POLICY NOTE

THE DISCLOSURE (SCOTLAND) ACT 2020 (COMMENCEMENT NO. 5, SAVING AND TRANSITIONAL PROVISION) REGULATIONS 2025

SSI 2025/27 (C. 4)

The above instrument is made by Scottish Ministers in exercise of the powers conferred by section 97(2) and (3) of the Disclosure (Scotland) Act 2020 ("the Disclosure Act") and all other powers enabling them to do so.

The instrument is subject to no procedure.

Summary Box

Commencement

This instrument brings into force the remainder of the provisions required for implementation of the Disclosure Act on 1 April 2025.

Savings and Transitional

This instrument makes saving and transitional provisions in consequence of some of the commencement provisions.

These provisions allow for the continued operation of both the disclosure functions and the Protecting Vulnerable Groups Scheme ("the PVG Scheme") to reflect the changes made to the disclosure system by Parts 1 and 2 of the Disclosure Act. The Regulations also make transitional provision in relation to offences inserted into the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act") by the Disclosure Act.

Policy Objectives

1. Disclosure Scotland is an executive agency of the Scottish Government that provides criminal record disclosures, maintains the PVG Scheme and keeps lists of individuals barred from working with children and 'protected' adults on behalf of Scottish Ministers.

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

   Background

   Part 1 of the Disclosure Act

3. Prior to the Disclosure Act, disclosure vetting functions were performed in accordance with Part 5 of the Police Act and Part 2 of the PVG Act.

4. Part 1 of the Disclosure Act reforms the system of disclosure of criminal records administered by the Scottish Ministers. Key changes under Part 1 of the Disclosure Act include:

- introducing Level 1 and Level 2 disclosures, replacing the previous disclosure types under the Police Act and PVG Act,

- introducing a right for individuals to apply for a review of the information included in their Level 1 or 2 disclosure on grounds of accuracy; to apply for a review of the decision by the Chief Constable to disclose other relevant information in their Level 2 disclosure; and to apply for a review of the decision by the Scottish Ministers to include details of a spent conviction in their Level 2 disclosure,

- introducing a right for individuals to apply to the independent reviewer in relation to a decision made by the Scottish Ministers or the Chief Constable to include information in their Level 2 disclosure,

- ending of automatic disclosure of childhood convictions; childhood convictions will now only ever be disclosed following a review by the independent reviewer,

- replacing the system of registration, under the Police Act, of registered persons who can countersign criminal record certificates, enhanced criminal record certificates, scheme records and short scheme records, with the register of accredited bodies who can request Level 1 disclosure applications on behalf of individuals and countersign Level 2 disclosure applications.

Operation of the PVG Scheme

5. Part 2 of the Disclosure Act amends the operation of the PVG Scheme under the PVG Act. Key changes under Part 2 of the Disclosure Act include:

- making it a requirement for anyone carrying out a regulated role (paid, unpaid or voluntary) to be a member of the PVG Scheme. Section 73 of the Disclosure Act inserts new offences into the PVG Act to support compulsory scheme membership,

- introducing 'regulated roles' as the basis of the compulsory scheme membership, replacing the previous concept of regulated work (see substituted section 91 of the PVG Act),

- substituting a new definition of protected adult (see substituted section 94 of the PVG Act),

- introducing a power which enables the chief constable of Police Scotland to make a referral to the Scottish Ministers, if the chief constable considers an individual is or has been carrying out a regulated role without being a PVG scheme member.

Commencement

6. Regulations 1(2), and 3(1) and (2) and the schedule of these Regulations bring into force the provisions of the Disclosure Act specified in column 1 of the table in the schedule on 1 April 2025. If a purpose is stated in column 3 of the table in the schedule, the provision is only brought into force for that purpose. Regulation 1(3) and 3(3) bring section 73(2) of the Disclosure Act (compulsory Scheme membership) into force for all remaining purposes on 1 July 2025. This affords a 3 months grace period to individuals who are not currently PVG Scheme members but will need to be, by virtue of the roles they are carrying out, so as to not fall foul of the mandatory offence provision. It also ensures that organisations who are encouraging individuals to take steps to join the PVG Scheme up until the 1 April 2025, do not inadvertently fall foul of this offence if Disclosure Scotland are still processing applications to join.

