback, Scottish Ministers believe that it should be very clear which roles are eligible for PVG scheme membership. These would become ‘protected roles’. The Government would publish a schedule of such roles and, through engagement with employers and other stakeholders, would also ensure that there were regular updates to that schedule. [Annex B](#) of this consultation includes a sample list of protected roles, this list is not exhaustive and you are invited to comment on and add to this list. This should simplify the process for employers and make it clear what roles or type of work require a PVG disclosure. This should ensure individuals are not given the wrong level of check and not made subject to ongoing monitoring unnecessarily. It will encourage employers to assess their own safeguarding practices and ensure the right people are getting the right level of disclosure and monitoring. It will not be acceptable for an employer to give a role the title of a protected role where the actual role does not require a PVG level disclosure simply to enable that check. The current offence for employers will continue into any new scheme.

It is clear that any such list of protected roles would need to be kept under review. Regulated work as a concept will be discontinued. It will simply become a criminal offence to do any of the protected roles whilst not a member of the PVG Scheme. This will assure the public that those they encounter when using care services are properly checked and monitored. The ability to update regularly the list of protected roles will ensure that the changing landscape in the care and education sectors can be captured and added to the list.

Introducing a mandatory scheme based on a list of roles will provide clarity about whether a check is needed. There may be circumstances where an employer feels that a role they are offering should be subject to a higher level check but it isn't yet on the published list of protected roles. There could therefore be a provision for Scottish Ministers to permit a check to be made where they reasonably believe that the role applied for is likely to qualify as a protected role, with a duty arising having done so to determine if the role is a protected role suitable for inclusion in the list.

**Question 20: Do you agree with the proposal to replace the “regulated work” definition with a list of roles/jobs?**

Yes  No

**Question 21: Do you foresee any challenges for organisations from this proposed approach?**

Yes  No

**Question 22: Are there any roles/jobs not within the list in Annex B that you think should be subject to mandatory PVG scheme membership?**

Yes  No

**Question 22a: If so, please provide more detail on why.**

## Additional Factors

It is clear that there are some situations where additional factors will need to be considered in determining who can join the PVG Scheme.

### **Family**

There are circumstances where care is provided within a family, and we propose that those who provide care in this case should not be drawn into the new mandatory scheme. A family member would be:

- spouse or domestic partner;
- parent, step-parent, mother-in-law or father-in-law;
- grandparent;
- uncle or aunt;
- brother or sister, including half sibling, step sibling, brother-in-law or sister-in-law.

### **Exceptions**

It is clear that determining membership of the mandatory scheme will be simpler for some protected roles than others. There will be some cases where consideration of the duties of the role will be needed to determine if it is in fact a protected role. There will also be some

instances where there will be exceptions to the rules and membership of the mandatory scheme may not be required.

The current PVG Scheme defines regulated work by reference to activities which a person does or establishments in which a person works. The key determining factor in deciding if work is regulated or not is whether the person's normal duties consist of certain specified activities with an individual who is protected by the 2007 Act or include work in a specified establishment. If the answer is 'yes', then regulated work is taking place. If the answer is 'no', then it is not regulated work. This consideration is designed to exclude those whose normal duties may bring individuals into regular but fleeting contact with one or more protected adults or children, such as a postman delivering mail to a care home, a receptionist in a health centre or a teacher who only teaches adults in the evening who finds they have to deliver a special lecture to a class of 12-year-olds.

The introduction of protected roles will in some circumstances assist with this as certain roles will not be protected. Using the examples above, postman would not be on the list and they would not be able to join the PVG Scheme. However, with the example above of the teacher this could result in individuals joining the PVG Scheme unnecessarily.

We want to maintain safeguarding without retaining the current level of bureaucracy and uncertainty around that decision. However, it is undesirable for the mandatory scheme to extend so as to include individuals whose normal duties result in fleeting or incidental contact with protected adults or children as this approach would result in a continual increase in size, and continual and unnecessary monitoring of some individuals.

**Question 23: To avoid inappropriate membership, what criteria to you think should be used to decide if an individual is in a protected role?**

**Question 24: Do you think that the decision about whether someone who is in a protected role meets an exception which makes them ineligible for the PVG Scheme should be taken by Scottish Ministers?**

**Question 25: Are there roles that would not be protected roles and therefore ineligible for membership to the new scheme, that should, however, be eligible for a level 2 disclosure?**

## Definition of protected adult

The idea of using the receipt of a service as a basis for dealing with adults was new in the 2007 Act. This approach was taken so that adults would not be labelled as vulnerable due to their having a condition, illness or disability.

The high-level headings of the types of services receipt of which mean an adult is a protected adult are: certain registered care services; health services; community care services; and welfare services.

Experience of operating the PVG Scheme has highlighted challenges with this approach. There is a lack of clarity about what services are included within some of the high-level

categories. There is also the point that any adult can be a protected adult on a transient basis, for example, when receiving dental treatment. Services provided to adults by a self-employed individual are excluded from the meaning of regulated work.

We believe that a person delivering certain services should be a scheme member.

The discussion below looks at how to ensure that individuals providing appropriate services are scheme members while at the same time avoiding a return to labelling adults. In more detail, the existing services within the scope of the PVG Scheme are:

### ***Registered care services***

A service by a person carrying on:

- (a) a support service,
- (b) an adult placement service,
- (c) a care home service, or
- (d) a housing support service.

### ***Health services***

A service provided or secured by a public health body concerning the treatment, care and support of, and provision of advice and assistance to individuals in relation to health and well-being, or similar services provided by an independent health care service provider.

### ***Community care services***

Social work and mental health services provided or secured by a council, or self-directed support paid for by a council.

### ***Welfare services***

A welfare service includes any service which provides support, assistance, advice or counselling to individuals with particular needs, meeting the following conditions. The service must be a service that:

- (a) is provided in the course of work to one or more persons aged 16 or over,
- (b) is delivered on behalf of an organisation,
- (c) requires training to be undertaken by the person delivering the service,
- (d) has a frequency and formality attached to the service, and
- (e) either-
  - (i) requires a contract to be agreed between the service provider and the recipient of the service prior to the service being carried out, or
  - (ii) is personalised to an individual adult's needs.

The first point that arises is whether the services mentioned above are those that should be covered by future scheme membership arrangements.

***Question 26: Are there any services that should be added, or are there any services that should be removed?***

**Yes  No**

***Question 26a: If yes, please state what these are***

There is then the question of the extent to which someone has to be involved in the delivery of a service to bring them within the scope of doing regulated work. At present, the front-line member of staff or volunteer whose normal duties require them to carry out certain activities with an adult, such as 'caring for', means that staff member is doing regulated work.

***Question 27: Is this appropriate?***

**Yes  No**

The immediate line manager of that member of staff is also able to become a scheme member.

***Question 28: Do you agree with this approach?***

**Yes  No**

Outwith the activities, a person can be doing regulated work with adults if they work in certain establishments, namely, a care home; or in residential establishment or accommodation for people aged 16 or over.

***Question 29: Do you think these are the correct facilities, or should any be added or removed?***

**Yes  No**

***Question 29a: If yes, please state what these are***

There are also certain exclusions that apply to work in such establishments. A person whose normal duties involve working in such a place will only be doing regulated work if doing something permitted by their position gives them unsupervised access to adults, and where that contact with the adults is not incidental.

***Question 30: Do you think this approach is clear and helpful?***

**Yes  No**

Lastly, the appointment of a person into certain positions in relation to services for adults means that membership of the PVG Scheme is possible. The positions are:

- member of a council committee or council sub-committee concerned with the provision of education, accommodation, social services or health care services to protected adults
- the chief social work officer of a council, and
- charity trustee of a charity whose—
  - (a) main purpose is to provide benefits for protected adults, and
  - (b) principal means of delivery of those benefits is by its workers doing regulated work with protected adults.

**Question 31: Do you think that list of positions is correct?**

Yes  No

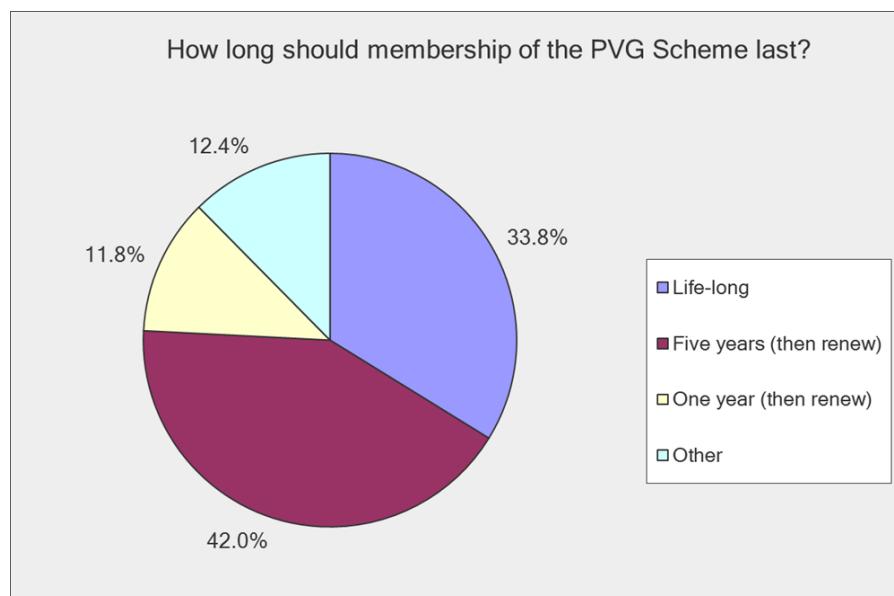
**Question 31a: Should it be amended either by adding to it, or by taking away from it?**

## Making PVG Scheme Membership time limited requiring periodic renewal

The current PVG Scheme is a lifetime membership scheme with minimum scope to leave the Scheme. Extensive customer research in recent years confirms that a large number of those presently in the PVG Scheme are no longer doing regulated work with children or protected adults because they joined the Scheme to undertake a short term role or have otherwise chosen to leave regulated work. Disclosure Scotland estimates that as many as 20% of the current scheme membership of over 1 million members falls into this category. This is supported by the research carried out by Progressive who found that of those asked 79% were still in regulated work, both voluntary and paid.

The 2007 Act does not currently give Scottish Ministers a power to remove a member from the Scheme unless the person is barred from regulated work which is clearly an inappropriate approach in the vast majority of cases. Scheme members can ask to be removed from the Scheme if they stop doing regulated work but very few do ask, and this has contributed to the Scheme having over one million members. Under the 2007 Act Scottish Ministers have powers to specify circumstances in which members could be removed from the Scheme, but those powers have so far not been used. The research carried out by Progressive, on behalf of Disclosure Scotland, found that 35% of those asked did not know they could leave the PVG Scheme and 44% never thought about leaving, even if no longer doing regulated work. Disclosure Scotland has attempted to contact many thousands of inactive scheme members in 2016 and 2017, experiencing a very low rate of customer response and only a very limited reduction in inactive membership. There is therefore an inbuilt tendency in the present design of the PVG Scheme to inflate in size, with those who join the Scheme subject to ongoing monitoring for life.

Accordingly, we consider that better managing the PVG Scheme size is a critical outcome of the PVG Review. A mandatory scheme is a key part of achieving that outcome. The longer the tenure of PVG Scheme membership, the longer a person is potentially subject to ongoing monitoring if they stop doing work that falls within the Scheme; this represents an unnecessary cost to Scottish Ministers and constitutes an unnecessary intrusion into citizens' personal business.



As you can see in the diagram above, more stakeholders agree that the tenure of PVG Scheme membership should be limited than consider that it should be for life. Scottish Ministers consider that PVG scheme membership should be for a defined period and be periodically renewed. This will ensure that inactive scheme members are afforded the opportunity to leave when they no longer require membership. It is important that in making this change the PVG Scheme delivers ever-better value for money and realises the policy intention of a truly portable and reusable scheme by harnessing new technology.

There will be a cost associated with renewal of scheme membership to incentivise those who ought to leave the PVG Scheme to do so. It will be necessary to ensure that anyone electing to leave the Scheme is not continuing in a protected role; this would be an offence for the individual and for the employer too.

***Question 32: How long should scheme membership last in a mandatory scheme?***

- a) 5 years
- b) 3 years
- c) 1 year

## Membership Card

Stakeholders have indicated support for the introduction of scheme membership cards, about the size of a debit card and including basic details of the individual such as name and scheme membership number. During pre-consultation engagement stakeholders expressed the view that a membership card would give individuals ownership of their disclosure membership.

Currently there are no membership cards for PVG Scheme members. An application for short scheme record or scheme membership statement can be used to show up to date membership status. Making an application for either of these requires an individual's scheme membership number. The introduction of a scheme membership card would offer the practical advantage of displaying information in a more accessible format that an individual could use to give access to scheme information to a prospective employer.

As proposed above, making the PVG scheme membership time-limited and requiring periodic renewal offers a better way to manage the Scheme. Membership cards including an expiry or renewal date would offer a tangible reminder to Scheme members of the need to renew their membership or to leave the Scheme if they are no longer undertaking regulated work. Likewise, prospective employers would be able to see from such cards that the person is a current scheme member. However, employers would still require disclosure of a scheme member's scheme record to make an informed recruitment decision, as a membership card would not include any details of vetting information. An employer could not simply rely on presentation of a membership card as indicating that a person could work with children or protected adults.

Membership cards would require to be included in the cost of joining the Scheme, and there would also be an associated cost with replacing lost cards. Current Scheme members would require to be retrospectively issued with membership cards also at a cost.

