



Law Society
of Scotland

Consultation Response

Protection of Vulnerable Groups and the Disclosure of Criminal Information

18 July 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Scottish Government consultation: Protection of Vulnerable Groups (PVG) and the Disclosure of Criminal Information (consultation). We are responding in relation to the public policy considerations lying behind the proposed changes as well as from the perspective of our regulatory role and experience.

Regulatory Perspective

As regulator of the solicitor profession in Scotland, we have a statutory responsibility to check that anyone who seeks to become a Scottish solicitor is a 'fit and proper person'¹. Solicitors occupy a privileged position, trusted by the public with their most confidential concerns, their most valuable assets and most important interests. They are trusted by the justice system to fulfil duties to the court and uphold the rule of law. Solicitors must meet the highest standards of honesty, integrity and professionalism in order to deserve that trust. A fair and just society and thriving and competitive economy require that individuals and businesses can have confidence that Scotland's legal and regulatory system will support them by providing appropriate protection of their rights and interests, whether in the commercial or personal sphere. That confidence is eroded if those providing legal services do not meet the highest standards of competence and ethics.

We are also responsible (along with the Scottish Legal Complaints Commission) with dealing with regulatory breaches and misconduct by solicitors. Both of these undertakings require significant resources which are paid for, in both cases, by solicitors. In addition, we administer a statutory fund (known as the

¹ Section 6 of the Solicitors (Scotland) Act 1980

Client Protection Fund or Guarantee Fund) to compensate those who suffer loss as a result of the dishonesty of a solicitor. That fund is entirely paid for by solicitors. The solicitor profession demands rigorous honesty. Misconduct by one can lead to costs for all – not just as a result of reputational damage and loss of public trust – but directly by increasing the costs of regulation, insurance and contributions required to the Client Protection Fund. Few (if any) other industries require that participants pay so directly for the dishonesty of their competitors.

We therefore have a duty, primarily to the public but also to our members, to do all we can to ensure that those seeking to become and remain solicitors are ‘fit and proper’ for the onerous responsibilities they will face. If we are to discharge that duty properly, we need the information required to enable us to make a full, considered and reasoned assessment of each individual’s circumstances. We should be and seek to be informed of anything which could lend weight (either positively or negatively) to the consideration of any application. Applications are considered based on our own established processes and tests. It may be that previous convictions can be safely disregarded subsequently through demonstrable patterns of behaviour. We have guidance in place which clearly sets out our processes and procedures which are unique to the role of solicitor. This guidance takes into account the position of trust that solicitors are placed in, both in terms of financial trust but also in the administration of justice. It is essential to us that we continue to fully regulate the solicitor profession using the requirements which have been uniquely developed for the solicitor profession. Entry to the legal profession in Scotland is not given of right and it is not suitable for everyone. Entry must be earned by qualification and integrity must be demonstrable.

The existing legislation and disclosure system recognises that we, as the gatekeeper acting to protect the public, have a legitimate interest in seeking a higher level of disclosure in respect of solicitors and prospective solicitors². We have therefore considered what impact the consultation proposals, if implemented, may have on our ability to achieve our regulatory objectives and fulfil our responsibilities as gatekeeper in an effective, proportionate and transparent manner.

Consultation Questions

Section 1 – Introduction

We support clarity and consistency in promoting an understanding of the law. The consultation follows a commitment during the Protection of Vulnerable Groups (Scotland) Act 2007 for a review to be undertaken.

² And, if the Society is authorised to act as an approved regulator of licensed legal services providers (LLSPs), non-solicitors who seek to hold certain interests or roles in such LLSPs

The PVG Scheme has been in operation since 2011. The balance between the landscape around public protection and an individual's right to move on with their life has changed. We therefore support undertaking the review of the disclosure system at this time.

The main aim of the consultation appears to be to simplify the system while still retaining the same degree and scope of the protection that the PVG system offers. Since the PVG system is quite convoluted at present as to what is disclosed and when, this supports the overall policy objectives of review in the consultation.

What the changes appear to achieve seem somewhat of a relabelling exercise. It is not immediately clear in practice that this aim of simplification while maintaining current levels of protection will be fully achieved. Instead of three levels of disclosure and a separate PVG system, there will be three levels including PVG but Level 2 disclosure (replacement for both standard and enhanced disclosure) will not be uniform and will vary depending on the rules applying. The extent of this variation is unspecified so it is difficult to gauge whether the system will be more user friendly post consultation or not.

We would emphasise that care needs to be taken to ensure at the end of this review what is being proposed and to be put in place is sufficiently transparent. That is necessary for the person affected by disclosure to be able to understand and effectively participate in the process. This comment underpins a number of our comments to the various questions.

