

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019

EXPLANATORY NOTES

PART 2: DISCLOSURE OF CONVICTIONS AND OTHER INFORMATION RELATING TO TIME WHEN PERSON UNDER 12

Changes made by the Act

What this Part of the Act does

Review process

58. [Sections 14 to 20](#) set out the process to be followed where the chief constable of Police Scotland has identified, and wishes to disclose, ORI that relates to a person's behaviour while aged under 12.
59. The initial part of the process is unchanged: when a person (the "applicant") applies for an enhanced disclosure or a scheme record, Disclosure Scotland will ask the chief constable whether Police Scotland holds any information which the chief constable reasonably believes to be relevant to the purpose for which the disclosure or record is required and which the chief constable considers ought to be disclosed. If no relevant information is identified, or if information is identified but the chief constable does not consider that it ought to be disclosed, then the chief constable will advise Disclosure Scotland of this and Disclosure Scotland will proceed to issue the disclosure or record accordingly. If, however, the chief constable identifies ORI and considers that it ought to be disclosed then, if the information relates to a time when the person was aged under 12, the process in sections 14 to 20 will be followed.
60. The chief constable sends the information which the chief constable considers ought to be disclosed to the independent reviewer, along with information about the purpose for which the disclosure is being applied for, an explanation of the chief constable's reasons for considering that the information ought to be disclosed, and any other information that the chief constable thinks is relevant (section 14). The chief constable will also, under section 15, notify the Scottish Ministers that information has been referred to the independent reviewer – so Disclosure Scotland will be aware that a review is taking place.
61. On receipt of the information, the independent reviewer notifies the applicant about the review in accordance with section 16. In particular, the applicant will be given details of the information referred for review and told that they can make representations, within a specified period,¹ to the reviewer about whether the information should be disclosed or not. If the reviewer thinks that the applicant may have further information, the reviewer can also ask the applicant to provide it. The protection against self-disclosure provided by sections 6 and 7 of the Act does not apply in relation to the independent reviewer's

¹ This period (and other periods within which certain things that form part of the review process must happen) may be specified in regulations made under section 23.

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Act 2019 (asp 7) which received Royal Assent on 11 June 2019*

consideration of the case (see section 8(1) and (2)). That is, the applicant has no right not to answer questions asked by the independent reviewer about the pre-12 behaviour that is the subject of the review.

62. The independent reviewer also has power, under section 17, to require other persons to provide the reviewer with information which the reviewer thinks is necessary to carry out the review.
63. The independent reviewer must then proceed to review whether the information identified by the chief constable ought to be disclosed. Section 18(3) requires the independent reviewer to take account of the explanation and any other information originally provided by the chief constable and also of any representations made by the applicant or information received in response to a request under section 17. It is implicit, therefore, that the review cannot take place until the time periods within which such representations can be made, or such information provided, have expired.
64. The issues that the independent reviewer is required to consider in reviewing information (see section 18(1) and (2)) are very similar to the tests that the chief constable is required to apply under section 113B(4) of the 1997 Act (see paragraph 59 above). In this case, the issues are whether the information is relevant in relation to the purpose for which the enhanced disclosure or scheme record is sought and whether the information ought to be included. The independent reviewer may, however, be in possession of information that was not known to the chief constable (for example, as a result of representations made by the applicant).
65. In carrying out a review, the independent reviewer is also required to have regard to any guidance issued by the Scottish Ministers under section 22.
66. The independent reviewer must, in the course of the seven days following the day on which the reviewer reached a decision about whether or not the information ought to be disclosed, notify the chief constable, the applicant and the Scottish Ministers (that is, Disclosure Scotland) of their decision (section 19). Under section 20, the applicant or chief constable can, within 28 days of that notification, appeal against the decision. But the appeal can only be on a point of law (for example, that the independent reviewer applied an incorrect test in making their decision). The appeal is to the sheriff,² who can confirm the independent reviewer's decision or substitute their own decision. No further appeals are possible once that route is exhausted. In addition, the procedure in the 1997 Act for the raising of disputes about the accuracy of information contained in an enhanced disclosure and the procedure in the 2007 Act for the correction of inaccurate scheme records do not apply in relation to information that has been subject to review by the independent reviewer (section 25).
67. Applications for enhanced disclosures and scheme records are made for specific purposes. For example, a person may require an enhanced disclosure for the purposes of a particular job application. If they then made a further application for a different job that also required an enhanced disclosure, they would require to obtain a new disclosure for the specific purpose of the second application. Each application for an enhanced disclosure would, if ORI about pre-12 behaviour existed that was potentially relevant to both jobs, require to be referred to the independent reviewer. Section 20(5) makes clear that, if an appeal is made in relation to the review in the first case, section 20(4) (which provides for the appeal decision to be final) does not prevent an appeal being made in relation to the separate, second case, even though the cases may relate to the same information.
68. The protection against self-disclosure provided by sections 6 and 7 of the Act also does not apply in relation to appeal proceedings under section 20 (see section 8(1) and (2)). That is, the applicant could be asked, and if asked would be required to answer,

² By virtue of the change made to the Courts Reform (Scotland) Act 2014 by section 81 of the Act, summary sheriffs can also deal with such appeals (with their determination also being final).

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questions about the pre-12 behaviour to which the appeal relates during the appeal proceedings.

69. Although Disclosure Scotland is notified of the independent reviewer's decision, the chief constable still has to formally comply with the duty to provide information in response to the original request made by Disclosure Scotland. The changes made to the 1997 Act and the 2007 Act by section 10 prohibit the chief constable from providing information until such time as the independent reviewer has determined that the information may be disclosed (and the period for appealing has expired or the sheriff has confirmed the decision on appeal) or the sheriff has decided on an appeal that the information may be disclosed.