If the member is barred from working with children or protected adults, their membership will be terminated. The membership card should be returned, and it is our intention to make it

an offence to fail to return the card when barred. If an applicant loses their membership card, another card will be issued at a cost.

***Question 33: Do you think a membership card would be beneficial to you as a member of the PVG scheme?***

Yes  No

***Question 34: Do you think a membership card would be beneficial to you as an employer?***

Yes  No

## Fees and Delivery of PVG disclosures

The present system requires a £59 payment to join the PVG Scheme and £18 for each subsequent short scheme record sought. In addition, employers pay a subscription to be registered bodies capable of countersigning PVG applications (and standard or enhanced disclosures under the 1997 Act); this annual fee is currently a minimum of £75.

Under the current system individuals cannot apply online to join the PVG Scheme. Once processed, Disclosure Scotland sends a paper certificate to the individual's address and in most cases a copy is sent to the employer who countersigned the disclosure application. If there are certain convictions for which the individual has a right to apply to a sheriff for removal from the disclosure and they do not use that right (either by telling Disclosure Scotland or allowing a prescribed period of time to pass without intimating to Disclosure Scotland their intention to make an application to a sheriff), the disclosure is then subsequently sent to the countersigning person, such as an employer. If an individual does use their right to apply to a sheriff for removal of a conviction, the person who countersigned the disclosure application will not see a copy of it until the sheriff has decided whether or not a conviction should be removed.

In the future, when applying for PVG membership, we want the individual to be able to apply online and provide all the information we need in order to process their application. They will then subsequently receive the disclosure. We think that this digital information should be owned by the individual who will be able to securely route it or share it with any employer or any other person they choose to provide it to i.e. voluntary organisation.

However, only those employers or other organisations, with their credentials established, who are lawfully entitled to see the information may do so, which would require them to be registered with Disclosure Scotland. The applicant would then be able to securely share their vetting information with the prospective employer, who would only be able to electronically receive it if all of the requirements were satisfied. This puts the sharing of the information with a third party entirely in the hands of the individual who applied for the disclosure. If they choose not to do so, they may not get the job or role but the decision to share or not share the information has been theirs.

This would change to a limited extent the current arrangements that employers typically have for countersigning higher-level disclosures. There will still be a requirement to have staff who have been vetted by Disclosure Scotland to receive the information shared by the individual.

It will be unlawful for any employer or any other person to request access to an individual's PVG account in order to circumvent proper checks on their legal entitlement to see higher level disclosure information – the only permitted way will be via the appropriate electronic sharing of the information with accredited parties.

## Registered body fees

Currently the cost for a registered body to allow them to countersign is £75 per year, and this allows the registered person and four countersignatories to countersign applications. If an organisation wishes to have more than four countersignatories, there is an annual fee of £15 for each additional person. It is our proposal that this registration fee should increase to £90.

This rise is in line with inflation since the fees came into force in 2011. We are not proposing to increase the fee for additional countersignatories above four.

The current conditions for registered bodies are set out in the Police Act 1997 and the Code of Practice published by the Scottish Ministers under section 120 of the 1997 Act. It is our intention to review these conditions to ensure they are suitable going forward. We also want to develop a scheme that can be delivered digitally, that includes registered body duties where possible.

### **Question 35: Do you agree with these proposals?**

**Yes  No**

#### **Membership and fees**

The table below sets out the options for membership (in line with the proposals earlier in this chapter) and the costs for the membership.

	Current PVG	Option 1	Option 2	Option 3
Fee	£59	£15 (every year)	£36 (3 yearly)	£65 (5 yearly)
Length of membership	Lifetime	1 year	3 years	5 years
Method of delivery	Certificate posted to applicant	Digital service	Digital service	Digital service
Age restriction	None apply	Not available to those under 16	Not available to those under 16	Not available to those under 16
Authentication of Identity	Checked by CSG	Possible online identification and verification	Possible online identification and verification	Possible online identification and verification

#### **Option 1**

This option would allow the applicant year round access to their account to update information etc. The applicant would be entitled twice, with no additional fee, to share information with employers etc. Any additional sharing required would be subject to a £10 fee which could be payable by the applicant or employer. The applicant would have to pay the renewal fee each year.

Subject to provisions regarding fees/fee waiver for volunteers in Qualifying Voluntary Organisations, any applicant who joins the Scheme subject to these provisions who then takes up paid employment, will be subsequently charged the appropriate fee as soon as paid employment begins.

#### **Option 2**

This option would allow the applicant year round access to their account to update information etc. The applicant would be entitled four times, with no additional fee, in their

three year membership to share information with employers etc. Any additional sharing required would be subject to a £10 fee which could be payable by the applicant or employer. The applicant would have to pay the renewal fee after three years.

Subject to provisions regarding fees/fee waiver for volunteers in Qualifying Voluntary Organisations, any applicant who joins the Scheme subject to these provisions who then takes up paid employment, will be subsequently charged the appropriate fee as soon as paid employment begins.

### **Option 3**

This option would allow the applicant year round access to their account to update information etc. The applicant would be entitled six times, with no additional fee, in their five year membership to share information with employers etc. Any additional sharing required would be subject to a £10 fee which could be payable by the applicant or employer. The applicant would have to pay the renewal fee after five years.

Subject to provisions regarding fees/fee waiver for volunteers in Qualifying Voluntary Organisations, any applicant who joins the Scheme subject to these provisions who then takes up paid employment, will be subsequently charged the appropriate fee as soon as paid employment begins.

***Question 36: What is your preferred option?***

**Option 1  Option 2  Option 3**

In relation to these options, arrangements will be needed to enable individuals and Disclosure Scotland to manage membership. In line with the general move to provide services online, Ministers believe that a secure electronic / online portal offers the most efficient way to interact with Disclosure Scotland. Using that method, members could update personal information, or permit access to and sharing of membership information including vetting information in line with the Level of disclosure sought, and the fee structure that is put in place.

If such online interaction about scheme membership is possible it follows that online arrangements are also needed with regard to payment of membership fees. Ministers' preference is for payment to be arranged online. This could be achieved, for example, by direct debit, by mobile phone text or any other online solution available and offered by Disclosure Scotland at the time. Ministers are also committed to looking at different payment options for members, for example a one off payment or instalments.

***Question 37: Are you in favour of being able to interact with Disclosure Scotland online?***

**Yes  No**

***Question 38: Are you in favour of using electronic payment method for fees?***

**Yes  No**

**Question 39: Do you have an electronic payment method that you prefer?**

Yes  No

**Question 39a: If you have answered 'yes' please say what it is:**

## Transitional arrangements

Ministers' proposals to move away from life-time scheme membership will have an impact on individuals who are PVG scheme members on the date the changes come into force. Two issues arise, firstly the movement of existing PVG scheme members into the new mandatory scheme if they are in a protected role. Secondly the bringing into the new mandatory scheme those either not currently in the PVG Scheme but doing regulated work or those whose duties come within the scope of a protected role for the first time.

Ministers would be grateful for your proposals on how these objectives could be best achieved.

**Question 40: Do you have any proposals on how the transitional arrangements should work?**

## Volunteer Checks

Certain checks for volunteers (those doing regulated work in a Qualifying Voluntary Organisation ("QVO")) are provided free at the point of use. The meaning of QVO is set out in a Scottish Statutory Instrument: <http://www.legislation.gov.uk/ssi/2010/167/contents/made>, as amended. This fee waiver has been felt to be very important so as to not discourage those who would like to volunteer. However inactive scheme members also impact the QVO sector; many people who volunteer do so in the context perhaps of helping with their own children – say coaching a youth football club – but do not want to continue to do so afterwards. As the Scheme operates now, their membership remains live despite them being inactive.

The proposal to move away from lifetime scheme membership to one of the options described above offers an opportunity to address inactive scheme members across all sectors including volunteers in QVOs. We believe that this will support the policy of having a membership scheme of that is of a manageable size. However, there is still a cost to Disclosure Scotland of delivering the membership scheme in the future. In light of that, we are asking for views on whether provision should be made for volunteers in QVOs to pay a nominal fee of, for example, £10 for five years' membership.

An alternative would be to remove a volunteer from the PVG Scheme after 5 years unless an organisation actively indicated a volunteering connection with them in a relevant protected role which would qualify for a further free membership, with the option to remain in the Scheme as an unattached personal member only remaining open upon payment of the full PVG fee.

Another factor that could contribute to a solution moving forward is to consider if the meaning of QVO properly encompasses voluntary work. One way to modify it would be to introduce a clear public interest test that have to be satisfied before a volunteer could benefit either from a reduced fee, or a fee waiver.

The meaning of QVO is set out in the Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010 (as amended)<sup>4</sup>:

7(2) In this regulation—

“qualifying voluntary organisation” means an organisation which is not—

- (a) a further education institution, a school, a public or local authority, or under the management of a public or local authority; and
- (b) conducted primarily for profit, and any profit generated is used to further the objectives of the organisation and not distributed to its members;

(3) For the purposes of the definition of “qualifying voluntary organisation” in paragraph (2)—  
“further education institution” has the same meaning as in paragraph 15 of schedule 2 to the Act; and

“school” has the same meaning as in the Education (Scotland) Act 1980 but does not include a school that solely provides early learning and childcare within the meaning of Part 6 of the Children and Young People (Scotland) Act 2014.

**Question 41: Should volunteers continue to receive free membership?**

Yes  No

**Question 41a: If no, should they be subject to a reduced fee?**

Yes  No

**Question 42: Do you agree that voluntary organisations seeking to benefit from a reduced fee or the fee waiver should be subject to a public interest test?**

Yes  No

**Question 42a: If so, how should that test be defined?**

**Question 43: Do you agree that employees and employers alike (including volunteers and volunteering bodies) who work or allow an individual to work in protected roles without joining the PVG Scheme or to stay in protected roles after membership has expired should be subject to criminal prosecution?**

Yes  No

**Question 44: Do you agree that any scheme member who fails to pay the relevant fee to renew their PVG Scheme membership and where there are no employers (or volunteering bodies) registered as having an interest in them in a protected role should exit the PVG Scheme automatically at the expiry of their membership?**

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<sup>4</sup> The amendment was made by The Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Amendment Regulations 2015 SSI 2015 No. 223 which is at: <http://www.legislation.gov.uk/ssi/2015/223/contents/made>

**Yes  No**

**Question 45: Should a person who joined the Scheme as a volunteer and benefitted from free entry later try and register a paying employer against their volunteer membership then the full fee would become payable and a new 5 years of membership would commence. Do you agree with this?**

**Yes  No**

## **Section 4 – Removing unsuitable people from work with vulnerable groups**

The special attributes of the PVG Scheme that make it innovative both within the UK and indeed internationally are twofold:

- It connects the act of applying for PVG scheme membership to a function of the state to scrutinise the vetting information about that applicant to identify if the applicant may be unsuitable for work with children or protected adults
- It monitors every PVG scheme member so that the state can scrutinise all new vetting information arising about the member and decide whether the member has become unsuitable, advising employers and regulatory bodies if it decides that the individual should be considered for barring.

The PVG Scheme also provides for referrals to be made to Disclosure Scotland in circumstances where an employer or similar party has dismissed (or would or might have dismissed) an individual from regulated work for conduct of a type specified in section 2 of the 2007 Act. That includes conduct where a child or a protected adult has been harmed or has been at risk of harm, or where there has been inappropriate sexual conduct. The conduct does not need to occur in the course of regulated work. In addition to this, section 8 of the 2007 Act confers a power on regulatory bodies to make referrals to Disclosure Scotland. These types of referrals can be made about any person who was doing regulated work; it is not necessary that they are or were a PVG Scheme member.

Similarly, when someone is convicted in court of offences specified in schedule 1 of the 2007 Act, the court must refer the person under section 7 of the 2007 Act to Disclosure Scotland, which must then consider the referred person for listing with children, whether or not the referred person has ever done regulated work. The court is also able under the same section to make a discretionary referral of a person convicted of any other offence where it considers that appropriate, but Disclosure Scotland must apply statutory tests to ensure that persons referred by the court this way have a history of doing, or the prospect of doing, regulated work.

The feedback we have received to date about PVG referrals falls into two main groups; one primarily concerned with making the referral process more accessible and a second that is concerned with the fitness of the current referral process against a background of increased personalisation of care and the use of personal employees. We are addressing both of these areas in the PVG Review.

The policy rationale for current referral routes to Disclosure Scotland flow from the non-mandatory nature of the Scheme. With a non-mandatory scheme it is possible that those dismissed by employers for serious and harmful conduct, or convicted of crimes against children, might again do regulated work without ever having to join the PVG Scheme and consequently having their past conduct scrutinised. The referral process therefore anticipates that those in regulated work, or convicted of serious offences against children, but who are not scheme members, can be referred to Disclosure Scotland in order that they be considered for listing and pre-emptively barred if necessary.

You will read elsewhere in this document that Scottish Ministers are considering making PVG Scheme membership mandatory for those working or volunteering in specific roles. In those circumstances, it would be an offence for a non-member to do work for which PVG Scheme membership is mandatory. It would also be an offence for an organisation to offer

such work to non-scheme members. This change of approach offers an opportunity to reform the referral process.

If those previously convicted of offences which suggest a capacity for harm want to work with children or protected adults, they will need to join the PVG Scheme, at which point their previous conduct would become known to Disclosure Scotland and their prospective employer. If the past conduct was such that it may be appropriate to list the individual Disclosure Scotland would commence the process to consider them for listing. If they were subsequently listed, it would be impossible to do work for which PVG Scheme membership is required without committing a criminal offence which would be punishable by law.