More clarity is required as to which roles are eligible for PVG scheme membership, by replacing the term 'regulated work' with a list of roles or jobs. There will need to be provisions regarding renewal of membership and leaving the PVG scheme.

We refer to our response to the Management of Offenders (Scotland) Bill³ where Part 2 of that Bill (sections 17 to 35) seeks to modernise and improve the Rehabilitation of Offenders Act (1974 Act). The 1974 Act currently provides the background in relation to the rules governing whether people with convictions are required to advise others such as prospective employers about these convictions. There is little doubt that the 1974 Act is complex. It has proved difficult for the public to understand. We understand that it is also proposed to reduce the disclosure periods for certain offences in line with the changing policy on rehabilitation of offenders and to reform the system for removing spent convictions from disclosure certificates.

The 1974 Act provides a system of protection to individuals with previous convictions allowing them not to have to disclose their convictions in certain circumstances. Without the 1974 Act, people would have required to answer, truthfully, any questions about their previous offending history. Though the Policy

³ <https://www.lawscot.org.uk/media/360080/call-for-evidence-management-of-offenders-scotland-bill.pdf>

Memorandum of the Management of Offenders (Scotland) Bill refers to basic and higher level disclosure⁴, there are, in fact, three different forms of disclosure which include basic, standard, enhanced and the PVG Scheme. The Management of Offenders (Scotland) Bill proposes to change the periods for certain convictions to be treated as spent which also relates and overlaps with this consultation.

This PVG consultation is taking place at the same time as the Management of Offenders (Scotland) Bill⁵ and the Age of Criminal Responsibility (Scotland) Bill (ACR Bill).⁶ There is an obvious overlap with the policies on which these draft Bills have been introduced. It is important to ensure any future legislation aligns (and takes into account the responses to this consultation). The depth and width of the consultation seeks to span a significant number of policy matters with a large number of very detailed and broad questions which range from policy to financial considerations. The consultation's length alone may make it difficult for some of the groups most affected by these issues to respond in full.

What needs to be achieved is a disclosure system that is straightforward and easy to understand for those requiring to obtain disclosure whether as regulator, applicant or employer.

Section 2 – Disclosure

Question 1: Do you agree that reducing the disclosure products will simplify the system?

Yes. It is a cluttered landscape so simplifying this, provided that there are no losses, seems a sensible approach. Applicants need to be able to access the correct form of disclosure that their job requires. This simplification will also assist us in carrying out our work as a regulator for the legal profession.

Question 2: As we are trying to simplify the system, do you have any views on what the product should be called?

Keeping the terminology as simple as possible seems the best approach to ensure that all who require to understand or implement the rules understand what it means. Using the term 'level' may well be better understood as a standard rather than using the terms 'basic' or 'enhanced'. Whatever the system is called, it needs to be clearly defined and understandable.

⁴ Paragraph 100 and 101

⁵ <http://www.parliament.scot/parliamentarybusiness/Bills/107731.aspx>

⁶ <http://www.parliament.scot/parliamentarybusiness/Bills/107986.aspx>

Question 3: As an applicant do you have any concerns with this approach?

We are not an applicant so we have no comment to make.

Question 4: Which option do you prefer and why?

We have no particular view, however given that our members are required to make at least two (currently) standard Disclosure Scotland applications, there is a slight financial benefit in Option 2 (£30 for first or one-off application).

Question 5: Do you agree that it is appropriate to regulate registered bodies in relation to B2B applications?

Yes. The proposed approach in the consultation will help to address a current issue which makes it possible for businesses to acquire basic disclosure checks on people without having properly secured their consent.

Question 6: What impacts, if any, do you foresee from moving from a paper based system to a digital system?

There will be a reducing number of persons who will be unable to use or access computers. This will continue to be an issue for a small group of people and paper based alternatives may be required on occasion. There needs to be access to this information for all. We would be interested to understand how it is intended that the relevant information will be supplied under the new system if there are to be no paper based certificates. The practice will need to be set out clearly.

It is also important to ensure that however the information is produced that it is accessible in a range of formats and languages. That will ensure that all information supplied through the disclosure system in relation to making any application is compliant with equality and diversity legislation.

We recognise that the move towards a digital system has the potential to become more efficient and should be capable of reducing costs.

Generally, we welcome a move towards electronic applications for both Level 1 and Level 2 disclosures, which will speed up our own processes and assist our members to meet our requirements.

Question 7: Do you agree with our proposed fee for this service?

We have no specific view on the fee to be charged. However it can be expensive for small organisations so we would want to ensure that where a service such as disclosure is required, the fee is fixed at a level which covers the administrative costs but does not include a profit element.

