

DISCLOSURE (SCOTLAND) ACT 2020

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”)¹, 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.

¹ 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 prescribed² by regulations subject to the negative procedure³, 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.

Level 1 disclosures: review applications

Section 5: Level 1 disclosure: application for review

18. The applicant can, within a period to be set by regulations subject to the negative procedure, request a review of the accuracy of any information included in the Level 1 disclosure. In the case of Level 1 disclosures provided electronically, the applicant can only seek a review where they have first notified Ministers of their intention to do so. Applications for review are to be known as a "Level 1 review applications".

Section 6: Review of accuracy of information by the Scottish Ministers

19. This section makes similar provision to the corrections process provided for under section 117 of the 1997 Act. Where a Level 1 review application seeks a review of

² 'Prescribed' means prescribed by regulations made by the Scottish Ministers.

³ '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>

the accuracy of any information in the disclosure, Ministers must carry out the review and must decide whether the information in question is accurate. They must notify the applicant of their decision.

20. There is no provision for a further review by the independent reviewer on the grounds of inaccuracy. This is because an accuracy review under section 6 is administrative in nature to enable the correction of the content of the disclosure, for example an error in the applicant's name, date of birth, address, or if the applicant has provided evidence to rebut the age presumption (see section 40).

Section 7: Provision of new Level 1 disclosure on conclusion of review proceedings

21. Once Ministers have made their decision under section 6(3), they must provide a new Level 1 disclosure to the applicant. The applicant is treated as having made a new application for a Level 1 disclosure on the date on which Ministers made the decision under section 6(3). If Ministers have determined that information within the Level 1 disclosure is inaccurate they are required under subsection (3) to give effect to that decision by correcting any inaccurate information and ensuring the new Level 1 disclosure contains corrected information.

Level 2 disclosures

Section 8: Level 2 disclosure

22. Section 8 defines the content of a Level 2 disclosure, which replaces standard and enhanced disclosures under the 1997 Act and scheme records under the PVG Act (collectively known as 'higher level disclosures').
23. Subsection (1)(a) provides that a Level 2 disclosure in relation to an individual will include details of criminal disposals incurred by the individual. "Criminal disposal, when read with subsection (3), includes (i) spent and unspent adult convictions, (ii) unspent childhood convictions, and (iii) unspent adult cautions, but does not include non-disclosable convictions. This means that unspent childhood convictions will be disclosed subject to the rules set out in section 9. This differs from information about spent childhood convictions which will follow the process set out in section 13.
24. Subsections (1)(b) to (e) provide that Level 2 disclosures may include information about spent childhood convictions and children's hearing outcomes, information provided by the chief constable, information provided by the chief officers of relevant overseas police forces, and confirmation of whether the applicant is subject to the notification requirements under the Sexual Offences Act 2003. It is also to include additional information where sections 16 or 17 apply. In this Part "children's hearing outcome" means anything treated as a conviction for the purposes of the 1974 Act by virtue of section 3 of that Act (see section 69). Section 3 of the 1974 Act covers referrals to a children's hearing under the Children (Scotland) Act 1995 or the Children's Hearings (Scotland) Act 2011 on grounds of the commission of an offence by a child where that ground of referral has been accepted, established or deemed to be established.
25. Information that was previously removed from a Level 2 disclosure under section 31(4) following a successful review application, must not be included in a Level 2 disclosure if it appears to Ministers that the subsequent Level 2 disclosure has been requested for the same purpose as the previous Level 2 disclosure. For example, if a childhood conviction is excluded from a PVG Level 2 disclosure following a review process in relation to an individual participating in the Scheme to carry out regulated roles with children, that conviction will never appear in the individual's subsequent Level 2 disclosures relating to them doing regulated roles with children. However, if the individual later joins the Scheme to carry out regulated roles with adults, the purpose of the disclosure is not the same as the previous Level 2 disclosure. The process in section 13, and if applicable sections 22 and 30, would therefore apply again. More information about the "purpose" of the disclosure can be found at paragraph 29 of these notes.

Section 9: Non-disclosable convictions

26. Section 9 defines the term “non-disclosable conviction”. A non-disclosable conviction will not be included in a Level 2 disclosure. To be non-disclosable, a conviction must be spent. It must also either (i) be for an offence that does not appear on either List A or List B (schedules 1 and 2 of the Act), or (ii) be for an offence that appears on List B and meet one of three conditions. The conditions are that: (a) the disposal was an admonition or absolute discharge; (b) the conviction was a childhood conviction and at least 5 years and 6 months have passed since the date of conviction; (c) the conviction was not a childhood conviction and at least 11 years have passed from the date of conviction. Ministers can modify the offence lists in schedules 1 and 2 by regulations. Section 91(2) specifies that these are to be made by regulations subject to the affirmative procedure.⁴

Section 10: Non-disclosable children’s hearing outcomes

27. Section 10 replicates section 9 on non-disclosable convictions, so that it is clear when a children’s hearing outcome may be included in a Level 2 disclosure, even although it is spent. All children’s hearing outcomes are spent immediately however the rules which apply to make children’s hearing outcomes non-disclosable are otherwise the same as for convictions, with reference to the offence lists in schedules 1 and 2 of the Act. Subsection (2) provides the conditions for when a children’s hearing outcome is relevant to this Part. Only when there is acceptance, establishment or deemed establishment of the grounds of an offence referral to a children’s hearing is it within scope for disclosure.

Section 11: Provision of Level 2 disclosures

28. 28. Section 11 sets out the circumstances in which a Level 2 disclosure is provided to the applicant. Ministers must provide a Level 2 disclosure where the applicant is aged 16 years or over and makes an application which is countersigned by an accredited body and is for a permitted purpose (countersigning and permitted purpose are both further explained in section 12). Ministers also have discretion to provide a Level 2 disclosure to an applicant 12 years of age or over but under 16 years if they consider it appropriate to do so. There may be some exceptional cases where this is justified such as, for example, where a foster family had a 15 year old child in the household. The application must still comply with section 12 and the child will not be able to become a member of the PVG Scheme. Ministers can refuse to provide a Level 2 disclosure if they conclude that the person who countersigned the application or certain other persons connected with the application (listed in subsection (4)) have not complied with the code of practice issued by Ministers under section 55. Subsection (5) provides that an individual can only apply for a disclosure in relation to themselves.

