EXPLANATORY MEMORANDUM TO

THE DISCLOSURE (SCOTLAND) ACT 2020 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2025

2025 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Ian Murray, Secretary of State for Scotland at the Scotland Office confirms that this Explanatory Memorandum meets the required standard.

2.2 Louise Nicholls, Deputy Director for Constitutional Policy at the Scotland Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Cat Carrigan at the Scotland Office [cat.carrigan1@ukgovscotland.gov.uk] can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The Disclosure (Scotland) Act 2020 ("the Disclosure Act") deals with the circumstances in which information about a person's criminal history, and other information held about them by the police and other law-enforcement bodies, can be disclosed by the Scottish Ministers. The Disclosure Act repeals and restates Part 5 of the Police Act 1997 ("the Police Act") as it applies in Scotland and amends the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act") creating a new simplified system of state disclosure in Scotland.

4.2 This Order makes provision in consequence of the Disclosure Act to ensure the continued provision of conviction information, cautions, relevant police information and records of fingerprints held by UK law-enforcement bodies across the UK to the Scottish Ministers for the purposes of the disclosure regime. In effect, the Order will preserve the arrangements that exist under the Police Act for ensuring effective cross-border information transfer for the purposes of the new disclosure regime under the Disclosure Act.

Where does the legislation extend to, and apply?

4.3 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.4 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the England and Wales, Scotland and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 The Disclosure Act modernises and improves proportionality in the disclosure system in Scotland. Its aim is to simplify it and strike the appropriate balance between strengthened safeguarding of the public and helping people with convictions get back to work. The Disclosure Act was developed following a detailed public consultation, extensive engagement with stakeholders who engage with the disclosure regime in Scotland and from intelligence gathered during the years the PVG Scheme has been in operation.

5.2 Part 5 of the Police Act makes provision for the Scottish Ministers to carry out criminal record checks in Scotland. Three levels of disclosure certificate can be issued under the Police Act: the Criminal Conviction Certificate (basic disclosure); the Criminal Record Certificate (standard disclosure); and the Enhanced Criminal Record Certificate (enhanced disclosure). In 2007, the PVG Act introduced the PVG Scheme in Scotland and made provision for disclosure checks to be carried out specifically for people working with children and protected adults. PVG scheme records and PVG short scheme records are disclosed under the PVG Act.

5.3 The Disclosure Act repeals Part 5 of the Police Act as it applies in Scotland and makes amendments to the PVG Act.

5.4 The Disclosure Act now sets out the circumstances in which information about a person's criminal history, and other information held by police and other law-enforcement bodies, can be disclosed by the Scottish Ministers. As part of its reform, the Disclosure Act created new disclosure products, Level 1 and Level 2 disclosures, which replace the previous disclosure products issued and disclosed under the Police Act (basic, standard and enhanced disclosures) and PVG Act (PVG scheme records and short scheme records).

5.5 Duties mirroring existing arrangements

Provision of police information to the Scottish Ministers

5.6 To make the disclosure regime in Scotland fully effective, section 119 of the Police Act[1] placed duties on UK police forces and law enforcement agencies to provide the Scottish Ministers with information about convictions, cautions, other relevant police information and records of fingerprints held by police forces across the UK. This cross-border information transfer is necessary to ensure that the Scottish Ministers can exercise their vetting and barring functions efficiently and effectively under the Police and PVG Acts. Articles 3, 4 and 5 of the Protection of Vulnerable Groups (Scotland) Act 2007 (Consequential Provisions) Order 2010 ("the 2010 Order)[2] place similar duties on police forces across the UK for the purposes of the PVG Act.

5.7 Articles 10 and 12 of this Order place duties on the chief officers of UK law-enforcement bodies to provide information, as requested by the Scottish Ministers, in relation to Level 2 disclosures of their functions under Part 1 of the Disclosure Act. The duties set out in these articles mirror the duties imposed on the chief constable of the Police Service of Scotland under Part 1 of the Disclosure Act.[3]

[1] Section 119 of the Police Act.
[2] Article 4 of the 2010 Order.
[3] Section 59 of the Disclosure Act; section 65 of the Disclosure Act.

