

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

**The Scottish Government response**

**June 2019**



**Scottish Government**  
Riaghaltas na h-Alba  
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## Ministerial Foreword



I am pleased to deliver the Scottish Government response to the Protection of Vulnerable Groups and the Disclosure of Criminal Information consultation report. The views and experiences shared by respondents provided vital insight into ways in which the disclosure regime, including the PVG Scheme, can be improved and simplified. From the outset, this Government intended the review of disclosure to capture the best ideas to strike a new balance between the twin objectives of delivering a fairer, less invasive, disclosure regime whilst also strengthening its ability to protect the most vulnerable in society. I believe that the policy proposals contained in this response successfully rebalance safeguarding and proportionality, delivering a disclosure regime that will be even more responsive to the needs of Scotland's people.

We hope to deliver a range of positive and proportionate reforms to the barring service in Scotland, ensuring the PVG Scheme continues to offer a world-class service in protecting the public from individuals whose past conduct may indicate unsuitability to work or volunteer with children and protected adults.

The Scottish Government is committed to policies that balance public protection with the right to forget past offences so that everyone in Scotland has the possibility of contributing to the wellbeing and development of our nation. These proposals, if enacted, will transform the disclosure position of young people and adults with childhood convictions. We are learning more and more about the impact of trauma and adverse childhood experiences on our life chances and we have to do more, not only to prevent adverse childhood experiences from happening in the first place, but to limit the damage they do to opportunities for individuals, families and communities in the longer term.

It is vital that employers and job applicants alike recognise the economic importance to Scotland of including people with convictions in the workforce so that we address reoffending and promote desistance from crime. To this end, I hope that every employer who seeks to use the disclosure system in Scotland will apply a fair and proportionate approach to considering and recruiting people with convictions, consistent with the Scotland Works for You principles promoted by Disclosure Scotland and its allies in the public, private and charitable sectors.

Going forward, I am committed to the involvement of those with an interest in our proposals and will make sure there are opportunities to engage further with users and practitioners as we prepare to deliver these proposals.

A handwritten signature in grey ink, appearing to read 'Maree Todd'.

**Maree Todd**  
**Minister for Children and Young People**

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## Chapter 1 – Background

### 1.1 Pre-consultation engagement

It has been eight years since the PVG Scheme commenced and over ten years since the Protection of Vulnerable Groups (Scotland) Act 2007 (“the PVG Act”) passed through the Scottish Parliament. During this time, Disclosure Scotland has listened to a wide range of stakeholders and customers to identify the issues with the current disclosure system and the areas where it can be made fairer, more efficient or simply better at protecting people from harm.

In 2015, Disclosure Scotland’s extensive customer research revealed that many respondents were confused about what being in the PVG Scheme meant, were unclear that it was possible to leave it, and did not know that Disclosure Scotland monitored police systems for new information about them, raising the possibility that this might lead to barring from working with vulnerable groups, even though they might not have done such work for many years.

This public consultation reviewed the purpose of disclosure in Scotland, the efficacy of current legislation and its practical delivery to determine whether it still fits the current landscape. It looked at whether digital technology can deliver an even more assured and customer-focused PVG Scheme to better serve individuals, businesses and volunteering organisations alike.

The consultation responses validated pre-consultation work which confirmed how publically valued the PVG Scheme is but also highlighted too much complexity in the disclosure system as a key problem.

### 1.2 Consultation process and responses

The Scottish Government would like to thank all individuals and organisations who took the time to consider and respond to the proposals contained in [the consultation](#) on the Protection of Vulnerable Groups and the Disclosure of Criminal Information in Scotland, especially as this was a lengthy and complex document. The Scottish Government would also like to thank those individuals and organisations that attended one of our 36 engagement events during the consultation period.

On April 2018, following extensive pre-consultation engagement between January and August 2017 with over 300 individuals and organisations, and an online survey generating over 800 responses, Disclosure Scotland published the consultation paper. This was distributed widely to stakeholders, including over 3,000 registered bodies using higher level disclosures. We received 353 responses, 269 from organisations and 84 from individuals. We had responses from a range of stakeholders including judicial bodies, the legal sector, local government, voluntary organisations, the health sector and individual scheme members.

Two hundred and forty-five respondents gave permission for their response to be published on the Citizen Space website at [https://consult.gov.scot/disclosure-scotland/protection-of-vulnerable/consultation/published\\_select\\_respondent](https://consult.gov.scot/disclosure-scotland/protection-of-vulnerable/consultation/published_select_respondent).

## Chapter 2 – The Scottish Government’s response

### 2.1 Summary of proposals

The table below gives a brief summary of proposed changes we hope to make to the current system. You can read more about each proposal in the subsequent text sections.

