POLICY NOTE

THE LEVEL 1 AND LEVEL 2 DISCLOSURE INFORMATION (SCOTLAND) REGULATIONS 2024

SSI 2024/315

The above instrument was made in exercise of the powers conferred by the powers conferred by sections 1(a), 8(1)(a), 16(1)(b) and (2), 16(4)(a)(ii) and (v), 16(4)(b)(ii) and (v), 17(3)(d), 36(a), 59(1) and 69 of the Disclosure (Scotland) Act 2020 and all other powers enabling them to do so. The instrument is subject to negative procedure.

Summary Box

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These Regulations make detailed provision about what information Level 1 and Level 2 disclosures will contain.

Policy Objectives

1. Disclosure Scotland is an executive agency of the Scottish Government that provides criminal record disclosures, maintains the Protection of Vulnerable Groups Scheme ("the PVG Scheme") and keeps lists of individuals barred from working with children and '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 ("the 1997 Act") as it applies in Scotland and also making amendments to the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act").

3. These Regulations replicate and restate the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 ("the 2010 Regulations") for the purpose of the Disclosure (Scotland) Act 2020, which will also be revoked when Part 5 of the 1997 Act is.

4. Level 1 and Level 2 disclosures, provided under the Disclosure Act, will replace basic, standard and enhanced disclosures issued under the 1997 Act as well as scheme records and short scheme records disclosed under the PVG Act. These Regulations make detailed provision in relation to what information Level 1 and Level 2 disclosures, provided under the Disclosure Act, will contain.

5. Section 69 of the Disclosure Act defines "central records" for the purposes of the Disclosure Act, these are records of information held for the use of police forces generally that may be prescribed. Regulation 3 prescribes those records as the information held in the criminal history/record databases held by forces across the UK and accessed by Disclosure Scotland when carrying out their vetting functions.

6. Regulations 4 and 5 prescribe the details of convictions and cautions that will be included on Level 1 and Level 2 disclosures. In the case of convictions this includes

the date of conviction, convicting court, offence and the penalty. For cautions this includes the date of the caution, the issuing police force and the offence.

7. Section 16 of the Disclosure Act provides for further information to be included in a Level 2 disclosure in cases where the disclosure is for a prescribed purpose. These purposes involve an assessment as to the suitability or otherwise of the individual to exercise power over vulnerable groups but fall short of being regulated roles for which PVG Scheme membership will be mandatory.

8. Regulation 6 sets out the prescribed purposes in relation to children and adults. The purposes prescribed largely replicate the purposes for which enhanced disclosures with suitability information in relation to children or adults could be requested under the 1997 Act and regulations 10 and 12 of the 2010 Regulations. Additionally, stakeholder feedback in relation to regulated roles together with a non-government amendment at Stage 2 of the Disclosure (Scotland) Bill resulted in two new purposes being prescribed in these Regulations because although the individuals concerned do not work directly with children or vulnerable adults, nor are they directly involved in their care, there is sufficient proximity to children and vulnerable adults to warrant them being prescribed for the purposes of section 16 of the Disclosure Act:

    (1) an individual aged 16 or over whose suitability is not being assessed to carry out a regulated role with children, but who is living on the grounds of a school (where that individual is not themselves employed or a pupil of the school), and,
    (2) individuals aged 16 or over living in the same household as a "Shared Lives Carer" within the meaning of paragraph 24 of schedule 3 of the PVG Act.

9. A shared lives carer is a person who provides care and support to one or more adults for either a short break or for a longer length of time, within their own home.

10. The prescribed details of the circumstances in which an individual became barred for the purposes of Level 2 disclosures under section 16 are prescribed in regulation 7 of these Regulations. replicating and replacing the existing provisions under regulation 11 and 13 of the 2010 Regulations.

11. The prescribed civil court orders and the prescribed details of those orders if imposed on an applicant are also provided for in the schedules to these Orders, which are prescribed because information about whether or not a PVG scheme member is the subject of a civil order would only be vetting information if it was revealed by a police force as other relevant information. But this is entirely a matter for the chief constable in determining whether the information is relevant to the type of regulated role in respect of which the individual is a PVG scheme member. Prescribing these civil orders as vetting information, removes the disclosing or otherwise of them from the discretion of chief constables and ensures that they are vetting information in every instance. The information will be gathered by Disclosure Scotland directly from central records.

12. These civil court orders are sexual offending orders and cover relevant offences that would be considered when determining an individuals suitability to work with

children and vulnerable adults. These Regulations prescribe those civil court orders as:

a) sexual offences prevention orders (or interim orders) under the Sexual Offences Act 2003,
b) sexual harm prevention orders (or interim orders), made under the Sexual Offences Act 2003 or the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 or the Sentencing Act,
c) foreign travel orders made under the Sexual Offences 2003 Act,
d) sexual risk orders (or interim orders) made under the Sexual Offences Act 2003 or the Abusive Behaviour and Sexual Harm (Scotland) Act 2016
e) notification orders (or interim orders) made under the Sexual Offences Act 2003
f) risk of sexual harm orders (or interim orders) made under the Sexual Offences Act 2003 or the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

13. Regulation 10 makes provision allowing Scottish Ministers to require an applicant to have their fingerprints taken for the purpose of confirming their identity where other means of authentication of identity has been unsuccessful.

14. 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 also sets out the timeline for the passage of the Bill (https://www.parliament.scot/bills-and-laws/bills/s5/disclosure-scotland-bill).

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

15. 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 Level 1 and Level 2 (Disclosure Information) (Scotland) Regulations 2024 are compatible with the UNCRC requirements as defined by section 1(2) of that Act.

EU Alignment Consideration

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

Consultation

17. 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.

18. 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.

19. 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.

20. 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. Disclosure Scotland is committed to providing more guidance and training and continually engage with stakeholders to develop guidance and training that meets user needs.

21. 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

22. 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/)

23. 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.

24. The Children's Rights and Wellbeing Impact Assessment identified that there is an impact in relation to Article 16 (right to privacy) as there are two new circumstances where Level 2 disclosure checks can be undertaken on 16 and 17 year olds but that this impact is neutral. The new circumstances are limited and similar to those which already exist. Safeguards in relation to the use of criminal history information in these circumstances have been established for over 10 years. In addition, children aged 16 and 17 years old must also agree to making the application for a non-PVG Scheme Level 2 disclosure. It cannot be done without their involvement.

25. The policy introducing the new circumstances also has a positive impact for children under Article 3 (best interests of the child and the Government supporting care and protection of children) and Article 19 (protection from all forms of violence) as it helps address public protection concerns about vulnerable people being cared for in home-based settings. The two new circumstances extend existing checks on those who are not doing regulated roles but who will be nearby and viewed as a trusted person by vulnerable groups in these home-based settings.

26. 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

27. 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

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