Savings and Transitional

7. Disclosure Scotland issued criminal conviction certificates (known as Basic Disclosures), criminal record certificates (known as Standard Disclosures) and enhanced criminal record certificates (known as Enhanced Disclosures) under the Police Act. They also disclosed scheme records, short scheme records (known as Scheme Record Updates) and statements of scheme membership under the PVG Act.

8. Under the Disclosure Act, Level 1 and 2 disclosures will replace these previous disclosure types under the Police and PVG Acts.

9. Under the Police and PVG Acts, applicants had a right to dispute the accuracy of information contained within a disclosure certificate (issued under the Police Act) or scheme record (disclosed under the PVG Act). Where the dispute was upheld, Disclosure Scotland was required to issue/disclose an accurate disclosure certificate or scheme record.

10. Under the Disclosure Act, applicants have the right to apply for the review of accuracy of information contained in their Level 1 or Level 2 disclosure. If the final decision is that the information is inaccurate, the Scottish Ministers must provide a new disclosure with corrected information.

11. Under the Police and PVG Acts, individuals applying for Standard or Enhanced Disclosure certificates, or a scheme record had a right to apply to a sheriff for certain spent convictions to be removed from their disclosure certificate or scheme record. In order to make such an application, the individual was required to notify Disclosure

Scotland of their intention to apply for a review to a sheriff within 10 days of their disclosure certificate or scheme record being issued/disclosed.

12. Where a sheriff ordered the removal of a spent conviction from a disclosure certificate or scheme record, Disclosure Scotland was required to issue or disclose a new disclosure certificate or scheme record without that spent conviction included.

13. Under the Disclosure Act, individuals can apply for a review of any reviewable information included in their Level 2 disclosure. Reviewable information for the purposes of Level 2 disclosures is childhood information,**1** relevant police information, and details of removable convictions.**2** In order to make the application, the individual is required to notify Scottish Ministers of their intent to do so and then make the application to the Scottish Ministers within a prescribed time period.

14. If the final decision in relation to any of the reviewable information is that it is not relevant and ought not to be included, the Scottish Ministers must issue a new Level 2 disclosure to the applicant with the information excluded from the Level 2 disclosure.

15. Under the Police Act, a person could register as a registered person to countersign applications for standard or enhanced disclosure certificates under the Police Act or scheme records or short scheme records under the PVG Act.

16. Under the Disclosure Act, a person may apply to be registered in the register of accredited bodies to be a person (accredited body) registered to make applications for Level 1 disclosures and countersign applications for Level 2 disclosures, or both.

<u>What this instrument does</u>

Savings and transitional provisions – Part 1 of the Disclosure Act

17. The relevant date for the purposes of this SSI is 1 April 2025. This is defined in regulation 2.

18. Regulation 4 makes transitional provision relating to applications for Basic Disclosures (made under section 112 of the Police Act). It provides that, where an application for a basic disclosure is made before the relevant date and on that date the Scottish Ministers have not yet issued the disclosure certificate, the application will be treated for all purposes as an application for a Level 1 disclosure made under section 2 of the Disclosure Act and processed accordingly. This means that the applicant can benefit from the new review mechanisms set out in sections 5 and 6 of the Disclosure Act as a result.

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1 https://www.legislation.gov.uk/asp/2020/13/section/13
2 https://www.legislation.gov.uk/asp/2020/13/section/20

19. Regulation 5 makes transitional provision relating to applications for Standard and Enhanced Disclosures (made under sections 113A, 113B, 114 or 116 of the Police Act) and requests for scheme records or short scheme records (made under sections 52 or 53 of the PVG Act).

20. It provides that where, before the relevant date, an application is made for any of those disclosure certificates or records and on that date Disclosure Scotland has not yet issued the certificate or disclosed the record, the application will be treated for all purposes as if it were an application for a Level 2 disclosure made under section 11 of the Disclosure Act and processed accordingly. This means that the applicant can benefit from the new review mechanisms set out in sections 20 to 30 of the Disclosure Act as a result.

21. Regulation 6 makes transitional provision relating to requests for statements of scheme membership that are made before the relevant date. A statement of scheme membership is a document which sets out the type of regulated work the individual is a scheme member for, confirms they are not barred from doing that work, states if Scottish Ministers are considering whether to list the scheme member. A confirmation of scheme membership will replace a statement of scheme membership.

