These notes relate to the Age of Criminal Responsibility (Scotland) Act 2019 (asp 7) which received Royal Assent on 11 June 2019

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019

EXPLANATORY NOTES

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

Pre-existing law

23. The Rehabilitation of Offenders Act 1974 (the "1974 Act"), broadly speaking, provides for certain convictions to become "spent" after a specified rehabilitation period. A principal effect of a conviction being spent is that the convicted person no longer has to disclose information about the conviction (for example, if asked about previous convictions in connection with a job application or in judicial proceedings). Certain convictions never become spent and so require to be disclosed throughout a person's life.[1] The period after which other convictions become spent varies according to circumstances.[2] Similar provision is made in relation to certain alternatives to prosecution (which are not convictions).[3] Section 7 of the 1974 Act and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013[4] also set out various circumstances in which the general protection against disclosure provided by the 1974 Act does not apply.

24. As already noted, children aged under eight cannot be convicted of an offence and so the 1974 Act has no application in relation to this age group. Prior to implementation of this Act, children aged eight to 11 could acquire convictions for the purposes of the 1974 Act, as the offence ground being accepted or established in or for the purposes of children's hearings proceedings counted as a conviction for these purposes.[5] Prior to the prosecution of children aged eight to 11 being prohibited by section 41A of the 1995 Act, children in this age group could also be convicted by the courts. Under the 1974 Act (prior to its amendment by this Act), both of these categories of conviction require to be disclosed at least until they become spent.

25. The 1974 Act largely deals with "self-disclosure" (that is, situations in which the convicted person is or is not themselves required to disclose information about spent convictions). The Police Act 1997 (the "1997 Act") and the Protection of Vulnerable Groups (Scotland) Act 2007 (the "2007 Act") established systems of "state disclosure", whereby certain information about a person is made available to other persons by the state (in Scotland, in the form of Disclosure Scotland – see paragraph 36). Information that will be disclosed by Disclosure Scotland is, generally speaking, not protected under the 1974 Act – that is, a person is not protected against failure to self-disclose information that will be disclosed by Disclosure Scotland under the 1997 Act or the 2007 Act.

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1 For example, a conviction in respect of which a sentence of imprisonment for life was imposed.
2 See section 5 of the 1974 Act.
3 See section 8 of the 1974 Act.
4 SSI 2013/50.
5 See section 3 of the 1974 Act. See also footnote 13 – determinations finding that the offence ground applied in relation to children aged eight to 11 ceased to be made on 29 November 2019.

26. The 1997 Act established a system for the state disclosure of information about a person's criminal record. The system is used, for example, to assist consideration of a person's suitability to undertake certain kinds of employment or voluntary work.[6] There are three levels of disclosure under the 1997 Act.

27. A basic disclosure under section 112 of the 1997 Act gives "prescribed details" of any unspent convictions held in "central records", or states that there are no such convictions. "Conviction" is defined in section 112(3) to mean a conviction within the meaning of the 1974 Act, other than a spent conviction. As already noted, the offence ground being accepted or established in or for the purposes of children's hearings proceedings counts as a conviction for this purpose.

28. A standard disclosure under section 113A of the 1997 Act:

- gives "prescribed details" of any "relevant matter" held in "central records" (or states that there are no such matters), and
- states whether the person to whom the disclosure relates is subject to notification requirements under Part 2 of the Sexual Offences Act 2003.

29. An enhanced disclosure under section 113B of the 1997 Act:

- gives "prescribed details" of any "relevant matter" held in "central records" (or states that there are no such matters),
- gives information which the chief officer of any relevant police force[7] reasonably believes is relevant to the purpose for which the disclosure is sought and which the chief officer considers ought to be disclosed (or states that there is no such information), and
- states whether the person to whom the disclosure relates is subject to notification requirements under Part 2 of the Sexual Offences Act 2003.

