POLICY NOTE

THE DISCLOSURE AND USE OF LEVEL 2 DISCLOSURES (PRESCRIBED PURPOSE AND CIRCUMSTANCES) (SCOTLAND) REGULATIONS 2024

SSI 2024/317

The above instrument was made in exercise of the powers conferred by sections 45(1)(f) and 45(2)(f) of the Disclosure (Scotland) Act 2020 and all other powers enabling them to do so. The instrument is subject to negative procedure.

Summary Box

These Regulations prescribe a further purpose and further circumstances, in which the offences under sections 42 and 44 of the Disclosure (Scotland) Act 2020 do not apply. That purpose and those circumstances are where an individual's employer has contractual arrangements with one of the specified third parties for the provision of transport services.

Policy Objectives

1. Disclosure Scotland is an executive agency of the Scottish Government that provides criminal record disclosures, maintains the Protecting Vulnerable Groups Scheme ("the PVG Scheme") and keeps lists of individuals barred from working with children and/or protected adults on behalf of Scottish Ministers.

2. The Disclosure (Scotland) Act 2020 ("the Disclosure Act") reforms the disclosure regime in Scotland, repealing Part 5 of the Police Act 1997 as it applies in Scotland and also making amendments to the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act") under which the Scottish Ministers administer the PVG Scheme.

3. Section 17 of the Disclosure Act makes provision for a Level 2 disclosure with scheme membership information to be provided to the accredited body which countersigned the application where the applicant requests that to happen in accordance with section 18.

4. Section 42 of the Disclosure Act 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. Section 44 of the Disclosure Act 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. Section 45 of the Disclosure Act sets out exceptions to the disclosure offences under sections 42 and 44.

5. These Regulations prescribe further exception to the disclosure offences under section 42 and 44 in relation to arrangements for the transportation of children and protected adults in particular circumstances where a third party may seek to use an individual's disclosure record. Regulation 3 specifies that those circumstances are where the

individual is doing a regulated role that involves transporting children or protected adults to an educational institution, health body or independent care service under the arrangements made by the individual's employer and the council or educational institution, health body or independent health care service.

6. Regulation 3(2) of these Regulations enables an employer to share a Level 2 disclosure with scheme membership information with the organisation contracting their services in the circumstances set out and not commit an offence under section 42(1) of the Disclosure Act.

7. Regulation 3(3) of these Regulations enable an organisation contracting transport services in these circumstances to use a Level 2 disclosure with scheme membership information and not commit an offence under section 44(3) of the Disclosure Act.

8. These Regulations support the safeguarding of children and protected adults in circumstances where they are under the care of the organisation contracting the transport service but where the service is not being provided directly by that organisation. This supports a consistent safeguarding approach.

9. These Regulations replicate provision provided for in the Protection of Vulnerable Groups (Scotland) Act 2007 (Unlawful Requests for Scheme Records) (Prescribed Circumstances) Regulations 2010 ("the 2010 Regulations"), permitting a continuity of the existing policy under the new disclosure types. The 2010 Regulations will be revoked as part of the Disclosure Act implementation project.

10. Further details of the policy objectives relating to the Disclosure Act are set out in the Policy Memorandum (https://www.parliament.scot/-/media/files/legislation/bills/s5-bills/disclosure-scotland-bill/introduced/policy-memorandum-disclosure-scotland-bill.pdf) which accompanied the Disclosure (Scotland) Bill. The Scottish Parliament website (https://www.parliament.scot/bills-and-laws/bills/s5/disclosure-scotland-bill) also sets out the timeline for the passage of the Bill.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

11. The Scottish Ministers have made the following statement regarding children's rights:

    In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, the Disclosure and Use of Level 2 Disclosures (Prescribed Purpose and Circumstances) (Scotland) Regulations 2024 are compatible with the UNCRC requirements as defined by section 1(2) of that Act.

EU Alignment Consideration

12. This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

13. The Disclosure Act received wide cross-party support during its passage through Parliament and was passed unanimously. Disclosure Scotland are continuing to engage with external stakeholders as part of the implementation of the Disclosure Act.