Question 8: Are there any professions/roles that are not included that should be on the list?

Yes.

Question 8a: If you have said yes, please note what these are:

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (2013 Order) allows questions to be asked about spent convictions (subject to exceptions) in circumstances which extend beyond the holding of the employments and roles listed in Annex A (Eligible Roles or Employment type for Level 2 Disclosure) of the consultation.

It seems appropriate that Level 2 disclosure should be available, where necessary, to verify the accuracy of the answer given to any question which the 2013 Order permits to be asked. If the proposal in the consultation is intended to exclude the availability of Level 2 disclosure except in respect of the employments and roles listed in Annex A, then no verification will be available in at least some of the circumstances where the 2013 Order permits disclosure of spent convictions to be required. This has the potential to defeat some of the policy objectives of the 2013 Order.

For example, Regulation 4 of the 2013 Order excludes the application of section 4(2)(a) and (b) of the 1974 Act in relation to questions put in circumstances to which Schedule 3 of the 2013 Order applies (subject to limitations). Paragraph 14 of Schedule 3 refers to:-

“any question asked by, or on behalf of, an approved regulator where it is asked for the purposes of section 62 of the Legal Services (Scotland) Act 2010 (fitness for involvement) in order to assess the fitness of a non-solicitor investor in a licensed legal services provider for having an interest in a licensed legal services provider”.

Section 62 of the Legal Services (Scotland) Act 2010 (2010 Act) requires the approved regulator of a licensed legal services provider to satisfy itself as to the fitness of every non-solicitor investor in such a provider before granting a licence to enable the provider to operate and deliver services to the public. The approved regulator is also required to monitor the fitness of non-solicitor investors.

We have been approved by Scottish Ministers as an approved regulator in terms of the 2010 Act on the basis of a regulatory scheme which requires non-solicitor investors to disclose spent convictions (subject to limitations) in accordance with the 2013 Order. Unless we can verify information provided by means of a Level 2 disclosure, we will not be able to verify matters independently which Scottish Ministers have previously accepted as important in the context of a fitness assessment required by legislation to protect the public interest.

Clarification is required as to the intention of the proposals here. The proposals should not 'cut across', or be inconsistent with the 2013 Order. In the final paragraph of page 54 of the consultation, it states that:

"the provisions of the 1997 Act are aligned with the provisions in the 2013 Order to ensure that the policy of self-disclosure and state disclosure remain aligned."

It appears that the proposals may threaten that alignment which is presumably not the policy objective.

We had assumed that Annex A of the consultation would reflect the professions, offices, employments and occupations specified in Schedule 4 of the 2013 Order. These do not all appear to be captured in Annex A but the exclusions are not explained.

With reference to Annex A, we note the references where appropriate should be to:

6. Judicial appointments: This should include at 8 Justices of the Peace since the judiciary in Scotland correctly refers to 'lay' as well as professional members. They are organised under the Judicial Office which is a separate branch of the Scottish Courts and Tribunal Service.

7. Crown Office and Procurator Fiscal Service: We suggest that the reference to 'officers' should be to staff instead.

8. The reference should also include legal advisers which is how the clerks are known in the Justice of the Peace Court. The reference to the Scottish Court Service should be to the Scottish Courts and Tribunal Service.

We also suggest that reference should be made to those employed in the various tribunals.

25. Again we note the reference to the Scottish Court Service which should read as above.

'Trainee solicitor' should also be specifically included.

There should also be the inclusion of all those working with vulnerable witnesses. Though many of them may be employed by organisations already referred to in the list there may be some who are not caught. Consideration should also be given to including individuals who have access to highly sensitive information such as ICT staff within organisations dealing with vulnerable groups which hold special category personal data or convictions data.

Question 9: Are there any professions/roles you think should be removed from the list?

No.

Question 10: Do you agree with the proposal to remove certain kinship carers from the membership scheme?

Yes.

Question 11: Do you think that the two types of kinship arrangements should continue to be treated differently under the future arrangements?

No.

Question 12: Do you agree with this proposal?

Yes.

Question 13: Do you agree with this proposal?

Yes.

Question 13a: Do you think that anyone in the foster/kinship carer's network needs to be checked? If so, who and why?

We consider only those that have the potential to have direct unsupervised contact should need to be checked.

Question 14: Do you believe that this is the correct approach going forward?

Yes.

Question 15: Which option should the content for Level 2 disclosure product be based upon? Please provide the reason for your choice.

Option 2b (equivalent to the current enhanced disclosure with a suitability information check). As the regulator for the solicitor profession in Scotland, we need to receive the maximum information possible to enable us to carry out our role. We are not members of the PVG scheme so will rely on receiving the Level 2 disclosure information.