30. A "relevant matter" is defined for the purposes of sections 113A and 113B of the 1997 Act as a "conviction" which is not a "protected conviction", a caution which is not spent by virtue of schedule 3 of the Rehabilitation of Offenders Act 1974 and a prescribed court order.[8] The convictions covered by this definition include certain spent convictions as well as unspent convictions.[9] Again, the offence ground being accepted or established in or for the purposes of children's hearings proceedings counts as a conviction for these purposes.[10]

31. The 2007 Act provides for additional checks on people doing regulated work with children or protected adults.[11] A person wishing to undertake such work is able to become a scheme member under the 2007 Act. Persons barred from certain types of regulated work under Part 1 of the 2007 Act are not permitted to become scheme members in relation to that type of work. When a person first joins the scheme, and periodically thereafter, a search for vetting information in relation to the person is undertaken. Vetting information is defined in section 49 of the 2007 Act as follows:

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6 Other contexts in which information about a person's criminal record may be required include adoption applications and applications for certain types of licence.

7 "Relevant police force" is defined in the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168). The definition includes, as well as the Police Service of Scotland, certain other police forces. So, for example, if a person is seeking an enhanced disclosure in Scotland having just moved from England, the information in the disclosure could include information provided by the chief constable of the English police force for the area where the person previously lived.

8 See section 113A(6) of the 1997 Act for definitions of "relevant matter" and "conviction". This section also defines "central records" (but see also the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168)). Those regulations also set out what is meant by "prescribed details". The meaning of "protected conviction" is set out in section 126ZA of the 1997 Act.

9 See section 126ZA of the 1997 Act.

10 Again, by virtue of section 3 of the Rehabilitation of Offenders Act 1974.

11 See Part 6 of the 2007 Act for definitions of terms such as "protected adult" and "regulated work".

- the information referred to in section 113A(3)(a) of the 1997 Act (which is the information mentioned in the first bullet-point of paragraph 28 above – that is, "prescribed details" of any "relevant matter" held in "central records" (or a statement that there is no such information)),
- information as to whether the scheme member is subject to notification requirements under Part 2 of the Sexual Offences Act 2003,
- information which the chief officer of a relevant police force[12] reasonably believes to be relevant in relation to the type of work in relation to which the scheme member participates in the scheme and which the chief officer considers ought to be included in the member's scheme record,
- any other information prescribed by the Scottish Ministers.[13]

32. There are three types of disclosure under the 2007 Act:

- a statement of scheme membership (section 54 of the 2007 Act): this is a document stating that a person is a scheme member,
- a short scheme record (section 53 of the 2007 Act): this is a document stating that a person is a scheme member and that the person's scheme record does not include any vetting information,
- a scheme record (section 52 of the 2007 Act): this is a document stating that a person is a scheme member and giving, in accordance with the provisions of the 2007 Act, details of the vetting information included in the person's scheme record.

33. The information described in the second bullet-point of paragraph 29 and the third bullet-point of paragraph 31 is referred to as "other relevant information" ("ORI").

34. Due to the fact that children aged under eight already cannot be convicted of an offence, no conviction information in relation to pre-eight behaviour exists to be disclosed in later life under the 1997 Act or the 2007 Act.

35. As children aged eight to 11 could acquire convictions (by virtue of the offence ground being accepted or established for children's hearings purposes) up to 28 November 2019, and could also be convicted by the courts in the past, information about things done while aged eight to 11 can fall to be disclosed as convictions under the 1997 Act and the 2007 Act.[14] Information about things done by children in this age group may also be disclosed as ORI.

36. The disclosure schemes under the 1997 Act and 2007 Act are both operated in Scotland by Disclosure Scotland.[15] Individuals apply to Disclosure Scotland for the type of disclosure they require. Disclosure Scotland then gathers information from police records of convictions prior to the disclosure information being provided in accordance with the 1997 Act or the 2007 Act. When the application is for an enhanced disclosure or a scheme record, Disclosure Scotland ask the chief officer of any relevant police force to provide information about the applicant for inclusion on the disclosure as ORI (as described in paragraphs 29, 31 and 33 above).

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12 By virtue of section 97(5) of the 2007 Act, "relevant police force" has the same meaning in that Act as it has in the 1997 Act – see footnote 22. But see also The Protection of Vulnerable Groups (Scotland) Act 2007 (Consequential Provisions) Order 2010 (SI 2010/2660) (an order made under section 104 of the Scotland Act 1998), which requires chief constables of relevant police forces outside Scotland to comply with requests for vetting information.

