

EXPLANATORY NOTES

Disclosure (Scotland) Act 2020 (asp 13)

£11.50

DISCLOSURE (SCOTLAND) ACT 2020

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Disclosure (Scotland) Act 2020. They do not form part of the Act and have not been endorsed by the Parliament.

2. These Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

OVERVIEW

3. The Act reforms the system of disclosure of criminal records administered by the Scottish Ministers through their executive agency Disclosure Scotland. Before the Act, disclosure functions have been performed under Part 5 of the Police Act 1997 (“the 1997 Act”) and Part 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the PVG Act”). The Act repeals and replaces Part 5 of the 1997 Act, amends the PVG Act and makes provision for new disclosure products. It also amends the provisions in the PVG Act under which the barring service and the Protecting Vulnerable Groups Scheme (“the PVG Scheme”) operate, and for connected purposes.

4. The Act also allows scope for digital processes to improve safeguarding and accessing disclosure so that people who would prefer to do so can carry out their disclosure tasks online, including making applications and viewing disclosures.

5. The Act repeals Part 5 of the 1997 Act as it applies in Scotland, and amends the PVG Act in a number of ways. Provision is made for new Level 1 and Level 2 disclosures that replace the basic, standard and enhanced disclosures under the 1997 Act and the PVG scheme record and short scheme record under the PVG Act. The Act makes membership of the PVG Scheme mandatory for anyone in a ‘regulated role’ (the new concept to replace regulated work). Changes are also proposed with regard to Ministers’ barring functions under Part 1 of the PVG Act.

6. The Act:

- reduces the number of disclosures from four main levels (basic, standard, enhanced and PVG) with ten products to two main levels (Level 1 and Level 2) with four

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products (sections 1-4 and 8-19), plus ‘confirmation of scheme membership’ as a replacement for ‘statement of scheme membership’ (section 86),

- changes the manner in which convictions and children’s hearing outcomes accrued by an individual for offences committed while aged 12 to 17 years old are disclosed (sections 13, 20, 22, 27 to 31 and 40),
- reforms and streamlines the process to have certain spent convictions removed from Level 2 disclosures (sections 20, 25 and 26 to 31),
- provides Level 2 disclosure applicants with a right to comment on proposed other relevant information (“ORI”) provided by police forces prior to that information being issued to a third party (sections 14 and 15, 23 and 24 and 28 to 31),
- establishes clear procedures for the registration of accredited bodies who can countersign Level 2 applications, including provisions to ensure the protection of individuals’ criminal history information (sections 46 to 56),
- provides clarity on disclosure arrangements for individuals directly employing a PVG scheme member for, for example, personal care or home tuition of children (section 56),
- ends life-time membership of the PVG Scheme and replaces it with a five-year membership period (sections 71 and 72),
- makes it a requirement that anyone carrying out a regulated role (paid, or unpaid and voluntary) must be a member of the PVG Scheme (section 73),
- replaces the concept of ‘regulated work’ in the PVG Act with ‘regulated roles’ (sections 74 to 75 and schedules 3 and 4),
- enables Scottish Ministers to impose standard conditions where appropriate on any individual who is under consideration for inclusion in one or both of the lists held under section 1 of the PVG Act i.e. the children’s list or the adults’ list, and to permit Ministers to give notice that a person is under consideration for listing and of their barred status (sections 76 to 79),
- provides new referral powers for Police Scotland and Scotland’s councils and integration joint boards (sections 80 and 82), and
- restates and amend the lists of offences in schedules 8A and 8B of the 1997 Act (schedules 1 and 2).

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

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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.

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.

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.

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 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.

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>

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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. 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

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>

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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

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.

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 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.

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. 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

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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.)

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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.

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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.

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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

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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

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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 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

Part 2: Protection of vulnerable groups

Scheme membership

Section 70: Participation in Scheme

133. Section 70 substitutes a new section 45 (Participation in Scheme) into the PVG Act. The new section 45(1) provides that an individual aged 16 or over may apply to participate in the PVG Scheme (the "Scheme"), or if already a scheme member apply to renew their membership. This is read with section 45(2) which sets out the type of regulated roles in relation to which an individual can participate in the Scheme i.e. individuals may participate in the Scheme in relation to regulated roles with children, regulated roles with adults, or both types of regulated role. The new section 45(3) states that Ministers must allow membership unless the person is under the age of 16, or barred from carrying out the type of regulated role to which their application to join, or renew their membership of, the Scheme relates.

134. For the avoidance of doubt, while individuals under the age of 16 years cannot participate in the PVG Scheme, they can still carry out activities that would amount to a regulated role if they were aged 16 or over. As set out below (see paragraph 144), the offence provisions for individuals, organisations and personnel suppliers do not apply in relation to individuals under the age of 16 years. This means that individuals under the age of 16 are not within scope of the mandatory scheme. It would be at the discretion of an employing organisation to assess what activities may be appropriate for a person under 16 and to put in place any suitable safeguarding measures both for the individual undertaking the role and any children or protected adults they were working with.

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

Section 71: Duration of Scheme membership

135. Section 71 inserts a new section 45A (Duration of Scheme membership) into the PVG Act. Section 45A(1) sets the length of PVG scheme membership at five years. Section 45A(3)(a) requires Ministers to contact the persons mentioned in subsection (4) (namely, the scheme member and each organisation, personnel supplier and relevant regulatory body for which they know the scheme member is carrying out a regulated role) three months before membership is due to expire to alert them that expiry is approaching. Section 45A(3)(b) allows Ministers to notify a person other than an organisation (for example, an individual employing a personal carer through self-directed support) that expiry is approaching.

136. Section 45A(5) and (6) work together to ensure that information about a scheme member who participates in the Scheme for both types of regulated roles but notice of expiry relates to only one of those types of regulated role. In that case, the notice in relation to that type of regulated role to the organisation (see definition in section 97(1) of the PVG Act), personnel supplier, relevant regulatory body or any other person for whom the scheme member is doing a regulated role must not disclose information about the scheme member's participation in the Scheme in relation to that other type of regulated role (or the fact that the scheme member participates in the Scheme in relation to that other type of regulated role).

137. In cases where a scheme member has applied for renewal of membership before the date of expiry, and where Ministers have not determined the application, then membership must continue until Ministers' determination of the renewal application occurs (see subsection (7)).