Question 16: Which price option do you prefer for the Level 2 product?

We believe that it should be kept at a level which covers the administrative and not profit level costs.

We prefer the option whereby applicants can create an account and experience a saving for multiple applications because our members will make multiple applications for Level 2 disclosures. We would like the option of movement between Level 2 and Level 1 disclosure checks because we require different level of checks for some roles.

Question 17: Is it proportionate that the free checks should continue for volunteers who obtain Level 2 disclosure?

Yes. We would consider it important to continue to support the voluntary sector as is done at present. There should therefore be a fee waiver system.

Question 18: What issues, if any, do you foresee with a move to digital service?

There would be the usual requirements for the online system that is developed to be compliant with Data Protection Act 2018 which implements the General Data Protection Requirements (GDPR) as it will handle special category personal data and data relating to convictions. The integrity and security of the data needs to be carefully safeguarded and appropriate authentication processes incorporated within it. There needs to be an awareness too that there remains a small group of digitally excluded people whose needs should be taken into consideration.

Access to the relevant information will need to be made available to the subjects of disclosure as well as to those receiving the information. We would be interested in further detail as to how this information will be provided and how Disclosure Scotland intends to verify the identity of those accessing information through a digital service.

Generally, however, we welcome a move towards electronic applications for both Level 1 and Level 2 disclosures which will speed up our own processes and assist our members to meet our requirements for regulation.

Section 3 – Reforming the policy underpinning the PVG Scheme

Question 19: How should a mandatory PVG Scheme be introduced and how should it work?

We would support the Scottish Government's view that there should be a PVG scheme which should clearly set out for all that need to understand it what it means and requires to be undertaken. It is a complex area of law so any guidance which is issued does need to be accessible and in language to be understood by those that are affected.

There is a need for public awareness to be factored in as part of the strategy behind the introduction of any mandatory PVG system. See our concluding comments.

Question 20: Do you agree with the proposal to replace the 'regulated work' definition with a list of roles/jobs?

Yes, this simplifies matters for all involved.

Question 21: Do you foresee any challenges for organisations from this proposed approach?

No.

Question 22: Are there any roles /jobs not within the list in Annex B that you think should be subject to mandatory PVG scheme membership?

No.

Question 23: To avoid inappropriate membership what criteria do you think should be used to decide if an individual is in a protected role?

We do not have a view because we are not members of the PVG scheme.

Question 24: Do you think any decisions about whether someone who is in a protected role meets an exception which makes them ineligible for the PVG Scheme should be taken by Scottish Ministers?

We do not have a view because we are not members of the PVG scheme.

Question 25: Are there roles that would not be protected roles and therefore ineligible for membership to the new scheme, that should, however, be eligible for a level 2 disclosure?

We do not have a view because we are not members of the PVG scheme.

Question 26: Are there any services that should be added or are there any services that should be removed?

We do not have a view because we are not members of the PVG scheme.

Question 27: Is this appropriate?

No comment.

Question 28: Do you agree with this approach?

No comment.

Question 29: Do you think these are the correct facilities or should any be added or removed?

No comment.

Question 30: Do you think this approach is clear and helpful?

We consider that this is best answered by those organisations directly involved in dealing with such adults. We would question whether all these requirements would apply to those who are appointed as Appropriate Adults. Though not directly caring for such adults, they are involved with such adults and the appropriate level of disclosure should be considered.

Question 31: Do you think that list of positions is correct?

It may be relevant to add to the categories within the definition of 'Protected Adult' individuals. This may include considering means of protecting individuals to whom measures under the Adults with Incapacity (Scotland) Act 2000 (2000 Act) are known to have been put in place. There will be considerable overlap with other roles that are subject to disclosure, but gaps may exist, for example, in relation to the proposed role of 'official supporter' which is currently being considered as part of a review of the 2000 Act. This and other potential developments could be covered by providing powers to Scottish Ministers to amend the list by way of regulations.

Question 32: How long should scheme membership last in a mandatory scheme?

5 years.

If there is a cost involved, we would wish to ensure that these costs are not incurred too frequently. That would seem too burdensome.

We note the reference to leaving the PVG Scheme and continuing to undertake a protected role as being created as an offence. We are unsure how this is intended to work as for this to be criminal; it would clearly require a declaration from the individual that they had left the scheme as it no longer continued to apply to them. Any offences need to be specified clearly. It cannot be committed tacitly or by default.

Question 33: Do you think a membership card would be beneficial to you as a member of the PVG scheme?

We are not members of PVG but we can see that it could be useful. However, the limitations of the card (in particular that presenting one does not necessarily mean that you are entitled to work with children or protected adults) would need to be made very clear.