Other relevant police information ("ORI")

5.8 ORI is information that may reveal allegations held on local police records about the applicant's criminal or other behaviour which have not been tested at trial or led to a conviction. ORI has the important function of enabling employers to be informed of non-conviction information relating to an individual which is relevant to the position applied for. Without provisions which enable ORI to be requested, provided and disclosed it is unlikely that employers would be aware of such information. This might result in an individual working in a role that could potentially put others at risk.

5.9 The Cullen Inquiry, following the Dunblane Primary School murders in 1996, found that there could be circumstances, such as that in the Dunblane murders, where the police were aware of non-conviction information relating to an individual, but this information was not disclosed to prospective employers. Following this Inquiry, the Police Act introduced provision which places a duty on the Scottish Ministers to request ORI from relevant polices forces for the purposes of including it in enhanced criminal record certificates issued under section 113B of the Police Act. If information, held by a relevant police force, satisfies certain criteria then the chief constable/officer of that police force can decide that it should be included in the certificate issued by Scottish Ministers. When the PVG Act introduced the PVG Scheme for those working with vulnerable groups, that Act also included the same provision to ensure that ORI could be included as vetting information in relevant PVG scheme records.

5.10 Section 8 of the Disclosure Act sets out what a Level 2 disclosure will contain.[4] This includes ORI provided by the chief constable of the Police Service of Scotland in accordance with section 14 of the Disclosure Act.[5]

5.11 Paragraph 1(3) of Schedule 1 and article 6 of this Order make the same provision for the purposes of the new disclosure regime in Scotland created by the Disclosure Act. The duties placed upon chief officers of relevant UK law-enforcement bodies replicate the duties imposed on the chief constable of the Police Service of Scotland under Part 1 of the Disclosure Act.

Provision of information to verify identity

5.12 Section 118 of the Police Act enabled the Secretary of State to obtain information to verify the identity of an applicant applying for a disclosure product under the Police Act. Article 17 of the 2010 Order enables the Secretary of State to assist Disclosure Scotland to verify the identity of an applicant applying to join the PVG Scheme under the PVG Act.

5.13 It is important for every type of disclosure that Disclosure Scotland confirms: (a) that identity information provided with the application relates to a real person; and (b) that the applicant is that person.

5.14 Article 11 of this Order enables the Scottish Ministers to obtain identity specific information which they can use to confirm identity of disclosure applicants. This will be used when the Scottish Ministers are unable to verify this through further checking with the applicant themselves or a countersigning body. This power is intended to

[4] Level 2 disclosures will replace criminal conviction certificates under section 112 of the Police Act, enhanced criminal record certificates under section 113B of the Police Act and PVG Scheme records under section 52 of the PVG Act. Section 8 of the Disclosure Act.

[5] Section 14 of the Disclosure Act. Paragraph 1(2) of Schedule 1 of this Order makes provision to amend section 8 so that ORI provided by UK law-enforcement bodies is also to be included (where relevant).

replicate the same as that provided to the Scottish Ministers in section 58 of the Disclosure Act.[6]

New duties

Statutory review process for ORI

5.15 The right to review of certain information before it is disclosed to a third party is a key policy area introduced by the Disclosure Act to enhance proportionality of the disclosure regime. It provides Level 2 disclosure applicants with a right to comment on proposed ORI provided by police forces and law enforcement bodies prior to that information being provided to a third party. Section 23 of the Disclosure Act creates a new review mechanism in relation to ORI provided by the chief constable of the Police Service of Scotland.[7]

5.16 Article 7 of this Order places an equivalent duty on chief officers of UK law-enforcement bodies. They must review any ORI they have provided in response to a request made by the Scottish Ministers, where the applicant specifies (to the Scottish Ministers) in a Level 2 review application that they wish ORI provided by the chief officer of such a force to be subject to such review.

5.17 In carrying out the review, the chief officer of a UK law-enforcement body must provide the applicant the opportunity to make representations and must have regard to them. This differs from the law in England, Wales and Northern Ireland currently where chief officers have a power to seek representations from disclosure applicants before disclosing ORI to third parties but are not under a duty to do so.