Section 72: Failure to apply for renewal of Scheme membership

138. Section 72 inserts a new section 45B (Failure to apply for renewal of Scheme membership) into the PVG Act. This section sets out the rules around what happens when a scheme member fails to apply to renew membership before the expiry date. Ministers cannot end scheme membership unless they are satisfied that the scheme member is no longer carrying out a regulated role. So membership is extended by 4 weeks, referred to as the "extended membership period", to enable Ministers to satisfy themselves of that fact (see subsection (2)).

139. If Ministers cannot be so satisfied before the extended membership period lapses, they may extend membership for six months – referred to as the "discretionary membership period" (see subsection (3)(b)). Where Ministers do this, they must notify the scheme member and any organisation, personnel supplier or relevant regulatory body for whom they know the scheme member is carrying out a regulated role. They may also notify a person other than an organisation for whom a scheme member is carrying out a regulated role. If during that discretionary membership period the scheme member does not apply to renew their membership and Ministers are satisfied that the scheme member is no longer carrying out a regulated role then the individual can be removed from the Scheme (see subsection (6)).

140. If the scheme member does not apply to renew their membership of the scheme and Ministers believe that the scheme member is still carrying out a regulated role they must place the individual under consideration for listing in the children's list or the adults' list (or both) if they consider that it may be appropriate for the scheme member to be included in that list,

regardless of the type of regulated role for which they participate in the Scheme (see subsections (7) and (8)).

141. Where an application is made by a scheme member to renew their membership to continue to participate in the Scheme during either the extended or discretionary membership period, Ministers must allow ongoing participation in the Scheme until the application is determined by them. Ministers can refuse to consider an application by an individual for a Level 2 disclosure (or a confirmation of scheme membership under section 54 of the PVG Act) that is made by the scheme member during any discretionary membership period (see subsection (11)). It is intended that this will encourage individuals who require to remain in the Scheme to do so by renewing their membership at the appropriate time. An application for a Level 2 disclosure made by a scheme member during the discretionary membership period may be disregarded in which case the individual would not be able to share a Level 2 disclosure or confirmation of their membership with, for example, an employer. This could prevent them from performing or continuing to perform a regulated role.

Section 73: Compulsory Scheme membership

142. Section 73 inserts five new sections: sections 45C, 45D, 45E, 45F and 45G into the PVG Act. The new section 45C (Individuals must be scheme members to carry out regulated roles) makes it an offence under subsection (1) for an individual to carry out, or agree to carry out, a regulated role if not a scheme member. Subsection (2) makes it clear, in relation to an offence under subsection (1), that an individual is not deemed to have agreed to carry out a regulated role if that agreement is subject to the individual joining the PVG Scheme for that type of role. It is a defence if the person did not know they were carrying out a regulated role, or if they did not know that their membership had not been renewed. The offence does not apply to any individual who is barred from the type of regulated role in question (although the offence under section 34 of the PVG Act may be triggered), or who is under the age of 16 years of age.

143. The offence also does not apply in relation to any individual who is barred from the type of regulated role in question (although section 35 of the PVG Act may apply), or who is under the age of 16 years of age (see paragraph 134 of these notes).

144. The new section 45D (Organisations not to use individuals for regulated roles without confirming scheme membership) makes it an offence for an organisation to offer a regulated role to a person unless the organisation has first had PVG scheme membership confirmed by Disclosure Scotland issuing a Level 2 disclosure to them. It is a defence if the organisation can prove that it did not know, and could not be expected to have known, that the person was not a scheme member. An organisation which had offered a role conditional on receipt of a disclosure does not commit an offence. The offence also does not apply in relation to any individual who is barred from the type of regulated role in question (although section 35 of the PVG Act may apply), or who is under the age of 16 years of age.

145. The new section 45E (Power to require organisations to stop using individuals for regulated roles without scheme membership) makes it an offence for an organisation to fail to comply with regulations made under subsection (1). Subsection (1) provides the Scottish

Ministers with a regulation making power (subject to the affirmative procedure by virtue of the amendment in section 73(3)) to prohibit organisations from permitting an individual to carry out a regulated role or to require organisations to remove an individual from a regulated role where the individual is not a scheme member. This is to address behaviour by organisations continuing to employ someone to carry out a regulated role where that person is not or is no longer a scheme member. Regulations may impose prohibitions or requirements in relation to particular types of organisations or in relation to particular kinds of regulated roles.

146. Section 45E ensures there is an ongoing impetus on organisations to check whether their employees remain scheme members. It does so by ensuring that there is a consequence for an organisation that does nothing following receipt of a notification under the new section 45B stating that a scheme member's membership has lapsed. Under subsection (4) it is a defence for an organisation charged with an offence under subsection (3) to prove that it did not know, and could not reasonably be expected to have known, that the individual was not a scheme member.

147. Section 45F (Personnel suppliers not to supply individuals for regulated roles without confirming scheme membership) makes provision, in relation to personnel suppliers offering an individual to carry out a regulated role for an organisation. A personnel supplier commits an offence by offering or supplying a person for a regulated role in an organisation unless the personnel supplier has first had PVG scheme membership confirmed by Disclosure Scotland issuing a Level 2 disclosure to them. The offence does not apply in relation to any individual who is barred from the type of regulated role in question (but see section 36 of the PVG Act), or who is under the age of 16 years.

148. The new section 45G (Penalties for offences relating to regulated roles by individuals not in Scheme) sets out the penalties for the offences introduced by sections 45C, 45D, 45E and 45F.

Regulated roles

Section 74: Regulated roles

149. Section 74 substitutes a new section 91 (Regulated roles) into the PVG Act to replace the concept of regulated work in the current section 91. Schedules 3 and 4 in the Act set out the meaning of "regulated roles with children", and "regulated roles with adults", substituting the existing schedules 2 and 3 of the PVG Act. Part 2 of schedule 5 of the Act makes various consequential amendments arising from the substituted concept of regulated roles.

Section 75: Meaning of "protected adult"

150. Section 75 amends the meaning of 'protected adult' in section 94 of the PVG Act. There is a move away from the previous lengthy and complex definition to a narrower range of issues affecting a person's wellbeing, capabilities and capacity. Section 75(2) of the Act substitutes into section 94 of the PVG Act a new subsection (1)(a) to (d). This provides the criteria which if satisfied will mean a person is a protected adult for the purpose of the PVG Act; these are alternatives and not cumulative.

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

151. The age a person must have attained to be regarded as a protected adult is changed from someone aged 16 or older, to someone aged 18 or older. This is to prevent an overlap between the children's and protected adult's workforces under the PVG Scheme.

