POLICY NOTE

THE DISCLOSURE (SCOTLAND) ACT 2020 (INCIDENTAL, SUPPLEMENTARY AND CONSEQUENTIAL PROVISION) REGULATIONS 2025

SSI 2025/XXX

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 92(1) and section 92(2) of the Disclosure (Scotland) Act 2020(**1**) and all other powers enabling them to do so.

The instrument is subject to affirmative procedure.

Summary Box

The Disclosure (Scotland) Act 2020 ("the Disclosure Act") reforms the system of disclosure of criminal records administered by the Scottish Ministers. Prior to the Disclosure Act, disclosure functions were performed in accordance with Part 5 of the Police Act 1997 ("the Police Act") and Part 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act"). The Disclosure Act repeals Part 5 of the Police Act as it applies in Scotland and amends the PVG Act.

This instrument makes various incidental, supplementary and consequential modifications to primary and secondary legislation to ensure that the disclosure system operates as the Disclosure Act intended and to reflect the changes made to the disclosure system by that Act.

It also revokes various enactments which, as a consequence of the changes made by the Disclosure Act, are no longer required.

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 protected adults on behalf of the Scottish Ministers.

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

3. Part 1 of the Disclosure Act reforms the system of disclosure of criminal records administered by the Scottish Ministers. Prior to the Disclosure Act, disclosure functions were performed in accordance with Part 5 of the Police Act and Part 2 of the PVG Act. The Disclosure Act repeals and replaces Part 5 of the Police Act and amends the PVG Act and

(**1**) 2020 asp 13.

makes provision for new disclosure products. New Level 1 and Level 2 disclosures replace criminal conviction certificates, criminal record certificates and enhanced criminal record certificates under the Police Act and PVG scheme records and short scheme records under the PVG Act.

4. The Disclosure Act also replaces the concept of "regulated work with children and adults" with "regulated roles with children and adults".

5. Part 1 of schedule 1 of this instrument makes modifications to primary legislation which are consequential, incidental and supplementary in nature to ensure that the disclosure system operates as the Disclosure Act intended.

Rehabilitation of Offenders Act 1974

6. Paragraph 1 of Part 1 of schedule 1 of this instrument modifies section 3 of the Rehabilitation of Offenders Act 1974 ("the 1974 Act").

7. Section 3 of the 1974 Act (as it was amended by paragraph 1(5) of schedule 2 of the Management of Offenders (Scotland) Act 2019 and section 4(3) of the Age of Criminal Responsibility (Scotland) Act 2019)) currently has effect (by virtue of article 2(3) of the Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013 ("the 2013 Order")) is modified as follows:

(1) Where-

(a) a ground for the referral of a child's case to a children's hearing under the Children (Scotland) Act 1995 is that mentioned in section 52(2)(i) of that Act (commission by the child of an offence) and that ground has either been accepted by the child and where necessary, by his parent or been established (or deemed established) to the satisfaction of the sheriff under section 68 or 85 of that Act;

or

(b) one or more of the section 67 grounds under the Children's Hearings (Scotland) Act 2011 is that mentioned in section 67(2)(j) of that Act (meaning of "section 67 ground") and that ground has either been accepted by the child and, where necessary, by any person who is a relevant person, or has been established to the satisfaction of the sheriff under section 108 or section 114 of that Act

the acceptance, establishment (or deemed establishment) of that ground shall be treated for the purposes of this Act (but not otherwise) as a conviction, and any disposal of the case thereafter by a children's hearing shall be treated for those purposes as a sentence; and references in this Act to a person's being charged or prosecuted for an offence shall be construed accordingly.

(2) In subsection (1)(b), "relevant person" has the meaning given in section 200 of the Children's Hearings (Scotland) Act 2011 and includes any individual who is

deemed a relevant person under section 81(3), or by virtue of an order under section 160(4)(b), of that Act.

(3) This section does not apply where the acts or omissions constituting the ground mentioned in subsection (1) occurred when the child was under 12 years of age.

8. The definition of "children's hearing outcome" in section 69 of the Disclosure Act relies on section 3 of the 1974 Act, as it currently has effect.

