

Partial Business and Regulatory Impact Assessment

Disclosure (Scotland) Bill

June 2019

PARTIAL / FINAL BUSINESS AND REGULATORY IMPACT ASSESSMENT

1. Title of proposal

Disclosure (Scotland) Bill

2. Purpose and intended effect

Background

The disclosure regime in Scotland is implemented under the Police Act 1997 (“the 1997 Act”) and the Protection of Vulnerable Groups (Scotland) Act 2007 (“the PVG Act”) to issue both basic and higher level disclosures in Scotland. There are presently four main levels of disclosure: basic, standard, enhanced and Protecting Vulnerable Groups (PVG) scheme record. However, Disclosure Scotland issues ten different products within these levels.

The PVG Act was the Scottish Government’s response to Sir Michael Richard’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 last for ten years unless the scheme member otherwise 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).

Since the 2007 Act came into force, further changes have been made to the legislation on disclosure of convictions on higher level disclosures (meaning standard and enhanced disclosures under the 1997 Act and PVG scheme records under the 2007 Act) in 2015 and 2018, following rulings from the UK Supreme Court on disclosure in England and Wales and the Court of Session on PVG disclosure in Scotland, which found that disclosure as it stood was not providing sufficient proportionality and breached a person’s Article 8 rights under the European Convention on Human Rights (ECHR)¹. A new reformed system restricted the

¹ Scottish Courts and Tribunals, ‘Opinion of Lord Pentland in the cause P (AP) against the Scottish Ministers’, (2017) CSOH 33 <https://www.scotcourts.gov.uk/search-judgments/judgment?id=70d42ba7-8980-69d2-b500-ff0000d74aa7> (last accessed: 20 May 2019)

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 and that individuals would be able to apply for the removal of these spent convictions from their disclosure.

The Disclosure (Scotland) Bill has been developed in response to the Government's commitment to review the PVG Act and the experience gained during the eight years the scheme has been in operation. The Bill was developed through extensive engagement with a wide range of stakeholders.

Objectives

The Bill is a vital element of the disclosure review, which is driving improvements to strengthen and simplify the disclosure regime in Scotland, ensuring a simpler and more proportionate disclosure system with safeguarding at its forefront.

It contains a number of provisions to do this, these include:

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

Ministers to give notice that a person is under consideration for listing and of their barred status (sections 77 to 80)

- provide new referral powers for Police Scotland and Scotland's councils and integration joint boards (sections 81 and 83), and
- restate and amend the lists of offences in schedules 8A and 8B of the 1997 Act (schedules 1 and 2).

Rationale for Government intervention

It has been eight years since the PVG Scheme commenced and over ten years since the PVG Act passed through the Scottish Parliament, and there was a commitment to review the legislation. Since the PVG Act commenced, stakeholders have raised a number of issues with the legislation and the delivery. Disclosure Scotland has listened to stakeholders and customers to identify areas where the disclosure system can be made fairer, more efficient and, vitally, better at protecting people from harm.

Experience of operating the scheme has shown that those joining the PVG Scheme tend to remain in it long after they have stopped working with vulnerable groups, which places inactive members at risk of being considered for listing should any vetting information appear on their PVG Scheme record. In addition to this, the effort to keep such records updated is unnecessary for public protection and will become increasingly expensive for little safeguarding return.

The Disclosure (Scotland) Bill aligns with the National Performance Framework, meeting three of the National Outcomes:

- We are well educated, skilled and able to contribute to society
- We grow up loved, safe and respected so that we realise our full potential and
- We live in communities that are inclusive, empowered, resilient and safe.

3. Consultation

The proposals within the Bill have been developed in collaborative way, involving Scottish Government colleagues as well as a wide range of stakeholders that use or have an interest in the disclosure regime in Scotland.

Within Government

Discussions have been on-going with colleagues across the Scottish Government in developing the Bill, including:

- Scottish Government Legal Directorate
- Youth Justice Team
- Adult Social Care Reform
- Third Sector Unit
- Criminal Justice Division
- Scottish Courts and Tribunal Service

- Education Directorate – Work experience
- Active Scotland Division
- Disclosure Scotland Finance

Scottish Government colleagues have helped to identify further organisations to consult with and are helping to ensure that the outcomes and strategic direction of the future disclosure regime are aligned with other relevant policies across the Scottish Government. Scottish Government policy officials from Justice, Youth Justice and Disclosure Scotland have worked closely together in all aspects of amending the disclosure regime in pursuit of a broader vision.

Early engagement

The Disclosure (Scotland) Bill has been developed through an inclusive approach, involving extensive stakeholder engagement and consultation across a full range of stakeholders.