Proposed change	Summary
<a href="#">Mandatory PVG Scheme</a>	Anyone doing regulated roles with children and adults will need to be a member of the PVG Scheme and it will become an offence to do such a role without first joining the PVG Scheme. This underpins many of the proposed changes and unlocks the potential for the system to be made more proportionate.
<a href="#">Disclosure products</a>	Changes relating to the disclosure products offered and practical changes for applicants and registered bodies.
<a href="#">Childhood conviction information</a>	There will be new rules on the disclosure of convictions obtained by a person whilst under the age of 18. These will prevent automatic disclosure of such convictions. Instead an assessment will be made as to whether such convictions should be disclosed and this will be subject to a right of review by the independent reviewer.
<a href="#">Removal of spent convictions from disclosures</a>	Changes the period after which an application for removal of a conviction for an offence on List A (replacing schedule 8A of the Police Act 1997) can be made; with spent convictions for offences listed on List B (replacing schedule 8B of the Police Act 1997), the disclosure period will be shortened. The process applying for convictions to be removed from a disclosure will be via an internal application to Disclosure Scotland, followed by a right to apply for review by the independent reviewer.
<a href="#">Providing applicants new rights to appeal Other Relevant Information (“ORI”)</a>	Applicants will be given the right to make representations to the police before they decide whether ORI should be included on a disclosure, followed by a right to apply for review by the independent reviewer if police decide to disclose ORI.
<a href="#">The PVG Scheme</a>	Changes relating to the streamlining of the PVG Scheme under a mandatory system.

Responses to the consultation highlight consistently that the disclosure system must make a better contribution to promoting fairness for people with convictions and desistance from crime, in particular with regard to childhood offending. However, respondents insisted that this was not to be at the expense of public protection which was considered equally vital for the safety of children and protected adults.

## 2.2 Mandatory scheme

The public consultation did not ask whether the PVG Scheme should be mandatory as early engagement found there was overwhelming support for this. Many organisations treat the Scheme as mandatory already and the public perception is that it is necessary to be a scheme member to carry out roles with vulnerable groups. A mandatory scheme will allow us to address safeguarding gaps in the current regime.

The current Scheme was originally introduced on a non-mandatory basis to prevent the unintended consequence of someone informally helping another person in a moment of need being criminalised because it technically qualified as regulated work under the PVG Scheme. This was a major consideration in drawing up ideas for a proportionate and fair mandatory PVG Scheme. Section 2.9.1 draws out the discussion from the consultation about how we can achieve this goal.

## 2.3 Disclosure products

Proposed changes	Summary
<a href="#">Reduction in number of products</a>	Four main levels of disclosure will be reduced to two; the ten products offered across the current structure will be reduced to four within a two level structure (plus a 'confirmation of scheme membership', which will not include conviction information).
<a href="#">Revised fee structure</a>	Further consultation on fees will be required. Free checks for qualifying volunteers will continue.
<a href="#">Digital delivery</a>	All products available via online application. Digital certificates with one "certificate" produced which the applicant can then share.
<a href="#">Accredited bodies</a>	'Responsible bodies' and 'registered bodies' will be replaced by accredited bodies. Accredited bodies will be formally regulated.

### 2.3.1 Reduction in number of products

#### Proposed change:

There should be four products, reduced from the current ten products.

There was significant support from respondents for a reduction in disclosure products offered under the Police Act 1997 ("the Police Act") and the PVG Act.

Our design principle is that customers will only need to know the role that they intend to do and the system will take care of guiding them to the appropriate disclosure. This will be done by developing a digital system that allows information input about

the job or role to lead to a clear outcome for the customer. There will be alternative provisions for those with no access to digital or who face other challenges using it.

Level 1	<ul style="list-style-type: none"> <li>• This product will replace the current basic disclosure under the Police Act.</li> <li>• Available to any individual aged 16 and over, for any purpose on payment of the prescribed fee.</li> <li>• This product will include notification requirements under Part 2 of the Sexual Offences Act 2003.</li> </ul>
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Within Level 2, the extent of disclosure will increase with the nature / sensitivity of the role:

Level 2 (e.g. for a gaming licence)	<ul style="list-style-type: none"> <li>• This disclosure product will replace all standard disclosures and some enhanced disclosures under the Police Act.</li> <li>• Available to an individual aged 16 and over for a prescribed purpose, where that purpose is connected to an accredited body, and on payment of the prescribed fee.</li> </ul>
Level 2 with suitability information (e.g. prospective adoptive parents)	<ul style="list-style-type: none"> <li>• This disclosure product will replace certain enhanced disclosures under the Police Act.</li> <li>• Available to an individual aged 16 and over for a prescribed purpose, where that purpose is connected to an accredited body, and on payment of the prescribed fee.</li> </ul>
Level 2 PVG Disclosure (e.g., for a school teacher)	<ul style="list-style-type: none"> <li>• This type of disclosure will replace the PVG scheme record and short scheme record.</li> <li>• There will still be a product equivalent to the statement of scheme membership (known as a confirmation of scheme membership), which does not include conviction information.</li> <li>• Available to an individual aged 16 and over and mandatory for those working with vulnerable groups. (Further information in section 2.9.1)</li> </ul>

Some respondents commented that the complexity of the disclosure system lies not only in the number of products available, but in a lack of understanding of the underpinning legislation and difficulty in navigating the system. We hope to simplify the system by ensuring the user only needs to understand the role they are seeking, not the disclosure system as well. Disclosure Scotland is also committed to increasing training and guidance to ensure that customers get the best out of the system. Disclosure Scotland has already started this work and has engaged with various stakeholder sectors to seek feedback and advice on this.