Question 34: Do you think a membership card would be beneficial to you as an employer?

This is not relevant to us as an employer or regulator.

Question 35: Do you agree with these proposals?

We do not have a view because we are not members of the PVG scheme.

Question 36: What is your preferred option?

We do not have a view because we are not members of the PVG scheme.

Question 37: Are you in favour of being able to interact with Disclosure Scotland online?

Yes, provided that there are alternative options for those unable to access online resources for whatever reason. Given the move towards paperless processes, online seems best as long as there can be adequate security around the sensitive data. We would welcome the opportunity to liaise with Disclosure Scotland staff online, should there be any queries.

Question 38: Are you in favour of using electronic payment method for fees?

Yes. Provided it can be accommodated securely, this would seem a modern approach.

Question 39: Do you have an electronic payment method that you prefer?

Yes, credit card/debit card for applications and bank transfer/invoices for Registered Body Invoices.

Question 40: Do you have any proposals on how the transitional arrangements should work?

We consider that this is a matter for drafting of the commencement section of the relevant legislation.

Question 41: Should volunteers continue to receive free membership?

Yes.

Question 42: Do you agree that voluntary organisations seeking to benefit from a reduced fee or the fee waiver should be subject to a public interest test?

We consider that volunteers should continue with free membership. They are working to benefit society in the public interest so fee waivers should apply.

Question 43: Do you agree that employees and employers alike (including volunteers and volunteering bodies) who work or allow an individual to work in protected roles without joining the PVG Scheme or to stay in protected roles after membership has expired should be subject to criminal prosecution?

This proposal is unclear and further detail is required around the terms of any suggested offence. Any criminalisation of conduct would need to be clearly articulated. Before creating new offences, it would be useful to determine the scale and scope of any currently perceived problems and whether there are other mechanisms that could be used to address the issues.

Question 44: Do you agree that any scheme member who fails to pay the relevant fee to renew their PVG Scheme membership and where there are no employers (or volunteering bodies) registered as having an interest in them in a protected role should exit the PVG Scheme automatically at the expiry of their membership?

This depends on the scheme in place but it seems sensible.

Question 45: Should a person who joined the Scheme as a volunteer and benefitted from free entry later try and register a paying employer against their volunteer membership then the full fee would become payable and a new 5 years of membership would commence. Do you agree with this?

Yes.

Section 4 – removing unsuitable persons from work with vulnerable groups

Question 46: Do you agree with our proposals to dispense with the current court referral procedure under section 7 of the 2007 Act?

No. We prefer the route of retaining section 7 of the 2007 Act. The court is well placed to understand the facts and circumstances of the case and when to make a referral.

Question 47: Are there offences missing from the Automatic Listing Order that you think should be included?

We have nothing to add.

Question 48: Do you agree with proposals to create new referral powers for the Police?

No. We note that this relates a new referral power for the police which could be used to make a referral where they have charged someone with an offence of working in a protected role whilst not a scheme member or where a referral has not been made by a relevant organisation.

We note that the word 'charged' has been used which may not accurately reflect the changes in terminology in the now commenced Criminal Justice (Scotland) Act 2016. It uses the term 'arrest'. We are also concerned about fairness. The use of the word 'charge' tends to indicate that it refers to a stage before court which is far from establishing any aspect of guilt. Indeed, the COPFS may well not mark any case for criminal proceedings in the public interest for a number of reasons such as lack of sufficiency of evidence or not constituting a crime known to the law of Scotland.

We would be concerned as to the effect of such a referral power when there has been no finding of guilt. We therefore do not agree with this proposal.

Question 49: Do you agree these powers should be limited to when police have charged a person with unlawfully doing a Protected Role whilst not a scheme member or where a referral has not been made by a relevant organisation?

See our answer to Question 48.

Question 50: Do you think this proposal closes the safeguarding gap in terms of self-directed support?

We consider that this question is best addressed by those who are involved in health and social care partnerships. If there is a safeguarding gap, then the proposal would seem to go some way towards addressing this issue in a positive manner.

Question 51: Do you think that this list of regulatory organisations should be amended?

We do not have a view.

Question 52: If you think the list should be amended, please give details of additions or removals.

These questions are best answered by the relevant local authorities.

Question 53: Do you agree with the proposal to provide Disclosure Scotland with powers to impose standard conditions?

Yes.

Question 54: If yes, how long should the conditions last before lapsing?

3 months.

Question 55: Under what circumstances do you think Disclosure Scotland should be able to impose standard conditions and why?

We think that Disclosure Scotland should be able to impose standard conditions when the criteria which is set out in any legislation is met to protect those that are vulnerable.

Question 56: Do you agree that it should be a criminal offence if an individual and employer/voluntary body failed to comply with standard conditions?