## Ending the necessity for court referrals to Disclosure Scotland

It is our proposal that we dispense with the current duty upon convicting courts to refer those convicted of offences specified in schedule 1 of the 2007 Act. We also consider that it is appropriate to remove the provision made in section 7 of the 2007 Act for courts to make a discretionary referral.

Removal of these court referrals is a simplification of the PVG Scheme that improves proportionality whilst maintaining safeguarding. Since the commencement of the 2007 Act more than 2,200 people have been listed on the children's list as a result of a section 7 court referral who were not PVG scheme members. It is surely preferable that the PVG Scheme impacts only those (except those convicted of the most serious offences<sup>5</sup> indicating unequivocal unsuitability) who are actually doing or seeking to do work with children or protected adults and does not require the consideration for barring of those who never have nor ever will seek such work. If an individual who is already a scheme member is convicted in court for an offence against a child, this will be picked up by the ongoing monitoring of their PVG Scheme membership without the need for a court referral. As a consequence of this proposal, we would give those people who were included in the barred lists as a result of a section 7 court referral the ability to apply for removal from the list, subject to rules about them not previously having done regulated work with children or adults.

***Question 46: Do you agree with our proposals to dispense with the current court referral procedure under section 7 of the 2007 Act?***

**Yes  No**

Section 14 of the 2007 Act requires Scottish Ministers automatically to list an individual of any age, who is convicted on indictment of an offence specified in the Protection of Vulnerable Groups (Scotland) Act 2007 (Automatic Listing) (Specified Criteria) Order 2010. Since the coming into force of the 2007 Act we have included more than 900 people in the children's and adults' lists through this route. The offences set out in the Automatic Listing Order are regarded as behaviour so reprehensible that the individual would be unable to provide an explanation or mitigation for his or her actions such as to cause the Scottish Ministers not to list them. While we are proposing to dispense with referrals under section 7 of the 2007 Act, we believe the automatic listing procedure should remain to prevent the most dangerous criminals from entering the PVG Scheme. For this reason, this consultation seeks to ask if the correct offences appear in Schedules 1 to 4 in the Order.

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<sup>5</sup> <http://www.legislation.gov.uk/ssi/2010/241/contents/made>

**Question 47: Are there offences missing from the Automatic Listing Order that you think should be included? You can access the order [here](#)**

Yes  No

**Question 47a: if you answered yes to question 47, please list the offences you believe are missing?**

### **Police forces**

In terms of major policy changes we believe that a mandatory scheme has a profound impact on the question of who must be able to refer under the PVG Scheme. At present UK police forces have certain functions with regard to the 2007 Act. Under Part 1, the police are required to respond to a request from Disclosure Scotland under section 18 for information to assist them in their consideration about whether to list someone. Under Part 2, the police are required to respond to a request from Disclosure Scotland under section 47(1) for vetting information about new scheme members. Additionally, under section 47(2) police forces can, of their own choice, provide vetting information to Disclosure Scotland about existing scheme members for inclusion in the scheme member's scheme record. This latter provision of vetting information is one aspect of the continuous updating arrangements that apply to scheme members.

UK police forces do not have a power under Part 1 of the 2007 Act to make a referral in the way that regulatory bodies can. Forces must rely on the continuous updating provision if they have a concern. But as that possibility only arises when the individual is a scheme member, there is currently a potential gap in protection.

For example, information about a recent arrest and pending prosecution of a scheme member can be provided to Disclosure Scotland by the police if they considered it relevant to disclose. In turn, Protection Services in Disclosure Scotland will review that information and decide whether it may be appropriate to list the individual. If they consider that it is, they will place the scheme member under consideration for listing and write under section 30 of the 2007 Act to all known parties for whom the individual is doing regulated work (of the type of work concerned) to advise of the new consideration for listing status. However, if the Police were to detect someone who had, for example, been accused of a type of conduct described in section 2 of the 2007 Act and that accused person was not a scheme member - in other words, unlawfully doing a protected role - the police would have no powers to provide information to Disclosure Scotland.

This gap creates particular risks in the area of self-directed support and personal employment. For example, if an adult with a disability engages a personal employee then that personal employee may well be doing regulated work. The law does not provide for the personal employer to see a disclosure of their new employee's criminal record nor does it provide a power for the employer to refer the employee to Disclosure Scotland even if they consider that one of the grounds in section 2 of the 2007 Act has been met. That power is reserved for organisations engaging people in regulated work or regulatory bodies. There were good policy reasons behind this; referrals initiate a process that can have very serious consequences for those referred. It is important that coherent investigations of allegations

must take place before a process as serious as consideration for listing can begin; it is not within the capability of Protection Services to conduct disciplinary or similar investigations from scratch. For this reason we do not propose that personal employers should have a duty or a power to refer an individual to Disclosure Scotland.

Instead, bearing in mind the proposal for a mandatory membership scheme and the ability of UK police forces to provide information about scheme members, we believe the correct approach is to strengthen the powers of police to pass information to Disclosure Scotland in relation to people who are not but should be scheme members. We propose the creation of a new referral power for the police which can be used to make a referral where they have charged someone with the offence of working in a protected role whilst not a scheme member or where a referral has not been made by a relevant organisation. We would make provision for Disclosure Scotland to be able to consider it for barring purposes.

***Question 48: Do you agree with proposals to create new referral powers for the Police?***

Yes  No

***Question 49: Do you agree these powers should be limited to when police have charged a person with unlawfully doing a Protected Role whilst not a scheme member or where a referral has not been made by a relevant organisation?***

Yes  No

### ***Local Authorities / Health and Social Care Partnerships***

Some of the Adult and Child Protection Committees that Disclosure Scotland have spoken with have said that giving local authorities/health and social care partnerships a power to refer would help close some safeguarding loopholes.

To address this we believe the powers of referral currently available to regulatory bodies under section 8 of the 2007 Act should be extended to local authorities/health and social care partnerships where a referral could not be made, or was negligently not made, in respect of a person doing a role where scheme membership was mandatory.

For example, a local authority/health and social care partnerships may have conducted a formal child protection or adult protection investigation and have found evidence during this that the conduct of an individual providing personal assistance via self-directed support mechanisms or care/support staff from organisations was of a type that met the referral grounds in section 2 of the 2007 Act. A carer may have pressured a protected adult into giving them money because they were made to feel sorry for them or obliged to help them, or concerns might have been reported by family members about improper moving and rough handling of their relative by a personal assistant employed through a self-directed mechanism. In either case a crime may not have been reported to the police either because the cared for person did not want to involve the police or they did not consider a crime had been committed. The local authority/health and social care partnership might consider a referral ground in section 2 of the 2007 Act is met on the basis of the these incidents or on the basis of aggregate information available to them in regards to a pattern of incidents of concern.

In these circumstances there is currently no basis for a local authority/health and social care partnership to make a referral to Disclosure Scotland. We consider the multi-agency nature

of the child and adult protection investigation can highlight whether a referral has been made to Scottish Ministers already by the police or an employing organisation and, if not, these changes to the legislation are designed to enable local authorities/health and social care partnerships to make a referral and Disclosure Scotland will be able to act on that referral.

The central concern of Adult and Child Protection Committees' processes are rightly, about ensuring the immediate and longer term safety of known children or vulnerable adults. The power to refer would specifically ask local authorities/health and social care partnerships to consider potential future victims where a perpetrator has been a scheme member.

***Question 50: Do you think this proposal closes the safeguarding gap in terms of self-directed support?***

**Yes  No**

#### ***Power to make a referral – regulatory organisations***

Under section 8(1) of the 2007 Act, certain regulatory organisations can make a referral to the Scottish Ministers about an individual who comes within the scope of their regulatory functions and who has met the referral grounds set out in section 2 of the 2007 Act. This power supports the policy of preventing unsuitable people from doing, or from continuing to do, regulated work.

The power to make such a referral extends to:

- Healthcare Improvement Scotland
- The Registrar of Chiropractors
- The registrar of dentists and dental care professionals
- The registrar of the General Medical Council
- The registrar of the General Optical Council
- The Registrar of health professionals
- The Registrar of nurses and midwives
- The Registrar of Osteopaths
- The registrar of pharmacists
- Social Care and Social Work Improvement Scotland (the Care Inspectorate)
- The General Teaching Council for Scotland
- The NHS Tribunal
- The Scottish Social Services Council

***Question 51: Do you think that this list of regulatory organisations should be amended?***

**Yes  No**

**Question 52: If you think the list should be amended, please gives details of additions or removals.**

### **Persons under consideration for listing – new restriction imposable by Scottish Ministers**

At present, when an individual is placed under consideration for listing they are not barred from doing regulated work during the period of the consideration. This has no definite period, but Disclosure Scotland may only disclose the fact of the consideration for listing status for six months after the decision to place the individual under consideration, unless they apply to court to extend this period or legal or regulatory body proceedings commence against the individual, which allows the consideration clock to stop and be reset. The disclosure of the consideration status on a PVG scheme record is augmented by duties placed on Scottish Ministers under section 30 of the 2007 Act to notify any organisation for which the individual does regulated work (of the type concerned) of the fact of the consideration together with any information that Disclosure Scotland considers relevant. A mandatory scheme without the possibility of court referrals leaves open the possibility that someone previously convicted of a very serious offence, for example attempted rape, could undertake regulated work for many months before the final decision is made on whether to bar them or not.

We have also listened to feedback from stakeholders who regularly look to Disclosure Scotland for guidance on whether to remove individuals from employment/volunteering while they are under consideration for listing. To address these issues Scottish Ministers propose to take powers to impose a strict supervision restriction on any person under consideration for listing where it is considered necessary to do so.

The parameters for imposing conditions would be set out in law and Scottish Ministers would be allowed to specify relevant temporary conditions which the individual and employer/volunteering body must adhere to avoid committing a serious criminal offence. The duration for which conditions last would be time limited and lapse if Disclosure Scotland does not apply for an extension from a sheriff.

We also consider that the ability to impose standard conditions should be extended to other situations where the conduct or alleged conduct is at a level that conditions ought to be imposed. For example, where a person is referred under sections 3 to 5 or 8 of the 2007 Act for serious misconduct involving a child or protected adult. Strict conditions are imposed on the individual by their professional regulatory body in relation only to their paid employment/profession. That person could still undertake another protected role, for example coaching a youth football team, without restriction while the consideration for listing process is ongoing. The new power would allow for Disclosure Scotland to impose conditions on the breadth of roles/opportunities requiring PVG Scheme membership. Another example may be that other relevant information (ORI) is provided by the police in relation to a scheme member who has been reported to the Procurator Fiscal for alleged financial exploitation of his elderly neighbours. The conduct did not occur in the context of regulated work and the person does both paid and voluntary work requiring scheme membership, allowing them access to the finances and property of children and protected adults. The consideration could last many months while Disclosure Scotland monitors the legal proceedings being considered by the Procurator Fiscal. The power to impose conditions would afford greater protections for children and protected adults while information is gathered during the formal consideration period.

**Question 53: Do you agree with the proposal to provide Disclosure Scotland with powers to impose standard conditions?**

Yes  No

**Question 54: If yes, how long should the conditions last before lapsing?**

- a) 3 months
- b) 6 months

**Question 55: Under what circumstances do you think Disclosure Scotland should be able to impose standard conditions and why?**

**Question 56: Do you agree that it should be a criminal offence if an individual and employer/voluntary body failed to comply with standard conditions?**

Yes  No

## Applications for Removal from the List

Under section 25 of the 2007 Act an individual may apply for removal from the list(s) at any time if they can demonstrate that their circumstances have changed. In addition, individuals may apply for removal after a certain prescribed time period has elapsed. The Protection of Vulnerable Groups (Scotland) Act 2007 (Applications for Removal from List and Late Representations) Regulations 2010<sup>6</sup> set this period at 10 years from the date of inclusion in the list in question for those aged 18 or over and a period of 5 years for those listed under the age of 18 years. Since the commencement of the 2007 Act Disclosure Scotland has listed 5,295 individuals. Disclosure Scotland has listed just over 100 people who were under the age of 18 at the time of inclusion in the list(s), and almost 600 who were aged between 18 and 24 years at the time of inclusion in the list(s).

You will have read elsewhere in this document that adolescence and early adulthood is statistically the peak period for offending. Evidence shows that most young people who offend do not continue to do so in adulthood and research demonstrates developmental issues usually play a large part in the behaviour of young people that leads to them acquiring convictions. We are therefore proposing the age threshold for the shorter prescribed period of 5 years should be raised to 25 years.

It is important to note that the prescribed period only sets a date when the individual can apply for removal. That removal will not be automatic and formal consideration will be given

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<sup>6</sup> <http://www.legislation.gov.uk/ssi/2010/179/contents/made>

to whether the individual is no longer unsuitable to work with children and/or protected adults.

**Options**

- a) no change to the age threshold
- b) raise the age threshold to under 21 years
- c) raise the age threshold to under 25 years

**Question 57: Do you agree the age threshold for the shorter prescribed period for a removal application to be made should be raised?**

**Yes  No**

**Question 58: Which option do you prefer?**

**Option A  Option B  Option C**

## **Extending the PVG Scheme to protect children and adults who come into contact with PVG Scheme members working overseas**

The current legislation allows employers, for example, aid agencies sending people abroad to work to have the individual PVG checked for some activities (including teaching and caring for children) which, if done in Scotland, would be regulated work.

This was achieved by making provision in the Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Purposes for the Consideration of Suitability) Regulations 2010 (SSI 2010 No. 381). Regulation 2(b) provides that consideration of suitability to do regulated work in Scotland includes consideration an individual's suitability -

(b) to do, or to be offered or supplied to do, work out with the United Kingdom that would, if done in Scotland, be—

(i) regulated work with children by virtue of paragraph 1(a) of part 1 of schedule 2 to the 2007 Act [ie any of the activities listed in part 1 of schedule 2 such as teaching etc];

(ii) regulated work with adults by virtue of paragraph 1(a) of part 1 of schedule 3 to the 2007 Act [ ie again any of the activities listed in part 1 of schedule 3 such as teaching etc].