The PVG Review was announced at the Disclosure Scotland stakeholder conference in November 2016 by Deputy First Minister John Swinney. To determine the terms of reference that would describe the broad scope of the review as it moved onto the next stages, Disclosure Scotland officials completed seven engagement events with 41 external stakeholders (from 36 organisations) and nine internal stakeholders. It was agreed the review would consider the following:

- definition and scope of regulated work and associated terminology
- whether the PVG Scheme should be mandatory for people doing regulated work
- the number of barred lists, and the number of regulated workforces
- products under the 1997 and PVG Acts
- PVG Scheme and Police Act disclosures fee structure
- thresholds and processes used to determine listing and referrals
- content of, levels of, and access to both disclosure and barring information and processes
- offences related to doing regulated work
- balance between safeguarding and proportionality/privacy based on risk assessment
- the role of vetting and barring in public protection

After agreeing the terms of reference for the review, Disclosure Scotland engaged with stakeholders to gain insight into how they felt about the current PVG Scheme and disclosure products and what they wanted to see in Scotland's future disclosure and barring arrangements. Three rounds of engagement took place for this phase of the review and, in order to ensure a high level of stakeholder engagement, a number of methods were used throughout this process. These included: individual interviews, group participation sessions, telephone interviews, an online survey and the stakeholder conference.

Feedback was collated, recorded and analysed after each round of engagement.

A wide range of participants took part in this stage of the review. Disclosure Scotland engaged with over 350 organisational representatives and individuals throughout Scotland, and the online survey generated over 800 responses. Examples of organisations which took part in the review included:

- local authorities
- NHS boards
- sport governing bodies
- education institutes
- church groups
- third sector organisations
- professional regulatory bodies, and
- individual scheme members.

Disclosure Scotland's pre-consultation engagement brought out the complex nature of the present disclosure system. It also highlighted the degree of value and trust that people invest in Disclosure Scotland and all of its products, but particularly the PVG Scheme. This early engagement provided the evidence to inform the options to take forward for further consultation.

Formal public consultation

Drawing on the outcomes and evidence from the early engagement, Disclosure Scotland published an extensive consultation paper on 25 April 2018 covering the following key areas of disclosure:

- Disclosure products
- Reforming the policy underpinning the PVG Scheme
- Removing unsuitable people from work with vulnerable groups
- Offence lists and removal of spent convictions from a disclosure record
- Additional policy questions
- Non-legislative changes

The consultation was distributed widely to stakeholders, including over 3,000 registered bodies and responsible bodies registered with Disclosure Scotland. Disclosure Scotland received 353 responses, 269 from organisations and 84 from individuals. Responses were received from a range of stakeholders with varying backgrounds including judicial bodies, the legal sector, local government, voluntary organisations and the health sector. All papers related to the consultation, including the early engagement report, consultation document, published responses, the summary and full reports on consultation responses, and the Scottish Government response to the consultation can be found at <https://consult.gov.scot/disclosure-scotland/protection-of-vulnerable/>.

Throughout this engagement there has been a widely held view that the disclosure regime needs to be simpler and supported by clear guidance. Disclosure Scotland has made a commitment to providing further guidance and training, however, there was an appetite for significant change to the policies underpinning the regime which will require legislative provision.

Since the formal public consultation closed, officials at Disclosure Scotland have continued to engage with stakeholders to further discuss policy options, address issues raised by the consultation responses and refine policy for inclusion in the Bill.

Business

The proposals for the Disclosure (Scotland) Bill impact upon all organisations which use the disclosure regime, including the PVG Scheme. The consultation was sent to a large stakeholder audience, including every registered body that uses the PVG Scheme and every responsible body that currently uses the B2B channel.

Disclosure Scotland also held 37 engagement events during the formal public consultation period, which 215 organisations attended. Feedback from these sessions was included as an annex to the full report on consultation responses.

Disclosure Scotland has an existing commitment to improve and evolve its services. In order to improve communication and engagement with stakeholders, a stakeholder advisory board was set up in 2015 to advise Disclosure Scotland on future work areas or about the stakeholder implications and reaction to possible future scenarios for the Agency and its services. The stakeholder advisory board has an evolving membership and consists of a number of organisations and/or sectors that use the disclosure regime, including representatives of local authorities, health boards, the care sector, regulatory bodies, voluntary organisations and victims groups.

In September 2017, the stakeholder advisory board were involved in drafting options for the future of the disclosure regime in Scotland. The proposals being progressed for consultation were again discussed with the board in March 2018 where some initial concerns and potential barriers around the mandatory scheme, regulated roles and standard conditions were discussed. Following analysis of consultation responses, the stakeholder advisory board met to discuss which proposals would be developed for the Bill, transitional and implementation issues following it and what further engagement was needed to look at the effects of these. It was agreed that the stakeholder advisory board should have an ongoing role in developing and delivering on transitional arrangements and they would supply Disclosure Scotland with further information on any anticipated impacts to their organisations. Towards the end of 2018, several members provided figures and narrative on the impacts on their organisations of the proposed changes to the disclosure regime.