9. The 2013 Order was made by the Scottish Ministers under section 205 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). Article 2(3) of the 2013 Order made temporary provision in article 2(3) which means that section 3 of the 1974 Act, in relation to the disclosure of children's hearing disposals for offences, is to be read as including disposals under the 2011 Act as well as disposals under the Children (Scotland) Act 1995. This is to ensure that such a disposal would be treated as a criminal conviction for the purposes of the 1974 Act.

10. Article 1 of the 2013 Order makes clear that the 2013 Order was transitory in nature and was to cease to have effect on the day section 187 of the 2011 Act came into force.

11. Section 187 and 188 of the 2011 Act set out how "alternatives to prosecution" under the 2011 Act will be treated under the disclosure regime, namely that these will become spent after 3 months of the offence grounds being accepted or established, or of a compulsory supervision order being made, and that alternatives to prosecution are brought into the meaning of "relevant matter" for the purposes of the 1997 Act.

12. It was accepted, at the time of the Disclosure (Scotland) Bill's inception, that amendments already made to the disclosure regime in Scotland by the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 and the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 together with further provision made in the Disclosure Act in relation to childhood conviction/hearing information, go further than would ever have been achieved through sections 187 and 188 of the 2011 Act. Accordingly, paragraph 13 of schedule 5 of the Disclosure Act repeals sections 187 and 188 of the 2011 Act.

13. The definition of "children's hearing outcome" in section 69 of the Disclosure Act relies on section 3 of the 1974 Act, as it currently has effect.

14. To ensure that there is no uncertainty as to the effect of section 3 of the 1974 Act when sections 187 and 188 of the 2011 Act are repealed by the Disclosure Act, paragraph 16 of schedule 2 of this instrument revokes the 2013 Order and paragraph 1 of Part 1 of schedule 1 of this instrument makes a permanent textual modification to section 3 of the 1974 Act which replicates what was provided for in article 2(3) of the 2013 Order. The revocation and amendment are in consequence of the Disclosure Act's repeal of sections 187 and 188 and are necessary to ensure that the definition of "children's hearing outcome" in section 69 of the Disclosure Act works as it is intended to work.

15. A "children's hearing outcome" is defined as *anything treated as a conviction for the purposes of the 1974 Act, by virtue of section 3 of that Act*. This definition relies on section 3 as it currently has effect (i.e. as modified by article 2(3) of the 2013 Order) and so it is

necessary for section 3 of the 1974 Act to include children's hearing disposals under both the Children (Scotland) Act 1995 and the 2011 Act so that the disclosure of this information for the purposes of sections 8, 10 and 13 of the Disclosure Act operate correctly and as intended. Otherwise, a safeguarding gap would be created as well as a difference in treatment in relation to the way in which the Disclosure Act's provisions apply to individuals who have accrued children's hearings disposals under the Children (Scotland) Act 1995 (which would be subject to the Disclosure Act's provisions, meaning they may be disclosed) and individuals who have children's hearings disposals under the 2011 Act (which would not be subject to the Disclosure Act's provisions, meaning they could not be disclosed at all).

16. The other amendments made to the 1974 Act by article 2 of the 2013 Order no longer have operative effective in relation to the disclosure regime due to subsequent amendments made by the Management of Offenders (Scotland) Act 2019 which came into effect in November 2020.

The Protection of Vulnerable Groups (Scotland) Act 2007 ("PVG Act)

17. Paragraph 2 of Part 1 of schedule 1 of this instrument modifies various sections of the PVG Act.

Section 18

18. Paragraph 5(2) of schedule 5 of the Disclosure Act amends section 18 of the PVG Act in relation to information that can be obtained by the Scottish Ministers for the purpose of enabling or assisting them to decide whether to list an individual when exercising their barring functions under the PVG Act. Paragraph 5(2)(a) substitutes subsection (4)(b) of section 18 and removes reference to the repealed Police Act 1997. It refers instead to the Disclosure Act's definition of central records in section 69 - that is, such records of convictions, cautions or other information held for the use of police forces generally as may be prescribed. Paragraph 5(2)(b) inserts new provision in section 18 to define "relevant matter" for the purposes of the section because currently that definition is also rooted in section 113A of the Police Act 1997.