Section 12: Level 2 disclosure applications: countersigning and purposes

29. Section 12 requires a Level 2 disclosure application to be countersigned by an accredited body, and to include a statement from that body about the purpose for which the disclosure is needed. The purpose must be one in relation to which the usual rules in sections 4(2)(a) or (b) of the 1974 Act⁵, about not having to self-disclose spent convictions when asked about criminal history, have been excluded by an order made by the Scottish Ministers.⁶

⁴ ‘Affirmative regulations’ means a type of secondary legislation that must be approved by the Scottish Parliament before it is made. Information about secondary legislation in the Scottish Parliament can be found here: <https://www.parliament.scot/parliamentarybusiness/26510.aspx>

⁵ The central policy behind the 1974 Act is that people should be able to move on from their previous offending behaviour after sufficient time has elapsed and where their behaviour was not of a severity that it must be disclosed forever. It is recognised, however, that the protection provided by the 1974 Act could not and should not apply in all circumstances. To deal with this, the Scottish Ministers have a power to make certain exclusions and exceptions to that general protection.

⁶ The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 made under section 4(4) of the 1974 Act sets out the circumstances in which an individual cannot deny the existence of a spent conviction. Article 3 of the order excludes the application of section 4(1) in relation to proceedings specified in schedule 1 of the Order and in respect of any proceedings relating to a decision mentioned in Part 1 of schedule 2. Article 4 excludes the application of section 4(2) in

30. By way of example, if an application for a Level 2 disclosure stated that it was for the purpose of a question asked in order to assess the suitability of the applicant to act as a child minder then this would be a valid purpose as it is one for which the application of section 4(2)(a) and (b) of the 1974 Act is excluded. It is then in relation to that purpose that, for instance, the relevance of any “other relevant information” (see sections 14 and 15) would be assessed for inclusion in a Level 2 disclosure.
31. This ensures that Level 2 disclosures (which can include details of spent convictions) may only be requested in circumstances where a person would be required to self-disclose information about certain spent convictions. References to the purpose of a Level 2 disclosure are to be understood in this way throughout Part 1 of the Act.

Section 13: Childhood information

32. Before providing a Level 2 disclosure to an applicant, Ministers must find out if the applicant has any spent childhood convictions and children’s hearing outcomes that are not non-disclosable convictions or non-disclosable outcomes. “Non-disclosable” is defined in sections 9 and 10 of the Act, both of which serve to act as a filter before the decision making process in this section is applied. If there are any such spent childhood convictions or children’s hearing outcomes, Ministers must decide if they are relevant to the purpose of the Level 2 disclosure, and if information about the conviction or outcome ought to be included in the disclosure. The effect of this section is that unspent childhood convictions are exempt from the decision-making process, the result of which will be disclosed following the rules set out in section 8 of the Act.
33. Ministers may request information under section 65 from the persons listed in subsection (3) of that section. If Ministers decide to include information about a spent childhood conviction or children’s hearing outcome in the disclosure, they must include such information as they consider appropriate and in such form as they consider appropriate. They are also required to notify the applicant of the reasons for their decision and advise the applicant of their right to make an application for review of the inclusion of that information by the independent reviewer. This marks a change from higher level disclosures issued under the 1997 Act and PVG Act, where there is no separate category of childhood information distinct from other convictions, and therefore no prior consideration of whether it is appropriate to include them in a disclosure.

Section 14: Provision of relevant Scottish police information

34. Before providing a Level 2 disclosure to an applicant, Ministers must ask the chief constable (defined in section 69 as the chief constable of the Police Service of Scotland) if they have any information which the chief constable reasonably believes to be relevant for the purpose of the disclosure, and which in the chief constable’s opinion ought to be disclosed. Such information is commonly referred to as “other relevant information” or “ORI”. The chief constable is required to comply promptly with a request from Ministers under this section, but need not provide information which the chief constable thinks would be contrary to the interests of the prevention or detection of crime. Subsection (4) provides that ORI from the chief constable can include information with respect to “relevant behaviour” within the meaning of section 5(1)(a) of the ACR Act. Under subsection (5) the chief constable may only provide information relating to a time when the applicant was under the age of 12 where the ACR Act procedures have been followed and it is determined by the independent reviewer, or on an appeal to a sheriff, that the information ought to be included in a Level 2 disclosure.

relation to the questions listed in schedule 3. These are questions asked to assess the suitability of an individual for a variety of occupations, positions, licences and registrations. In this respect, the reference to a “question” is to be read in the context of section 4(2)(a) and (b) of the 1974 Act and means a question about a person’s previous convictions, offences, conduct or information. Finally, article 5 excepts from section 4(3) a number of professions, offices, employments, occupations and decisions listed in schedule 4 and Part 1 of schedule 2.

It is expected that similar provision in relation to the other relevant police forces in the UK will be made by order under section 104 of the Scotland Act 1998.

Section 15: Provision of relevant overseas police information

35. Before providing a Level 2 disclosure to an applicant, Ministers must ask the chief officer of every relevant overseas police force to provide information that the chief officer reasonably believes is relevant for the purpose of the disclosure and that in the chief officer's opinion ought to be included in the disclosure. Subsection (6) provides the definition of "chief officer" for the purpose of this section and that "overseas police force" includes (a) the States of Jersey Police Force, (b) the salaried police force of the Island of Guernsey, (c) the Isle of Man Constabulary and (d) other equivalent police forces outside the UK, the Channel Islands and the Isle of Man. This subsection also provides the Scottish Ministers with the power to prescribe "relevant" overseas police forces, which is the detailed criteria that makes an overseas police force relevant for the purpose of the Scottish Ministers requesting information that meets the two-part test.
36. Under subsection (2), where such information is provided, the Scottish Ministers must arrange for a review to be carried out by the independent reviewer. The review process for relevant overseas police information differs from the process for relevant information provided by the chief constable of the Police Service of Scotland because the Scottish Parliament cannot impose statutory obligations on overseas police forces in the way it can for the chief constable and the independent reviewer. The independent reviewer must decide if the information is relevant for the purpose of the disclosure and whether the information ought to be included in the disclosure. Subsection (4) provides that it is only if the outcome of the review process (including any appeal against the independent reviewer's decision) is that the two-part test is met that the information can be included in a Level 2 disclosure. The Scottish Ministers may make further provision by regulations under subsection (5) about the procedural aspects of the independent reviewer carrying out a review of relevant overseas information.

