

# **DISCLOSURE (SCOTLAND) ACT 2020**

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## **EXPLANATORY NOTES**

### **PROVISION BY PROVISION COMMENTARY**

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

##### **Offences relating to Level 1 and Level 2 disclosures**

###### ***Section 41: Falsification of a Level 1 or Level 2 disclosure***

83. Section 41 replicates the falsification offences in section 123 of the 1997 Act and section 65 of the PVG Act in respect of the new Level 1 and Level 2 disclosure products. It is an offence under subsection (1) for a person, with intent to deceive, to make a false Level 1 or Level 2 disclosure. It is an offence for a person to change or amend a Level 1 or Level 2 disclosure. It is also an offence for a person to use, or allow another person to use, a Level 1 or Level 2 disclosure in a way that suggests it relates to a person other than the individual who is the subject of the disclosure. Where a barred individual falsifies a disclosure record to access a regulated role, that individual would be committing this offence *and* the offence under section 34 of the PVG Act. Subsection (2) makes it an offence for a person to knowingly make a false or misleading statement so that they or another person can obtain a Level 1 or Level 2 disclosure. Subsection (3) sets out the penalties for an offence committed under this section.

###### ***Section 42: Unlawful disclosure of a Level 2 disclosure***

84. This section makes it an offence for a person to whom a Level 2 disclosure is made available or disclosed to unlawfully disclose it to another person. Subsection (2) provides that lawful disclosure occurs in the circumstances permitted under section 43 and will otherwise be unlawful. It is also an offence for a person to whom an unlawful disclosure was made to disclose the Level 2 disclosure to another person. These offences are needed to ensure that sensitive information contained in Level 2 disclosures is not shared unnecessarily. Subsection (4) sets the penalties for an offence committed under this section.

###### ***Section 43: Lawful disclosures of Level 2 disclosures***

85. This section sets out the circumstances in which it is not an offence to disclose a Level 2 disclosure. This section recognises that it may be necessary to share Level 2 disclosures with other employees, members and office-holders within an organisation, or where the disclosure has been requested on somebody else's behalf. This section removes such sharing from the scope of the offence in section 42.
86. Disclosure under this section is only allowed in so far as (a) the disclosure is made in the course of the functions of the person sharing the disclosure, (b) for the same purpose as the purpose for which the Level 2 application was originally made, and (c) where the disclosure application has been made on another person's behalf, further sharing of the information in the disclosure by the accredited body who countersigned the application is permitted by section 56(3) or (4). This is important to ensure that

disclosure information is only shared for legitimate purposes and with appropriate persons.

***Section 44: Unlawful request for and use of a Level 2 disclosure***

87. Section 44(1) makes it an offence for a person to request, or otherwise seek sight of a Level 2 disclosure for a purpose other than a permitted purpose. “Permitted purpose” for this offence is defined as a purpose for which the usual rules under section 4(2) (a) or (b) of the 1974 Act (about not having to self-disclose spent convictions) have been disapplied by virtue of an order made under section 4(4) that Act including, in the case of a Level 2 disclosure for a PVG scheme member, for the purpose of considering the suitability of the person for regulated roles (matching the purpose referred to in section 17(1)(b)). This is to prevent anyone from attempting to see a disclosure record other than to check an individual’s suitability for the various offices or employment for which the normal protections against self-disclosure of spent convictions (see paragraph 29 of these notes) are disapplied. Section 44(3) separately makes it an offence to use a Level 2 disclosure for a purpose other than a permitted purpose. In relation to this offence, the only permitted purpose for use is the same purpose as the purpose for which the disclosure was applied for. Subsection (5) provides the penalties for an offence committed under this section.

***Section 45: Offences under sections 42 and 44: supplementary provision***

88. Section 45 makes exceptions to the offences under sections 42 and 44. Subsection (1) (a) and (b) makes clear that it is not an offence for the subject of the disclosure to share a Level 2 disclosure that relates to them, nor is it an offence where the subject of the disclosure consents to their disclosure information being shared. Subsection (1)(c) to (e) provides further circumstances in which the offence in section 42 is disapplied. Ministers have the power to prescribe further circumstances under subsection (1)(f).
89. Subsection (2)(a) and (b) has a similar effect of disapplying the offence under section 44 where the use of the disclosure is by the subject of the disclosure or by another person with the consent of the subject of the disclosure. Subsection (2)(c) to (e) provides further circumstances in which the offence at section 44 is disapplied. Ministers have the power under subsection (2)(f) to prescribe other circumstances in which it will not be an offence to disclose or use a Level 2 disclosure.