152. New subsection (1)(a) provides that an individual who as a result of physical or mental disability, illness, infirmity or ageing has an impaired ability to protect themselves from physical or psychological harm or who requires assistance with activities of daily living, such as, personal care, is a protected adult for the purpose of the PVG Act.

153. New subsection (1)(b) makes provision for individuals who are homeless, or have experienced, are experiencing or are at risk of experiencing domestic abuse. However, such individuals are only brought within the meaning of protected adult in relation to a role that involves the carrying out of activities mentioned in paragraph 17 of the new schedule 3 of the PVG Act substituted by schedule 4 of the Act (provision of counselling, therapy, advice or guidance for protected adults).

154. New subsection (2A) defines "domestic abuse" for the purpose of subsection (1)(b)(ii). Domestic abuse is defined as behaviour, whether or not amounting to criminal behaviour, that is perpetrated between partners or ex-partners, whether in the home or elsewhere or by means of electronic or other forms of communications, and involves any form of physical, verbal, sexual, psychological, emotional or financial abuse of one of the partners or ex-partners by the other. New subsection (2B) makes clear that an individual is a person's "partner" if they are married to each other, civil partners of each other, living with each other as if they were married to each other or otherwise in an intimate relationship with each other. "Ex-partner" is to be construed accordingly.

155. Individuals accessing health services provided by certain registered health professionals (to be prescribed by Ministers by regulations subject to the negative procedure) will also be protected adults while being provided with those services, by virtue of subsection (1)(c).

156. Individuals in receipt of a prescribed service of the type listed in new subsection (1)(d) will also be protected adults when being provided with any of those services. These are the same types of services provided under the section 94 definition of protected adult in the PVG Act.

Scheme members under consideration for listing

Section 76: Conditions imposed on scheme members under consideration for listing

157. Section 76 inserts three new sections into the PVG Act. The sections relate to Ministers' new powers to impose conditions on a person who is under consideration for listing. New section 13A (Conditions imposed on scheme members under consideration for listing) contains powers for Ministers to impose prescribed conditions on scheme members who are under consideration for listing. The conditions are to be prescribed in regulations subject to the negative procedure in the Scottish Parliament. Ministers will also be able to use their powers under section 42(1)(c) of the PVG Act to make further procedure about the procedure which is to be followed before making a decision to impose conditions on a scheme member who is under consideration for listing.

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

158. The conditions that Ministers impose can be based only on the information that led them to place the scheme member under consideration for listing, information gathered under section 18 to 20 of the PVG Act, or information gathered while performing their functions relating to the PVG Scheme.

159. Any conditions imposed last for an initial period to be prescribed by regulations subject to the negative procedure to be made by Ministers. They can be extended beyond that period subject to confirmation by a sheriff on application by Ministers under section 13B. The conditions will lapse at the end of the initial period prescribed by regulations unless they are confirmed by a sheriff.

160. Section 13A(5) requires Ministers to notify the persons listed in subsection (6) of the fact that conditions have been imposed, and what those conditions are. Ministers must inform the scheme member only of the reasons why the conditions are being imposed.

161. The new section 13B (Application to sheriff for confirmation of conditions) allows Ministers to apply to a sheriff to have conditions imposed by them approved by a sheriff. The scheme member on whom conditions have been imposed is entitled to be a party to proceedings before the sheriff (subsection (8)). An application must be made before the prescribed period under section 13A(4) expires. In cases where the application is made, the prescribed period extends until the sheriff determines the application (see new section 13B(3)). The application is to be made when it is lodged with the sheriff clerk (see subsection (10)). A sheriff can hear the application in private (see subsection (11)).

162. Subsections (4) to (7) specify the decisions that a sheriff may make on an application; that any variation of a condition or imposition of a new condition cannot go beyond what Ministers could have imposed under section 13A; that if the sheriff approves the application (with or without variation, or imposition of a new condition) the conditions will remain in place while Ministers are considering whether to list the scheme member in the adults' list or the children's list (as they case may be); and, where the sheriff removes that condition imposed by Ministers, that removal takes effect from the date of the sheriff's decision. The persons to be notified of a sheriff's decision are set out in subsection (9), and they are the same persons as were notified under section 13A(6).

163. The new section 13C (Breach of conditions: offences) makes it an offence for a scheme member to fail to comply with a condition imposed. It is also an offence for a person mentioned in subsection (3), namely an organisation or personnel supplier employing or supplying the scheme member in a regulated role, to fail to take action to prevent a condition imposed being adhered to. It is a defence for a scheme member or any employer or personnel supplier that they did not know, and could not reasonably be expected to have known, that a condition was imposed. The penalties for the offences are set out in subsection (5).

Section 77: Notice of consideration for listing

164. Section 77 amends section 30 of the PVG Act relating to notice of listing. Subsection (2) extends Ministers' notification duty under section 30(3) of the PVG Act to personnel suppliers. Subsection (3) inserts new subsections (3A), (3B) and (3C) into section 30. Together,

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subsections (3A) and (3B) give Ministers a discretionary power to notify an individual who employs other persons but not in the course of business, for example a parent who is employing a music tutor to give their child piano lessons or an individual employing a carer within the context of self-directed care, that a scheme member is being considered for listing, and where appropriate give notice of any conditions imposed on the individual. Subsection (3C) allows Ministers to notify such persons of the outcome of the consideration for listing process.

Section 78: Withdrawal from Scheme when under consideration for listing

165. Section 78(2) inserts a new section 59A (Withdrawal from Scheme when under consideration for listing) into the PVG Act. This new section is contingent on Ministers having removed an individual from the PVG Scheme under section 59 of the PVG Act (where the scheme member has applied to be removed from the register and Ministers are satisfied that the scheme member is not carrying out a regulated role), and the removal occurring while the individual was under consideration for listing in the children's list or the adults' list or both. Ministers can decide whether to continue with the consideration case after removal takes place. A decision under section 59A(2) does not amount to a decision not to list the individual for the purpose of the notification provisions under section 30(3C) or (4) of the PVG Act,

166. Subsection (3) amends section 60 of the PVG Act to require that a notice under section 60(1), advising of removal from the Scheme, must give information about any decision under section 59A(2) where appropriate.

Notice of barred status

Section 79: Notice of barred status

167. Section 79 inserts a new section 46A (Notice of barred status) into the PVG Act. Section 46A(2) provides that Ministers must advise an accredited body that an individual has been refused scheme membership due to their being listed in either the children's list, the adults' list or both lists. This notification can be made only when Ministers know the person has sought or agreed to carry out a regulated role from which they are barred.

