

DISCLOSURE (SCOTLAND) ACT 2020

EXPLANATORY NOTES

PROVISION BY PROVISION COMMENTARY

Part 1: Disclosure of criminal history and other information

Level 2 disclosures: considering relevance and whether to include information

Section 33: Level 2 disclosure: considering relevance and whether to include certain information

70. Section 33 provides for a list of decision-making factors which may be taken into account when the Scottish Ministers, independent reviewer and the chief constable are applying the two-part test (relevant for the purpose of the disclosure and what ought to be included in the disclosure) in the Act.
71. Subsection (1) provides that where a decision maker is considering whether a conviction, children's hearing outcome or other information is relevant for the purpose of a Level 2 disclosure and whether information about, or details of, the conviction or outcome or the other information ought to be included in the disclosure, the factors set out in subsections (2) and (3) may be taken into account.
72. Subsection (2) provides the set of matters that the decision maker may take into account when considering whether the conviction, children's hearing outcome or other information is relevant for the purpose of the disclosure. Subsection (3) provides the set of matters that the decision maker may take into account when considering whether information about the conviction, children's hearing outcome or other information ought to be included in the disclosure.
73. Subsections (2) and (3) are both framed as matters which may be taken into account. There is no duty to take account of all the matters listed as not every factor will necessarily be pertinent to every decision that is made under the two-part test. Subsections (2) and (3) ensure the decision maker is not required to have to consider or rule out every factor (for instance by using the information gathering powers under section 65 of the Act to obtain information about each and every factor). Subsections (2) and (3) also provide that the matters listed in each subsection are non-exhaustive, so as not to preclude other factors from being taken into account.
74. Subsection (4) explains that references to "other information" within this section means information provided or to be provided in accordance with section 14 (Other relevant information from the chief constable) or section 15 on the provision of other relevant information by an overseas police force. Subsection (5) enables subsections (2) and (3) to be modified by regulations. Regulations under this subsection will be subject to the negative procedure by virtue of the default rule in section 91(4).
75. The same decision making factors are intended to apply in relation to the provision of ORI under the PVG Act and ACR Act and both Acts are to be amended by the Act to that effect (see paragraph 250 of these notes).