However, this only allows access to disclosures for organisations recruiting staff for work abroad. Going forward we propose that overseas work which would be a protected role, if done in Scotland, should be a specified protected role.

A related issue that arises now is that the offence provisions of the 2007 Act do not apply because the regulated work is not being done in Scotland. So a person could be barred in Scotland and do the equivalent regulated work abroad and the organisation would not be committing an offence if they decide to continue to employ that individual.

The barred individual would not be able to join the PVG Scheme and the organisation would be notified of their non-member status, however, information that they are barred would not be provided. This is the case now for organisations even if they are offering the regulated

work in Scotland. It is our proposal to allow organisations to be informed that the person has been barred from doing regulated work, that is working with children or a protected adult.

***Question 59: Do you think it's appropriate that organisations, irrespective of where the regulated work is to be carried out, should be informed of a listed individual's barred status?***

**Yes  No**

We propose to take the policy further, there are significant limitations to the implementation of policy in this area. The criminal justice systems of many countries in the world vary considerably from that of Scotland and the rest of the United Kingdom, both in terms of the range and content of criminal offences and the manner in which prosecution and sentencing operates.

There is no method by which the criminal history of a person living and working in most countries in the world can become automatically known to UK authorities. Of course, measures exist between law enforcement organisations across the world to share information and resources to prevent and detect serious crime and these can result in information being passed to UK authorities about the conduct of UK nationals abroad. But the current information sharing arrangements could not support the ongoing monitoring of PVG Scheme members working abroad in the same way that the UK criminal records databases support the ongoing monitoring of PVG scheme members who live and work in Scotland.

In these circumstances, our policy idea is to build upon the existing provisions in the PVG legislation that give access to PVG scheme records to organisations employing people to work overseas in what would be regulated work in Scotland. We recognise that the existing duties on employers to refer inappropriate conduct of PVG Scheme members to Disclosure Scotland do not extend an organisation which has PVG Scheme members working abroad. Rather than rely on the criminal justice system in the host country to provide information to Disclosure Scotland when inappropriate conduct occurs, we believe that this should be the responsibility of the organisation employing the PVG Scheme member.

We propose to do this in the following way:

- Require any employing organisation registered in Scotland to obtain a PVG check on any individual whom they intend to place overseas in a position that would be a protected role were it in Scotland.
- To make it a criminal offence for any Scottish based organisation to knowingly offer a barred individual for work overseas that would be a protected role were it in Scotland.
- To make it a criminal offence, prosecutable in Scotland, for any Scottish-based organisation to fail to submit an organisational referral to Disclosure Scotland when they move or dismiss an individual from a protected role for conduct that would have necessitated an organisational referral to Disclosure Scotland had it taken place in the course of work in a protected role in Scotland.

***Question 60: Do you agree with our approach for PVG Scheme Members in a protected role overseas or organisations employing PVG members to do a protected role, such as providing aid services?***

**Yes  No**

**Question 61:** We are proposing that there should be criminal offences in relation to organisations who employ barred persons overseas. Do you think that we should also consider introducing criminal offences in relation to barred individuals offering to undertake a protected role overseas?

Yes  No

## **Section 5 – Offence Lists and Removal of spent convictions from a disclosure**

### **Background**

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

In June 2014, the UK Supreme Court, in a judgment relating to the disclosure of cautions issued by the police in England and Wales for minor offences found that the system under the 1997 Act as it applied in England and Wales breached a person's article 8 rights under the European Convention on Human Rights (ECHR). Although the court fully accepted the need for additional scrutiny of a person's background if they wanted to work with vulnerable groups or in other sensitive roles, it indicated that the automatic indiscriminate requirement for disclosure of all convictions was not proportionate as no assessment was undertaken of the relevance of the information disclosed to the purpose for which the disclosure was required.

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

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

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

In February 2017 the Court of Session ruled on a judicial review brought in relation to the disclosure of a previous conviction on the petitioner's PVG scheme record. The court found that, insofar as they required automatic disclosure of the petitioner's convictions before the Children's Hearing, the reforms made in 2015 still left in place a position that unlawfully and unjustifiably interfered with the petitioner's article 8 rights under the ECHR.

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

## Schedule 8A and 8B offence lists

As explained above, two lists of offences have been developed – a list of ‘Offences which must be disclosed unless a Sheriff orders otherwise’ (schedule 8A) and a list of ‘Offences which are to be disclosed subject to rules’ (schedule 8B). Offences that do not appear on either list will not be disclosed after they become spent. In developing these lists of offences careful consideration was given to the attributes required for roles requiring higher level disclosure. Such roles place the individuals filling them in a position of power and responsibility. A conviction for a criminal offence that:

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

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

The offence lists have been developed using multiple sources of information. The starting point was the Scottish Government published Recorded Crime in Scotland Classification of Crimes and Offences. Thereafter we considered all CHS and PNC recorded offences that have appeared on higher level disclosures since 2007. We considered the Disclosure and Barring Service’s (DBS) list of offences that will never be filtered from a DBS certificate in England and Access Northern Ireland’s filtering list.

Links to the lists of the offences in schedule 8A and schedule 8B of the 1997 Act can be found in Annex C; the Annex also shows new offences that have been created since the reforms in 2015 and the schedules we believe each these offences belong to.

The offences listed in schedule 8A and 8B of the 1997 Act are mirrored in schedules [A1](#) and [B1](#) respectively of the 2013 order, as amended. The provisions in the 1997 Act are aligned with the provisions in the 2013 Order to ensure that the policy of self-disclosure and state disclosure remain aligned. The current rules about self-disclosure are set out in [section 1](#) above.

**Question 62: Are there any offences missing from either list that you think should be included? If so what are they, on what list should they appear and why?**

**Question 63: Are there any offences on schedule 8A that you think should be on schedule 8B? If so, please list them and explain why.**

**Question 64: Are there any offences on schedule 8B that you think should be on schedule 8A? If so, please list them and explain why.**

**Question 65: Do you agree with the categorisation of the new offences?**

Yes  No

**Question 65a: If no, please state how they should be categorised.**

## Applications to a sheriff for removal of spent convictions from a higher level disclosure

### **Applications for removal of schedule 8A offences**

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

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

### **Applications for removal of schedule 8B offences**

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

- the conviction for the schedule 8B offence is spent
- A conviction for an 8B offence will no longer be included in a disclosure certificate if the following rules are met –
- the conviction for a schedule 8B offence is spent, and –
    - (a) where the person was aged under 18 at the date of conviction, 7 years and 6 months have passed since the date of the conviction;
    - (b) where the person was aged 18 or over at the date of conviction, 15 years have passed since the date of the conviction; or
    - (c) the sentence imposed in respect of the conviction was an admonition, an absolute discharge or a discharge from a children's hearing where the referral was on offence grounds.

### **What will the sheriff decide**

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

purpose of the disclosure, the conviction would be removed before the disclosure is issued to a third party such as an employer.

#### ***How were the disclosure periods in relation to schedule 8A and 8B offences derived?***

The 15 year (or 7.5 year depending on the individual's age at date of conviction) time periods were derived from the context of the current rehabilitation periods set out in the Rehabilitation of Offenders Act 1974 and the timescales for retention of criminal conviction information on the police Criminal History System.

The longest rehabilitation period (that is, the period during which a conviction is not yet spent) for someone who was aged over 18 at the date of conviction is currently 10 years under the Rehabilitation of Offenders Act 1974. This would be the rehabilitation period which would result from a custodial sentence of greater than six months but no more than 30 months.

The Management of Offenders (Scotland) Bill<sup>7</sup> has recently been introduced into the Scottish Parliament and, if passed, will make changes to the current rehabilitation periods. As the current disclosure regime is derived from the current rehabilitation periods it makes sense to review the current disclosure periods.

The Management of Offenders (Scotland) Bill proposes the following changes to the rehabilitation periods in respect of custodial sentences and when they would become spent for individuals convicted over the age of 18 and those convicted when under the age of 18.

<b>Custodial sentences</b>	<b>Rehabilitation period</b>	<b>Rehabilitation period</b>
	<b>Aged 18 or over when convicted</b>	<b>Aged under 18 when convicted</b>
Not more than 12 months	Sentence plus 2 years	Sentence plus 1 year
More than 12 months but less than 30 months	Sentence plus 4 years	Sentence plus 2 years
More than 30 months but not more than 48 months	Sentence plus 6 years	Sentence plus 3 years

If the Bill is passed, the longest period of disclosure for someone over 18 receiving a custodial sentence would continue to be ten years, (that is, for a 4 year sentence, the disclosure period is length of sentence, (4 years), plus 6 years which equals 10 years). However, as can be seen from the above table, the overall policy intention set out in Management of Offenders (Scotland) Bill is to reduce the period of disclosure for custodial sentences up to and including 48 months. For example, currently if someone is convicted of an offence and is given a 12 months' custodial sentence the conviction will become spent 10 years from the date of conviction. Under the proposals in the Management of Offenders (Scotland) Bill a 12 month custodial sentence will become spent 3 years from the date of conviction, (that is, length of sentence (12 months) plus 2 years which equals 3 years).

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<sup>7</sup> <http://www.parliament.scot/parliamentarybusiness/Bills/107731.aspx>

For such an example, this could result in an individual having their spent conviction disclosed for an additional 12 years on a higher level disclosure for an offence on schedule 8B before it will no longer be disclosed. Or wait a further 12 years before they can make an application to a sheriff to have the conviction for a schedule 8A offence removed.

We believe that there are two possible options going forward. Those are:

- maintaining the status quo for the disclosure periods; or
- reducing the disclosure periods to less than 15 years (for over 18s) and less than 7.5 years (for under 18s).

We do not believe that an approach that would increase the periods would be appropriate. This would be disproportionate when balancing safeguarding and an individual's right to a private life.

## **Reducing the disclosure periods for spent convictions**

In relation to spent convictions for offences listed in schedule 8B, we propose that the current disclosure periods should reduce to no less than 11 years for those aged 18 or over at the date of conviction, and to no less than 5.5 years for those under 18 at the date of conviction. For those aged 18 or over on the date of conviction, this would ensure the continued disclosure of a conviction for any offences on schedule 8B for at least a year once the conviction was spent (where the longest rehabilitation period of 10 years continues to apply). This means that convictions for schedule 8B offences would become protected 11 years from the date of conviction and would no longer be included in a disclosure certificate once the 11 years were complete. If the applicant was under the age of 18 on the date of conviction, at least 5.5 years must pass before the conviction is protected. There will, however, be some cases, where the individual is under the age of 18 at the date of conviction and receives a custodial sentence of more than 30 months, that a sentence becoming spent and becoming protected could occur at the same time. The current rules regarding applications to a sheriff for removal of convictions for schedule 8B offences would continue so that an applicant could, as now, apply for the removal of a conviction from a disclosure once the conviction is spent.

For offences on schedule 8A, as with the current rules, no offence will be automatically protected and removed from a disclosure certificate after any particular period of time. However a change in the length of the automatic disclosure period would allow an applicant the ability to apply for removal of the spent conviction after 11 years (instead of 15 years) if over 18 at the time of conviction or 5.5 years (instead of 7.5 years) if under 18 at the time of conviction.

**Question 66: Do you believe the rules for disclosure in the current form of 15 years and 7.5 years provide appropriate safeguarding and privacy protections?**

**Yes  No**

**Question 67: Do you agree that a reduction in the disclosure periods from 15 & 7.5 years is appropriate considering the changing policy on rehabilitation of offenders?**

**Yes  No**

**Question 68: What period between 11 and 15 years do you think is appropriate for disclosure?**

**11  12  13  14  15**

## **Removal of spent convictions from a disclosure**

### ***How effective is the current system?***

To date we have had 346 applicants intimate to Disclosure Scotland their intention to apply to a sheriff for the removal of a conviction from their disclosure. 27 of these have then proceeded to make an application to a sheriff. In one case the sheriff has ordered convictions removed from the disclosure. In three cases the sheriff has ordered that convictions should not be removed from their disclosure as they were still relevant. Out of the 27 cases, 23 have yet to be decided by the sheriff. In 24 cases, the person did not actually proceed to make an application to the sheriff and therefore the disclosure application ended without any disclosure being issued to the person who had countersigned it.

The average time from an applicant's notification of intention to Disclosure Scotland to apply to a sheriff for removal of a conviction to the completion of their case by the sheriff has taken 6 months, but some of the pending cases have taken considerably longer than that.

To understand fully the implications and/or issues with the current application mechanism, Disclosure Scotland emailed 346 applicants who had intimated an intention to apply to a sheriff and asked the following questions:-

- 1. Did you pursue your application to a sheriff? If so, how did you find the process?*
- 2. If you did not pursue your application to a sheriff, why?*
- 3. Did you find the insert explaining your right to make an application to a sheriff, as well as any other information provided by Disclosure Scotland, helpful?*
- 4. Have you made a new PVG application since?*
- 5. Are you still in regulated work? If not, would you like to be removed from the scheme?*

In total, 51 applicants responded. Four respondents currently have live applications pending with the sheriff court seeking to have their schedule 8B offence removed. 38 respondents did not pursue an application to a sheriff, 9 respondents noted an interest in making an application to a sheriff but needed more guidance on how to do this, 2 respondents pursued applications which are now concluded.