If agreed, Level 2 disclosure will be available for employment and roles that are covered by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013. During consultation, respondents suggested additions to the schedule of eligible roles or employment type for Level 2 disclosure. We continue to work with stakeholders to better understand evolving requirements, and we would



propose that the schedule of eligible roles is set in secondary legislation so that we can continue to match the employment landscape, capturing new roles as they arise and removing roles no longer required or eligible.

### Content of Disclosure Product

	Level 1	Level 2	Level 2 with suitability	Level 2 PVG Disclosure
Unspent convictions from UK central records	✓	✓	✓	✓
Notification requirements under Part 2 of the Sexual Offences Act 2003	✓	✓	✓	✓
Unspent cautions from police forces in England, Wales and Northern Ireland		✓	✓	✓
ORI		✓	✓	✓
Relevant spent convictions		✓	✓	✓
Whether the applicant is subject to any prescribed civil orders			✓	✓
Whether the applicant is under consideration for listing			✓	✓
Whether the applicant's name is included in the children's list and / or the adults' list			✓	
Ongoing monitoring of convictions and other relevant information				✓

### 2.3.2 Age restrictions

#### Proposed change:

There should be a minimum age of 16 years on obtaining a criminal record check.

There was significant support for placing a minimum age of 16 years on obtaining a criminal record check. We propose that this would not be a blanket prohibition, with exceptions made, for instance, to avoid preventing individuals under 16 years of age from applying for work or college places which require a disclosure on anticipation of them turning 16. Young people would have to contact Disclosure Scotland and explain why they need a disclosure and Disclosure Scotland will have the power to issue it where appropriate. However, there will be no circumstances in which an individual under the age of 16 can apply to join the PVG Scheme.

### 2.3.3 Fees

#### Proposed change:

Individuals who create an account for multiple applications will benefit from a reduced charge in subsequent applications.

Scottish Ministers will retain the ability to set fees for disclosure products/services. As part of developing the new digital platform we will be able to explore options for fee payment which might provide more flexibility in how people can pay for their disclosures.

Further consultation will be required on fees (as the details are not provided for in the Bill) and stakeholder engagement is ongoing to determine proposals for appropriate fees and payment methods.

	Non-recurring applications	Account established for multiple applications	
Level 1 - fee differentiation by customer	One-off fee	Initial fee	Smaller subsequent fee
Level 2 - fee for a single application	One-off fee		
Level 2 - fee for five-year membership	One-off fee		

The Level 1 multiple application option will help those who may engage with a number of employers. We believe that it would better reflect the current rise in short-term contract and freelance work to offer a higher initial fee, with a reduced fee for subsequent applications. We propose that individuals creating an account will pay a reduced fee for subsequent applications as their personal information, their identification having been verified, will be stored within the account and will not need to be input for subsequent applications. Individuals applying for a one time check would not benefit from a reduced charge for subsequent applications.

Those with five-year PVG scheme membership would be able to authorise a disclosure to their current or prospective new employers throughout that membership period without paying every time, subject to a fair use policy.

### 2.3.4 Digital delivery

The consultation strongly supported moving Disclosure Scotland's services online. The consultation set out a number of policy proposals based on a system that is digital-by-preference that would enhance the operational efficiency, portability, ownership of information for the applicant and give greater control over whom they share that information with.

Our proposal for the future system is built on increasing the extent to which applicants may interact digitally with Disclosure Scotland and with prospective employers in the context of disclosure. We continue to explore ways in which Disclosure Scotland can provide a digital way to improve safeguarding and access disclosures that is more responsive to Scotland's people. Our intention is to have simple and accessible digital services so that people will prefer to carry out their task online. We are also mindful of the need to provide an alternative to avoid precluding those unable to or unwilling to use services online. This is very important; people experiencing poverty and exclusion have much reduced digital access and Disclosure Scotland is committed to finding the right ways to make products accessible.

### **2.3.5 Accredited bodies**

#### ***Level 1***

Disclosure Scotland offers businesses the ability to obtain basic disclosures for a large number of job applicants using special arrangements that allow for bulk applications. This is known as Business 2 Business, or B2B for short.

We intend to continue to offer a B2B service for Level 1 disclosures to organisations that require it but are proposing these organisations should be brought within the scope of accredited bodies, as is the case just now for organisations who can see standard, enhanced and PVG disclosures, replacing the current non-statutory definition of 'responsible body' for B2B customers.

We believe that the law governing how B2B works needs to be tightened to assure the protection of personal data as the service moves onto new digital platforms, whilst still allowing for the efficient delivery of the service. A majority of consultation respondents supported this approach, commenting that, given the new data protection laws in place, organisations requesting disclosures from a large volume of employees should be formally accredited and their processing and storage of personal data regulated.

Stakeholders have expressed support for increasing the applicant's ownership of data and giving them greater control over who they share that information with. We are proposing that Disclosure Scotland will continue to accept bulk applications for Level 1 disclosures, but the practice of returning disclosures in bulk to the accredited body will end. The Level 1 disclosure will be issued to the applicant only with the individual then having control (usually digitally) over sharing the Level 1 disclosure with a third party. In cases where a paper Level 1 disclosure certificate is issued, only one will be sent to the applicant who will have control over the sharing of that disclosure.