19. Collectively, these amendments mean that the Scottish Ministers will be able, for the purposes of their barring functions, to request all convictions (except non-disclosable convictions) that are held on police forces' records and all children's hearing outcomes (regardless of whether or not they are non-disclosable). Conviction, for the purposes of the PVG Act, is taken from section 97(1) of the PVG Act and that is, a conviction within the meaning of the 1974 Act which includes children's hearing outcomes in accordance with section 3 of the 1974 Act.

20. This does not accord with the way in which spent childhood convictions and all children's hearing outcomes will be disclosed on Level 2 disclosures under the Disclosure Act. Childhood convictions and children's hearing outcomes will be subject to a 2-stage filtering process:

- firstly, under sections 9 and 10 of the Disclosure Act in relation to whether they are disclosable or not, and

- secondly, under section 13 of the Disclosure Act in relation to whether the information is relevant and proportionate to disclose before they can be included in a Level 2 disclosure.

21. Paragraph 2(2) of Part 1 of schedule 1 of this instrument modifies section 18 of the PVG Act to insert "a conviction that is not a non-disclosable children's hearing outcome within the meaning of section 10 of that Act" to the definition of "relevant matter" in subsection (5). This modification ensures that the Scottish Ministers are unable to consider non-disclosable children's hearing outcomes for purposes of their barring functions. This matches the provisions in Part 1 of the Disclosure Act in relation to their vetting functions that mean non-disclosable children's hearing outcomes cannot be included on Level 2 disclosures.

22. Paragraph 2(1) of Part 1 of schedule 1 of this instrument modifies section 18 of the PVG Act to correct a typographical error.

Section 30(4)

23. Section 30 of the PVG Act requires the Scottish Ministers to notify specified persons when Disclosure Scotland are considering whether to list an individual for the purposes of the PVG scheme. Section 77(2) of the Disclosure Act amends section 30(2) of the PVG Act (in relation to notifications about barring or consideration for listing) to extend the Scottish Ministers' notification duties to personnel suppliers.

24. The same amendment has not been made to section 30(4) of the PVG Act, meaning that personnel suppliers will be notified when an individual is placed under consideration for listing by Disclosure Scotland, and if the individual is barred, but will not be notified if Disclosure Scotland decide not to bar the individual. This means that the notification procedures do not apply equally to organisational employers and personnel suppliers.

25. Paragraph 2(3) of Part 1 of schedule 1 of this instrument makes a supplementary modification to section 30 of the PVG Act to insert provision which requires the Scottish Ministers to notify personnel suppliers in circumstances where they have decided not to list an individual following a Disclosure Scotland consideration of that individual for listing. This supplementary provision gives full effect to the intention of the amendments made by the Disclosure Act to section 30(2) of the PVG Act, and means that personnel suppliers are included as persons who ought to be notified when a consideration for listing ends without listing.

Sections 47H, 49 and 94(4)

26. Paragraph 2(4), (5) and (7) of Part 1 of schedule 1 of this instrument makes incidental provision to correct typographical errors in respect of provisions inserted, or substituted, into the PVG Act to ensure clarity in the legislation and to enable those provisions to operate as intended.

Section 75

27. Paragraph 7(3) of schedule 5 of the Disclosure Act makes provision to repeal section 10(1), (2) and (4) of the Age of Criminal Responsibility (Scotland) Act 2019 ("the 2019

Act"). These sections of the 2019 Act deal with the inclusion of other relevant information held by police forces that relates to pre-12 behaviour in an enhanced disclosure or scheme record. At the time of Royal Assent for the Disclosure (Scotland) Bill, section 10 of the 2019 Act was not in force.