Section 16: Further information for certain purposes: non-PVG scheme members

37. Section 16 provides for further information to be included in a Level 2 disclosure in cases where the disclosure is for a prescribed purpose. The purposes to which this section applies will be set out by regulations subject to the negative procedure and will relate to children and protected adults (but will be roles which fall short of regulated roles for which PVG scheme membership would be mandatory). Where one of the prescribed purposes applies, Ministers must include on the disclosure any further information about the individual, in addition to the information which must always be included in a Level 2 disclosure in terms of section 8.
38. The further information which must be disclosed is: whether the applicant is barred from carrying out a regulated role with either children or adults (as relevant to the purpose of the disclosure) and, if barred, information about why; whether Ministers are considering the applicant for listing under the PVG Act and, if they are, whether any standard conditions have been imposed on the applicant under the new section 13A inserted into the PVG Act by section 76(2) of the Act; and whether any prescribed civil court orders are in force against the applicant.

Section 17: Further information for certain purposes: PVG scheme members

39. Section 17 provides for further information to be included in a Level 2 disclosure in cases where the applicant is a PVG scheme member and the purpose of the disclosure is to enable or assist another person to consider the applicant's suitability to do a regulated role. Consideration of suitability is further defined by section 68. Ministers must include on the disclosure any further information about the applicant, in addition to the information which must always be included in a Level 2 disclosure in terms of section 8.

40. The further information which must be disclosed is: confirmation that the applicant is a scheme member for the regulated role of the type to which the Level 2 disclosure relates; whether Ministers are considering the applicant for listing under the PVG Act and, if they are, whether any standard conditions have been imposed on the applicant; and whether any prescribed civil court orders are in force against the applicant.
41. In cases where a scheme member participates in the Scheme for both types of regulated role, but the purpose of the disclosure only relates to one type, the Level 2 disclosure must not include information that is only relevant to the other type of role.

Section 18: Provision of Level 2 disclosure to accredited bodies

42. An applicant who receives a Level 2 disclosure has the choice, within a period to be prescribed by regulations subject to the negative procedure, either to ask Ministers to share a copy of the disclosure with the accredited body that countersigned the application, or to notify Ministers of an intention to seek a review under section 20. Ministers must make the disclosure available to the accredited body on request by the applicant.
43. The individual can 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 2 disclosure with the accredited body. 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, a failure to act does not prevent the individual from making another Level 2 disclosure application for the same purpose.
44. 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. This is a change from the law for standard and enhanced disclosures under the 1997 Act, and the PVG scheme record under the PVG Act, which are usually provided to the accredited body without the need for a further request by the applicant that disclosure should take place.

Section 19: Crown employment

45. This section excludes the requirement for an application for a Level 2 disclosure to comply with section 12 where it is needed in connection with Crown employment. Instead of being countersigned by an accredited body, the application must be accompanied by a statement of the purpose for which the disclosure is required (which, as under section 12, must be one in relation to which the protections against self-disclosure of spent convictions have been disapplied (see paragraph 29 of these notes)). It must also be accompanied by a statement that it is required to consider the applicant's suitability for a Crown appointment. Subsection (3) lists the persons who may make the necessary statement to accompany the application. Provision is made in subsection (5) so that any reference to the accredited body that countersigned an application for a Level 2 disclosure in the rest of Part 1, or to the accredited body to whom a Level 2 disclosure is made available, is to be read as a reference to the person making the statement under subsection (1). Subsection (6) ensures that references to the purpose of the disclosure in Part 1 are to be read as the purpose mentioned in the statement that accompanied the disclosure.

Level 2 disclosures: review applications

Section 20: Level 2 disclosure: application for review

46. Where a Level 2 disclosure is provided to an applicant, the applicant can, within a period to be set by regulations subject to the negative procedure, request a review of: (a) the accuracy of any information included in the disclosure, or (b) the inclusion of any reviewable information. Reviewable information is: information about a spent

childhood conviction or children's hearing outcome; information provided by the chief constable for inclusion in the disclosure; and details of a removable conviction. A removable conviction is a spent conviction that is not a childhood conviction or children's hearing outcome, either for an offence in List A where at least 11 years have passed since the date of conviction, or for an offence in List B that is not a non-disclosable conviction (as defined in section 9.)

47. The applicant can only seek a review where Ministers were given prior notice of the applicant's intention to apply for review, in line with the process described in section 18. The applicant must specify in the review application the information that the applicant wishes to be reviewed. This is important as there are separate provisions for each of the four possible reviews: sections 21, 22, 23 and 25. An application for review (of whatever type, including combined reviews) is known as a "Level 2 review application".

Section 21: Review of accuracy of information by the Scottish Ministers

48. This section makes similar provision to the corrections process provided for under section 117 of the 1997 Act and section 51 of the PVG Act. The corrections process is now integrated with the new review procedures provided for in sections 22 to 30. Where a Level 2 review application seeks a review of the accuracy of any information in the disclosure, Ministers must carry out a review and must decide whether the information in question is accurate. They must notify the applicant of their decision. A review of the accuracy of information in a Level 2 disclosure cannot take place where the information in question relates to reviewable information, for which there are separate review mechanisms under sections 22, 23 or 25. An accuracy review is also excluded where the information could be reviewed under section 18 of the ACR Act, i.e. where it relates to information that has been provided by the police about a person's behaviour while they were under the age of 12.
49. There is no further review by the independent reviewer under section 21. An accuracy review under section 21 is administrative in nature to enable the correction of the content of the disclosure, for example an error in the applicant's name, date of birth, address, or if the applicant has provided evidence to rebut the age presumption (see section 40). This is in contrast to the other review procedures under sections 22, 23 or 25, which involve an exercise of judgment as to whether information ought to be included in a Level 2 disclosure.

Section 22: Review of childhood information by the independent reviewer

50. Where a Level 2 review application seeks a review of the inclusion of information about a spent childhood conviction or children's hearing outcome, Ministers must arrange for a review by the independent reviewer of Ministers' decision to disclose the childhood information. The independent reviewer must decide whether the childhood conviction or children's hearing outcome is relevant for the purpose of the disclosure and whether information about it ought to be included in the disclosure. Any finding of fact on which a childhood conviction or children's hearing outcome was based cannot be challenged in the course of a review. Section 28 makes further provision on the procedure for reviews carried out by the independent reviewer.