Listing

Section 80: Reference by chief constable

168. Section 80 inserts a new section 6A (Reference by chief constable) into the PVG Act. This new power enables the chief constable of Police Service of Scotland to make a referral to Ministers if the chief constable considers an individual is or has been carrying out a regulated role without being a PVG scheme member (which will now be an offence under the new section 45C of the PVG Act). This power exists independently of the powers the chief constable has to investigate whether an offence has been committed by the individual. Subsection (3) inserts a new paragraph (aa) into section 10(1) of the PVG Act so that Ministers can take action on such a referral by the chief constable, and if appropriate place the individual under consideration for listing.

Section 81: Removal of references by court

169. Section 81 repeals a number of provisions in the PVG Act to bring to an end the requirement for court referrals upon conviction for a relevant offence. This process is no longer necessary in light of the new mandatory scheme requirement for all regulated roles.

Section 82: Reference by councils or integration joint boards

170. Section 82 extends the power to make a referral to Ministers to Scottish local authorities and integration joint boards. To achieve this, section 8 of the PVG Act is amended. The referrals can be made only in connection with issues that arise in exercise of certain statutory functions by these bodies. These functions are listed in subsection (3).

Section 83: Application for removal from list

171. Subsections (2) and (3) change the test in section 25 of the PVG Act so that it more explicitly reflects the filtering nature of the provision, such that an application for removal will only be competent if Ministers are satisfied that there has been a change in circumstances since the applicant was listed or last made an application for removal from the list which is relevant to the question of their suitability to carry out a regulated role.

172. Subsection (4) repeals references to a quashed conviction in 25(5) and 25(6) of the PVG Act. The repeal of these subsections does not necessarily mean that a quashed conviction will no longer be treated as a relevant change of circumstances. It may still be a relevant change in circumstances leading to a competent application for determination under section 26 of the PVG Act, but it will not always be relevant. This resolves any ambiguity for individuals who may think that a conviction being quashed will automatically lead to someone's removal from the list. This is not the case, since there are different standards of proof for a criminal finding of guilt (beyond reasonable doubt) and the civil standard for listing decisions (balance of probabilities).

Section 84: Ministers' powers to remove from list

173. Subsection (2) modifies section 28 of the PVG Act so that Ministers have a power to receive and consider late representations from an individual as to why they should not have been listed when it is appropriate to do so in the circumstances. This is to allow the listed individual to provide information to Ministers, which, if they had done before listing, would have led to a decision not to list.

174. Subsection (3) broadens section 29(1)(b) of the PVG Act so that Ministers have discretion to remove an individual from either of the lists at any time if they are satisfied that the individual is no longer unsuitable to carry out the relevant type of regulated role. This is in addition to the existing discretion to remove from the list if they are satisfied that the individual should not have been listed.

Section 85: Appeals and removals: information power

175. Sections 18 to 20 of the PVG Act relate to the information gathering powers available to Ministers when considering whether to list an individual (under sections 15 or 16) or whether to remove an individual from the list (under section 26). Section 85 of the Act adds a new

section 29A to the PVG Act that expands the application of sections 18 to 20 so that the powers to obtain information also apply where Ministers are considering whether or not an individual *should not have been listed* or is *no longer unsuitable* to carry out regulated roles with children or adults. This consideration would take place when an individual raises an appeal, but also in other circumstances, e.g. when late representations are received or when Ministers become aware of information from another source which called into question the original listing decision.

Confirmation of PVG Scheme membership

Section 86: Confirmation of scheme membership under the PVG Act

176. Section 86 substitutes two sections in the PVG Act: 46 (Statement of scheme membership), and section 54 (Disclosure of scheme membership).

177. The new section 46 of the PVG Act requires Ministers to provide confirmation of scheme membership to each scheme member and sets out what the content is to be. The confirmation of scheme membership replaces what was previously a statement of scheme membership under the PVG Act. It is a form of disclosure which contains no vetting information (i.e. no details of criminal offences or police information). Under the new provisions, it can now also include information about conditions imposed on a scheme member who is under consideration for listing. The conditions are capable of being imposed under the new section 13A of the PVG Act (inserted by section 76 of the Act). Subsection (3) provides that a confirmation of scheme membership will always be provided to the individual when joining the Scheme, unless the individual makes an application under section 11 for a Level 2 disclosure (to which section 17 of the Act applies) at the same time.

178. The new section 54 of the PVG Act requires Ministers, if requested by the applicant, to provide the confirmation of scheme membership to a third party. This must be for the purpose of enabling the third party to consider a scheme member's suitability to carry out a regulated role. When Ministers make a confirmation of scheme membership available to a third party, they may also send a copy of the confirmation to the scheme member, if requested.

Miscellaneous

Section 87: Retention of scheme records after removal

179. Section 87 inserts a new subsection (3) into section 61 of the PVG Act, so that if Ministers decide under section 59A(1) of the PVG Act not to continue with a consideration case, they can retain information about the scheme member who applied to be removed from the Scheme under section 59 while under consideration for listing.

Section 88: Offences outside Scotland

180. Section 88 introduces sections 37A and 47G into the PVG Act. These sections ensure that Scottish courts have clear jurisdiction over offences under sections 34, 35, 36, 45C, 45D, 45E or 45F of the PVG Act where the acts constituting the offence take place outside Scotland. For instance, this will ensure that an offence under section 35 of the PVG Act, committed by a

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non-Scottish organisation of offering a barred individual for a regulated role in Scotland, can be prosecuted in Scotland.

Section 89: Guidance for chief constable

181. This section inserts section 84A into the PVG Act and provides that Ministers must issue guidance to the chief constable of the Police Service of Scotland about the chief constable's functions under Parts 1 and 2 of the PVG Act (see section 63 for guidance with regard to the chief constable's functions under Part 1 of the Act). Guidance can only be issued after Ministers have consulted the chief constable. The guidance can be reviewed as necessary. The chief constable must have regard to the guidance when exercising any functions under Part 1 or 2 of the PVG Act.

Section 90: Meaning of "conviction"

182. Section 90 inserts a definition of "conviction" into section 97(1) of the PVG Act, and also inserts the term into the Act's index in schedule 5. The meaning of conviction is derived from the 1974 Act. This ensures that a consistent definition of conviction applies throughout the PVG Act (previously the definition only applied for the purposes of Part 2).

183. The meaning of conviction now applies throughout the PVG Act, and "convicted" is construed accordingly except in relation to section 14. A narrower definition is needed for section 14, which deals with automatic listing, so that it does not include disposals by way of absolute discharge – see section 247 of the Criminal Procedure (Scotland) Act 1995.