5.18 This provision ensures that the review provisions introduced by the Disclosure Act, apply consistently across the UK so that when the Scottish Ministers make a request to UK law-enforcement bodies for ORI, chief officers follow the law in the same way as the chief constable of the Police Service of Scotland does. Paragraph 1(4) and (5) of Schedule 1 of this Order makes amendments to sections 20 and 23 of the Disclosure Act to ensure that they operate in relation to the chief officer of UK law-enforcement bodies in broadly the same way as they do in relation to the chief constable of Police Service of Scotland.

5.19 If the applicant remains dissatisfied with the chief officer's review decision, they can ask for a review to be carried out by the independent reviewer.[8] Under section 30 of the Disclosure Act the chief officer may make an appeal against the independent reviewer's decision (on a point of law only).[9]

Duty to provide information requested by the Independent Reviewer

5.20 Section 28 of the Disclosure Act enables the independent reviewer to obtain, for the purpose of their review functions under Part 1 of that Act, information from the chief constable, the Scottish Courts and Tribunal Service and any other person the independent reviewer thinks appropriate and which the independent reviewer believes

[6] Section 58 of the Disclosure Act.
[7] Section 23 of the Disclosure Act.
[8] Section 24 of the Disclosure Act. Paragraph 1(6) of Schedule 1 of this Order makes amendments to section 24 of the Disclosure Act to ensure that it operates in relation to information provided by chief officers of UK law-enforcement bodies in broadly the same way it does in relation to information provided by the chief constable of Police Service of Scotland.
[9] Section 30 of the Disclosure Act. Paragraph 1(9) of Schedule 1 of this Order makes amendments to section 30 of the Disclosure Act to ensure that it operates in relation to chief officers of UK law-enforcement bodies in broadly the same way it does in relation to chief constable of Police Service of Scotland.

they hold and considers necessary to carry out the review. This information gathering power will be used by the independent reviewer to contextualise offending behaviour that has occurred outside of Scotland for the purpose of reviews.

5.21 Article 8 of this Order places an equivalent duty on the chief officer of a UK law-enforcement body, Secretary of State, the Department of Justice in Northern Ireland and other person whom the independent reviewer considers appropriate and could not require to provide the information under section 28(1)(b) of the Disclosure Act. This will prevent individuals who accrued a conviction elsewhere in the UK being disadvantaged compared to an individual who accrued a conviction in Scotland because the independent reviewer will be able to request and obtain information to contextualise offending behaviour outside of Scotland for the purpose of reviews.

Suitable persons to have access to disclosure information

5.22 Section 46 of the Disclosure Act requires the Scottish Ministers to maintain a register of accredited bodies for the purposes of Part 1 of the Disclosure Act. To make applications for a Level 1 disclosure on behalf of an individual or to countersign an application for a Level 2 disclosure, an individual must be registered with Disclosure Scotland as an accredited body. Registration can be for one of these purposes or both.

5.23 Section 49 of the Disclosure Act sets out the information the Scottish Ministers may have regard to for determining whether an individual is suitable to have access to disclosure information for the purposes of registering as an accredited body with Disclosure Scotland. In particular, section 49(2) provides for that information to include ORI from relevant police forces. For the purposes of section 49, "police forces" is defined in section 49(7) and section 69 of the Disclosure Act and includes forces which are designed as UK law-enforcement bodies under Part 1 of this Order.

5.24 Article 9 places a duty on the chief officer of a UK law-enforcement body to comply with a request made by the Scottish Ministers under section 49(2) of the Disclosure Act. This ensures that s information can be obtained from chief officers of UK law-enforcement bodies for the purposes of determining whether an individual is a suitable person to have access to disclosure information to become an accredited body or a countersigner of disclosure applications under the Disclosure Act.

Duty to provide information requested by Scottish Ministers

5.25 Section 65 of the Disclosure Act affords the Scottish Ministers a power to require, by notice, certain persons to provide them with information for the purposes of exercising their functions under Part 1 of the Disclosure Act. This power will be used, mainly, to gather information to inform the Scottish Ministers' decision making in respect of the disclosure of childhood convictions (under section 13 of the Disclosure Act) and the review of removable convictions (under section 25 of the Disclosure Act) on Level 2 disclosures. Like the independent reviewer, these information gathering powers allow Disclosure Scotland to obtain information about convictions to contextualise offending behaviour for the purpose of reviews.