Section 23: Review of relevant Scottish police information by the police

51. Where a Level 2 review application seeks review of the inclusion of relevant police information that has been provided by the chief constable of the Police Service of Scotland, Ministers must refer the application to the chief constable for a review. The chief constable must decide whether the chief constable still reasonably believes that the information is relevant to the purpose of the disclosure and that it ought to be included in the disclosure. The chief constable must invite representations from the applicant when carrying out the review and have regard to them. It is necessary that the initial review is carried out under the authority of the chief constable, as the person whose duty it is

to provide ORI. In practice, however, as a matter of good administrative practice, it is expected that the review would be carried out by members of police staff who have not previously been involved in the original disclosure process. It is expected that similar provision for review of relevant police information provided by the chief officers of other relevant police forces in the UK will be made by order under section 104 of the Scotland Act 1998.

52. On completion of the review, the chief constable must notify Ministers of the decision and reasons for it, and in turn Ministers must notify the applicant of the outcome and reasons. In cases where the chief constable has decided the relevant police information should remain on the disclosure, Ministers must advise the applicant of the option to have the chief constable's decision reviewed by the independent reviewer under section 24.
53. No review application may be made under this section if the information could be reviewed under section 18 of the ACR Act (which relates to information provided by the police about pre-12 years behaviour which can no longer amount to a criminal conviction).

Section 24: Review of relevant Scottish police information by the independent reviewer

54. This section gives an applicant the right to request a review by the independent reviewer following a review of relevant police information under section 23 by the chief constable. If a request for review is made within the prescribed period, Ministers must arrange for a review by the independent reviewer. The independent reviewer's role is to decide whether the police information is relevant for the purpose of the disclosure and whether it ought to be included. Section 28 makes further provision on the procedure for reviews carried out by the independent reviewer.

Section 25: Review of inclusion of removable convictions by the Scottish Ministers

55. Where a Level 2 review application seeks review of the inclusion of details of a removable conviction (as defined in section 20(6) of the Act), Ministers must carry out a review and decide whether the conviction is relevant for the purpose of the disclosure and whether details of it ought to be included. Ministers must give the applicant an opportunity to make representations and may request information under section 65 from the persons listed in subsection (3) of that section. Ministers must take account of any representations or information received before reaching their review decision. Any finding of fact on which a conviction was based cannot be challenged in the course of a review. Ministers must notify the applicant of their decision, and in cases where the review outcome is that information about a removable conviction should remain on the disclosure, the reasons for that decision, and the applicant must be advised of the option to have the Ministers' decision reviewed by the independent reviewer under section 26.

Section 26: Review of inclusion of removable convictions by the independent reviewer

56. This section gives an applicant the right to request a review by the independent reviewer following a review of the inclusion of the removable conviction information under section 25 by Ministers. If a request for review is made within the prescribed period, Ministers must arrange a review of the inclusion of the conviction by the independent reviewer. The independent reviewer's role is to decide whether the removable conviction is relevant for the purpose of the disclosure and whether it ought to be included. Any finding of fact on which a conviction was based cannot be challenged in the course of a review. Section 28 makes further provision on the procedure for reviews carried out by the independent reviewer.

Section 27: Combination of reviews by the independent reviewer

57. Where a Level 2 review application has been made seeking review of more than one type of reviewable information and, as a result, more than one review is to be carried out by the independent reviewer, Ministers must arrange for the independent reviewer to bring them together and treat them as a single review. This will avoid duplication of effort, for example, two requests for information being sent to the same person. It will also ensure a single, streamlined outcome for the applicant. There are provisions to ensure that where one or more of the strands of review requires a prior decision by either the chief constable or Ministers, the single review by the independent reviewer cannot begin until any such earlier reviews are completed and the prescribed period for the applicant to request a review by the independent reviewer has expired (either with or without a request for review having been made). Where there is more than one type of earlier review, the independent review process can only proceed when all prior reviews are complete.

Section 28: Independent reviewer: information and representations

58. Section 28 gives the independent reviewer powers to gather information in connection with the review. The independent reviewer must invite representations from the applicant, and can require information to be provided by certain persons listed in subsection (2), within such time as the reviewer may specify (subject to any time periods set by Ministers in regulations made under section 37(2)(c)). The Scottish Ministers are under a duty to provide the independent reviewer with a statement of reasons for their own decision or the chief constable's decision which is the subject of the review (the chief constable has to notify Ministers of the reasons for the chief constable's decision under section 23(7)). The chief constable cannot provide information to the independent reviewer if doing so would harm the interests of the prevention or detection of crime. The independent reviewer must take account of any representations, statement of reasons or information received when carrying out a review.

Section 29: Notification of independent reviewer's decision

59. The independent reviewer must notify the applicant and Ministers of the reviewer's decision and the reasons for it. Notification must also be given to the chief constable where a decision by the chief constable was under review.

Section 30: Appeal against independent reviewer's decision

60. This section allows an appeal to a sheriff on a point of law only against a decision of the independent reviewer. The "point of law" ground would include an appeal on many of the grounds which might be the subject of an application to the court for judicial review. For instance, an appeal may be taken if the applicant claimed that there had been procedural unfairness in the process before the independent reviewer, or if the independent reviewer's decision was said to be incompatible with the applicants ECHR rights.
61. An appeal may be taken by the applicant or, where a decision by the chief constable was under review, the chief constable. An appeal must be made within three months of the independent reviewer's decision, starting on the date on which the decision was notified to the applicant. Both the applicant and the chief constable can provide notice that they do not intend to appeal the independent reviewer's decision. If notification is given to Ministers of an intention not to appeal to the sheriff before the end of that three-month period, the right to appeal is lost. Notifying Ministers sooner of an intention not to appeal will allow the process under section 31 for providing a new Level 2 disclosure to begin sooner (see section 31(6)(c)).
62. The role of the sheriff in an appeal is to confirm or overturn the independent reviewer's decision. Any finding of fact on which a conviction was based cannot be challenged in the course of an appeal. The sheriff can hear the appeal in private. The sheriff can allow

an appeal in part where it relates to more than one decision or information about two or more convictions. The sheriff's decision in an appeal is final.