Part 3: General

Section 91: Regulations

184. This section sets out the extent of powers Ministers have to make regulations. Regulations under any of sections 9(3), 38(1) or 39(1) and regulations under section 92(1) which amend any Act are subject to affirmative procedure. Otherwise, negative procedure can be used. This section does not apply to commencement regulations made under section 97(2).

Section 92: Ancillary provision

185. Section 92 enables Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision relating to the Act. The power can be used to modify any Act including the Act resulting from this Bill.

Section 93: Consequential and minor modifications

186. Section 93 introduces schedule 5, which is in three parts. Part 1 deals with amendments arising from Part 1 of the Act, including repeal of Part 5 of the 1997 Act as it applies in Scotland, and the requirement on Ministers to provide the PVG scheme record and the PVG short scheme record. Part 2 contains amendments to various Acts as a result of Part 2 of the Act (including the change from 'regulated work' to 'regulated roles' and various other

amendments to the PVG Act itself). Part 3 sets out other consequential amendments and minor modifications to Acts, including the PVG Act.

Section 94: Individual culpability where organisation commits offence

187. Section 94 makes provision about offences under the Act committed by legal entities, such as companies, partnerships and associations. Where an offence under the Act is committed by a “relevant organisation”, this section provides that the relevant organisation and, in some cases, a “responsible individual” in that organisation are both to be held responsible. This ensures that those running legal entities who are responsible for the decisions leading to an offence under the Act can also be prosecuted for it.

Section 95: Meaning of “PVG Act”

188. Section 95 provides a meaning for “the PVG Act” in the Act.

Section 96: Crown application

189. Section 96 prevents the Crown from being criminally liable under the Act.

Section 97: Commencement

190. Section 97 makes provision for commencement of the Act, including the power to bring provisions into force by regulations, which can include transitional, saving or transitory provisions, and which may make different provision for different purposes.

Section 98: Short title

191. Section 98 gives the Act’s short title, namely, the Disclosure (Scotland) Act 2020.

Schedule 1: List A offences

192. This schedule contains the list of offences that must always be disclosed, unless removed following a successful review application to Ministers or the independent reviewer, or after an appeal to the sheriff. It has three Parts. Part 1 lists common law offences at paragraphs 1 to 18. Part 2 lists statutory offences at paragraphs 19 to 74, and statutory aggravations at paragraph 75. Part 3 covers common law aggravations⁸ (76 and 77), inchoate offences (78 and 79), superseded offences (80), combined offences (81), and corresponding offences from elsewhere in the UK or abroad (82). List A replaces and amends the list of offences in schedule 8A of the 1997 Act.

⁸ Paragraphs 76 and 77 have the effect of promoting any offence which is not in List A to schedule 1 when the conditions there apply. For example, an offence under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (paragraph 99 of schedule 2) would be treated as a List A offence if it was committed against a child.

Schedule 2: List B offences

193. This schedule contains the list of offences that must be disclosed until they become non-disclosable within the meaning of section 9, or until removed following a successful review application to Ministers or the independent reviewer, or after an appeal to the sheriff. It has three Parts. Part 1 lists common law offences at paragraphs 1 to 18. Part 2 lists statutory offences at paragraphs 19 to 103, and statutory aggravations⁹ at paragraphs 104 and 105. Part 3 covers common law aggravations (106 and 107), inchoate offences (108 and 109), superseded offences (110), combined offences (111), and corresponding offences from elsewhere in the UK or abroad (112). List B replaces and amends the list of offences in schedule 8B of the 1997 Act.

Schedule 3: Schedule to be substituted for schedule 2 of the PVG Act

194. This schedule provides for the substitution of the existing schedule 2 of the PVG Act to deal with the change from “regulated work with children” to “regulated roles with children”.

Part 1: Preliminary

195. Paragraph 1(1) defines what is meant by a regulated role with children. To be carrying out a regulated role, a person must be carrying out one or more activities listed in Part 2 of the schedule. The activities must be carried out as a necessary part of the role and take place in Scotland (or take place outside the UK, the Channel Islands and the Isle of Man and be carried out by an individual who is ordinarily resident in the UK for an organisation or a personnel supplier with a place of business in Scotland, whose functions in relation to the carrying out the activity by the individual are principally exercised at that place of business – see paragraph 1(4) of the schedule).

196. In addition, carrying out the activities must give the person the opportunity to have contact with children (but, the carrying out of activities in an education institution, hospital, nursery, day care premises, hospice, residential care setting or secure accommodation for children, must give the individual carrying them out the opportunity to have *unsupervised* contact with children).

197. “Contact with children” and “unsupervised contact with children” are defined by paragraph 3. Contact includes physical contact with children, written or verbal communication and exercising power or influence over children. Paragraph 3(4) provides the definition of “exercising power or influence” over children

198. The revised definition of “contact with children” marks an important change in the construct of who is brought into scope of the PVG Scheme. The prerequisite for regulated roles with children is not confined to the opportunity for *unsupervised contact* with children in relation to all the activities before a role becomes within scope of the PVG Scheme. The reason for this is that some roles allow individuals to exert power or influence over children to such a

⁹ Paragraphs 104 and 105 have the effect of promoting any offence (other than a List A offence) which is not in List B to schedule 2 when the conditions there apply. For instance, an offence which did not appear in either schedule 1 or schedule 2, but which was racially aggravated, would be treated as a List B offence.

degree that even if contact occurs within the presence of a “responsible person” within the meaning of paragraph 3(1) of schedule 3 the role should still be one which requires membership of the Scheme. The only prerequisite for all the activities (but see paragraph 199 below) in schedule 3 is that the carrying out of the activities gives the individual carrying them out, when doing anything permitted or required in connection with the carrying out of the activities, the opportunity to have “contact with children” (which is then defined in paragraph 3(1) of schedule 3). For example, the football agent representing a child in regards to their future recruitment, training or employment with a football club possesses significant power or influence over the child. Even if the contact occurs within the presence of a parent or other responsible person in relation to the child, the Act ensures that individuals carrying out such a role would be brought into the PVG Scheme. The same would apply to the official working on behalf of the football club.

