

# **DISCLOSURE (SCOTLAND) ACT 2020**

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## **EXPLANATORY NOTES**

### **PROVISION BY PROVISION COMMENTARY**

#### **Part 1: Disclosure of criminal history and other information**

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

##### *Section 1: Level 1 disclosure*

7. Section 1 defines the content of a Level 1 disclosure, replacing the basic disclosure offered under the 1997 Act. This includes information about unspent convictions (including unspent childhood convictions) from the Criminal History System and Police National Computer. It will also confirm whether the applicant is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003.
8. In this Part “conviction” has the same meaning as in the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) (see section 69 of the Act), but does not include a children’s hearing outcome (see paragraph 24). “Childhood conviction” of a person means a conviction for an offence committed when the person was under the age of 18 (see section 69).
9. An unspent conviction is one which is not spent under the 1974 Act (see section 69 of the Act). By virtue of amendments made to the 1974 Act by paragraph 2 of schedule 5 of the Act, the majority of childhood convictions will become spent immediately (see paragraphs 248 and 249 of these notes for a fuller explanation of the relevant amendments).
10. By virtue of the Age of Criminal Responsibility (Scotland) Act 2019 (“ACR Act”)<sup>1</sup>, a conviction of a person for an offence committed while the person was under the age of 12 will no longer be treated as a conviction for the purposes of the 1974 Act and, consequently, for this Act.

##### *Section 2: Provision of Level 1 disclosures*

11. Section 2 sets out the circumstances in which a Level 1 disclosure must be provided. For applicants aged 16 years or over, the Scottish Ministers must provide a Level 1 disclosure to anyone who makes an application. Ministers also have the power to provide a Level 1 disclosure to an applicant 12 years of age or over but under 16 years, if they consider it appropriate to do so. This might be appropriate where, for example, a fifteen year old applied for a job shortly before their sixteenth birthday and their employer requested sight of a Level 1 disclosure as a condition of employment. Subsection (3) allows Ministers to decline to provide a Level 1 disclosure if they conclude the application should have been sent to a different UK disclosure service. Subsection (4) provides that an individual can only apply for a disclosure in relation to themselves.

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<sup>1</sup> The Age of Criminal Responsibility (Scotland) Bill was passed by the Parliament on 7 May 2019 and received Royal Assent on 11 June 2019.

***Section 3: Applications by accredited bodies on behalf of individuals***

12. Section 3 allows accredited bodies (as defined in section 46) to make a Level 1 disclosure application on behalf of an individual, but only with the individual's consent. Ministers must refuse to consider such an application if the individual has not given their consent. Ministers must treat an application from an accredited body as if it had been made by the applicant, and must therefore provide the Level 1 disclosure directly to the individual and not the accredited body. The individual may then consent to their disclosure being made available by Ministers to a third party in terms of section 4 if the Level 1 disclosure was provided electronically. If the Level 1 disclosure was provided to the applicant in paper form then the applicant is free to share it with whomever they wish.
13. Ministers can refuse to provide a Level 1 disclosure to an individual where the application has been made by an accredited body and Ministers consider that the accredited body, or its lead signatory or any countersignatory, has not complied with the code of practice published under section 55.

***Section 4: Provision of Level 1 disclosure to third parties***

14. An applicant who receives a Level 1 disclosure by electronic communications has the choice, within a period to be prescribed<sup>2</sup> by regulations subject to the negative procedure<sup>3</sup>, either to share that disclosure with a third party, or to notify Ministers that they intend to make an application for review under section 5. Ministers must make the disclosure available to a third party on request by the applicant.
15. Subsection (3) allows an individual to change their mind in cases where they have indicated an intention to seek a review. To do so they must make a request before the end of the prescribed period for Ministers to share their Level 1 disclosure with a third party.
16. If the individual takes no action and does not notify Ministers of their decision either to share the disclosure or seek a review, the disclosure lapses at the end of the prescribed period and nothing more may be done with it. However, subsection (5) makes it clear that a failure to act in relation to a Level 1 disclosure does not prevent the individual from applying for another Level 1 disclosure. If the provisions in this section are not followed, Ministers are not otherwise permitted to make the disclosure available to the accredited body or any other person.
17. This section does not apply to Level 1 disclosures provided in paper form.

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<sup>2</sup> 'Prescribed' means prescribed by regulations made by the Scottish Ministers.

<sup>3</sup> 'Negative regulations' means regulations subject to the negative procedure (see section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010) i.e. a type of secondary legislation that is made by the Scottish Ministers and then laid before the Scottish Parliament for a period during which they may be annulled. Information about secondary legislation in the Scottish Parliament can be found here: <https://www.parliament.scot/parliamentarybusiness/26510.aspx>