#### ***Level 2***

Accredited bodies will replace 'registered persons', under the Police Act, for access to Level 2 disclosures. An individual can apply without an accredited body to obtain a certificate confirming their PVG scheme membership status.

It will not be possible for an individual to apply for a Level 2 with full vetting information without the accredited body connection being made. The accredited body will have to confirm the level of disclosure applied for is appropriate for the role the applicant will carry out. Accredited bodies will be required to pay a fee to cover the administrative costs to Disclosure Scotland of providing the service.

A noteworthy improvement is that we intend control over the use and sharing of disclosure data to pass to the disclosure applicant. Presently employers generally receive a copy of the disclosure at the same time as the applicant. We propose to change this, so the disclosure applicant will explicitly elect to share online access to their record, meaning that sharing with the employer will not happen until the applicant chooses to. Sharing both Level 1 and Level 2 disclosures electronically with accredited bodies (or other third parties in the case of Level 1 disclosures issued electronically) will be time-limited to ensure that the disclosure recipient received up-to-date information that can be relied upon. Where the applicant decides to pursue a review of the information to be included on the disclosure, sharing will only be possible after the right for review is exhausted unless the applicant chooses to opt out of the review process and makes the decision to share the disclosure. An alternative will be made available for those who cannot use digital services.

It is proposed that umbrella bodies will be maintained under the new accredited body provisions meaning that it will be possible for accredited bodies to countersign applications for Level 2 disclosures on behalf of non-accredited body employers. Umbrella bodies will also be able to assess an individual's suitability for work on behalf of a private individual employing someone in a personal capacity (since that private individual would not be entitled to see a Level 2 disclosure).

## **2.4 Disclosure provisions for childhood convictions**

### **Proposed change:**

There is no possibility of automatically disclosing a conviction accrued under the upper age limit, on any type of disclosure.

The Age of Criminal Responsibility (Scotland) Bill ("the ACR Bill") proposes that harmful behaviour by children under the age of 12 cannot be criminal because children under this age are too young to be held criminally responsible. The provisions in the ACR Bill only affect behaviour of children under 12 and there remains the possibility of children over 12 being convicted of offences and being subject to subsequent state disclosure of information about such convictions.

A singular theme from consultation responses is that change is needed in the disclosure of childhood offending behaviour. Respondents recognised that there was real need to consider how the disclosure system works to ensure it is fair to all, protecting the life chances of people who may have committed offences as children but who now lead law-abiding lives, while also ensuring public protection.

We therefore propose to end the current system where a disclosure certificate will automatically contain information about convictions accrued under the age of 18 years, which the law currently requires be disclosed. The public consultation strongly

supported the idea that such a disclosure should only be made after careful and informed consideration of the public protection necessity and the impact on the individual.

The proposal is that if there are convictions present from childhood, Disclosure Scotland will assess whether to disclose information about the conviction. If it was decided to disclose such information, the applicant would get a chance to make representations to the independent reviewer, whose role is set out in more detail in section 2.8, showing that the conviction is not relevant for the purpose of their disclosure, before the information was made available for sharing with an employer or third party.

To be clear, this proposal will benefit those aged 16-17 applying for a disclosure (because you will not normally be allowed to get a disclosure if you are under 16), as well as anyone aged 18 or over applying for a disclosure who obtained a conviction for an offence accrued whilst aged under 18. This strikes a balance between a system that protects people's right to move on with their lives, but still allows for disclosure of convictions that are relevant and ought to be disclosed.

If Disclosure Scotland finds a conviction resulting from a period when the individual was under 18 years old and, in the case of a Level 1 disclosure, was unspent or, in a Level 2 disclosure, was not a non-disclosable conviction:

- they will make an assessment on whether or not to disclose information about the conviction;
- if they proposed to include such information the individual would be informed and could ask Disclosure Scotland to refer it to the independent reviewer who will make the decision about whether it ought to be disclosed; and
- applicants will be given the opportunity to provide representations to the independent reviewer.

If this approach is agreed, we will publish guidance for the applicant and make sure there is support to help them positively engage in the process.

## **2.5 Offence lists in schedules 8A and 8B of the Police Act**

### **Proposed change:**

Reduce the periods certain convictions will be disclosed for and make amendments to the offence lists.

At present higher level disclosures may contain information about spent convictions for offences listed on schedules 8A and 8B of the Police Act. It is necessary that relevant and serious convictions can continue to be disclosed in the public interest and we are proposing these will be restated in the Bill as List A (replacing 8A) and List B (replacing 8B). Currently, convictions for offences in schedule 8A must always be disclosed unless a person has successfully applied for the conviction to be removed from their disclosure; such an application can only be made once 15 years have passed from the date of the conviction if the person was 18 or over when

convicted (or 7.5 years if the person was under 18 at the time of conviction). For offences in schedule 8B, the period during which offences are disclosed is 15 years from date of conviction if the person was over 18 at the date of conviction (or 7.5 years for convictions accrued aged under 18); after this disclosure period, spent convictions for offences on schedule 8B become protected and can no longer be disclosed.