22. If such a request is made before the relevant date and on that date the Scottish Ministers have not yet disclosed the statement of scheme membership, the request will be treated as if it were a request for a confirmation of scheme membership.

23. Regulation 7 makes transitional provision relating to disputes about accuracy of disclosure certificates issued under the Police Act (Basic, Standard, and Enhanced) and correction of inaccurate scheme records disclosed under the PVG Act.

24. Paragraphs (1) and (2) of regulation 7 provide that where, before the relevant date, Scottish Ministers have issued a certificate under the Police Act or disclosed a scheme record under the PVG Act and then on or after that date receive notification from an individual that they believe the information contained in the disclosure certificate or scheme record to be inaccurate, the Scottish Ministers must –

    - treat a basic disclosure (issued under section 112 of the Police Act) as if it were a Level 1 disclosure for which an application for review has been made under section 5(1) of the Disclosure Act.
    - treat a standard or enhanced disclosure (issued under 113A, 113B, 114 or 116 of the Police Act) or scheme record disclosed under section 52 of the PVG Act as if it were a Level 2 disclosure for which an application for review had been made under section 20(1)(a) under the Disclosure Act.

25. Where paragraph (2)(b) of regulation 7 applies, the requirement in section 20(3) of the Disclosure Act does not apply, meaning that it is not necessary for the applicant to have previously notified Scottish Ministers under 18(1)(b) of the Disclosure Act of their intention to make the application for review of accuracy.

26. Paragraphs (4) and (5) of regulation 7 provide that, where Scottish Ministers were already considering the accuracy of the information included in a disclosure certificate issued under the Police Act or scheme record issued under the PVG Act before the relevant date and on that date they have not yet made a decision about the accuracy of the information, they must -

    - treat a basic disclosure (issued under section 112 of the Police Act) as if it were a Level 1 disclosure in respect of which they are carrying out a review under section 6(2) of the Disclosure Act, and
    - treat a standard or enhanced disclosure (issued under section 113A, 113B, 114 or 116 of the Police Act) or scheme record disclosed under section 52 of the PVG Act as if it were a Level 2 disclosure in respect of which they are carrying out a review under section 21(2) of the Disclosure Act.

27. Regulation 7 allows the applicant in each circumstance to benefit from the review processes introduced by the Disclosure Act.

28. Regulation 8 makes transitional provision relating to certificates and scheme records which contain convictions falling within section 116ZA(1A) of the Police Act or section 52(2A) of the PVG Act. These are spent convictions which can be the subject of an application to the sheriff, for removal from a disclosure certificate or scheme record.**3**

29. Paragraphs (1) and (2) of regulation 8 provide that where, before the relevant date, Scottish Ministers have issued a standard disclosure or enhanced disclosure or a PVG scheme record which includes details of such a conviction and on that date –

    - and the applicant has not yet notified the Scottish Ministers of an intention to make an application to the sheriff under section 116ZB(2) of the Police Act or section 52A(2) of the PVG Act for the conviction to be removed,
    - and the notification period (10 days) has not expired,

    the Scottish Ministers must treat the original disclosure certificate application or original scheme record request for all purposes as if it were an application for a Level 2 disclosure under section 11 of the Disclosure Act. This means that any subsequent notification made by the individual (made within the timescale for doing so) will be treated as a Level 2 review application under section 20(1)(b) of the Disclosure Act,

3 Applications can be made under section 116ZB of the Police Act and 52A of the PVG Act.

meaning the applicant can benefit from the review processes introduced by the Disclosure Act.

30. Paragraphs (3) and (4) of regulation 8 provide for circumstances where the Scottish Ministers have issued a standard disclosure or enhanced disclosure or a PVG scheme record and the individual has already, within the 10 day notification period, notified the Scottish Ministers of their intention to make an application to the sheriff before the relevant date but on that date the individual has not yet made the actual application and the 3 month period (mentioned in 116ZB(3)(b) of the Police Act or section 52A(3)(b) of the PVG Act) has not expired.