Section 31: Provision of new Level 2 disclosure on conclusion of review proceedings

63. Once proceedings on a Level 2 review application have finally concluded (according to the definition in subsection (7)), Ministers must provide a new Level 2 disclosure to the applicant. The applicant is treated as having made a new application for a Level 2 disclosure on the date on which proceedings finally concluded. Ministers are required to give effect to the final outcome of the proceedings (as defined by subsection (9), for instance by correcting any inaccurate information or by excluding reviewable information which the final decision maker in the review process (be that Ministers, the chief constable, the independent reviewer or the sheriff) has determined is not relevant for the purpose of the disclosure and ought not to be included.
64. Where an application for review of reviewable information was unsuccessful, the applicant cannot make a Level 2 review application about the same information when their new Level 2 disclosure is issued to them at the end of the review process. The applicant may request subsequent review of the same information provided for the same purpose after a period of time (to be set in regulations), or if Ministers are satisfied their circumstances have changed in a material respect since the final outcome of proceedings.
65. Where information is excluded from the new Level 2 disclosure provided to the applicant, and the applicant is a PVG scheme member, Ministers must also exclude the information from a scheme member's PVG scheme record where the purpose of the disclosure related to the type of regulated role for which the individual is a scheme member. The information is also to be treated as not being vetting information for the purposes of the PVG Act. Consequential amendments are made in schedule 5 of the Act to section 51 of the PVG Act, which makes provision for corrections to a person's scheme record.

Section 32: Disapplication of provisions of section 4 of the Rehabilitation of Offenders Act 1974

66. Section 32 lifts the protections against the normal duty to self-disclose information about spent convictions afforded by section 4 of the 1974 Act, so that someone who has applied for a review under section 22 of the inclusion of a spent childhood conviction or children's hearing outcome, or a review of the inclusion of removable convictions by the Scottish Ministers under section 25 or the independent reviewer under section 26, has to answer questions and provide honest and accurate information about that conviction or outcome for the purposes of the review.
67. Subsections (1) and (2) provide that the usual protections against self-disclosure of spent convictions will not apply where a review is to be carried out by the Scottish Ministers or the independent reviewer about the inclusion of a removable conviction, or the independent reviewer in connection with determining whether information about a spent childhood conviction (or children's hearing outcome) should be included in a Level 2 disclosure. Subsections (2)(a) and (b) provide that the protections do not apply for the purpose of the review (and any appeal under section 30) and in relation to the information which is the subject of the referral. The effect of this is that the protection is lifted insofar as relating to the spent childhood conviction, children's hearing outcome or removable conviction which is the subject of the review. However, the disapplication of the usual protections against self-disclosure of spent convictions would not extend to questions about other spent childhood convictions, children's hearing outcomes or removable convictions which are not the subject of the review.
68. Subsections (3) and (4) disapply the protections in the 1974 Act when information about or details of spent childhood convictions, children's hearing outcomes or removable

convictions are thereafter included on a Level 2 disclosure. The effect of this is that it will allow an employer to ask a person about their spent childhood conviction, children's hearing outcome or removable conviction. The protections are, however, only disapplied insofar as discussions / proceedings relate to the specific purpose for which the Level 2 disclosure was issued (e.g. discussions with the employer following receipt of the disclosure).

69. Subsections (5) and (6) make it clear that the protections given by the 1974 Act are not lifted in respect of a failure to acknowledge a spent childhood conviction, children's hearing outcome or removable conviction or any circumstances ancillary to it before it is disclosed. This means that the individual can still benefit from the protections under the 1974 Act up to the point where the information about or details of a spent childhood conviction, children's hearing outcome or removable conviction is included in a disclosure certificate, so that the individual is not in any doubt about whether or not there is a duty to self-disclose.

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).

Common provisions relating to Level 1 and Level 2 disclosures

Section 34: Form and manner of provision of disclosures

76. Ministers must determine the form and manner in which Level 1 and Level 2 disclosures are to be provided. The disclosure can be provided by electronic communications, but there must be scope for them to be made available in a written or a printed document where the applicant so requests. Ministers can make different determinations as to the form and manner of disclosures for different disclosures or different purposes, and they must publish the determinations as they see fit. Level 1 and Level 2 disclosures have to specify the date on which they were provided to the applicant.

Section 35: Reclassification of applications

77. Ministers can treat an application received for any type of disclosure as an application for any other disclosure where it appears to them that another type of disclosure would be more appropriate in the circumstances. There are provisions allowing them to adjust the level of fees accordingly.

Section 36: Regulations about procedure for disclosure requests

78. Ministers have the power to make regulations subject to the negative procedure with regard to: the making of Level 1 or Level 2 disclosure applications; the provision of disclosures to applicants; and the provision of disclosures to persons who are not applicants.

Section 37: Regulations about review procedure

79. Ministers have the power to make regulations subject to the negative procedure in connection with the procedure for any of the possible reviews under Part 1 of the Act. The regulations can cover any aspect of the procedure relating to a review, including specifying time periods for issuing notices, making representations, and providing statements of reasons.

Section 38: Power to modify definitions of Level 1 disclosure and Level 2 disclosure

80. Ministers can make regulations by the affirmative procedure to modify the provisions which define the content of Level 1 and Level 2 disclosures, including to enable information held outside the United Kingdom to be included on a Level 1 or Level 2 disclosure provided under the Act.

Section 39: Childhood information: power to modify other enactments

81. Ministers can make regulations by the affirmative procedure to modify any other disclosure enactment (except the Act, when enacted) to ensure that childhood convictions, children's hearing outcomes or other criminal disposals incurred in childhood are not required or allowed to be disclosed by another person unless that information has been disclosed on a Level 1 or Level 2 disclosure provided under the Act. This is to ensure that the rules in the Act which reduce the disclosure of childhood information are not undermined by any other disclosure enactment that provides for the release of such information.

Section 40: Presumption as to age in relation to convictions

82. This section allows Ministers to make a presumption about a person's age when the person committed an offence. It may not always be clear to Disclosure Scotland from conviction information how old the convicted person was at the time of the offence. This is important for determining whether an applicant's conviction is a "childhood conviction" because it is the age of the applicant at the date of the offence rather than the date of conviction that is relevant for that purpose. Ministers can presume

that the applicant's age as at the date the offence occurred was the same as at the date of conviction. Evidence to rebut the presumption can be provided and would lead to a review on accuracy grounds under either section 6 (for a Level 1 disclosure) or section 21 (for a Level 2 disclosure).

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.

Accredited bodies

Section 46: Register of accredited bodies

90. This section requires Ministers to maintain a register of accredited bodies, and also contains the definition of "accredited body" and what is meant by "registration".