199. There are some activities that could give a person the opportunity to have unsupervised contact with children which is secondary to them carrying out those activities. Paragraph 21 of schedule 3 states that carrying out an activity in an education institution, hospital, nursery, day care premises, hospice, residential care setting or secure accommodation for children will be a regulated role. But this is qualified by paragraph 1(2)(b)(i) in Part 1 of the schedule so that the activities mentioned must give rise to the opportunity to have unsupervised contact with children. For example, the specific plumber identified in a building firm as the individual who always does work on school premises because they have specialist knowledge of the central heating systems would be regarded as having the opportunity to have unsupervised contact with children, even if actual callouts occur quite infrequently. The concept of unsupervised contact with children is unique to regulated roles with children.

200. A person with day-to-day supervision or management of an individual carrying out a regulated role is also to be treated as being in a regulated role. Training or studying in Scotland for the activities mentioned in Part 2 of the schedule will also amount to a regulated role with children (as will training or study for one of those activities that is undertaken outside the UK, the Channel Islands and the Isle of Man by an individual who is ordinarily resident in the UK for an organisation or a personnel supplier with a place of business in Scotland, whose functions in relation to the carrying out the activity by the individual are principally exercised at that place of business – see paragraph 1(5) of the schedule). For example, a person ordinarily resident in Glasgow going to Trinity College in Dublin to study medicine would not have to join the PVG Scheme. However, the provisions bring into scope any training provided overseas where a person is doing a placement or secondment with a non-Scottish organisation, but their training is still subject to overall supervision and sign-off by a training provider in Scotland. Therefore, a Scottish-domiciled medical student at University of Glasgow on exchange to Trinity College and working in a children’s hospital in Dublin would still need to be a scheme member for the period of the placement/exchange.

201. There are exceptions to regulated roles with children set out in paragraph 2 of the schedule. A person will not be carrying out a regulated role when the interaction with a child is a result of the child being in paid employment (see paragraph 2(1)(a) of the schedule). This means, for example, that a shop manager recruiting or supervising children aged 16 or 17 as assistants (whether paid or unpaid) is not within the scope of regulated roles with children and

does not need to become a member of the PVG Scheme. There is also an exclusion for activities carried out in the course of a family or personal relationship (see paragraph 2(1)(b) and (c) of the schedule). These exclude, for example, a brother providing childcare services for his sister whether or not there is payment or a friend providing unpaid childcare services to another friend. The exclusions are the same as those provided by the definition of “work” in section 95(3) and (4) of the PVG Act (which are to be repealed as a result of the move from regulated work to regulated roles).

Part 2: Activities

202. Part 2 of the new schedule substituted by schedule 3 lists the activities that give rise to a regulated role with children for which PVG scheme membership will be mandatory under the Act.

203. Paragraph 4 covers all types of foster care, including private foster care arrangements. Section 96 of the PVG Act provides a definition of foster care for the purpose of the Act. This covers public fostering arranged by councils under section 26(1)(a) of the Children (Scotland) Act 1995 which would cover many foster care placements and also include the situation where a looked after child is placed by the council with a relative or friend, even though that individual is not a career foster carer. It would thereby include some kinship care scenarios. Those looking after a child in pursuance of a permanence order, and those looking after a child under a supervision requirement are covered too.

204. Paragraph 5 is relevant to care arrangements arranged by a local authority.

205. Paragraph 6 applies, for example, to scout leaders or safety and welfare officers at sports clubs.

206. Paragraph 7 covers social workers (including the Chief Social Worker Officer of a local authority), members of the Children’s Panel, Children’s Hearings Scotland or the Scottish Children’s Reporter Administration. Explicitly excluded are individuals carrying out such a role in the capacity of an “elected representative”, which paragraph 31 defines as (a) a member of the House of Commons or (b) a member of the Scottish Parliament. Accordingly, paragraph 7 does extend to councillors of local authorities who have the ability to directly influence decisions about the welfare or safety of a child, for example, due to holding a position on a committee concerned with the provision of children’s social services.

207. Paragraph 8 covers teaching, instructing or delivering training to children. This captures teaching of any subject, in an establishment such as a school or home-based tuition.

208. Paragraph 9 makes provision for education inspectors, the Chief Education Officer of a local authority, members of the governing body responsible for the management of a school or further education institution and the Registrar of Independent Schools in Scotland. Explicitly excluded are individuals carrying out such a role in the capacity of an “elected representative” which paragraph 31 defines as (a) a member of the House of Commons or (b) a member of the Scottish Parliament. Accordingly, paragraph 9 does extend to councillors of a local authority who have the ability to directly influence operational delivery of education services for

children, for example, due to holding a position on a particular committee with an education remit.

209. Paragraph 10 captures those who act on behalf of children where a power imbalance exists, for instance football agents and talent scouts. This matter was considered by the Scottish Parliament's Health and Sport Committee in their report *Child Protection in Sport*¹⁰.

210. Paragraph 11 covers individuals engaged in the provision of advice or guidance in relation to career development or education, for example careers advisers.

211. Paragraph 12 makes provision to cover activities such as crèche workers where individuals will be in charge or caring for children.

212. Paragraphs 13 to 19 cover various health professionals who are actively practising and are not, for example, on a career break.

213. Paragraph 20 covers those providing domestic services (such as cleaning, food preparation, caretaking or maintenance roles) in establishments which are provided for children, such as schools, children's hospitals, nurseries or outdoor activity centres for children.

214. Paragraph 21 is qualified by paragraph 1(2)(b)(i) in Part 1 of the schedule so that the activities mentioned in paragraph 21 must give rise to the opportunity to have unsupervised contact with children (see paragraph 3(1) of the schedule for the meaning of "unsupervised contact with children").

215. Paragraph 22 covers the provision of a care home service or independent healthcare service as defined by the interpretation section at paragraph 31.

216. Paragraph 23 makes provision for self-employed individuals providing personal care services.

217. Paragraph 24 covers individuals providing counselling, therapy or advice or guidance in relation to health or wellbeing to children. This covers advice or guidance provided to a child on their physical or mental health or welfare. The activities mentioned in paragraph 24 capture individuals providing these services to children within shelters, hostels, refuges and other types of accommodation where they are offered support or guidance on their situation or experience. Excluded from scope however are individuals providing such services to a fellow prisoner in a young offenders institution for example. This exception will enable individuals who may be automatically barred from carrying out regulated roles with children due to the nature of their convictions to take part in peer to peer support services provided to other prisoners.

218. Paragraph 25 covers persons who have responsibility for the scrutiny or inspection, on behalf of a statutory body, of medical and healthcare services provided for children. Explicitly excluded are individuals carrying out such a role in the capacity of an "elected representative" which paragraph 31 defines as (a) a member of the House of Commons or (b) a member of the

¹⁰ <https://sp-bpr-en-prod-cdneq.azureedge.net/published/HS/2017/4/26/Child-Protection-in-Sport/3rd%20Report.pdf>

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Scottish Parliament. Accordingly, paragraph 25 does extend to councillors of a local authority who have the ability to directly influence the operational delivery of medical or care services for children, for example, due to holding a position on a committee.