31. In these circumstances, the Scottish Ministers must for all purposes treat the notification of an intention to make an application to the sheriff as a Level 2 review application made under section 20(1)(b) of the Disclosure Act. Again, this means the applicant can benefit from the review processes introduced by the Disclosure Act.

32. Regulation 9 makes savings and transitional provision relating to applications already made by individuals to a sheriff for an order (under section 116ZB of the 1997 Act or section 52A of the PVG Act) to remove spent convictions from their disclosure certificate or scheme record.

33. Paragraph (1) of regulation 9 makes saving provision to ensure that relevant sections of the Police and PVG Acts continue to apply in relation to applications made to the sheriff before the relevant date which have not been finally disposed of by the relevant date.

34. Paragraphs (2) and (4) of regulation 9 make transitional provision so that, where on or after the relevant date, the sheriff allows an application (meaning they are satisfied the conviction is not relevant), the sheriff must order the Scottish Ministers to –

    - issue a Level 2 disclosure to the individual as if the individual had made an application for a Level 2 disclosure under section 11 of the Disclosure Act on the date on which the sheriff makes the order, and
    - exclude from that Level 2 disclosure the details which the sheriff is satisfied are not relevant.

35. Paragraphs (3) and (5) of regulation 9 makes transitional provision so that where on or after the relevant date, the sheriff refuses an application (meaning they are satisfied the conviction is relevant), the sheriff must order the Scottish Ministers to issue a Level 2 disclosure (with the conviction included) to the individual as if the individual had made an application for a Level 2 disclosure under section 11 of the Disclosure Act on the date on which the sheriff makes the order.

36. The provisions in paragraphs (2), (3), (4) and (5) mean that the applicant is provided with a current disclosure product under the new regime, and that the disclosure includes the most up to date information, avoiding any potential safeguarding risks.

37. Paragraphs (6) and (7) of regulation 9 makes transitional provision so that an individual cannot make a Level 2 review application under section 20(1) of the Disclosure Act in relation to a Level 2 disclosure that a sheriff has ordered to be issued under paragraphs (3)(b) or (5)(b) of regulation 9 (or any subsequent Level 2 disclosure provided for the same purpose as the original certificate application or original scheme record request) in relation to the conviction which the sheriff was satisfied was relevant, unless:

- the review application, in relation to the subsequent Level 2 disclosure, is made after the end of the period specified in regulation 10 of the Level 1 and Level 2 Disclosure Review Application (Scotland) Regulations 2025 (made under section 31(6)(a) of the Disclosure Act). The periods are 10 years for applicants aged 18 years or over on the date of the final outcome of the original review and 5 years for applicants who were under 18 on the date of the final outcome of the original review.**4**

or

- the Scottish Ministers are satisfied that the individual's circumstances have changed in a material respect since the application to the sheriff was finally disposed of.

38. Paragraph (8) of regulation 9 explains what "finally disposed" of means for the purposes of the regulation. It means that the sheriff has determined the application, or the proceedings are otherwise disposed of without the sheriff making a determination.

39. Regulation 10 makes transitional provision relating to individuals currently included in the register of registered persons under the Police Act. It provides that, from the relevant date, a person who was a registered person under section 120(1) of the Police Act, must be treated, for all purposes, as an accredited body under section 46(2)(a) of the Disclosure Act and the Scottish Ministers must include that person in the register of accredited bodies in relation to the countersigning of applications for Level 2 disclosures under section 11 of the Disclosure Act.

40. This provision means that existing registered persons will not need to apply again to continue their inclusion in the register, following the move to the register of accredited bodies.

4 Laid in the Scottish Parliament on 3 February 2025.

41. Paragraphs (3) and (4) of regulation 10 provide that where, before the relevant date, the Scottish Ministers have imposed any conditions on a registered person under section 122(4) of the Police Act, in relation to their continuing to be listed in the register, these conditions will continue to apply under the Disclosure Act in relation to their registration as an accredited body.

42. Paragraphs (5) and (6) of regulation 10 provide that any application, made before the relevant date to become a registered person that is not concluded by the Scottish Ministers on that date, will be treated as an application to be registered in the register of accredited bodies under section 47(1)(b) of the Disclosure Act.