The consultation proposed to simplify and ensure the proportionality of the current system by reducing the periods certain convictions will be disclosed for. We propose the disclosure period of 11 years as this mirrors arrangements elsewhere in the UK whilst allowing for a significant extended disclosure of relevant spent convictions on Level 2 disclosures. This also follows on from the broad support we found in the consultation results and our stakeholder engagement that the period should be reduced from 15 years. This change is also supported by emerging research in relation to certain conviction types and reoffending.

The consultation also set out proposals for the categorisation of new offences to reflect recent developments in legislation and the experience of operating the lists in practice in the context of the disclosure system. The vast majority of respondents were in favour of the proposed changes to the offence lists.

#### List A offences

- A List A spent conviction resulting from a period when the individual was aged 18 years or over will always be disclosed unless an applicant successfully applies to have the conviction removed from their disclosure.
- Applicants may apply for removal of a conviction accrued when aged 18 years or over once the conviction is spent and **11 years** have passed since the date of conviction.

#### List B offences

- An applicant with a conviction resulting from a period when the individual was aged 18 years or over will be able to apply for the removal of a List B conviction from their disclosure once spent.
- A spent conviction resulting from a period when the individual was aged 18 years or over will become non-disclosable after **11 years** from the date of conviction and will no longer be disclosed on the applicant's disclosure.

Convictions for offences accrued while aged **under 18** will be dealt separately under the new rules discussed earlier in section 2.4.

## 2.6 Application process for removable convictions

### Proposed change:

Introducing an internal application to Disclosure Scotland for removal, followed by a right to apply for review by the independent reviewer.

The current system for disclosure applicants making an application to a sheriff for removal of spent conviction information from a disclosure is deemed to be complex and difficult for applicants to navigate. A number of stakeholders saw it as disproportionate due to the length of time and the types of convictions being disclosed. The majority of consultation respondents supported reviewing the process to seek removal of a spent conviction. Stakeholders expressed support for an alternative to the current system with most preferring an internal appeal to Disclosure Scotland. We believe an internal assessment will be simpler for applicants to understand and will be less expensive as legal representation would not be required.

We therefore propose that individuals may make an application to Disclosure Scotland to have a conviction removed from their certificate. There will be a prescribed fee for this application. Applicants will be able to provide representations in support of their application to have the conviction removed from their disclosure, showing that the conviction is not relevant for the purpose of their disclosure. If Disclosure Scotland refuse to remove the conviction, a disclosure applicant would then have a right to apply to the independent reviewer to consider removal of the conviction, instead of applying to the sheriff. Under the new system an appeal to a sheriff of the decision made by the independent reviewer would be available on a point of law only.

## 2.7 Other Relevant Information (ORI)

### Proposed changes:

Police Scotland will have a duty to consider representations from applicants before they decide that ORI should be included on a disclosure. Applicants will be given the right to apply to the independent reviewer for review of the police decision to disclose ORI.

ORI is information provided by a police force to Disclosure Scotland for inclusion in an enhanced disclosure or PVG scheme record. It is presently used very infrequently but is very important for public protection.

We intend to change the point at which the individual becomes aware of the police intention to include ORI on a Level 2 disclosure so that they have the opportunity to provide representations before it is included on the disclosure they will share with employers or other third parties.

Respondents welcomed this proposal, viewing the provision for applicants to submit representations and to have decisions reviewed by the independent reviewer before any ORI is shared with a third party as improving fairness and transparency. To

ensure effectiveness of the proposals, the process should be easy to understand, simple as possible, and have set timescales to avoid unnecessary delays and the resulting impact on opportunities.

If agreed, Disclosure Scotland will publish guidance for Police Scotland and the independent reviewer about making decisions on ORI. Guidance will also be developed for applicants and support will be available to help enable them to engage in the process. We continue to engage with stakeholders to develop guidance and training that meets user needs.

## 2.8 Independent reviewer

We are proposing that the independent reviewer will have a role in determining appeals for **childhood convictions** process described earlier in section 2.4, the **removable convictions** process described in 2.6, and for **Other Relevant Information** described in 2.7.

We believe that unifying the appeal mechanisms, so that the independent reviewer is responsible for all types of appeal, will make the system as simple and coherent as possible for applicants and stakeholders. There will also be arrangements in place for dealing with combination reviews for circumstances when an applicant pursues a review for more than one type of information, for example childhood information and the removal of spent convictions. Under the new system an appeal to a sheriff of the decision made by the independent reviewer would be available on a point of law only.

## 2.9 The PVG Scheme

Proposed changes	Summary
<a href="#">Roles working with vulnerable groups</a>	Regulated work as a concept will be discontinued and replaced with 'regulated roles'.
<a href="#">Membership length</a>	Introduction of a time-limited five year membership of the PVG Scheme, in place of the current lifetime membership.
<a href="#">Preventing unsuitable people from doing regulated roles with vulnerable groups</a>	New referral provisions for Police Scotland and local authorities, and new powers to impose standard conditions on people being considered for barring.
<a href="#">Personal employment (including self-directed care)</a>	Supporting safeguarding when using self-employed workers while respecting individual privacy.



## 2.9.1 Roles working with vulnerable groups

### Proposed changes:

Replacing the concept of 'doing regulated work' with 'regulated roles' and schedules containing activities that qualify for PVG scheme membership.