As mentioned above, 38 of those initially intimating an application to a sheriff did not proceed any further with their application to have convictions removed. There were a number of reasons given for this, the main ones being:

- Cost - for many the costs associated with making an application, legal representation and court fees, were prohibitive. One commenter stated they felt the process to be unfairly weighted against those who cannot afford legal help.
- Length of time - a number of these respondents noted that to launch an application would result in a delay to the employment opportunity necessitating the higher level disclosure.
- Uncertainty about how to make an application - respondents explained that they found the current process to be complicated, unclear and confusing. Respondents further commented that the information provided by Disclosure Scotland on the application process is hard to understand or otherwise insufficient.

This suggests that the current system could deter individuals who have the right to make an application to a sheriff from doing so. The costs could also be a deterrent. Although a number of the respondents were already in work, it is possible that the delays involved could impact on an individual's ability to get work. This could also have a subsequent effect on organisations trying to recruit certain posts.

## Options going forward

### *Maintain the status quo*

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

### *Introduce an administrative process stage prior to application to a sheriff*

Protection Services within Disclosure Scotland already receives and considers referrals and other information and takes decisions, on behalf of Scottish Ministers, about whether individuals are unsuitable to work with children or protected adults. We believe that this skill-set equips them to make robust decisions on whether or not a spent conviction is relevant to the position applied for and consequently whether it should or should not be disclosed on a person's scheme record or on a standard or enhanced disclosure.

There is therefore an option of allowing people to make an application to Disclosure Scotland to have a conviction removed from their certificate. This would be a compulsory first step. An application to a sheriff could only be made if Disclosure Scotland decided that the conviction should not be removed.

In this scenario, the law would give Disclosure Scotland powers to enable them to gather the relevant information from the relevant bodies to allow them to make robust decisions about whether a conviction ought to be disclosed or not.

Applicants would be able to provide representations in support of their application to have the conviction removed from their disclosure.

Any application to Disclosure Scotland to consider whether a conviction should be removed from the disclosure would require to be made within 3 months (the same as the current time limit for an application to a sheriff) and would be available in the same circumstances as an application to the sheriff, but the time to have the matter considered and decided would be typically shorter.

If an applicant was dissatisfied with Disclosure Scotland's decision not to remove a conviction, they would retain the right to apply to a sheriff for the conviction to be removed. We propose that the sheriff should consider the facts again and make a new decision.

Advantages of an internal administrative process:

- Simpler for applicants to understand and progress;
- Cheaper for applicants as legal representations not required. An administration fee of £30 will be charged;
- Quicker decisions;
- There is a lack of developed case law for sheriffs to rely on under the current system ; however, Disclosure Scotland already has in place a decision-making process for

removing unsuitable individuals from regulated work and the experience of that process could be applied to the context of applications for removal of convictions;

- The ability to make an application to the sheriff for a further decision about whether a conviction should be removed offers an additional level of scrutiny.

Disadvantages of an internal administrative process:

- Increase in possible vexatious or spurious claims;
- Cost to Disclosure Scotland – particularly staff costs and time;
- Some cases may take just as long as a sheriff due to complexity.

### ***Introduce an Independent Reviewer***

An independent reviewer is to be established under the Age of Criminal Responsibility (Scotland) Bill (“the ACR Bill”). It would be possible to extend the functions of the independent reviewer to include a review of whether convictions listed in schedules 8A and 8B should be included in a disclosure. The only ground for an application to a sheriff to review the independent reviewer’s decision would be on a point of law.

Advantages of an independent reviewer:

- Simpler for applicants to understand and progress and a less formal process;
- Cheaper for applicants as legal representations not required. A fee of £30 will be charged;
- Quicker decisions.

Disadvantages of an independent reviewer:

- Increase in possible vexatious or spurious claims;
- There will be additional costs to provide administrative support, and for office space and equipment;
- Some cases may take just as long as a Sheriff due to complexity.

## ***Application to the Scottish Tribunals***

The Tribunals (Scotland) Act 2014 (“the 2014 Act”) created a new, simplified statutory framework for tribunals in Scotland, bringing existing tribunal jurisdictions together and providing a structure for new jurisdictions. The 2014 Act created two new tribunals, the First-tier Tribunal for Scotland (First-tier Tribunal) and the Upper Tribunal for Scotland (Upper Tribunal), known collectively as the Scottish Tribunals.

In some cases, appeal functions were transferred to allow the first-tier tribunal to hear Scottish cases instead of using a sheriff. Examples of the issues that tribunals handle include the compulsory care and treatment of people with mental health disorders; disputes between tenants and landlords; disputes involving land and property; and cases concerning children and young people with additional support needs.

An application for removal of convictions could be made to the Scottish Tribunals instead of to a sheriff.

Advantages of a Tribunal:

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

Disadvantages of a Tribunal:

- Can be costly and time consuming to establish (will require legislative change and a statutory basis; statutory rules of procedure; may require appointment of judiciary if an existing jurisdiction cannot deal with the matter; development of case management systems etc);
- Legal aid is generally not available at first instance which can deter people from submitting a claim;
- The lack of fees may result in ill-founded or speculative claims;
- Procedures and rules can be complex depending on the jurisdiction making the process challenging for unrepresented parties;

- Time consuming – cases not completed any quicker than a sheriff if it is a complex case.

**Question 69: Do you think the application process to seek removal of a spent conviction should be reviewed?**

Yes  No

**Question 70: At present, an individual has three months from the date of notification of an intention to appeal to make an application to a Sheriff. Do you think this time period is:**

Too long  Too short  Correct

**Question 70a: If you indicated that the time period is too long or too short, what do you think the time period should be?**

**Question 71: Do you think any of the options set out above offer viable alternatives to an application to a Sheriff?**

Yes  No

**Question 71a: If yes, which one?**

**Question 71b: If not, do you have any other suggestions?**

## Section 6 – Additional Policy Questions

Additional Policy Questions	<ul style="list-style-type: none"><li>• Reforms to other relevant information</li><li>• Provisions for 12-17 year olds</li><li>• Registered persons and countersignatories for higher-level disclosure applications</li><li>• Self-Directed Support</li><li>• Private Individuals i.e. Tutors working with children or protected adults</li><li>• Notification requirements under Part 2 of the Sexual Offences Act 2003</li></ul>
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## Other Relevant Information

Scottish Ministers consider Other Relevant Information (“ORI”) to be important for public protection. It allows for the disclosure of non-conviction information and is a direct response to past tragic cases where information was known about serious offenders but not disclosed. The Bichard Report, following the Soham murders on 4 August 2002, and the Cullen Inquiry that followed the Dunblane massacre on 13 March 1996, both highlighted the importance of managing better what is known about individuals who are of interest to the police and about whom there are valid safeguarding concerns.

In response to the Cullen Inquiry, the 1997 Act introduced the ability for Disclosure Scotland to ask the chief officer of any relevant police force to provide information about the applicant for inclusion on the enhanced disclosure. Any information disclosed by a chief officer is known as ORI. And in enacting the 2007 Act (Scottish Ministers’ response to the Bichard Report), the Scottish Parliament provided for the possibility of ORI being disclosed on the PVG scheme record.

Scottish Ministers are confident that Police Scotland and other UK police forces exercise utmost rigour before deciding to include ORI. Only a tiny minority of enhanced and PVG scheme record disclosures in Scotland, 766 in total from 2016 to 2017, contain such information. However, the law in Scotland governing ORI differs from the rest of the UK. In England and Wales the police forces work to Home Office guidance governing ORI and the law provides chief officers with a power to seek representations from disclosure applicants. It also affords applicants the right to apply for an independent review of the ORI to have it removed or changed prior to disclosure.

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

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

circumstances, the ORI will be disclosed to the employer and the individual at the same time.

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

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

Ministers would like to alter the point at which the individual disclosure subject becomes aware of the police intention to disclose ORI. They would like to provide the individual with the opportunity to challenge any proposed ORI and have it removed or adapted before it is disclosed to a prospective employer. As such we consider it necessary to introduce additional steps in the process for disclosing ORI.

To achieve this we intend to seek a power for Ministers to issue statutory guidance in relation to the disclosure of ORI. This will include that the police will seek representations from the individual before the inclusion of that ORI on a PVG scheme record, or enhanced disclosure, and consider those representations and have regard to them. We propose to continue the right for the individual to request that the police should review whether or not ORI is disclosed, but in future there will be no disclosure to an employer or potential employer before this stage.

Where, after requesting a review, any individual remains dissatisfied with the police decision on including ORI on their disclosure we propose that the subject of the ORI should be able to apply to an independent reviewer to review whether the ORI should be included on their scheme record or enhanced disclosure prior to any disclosure of the ORI to an employer or potential employer.

This right to request an independent review would be available only after the existing right to seek a review by the chief officer had been exhausted, but before taking the step of moving to judicial review. We do not think there should be an appeal available in relation to a decision made by the independent reviewer, but the disclosure subject could seek a judicial review. One option would be to use the independent reviewer being appointed under the Age of Criminal Responsibility (Scotland) Bill ("the ACR Bill") to carry out the proposed review function.

**Question 72: Do you agree that Ministers should have a power to issue statutory guidance to Police Scotland on the processes governing the generation and disclosure of ORI, including seeking representations from the individual before issuing it for inclusion on an enhanced disclosure or PVG scheme record?**

Yes  No

**Question 73: Do you agree with Ministers' proposals to allow for representations to the chief constable before disclosure of ORI to a third party and for providing the individual with the option to appeal to an independent reviewer before ORI is disclosed?**

Yes  No

**Question 74: Do you agree that the independent reviewer being appointed under the ACR Bill should be used for reviewing ORI?**

Yes  No

## Disclosure provisions for 12 – 17 year old children

### The current position

Scotland's current policy and legislative position already addresses the peculiar nature of youth offending as a serious, but usually temporary, phenomenon. Our Children's Hearings System already prevents many acts that would otherwise be construed as criminal from being processed as such, ensuring that behaviour by young people never reach a criminal court.

The existing position offers protections for young people who have committed offences. The Lord Advocate's Guidelines, the differential periods of disclosure provided for in the Rehabilitation of Offenders Act 1974 ("the 1974 Act") and the reforms made to higher-level disclosures in 2015 have all contributed to a system that helps young people move on from past offending. The content of higher level disclosures (standard, enhanced or PVG) is filtered to ensure that minor spent convictions do not appear at all, moderately serious convictions appear for 15 years after conviction (7.5 years if the conviction was before the individual's 18<sup>th</sup> birthday) and serious offences stay on indefinitely, unless a sheriff orders otherwise.

Scotland's 'whole system approach' to youth justice is well-established, complementing other initiatives to prevent, tackle and cut youth crime. A growing body of research exists on why young people may desist from crime, and also about what gets in the way of positive outcomes. Professor Fergus McNeill from Glasgow University said :

“Psychological” or “correctional” rehabilitation can take a person part of the way towards a better life, but if the route is blocked, for example, by the practical effects of a criminal record or by the ‘stickiness’ of the criminal label and the refusal of the community to accept that someone has changed, then desistance may be quickly derailed.”<sup>8</sup>

The current position will be improved further with the enactment of the Age of Criminal Responsibility (Scotland) and the Management of Offenders (Scotland) Bills. The Age of Criminal Responsibility (Scotland) Bill was introduced into the Scottish Parliament on 13 March 2018. If enacted, it will mean that the behaviour of children under 12 can never result in a conviction. Also any disclosure by the state (Disclosure Scotland) of that pre-12 behaviour will only happen as ORI from Police Scotland, and after independent review.

The Management of Offenders (Scotland) Bill was introduced to Parliament on 22 February and will, if enacted, shorten the period for which most offences remain ‘unspent’, with measures to shorten further the ‘unspent’ period for most offences when the offender was

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<sup>8</sup> Professor Fergus McNeill et al, *How and Why People Stop Offending: Discovering Desistance*, Institute for Research and Innovation in Social Services, 15 April 2012. <https://www.iriss.org.uk/sites/default/files/iriss-insight-15.pdf>

under 18 years at the date of conviction. This will impact on basic and higher level disclosures and reduce disclosure by both the state or the individual.

However, for those aged 12 years or more when convicted there remains the possibility both of conviction and subsequent disclosure.

## **Proposal for the future**

The impact of youth crime should not be underestimated. Adolescence and early adulthood is statistically a peak period for offending. Youth crime and disorder places a significant burden on society; it may put the public at risk of harm, can persist for years and active individuals may accrue many convictions.

Desistance from youth crime typically follows by the mid-twenties. There are particular disadvantages that impact on young people who persistently get into trouble with the law. Young people looked after and accommodated, for example, in foster care or residential care, are more likely to accrue convictions for minor matters that would likely have been dealt with by parental sanctions (see Moodie research from CYCJ 2016: 'Responses to offending in residential child care – factors that influence decision making'). The vast majority of children who are looked after and accommodated by the local authority are there on purely welfare and protection grounds, not offending behaviour. Yet there is a strong stigma felt by care experienced young people; judged and labelled as criminals despite having done nothing wrong or being in any way responsible for their care status. The experience of adversity and childhood traumas can draw children into harmful behaviours and lead to contact with the police that simply would not have occurred had the child not had to negotiate the care system. Scottish Ministers consider that we have a duty to help young people move on from early harmful or criminal behaviour and live productive lives when they are ready to do so, whilst simultaneously ensuring that the disclosure system addresses those who pose risks of serious harm to the public.

While youth offending will cease with age in most cases, this isn't always so. In fact, there are instances where early onset predicts later escalating criminality; it is one of the proven risk factors typically assessed when examining the behaviour of an adult offender. We therefore propose that the appropriate policy solution will strike a balance between the rights of the young person to get on with life without the unnecessary burden of a criminal record and the requirement that harmful behaviour is identified in the interests of the public protection.