4. Options

The proposals within the Bill that will have an impact on businesses are:

Mandatory Scheme	The Bill will make the PVG Scheme mandatory for certain roles that involve working, paid or voluntary, with protected adults and children. The current scheme is not mandatory.
Time-limited scheme membership	The Bill will introduce a time-limited, renewable scheme membership. Currently the PVG scheme membership is a lifetime membership where the scheme member is subject to continuous checking of records held on police criminal history systems to discover new vetting information, including other relevant information (“ORI”).
Regulated roles	Many of our stakeholders expressed that they understood what was meant by ‘regulated work’ but, on closer examination, there were common misconceptions about how to apply this term in practice. This has resulted in a number of employers trying to put all employees into the PVG Scheme or not classifying the right roles as requiring PVG membership. This means there are people working with protected adults and children who are not in the PVG Scheme who should be, also it has resulted in people being in the scheme who should not be. This could lead to people inadvertently committing offences, as it is an offence to request a PVG scheme record where someone is not doing regulated work. The Bill proposes to replace the concept of ‘doing regulated work’ with a schedule of activities which will always be present in ‘regulated roles’, to bring greater certainty around who qualifies for PVG scheme membership. The requirement of scheme membership will be placed on those who exercise power or influence over children and protected adults. This is the guiding principle on which the schedule of activities is based and it is expected that the schedule will give us the flexibility to respond to changing employment landscapes.
Accredited bodies	<p>Accredited bodies will replace ‘registered persons’, under the 1997 Act, as the bodies eligible to access Level 2 disclosures. A disclosure request must be countersigned by an accredited body to be valid. An individual can apply without an accredited body to obtain a certificate confirming their PVG scheme membership status (called a confirmation of scheme membership).</p> <p>Under the current system, an organisation which uses basic disclosures as part of their recruitment process 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. Disclosure Scotland offers these businesses the</p>

	<p>ability to obtain basic disclosures for a large number of job applicants using special arrangements that allow for bulk applications. This is known as Business 2 Business, or B2B for short. The Bill will bring responsible bodies within the remit of accredited bodies, and they will be subject to the same fees and responsibilities as registered persons.</p>
<p>Barring provisions</p>	<p>Under the current system, when an individual is placed under consideration for listing they are not barred from doing regulated work during the period of the consideration.</p> <p>The Bill proposes that Disclosure Scotland is given new powers to impose certain conditions on people who are being considered for listing. For example, if Disclosure Scotland considered there to be a safeguarding concern, conditions - such as restricted duties or preventing an individual from working with certain age groups - could be imposed.</p> <p>The Bill also proposes to end the system of court referrals. This is not considered to be necessary in light of the mandatory scheme. However, the referral system is otherwise being enhanced by giving new powers to the police to make referrals if they discover someone who is doing a regulated role without being a scheme member. Local authorities and integration joint boards are also given new referral powers, largely to ensure that referrals can be made where harmful behaviour is carried out by a self-employed individual in the care sector.</p>
<p>Digital delivery</p>	<p>Disclosure Scotland want to move the disclosure system, which is currently an onerous, paper-based system, to a flexible, user-centred digital system. The detail of how this will operate in practice will be developed in close consultation and engagement with those who use the services.</p> <p>The Bill provisions will support the development of a new digital system. The implementation of increased digital services will over time modernise and simplify the disclosure system. The design principle is that customers should only need to know the role they want to do and the system should take care of guiding them to the appropriate disclosure.</p> <p>All products will be available as a digital certificate following an online application which the applicant can elect to share with third parties, such as a prospective employer.</p>

Option 1 – Do nothing

Option 2 – Introduce the Disclosure (Scotland) Bill

The Bill, together with the wider review, presents proposals for improving and simplifying the disclosure regime in Scotland. This assessment provides only summary costs and savings for each option. Detailed calculations are provided in the Financial Memorandum, which can be found on the Scottish Parliament website under the Disclosure (Scotland) Bill.

Sectors and groups affected

As of May 2019, there were 1,240,343 members of the PVG Scheme. The membership landscape of the PVG Scheme is varied and includes doctors, nurses, teachers, sports coaches, care assistants and volunteers doing regulated work with children and protected adults. The public sector, third sector and the voluntary sector will all be affected by any changes to the current disclosure regime.

As well as PVG scheme members, individuals request basic, standard and enhanced disclosures under the 1997 Act. These can be requested for a variety of reasons and employment sectors, for example, solicitor, door attendant, adoptive parent, store worker etc. The landscape for all disclosure products is wide and far reaching. In 2018 there were 308,427 requests for basic, standard and enhanced disclosures.

The Bill will have the greatest impact on the individuals who use the disclosure regime, particularly PVG scheme members.

Option 1 – Do nothing

Option 1 would meet the Government's commitment to review the PVG Scheme, however, doing nothing would mean that no action would be taken to resolve any the issues highlighted by stakeholders.

Mandatory Scheme

Non-mandatory membership of the PVG Scheme; the Scheme would continue to be available to people doing 'regulated work', however, there would be no legal requirement to be a member of the scheme if working with protected adults or children. There would be no requirement for employers to ask for a PVG disclosure, although they would still have the risk of employing someone who is barred, which is an offence. Disclosure Scotland would need to find another way of ensuring that those who should be scheme members are although, with no levers to ensure it, under the current system this has been difficult.