13 See The Protection of Vulnerable Groups (Scotland) Act 2007 (Vetting Information) Regulations 2010 (SSI 2010/189).

14 And, as mentioned in paragraph 25, once disclosed in this way, the protections against self-disclosure provided by the 1974 Act cease to apply.

15 Which is an executive agency of the Scottish Government.

Changes made by the Act

Impact on pre-existing law of change in age of criminal responsibility

37. Once Part 1 of the Act comes into force, it will no longer be possible for a person to acquire a criminal conviction on the basis of behaviour that occurred when they were aged under 12. In the future, therefore, there will not be any conviction information relating to this period in a person's life to disclose in later life. But nothing in Part 1 of the Act impacts on the ability of the police to hold information, relating to a time when a person was aged eight to 11, which might, in the absence of any provision to the contrary, be able to be disclosed as ORI.

38. Convictions acquired prior to the change in the age of criminal responsibility in respect of behaviour that occurred when a person was aged eight to 11 are not affected by Part 1 of the Act – that is, such convictions will still exist after the Act comes into force. Some of those convictions will by now be spent, but others may not be. So, depending on the circumstances, information about such convictions might, in the absence of any provision to the contrary, sometimes fall to be disclosed. And, again, nothing in the Act affects the ability of the police to continue to hold information, acquired prior to the change in the age of criminal responsibility and relating to a time when a person was aged eight to 11, which might, in the absence of any provision to the contrary, be able to be disclosed as ORI.

What this Part of the Act does

Amendment and replacement of the 1974 Act in relation to pre-12 behaviour

39. Section 4 of the Act makes various amendments to the 1974 Act. In particular, it provides that "conviction", when used in the 1974 Act, no longer applies to convictions for offences committed when the convicted person was aged under 12. It also provides that the offence ground having been accepted or established in or for the purposes of children's hearing proceedings, in relation to behaviour which occurred when a person was aged under 12, no longer counts as a conviction for the purposes of that Act.

40. The effect of the amendments made by section 4 is that the 1974 Act no longer applies in relation to behaviour that occurred, prior to the change in the age of criminal responsibility, when a person was aged eight to 11. In addition, the 1974 Act will not apply to behaviour which occurs, after section 1 of the Act comes into force, when a person is aged eight to 11 (as there will be no conviction to become spent in such cases in future). Following the change in the age of criminal responsibility, therefore, the 1974 Act will not apply at all to pre-12 behaviour.

41. One of the effects of this is that the protection against self-disclosure of certain information provided by the 1974 Act falls away in relation to all previously covered pre-12 behaviour. This would mean that if, when applying for a job, a person did not disclose information about a conviction for an offence that they committed when under 12, and prior to section 1 of the Act coming into force, the employer might be able to dismiss them on this ground if the information subsequently came to light.

42. Sections 5 to 9 of the Act therefore make new provision about self-disclosure of information in relation to pre-12 behaviour. Sections 6 and 7, broadly speaking, provide protection against having to self-disclose certain information in certain circumstances.[16]

43. The information that is protected is information in relation to "relevant behaviour" and "circumstances ancillary to relevant behaviour". Section 5 defines these terms. Subsection (1)(a) defines "relevant behaviour" in relation to situations arising prior to the change in the age of criminal responsibility (that is, a person being convicted of, or being given an alternative to prosecution in respect of, an offence which was

16 The provision made in sections 6 and 7 is broadly equivalent to the provision made in section 4(1) to (3) of the 1974 Act.

committed when the person was aged under 12). Subsection (3) provides that the acceptance or establishment of the offence ground in or for the purposes of children's hearings proceedings counts as a conviction for this purpose. Subsection (1)(b) defines "relevant behaviour" in relation to situations, arising after the change in the age of criminal responsibility, where suspected harmful behaviour by the child leads to various provisions in Part 4 of the Act being used. Subsection (2) provides some examples of "circumstances ancillary to relevant behaviour". The purpose of defining "circumstances ancillary to relevant behaviour" is to extend the protection against self-disclosure to questions that don't directly ask, for example, whether a person has a conviction, but relate to the wider circumstances of an offence and the answers to which would indirectly reveal the existence of the conviction.