Transitional and savings provisions – Part 2 of the Disclosure Act

43. When the Disclosure Act comes into force, PVG scheme membership will become a legal requirement for individuals carrying out a regulated role. It will be an offence under section 45C of the PVG Act for an individual to carry out or agree to carry out a regulated role unless the individual participates in the PVG Scheme in relation to that type of regulated role.**5**

44. Regulation 11 makes transitional provision in relation to this offence. It provides that it is not an offence under section 45C of the PVG Act for an individual to carry out any type of regulated role where they do not participate in the Scheme in relation to that type of regulated role if, before 1 July 2025, the individual has applied to join the Scheme in relation to that type of regulated role and the application has not been withdrawn or finally determined. This is to avoid the inadvertent criminalisation of individuals on the relevant date when PVG scheme membership becomes mandatory for individuals carrying out a regulated role.

45. For the purposes of regulation 11, an application to join the PVG Scheme is finally determined when a confirmation of scheme membership is provided to the individual under section 46(1) of the PVG Act, or a Level 2 disclosure is provided to the individual under section 11 of the Disclosure Act, or the Scottish Ministers notify the individual that their application to join will not be considered by them in accordance with section 71(3) of the PVG Act.

46. When the Disclosure Act comes into force, it will be an offence under section 45D of the PVG Act for an organisation to offer a regulated role to an individual, and under section 45F of the PVG Act for a personnel supplier to offer or supply an individual for a regulated role, without first having received a Level 2 disclosure containing a

5 https://www.legislation.gov.uk/asp/2020/13/section/73

statement confirming the individual participates in the Scheme in relation to that type of regulated role.

47. Regulation 12 makes transitional provision in relation to how sections 45D and 45F of the PVG are to be read where an organisation or personnel supplier has, before the relevant date, received disclosure of a scheme record under section 52 of the PVG Act or a short scheme record under section 53 of the PVG Act in relation to an individual.

48. An organisation or personnel supplier will not commit an offence if, before the relevant date, it has received a scheme record or short scheme record which sets out that the individual participates in the PVG Scheme in relation to a type of regulated work (i.e. with children or protected adults), and on or after the relevant date, it offers the individual a regulated role (or supplies the individual to an organisation to carry out a regulated role) which is of the same type as the regulated work (i.e. with children or adults). This is to avoid organisations and personnel suppliers having to immediately seek a Level 2 disclosure for an individual where they are already in receipt of scheme record for that individual which sets out that they participate in the PVG Scheme for that type of regulated role.

49. Further details of the policy objectives relating to the Disclosure Act are set out in the Policy Memorandum which accompanied the Disclosure (Scotland) Bill. The Scottish Parliament website also sets out the timeline for the passage of the Bill.

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

50. 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 Act), the Scottish Ministers certify that, in their view, the Disclosure (Scotland) Act 2020 (Commencement No.5, Saving and Transitional Provision) Regulations 2025 are compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

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

Consultation

52. 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.

53. Disclosure Scotland published a consultation paper on 25 April 2018 (**6**). This was distributed widely to many 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 scheme members.

54. 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.

55. The results of the consultation informed further development of the policy and (Disclosure) (Scotland) Bill provisions. The Scottish Government published its response to the consultation on 13 June 2019.

56. A communications campaign is also underway to raise awareness of the impact of the changes brought about by the Disclosure Act. A key focus of this communication campaign is the move to the PVG scheme becoming a legal requirement, and the offences for individuals and organisation that will take effect from 1 July 2025, as included in these regulations. Disclosure Scotland use a range of communication channels to inform stakeholders of the changes the Disclosure Act will bring.

57. This commitment to providing improved resources to support stakeholders is one that will continue throughout the transition to the simplified, modern, and proportionate disclosure regime in Scotland under the Disclosure Act.

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6 https://consult.gov.scot/disclosure-scotland/protection-of-vulnerable/

Impact Assessments

58. 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/)

59. An Equalities Impact Assessment has been completed for these Regulations. This will be published alongside this instrument on legislation.gov.uk. No negative equality impact issues have been identified.

60. 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.

61. A Children's Rights and Wellbeing Impact Assessment was considered and deemed not necessary for these Regulations.

Financial Effects

62. The Minister for Children, Young People and the Promise confirms that a Business and Regulatory Impact Assessment 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

January 2025