Time-limited membership

The Scheme will continue to be a life-time scheme membership. This would result in the Scheme continuing to inflate in size. When the PVG Bill was introduced it was thought that around one million people would be in the PVG Scheme, but there are presently just over 1.22 million scheme members and, without introducing time-limited membership, it is forecasted to rise to 1.49 million people by the end of

March 2022. Recent attempts to get scheme members to leave the scheme when they are no longer continuing regulated work has had very little impact. Disclosure Scotland would need to develop a process to remove members from the Scheme. There are few legislative options to remove people from the scheme, and to date, the options tried have been unsuccessful.

Regulated roles

The Scheme would continue to operate under the model of 'regulated work'. Under the current system the definition of regulated work in the PVG Act allows for generic criteria to be applied to a wide spectrum of job and roles and this can make it difficult for the employers to assess whether the role is regulated work. There is a risk that the current definition of regulated work is too restrictive and difficult to apply in practice, leading to people who should be in the Scheme not being members. For instance, the Scottish Parliament's Health and Sport Committee found in their [report](#) that there were variations in practice between sports clubs and bodies regarding whether or not coaches could work/volunteer in a limited capacity without a PVG check having been completed. The Health and Sport Committee stated these variations in practice could well be effecting the overall value of the PVG scheme as a child protection measure.

Accredited bodies

Registered persons and responsible bodies would continue. Responsible bodies would not be constrained by the current legislation in the same way registered persons are. Disclosure Scotland would not assess whether an employer is eligible to become a 'responsible body'. Another solution would be required to ensure responsible bodies operate appropriately, without legislative levers this would be difficult.

Barring provisions

There would be no change to the current barring provisions. It would not be possible to impose conditions on individuals under consideration for listing, thereby leaving a potential safeguarding gap. Disclosure Scotland would continue to receive court referrals for individuals who are not in the PVG scheme or who have no intention of doing regulated work. Police and local authorities would not be able to make referrals, which could result in a safeguarding risk.

Digital Delivery

The system would continue to be paper-based, with some limited digital aspects that can be delivered under the existing legislation.

Option 2 – Introduce the Disclosure (Scotland) Bill

The Bill makes provisions for a number of amendments to the current disclosure regime in Scotland, improving the system for individuals and organisations alike.

Mandatory Scheme

It would become an offence for an individual to do a regulated role without being a PVG scheme member. It would be an offence for employers to employ someone in such a role without first confirming their membership of the PVG Scheme.

Time-limited membership

Five-year time limit on membership. This may be linked to a fixed fee for each scheme membership period. Updates would not exist in their current form and no additional fee would be charged for them.

Regulated roles

Replacing the concept of 'doing regulated work' with a schedule of activities giving rise to 'regulated roles' that trigger mandatory PVG scheme membership (voluntary and paid). This will simplify the system for the majority of individuals and organisations using the current system.

Accredited bodies

Replace 'registered persons' and 'responsible bodies' with accredited bodies. Any organisation requesting Level 1 disclosures or wishing to use the B2B service is brought within the scope of an accredited body and is subject to regular suitability checks from Disclosure Scotland.

Barring provisions

Disclosure Scotland are able to impose standard conditions on scheme members when considered necessary for public protection, or where conditions are otherwise in the public interest. New referral powers for the police and local authorities will help to close safeguarding gaps.

Digital delivery

Develop an online application and access system where digital information is 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.

Benefits

Option 1 – Do nothing

As there would be no action, there would be no significant benefits to the issues identified by stakeholders, including businesses. However, the status quo would remain, organisations would have some knowledge of the existing system and how it works. They would not have to familiarise themselves with a new system and adjust their internal processes to ensure they are in line with new legislation. There would also be no additional administrative burden due to a time-limited membership or standard conditions.

Option 2 – Introduce the Disclosure (Scotland) Bill

Mandatory Scheme

A mandatory scheme will address safeguarding gaps in the current regime as identified by the Health and Sport Committee. Disclosure Scotland will be able to monitor compliance with all organisations in which people are in regulated roles with children or protected adults. Organisations will have greater confidence in the PVG Scheme.

Many organisations and individuals already believe that the Scheme is mandatory, which can cause uncertainty and distrust for the general public when they are unsure if someone has gone through a check. This can undermine confidence in organisations and the Scheme itself. It can also leave individuals unsure about the operations of the Scheme when they move between organisations which follow different procedures.

There is a significant safeguarding risk that concerns key stakeholders and public confidence in the potential for an employer which does not use the Scheme to hire someone who is unsuitable to undertake regulated work, resulting in harm to vulnerable groups.

A mandatory scheme would remove the variations in use of the Scheme from organisation to organisation and assist in understanding and compliance with better safeguarding.

Time-limited scheme membership

Under the current lifetime membership, those joining the Scheme tend to remain in it long after they no longer do regulated work, or fail to inform Disclosure Scotland when they are no longer involved in regulated work with a particular organisation. Introducing a time-limited membership period ensures that account information will be accurate as members will be required to review their information prior to each renewal or, if no longer in regulated work, will be encouraged to leave the Scheme. This will reduce occasions where organisations are contacted by Disclosure Scotland unnecessarily as a result of out of date account information. This will create a saving for organisations both in staff time and administration costs.