44. Subsection (4) allows the Scottish Ministers to make regulations modifying the definitions of "relevant behaviour" and "circumstances ancillary to relevant behaviour" in subsection (1). For example, if a new power was created in relation to harmful behaviour by children aged under 12 in future, this power could be used to protect a child from having to subsequently disclose the fact that that power had been was used in relation to them. Regulations modifying subsection (1) are subject to the affirmative procedure (see section 82(3)(a)).

45. Section 6 makes provision in relation to the disclosure of information about relevant behaviour and circumstances ancillary to relevant behaviour in judicial proceedings (which is defined in subsection (3)). By virtue of subsection (1), evidence proving such behaviour or circumstances is inadmissible in judicial proceedings. Under subsection (2), a person cannot be asked any question in judicial proceedings which they would be unable to answer without revealing relevant behaviour or circumstances ancillary to such behaviour. If the person is asked such a question, they are not obliged to answer.

46. Section 7 provides protections in relation to non-judicial proceedings (including, for example, job applications). So, if a person who, prior to the change in the age of criminal responsibility, was convicted of an offence committed while they were under 12 is asked in a job application or interview if they have any convictions, they are not obliged to mention that conviction (subsection (1)(a)). And a person cannot be dismissed from a job by reason of such a conviction or for failing to disclose such a conviction (subsection (3)). Subsection (2) provides that legal requirements to disclose information do not extend to information about relevant behaviour or circumstances ancillary to such behaviour from legal requirements to disclose information (the effect being that such information need not be disclosed).

47. Section 8 sets out certain exceptions to the protections provided by sections 6 and 7 in connection with disclosure under the 1997 and 2007 Acts, including the review process established by sections 14 to 20 of this Act. In the specified circumstances, a person is not protected from having to, for example, answer questions about relevant behaviour and circumstances ancillary to such behaviour. See paragraphs 61, 68 and 70 for more detail on these exceptions.

48. Further, more general, exceptions to the protections provided by sections 6 and 7 are set out in section 9.

49. Subsection (1) of section 9 provides that section 6 does not apply in the types of judicial proceedings listed in subsection (2). These include, for example, criminal proceedings. Evidence relating to relevant behaviour and circumstances ancillary to such behaviour can therefore be admitted in such proceedings (and a person can be asked, and required to answer, questions about such behaviour or circumstances in such proceedings). Subsection (3) allows evidence about such behaviour or circumstances to be admitted in judicial proceedings not listed in subsection (2) provided that justice cannot otherwise be done. [17]

17 These exceptions are broadly equivalent to the provision made in section 7(2) and (3) of the 1974 Act.

50. Subsection (4) of section 9 gives the Scottish Ministers power to make regulations adjusting the list of proceedings set out in subsection (2) (paragraph (a)) or otherwise providing that section 6 does not apply in proceedings specified in the regulations to the extent and for the purposes set out in the regulations (paragraph (b)).

51. Regulations under subsection (4) may also include provision setting out exceptions to the protection provided by section 7 (paragraphs (c) and (d)). Again, the effect of any such provision would be to allow questions to be asked, and require answers to be given, in relation to relevant behaviour and circumstances ancillary to such behaviour in non-judicial contexts listed in the regulations.[18]

52. Regulations under section 9(4) are subject to the affirmative procedure (see section 82(3)(b)).

Effect of amendments of 1974 Act on 1997 and 2007 Acts

53. The amendments made to the 1974 Act by section 4 also have effects in relation to state disclosure of information under the 1997 Act and the 2007 Act. This is because, as already noted, the 1997 Act defines "conviction" with reference to the 1974 Act, and that definition also carries through to the 2007 Act. By virtue of the 1974 Act no longer applying in relation to convictions acquired, prior to the change in the age of criminal responsibility, for offences committed when a person was aged under 12, information about such offences will no longer be automatically disclosed as part of a basic disclosure, a standard disclosure or an enhanced disclosure under the 1997 Act. And, by virtue of the change in the age of criminal responsibility, pre-12 behaviour will not in the future result in a conviction, again meaning that such behaviour will not fall to be automatically disclosed in any of these types of disclosure. In addition, information about such convictions or behaviour will no longer be disclosed as vetting information as part of a scheme record under the 2007 Act. The existence of such a conviction or behaviour will also not automatically prevent a short scheme record stating that no vetting information exists.