28. Section 10 of the 2019 Act has since come into force and amendments were made to section 75 of the PVG Act in November 2020 in accordance with section 10(4) of the 2019 Act. Paragraph 2(6) of Part 1 of schedule 1 of this instrument makes provision to repeal subsections (2A) and (6) of section 75 of the PVG Act to give full effect to paragraph 7(3) of schedule 5 of the Disclosure Act and ensure that the disclosure system operates as intended.

Age of Criminal Responsibility (Scotland) Act 2019

29. Paragraphs 7 and 11 of schedule 5 of the Disclosure Act make amendments to Part 2 of the 2019 Act (disclosure of convictions and other information in relation to time when person under 12) in consequence of the changes made to the disclosure regime by the Disclosure Act.

30. In December 2021, the Independent Reviewer (Modification of Functions) (Scotland) Regulations 2021 further modified sections 16, 18, 19 and 20 in Part 2 of the 2019 Act in consequence of the Age of Criminal Responsibility (Scotland) Act 2019 (Consequential Provisions and Modifications) Order 2021.

31. Paragraph 3 of Part 1 of schedule 1 makes consequential provision to amend sections 16, 18, 19 and 20 in Part 2 of the 2019 Act to give full effect to the amendments made by paragraphs 7 and 11 of schedule 5 of the Disclosure Act, by repealing provisions that were inserted by the Independent Reviewer (Modification of Functions) (Scotland) Regulations 2021 which will become redundant when the paragraphs 7 and 11 of schedule 5 of the Disclosure Act are commenced.

Subordinate legislation made under the PVG Act

32. Part 2 of schedule 1 of this instrument makes consequential amendments to subordinate legislation made under the PVG Act which reflect the changes made to the disclosure system and the operation of the PVG Scheme and barring service by the Disclosure Act.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Applications for Removal from List and Late Representations) Regulations 2010, the Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010 and the Protection of Vulnerable Groups (Scotland) Act 2007 (Miscellaneous Provisions) Order 2010

33. The Disclosure Act replaces the concept of "regulated work" with "regulated roles". The amendments made by paragraphs 4, 5 and 7 of Part 2 of schedule 1 of this instrument reflect this update in terminology. This is necessary to ensure that the provisions contained in each of the Regulations continue to apply to individuals carrying out a regulated role.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listing) Regulations 2010

34. In addition to amendments that update outdated references to regulated work, provision is made in paragraph 6 of Part 2 of schedule 1 of this Instrument to insert reference, where appropriate, to the new referral power under section 6A of the PVG Act into the Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listing) Regulations 2010.

35. Section 6A of the PVG Act was inserted by section 80 of the Disclosure Act and places a duty on the chief constable to give Scottish Ministers any prescribed information that the chief constable holds in relation to an individual whom the chief constable considers is or has been carrying out a type of regulated role while not participating in the Scheme in relation to that type of regulated role. This amendment ensures that those regulations apply to individuals who are the subject of such a referral.

Other subordinate legislation

36. The amendments made by paragraphs 8 to 21 of this instrument are to reflect the update in terminology from "regulated work" to "regulated roles" and in relation to relevant disclosure products that will no longer be available under the Police or the PVG Acts when the relevant repeals in paragraphs 3 and 5 of schedule 5 of the Disclosure Act come into force. New Level 1 and Level 2 disclosures replace criminal conviction certificates, criminal record certificates and enhanced criminal record certificates under the Police Act and PVG scheme records and short scheme records under the PVG Act.

Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991, the Debt Arrangement Scheme (Scotland) Regulations 2011 and the Enhanced Enforcement Areas Scheme (Scotland) Regulations 2015

37. The amendments in paragraphs 8, 15 and 18 of Part 3 of schedule 1 of this instrument will ensure that a Level 2 disclosure can be sought and provided instead of an enhanced criminal record certificate issued under section 113B of the Police Act 1997. This will ensure that existing practice in relation to various circumstances is maintained and equivalent access to disclosure information is provided.