The ACR Bill draws a clear line at 12 years with regard to revised disclosure provisions for children because that is the proposed new age of criminal responsibility; all of the provisions in the ACR Bill support that change. The Scottish Government knows that there is a requirement to consider more widely how the disclosure system works for children who are aged 12 or older so as to ensure it is equitable and fair to all, protecting the life chances of children who may have committed offences in the past but who now wish to move on with law-abiding lives.

If the ACR Bill progresses to law, behaviour by children under age 12 will not be labelled as criminal. However, as a child progresses through teenage years and towards adulthood it is reasonable to consider there is a growing sense of responsibility and accountability for their actions which is why they are held to be criminally responsible from 12, but nevertheless still protected by the Children's Hearings System and by the system for disclosure of such offending behaviour. The Government is committed to affording all young people the chance to overcome early adversity, including the adversity of involvement in offending behaviour, to become productive and fulfilled adult citizens. The 2016-17 'Programme for Government: A

Plan for Scotland' says that Ministers will 'look afresh at the disclosure of early childhood offending to enable young people to move beyond early mistakes.' The current Programme for Government commits Ministers 'as part of the Year of Young People, [to] undertake a comprehensive audit on the most effective and practical way to further embed the principles of the UN Convention on the Rights of the Child into policy and legislation.'

During the preparation of the 2016 Report of the Age of Criminal Responsibility Advisory Group, members on its Disclosure Sub-Group reached a clear consensus that the issue of disclosure of conduct occurring when the subject was aged between 12 -17 merited early consideration and reform.

The policy solution to revise the system for the disclosure of offending conduct of individuals when age 12 or over has a variety of possibilities. Each option balances differently risks and benefits, and rights and responsibilities.

Some key policy options are outlined for discussion and debate below:

#### ***Option 1***

Make no changes to the existing system which would mean that convictions accrued from age 12 and before 18 years would remain in the same position as now, which means that they are disclosed whilst unspent on all levels of disclosure, and disclosed whilst spent on higher level disclosures if listed on schedules 8A or 8B of the Police Act 1997.

#### ***Option 2***

Apply for children between 12 and an upper age we are consulting on exactly the same disclosure system as has been set out in the ACR Bill for children under 12.

There would therefore be no possibility of disclosing automatically a conviction accrued during this age range, on any type of disclosure. A Level 1 disclosure (currently a basic disclosure) could contain no information about convictions under the upper age; there is also no possibility to include police information on this type of disclosure. All convictions accrued above age 12 and under the upper age limit would therefore remain undisclosed on those types of disclosures if this option was selected. Disclosure could only occur on Level 2 or PVG level disclosures as ORI following independent review.

At present, there is alignment between state disclosure and self-disclosure for higher-level disclosures. We are proposing that this alignment will be maintained under the future arrangements for Level 2 and PVG level disclosures. This will require changes to the Rehabilitation of Offenders legislation the nature of which will be contingent upon whatever decision is taken about the option for handling convictions obtained between 12 and the upper age.

If such a system were to be applied for disclosures requested only by people who are teenagers at the time of the disclosure request the impact would be low with around 870 disclosures per year. However, if this was applied for adult applicants who happen to have convictions from adolescence it would require a significant new investment in building capability and capacity in both the police and the independent reviewer service.

#### ***Option 3***

There is an option to build on the current legislation to provide that no conviction, regardless of how recent, may be disclosed on a state disclosure when the individual was, at conviction, aged between 12 years and the upper age. However, this protection would be set aside:

- Where the conviction is listed on schedule 8A of the Police Act 1997
- Where the conviction is listed on Schedule 8B of the Police Act 1997
- Where the conviction is of a type that cannot become spent under the Rehabilitation of Offenders Act 1974 (excluded from rehabilitation)

But protected convictions would not be disclosed on higher-level disclosures.

The consequence of this is that more serious offending would continue to appear as is currently the case on disclosures of youth offending on level 1, 2 and PVG disclosures, but unspent convictions for minor offences, for example, dropping litter would never be disclosed. This provides special protections for children as the corresponding disclosures for similar convictions accrued by adults would include all minor offence convictions until they were deemed spent under the 1974 Act.

At present, there is alignment between state disclosure and self-disclosure for higher-level disclosures. We are proposing that this alignment will be maintained under the future arrangements for Level 2 and PVG level disclosures. This will require changes to the Rehabilitation of Offenders legislation that will be contingent on which option is selected disclosing convictions obtained whilst the individual was aged 12 to the upper age.

An individual may consider that even a serious conviction should not be disclosed because of their youth at the time of the offence and because they consider that the circumstances are exceptional enough to justify non-disclosure.

The current legislation allows an individual to apply to a sheriff for removal of schedule 8B convictions if they are already spent and for removal of schedule 8A convictions if they are already spent and after a certain period of time has expired. This period of time is shorter (seven and a half years) for individuals who were under 18 when convicted.

Pursuing this option would mean that the individual could apply to the sheriff for removal of convictions accrued between 12 and the upper age regardless of whether the conviction is spent or not. This applies another protection for children convicted of offences to have immediate recourse to have a court to look at their circumstances and direct that a matter should not be disclosed, where the sheriff decides that is the appropriate outcome.

This option would permit minor offending by young people to be forgotten immediately in disclosure terms so that it does not blight their life chances at critical junctures such as securing training and apprenticeships. An example of this is a young person's story Scottish Ministers encountered through the charity Who Cares? Scotland.

*Lynne was looked after and accommodated and living in a care home. The reasons for her reception into local authority care were entirely about her care and protection, caused by an adverse family background that included domestic violence and parental alcohol abuse. After she went to live in a residential unit she felt poorly supported and believed that the attitude of the authorities towards her defaulted to the view that she was an offender or "bad girl" as she terms it. During a minor domestic argument at the care home when she was a teenager she threw a soft-boiled vegetable at a member of care staff and the police were called. She was prosecuted for assault. This criminal conviction continued to impact on her ability to get into work and training when she left care.<sup>9</sup>*

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<sup>9</sup> Who Cares? Scotland, 'Scotland Works for You' Guidance, p.19, 25 March 2018.

<https://www.mygov.scot/scotland-works-for-you/scotland-works-for-you-guidance-pack.pdf?inline=true>

It is also true that some scenarios that might arise under this option are more challenging for employers to accommodate. For example, recent minor theft convictions would not be disclosed yet a young person could present to start an apprenticeship in a bank or supermarket where they will handle cash. In that scenario it is important that the employer considers all the relevant sources of information when making a recruitment decision, including the strong probability that youthful offending will not persist into adulthood, the controls and training that they have in place for their employees as a deterrent to dishonesty and indeed the young person themselves seeing the opportunity of working as a very positive offer that they would be loath to lose. The disclosure system does not predict all instances of dishonesty in a workplace; much detected workplace crime comes from those who have not been previously detected or ever convicted. It is also true that the existence of a conviction, especially a minor one, may not be the best proxy for future behaviour. It is true that most, if not all, of us commit what would be criminal offences at various times of life for which we are never detected or convicted. The existence of a conviction on a person's record allows us to readily identify a group of citizens as being 'criminal' and therefore not like 'us' when in actual fact much of that is actually reflective of whether crime was detected or not.

Finally, it is worth reflecting on emerging evidence that after a period of desistance from typical offending types the probability of an offender being reconvicted returns to that of the general population. This tells us that people can and do change and past dishonesty does not necessarily mean that the person will offend again, contrary to much received wisdom on this matter.<sup>10</sup> This is borne out by the testimony of major employers who recruit people with convictions. Research with such employers tells us that they value the individuals with adverse criminal records very highly as being loyal and trustworthy employees who recognise that employment has allowed them to move on and experience success.

There is no proposal made in this option to end the facility of the police to provide non-conviction information about those aged over 12 on the enhanced disclosure and PVG scheme record. The reader is drawn to review the policy proposal elsewhere in this consultation about changes to the general system of ORI so that there are new powers for Scottish Ministers to issue guidance to the police on ORI and, specifically, to provide that individuals can make representations before the disclosure of ORI to a third party and also a facility to have the decision independently reviewed before disclosure occurs.

These measures, if enacted, would enhance the protections for those who have conduct dating from age 12 to the upper limit so that the provision of ORI about that behaviour will be subject to a number of checks and controls that enhance fairness whilst retaining and protecting the important role that ORI has in protecting the public.

**Question 75: Should there be specific provisions reducing the possibility of the state disclosure of criminal convictions accrued by young people 12 years or older on all types of disclosure?**

Yes  No

**Question 75a: If there should, what age range should the special provisions apply to?**

1. 12 – 14 years
2. 12 – 15 Years

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<sup>10</sup> Dr Beth Weaver, *Time for Policy Redemption? A Review of the Evidence on Disclosure of Criminal Records*, The Scottish Centre for Crime & Justice Research, March 2018

- 3. 12 – 16 years**
- 4. 12 – 17 years**
- 5. 12 – 18 years**
- 6. 12 – 21 years**

**Question 75b: Please tell us why you have selected an age range or given your answer.**

**Questions 76: Should there be a presumption against the disclosure of all convictions accrued between 12 and a specified upper age, with the only possibility being police disclosure as ORI after ratification by the Independent Reviewer on the Level 2 and PVG Level disclosures?**

**Yes  No**

**or**

**Question 77: Should there be no state disclosure of any conviction between the age of 12 and the specified upper limit, except where the conviction is for an offence listed in schedule 8A or 8B?**

**Yes  No**

**Question 78: If there is a disclosure of an 8A or 8B conviction(s) should all other unspent convictions be disclosed even if the other unspent convictions are for offences not listed in schedule 8A or 8B?**

**Yes  No**

**Question 79: Should disclosure applicants with 8A and 8B convictions be able to apply immediately to a sheriff (or other authority) to have those treated as protected regardless of the passage of time?**

**Yes  No**

**Question 80: When including ORI on any disclosure about conduct between the age of 12 and the upper age limit should the police only be able to refer to matters they reasonably considered to be serious?**

**Yes  No**

#### **Availability of all types of disclosures for under -16s**

At present, Disclosure Scotland offers all types of criminal record checks regardless of the age of the applicant. This is not the case elsewhere in the United Kingdom. Ministers in those jurisdictions believe that it is generally inappropriate for children under 16 to apply for criminal record checks as they should not have an unsupervised role where they are, for example, caring for other children or protected adults on behalf of an organisation or employer. We consider that it is appropriate to ask if the practice of not having a lower age limit should continue.

The prohibition would not be blanket, we would make exceptions in certain circumstances where a disclosure check on a young person may be in the public interest. An example

might be when a foster family has a 15 year old child and a foster child is coming to live with them. The check would be a Level 2 check which is explained later in this consultation document.

***Question 81: Do you agree with the proposal to place a lower age limit on applicants for criminal record checks?***

Yes  No

***Question 82: In what circumstances should a criminal record check for a child under 16 be permitted?***

### ***Registered persons and countersignatories for higher-level disclosure applications***

One feature of the current arrangements for higher-level disclosure applications is that they must be countersigned by an individual whose name is included on a register held by Disclosure Scotland under section 120 of the 1997 Act. You will have seen in the options set out in section 3 above that Ministers are of the view that a counter-signatory will have a part to play in the future disclosure arrangements that are proposed for Level 2 and PVG Level disclosures.

At present, a person applying for registration under section 120 must be—

- (a) a body corporate or unincorporate,
- (b) a person appointed to an office by virtue of any enactment, or
- (c) an individual who employs others in the course of a business.

In the case of paragraphs (a) and (b) above, once the person is registered, they can nominate another person, or persons, to act on their behalf as a counter-signatory. The countersignatory's responsibilities are set out in the 1997 Act, Regulations made under the 1997 Act, and the Code of Practice and include, among other things, authenticating the identity of higher-level disclosure applicants, and handling the disclosure certificates. There is not currently a lower age limit for either a person applying to be the registered person, or for individuals being nominated as countersignatories. In view of the responsibilities both can have, Ministers propose to introduce a minimum age of 18 years for people who want to become registered person or those who are nominated to be countersignatory in connection with Level 2 and PVG Level disclosures.

***Question 83: Do you have any concerns with this proposal?***

## **Self-directed support**

The aim of self-directed social care is to put the supported person in control of their care (if they wish it), including taking on all employer responsibilities. They will not be able to do this unless they have been judged as having capacity, and in that case all decisions – and the right to make mistakes – sit with them.

The Social Care (Self-directed Support) (Scotland) Act 2013 provides for a supported person making self-directed social care arrangements. Under self-directed approaches to social care, a supported person may choose to directly employ their own staff using social care funding supplied by the local authority/ Integration Joint Board (which is a partnership between a local authority and a health board to manage adult health and social care services). A range of information will be available to the individual when making their decision and can include: professional qualifications, relevant work experience, and references.

At present under the 2007 Act, the supported person can (depending on the type of social care being provided) ask a prospective carer (unless that person is a family member, or a private individual unconnected with an organisation) to apply to join the PVG Scheme, and for disclosure of the prospective carer's statement of scheme membership. The PVG statement of scheme membership does not contain vetting information; it states that the person is a PVG scheme member and for which workforce, and whether she or he is under consideration for listing. It does not show whether the prospective care has any previous convictions.

Supported persons making social care arrangements have complained that this omission of information can lead to them having to make recruitment decisions in the absence of potentially relevant information.