Yes, provided that any criminal offence clearly sets out what the criminal conduct is.

Question 57: Do you agree the age threshold for the shorter prescribed period for a removal application to be made should be raised?

We note that Questions 53-57 all refer to the imposition of conditions where the conduct or alleged conduct is such that conditions should be imposed. We have concerns about due processes of transparency and fairness where there is reference to alleged conduct when the conduct has not actually been established through a criminal court in a finding of guilt to the necessary standard.

We would need to see the detail of how any such scheme would work and the processes for review on the imposition of any conditions by the court.

Question 58: Which option do you prefer?

We have no preference but consideration in aligning with any changes being proposed under the Management of Offenders (Scotland) Bill is required.

Question 59: Do you think it's appropriate that organisations, irrespective of where the regulated work is to be carried out, should be informed of a listed individual's barred status?

We have no observations to make other than this will be subject to the GDPR requirements.

Question 60: Do you agree with our approach for PVG Scheme Members in a protected role overseas or organisations employing PVG members to do a protected role, such as providing aid services?

Yes.

Question 61: We are proposing that there should be criminal offences in relation to organisations that employ barred persons overseas. Do you think that we should also consider introducing criminal offences in relation to barred individuals offering to undertake a protected role overseas?

There may be difficulties with this approach given that crimes should only be prosecuted in Scotland if they arise within Scottish jurisdiction.

Any criminalisation of conduct needs to be considered carefully. If considered that any conduct should be criminal, it needs to be set out clearly.

Section 5 – Offence Lists and Removal of spent convictions from a disclosure

Question 62: Are there any offences missing from either list that you think should be included? If so what are they, on what list should they appear and why?

Identity theft, tax offences and breaches of court orders should be included within Schedule 8B Offences which are to be disclosed subject to rules because they are offences of dishonesty which would cause us serious concern should the offender wish to become a solicitor.

Question 63: Are there any offences on schedule 8A that you think should be on schedule 8B? If so, please list them and explain why.

No.

Question 64: Are there any offences on schedule 8B that you think should be on schedule 8A? If so, please list them and explain why.

Yes. There are a number of offences which in terms of our fitness and properness procedures and the requirements that solicitors are in positions of trust which would cause us serious concern should the individual wish to become a solicitor. Specifically, these would include perjury, fraud and forgery, embezzlement, any other offences involving dishonesty, offences under the Solicitors (Scotland) Act 1980, proceeds of crime and money laundering legislation.

Question 65: Do you agree with the categorisation of the new offences?

No. The Criminal Finances Act 2017 section 45(1) and section 46(1) offences should be on Schedule 8A because of their importance to solicitors being officers of the court and in positions of trust while also acting for their clients.

Question 66: Do you believe the rules for disclosure in the current form of 15 years and 7.5 years provide appropriate safeguarding and privacy protections?

Yes.

Question 67: Do you agree that a reduction in the disclosure periods from 15 & 7.5 years is appropriate considering the changing policy on rehabilitation of offenders?

We might struggle with our regulatory functions if the periods were reduced. From our regulatory perspective, the length of time should not be reduced before disclosure is not required. We do not feel that this would be prejudicial to any person wishing to become a solicitor. Any decision regarding applicants would be made by us on a more informed basis and the information regarding previous convictions would help inform that decision. In our view, this is necessary information and is needed to assist us in our regulatory objectives of safeguarding the public and the profession.

Question 68: What period between 11 and 15 years do you think is appropriate for disclosure?

We have no comment.

Question 69: Do you think the application process to seek removal of a spent conviction should be reviewed?

Whatever the process for seeking removal of a spent conviction, we would emphasise the importance of taking into consideration the needs of regulated professions. In particular, the nature of the solicitor profession and our regulatory role, as discussed above, means that we have a strong legitimate interest in specific types of offending, such as crimes of dishonesty. Although we will likely not be aware of an individual seeking to have a spent conviction removed, we are concerned to ensure that the procedures and guidelines for those making these decisions are consistent and fully transparent. That will enable us to be confident that our specific professional requirements are understood and taken into account.

Question 70: At present, an individual has three months from the date of notification of an intention to appeal to make an application to a Sheriff. Do you think this time period is correct?

Time periods for making these applications must balance both the need to allow adequate time for an applicant to consult and prepare with the time pressures associated with providing documentation to prospective employers. The process should be made to be as straightforward as possible, so that applicants who need a decision in order to take up an offer of employment are not faced with delays that could ultimately prejudice that employment. Allowing up to three months to make an application may be appropriate (and may well be in line with many other court application procedures). The process should allow for an application to be made and decided on swiftly when required.