5.26 Article 13 of this Order ensures that the Scottish Ministers can request the same type of information from bodies elsewhere in the UK in the same way as they can from bodies in Scotland, under section 65 of the Disclosure Act[10]. This will ensure individuals who accrued a childhood conviction, for example, in England and Wales or Northern Ireland are not disadvantaged compared to an individual who accrued a childhood conviction in Scotland because the Scottish Ministers will be able to

[10] Section 65 of the Disclosure Act.

request and obtain information to contextualise offending behaviour that has occurred outside of Scotland for the purpose of reviews.

Statutory guidance to police forces

5.27 Section 63 of the Disclosure Act places a duty on the Scottish Ministers to issue guidance to the chief constable about the exercise of the chief constable's functions under Part 1 of the Disclosure Act. The guidance may, in particular, include provision about the conduct of reviews under section 23. The chief constable must have regard to the guidance issued under this section when performing their functions under Part 1 of the Disclosure Act.

5.28 Section 89 of the Disclosure Act, inserted section 84A into the PVG Act, this insertion means that the Scottish Ministers are also under a duty to issue guidance to the chief constable in respect of the chief constable's functions under parts 1 and 2 of the PVG Act. The chief constable must have regard to the guidance when exercising their functions under the PVG Act.

5.29 To ensure consistency in decision-making across the UK, article 16 and paragraph 4(3) of Schedule 2 of this Order place an equivalent duty on the chief officer of the chief offices of UK law-enforcement bodies. This means the chief officer of any such body is under a duty to have regard to the statutory guidance issued by Scottish Ministers when making a decision about whether to disclose ORI having been requested to do so by the Scottish Ministers for the purposes of a Level 2 disclosure or when exercising their functions under the PVG Act. Guidance under section 63 aims to be consistent with guidance issued to officers across the UK.

5.30 The requirement to have regard to statutory guidance already exists in England, Wales and Northern Ireland.[11]

Miscellaneous

5.31 The remaining provisions in Part 4 of this Order make provision connected to the duties in Part 2 of this Order, including in relation to payment of fees.

5.32 The remaining provisions in Schedule 1 of this Order make modifications to enactments in consequence of Part 2 of this Order. This is to ensure that those enactments operate in relation to UK law-enforcement bodies in the same way as they operate in relation to the Police Service of Scotland.

5.33 The remaining provisions in Schedule 2 of this Order make modifications to enactments in consequence of the Disclosure Act. This is to reflect terminology updates and changes, as a result of the changes made by the Disclosure Act to the disclosure regime.

6. Legislative and Legal Context

How has the law changed?

6.1 This Order is made in exercise of the powers conferred by sections 104, 112(1), 113(4) and (5) and 114(1) of the Scotland Act 1998 ("the Scotland Act"). Section 104 of the Scotland Act enables provisions to be made that are necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament. This Order makes provisions that are necessary and expedient in consequence of the changes that the Disclosure Act made to the existing disclosure regime in Scotland.

[11] https://www.gov.uk/government/publications/statutory-disclosure-guidance, https://www.justice-ni.gov.uk/publications/statutory-disclosure-guidance-chief-officers-police

Why was this approach taken to change the law?

6.2 This Order's principal purpose is to ensure that the new simplified disclosure regime, created by the Disclosure Act, operates correctly by making provision about those matters for which the Scottish Parliament could not legislate. It ensures the continued provision of information about a person's criminal history, and other information held about them by police and other law-enforcement bodies, to the Scottish Ministers from police forces across the UK so that this can be disclosed by the Scottish Ministers in exercise of their functions under the Disclosure Act. It also modifies particular enactments so that they operate in relation to UK law-enforcement bodies in broadly the same way as they do in relation to the Police Service of Scotland.