Section 47: Registration in the register of accredited bodies

91. To make applications for a Level 1 disclosure on behalf of individuals, or to countersign applications for Level 2 disclosures, a person must be registered as an accredited body. Registration can be for one of those purposes or both. This section sets out who can apply to be included in the register of accredited bodies upon Ministers being satisfied that the application has been made to act in connection with disclosure requests. For accredited bodies acting in relation to Level 2 disclosures, Ministers must be satisfied that each relevant individual, defined by subsection (6), is suitable to have access to disclosure information. Suitability is assessed under section 49.
92. An application by an individual who employs others in the course of a business (a "sole business proprietor") must be accepted where the individual is aged 18 years or over and meets the registration condition in subsection (4) and, if the individual is seeking registration to be able to countersign Level 2 disclosures, the condition in subsection (5). The condition in subsection (4) is that the individual satisfies Ministers that the individual is likely to be making applications for Level 1 disclosures and/or countersigning Level 2 disclosures (depending on the type of registration sought). The condition in subsection (5) is that Ministers are satisfied that the individual is a suitable person to receive information contained in a Level 2 disclosure.
93. Furthermore, an application by a body corporate or unincorporated or a person appointed to an office by virtue of an enactment must be accepted if the person satisfies the condition mentioned in subsection (4) and, where the person is seeking registration to be able to countersign Level 2 disclosures, that Ministers are satisfied that the person's lead signatory (and, if applicable, countersignatory (or countersignatories)) (see section 51) are suitable persons to have access to information contained in Level 2 disclosures (this is the condition in subsection (5)).

94. Ministers also have discretion to register an individual aged 16 or 17 years who is a sole business proprietor and meets the condition in subsection (4) and, where the individual will act in relation to Level 2 disclosures, the condition in subsection (5).
95. If Ministers are considering refusing an application for registration, they must give the applicant the opportunity to make representations. Refusal may be partial, if the person is seeking registration to act in relation to both Level 1 and Level 2 applications.

Section 48: Protection of information: removal of registration

96. This section sets out the factors that Ministers can take account of when deciding whether to remove a person from the register of accredited bodies because a “relevant individual” is not a suitable person to have access to disclosure information. A “relevant individual” is, in the case where the accredited body is an individual who is a sole business proprietor, that individual and, in the where the accredited body is a body corporate or unincorporated or a person appointed to an office by virtue of an enactment (a “body corporate accredited body”), the body’s lead signatory or any countersignatory.
97. Subsections (5) and (6) ensure that criminal conviction information about an individual giving rise to concern about the individual’s suitability to have access to information contained in a Level 2 disclosure is not disclosed to anyone other than that individual. This means that both the relevant person who Ministers consider may not be a suitable person to have access to that information and, where the accredited body is a body corporate accredited body, the accredited body, are entitled to make representations before a decision to remove the accredited body. But a body corporate accredited body will not be permitted to know the reasons for the proposed removal where the reasons relate to criminal conviction information of the accredited body’s lead signatory or countersignatory. A decision to remove an accredited body on the ground that a relevant individual is unsuitable can only be made in relation to the body’s registration to countersign applications for Level 2 disclosures; any registration relating to the making of applications for Level 1 disclosures on behalf of an individual would not be affected (see subsection (7)).

Section 49: Suitable persons to have access to disclosure information

98. This section sets out the information Ministers may have regard to for determining whether an individual is suitable to have access to disclosure information for the purposes of section 47(5) or 48(2). “Individual” in this context refers to the sole business proprietor applying to be (or registered as) an accredited body or, in the case of body corporate applicants or accredited bodies, the lead signatory or countersignatory (or nominee for that position).
99. Subsection (1)(a) to (g) sets out the information Ministers may have regard to, including prescribed details of criminal disposals, information from the barred lists, representations made by the individual concerned, and information requested by Ministers from the chief officer of any relevant police force under subsection (2). It is not intended that subsection (1)(g) should be read broadly. In practice, “any other information held by the Scottish Ministers” will be limited to information held by Disclosure Scotland in relation to its functions under sections 46 to 56 of the Act, rather than information held generally by the wider Scottish Government. In exercising this power, Ministers would be required to act proportionately and to have regard to the principles of the ECHR and data protection legislation. Ministers have the power under subsection (5) to prescribe relevant police forces by regulations subject to the negative procedure, and subsection (7) lists various bodies which constitute a police force for this purpose, in addition to the UK police forces covered by the general definition in section 69. Under subsection (3), the chief constable (defined in section 69 as the chief constable of the Police Service of Scotland) is required to comply promptly with a request from Ministers under this section, but need not provide information which the

chief constable thinks would be contrary to the interests of the prevention or detection of crime. It is expected that similar provision in relation to the other relevant police forces will be made by order under section 104 of the Scotland Act 1998.

100. Subsection (6) allows Ministers to have regard to the individual's removal from or refusal of an equivalent registration in England and Wales or Northern Ireland.

Section 50: Removal of registration on other grounds

101. This section sets out the grounds on which Ministers may remove an accredited body from the register other than the suitability of individuals to have access to disclosure information. Subsection (2)(a) to (c) specifies the grounds on which removal of registration may occur, including that the accredited body is no longer likely to act in relation to the type of disclosure request they are registered for, the accredited body has breached any condition imposed on them, or failure to comply with the code of practice published by Ministers under section 55. Subsection (3) provides that, for an accredited body that is a corporate or unincorporated body or a statutory office-holder, a further ground for removal is that the accredited body does not have a lead signatory. Where an accredited body is registered in relation to both making applications for Level 1 disclosures and countersigning applications for Level 2 disclosures, Ministers may remove the accredited body in relation to either or both (see subsection (4)).
102. Before removing an accredited body from the register, Ministers must notify the accredited body that they are considering whether to remove them, provide the reasons for considering that removal and give the accredited body the opportunity to make representations (see subsection (5)).