A time-limited membership also ensures that the Scheme self-adjusts to the right size because people who do not need to be in it have the incentive and easy ability to leave. Organisations will benefit from this as it will prevent the Scheme from unnecessarily growing in size which would have further cost implications.

Regulated roles

Many of Disclosure Scotland's stakeholders expressed that they understood what was meant by 'regulated work' but, on closer examination, there were common misconceptions about how to apply this term in practice. The current system is onerous and complex, our proposals aim to simplify the system, making it easier for applicants and employers to navigate. The new system proposes to reduce the administrative burden on organisations by guiding them to the correct disclosure products, as well as delivering it in a more accessible manner.

The Bill proposes to replace the concept of 'doing regulated work' with a schedule of activities which will always be present in 'regulated roles', to bring greater certainty around who requires PVG scheme membership. The requirement of scheme membership will be placed on those who exercise power or influence over children and protected adults. This is the guiding principle on which the schedule of activities is based and it is expected that the schedule will give us the flexibility to respond to changing employment landscapes.

Accredited bodies

This will tighten the security of the B2B service to assure the protection of personal data whilst still allowing for the efficient delivery of the service.

Barring provisions

Introducing standard conditions will result in an additional level of protection to ensure children and the vulnerable are protected from harm. During consultation organisations also stated it would help them better manage risk on a case-by-case basis.

It is anticipated that imposing standard conditions closes the safeguarding risk where a self-employed person could be under consideration for barring but no employer or statutory authority might exist who could constrain or limit their exposure to vulnerable groups for the time of that consideration. For example, a self-employed football agent with a previous conviction for grooming children in order to engage in sexual activity with them, could choose to join the PVG Scheme in order to work with children. There would be no employer to notify of the consideration for barring status and during that period the individual might have privileged and unsupervised access to children where they hold a position of trust and influence over them. Disclosure Scotland could impose a condition requiring the football agent to provide information relating to any regulated role which that scheme member is carrying out, or is to carry out. This would enable Disclosure Scotland to share important information with the child (or a person with parental responsibilities if appropriate), including notification that the football agent is being considered for barring and provide details of any conditions imposed. Conditions will also be notifiable to Police Scotland for the purposes of the prevention and detection of crime.

Digital delivery

A user-designed, digital-by-preference system will reduce the need for employers to spend time ordering, completing, scanning and mailing paper forms. An online application process more focussed on individual responsibility will reduce the processing requirements of employers in the long term. The system will be designed working with both individuals and employers to ensure digital solutions are accessible and meet the requirements of those using it. While the Bill itself does not require a digital system, the legal provisions will support the development of an online platform. There will still be an option to engage in a non-digital way for those who cannot, or prefer not to, use the new digital system.

Costs

Option 1 – Do nothing

Current costs for operating the disclosure regime continue, with no potential for savings. There could be increased costs to businesses in continuing with the primarily paper-based system. A continually increasing scheme member size will result in the cost of administrating the scheme continuing to go up.

There is a risk of reputational damage, as a non-mandatory scheme could result in a business employing someone who is barred. Possible GDPR/ECHR implications are

also present for employers as they may be provided with information they are not entitled to due to inaccurate scheme membership or registered body details.

Option 2 – Introduce the Disclosure (Scotland) Bill

Mandatory Scheme

For many organisations the move to a mandatory Scheme itself will have a minimal cost implication. It is an existing requirement of many businesses and all professional regulatory bodies (such as the General Teaching Council for Scotland) that individuals should have the right level of disclosure for their role, including those requiring PVG scheme membership.

A mandatory scheme will only draw in a minority of eligible organisations which do not currently use it. It will have an impact on Scottish based organisations who deploy people who are ordinarily resident in the UK to do work overseas which would be a regulated role if the activity were done in Scotland. For organisations that have never used the Scheme before, they will have to register as accredited bodies at a cost. If they chose to pay for scheme membership for their employees, they will incur scheme membership costs (costs have yet to be set but for indicative purposes the current fees are £59 for a full PVG scheme record and £18 for any additional update).

Time-limited scheme membership

Disclosure Scotland believe that the cost of administering a time-limited scheme membership for their employees will be minimal as individual scheme members will be responsible for renewing their membership. Concerns were raised during our engagement with regards to the administration costs of chasing up individuals membership. This was highlighted by NHS organisations and their experience of following up with individuals failing to get their Nursing and Midwifery Council registration renewed. However, Disclosure Scotland believe there will be no additional burden from the current scheme for businesses. Currently Disclosure Scotland need to contact organisations for updates about whether scheme members are still working for them. These checks are required to ensure safeguarding and will be required if a scheme member does not renew their scheme membership.

The current system is paper-based, which is time-consuming and complex, and can often result in recurring engagement with the applicant to ensure the information being submitted to Disclosure Scotland is correct. Disclosure Scotland believe that the movement to a more individual focused regime and the digital delivery of the scheme will result in savings for employers.

Although the Bill itself does not set specify fees, it does give Ministers powers to charge fees for various disclosure products and services. There are also existing powers in the 2007 Act which allow Ministers to set fees. Ministers may choose to attribute a fee to the time-limited Scheme membership.