***Question 84: Do you think a supported person arranging self-directed social care should have access to vetting information which could include details about previous convictions relating to a prospective carer?***

**Yes  No**

***Question 84a: If you responded 'No' to Q84 , do you have any suggestions about how Disclosure Scotland checks could be structured to assist a supported person making their own arrangements for self-directed social care?***

## **Private individuals – work with children and / or protected adults**

The question about the extent to which private individuals who provide services should be subject to the proposed mandatory membership of the PVG Scheme arises in circumstances apart from self-directed support. Under the current PVG Scheme, examples that have arisen include private tutors, and interpreters.

In cases, where a private tutor is being engaged, the person offering the work can ask for a PVG statement of scheme membership if the work being done will fall within the scope of regulated work because it is within the activities set out in Part 2 of schedule 2 of the 2007 Act. But again, this means that no vetting information is provided to the prospective recruiter. Private tutors providing services to an adult cannot apply for PVG scheme membership as their work will not fall within the definition of regulated work.

***Question 85: Do you think this approach is correct?***

**Yes  No**

Likewise with specialised interpreters whose assistance may be needed to allow a person to participate in day-to-day life. It is questionable whether this work is regulated work.

***Question 86: Do you think that it should be?***

**Yes  No**

If you do, the question about the appropriate level of disclosure arises

***Question 87: Should vetting information be available if the arrangements are being made by a private individual?***

**Yes  No**

## **Charity Trustees**

With regard to charity trustees, there is a separate anomaly relating to the fact that a charity must have one main purpose only, that is work with children or work with protected adults, for a trustee to be able to join the PVG Scheme. If a charity has as its main purpose services directed at both vulnerable groups then trustees cannot apply to join the PVG Scheme. Subject to respondents' views on whether charity trustees of charities providing services to children and protected adults should remain within the scope of PVG scheme membership, we propose to sort this anomaly.

***Question 88: Do you agree that the law be changed to sort this anomaly?***

**Yes  No**

## **Notification requirements under Part 2 of the Sexual Offences Act 2003**

Notification requirements under the Sexual Offences Act 2003 (“the 2003 Act”) arise following conviction anywhere in the UK, or following a caution in England and Wales, and Northern Ireland for an offence listed in Schedule 3 of the 2003 Act. A person subject to notification requirements under the previous legislation (the Sex Offenders Act 1997) whose notification requirement was still live when the 2003 Act came into force transferred to the new arrangements.

When a notification requirement is part of the disposal for a case, information about is included in all types of disclosure in line with the current law about the content of disclosure certificates.

In addition, to people convicted or cautioned in the UK, the 2003 Act provides that a chief constable can apply to a court for an order to subject a person convicted or cautioned for a relevant offence outwith the UK to the notification requirements.

At present, higher-level disclosures (the standard or the enhanced disclosure under the 1997 Act, and the PVG scheme record under the 2007 Act) can include information about whether the applicant is subject to notification requirements made following an application by a chief constable.

Disclosure Scotland must include such information in the disclosures. This is set out in section 113A(3)(b) of the 1997 Act for the standard disclosure; section 113B(3)(b) of the 1997 Act for the enhanced disclosure; and section 49(1)(b) of the 2007 Act for the PVG scheme record. The requirement for Disclosure Scotland to include the information on higher-level disclosures came into force on 28 February 2011.

Separate provision was made in section 78(1) of the 2007 Act to amend section 112 of the 1997 Act. That amendment would have allowed information about a notification requirement under the 2003 Act made following an application by a chief constable to be included on a basic disclosure. The amendment has not been brought into force.

***Question 89: Do you think that provision should be made to bring into force the amendment at section 78(1) of the 2007 Act?***

**Yes  No**

## **Miscellaneous changes**

We will be taking this opportunity to make minor drafting amendments to the existing legislation, for example, updating the names of organisations or regulatory bodies listed within current legislation etc.

## **Additional Questions**

**Question 90: Please tell us about any potential impacts, either positive or negative; you feel the proposals in this consultation document may have on any particular groups of people?**

**Question 91: Please tell us what potential there may be within these proposals to advance equality of opportunity between different groups and to foster good relations between different groups?**

**Question 92: Please tell us about any potential impacts you think there may be to particular businesses or organisations?**

**Question 93: Please tell us about any potential impacts you think there may be to an individual's privacy?**

**Question 94: Please tell us about any potential impacts, either positive or negative; you feel the proposals in this consultation document may have on children?**

## **Section 7 – Non Legislative Changes**

Some stakeholders have suggested that one of the main challenges with disclosure legislation is that it is difficult for individual members and employers to understand, and if this could be addressed, there may be a lesser need for legislative change. Along with the possibility of simplifying the legislation where possible, one suggestion to address these complexities would be the provision of comprehensive guidance on the processes and issues raised.

Disclosure Scotland are currently engaged in discussion about reviewing and updating the guidance that is already produced by them, how it may be made more comprehensive and how this may be made more readily accessible. This guidance could be updated as necessary to reflect changes in law, including any transitional arrangements that may be required if the existing legislation is amended.

Disclosure Scotland has listened carefully to the stakeholder feedback about the legal requirement organisations have to make referrals to Disclosure Scotland about individuals who have been dismissed or moved permanently from working with children or protected adults because of inappropriate conduct of the types listed in section 2 of the 2007 Act.

Our discussions with stakeholders confirm that part of the solution in addressing referral issues is to address ignorance of the duty to refer. To this end, in recent years, the Disclosure Scotland customer engagement team has been supporting registered bodies in their understanding of the duty to refer. The customer engagement team have done this through regular training workshops for organisations, individual visits and bespoke training for organisations and through involvement in external forums and events. A key priority informing the work of the customer engagement team will continue to be addressing known gaps in knowledge about when the duty to refer arises.

Disclosure Scotland is committed to developing more guidance and training in this area and it is clear that following the completion of the PVG Review, and the commencement of a refreshed Scheme, that there must be a comprehensive and appropriate programme to ensure that all who require to know about referrals to Disclosure Scotland do know and that this awareness is maintained over time.

We have also taken heed of the feedback on the complexities around submitting a referral to Disclosure Scotland in its current format. Disclosure Scotland is investing heavily in new technology and we consider that we will, in time for the commencement of the refreshed Scheme, move the referral process into the digital domain. We will co-design with stakeholders and users the forms and inputs that will be completed to make a referral online as well as the necessary arrangements for those who cannot use digital channels.

## **Annex A      Eligible Roles or Employment type for Level 2 Disclosure**

1. Advocate, solicitor.
2. Accountant.
3. Veterinary surgeon.
4. Actuary.
5. Registered European lawyer, registered foreign lawyer.
6. Judicial appointments.
7. Prosecutors, officers assisting prosecutors, and officers assisting in the work of the Crown Office.
8. Justices of the Peace and members of local authorities with signing functions under section 76 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007(3).
9. Clerks (including depute and assistant clerks) and officers of the High Court of Justiciary, the Court of Session and the justice of the peace court, sheriff clerks (including sheriff clerks depute) and their clerks and assistants and other support officers assisting in the work of the Scottish Court Service.
10. Precognition agents.
11. Any office, employment or work which is concerned with the administration of, or is otherwise normally carried out wholly or partly within the precincts of a prison, remand centre, young offenders institution, detention centre or removal centre, prison monitoring co-ordinators appointed under section 7A(2) of the Prisons (Scotland) Act 1989, and independent prison monitors appointed under section 7B(2)(a) of that Act.
12. Traffic wardens appointed under or in accordance with section 95 of the Road Traffic Regulation Act 1984(6).
13. Any employment or work in the Scottish Society for the Prevention of Cruelty to Animals where the person employed or working, as part of his or her duties, may carry out the killing of animals.
14. Any office, employment or work in the Serious Fraud Office.
15. Any office, employment or work in the National Crime Agency.
16. Any office, employment or work in Her Majesty's Revenue and Customs.
17. Any employment which is concerned with the monitoring, for the purposes of child protection, of communications by means of the internet.
18. Her Majesty's Inspectors, or any person appointed by the Scottish Ministers for the purposes of section 66 of the Education (Scotland) Act 1980(7) or section 9 of the Standards in Scotland's Schools etc. Act 2000(8), or members of any Management Board established to assist either Her Majesty's Inspectors or any such person, or any individual undertaking employment or work for Her Majesty's Inspectors or any such person in relation to the carrying out of inspections under section 66 of the Education (Scotland) Act 1980, section 9 of the Standards in Scotland's Schools etc. Act 2000 or section 115 of the 2010 Act(9), or otherwise in regard to matters associated with such inspections.
19. Any office or employment in the Risk Management Authority.
20. Any office or employment in the Scottish Criminal Cases Review Commission.
21. Any office or employment in a relevant authority as defined in section 6 of the Fire (Scotland) Act 2005(12).
22. Members mentioned in section 35(4)(c) of the Judiciary and Courts (Scotland) Act 2008(13) of a tribunal constituted under section 35(1) of that Act to consider the fitness for judicial office of a person holding a judicial office mentioned in section 35(2) of that Act.
23. Members mentioned in section 12A(4)(d) of the Sheriff Courts (Scotland) Act 1971(14) of a tribunal constituted under section 12A(1) of that Act to consider the

- fitness for shrieval office of a person holding a shrieval office mentioned in section 12A(2) of that Act.
- 24. Lay members of the Judicial Appointments Board for Scotland appointed by the Scottish Ministers under paragraph 2 of schedule 1 to the Judiciary and Courts (Scotland) Act 2008.
  - 25. Non-judicial members of the Scottish Court Service mentioned in paragraph 2(3)(d) of schedule 3 to the Judiciary and Courts (Scotland) Act 2008.
  - 26. A Head of Practice or a member of a Practice Committee of a licensed legal services provider.
  - 27. Any occupation in respect of which an application to the Gambling Commission for a licence, certificate or registration is required by or under any enactment.
  - 28. Any occupation which is concerned with the management of a place in respect of which the approval of the Scottish Ministers is required by section 1 of the Abortion Act 1967.
  - 29. Any occupation in respect of which an application to the Security Industry Authority for a licence is required by the Private Security Industry Act 2001.
  - 30. Any occupation in respect of which a licence or registration is required by or under Part V (driving instruction) of the Road Traffic Act 1988.
  - 31. Foster/Kinship Carers
  - 32. Adoptive parents
  - 33. Any office or employment in Social Care and Social Work Improvement Scotland.
  - 34. Any office or employment in the General Teaching Council for Scotland.
  - 35. Financial service - Any question asked in order to assess the suitability of the individual to whom the question relates to have the status specified in the first column of the table in Part 2 of Schedule 2 by, or on behalf of, the person listed in relation to that status in the second column of that table.
  - 36. Registration of certain landlords
  - 37. Public procurement

## **Annex B**

## **Protected Roles/Work**

### General

1. Any student training for a profession whose members are in protected roles.
2. The Reporter of officers appointed under section 8(5) of the Local Government etc (Scotland) Act 1994 to assist that officer

### Social care/Care

1. Care home owner / manager
2. Care Assistant (in any setting with children or adults with welfare needs, illness or disability)
3. Day Carer in any setting with children or adults with illness or disability
4. Registered Social Service Worker
5. Registered Social worker
6. Volunteer with children, or adults with disability or illness
7. Peer worker for children, or adults with disability or illness
8. Support worker for children, or adults with disability or illness
9. Youth worker/volunteer
10. Careers Advisor – children and/or adults
11. Driver
  - Transport of patients
  - Transport of School children
  - Transport of children, or adults with disability or illness
12. Carer / Personal Carer
13. Care assistant
14. Counsellor
  - Children
  - Drug and alcohol
  - Bereavement
  - Family mediation
  - Faith/Religious
15. Volunteer with children, or adults with disability or illness
16. Peer worker for children, or adults with disability or illness
17. Support worker for children, or adults with disability or illness
18. Youth worker/volunteer
19. Placement Carer
20. Child minder / child-minding assistant
21. Interpreters for children, or adults with disability or illness

### Education

1. Teacher
  - Children
  - Protected Adults
  - Sunday School
  - Music teacher
2. Classroom Assistant
3. School Coordinator

4. Nursery worker
5. Active schools coordinator
6. Support for learning staff
7. Tutor
8. School hostel worker

### Health

1. Medical Doctor
2. Medical/Dental Nurse
3. Dentist
4. Dental Hygienist
5. Radiographer
6. Physiotherapist
7. Ophthalmic optician
8. Dispensing optician
9. Registered Osteopath
10. Registered Chiropractor
11. Registered Pharmacy Technician
12. Registered Pharmacist
13. Midwife
14. Healthcare support workers/Auxiliaries
15. Social Worker
16. Speech Therapist
17. Sport therapists
18. Prosthetist
19. Psychologist
20. Paramedic/ambulance technician
21. Orthoptist
22. Occupational Therapist
23. Hearing aid dispenser
24. Arts therapists
25. Chiropodist
26. Podiatrist
27. Pathologist

### Volunteering

1. Community centre volunteer for children, or adults with disability or illness
2. Youth/children's club volunteer
3. Any protected role listed in a voluntary capacity
4. Aid Worker

### Sports & Leisure

1. Sports Coach for children, or adults with disability or illness
2. Academy Skills Coach
3. Sports Agents
4. Sports Scout
5. Kit man
6. Adult Learning Tutor/coach
7. Youth Development
8. Outdoor sport and recreation activity instructors
9. Assistant coaches

10. Lifeguard
11. Leisure attendant

Protected Establishments - children

1. School workers
2. Children's hospital workers
3. Children's hospice workers
4. Children's home workers
5. Children's secure accommodation workers
6. Children's ward workers
7. Leisure centre workers accessing changing areas

Protected Establishments – adults

1. Adult care home
2. Adult hospice
3. Workers in patient treatment areas of hospitals

## Annex C

## Schedule 8A and 8B Offences

Schedules 8A and 8B were introduced into the Police Act 1997 on 10 September 2015, to address the operation of the 1997 Act in Scotland following a UK Supreme Court ruling about its operation in England and Wales.