219. Paragraph 26 covers, for example, individuals providing entertainment or party services for children or photography services for children, or people running art classes or summer clubs for children.

220. Paragraph 27 covers individuals providing sports coaching or coaching of other physical activities to children.

221. Paragraph 28 covers individuals volunteering at Sunday school, youth church activities or chaplaincy services. This paragraph covers all denominations or religious beliefs.

222. Paragraph 29 makes provision for individuals engaging in the provision of transport services for children but is limited to those driving or escorting children, for example, on a school bus rather than a depot manager or individual arranging the scheduling for the transport service.

223. Paragraph 30 captures persons such as trustees of a children's charity and the Commissioner for Children and Young People in Scotland.

224. Interpretation is provided for certain terms and expressions used in the substituted schedule by paragraph 31. Paragraph 32 gives Ministers a power (by regulations subject to the negative procedure) to amend the meaning of the expression "further education institution" but only for the purposes of this schedule.

Part 3: General

225. Paragraph 33 allows Ministers by regulations to modify the substituted schedule, by affirmative procedure. Paragraph 34 clarifies that Ministers' power to make regulations under paragraph 33 can include provision to disapply or otherwise modify the application of the offence provisions at sections 34 to 37 and sections 45C to 45G of the PVG Act.

Schedule 4: Schedule to be substituted for schedule 3 of the PVG Act

226. This schedule provides for the substitution of the existing schedule 3 of the PVG Act to deal with the change from "regulated work with adults" to "regulated roles with adults".

Part 1: Preliminary

227. Paragraph 1(1) defines what is meant by a regulated role with adults. A person must be carrying out one or more activities listed in Part 2 of the schedule. The activities must be a necessary part of the role and take place in Scotland (or take place outside the UK, the Channel Islands and the Isle of Man and be carried out by an individual who is ordinarily resident in the UK for an organisation or a personnel supplier with a place of business in Scotland, whose functions in relation to the carrying out the activity by the individual are principally exercised at that place of business – see paragraph 1(4) of the schedule).

228. In addition, the carrying out of the activities must give the individual the opportunity to have “contact with protected adults” (defined in paragraph 3 of the schedule). Contact includes physical contact with protected adults, written or verbal communication and exercising power or influence over protected adults. Paragraph 3(3) provides the definition of “exercising power or influence” over protected adults.

229. A person with day-to-day supervision or management of an individual carrying out a regulated role with adults is also to be treated as being in a regulated role (see paragraph 1(3)(a) of the schedule). Those involved in training or studying in Scotland for the activities listed in Part 2 will also be treated as carrying out a regulated role with adults (see paragraph 1(3)(b) of the schedule) (as will individuals who are ordinarily resident in the UK who are undertaking training or study for a regulated role with adults outside the UK, the Channel Islands and the Isle of Man for an organisation or a personnel supplier with a place of business in Scotland, whose functions in relation to the carrying out the activity by the individual are principally exercised at that place of business – see paragraph 1(5) of the schedule).

230. There are exceptions to regulated roles with adults set out in paragraph 2. An activity carried out in the course of a family relationship (either paid or unpaid) or in the course of a personal relationship where there is no payment is not a regulated role. This preserves the exclusions to what was considered “work” under section 95(3) and (4) of the PVG Act (which is repealed by the Act as a result of the shift from regulated work to regulated roles).

Part 2: Activities

231. Part 2 of schedule 4 lists the activities that give rise to a regulated role with adults.

232. Paragraphs 4 and 5 cover teaching, instructing, training or supervising protected adults, as well as the provision of advice or guidance in relation to education, training or employability.

233. Paragraphs 6 to 12 cover various health professions who are actively practising and are not, for example, on a career break.

234. Paragraph 13 covers domestic service activities that may be provided to a protected adult, for example in a hospital, hospice, care home, day care centre or adult placement setting. This could include such things as cleaning, maintenance and food preparation.

235. Paragraph 14 covers activities where an individual is in charge of protected adults, for instance someone leading a group or one-to-one activity with protected adults.

236. Paragraph 15 makes provision for self-employed individuals providing personal care services.

237. Paragraph 16 makes provision for individuals providing support to a protected adult under a shared lives scheme, as defined by paragraph 24. This captures a shared lives carer, which is an individual who provides, or intends to provide, personal care to a protected adult together with, where necessary, accommodation in the carer’s home. Also covered are individuals recruiting and training shared lives carers, those making arrangements to place

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protected adults with shared lives carers and individuals supporting and monitoring such placements.

238. Paragraph 17 covers individuals providing counselling, therapy or advice or guidance in relation to health or wellbeing to protected adults. This covers advice or guidance provided to a protected adult on their physical or mental health or welfare. The activities mentioned in paragraph 17 capture individuals providing services related to domestic abuse and homelessness, as referred to in subsection(1)(aa) inserted into section 94 of the PVG Act by section 75(2) of the Act (meaning of protected adult). Services such as shelters, hostels, refuges and other types of accommodation that someone may find themselves in, and where they are offered support or guidance on their situation or experience, are covered. Excluded from scope, however, are individuals providing such services to a fellow prisoner. This exception will enable individuals who may be automatically barred from carrying out regulated roles with protected adults due to the nature of their convictions to take part in peer to peer support services provided to other prisoners.

239. Paragraph 18 covers the Chief Social Work Officer of a local authority and persons who have responsibility for the scrutiny or inspection, on behalf of a statutory body, of medical and healthcare services provided for protected adults. Explicitly excluded are individuals carrying out such a role in the capacity of an “elected representative” which paragraph 24 defines as (a) a member of the House of Commons or (b) a member of the Scottish Parliament. Accordingly, paragraph 18 does extend to councillors of a local authority who have the ability to directly influence the operational delivery of medical or care services for protected adults, for example, due to holding a position on a committee.

240. Paragraphs 19 covers individuals providing leisure, cultural, social or recreational activities for protected adults.

241. Paragraph 20 covers individuals providing sports coaching or other physical activities to protected adults.

242. Paragraph 21 covers, for example, individuals volunteering at church activities or chaplaincy services. This paragraph covers all denominations or religious beliefs.

243. Paragraph 22 makes provision for individuals engaging in the provision of transport services for protected adults but is limited to those driving or escorting protected adults, for example, rather than a depot manager or individual arranging the scheduling for the transport service.