The following examples are for illustrative purposes to show some varying costs for one scheme member over a 20 year working period, depending on how they use the current scheme and a five year membership with current fees. It should be noted if

an employer asked for a full scheme record, rather than a scheme record update for an individual, this would cost another £59. This is not a scenario set out in the below table.

	Membership	Update	Updates²	Renewals	Total
Option 1 – Do nothing	£59	£18	0	0	£59
Option 1 – Do nothing (with updates)	£59	£18	6	0	£167
Option 2 – five year membership	£59	£0	No limit, subject to fair use	3	£236

The current legislation is silent on who should pay the fee, this will not change under the new system. Although not set out in the Bill, our policy intent is that the scheme member would be expected to pay, reflecting the emphasis that it is the disclosure subject who is empowered by many of the policies contained in the Bill.

However, in circumstances where an employer chooses to reimburse a member's fees, changes to the fee structure such as option 2 (five year membership) could increase their expenditure, although in some cases their expenditure could actually reduce. This is because the real position is not as straightforward as the table above. The scheme at present is not fully portable and a care worker who moves between local authorities or a nurse who moves between health boards may well be asked to reapply to the Scheme repeatedly at the cost of another £59. The extent to which expenditure will change will be determined by the level at which fees are eventually set.

A real life example of this is a current scheme member who is a care worker working with protected adults. This scheme member made eleven applications for an update of their scheme record in a five year period (between 1st April 2014 and 1st April 2019) for different organisations. Each update cost £18 (£198 total). The scheme member also made four full scheme record applications during this time for different organisations at a cost of £59 each (£236 total). The total cost in using this scheme membership, over the five year period, was **£434**. This shows that individuals can benefit from the recurring membership that allows them to access and disclose their information at no extra cost over that five year period. Analysis so far shows that 210,790 scheme members have requested at least one additional full scheme record at £59 and 433,890 scheme members have requested at least one additional updated scheme record at £18. Further work is being undertaken by analysts to determine how many have requested more than one additional scheme record or scheme record.

The current intention is to adopt a fee structure for PVG scheme membership that most accurately reflects the full cost of providing the service, i.e. full cost recovery. Fees will be set in regulations which will require further consultation prior to being

² For illustrative purposes, this is based on the Care Inspectorate recommendation of a scheme record update every three years to check there is no new information. Some organisations may never use updates, or may use them only when they believe new information may be present on a certificate through other sources.

laid before Parliament. Stakeholder engagement will continue to help determine appropriate fees and payment methods, exploring options which might provide more flexibility in how people can pay for their disclosure.

Regulated roles

There will be a requirement for organisations to understand and apply the concept of regulated roles, however, for the majority will not be required to do this as the role they are looking at will be on a list and no assessment will be required. It is expected that the new regime will streamline the disclosure process and provide an electronic facility for requesting and sharing information which should cut administration costs for employers. There could be a cost of updating internal policies.

Accredited Bodies

The fees associated with being a registered person or countersignatory have remained static since 2011. It is intended that there will be a small fee increase in line with inflation which will mean that accredited bodies will pay an annual registration fee of £100 (currently £75 for registered bodies), with four additional countersignatories included. It would be £20 (currently £15) to add additional countersignatories. This is not expressly provided for in the Bill, as fees are set in regulations.

As of April 2019, there are 1,688 responsible bodies who will now fall within the remit of accredited bodies. These bodies will be impacted as they will now have to pay the fees set out above. Responsible bodies already incur an administrative cost in discharging their duties set out in the OPA (operational agreement they sign with Disclosure Scotland) and many of these duties replicate those within the code of practice. There may also be a small administrative burden on these organisations in ensuring the discharge of any additional duties appropriately.

3,935 organisations are currently registered as accredited bodies and will see a small increase in registration fees from £75 to £100. Registered bodies already incur administration costs in relation to discharging their registration duties set out in the code of practice, these duties will remain.

Barring provisions

There could be an administrative burden on some organisations in ensuring the conditions are met. Some volunteer-led organisations and smaller businesses have expressed concern that standard conditions may impact their workforce as they may not have the resources to oversee conditions placed on scheme members. Disclosure Scotland currently considers around 3,000 people per year for listing, but standard conditions will only be imposed in the most serious cases, and it is anticipated that there will be less than 100 cases per year, 3% of the cases considered for listing. Due to the small number of cases, it is anticipated that the administrative burden on employers will be minimal and will have huge safeguarding benefits.

Local authorities will continue to need to be in a position to provide information to Disclosure Scotland and comply with requests for further information in respect of any particular case. The proposals within the Bill give local authorities a power to

refer when acting in a role other than as regulated role provider, i.e. when undertaking a safeguarding role. For example, a personal employer may have recruited an individual to provide personal care services through self-directed support, then, following an adult protection investigation, the local authority may consider it appropriate to refer the individual to Disclosure Scotland due to the concerns raised during their investigation. There was significant support for this from local authorities during engagement sessions as well as the formal public consultation. The number of additional referrals for this proposal alone are not expected to be high. The proposals within the Bill will not increase the burden on local authorities to provide information to Disclosure Scotland. Indeed, it is expected that the new Scheme will streamline the request and submission of information and provide an online facility which should cut administration costs for employers.