We intend to replace the concept of 'doing regulated work' with 'carrying out a regulated role' which will be synonymous with roles holding power or influence over children or adults who are vulnerable as a result of receiving a service. Identifying whether a role has this power or influence will be done by considering it against a list of activities in relation to children and a list of activities in relation to protected adults which will make clear whether PVG membership is required or if another Level 2 disclosure would be appropriate.

Disclosure Scotland will publish a list of roles for typically-encountered positions for which PVG scheme membership would be mandatory to save applicants' time in auditing their role against the core characteristics

In this way we can fulfil our principal commitment to provide the right disclosure for the applicant with the only pre-requisite being that the applicant understands what the new position involves. The applicant will not need to understand the types of disclosure products. The presence or absence of one or more activities as a core characteristic of the role will determine the disclosure type.

Roles for which membership is a mandatory requirement will have at their core the capacity to exert significant power or influence over a child or protected adult. Replacing regulated work with regulated roles will not impact on the two barred lists; this is to be retained. We are also proposing that overseas work, which would be a regulated role if done in Scotland, done by someone who is ordinarily resident in the UK for a company with a place of business in Scotland, should fully qualify as a regulated role and people doing such roles on behalf of a Scottish organisation will be within the scope of the mandatory PVG Scheme and its barring provisions.

The majority of respondents supported the proposal to replace 'regulated work' with something much easier to understand. The need for clarity about the scope of regulated roles, especially due to the criminal offence supporting the mandatory PVG Scheme, was highlighted. We aim to provide a legal test which brings greater certainty to which roles are eligible for PVG scheme membership. In developing the new approach to defining regulated roles, there is also the opportunity to move away from the previous lengthy and complex definition of "protected adult" to a narrower range of issues that brings clarity to the existing definition.

## 2.9.2 Membership length

### Proposed changes:

Ending lifetime membership and replacing it with time-limited membership of five years.

The current PVG Scheme is a lifetime membership scheme with minimum scope to leave it. Once a person becomes a scheme member they are subject to continuous updating of the scheme record held by Disclosure Scotland, which means continually checking records held on police criminal history systems to discover new vetting information. Disclosure Scotland can place individuals under consideration for listing if information comes to light in the course of a person's membership which calls into question their suitability for regulated work. Those joining the PVG Scheme tend to remain in it long after they no longer do regulated work. The effort to keep such records updated is unnecessary for public protection and puts inactive members at risk of being considered for listing should any vetting information appear on their PVG scheme record. The number of members of the PVG Scheme, in its present format with indefinite membership, will simply continue to increase and will become increasingly expensive for little safeguarding return. In order to address these concerns we are proposing that the current lifetime membership arrangements should end and be replaced with a renewable time-limited membership of five years.

We recognise that the transition from the current scheme membership arrangements to the new model may pose challenges and will require careful consideration of fairness. Respondents highlighted the need for guidance and clear communication regarding arrangements for moving to the new regime. We are committed to working closely with stakeholders to ensure this happens smoothly, which will include taking account of the timescales for completion of the change.

## 2.9.3 Removing unsuitable people from regulated roles

Proposed change	Summary
<a href="#">Court referrals</a>	End the court referral process as a mandatory scheme will close the safeguarding gap presently necessitating them. For extremely serious offences individuals will still be automatically barred.
<a href="#">Police Scotland referrals</a>	Placing a duty on Police Scotland to provide Disclosure Scotland with information about people they have discovered doing regulated roles unlawfully.
<a href="#">Local authority referrals</a>	Strengthening the power of local authorities and integration joint boards to refer individuals to Disclosure Scotland within their normal safeguarding normal duties.
<a href="#">Standard conditions</a>	Disclosure Scotland to be given power when justified to impose standard conditions on those being considered for listing.

## **Court referrals**

### **Proposed changes:**

Ending the court referrals process under section 7 of the PVG Act.

We propose that referrals from courts under section 7 of the PVG Act can safely end because there will be a mandatory PVG Scheme and new powers to impose conditions on those being considered for listing.

The present law requires the courts to refer certain convicted individuals to Disclosure Scotland for consideration for barring, even if the individual has never sought or done regulated work with vulnerable groups. A major part of this is because the PVG Scheme is not mandatory; pre-emptively considering and possibly barring those convicted of serious offences against children lowers the risk that they might do regulated work lawfully and never join the PVG Scheme, for example, if working as a self-employed tutor. A mandatory scheme presents us with an opportunity to end the court referral process because it will no longer be lawful to do a regulated role without PVG membership. Upon an application to join the PVG Scheme, all relevant previous convictions and police information would become known to Disclosure Scotland and could trigger a consideration for listing. There was strong support in the consultation for this policy proposal, with respondents agreeing the PVG Scheme should only interfere with the privacy of those who are actually doing or seeking to do regulated work (or its successor).