244. Paragraph 23 includes individuals holding a position of responsibility in an organisation whose main purpose is to provide benefits for or to protected adults.

245. Interpretation is provided for certain terms and expressions used in schedule 4 by paragraph 24.

Part 3: General

246. Paragraph 25 allows Ministers by affirmative regulations to modify the substituted schedule. Paragraph 26 clarifies that Ministers' power to make regulations under paragraph 25 can include provision to disapply or otherwise modify the application of the offence provisions at sections 34 to 37 and sections 45C to 45F of the PVG Act.

Schedule 5: Consequential and minor modifications

247. This schedule is introduced by section 93. It repeals Part 5 of the Police Act 1997 (certificates of criminal records etc.) and makes various consequential and minor modifications to other Acts (including the PVG Act) as a result of changes to the disclosure system and the operation of the PVG Scheme and barring service made by the Act.

248. By virtue of the amendments made to the 1974 Act by paragraph 2 of the schedule, the majority of childhood convictions will become spent immediately. Sub-paragraph (8) amends section 5J (sentences to which no disclosure period applies) of the 1974 Act, as inserted by the Management of Offenders (Scotland) Act 2019. The effect of sub-paragraph (8)(a) is that there is no disclosure period for any sentence, other than an excepted sentence mentioned in the new subsection (1A) of section 5J, imposed on a person in respect of a conviction for an offence committed when the person was under the age of 18 years. Sub-paragraph (8)(b) then inserts subsection (1A) which sets out the excepted sentences, namely excluded sentences and custodial sentences of over 12 months in respect of sexual offences (which are listed in paragraphs 52 to 59 of schedule 1 of the Act). This paragraph also adds a new subsection (1B) to section 5J of the 1974 Act, providing for an age presumption similar to that in section 40 of the Act, where for the purposes of the definition of childhood conviction only, it will be presumed that a person convicted of an offence was of the same age at the time when the offence was committed as at the date of conviction, in the absence of evidence to the contrary.

249. To avoid possible inconsistencies or scope for confusion in the 1974 Act, sub-paragraphs (2) to (7) of paragraph 2 of schedule 5 make a number of consequential technical amendments to sections 5 to 5I of the 1974 Act. This includes amendments to the specific disclosure periods for sentences imposed when a person was under the age of 18 at the date of conviction. Sub-paragraph (2) makes it clear that section 5(2A)(a) is subject to section 5J(1)(ba). Sub-paragraph (3) amends the relevant entries in the third column in Table A so that the disclosure periods are reduced to nil, as a consequence of the new section 5J(1)(ba). Sub-paragraphs (4) to (7) amend sections 5B, 5C, 5D and 5I, removing obsolete references to disclosure periods in respect of these sentences.

250. Paragraph 5(3)(b) of the schedule applies section 33 of the Act which sets out the list of decision making matters (see paragraphs 70 to 75 of these notes) for the purposes of section 49 of the PVG Act, which is concerned with the provision of ORI to Scottish Ministers. Sub-paragraphs (a) to (d) of the new subsection (1A) inserted by paragraph 5(3) provide that references in section 33 of the Act to a conviction or children's hearing outcome are omitted, and references to other information are to be considered as references to the chief constable considering whether to include ORI in the scheme member's scheme record. Similarly, paragraph 7(8)(b) of the schedule extends the same decision-making principles to decisions

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made on the inclusion of relevant behaviour in a disclosure certificate under section 18 of the Age of Criminal Responsibility (Scotland) Act 2019. However, references to convictions and children’s hearing outcomes are omitted and references to other information are to be taken as references to information mentioned under section 14(1)(a) of that Act.

PARLIAMENTARY HISTORY

251. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill’s parliamentary passage.

Proceedings and reports	Reference
<i>Introduction</i>	
Bill as introduced, 12 June 2019	Session 5 SP Bill 50 [as introduced]
Policy Memorandum	Session 5 SP Bill 50-PM [policy memorandum]
Financial Memorandum	Session 5 SP Bill 50-FM [financial memorandum]
Explanatory Notes	Session 5 SP Bill 50-EN [explanatory notes]
Delegated Powers Memorandum	Session 5 SP Bill 50-DPM [delegated powers memorandum]
Scottish Parliament Information Centre briefing, 30 August 2019	SPICe Briefing, The Disclosure (Scotland) Bill, SB 19-53
<i>Stage 1</i>	
Education and Skills Committee, 4 September 2019	Col 2 - 14
Education and Skills Committee, 9 October 2019	Col 2 - 28
Education and Skills Committee, 6 November 2019	Col 2 - 28
Education and Skills Committee, 13 November 2019	Col 1 - 24
Education and Skills Committee, 20 November 2019	Col 2 - 24
Delegated Powers and Law Reform Committee, Stage 1 Report, 2 October 2019	SP Paper 594, 46th Report 2019 (Session 5)
Education and Skills Committee, Stage 1 Report, 17 December 2019	SP Paper 643, 9th Report (Session 5)

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Proceedings and reports	Reference
Stage 1 Debate, 16 January 2020	Meeting of the Parliament, col 55 - 99
Education and Skills Committee, post-Stage 1 evidence, 19 February 2019	Col 1 - 9
<i>Stage 2</i>	
Education and Skills Committee, Stage 2, Day 1, 4 March 2019	Col 3 - 26
Education and Skills Committee, Stage 2, Day 2, 11 March 2020	Col 3 - 46
Bill as amended at Stage 2	Session 5 SP Bill 50 [as amended at Stage 2]
Revised Explanatory Notes	Session 5 SP Bill 50-EN [revised explanatory notes]
Revised Delegated Powers Memorandum	Session 5 SP Bill 50-DPM [supplementary delegated powers memorandum]
Delegated Powers and Law Reform Committee, post Stage 2 report, 23 April 2020	SP Paper 720, 24th Report 2020 (Session 5)
<i>Stage 3</i>	
Scottish Parliament Information Centre briefing, 4 June 2020	Briefing for Members at Stage 3, SB 20-39
Stage 3 (consideration of amendments and debate), 10 June 2020	Meeting of the Parliament, col 90 - 126
Bill as passed	Session 5 SP Bill 50 [as passed]
Royal Assent — 14 July 2020	2020 asp 13

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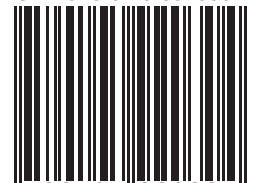
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