Digital delivery

It is expected that the new regime will streamline the disclosure process and provide an online facility for requesting and sharing information which should cut administration costs for businesses, local authorities and health boards.

5. Scottish Firms Impact Test

Extensive engagement has taken place with a wide range of stakeholders. During this engagement a number of options for reform were presented and the impacts discussed. These were presented in the statutory consultation that ran for 12 weeks from 24 April 2018. Not only were the views on various options requested, there were also a number of questions specifically asking about the impact of the proposals on businesses and organisations.

As well as this engagement, the proposals and their impacts were discussed during several Stakeholder Advisory Board meetings. The Stakeholder Advisory Board consists of representatives across the various sectors using disclosures. The organisations and sectors represented are:

- General Teaching Council for Scotland
- Coalition of Care and Support Providers in Scotland (CCPS)
- General Pharmaceutics Council
- Scottish Ambulance Service
- NHS Lothian
- Community Pharmacy Scotland
- NHS Dumfries and Galloway
- Church of Scotland (Safeguarding Service)
- NHS Greater Glasgow and Clyde
- Scottish Social Services Council (SSSC)
- East Lothian Council
- General Dental Council
- Scottish Women's Aid (as of October 2018)

Businesses were asked to consider a projection of the impact of changing fees to their organisation, current administrative costs for managing the current Scheme

(staff numbers, admin costs, postage etc) and impacts of the move to a mandatory scheme on their organisations.

The main concerns were around:

- potential for a significant increase to annual costs due to existing membership renewals
- the administrative burden could deter people from volunteering, as could the threat of criminalising those who fail to join the scheme for roles which necessitate membership
- digital compatibility with any new system brought in
- how to ensure the regulated roles route to membership can be audited by both organisation and individual to ensure safeguarding.

The main benefits were perceived as:

- lower costs for new starts with no fee on updates;
- digital providing a quicker application process and having the potential to help with human resourcing administration monitor scheme membership;
- a mandatory scheme closing safeguarding gaps.

The Scottish Government has carefully considered the views expressed through the consultation and the Scottish Firms Impact Test in shaping the Bill's provisions.

6. Competition Assessment

Having applied the Competitions and Markets Authority competition filter, the proposals will not have any negative impact on competition. The proposals will not limit the number or range of suppliers, nor will the proposals limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously. There should be no competitive advantage to any particular individual or group as a consequence of the Bill will apply equally to all.

7. Test run of business forms

For any new or revised forms resulting from the changes proposed, Disclosure Scotland have been carrying out user testing on the current forms. To date they have carried out a significant amount of research, this has included a range of users, such as:

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

To ensure a deep understanding of users' needs a variety of methods have been used, including: one-to-one interviews, focus groups, sense-making workshops, usability testing, accessibility testing and contextual visits in people's homes and workplaces.

As a result of the research the team have elicited over 200 user needs and created a customer experience map. The map evidences the steps a user may go through when using Disclosure Scotland's services. In addition to understanding current pain points the user research team have also gathered a list of opportunities for improvement from users.

This user research will continue once the Bill has been finalised, working with businesses and individuals who will have to use any new forms and services.

8. Legal Aid Impact Test

The mandatory scheme would be supported by a requirement, punishable by an offence, that a person working in a regulated role in Scotland must first be a member of the PVG Scheme and had a Level 2 PVG disclosure issued to them.

It is not possible to determine in advance the number of people who should fall under the mandatory scheme who are not currently members or how many would be likely to avoid obtaining membership. As of May 2019, there were 1,240,343 scheme members, however, not all members are currently undertaking regulated work.

The Bill introduces new mechanisms for reviewing certain types of information in disclosure products. It will be possible to have the inclusion of certain convictions or police information reviewed by an independent reviewer. There will also be a right of appeal to a sheriff on a point of law against any decision of the independent reviewer. This is similar to the right of appeal which currently exists in relation to certain removable convictions under both the 1997 Act and 2007 Act. Disclosure Scotland do not envisage there being any additional costs to SLAB in relation to the application to a sheriff for the removal of a conviction from a Level 2 disclosure. Disclosure Scotland believe there will be a reduction in the current costs to SLAB as applicants will be making their appeals to the independent reviewer, not the sheriff. An appeal will be available to the sheriff on the point of law only. Disclosure Scotland believe that these figures will be very low, with costs predicted to be no more than £8,000 per year. This is based on the fact that these would be similar to other civic government appeals, where costs are limited to £1,000.

The Bill also creates a new form of application to a sheriff in relation to standard conditions imposed where a person is under consideration for listing. Ministers must apply to a sheriff to have conditions confirmed, or they will lapse after a prescribed period of time. Disclosure Scotland predict that these numbers will be very low. Although different due to the fact that the appeal will be for Scottish Ministers not individuals, we have based this assumption on the nearest example, the number of individuals who have appealed their inclusion on the barred list. Since the inception of the PVG Act in 2011 there have been 52 appeals. The number of people listed each year is far higher than the predicted number of cases with standard conditions. Costs are predicted to be no more than £7,000 per year, based on the fact that these

would be similar to other civic government appeals, where costs are limited to £1,000.