This means that people who were convicted of child abuse offences or offences against adults where there was an abuse of power could in future conceivably seek to join the reformed PVG Scheme and could work with children or protected adults whilst they were being considered for listing. They are entitled to a fair process to determine if they ought to be barred; the listing should not happen before that fair and transparent process is finished. To protect the public in these circumstances, and others where public protection is an issue for different reasons, the Bill will provide the possibility for Scottish Ministers to impose standard conditions on scheme members while they are under consideration for listing. These will ensure that risk factors arising from past behaviour are controlled without imposing a complete temporary bar before the consideration for listing process completes.

Section 14 of the PVG Act will be retained to ensure that the most dangerous offenders are automatically barred from working with vulnerable groups and therefore are prevented from ever entering the PVG Scheme.

### **Two barred lists**

Although the consultation did not ask for views on this, some respondents took the opportunity to ask why two lists of barred persons (children and protected adults) were necessary. The Scottish Government considers it necessary to retain two lists of barred persons. The purpose of the automatic listing provisions is to address conduct which is so heinous (for example rape) that suitability to work with any vulnerable group is fundamentally undermined by a conviction for such conduct. However it is unlikely that all conduct that might cause an individual to be barred

from working with adults would also lead to barring with children. For example, the abuse of trust present in persuading elderly people into rewriting their will, would not be sufficient in every case to justify barring the individual from working with children. For this reason two barred lists must continue to exist.

The PVG Scheme, in certain circumstances – such as organisational referrals - already allows for an individual referred for one list to be considered for the other. Where there is a justification and sufficient evidence for a decision, such persons can be included in both barred lists. Disclosure Scotland considers this on a case-by-case basis. Not having this flexibility could result in some individuals losing their livelihoods in circumstances where they could quite safely work with the other group.

### ***Police Scotland referrals***

#### **Proposed changes:**

Police Scotland will be under a duty to give Disclosure Scotland information when they have detected a person unlawfully working with vulnerable groups.

Under the PVG Act, the police can only provide relevant non-conviction information (ORI) about a person who is already a PVG scheme member. There was strong support from stakeholders to do more to close that safeguarding gap by further widening the powers available to Police Scotland so that they can provide non-conviction information about people who were not, but should have been, PVG scheme members.

We propose to take this further in that in future Police Scotland will not only be able to make referrals in respect of ORI about PVG Scheme Members but will also be under a duty to make referrals to Disclosure Scotland about individuals they discover are unlawfully working or volunteering in a regulated role whilst not a PVG Scheme Member. In this scenario, the police could make a report to the Procurator Fiscal for the offence of failing to join the PVG Scheme and at the same time could also provide information to Disclosure Scotland about the individual working without being a scheme member which could be capable of triggering that person being considered for listing.

### ***Local authorities/Integration Joint Board referrals***

#### **Proposed changes:**

Local authorities will be given powers to make referrals to Disclosure Scotland within the context of their normal safeguarding role.

There was strong support in the consultation for providing new pathways to refer people to Disclosure Scotland for consideration for listing, reflecting changes in the care environment where self-directed support and personalisation of services is more common than it was in 2007. The PVG Act does not provide for private citizens who employ personal assistants to refer their employees to Disclosure Scotland

because coherent investigations of allegations must occur before a process as serious as consideration for listing can begin.

Local authorities and Integration Joint Boards have told us that having a power to refer someone who has been doing a regulated role to Disclosure Scotland for the purpose of having them considered for listing would close safeguarding loopholes. This is especially so with self-directed support and personal employment where there is often no statutory regulatory body involved. You can find further information on PVG and self-directed care in section 2.9.4.

We propose that local authorities and Integration Joint Boards should have a power to make referrals about PVG scheme members to Disclosure Scotland within the context of their normal safeguarding functions. For example, if an adult protection investigation found that a self-employed personal assistant had carried out emotional abuse of elderly clients and they had identified no referral had been made or could not have been made, they could refer their concerns to Disclosure Scotland. The power would be restricted to those individuals who are in the PVG Scheme (or unlawfully working with vulnerable groups whilst not in the PVG Scheme) to limit the extent to which the PVG Scheme interferes with the privacy of citizens.

### ***Standard conditions***

#### **Proposed changes:**

Disclosure Scotland should have new powers to impose certain conditions on scheme members who are being considered for listing.

There was strong support for this proposal, with organisations stating it would support them to manage risk in such situations.

These conditions need to balance safeguarding with fairness and proportionality. They are a significant extension of the power of the state in relation to persons being considered for listing, but the necessity for them arises because of the abolition of referrals of convicted persons from courts, as well as from the experience of Disclosure Scotland in having operated the barring system, encountering cases where the ability to impose such conditions would have benefitted public protection. In cases where a person being considered for barring is also a member of a regulated workforce, for example a teacher or doctor, the regulatory body may have already imposed conditions that manage risk whilst they carry out their investigatory functions. This is not available for the many PVG scheme members who do not belong to a regulated profession or indeed where the risk arises away from the professional area that the regulatory body can control.

It is recognised that conditions should only be imposed in the most serious of cases and care must be taken to ensure transparency, proportionally and fair use of such powers.

Disclosure Scotland is committed to further collaboration with stakeholders to develop parameters for imposing conditions, what conditions would comprise, the

duration of conditions, and how they would be effectively enforced, monitored and supervised.