14. Disclosure Scotland published a consultation paper on 25 April 2018. This was distributed widely to a large number of stakeholders, including over 3,000 registered bodies. There were 353 responses, 269 from organisations and 84 from individuals. There were responses from a range of stakeholders with varying backgrounds including judicial bodies, the legal sector, local government, voluntary organisations, the health sector and individual PVG Scheme members.

15. There was extensive engagement with stakeholders during the consultation period. This included group discussions and meetings with individual groups or organisations, in total 38 engagement sessions took place during the formal consultation period. During this time Disclosure Scotland User Researchers also engaged with a variety of stakeholders. Since April 2016 the user research team carried out a significant amount of research, which has included a range of users, including;

    - individuals with and without experience of using Disclosure Scotland's services,
    - individuals with convictions,
    - care experienced people,
    - people with disabilities, including blind participants, deaf participants, people with low cognitive skills, dyslexia, dyspraxia,
    - organisations – including various roles e.g. HR, admin staff, countersignatories,
    - charities, and
    - voluntary organisations.

16. The results of the consultation informed further development of the policy and Disclosure (Scotland) Bill provisions. The Scottish Government published its response (https://www.gov.scot/publications/government-response-protection-vulnerable-groups-disclosure-criminal-information-consultation/pages/1/) to the consultation on 13 June 2019.

17. These Regulations continue in effect the current policy for the sharing and use of PVG scheme records in these specific circumstances. There was extensive engagement in 2009 and 2010 on the scope of circumstances where such disclosures should be made available. The Scottish Government sought views on whether the Protection of Vulnerable Groups (Scotland) Act 2007 (Unlawful Requests For Scheme Records) (Prescribed Circumstances) Regulations 2010 delivered the policy as intended and whether they should be adjusted, although extension beyond transport services was outside the scope of the consultation. The ability to use the provisions have been adopted into practice, notably for local authorities on transport contracts where there is standardised guidance. The review of the PVG scheme in 2017 and recent engagement has not identified a need for changes to the scope of the circumstances where this type of sharing would be lawful.

18. Disclosure Scotland are committed to providing more guidance and training and continually engage with stakeholders to develop guidance and training that meets user needs. This commitment to providing improved resources to support stakeholders is one that will continue throughout the transition to the refreshed disclosure regime under the Disclosure Act. The guidance provided by the Scottish Government to local authorities on transport services will be updated to reflect the updates in legislative references and terminology.

Impact Assessments

19. A suite of Impact Assessments was completed as part of the Disclosure (Scotland) Bill process: ()

    - Disclosure (Scotland) Bill: Fairer Scotland Duty assessment (https://www.gov.scot/publications/disclosure-scotland-bill-impact-assessment-fairer-scotland-duty/)
    - Disclosure (Scotland) Bill: children rights and wellbeing impact assessment (https://www.gov.scot/publications/disclosure-scotland-bill-impact-assessment-crwia/)
    - Disclosure (Scotland) Bill: data protection impact assessment (https://www.gov.scot/publications/disclosure-scotland-bill-impact-assessment-dpia/)
    - Disclosure (Scotland) Bill: equality impact assessment (https://www.gov.scot/publications/disclosure-scotland-bill-impact-assessment-eqia/)
    - Disclosure (Scotland) Bill: partial Business and Regulatory Impact Assessment (https://www.gov.scot/publications/disclosure-scotland-bill-impact-assessment-partial-bria/)

20. An Equalities Impact Assessment and an Impact Assessment regarding Children's Rights and Wellbeing have been completed for these Regulations. These will be published alongside this instrument on legislation.gov.uk. No negative equality impact issues have been identified. No impact on children's rights have been identified.

21. Fairer Scotland Duty Assessment and Island Communities Impact Assessment screening was undertaken. No impact was identified during screening and a full impact assessment was not done.

Financial Effects

22. The Minister for Children, Young People and the Promise confirms that a BRIA has been completed for this instrument however it has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Disclosure Scotland

November 2024