Section 51: Lead signatories and countersignatories

103. This section sets out rules about what the different types of person making an application for inclusion in the register must do in relation to the nomination of a lead signatory and countersignatories (see definitions in subsection (8)). A person seeking registration as a body corporate accredited body must nominate a lead signatory (see subsection (1)(a)). Where that person is seeking registration to countersign applications for Level 2 disclosures, that person may also nominate one or more countersignatories (note that in such cases the lead signatory can also act as a countersignatory – see the definition of “lead signatory” in subsection (8)). Subsection (2) relates to the nomination of a substitute lead signatory or a substitute or additional countersignatory by a body corporate accredited body.
104. Where the accredited body application is made by a sole business proprietor in relation to the countersigning of applications for Level 2 disclosure, that person may nominate one or more countersignatories (see subsection (3)). Where an accredited body is a sole business proprietor and is registered to countersign applications for Level 2 disclosures, the accredited body may nominate one or more countersignatories (see subsection (4)). Ministers may make regulations, subject to the negative procedure, under subsection (5) prescribing the details that must be included in an application nominating a lead signatory or countersignatory. Any accredited body must advise Ministers of any changes in those prescribed details of its lead signatory or any countersignatory (see subsection (7)).
105. Subsection (9) provides that an individual may not act as the lead signatory or countersignatory of an accredited body unless their details are included in the entry for the accredited body in the register of accredited bodies (and Ministers will include these details if they accept a nomination - see subsection (6)).

Section 52: Lead signatories and countersignatories: acceptance or refusal of nomination and removal from the register

106. This section places certain duties on Ministers to accept the nomination of an individual as the lead signatory or a countersignatory of an accredited body. Ministers must accept the nomination of someone over the age of 18 who is employed or appointed directly by the accredited body, or employed by someone acting on the accredited body's behalf (see subsection (1)).
107. But under subsection (2), where the accredited body's registration relates to countersigning Level 2 disclosure applications (either alone or in conjunction with the making of Level 1 disclosures) Ministers may refuse to accept the nomination of an individual as a lead signatory or countersignatory if, in their opinion, the individual is not a suitable person to have access to information contained in a Level 2 disclosure (see definition of "disclosure information" in section 69).
108. Subsection (3) allows Ministers to remove all of the prescribed details of a lead signatory or countersignatory if that individual is not a suitable person to have access to information contained in a Level 2 disclosure, or if they have failed to comply with the code of practice published under section 55. In determining whether an individual is a suitable person to have access to disclosure information, Ministers may have regard to any of the information mentioned in section 49(1) and any representations made by the individual who is (or is nominated as) the lead signatory or a countersignatory of the accredited body concerned.
109. Subsection (5) requires Ministers to notify the individual whose nomination as lead signatory or countersignatory of an accredited body they are considering whether to refuse that they are so considering and of the reasons for doing so, and give the individual an opportunity to make representations. Subsection (6) replicates the procedure for those individuals already in the register who may become unsuitable at a later point in time of their registration for reasons under subsection (3)(a) or (b).
110. Subsection (7) provides that, in relation to an applicant seeking, or an accredited body with, mixed registration to make applications for Level 1 disclosures and countersign applications for Level 2 disclosures, the refusal of the nomination of an individual as lead signatory or the removal of a lead signatory from the register on the grounds that the individual is not a suitable person to have access to Level 2 disclosure information does not affect the individual's ability to act in relation to Level 1 disclosures.

Section 53: Notification and review of decisions: removal from register or refusal of registration or nomination

111. This section places certain duties on Ministers should they refuse an application for inclusion in the register, or remove a person from it (and subsection (2) provides for partial or whole removal from the register of an accredited body which is registered both to make applications for Level 1 disclosures and to countersign applications for Level 2 disclosures).
112. Ministers must notify the affected person(s) (see subsection (4)) and give reasons for their decision. The person so refused or removed can apply for a review of Ministers' decision if they consider that the information on which it was based may have been inaccurate (see subsection (6)). Ministers may make regulations subject to the negative procedure under section 54 (see subsection (2)(g)) in connection with those reviews.

Section 54: Regulations about registration

113. This section gives Ministers a power to make regulations about the register of accredited bodies and registration in the register. The regulations will be subject to negative procedure in the Scottish Parliament and can cover aspects such as: information to be provided on application; the content of the register; imposing conditions on accredited

bodies; the process for refusing and removing registration; and re-application following refusal or removal.

Section 55: Code of practice

114. Ministers must publish a code of practice and lay it before the Scottish Parliament as soon as possible after publication. They can revise the code of practice if necessary (see subsection (6)). Subsection (4) lists the persons who must comply with the code of practice. Failure to comply with the code can lead to Ministers imposing a condition in relation to the registration of an accredited body (see subsection (7)) or refusing to provide a Level 2 disclosure (see section 11(3)).

Section 56: Sharing of Level 2 disclosure information by accredited bodies

115. Section 56 applies to accredited bodies, and allows them to countersign a Level 2 disclosure application under section 11 on their own behalf, or on behalf of other persons. When they are acting on behalf of others, this is often referred to by Disclosure Scotland as an ‘umbrella body’ service.
116. The persons on whose behalf an accredited body can act must either be someone who would be eligible in terms of section 47(3) to become an accredited body (but who is not registered as an accredited body), or an individual who employs other persons but not in the course of a business. The ability to act on behalf of another person is subject to the condition that the person is asking a question about the individual who is the subject of the disclosure for the purpose of the disclosure, which may, for example, be in connection with recruitment into paid or voluntary work.
117. In cases where the accredited body acts on behalf of a person of the type eligible to become an accredited body (i.e. bodies corporate or unincorporated, statutory office-holders or sole business proprietors), the accredited body may share the Level 2 disclosure with that other person if it is satisfied that disclosure to the person would comply with the code of practice (see subsection (3)).
118. In cases where the accredited body acts for an individual seeking to employ or engage the services of another individual in a personal capacity, the accredited body cannot share the Level 2 disclosure or disclose its content. The accredited body can, however, provide advice to the individual in relation to how any information in the disclosure might affect the decision for which the Level 2 disclosure was requested (see subsection (4)). This means that an accredited body could provide suitability advice to individuals who are in the process of recruiting or using a self-employed worker, such as a music tutor, nanny or carer. Ministers may, by regulations subject to the negative procedure, set a maximum fee that an accredited body may charge an individual for acting on their behalf in this way (see subsection (5)).

Evidence of identity

Section 57: Evidence of identity

119. Ensuring that an identity presented is an actual person, and that the individual presenting the identity is entitled to use the identity on an application, are critical to avoid misuse of disclosures, such as a disclosure being issued to someone in an identity that is not their own. Section 57 allows Ministers to require an applicant to provide evidence that they are who they say they are, and Ministers do not need to consider an application if that evidence is not forthcoming, or other requirements set by Ministers are not met, or if they are not satisfied by the evidence as to the applicant’s identity.