9. Enforcement, sanctions and monitoring

The Disclosure (Scotland) Bill will include provisions that will contribute to the enforcement of a mandatory PVG Scheme for individuals carrying out work in a regulated role. It will also include provisions allowing Disclosure Scotland to impose conditions on scheme members during the period of consideration for listing.

The Bill proposes that it should be an offence for:

- an individual engaging in, or seeking to engage in, a regulated role without being a member of the PVG Scheme (this includes lapsed memberships),
- organisational employers and personnel suppliers to offer a regulated role to an individual who is not a member of the PVG scheme and without having had sight of a Level 2 disclosure for PVG scheme members, and
- an individual, organisation or personnel supplier to fail to comply with any conditions or restrictions imposed by Ministers.

A person found guilty of these proposed offences should be liable on summary conviction to a term of imprisonment not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both. A person found guilty of this offence should be liable on indictment to a term of imprisonment not exceeding 5 years or to a fine, or to both.

These penalties are comparable to the existing offence provisions in sections 9 and 34 – 37 of the PVG Act.

The Bill will also introduce offences in relation to the falsification of disclosures and the unlawful request, use and disclosure of a level 2 disclosure. The bill proposes that that is should be an offence for:

- an individual to make a document that purports to be a level 1 or level 2 disclosure, or make a false or misleading statement for the purpose of obtaining or enabling another person to obtain a level 1 or level 2 disclosure.
- an individual to unlawfully disclose a level 2 disclosure to another person.
- an individual to request the provision of, or otherwise seeks sight of, a Level 2 disclosure for a purpose other than a permitted purpose

A person who commits an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale (or both).

These penalties are comparable to the existing offence provisions in sections 9 and 65-69 of the PVG Act.

Enforcement and monitoring of these offence provisions will be achieved through police constables acting in accordance with their statutory functions to investigate alleged offences; the Care Inspectorate's powers to inspect care services and duties

placed on organisations and bodies under a Code of Practice who use Disclosure Scotland's services.

10. Implementation and delivery plan

It is intended that the first phase of implementation will be operational in April 2022. This requires the introduction of primary legislation - the Disclosure (Scotland) Bill - setting out any amendments to the current system and a framework for the operation of the new disclosure regime. Secondary legislation is also required that sets out the detail of the operation of disclosure. Secondary legislation will be brought forward in 2021 - 2022. To support the implementation and delivery of the Bill, the Scottish Government will be developing an implementation plan. This plan will include extensive engagement with a wide range of stakeholders to develop the plan and aid in the development of training and guidance for each sector impacted by any changes made the regime. The Customer Engagement Team within Disclosure Scotland has started this engagement.

Post implementation review

An important measure of the impact of the legislation is through the identification and review of performance targets at Disclosure Scotland. These performance targets will build upon the existing performance measures, including the time taken to process applications, volume and nature of complaints and stakeholder feedback.

A decision about how and when a review of the legislation underpinning the disclosure regime in Scotland will be determined by Scottish Ministers.

11. Summary and recommendation

Summary and recommendation

It is recommended to proceed with **Option 2 – introduce the Disclosure (Scotland) Bill**.

- **Summary costs and benefits table**

Option	Total benefit: - economic, environmental, social	Total cost: - economic, environmental, social - policy and administrative
1 - Do Nothing	No additional benefits envisaged.	No additional / minimal increase in costs envisaged. Privacy implications.
2	<u>Mandatory Scheme</u> Closes safeguarding gap Increases consistency in use Improves public confidence	<u>Mandatory Scheme</u> Small number of organisations brought into the Scheme (£100 annual registration)
2	<u>Time-limited scheme membership</u> Prevents unnecessary monitoring and barring Simplifies compliance with GDPR Prevents exponential increase in scheme membership leading to fee increases due to burden on DS Reduction in cost for repeat users/updates	<u>Time-limited scheme membership</u> Increased cost for low use of scheme membership
2	<u>Regulated roles</u> Prevent unnecessary inclusion in Scheme Assists in understanding of why a role needs be in the Scheme	<u>Regulated roles</u> Initial one-off cost to updating internal policies for some organisations
2	<u>Accredited bodies</u> Increases protection of sensitive personal data	<u>Accredited bodies</u> Increase of £100 p.a. for responsible bodies brought into the scope Increase of £25 p.a. for registered persons, in line with inflation
2	<u>Barring provisions</u> Assist in managing risk and supporting safeguarding	<u>Barring provisions</u> Minimal
2	<u>Digital delivery</u> Long term reduction to administrative costs as processing requirements for organisations will be reduced More accessible due to user-focussed development	<u>Digital delivery</u> Minimal

The financial costs and any potential savings associated with the Bill are fully detailed in the Financial Memorandum, published on the Scottish Parliament website, which accompanies the Bill.

12. Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

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