The schedules, as listed below, consist of common law offences and statutory offences, where the offence is statutory a brief description is included.

### Schedule 8A - List of offences that must be disclosed to an employer unless a sheriff orders otherwise

### Schedule 8B - List of offences that must be disclosed to an employer subject to rules

Since these schedules were inserted into the 1997 Act, a number of statutory offences from the UK Parliament and the Scottish Parliament have come into force, or will shortly, which we believe merit inclusion in the schedules.

The following section includes the new offences categorised into either schedule 8A or schedule 8B, and sets out questions on whether you feel these offences have been placed appropriately on either list.

### Proposed Schedule 8A Offences

Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s2	Disclosing, or threatening to disclose, an intimate photograph or film
Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s7	S7 of the 2016 Act amends and re-titles s54 of the Sexual Offences (Scotland) Act 2009 to 'Incitement to commit certain sexual acts outside Scotland'
Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s8	Inserts a new section into the Sexual Offences (Scotland) Act 2009 concerning 'Offences committed outside of Scotland'
Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s9	S9 of the 2016 Act amends s55 of the Sexual Offences (Scotland) Act 2009 which concerns offences committed outside the UK
Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s24	Breaching a Sexual Harm Prevention Order (SOPO)
Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s23	Breaching a Sexual Risk Order (SRO)
Air Weapons and Licensing (Scotland) Act 2015, s2	Possessing an air weapon without a certificate
Air Weapons and Licensing (Scotland) Act 2015, s11(5)	Fail to comply with the requirements of a revocation notice
Air Weapons and Licensing (Scotland) Act	Fail to comply with the conditions of a police

2015, s15(4)	permit or a visitor permit. (The permits allow people to have air weapons subject to certain conditions without the need for a certificate)
Air Weapons and Licensing (Scotland) Act 2015, s16(6)	Fail to comply with a variation of the conditions of a police permit or a visitor permit
Air Weapons and Licensing (Scotland) Act 2015, s22(6)	Obstructing the inspection of an air weapons club, including an inspection of anything in that club
Air Weapons and Licensing (Scotland) Act 2015, s23(2)	Operate a recreational shooting facility without a certificate, or failure to display such a certificate
Air Weapons and Licensing (Scotland) Act 2015, s24(1)	Offence of a person other than a registered firearms dealer possessing an air weapon
Air Weapons and Licensing (Scotland) Act 2015, s24(2)	Offence of a person selling an air weapon to someone other than a registered firearms dealer, or to a person who holds an air weapons certificate
Air Weapons and Licensing (Scotland) Act 2015, s24(3)	Offence of a person manufacturing, testing or repairing an air weapon for someone other than a registered firearms dealer or, for a person who holds an air weapons certificate
Air Weapons and Licensing (Scotland) Act 2015, s25(2)	Offence of selling an air weapon to someone who is not a registered firearms dealer other than in circumstance where both parties to the sale are present
Air Weapons and Licensing (Scotland) Act 2015, s26(4)	Offence of obstructing police with search warrant
Air Weapons and Licensing (Scotland) Act 2015, S 27(3)	Offence of failing to provide air weapon certificate, or giving false name and address
Air Weapons and Licensing (Scotland) Act 2015, s 28(4)	Fail to comply with notice to surrender air weapon
Air Weapons and Licensing (Scotland) Act 2015, s 30(1)	Fail to keep air weapon safe, or fail to notify loss or theft of air weapon
Air Weapons and Licensing (Scotland) Act 2015, s31(1)	Offence of making false or reckless statements in connection with air weapons certificates, or police or visitor permits
Air Weapons and Licensing (Scotland) Act 2015, s31(2)	Use false certificate or permit to buy, use, test etc. air weapon
Air Weapons and Licensing (Scotland) Act	Offences by bodies corporate

2015, s33	
Crime and Security Act 2010, s46	Inserts a new section into the Firearms Act 1968, this offence relates to failing to prevent minors from having air weapons
Digital Economy Act 2017 Part 3	Concerns the restriction of access to online pornography
Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016, s 26	Offence for a care worker to ill-treat or wilfully neglect a person in their care
Human Trafficking and Exploitation (Scotland) Act 2015, s1	Offence of human trafficking
Human Trafficking and Exploitation (Scotland) Act 2015, s4	Offence of slavery, servitude and forced or compulsory labour
Human Trafficking and Exploitation (Scotland) Act 2015, s5	Aggravation of an offence due to connection with human trafficking activity
Human Trafficking and Exploitation (Scotland) Act 2015, s6	Aggravation of human trafficking offence being committed against a child
Human Trafficking and Exploitation (Scotland) Act 2015, s7	Aggravation of human trafficking offence through abuse by a public position by a public official
Human Trafficking and Exploitation (Scotland) Act 2015, s32(1)(a)	Offence of doing something prohibited by an order under the 2015 Act, this includes: <ul style="list-style-type: none"> <li>• trafficking and exploitation prevention order (sections 17 and 18)</li> <li>• interim trafficking and exploitation prevention order (section 24)</li> <li>• trafficking and exploitation risk order (section 26)</li> <li>• interim trafficking and exploitation risk order (section 30)</li> </ul>
Human Trafficking and Exploitation (Scotland) Act 2015, s32(1)(b)	Offence of failing to do anything required by an order under the 2015 Act
Human Trafficking and Exploitation (Scotland) Act 2015, s39	Offences under the 2015 Act committed by bodies corporate
Serious Crime Act 2015, s42(1)	Inserts new section into the Computer Misuse Act 1990 concerning unauthorised acts causing, or creating risk of serious damage this covers acts which include damage to human welfare, the environment, loss of human life or human illness or injury

Serious Crime Act 2015, s69	Creates new offence ‘Possession of Paedophile manual’, which extends to England, Wales and Northern Ireland. There does not seem to be an equivalent offence in the law of Scotland.
Serious Crime Act 2015, s72	Inserts new offence of ‘failing to protect girl from risk of genital mutilation’ into the Female Genital Mutilation Act 2003, which extends to England, Wales and Northern Ireland

### Proposed Schedule 8B Offences

Abusive Behaviour and Sexual Harm Scotland Act 2016, s 1	Inserts new statutory aggravator in connection with offence where there is abuse of a partner or ex-partner
Domestic Abuse (Scotland) Bill, s1	Abusive behaviour towards partner or ex-partner
Air Weapons and Licensing (Scotland) Act 2015, s53	Inserts two new sections into the Licensing (Scotland) Act 2005 in relation to the supply of alcohol to a child and the supply of alcohol to a child
Crime and Courts Act 2013, s56	Inserts new section into the Road Traffic Act 1988 concerning being in charge of a motor vehicle with concentration of specified controlled drug above specified limit
Criminal Finances Act 2017, s45(1)	Failure to prevent UK tax evasion
Criminal Finances Act 2017, s46(1)	Failure to prevent facilitation of UK tax evasion offences
Food (Scotland) Act 2015, s22(3)	Obstruct and authorised person; fail to comply with requirement; and provide false or misleading information in connection with a Food Standards Scotland observation
Food (Scotland) Act 2015, s27(1)	Fail to comply with enforcement requirement
Food (Scotland) Act 2015, s27(2)	Provide false or misleading information to support purported compliance with requirement
Food (Scotland) Act 2015, s29(3)	Obstruct an authorised person from carrying out monitoring of enforcement action
Immigration Act 2016, s34	Inserts new section on illegal working into the Immigration Act 1971

Immigration Act 2016, s35	Amends s 21 of the Immigration, Asylum and Nationality Act 2006 to create a new offence of employing an illegal worker
Immigration Act 2016, s39	Inserts new sections into the Immigration Act 2014 for offences relating to landlords and agents entering into tenancy agreements with a person whose immigration status disqualifies them from such an agreement
Immigration Act 2016, s53	Amends s 11 of the Immigration and Asylum Act 1999 to extend the assault and obstructing offences to functions relating to a search for nationality documents
Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, s23	Offence for a person to publish information that could identify a child involved in an inquiry in contravention of a Sheriff's order
Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, s23	Offence relating to bodies corporate
Psychoactive Substances Act 2016, s5	Supplying, or offering to supply, a psychoactive substance
Psychoactive Substances Act 2016, s7	Possession of a psychoactive substance with intent to supply
Psychoactive Substances Act 2016, s8	Importing or exporting a psychoactive substance
Psychoactive Substances Act 2016, s9	Possession of a psychoactive substance in a custodial institution
Psychoactive Substances Act 2016, s48	Intentionally obstruct a relevant enforcement officer in the performance of duties under sections 36 to 45 of the act including stop and search and entering and searching vehicles
Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016, s1	Offence for an adult to smoke in a vehicle when the vehicle is in a public place and when there is a child in the vehicle (subject to an exception if the vehicle is parked and adapted as living accommodation)
Wildlife and Natural Environment (Scotland) Act 2011, s6	Inserts new section into the Wildlife and Countryside Act 1981 concerning the protection of wild hares etc.
Wildlife and Natural Environment (Scotland) Act 2011, s7	Inserts new section into the Wildlife and Countryside Act 1981 on the prevention of poaching: wild hares, rabbits etc.
Wildlife and Natural Environment (Scotland)	Inserts new section into the Wildlife and Countryside Act 1981 on the sale,

Act 2011, s8	possession etc. of wild hares, rabbits etc. killed or taken unlawfully
Wild Animals in Travelling Circuses (Scotland) Bill 2018, s1	A circus operator commits an offence when if they cause or permit a wild animal to be used in a circus

There are a number of provisions from existing legislation not included in the offence lists created in 2015 that we consider should be added to schedules 8A and 8B.

For **schedule 8A**, these are:

Criminal Law (Consolidation) (Scotland) Act 1995, s13(9)	Offence in s13(9) of living on the earnings of another from male prostitution
Firearms (Amendment) Act 1988, s12(2)	Offence to fail to comply with a notice revoking a firearms certificate under section s30A(2), (3) or (4) of the Firearms Act 1968
Violent Crime Reduction Act 2006, s34	Inserts a new section 21A into the Firearms Act 1968 relates to offence of firing an air weapon beyond premises
Violent Crime Reduction Act 2006, s40	Inserts a new section 24A into the Firearms Act 1968 relates to offence of supplying imitation firearms to minors

For **schedule 8B**, these are:

Civil Government (Scotland) Act 1982, s49(1)	Offence of permitting any creature in his charge to cause danger or injury to any other person in a public place
Civil Government (Scotland) Act 1982, s49(4)	Fail to comply with an order to prevent the continuance of annoyance to another person in the vicinity of that other person's residence
Crime, Justice and Public Order Act 1994, s68(1)	Aggravated trespassing
Protection from Harassment Act 1997, s2	Offence of harassment as applies in England and Wales
Protection from Harassment Act 1997, s4	Offence of putting people in fear as applies in England and Wales

In addition to the offences described above considered to merit inclusion, there are some offences we do not consider should be included in either list and as such would not be disclosed on a higher level disclosure when spent. These offences include:

Cultural Property Armed Conflicts Act 2017, s3	Offence of serious violation of the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict
Cultural Property Armed Conflicts Act 2017, s9(1)	Offence of unauthorised use of a cultural emblem
Cultural Property Armed Conflicts Act 2017, s17(1)	Offence of dealing in unlawfully exported cultural property

## Annex D

## List of Consultees

### **Education**

Principals and Vice Principals of Scotland's Colleges and Universities  
The Open University in Scotland  
Educational Institute of Scotland  
General Teaching Council Scotland

### **Health**

Health Boards  
Special Health Boards  
British Medical Association  
General Dental Council  
General Medical Council  
General Pharmaceutical Council  
Royal College of Psychiatrists

### **Local Authorities**

Chief Executives  
Directors of Social Work  
Directors of Education  
Association of Directors of Education  
Association of Directors of Social Work  
CoSLA  
Society of Local Authority Chief Executives

### **Justice**

Chief Executive, Crown Office and Procurator Fiscal Service  
Chief Executive, Scottish Court and Tribunal Service  
Children's Hearings Scotland  
Faculty of Advocates  
Law Society of Scotland  
Lord President and Lord Justice General  
Parole Board for Scotland  
Sheriff Principals  
Sheriffs' Association  
Scottish Law Commission  
Scottish Committee of the Council of Tribunals  
Scottish Children's Reporter Administration

### **Police**

Chief Constable of Police Scotland  
Scottish Police Authority  
Scottish Police Federation  
Association of Scottish Police Superintendents  
HM Inspectorate of Constabulary Scotland

### **Prisons**

Chief Executive, Scottish Prison Service  
HM Inspectorate of Prisons  
Scottish Prison Officers Association

### **Other Organisations including Voluntary Organisations**

Apex Scotland  
Care Inspectorate  
Children 1st  
CJSW Dumfries and Galloway  
Coalition of Care and Support Providers Scotland  
Disclosure Scotland Stakeholder Advisory Board  
Howard League for Penal Reform  
NSPCC Scotland  
Recruit With Conviction  
SACRO  
Scottish Churches Committee Safeguarding Representatives  
Scottish Commission for Human Rights  
Scottish Commissioner for Children and Young People  
Scottish Council of Jewish Communities  
Scottish Council for Voluntary Organisations  
Social Work Scotland  
Sports Scotland  
Strathclyde Partnership for Transport  
Scottish Social Services Council  
Unlock  
Victim Support Scotland  
Volunteer Scotland Disclosure Services  
Who Cares? Scotland

All registered bodies  
All organisations/individuals who have taken part in earlier engagement sessions



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