Question 71: Do you think any of the options set out above offer viable alternatives to an application to a Sheriff?

No. In our response to the call for evidence in the ACR Bill, we were concerned that any reviews from the decisions of the independent reviewers would be limited to a point of law only. This is not consistent with other rights of appeal in public law decision making. We would recommend that appeals should also be permitted on the grounds of procedural irregularity and *Wednesbury*⁷ unreasonableness.

We acknowledge that Protection Services within Disclosure Scotland may have considerable experience in considering referrals and making decisions about whether individuals are unsuitable to work with children or protected adults. However we consider that skill-set may not adequately equip Disclosure Scotland with the experience and expertise necessary to consider the relevance of convictions in other contexts, such as assessing the fitness and properness of a person seeking to be a solicitor.

We are charged with assessing that fitness and properness and have been making that assessment, in line with published criteria (the latest guidance is available on our website⁸) for many years. Convictions may reasonably be regarded as very relevant to that assessment which could well be less relevant in another context, such as working with children. For example, a series of spent convictions for shoplifting may be less relevant in the context of a person seeking to be a sports-coach than it would reasonably be regarded if that person were seeking to become a solicitor. Solicitors are trusted by clients (some of whom are vulnerable) with their money and assets. Solicitors have a duty to uphold the rule of law. Any conviction for an offence of dishonesty, and particularly one which involves abuse of a position of trust, may therefore be of relevance and repeated (even minor) convictions may be relevant to the extent that they may suggest a lack of respect for the rule of law.

⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

⁸ <https://www.lawscot.org.uk/media/359166/fit-and-proper-guidance-november-2017.pdf>

Would Disclosure Scotland consult with us on what convictions we would regard as relevant in this context? Would Disclosure Scotland publish the decision-making criteria it applies to considerations of questions of the relevance of convictions to all the different roles, positions and circumstances?

In short, we have significant concerns about the appropriateness and transparency of the proposals in this regard and refer to our comments at Question 69 above.

Section 6 – Additional Policy Questions

This relates to Other Relevant Information (ORI) disclosure that is a necessary but difficult element of disclosure. It is the area where the most difficult balance between necessary disclosure to protect the public and invasion of privacy (including damage to reputation and stigma) arises. The section begins by summarising the present system for notification to ‘challenge’ by the disclosure subject of proposed ORI disclosure and then sets out the proposed changes. We would seek to make general observations as well as answering the specific questions.

The general proposal that notification be made to the disclosure subject before disclosure occurs is a welcomed development. It resolves the previous situation of (in some cases) the right of seeking review being academic and after the event. Scottish Ministers being empowered to make statutory guidance to assist the police on dealing with ORI disclosures is positive in principle. At present, the system allows for subjective decision making without measures to ensure consistency. Whilst infrequent, it should be remembered that ORI disclosures are potentially the most significant because they necessarily will involve the disclosure of serious allegations where a conviction has not occurred. As such, they have potential to be the most damaging to an individual. Consistency in approach is to be welcomed. The proposed system would also be in line with the system that operates in England and Wales.

The consultation does not specify, as we mention at the conclusion, what form that statutory guidance would take. It does not identify nor invite comment upon the considerations to disclosure of ORI, nor does it identify the proposed threshold test for disclosure. Given how significant this area is, we would expect further consultation on the details of the proposed system. It is unclear why the proposal for a threshold test to be set out in primary legislation with guidance supplementing that is not an option. The aim should be for disclosure only where necessary in the public interest and where proportionate (taking account of the disclosure subject’s interests) to achieve that aim. This would give greater clarity and security to the disclosure subject. This could be set out in simple terms. It could state that the Chief Officer shall not make disclosure of ORI unless he or she is satisfied that disclosure is both (a) necessary in the public interest; and (b) proportionate to any harm or detriment it may cause the disclosure subject.

Under the new proposals, it is unclear why there is a retention of the right to seek review by the Chief Officer. This is particularly redundant where there is already a proposed right of advance notice to allow

representations pre-disclosure. In effect, we would have representations from the disclosure subject and a decision and then further representations and reconsideration by the same person.

One consequence of the introduction of advanced notice and an additional layer of challenge is that there will be delay caused between the ORI being identified as potentially relevant and actual disclosure taking place.

Given the introduction of the right to seek review by the independent reviewer, the right to seek review by the original decision maker is redundant and should be removed. This still gives the disclosure subject three opportunities to prevent unnecessary disclosure which include:

- (a) representations to the Chief Officer
- (b) review by the independent reviewer and
- (c) judicial review.