Section 58: Power to use personal data to check identity

120. Section 58 supports Ministers’ powers to verify an applicant’s identity by enabling enquiries to be made of a number of public bodies, including the Registrar General

for Scotland, the Keeper of the Records of Scotland and Ministers in certain UK Government Departments. Subsection (2)(d) gives Ministers a power by regulations, subject to negative procedure, to prescribe other organisations to support the authentication of the identity of disclosure applicants.

Section 59: Power to use fingerprints to check identity

121. Section 59 gives Ministers the option of using fingerprints to verify the identity of an applicant. This power will only be used in cases where other means of authentication have been unsuccessful, for instance where the Scottish Ministers cannot otherwise match an applicant to a criminal record held in central records. The process will be governed by regulations subject to the negative procedure. Ministers can refuse to consider a disclosure application in cases where the applicant refuses to provide fingerprints. Ministers must ensure the destruction of fingerprints taken for assisting the authentication of identity, once that task is completed.

General

Section 60: Form and manner of applications and notices

122. Section 60 allows Ministers to determine the form and manner of applications (which includes any documents accompanying the request or application). This includes a determination for applications to be made electronically. Ministers must allow applications to be made in printed or written form, except when an accredited body makes the application for a Level 1 disclosure on behalf of an individual (using the process in section 3). For Level 1 disclosure applications made on behalf of an individual, Ministers can determine how to evidence the individual's consent. Ministers can make different determinations for different purposes. They must publish them in such manner as they see fit. Ministers need not deal with an application unless it is made in accordance with the appropriate determination. The section also allows Ministers to make similar provision in relation to the giving of notices or notifications.

Section 61: Fees

123. This section allows Ministers, by regulations subject to the negative procedure, to prescribe fees for the exercise of their functions under Part 1. For example, fees may be imposed by regulations in connection with applications relating to accredited bodies, disclosure products, disclosure requests, and related applications (such as for removal of a conviction). The regulation-making powers allow for different fees, including annual or recurring fees, to be prescribed for different purposes, and for the reduction, refund or waiver of the prescribed fee in prescribed circumstances (see subsection (3)). Ministers need not consider any application unless the fee that is provided for by regulations in relation to the application is paid in the manner provided for in the regulations (see subsection (5)).

Section 62: Fees for provision of information by the chief constable

124. Section 62 requires Ministers to pay the Scottish Police Authority an appropriate fee for information received from the chief constable of the Police Service of Scotland (see definition of "chief constable" in section 69) in connection with Ministers' functions under Part 1 of the Act.

Section 63: Guidance for chief constable

125. This section allows Ministers to issue guidance to the chief constable of the Police Service of Scotland about the chief constable's functions under Part 1 of the Act (see section 89 for guidance with regard to the chief constable's functions under the PVG Act). Guidance can only be issued after Ministers have consulted the chief constable. The guidance can be reviewed as necessary. Guidance must include provision for

any review process under section 23 and the chief constable must have regard to the guidance when exercising any functions under Part 1 of the Act (including where any review is being carried out).

Section 64: Sharing of information with the chief constable

126. Section 64 gives Ministers a power to share information with the chief constable of the Police Service of Scotland. It applies to information held in connection with Ministers' functions under this Part of the Act, but all that may be shared is the name, address and date of birth of an individual, and other information to enable the Police Service of Scotland to satisfy itself of a person's identity. When Ministers disclose information to the chief constable it is to be used only by constables of the Police Service of Scotland in connection with the chief constable's functions under Part 1 of the Act, or for law enforcement purposes as defined in section 31 of the Data Protection Act 2018.
127. This power may, for example, be exercised by the Scottish Ministers when as a result of searching central records in connection with an application made for a disclosure, it appears that Ministers hold a more current residential address than that in central records for an applicant who is wanted by the police in relation to an arrest warrant.

Section 65: Sources of information

128. Ministers are entitled to access information held in central records (as defined by section 69) to assist with Ministers' functions. Ministers can also require certain persons to provide them with information which they believe the person holds and which they consider necessary to carry out their functions under this Part of the Act, for example gathering information to enable them to make a determination under section 13. The chief constable cannot provide information if disclosing it would be contrary to the interests of the prevention or detection of crime. Ministers cannot be held liable for any inaccuracy in information provided to them under Part 1 of the Act by a third party.

Section 66: Delegation of functions of Scottish Ministers

129. Section 66 allows Ministers to delegate their functions under the Act, except functions which involve making regulations, issuing and revising guidance to the chief constable, publishing the code of practice under section 55 and laying it in the Scottish Parliament, determining the form and manner of applications and disclosures under this Part of the Act, and setting fees. A delegation may be revoked or varied at any time. Subsection (4) protects a person to whom a function is delegated from proceedings in cases where inaccurate information is provided to that person by another party who provides information to Ministers under Part 1 of the Act.

Section 67: Saving: disclosure of information and records

130. Section 67 prevents the state disclosure system from prejudicing any other power which exists elsewhere to disclose information or make records available. For instance, the Act does not affect the police's common law powers to make a community disclosure to a parent, carer or guardian of a child who is requesting information about someone involved in their family life, specifically if they are concerned that the person might be a child sexual offender.⁷

Section 68: Definition of consideration of suitability

131. This section replicates the effect of section 73 of the PVG Act. It explains what is meant by references to consideration of the suitability of a person for a type of regulated role for the purpose of provisions relating to Level 2 disclosures for PVG scheme members (see sections 17(1)(b) and 44(2)). It captures people appointing someone to a regulated role directly (including private individuals employing someone in their

⁷ <https://www2.gov.scot/Resource/0047/00470296.pdf>

*These notes relate to the Disclosure (Scotland) Act 2020
(asp 13) which received Royal Assent on 14 July 2020*

personal capacity) and people supplying an individual to someone else to carry out a regulated role. In circumstances where a private individual has used an accredited body to act as countersignatory for the application (see paragraph 118 of these notes), it is still the employer who is assessing the individual's suitability for the role, acting on the advice as to suitability provided by the accredited body. There is also a power under paragraph (c) to prescribe other purposes.

Section 69: Interpretation of Part 1

132. Section 69 provides the meanings for certain words and phrases used in Part 1 of the Act