#### **2.9.4 Personal employment (including self-directed care)**

A significant number of respondents thought that parents and personal employers should have access to conviction information and ORI when selecting, for instance, nannies, music teachers or carers for protected adults. Although we acknowledge respondents' comments calling for personal assistant employers to have direct access to disclosure information in order to make better informed recruitment decisions, we believe there remained significant risks with this approach and more disadvantages than benefits when taking into account wider fairness considerations.

Proposals put forward by respondents to allow supported persons to receive disclosure records containing details of convictions and ORI would mean they are brought into the realms of becoming an 'accredited body'. In simple terms this means a supported person would need to pay fees to become (and remain) an accredited body and would then be subject to vetting, regulations, a Code of Practice and the offence implications in relation to the improper handling of sensitive information. It is also very important to recognise that the disclosure of vetting information interferes with Article 8 of the European Convention on Human Rights (right to a private life) as spent convictions or police ORI will form part of a person's private life. Any interference with Article 8 needs to be lawful and proportionate, so it is vital to have proper safeguards in place to protect access to sensitive information about individuals.

Disclosure Scotland is committed to finding a proportionate solution to create special arrangements for people wishing to employ a self-employed PVG scheme member. We propose to enable under future arrangements for umbrella bodies to register as accredited bodies, as discussed above at section 2.3.5, specifically for the purpose of assisting people who are considering the suitability of personal employees. Such umbrella bodies will not be able to disclose vetting information but they will be able to provide advice based on this information to the personal employer.

We believe this arrangement would complement the new referral powers given to Police Scotland and local authorities/Integration Joint Boards, potentially enabling personal employers to take recruitment advice from umbrella bodies and report concerns/make referrals through Police Scotland or their local authority.

## **Chapter 3 – Next steps**

### **3.1 Programme for Government 2018-19**

The Scottish Government's Programme for Government 2018-19 announced our intention to bring forward the Disclosure (Scotland) Bill, which was introduced to Parliament on 12 June 2019. The Bill will make amendments to the Protection of Vulnerable Groups (Scotland) Act 2007 and Part 5 of the Police Act as it applies in Scotland to support the modernisation of the policy design of the disclosure system. It will continue to balance safeguarding and proportionality, and provide a disclosure regime in Scotland that is more responsive to the needs of stakeholders.

As set out in the Government response, the Bill contains proposals to simplify our current disclosure regime, while maintaining the right balance between strengthened safeguarding and helping people with convictions move on from their past. We will provide a digital way to access disclosures that is more responsive to Scotland's people.

The Programme for Government 2018-19 was published to the Scottish Government website at: <https://www.gov.scot/programme-for-government/>. The Disclosure (Scotland) Bill can be found on the Scottish Parliament website.

### **3.2 Links with other legislation**

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. The current proposals in the Management of Offenders (Scotland) Bill will significantly shorten disclosure periods for almost all sentences. The policy intention set out in that Bill is to reduce the period of disclosure for custodial sentences up to and including 48 months. This will have a positive impact on disclosure users whether they be adults or children as convictions will be spent sooner, meaning that minor convictions are less likely to be disclosed on the basic disclosure. The reforms will also mean that applicants for higher level disclosures will be able to make the application to a sheriff sooner in those cases where the individual has a conviction for an offence included on List B.

The Age of Criminal Responsibility (Scotland) Bill as passed in Parliament on 7 May 2019 proposes to increase that age from eight to 12, meaning that there can be no convictions (in practical terms this refers to offence grounds being found proved by a Children's Hearing) recorded before that. This builds on the change made in the Criminal Justice and Licensing (Scotland) Act 2010 which ended the possibility of children under 12 being prosecuted for offending behaviour. Disclosure of any behaviour from before the age of criminal responsibility would only be possible after the independent review of the police decision to include it, and where the disclosure subject has the opportunity to respond to the police information before it is disclosed to another party, such as an employer.

The policy ideas proposed in the consultation are fully in keeping with the wider Government strategy to improve the disclosure system and the justice system generally for both children and adults. They must be seen in this context. The review

contains proposals that, if enacted, would represent a transformational improvement in the position of young people and adults.

Taken together, these changes show how this Government has embarked on a steady progression of reforms that have sought to engage the public, and key professional concerns, at all stages. We are committed to policies that balance public protection with the right to forget past offences so that everyone in Scotland has the possibility of contributing to the wellbeing and development of our nation.

### **3.3 Stakeholder engagement**

Our consultation paper, the responses to it and this response are only the start of the process of involving those with an interest in our proposals and their continued development. We will make sure that there are opportunities to engage further with users and practitioners as the Bill passes through Parliament. The Scottish Parliament's consideration of the Disclosure Bill will be accompanied by thorough scrutiny including drawing on the expertise of those already involved in the system.

Disclosure Scotland will continue to engage with stakeholders on fees, transitional arrangements, delivery of the changes and digital delivery to ensure it is delivered effectively and efficiently.

As touched on above and detailed in the consultation, Disclosure Scotland has made a commitment to providing more guidance and training. We are continually engaging with stakeholders to develop guidance and training that meets user needs and welcome respondents' views on how this can be achieved.

This commitment to providing improved resources to support stakeholders is one that will continue as we transition to a refreshed disclosure system and beyond.





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