The Scottish Social Services Council (Appointments, Procedure and Access to the Register) Regulations 2001, the Public Services Reform (General Teaching Council for Scotland) Order 2011, the Children's Hearings (Scotland) Act 2011 (Safeguarders Panel) Regulations 2012 and the Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021

The amendments in paragraphs 9, 14, 16 and 21 of Part 3 of schedule 1 of this instrument update various references from "regulated work" to "regulated roles". This is necessary to ensure that the provisions contained in each of the SSIs continue to apply to individuals carrying out a regulated role.

The National Health Service (Primary Medical Services Performers Lists) (Scotland) Regulations 2004, the National Health Service (General Ophthalmic Services) (Scotland) Regulations 2006 and the National Health Service (General Dental Services) (Scotland) Regulations 2010

38. The amendments in paragraphs 10, 11 and 13 of Part 3 of schedule 1 of this instrument ensures that:

- references to "regulated work" are replaced with "regulated roles"
- redundant disclosure product definitions are repealed and replaced with the new equivalents
- the correct disclosure application and/or product can be obtained or provided as required for the purposes of being included in the primary medical services performers list, the ophthalmic list, and the dental list.

39. These modifications ensure that existing practice in relation to the lists is maintained and equivalent access to disclosure information is provided.

The Registration of Independent Schools (Scotland) Regulations 2006

40. The amendments made by paragraph 12 of Part 3 of schedule 2 of this instrument ensures that:

- references to "regulated work" are replaced with "regulated roles"
- redundant disclosure product definitions are repealed and replaced with the new equivalents
- a Level 2 disclosure can be sought and provided instead of scheme records issued by the Scottish Ministers under section 52 or section 53 of the PVG Act.

41. This ensures that existing processes for the registration of independent schools is maintained and equivalent access to disclosure information is provided.

The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013

42. The amendments made by paragraph 17 of Part 3 of schedule 1 of this instrument inserts the Disclosure Act into the list of enactments in Rule 90 of the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, under which the chief constable and police forces can use information for the purposes of enabling or assisting them to perform their functions under those enactments. This is required to ensure that the chief officer and police forces can use information disclosed to them by the Principal Reporter to perform their functions under the Disclosure Act to prevent any safeguarding gap.

The Letting Agent Registration (Scotland) Regulations 2016

43. The amendment in paragraph 19 of Part 3 of schedule 1 of this instrument ensures that a Level 1 disclosure (instead of a criminal conviction certificate issued under section 112 of the Police Act 1997) can be required, in certain circumstances, as part of the application

preserving existing practice equivalent access to disclosure information under the Letting Agent Registration (Scotland) Regulations 2016.

The Age of Criminal Responsibility (Scotland) Act 2019 (Independent Review of Disclosure of Information) Regulations 2020

44. The amendments in paragraph 20 of part 3 of schedule 1 of this instrument reflect similar amendments being made by paragraph 7 of schedule 5 of the Disclosure Act to the 2019 Act. This ensure that the correct disclosure product is referred to in the Age of Criminal Responsibility (Scotland) Act 2019 (Independent Review of Disclosure of Information) Regulations 2020 and consistency is achieved for the entire review process provided for under the 2019 Act.

Schedule 2

45. Schedule 2 of this instrument revokes various enactments which are no longer required in consequence of the changes to the disclosure system and the operation of the PVG Scheme and barring service by the Disclosure Act. The majority of these are SSIs made under the Police and PVG Acts and are no longer required as a result of the Disclosure Act and the suite of SSIs made under it as part of implementation.

46. As noted above at paragraph 14, schedule 2 of this instrument also revokes the Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013.

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

47. 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 (Incidental, Supplementary and Consequential Provision) Regulations 2025 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

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

Consultation

49. 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.

50. 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 scheme members.

51. 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;

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

52. The results of the consultation generally informed further development of the policy and (Disclosure)(Scotland) Bill provisions.

53. Disclosure Scotland will continue developing guidance for stakeholders to help their understanding. A communications campaign is also underway to raise awareness of the impact of the changes brought about by the Disclosure Act. 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.

Impact Assessments

54. 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/)

55. The Children's Rights and Wellbeing Impact Assessment for these Regulations identified that there was no impact in relation to children's rights.

56. Equality Impact Assessment, 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 completed.

Financial Effects

57. 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