54. But, as noted in paragraph 33, enhanced disclosures under the 1997 Act and scheme records under the 2007 Act may also include ORI – which may, as this Act does not include any provision to the contrary, include information about pre-12 behaviour. Subsections (2) and (3) of section 10 amend the 1997 Act and the 2007 Act respectively to make clear that ORI can include information about relevant behaviour within the meaning of section 5(1)(a) – that is, pre-12 behaviour which, prior to the implementation of this Act, resulted in a conviction (including the offence ground being accepted or established for children's hearings purposes) or an alternative to prosecution. So, although information about pre-12 convictions will no longer be automatically disclosed under the 1997 and 2007 Acts, such information may be disclosed as ORI.

Prohibition on provision of ORI unless approved by independent reviewer

55. Section 10(1) of the Act changes the operation of section 113B of the 1997 Act (via an amendment of section 119 of that Act) and of section 75 of the 2007 Act in relation to the inclusion of ORI that relates to pre-12 behaviour in an enhanced disclosure or scheme record. These amendments apply in relation to both information about things done by children aged under 12 already held by the police when the age of criminal responsibility changes and information about things done by children in this age group acquired after that change. The effect of these amendments is that, following the change in the age of criminal responsibility, ORI which relates to behaviour while a person was

18 The power conferred by section 9(4) is broadly equivalent to the powers conferred by sections 4(4) and 7(4) of the 1974 – these are the sections under which the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 is made.

aged under 12 will only be able to be provided by the police[19] to Disclosure Scotland for inclusion in an enhanced disclosure or a scheme record if the outcome of the review process set out in sections 14 to 20 of the Act is that the information ought to be included in the disclosure.

The independent reviewer

56. Section 11 of the Act creates the position of independent reviewer. The principal function conferred on the independent reviewer by the Act is reviewing information proposed to be included in enhanced disclosures or scheme records as ORI. Other functions include the preparation of an annual report, which may include recommendations, for example, about changes to how the review system works (see section 21). Section 24 allows the independent reviewer's functions to be modified by regulations (subject to the affirmative procedure – see section 82(3)(c)).

57. The independent reviewer will be appointed by the Scottish Ministers (section 12(1)). The rest of section 12 makes self-explanatory provision about various other matters to do with appointment (including disqualification from appointment and removal from office). The reviewer is likely to require administrative support and section 13 allows this to be provided by the Scottish Ministers, following consultation with the reviewer. If support is not directly provided by the Scottish Ministers, they must ensure that the necessary support is provided.

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 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

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19 The provision being inserted into the 1997 Act by section 10 of the Act refers only to the chief constable of the Police Service of Scotland. In the 2007 Act, "chief constable" is defined to mean the chief constable of the Police Service of Scotland, so the reference in the provision inserted into that Act by section 10 of the Act also refers only to the chief constable of the Police Service of Scotland. Section 26 of the Act defines "chief constable" in the same way – so the review process set out in the Act only applies in relation to information held by the Police Service of Scotland.

specified period,[20] 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 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,[21] 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

20 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.

21 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).

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, 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.

Effect of decision to include information about pre-12 behaviour as ORI on self-disclosure rules

70. Once information about pre-12 behaviour is included (as ORI) in an enhanced disclosure or a scheme record, the protection against self-disclosure of such information falls away (see section 8(3) and (4)). So, for example, a potential employer to whom such an enhanced disclosure or scheme record is provided is then entitled to ask questions in relation to the pre-12 behaviour disclosed, and the applicant has no right not to answer those questions. Section 8(6) and (7) provide additional clarification that the protection against self-disclosure remains in place until the enhanced disclosure or scheme record is actually issued – if the person fails to disclose the pre-12 behaviour to a potential employer at an earlier stage, the person cannot be excluded from a job solely by reason of that failure to disclose (but they could potentially be excluded from the job by reason of the pre-12 behaviour, or by reason of failing to answer questions about that behaviour after the issue of the enhanced disclosure or scheme record).