7. Consultation

Summary of consultation outcome and methodology

7.1 We do not consider a public consultation to be a necessary requirement for this Order.

7.2 In respect of the provision of police information, this Order makes provision to preserve the arrangements for the cross-border transfer of information that was provided for under Part 5 of the Police Act (and is provided for under the 2010 Order) for the purposes of the new disclosure regime under the Disclosure Act.

7.3 The inclusion, and subsequent disclosure to employers, of ORI is a vital element of safeguarding and is the direct result of past tragic cases where information was known about offenders but was not disclosed. It is for this reason that the public consultation on the Protection of Vulnerable Groups and Disclosure of Criminal Information [12]which informed the policy delivered by the Disclosure Act did not propose changes in relation to the provision of ORI to the Scottish Ministers.

7.4 The consultation did include proposals on the issuing of guidance to the chief constable on the process governing the generation and disclosure of ORI, the right of an applicant to provide representations to the chief constable about the inclusion on ORI in a disclosure before it is shared with a third party and the right to have ORI independently reviewed before disclosure to third party. The majority of consultation responses supported these proposals.

7.5 This Order will bring the Scottish disclosure regime more into line with the existing disclosure regimes in other parts of the UK, by introducing statutory guidance and review process provisions.

7.6 Disclosure Scotland have worked alongside officials in the Ministry of Justice, the Home Office, the Ministry of Housing, Communities and Local Government, the Department of Justice in Northern Ireland and the Welsh Government on the policy for, and drafting of, this Order.

8. Applicable Guidance

8.1 Specific guidance on operation of this Order itself will not be provided, however guidance will be issued to UK law-enforcement bodies, as set out in article 16 of this Order. This guidance is not yet available but will be drafted (in consultation with Scottish and UK law-enforcement colleagues) and published on Disclosure Scotland's website by 1 April 2025.

[12] Protection of Vulnerable Groups and the Disclosure of Criminal Information - https://consult.gov.scot/disclosure-scotland/protection-of-vulnerable/

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because we do not anticipate that this Order will have any particular impacts on the private or voluntary sector. A Justice Impact Assessment has also been carried out.

9.2 A number of impact assessments were conducted and published when the Disclosure (Scotland) Bill ("the Bill") was introduced into the Scottish Parliament in June 2019. The introduction of an applicant's right to make representations to the chief constable before ORI is disclosed to a third party and the right to an independent review of ORI proposed for disclosure was considered and was found to afford a positive impact that would benefit applicants for disclosure.

9.3 In addition, the Bill's Financial Memorandum[13] laid before the Scottish Parliament set out the costs on the Police Service of Scotland and other Scottish public bodies.

9.4 For the purpose of this Order, we have considered the impact of extending provisions within the Disclosure Act to UK law-enforcement bodies and other public bodies in England and Wales and Northern Ireland. The section 104 Order will be needed to place a duty on non-Scottish police forces who hold records of convictions, cautions, fingerprints or other information for the use of police forces generally to make those records available to the Scottish Ministers for the purposes of their functions under Part 1 of the Disclosure Act. There is no significant impact here because similar duties already exist for UK law-enforcement bodies under the Police Act and PVG Act 104 Order.

Impact on businesses, charities and voluntary bodies

9.5 There is no impact on business, charities or voluntary bodies because this instrument is needed to maintain the continued provision of conviction information, cautions, records of fingerprints and relevant police information to the Scottish Ministers held by police forces across the UK. The Order will preserve the status quo by ensuring effective cross-border information continues as it did under the Police Act.

9.6 The legislation does not impact small or micro businesses.

9.7 There is no, or no significant, impact on the public sector because this maintains the continued provision and flow of relevant police information held by police forces across the UK to the Scottish Ministers.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is through normal business accuracy and assurance processes. No formal monitoring is necessary.

[13] https://webarchive.nrscotland.gov.uk/20210404211117mp_/https:/www.parliament.scot/-/media/files/legislation/bills/current-bills/disclosure-scotland-bill/introduced/financial-memorandum-disclosure-scotland-bill.pdf

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:

"In my view the provisions of the Disclosure (Scotland) Act 2020 (Consequential Provisions and Modifications) Order 2025 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").