Not offering a right of appeal to the Sheriff would mean that any such appeal would ultimately require to proceed to a judicial review. This may be at odds with the proposal under ACR Bill of a statutory right of appeal. The benefit of a statutory right of appeal is the opportunity to create specific rules of procedure (and, critically, timescales) for this type of appeal.

This approach allows appeals to be expedited. For example they can be lodged in a much shorter timescale (28 days as against the three months permissible for judicial review) and requiring them to be determined in a fixed period of time. This would assist in balancing out any concern about delays in necessary disclosures where rights of review are exercised.

The consultation gives no information about proposed timescales for the different stages and one could easily see several months elapsing before disclosure occurs. This means that there is a possibility of relevant information that is ultimately being disclosed not being made available to an employer or organisation for someone working with children or vulnerable adults meantime. That would need to be avoided.

This section presupposes the change of the age of criminal responsibility in the ACR Bill which is why it covers 12-17 year olds. We have raised concerns about the possible (unintended) consequence for children below 12 accused of conduct that previously would have been categorised as an offence.⁹ If our proposed change to section 67 of the ACR Bill (introduction of a new ground of referral) is not enacted, a child aged 11 accused of the same conduct will potentially be in a worse position than that of a child aged

⁹ Law Society of Scotland, Written Evidence on the Age of Criminal Responsibility (Scotland) Bill, July 2018 <https://www.lawsco.org.uk/news-and-events/news/society-supports-recommendation-to-raise-age-of-criminal-responsibility/>

12 because of the removal of procedural and evidential safeguards that exist in a criminal law context but do not in a civil law context.

Disclosure of ORI is at the discretion of the Chief Officer of the relevant police force. It could occur in any event where there is no conviction. There is a risk that allegations are considered 'more credible' where they are the subject of an established ground of referral. This may lead to a higher likelihood of disclosure of adverse behaviour by a child under 12 than where the same allegation for a 12-17 year old is the subject of judicial determination in a grounds of referral application and is expressly not established. This consequence would run contrary to the underlying intention of the ACR Bill to offer additional protection to children under 12.

It is a difficult balance to be struck between the damaging consequences for youth offenders of future disclosure (particularly of ORI) and the need to help the aim of protecting the public from harm by using child offending information as a predictor of future offending behaviour/adverse conduct.

There are two proposed alternatives to the existing system. The first is that the same system proposed in the ACR Bill would be enacted, meaning that there would be no automatic disclosure of offences committed (where an offence ground of referral is established) for children aged between 12 and an undefined upper limit in terms of basic disclosure, but disclosure would occur with Level 2 or PVG disclosure. The second is for a prohibition on disclosure of any offence which is established/for which there is a conviction in that age range, with exceptions for certain types of offences.

The second option (prohibition with exceptions) is attractive, as it continues the policy aim of decriminalising conduct by children. It gives specific consideration to and distinguishes child offending from adult offending. The consultation recognises that child offending is a less reliable predictor of future recidivism than adult offending. It limits the situations in which the risk of future stigma or harm to a disclosure subject might occur, where the disclosure relates to childhood offending. It also strikes a balance by still allowing disclosure as ORI.

This option would, in order to be effective, make all the more important the careful regulation of ORI disclosure. ORI disclosure would become the only means by which disclosure of childhood offending would occur (dependent upon the upper age selected). Despite the consultation paper suggesting that disclosure would become infrequent (quoting the number of ORI disclosures), this presupposes that ORI disclosures would not become more frequent to deal with the cases where a child was convicted of an offence or an offence ground of referral was established. As with our concerns in relation to the ACR Bill, this risks the unintended consequence of putting such children in a worse position by removing existing safeguards. We would include the following examples:

- The erosion of the significance of a conviction/established ground, with the possibility of disclosure always being entirely on the basis of the discretionary ORI disclosure;

- The disincentive to bring such criminal prosecutions given their more limited purpose, potentially putting children at higher risk of disclosure of untested allegations;
- The higher risk of those offences being brought by means of another ground of referral given the removal of any distinction in consequence between conduct established as an offence or conduct established as something else (e.g. adverse conduct under s 67(2)(m) and the consequential removal of the procedural and evidential safeguards that exist for offence grounds of referral. This potentially heightens the risk of ORI disclosure because the Chief Officer may treat an established ground (which could be at a lower standard of proof; where a child was not presented; and with evidence that otherwise would have been deemed inadmissible) as more credible.

In addition, there are public policy considerations to the change, including the risk of less frequent prosecution of offending behaviour.

On balance, this option would be a change consistent with the 'whole system' approach to child welfare implemented by the Scottish Government but it would be essential that there were appropriate safeguards, particularly around ORI disclosures and also in the approach taken by the Scottish Children's Reporter Administration to the categorisation of adverse childhood conduct (which ground the conduct was brought as). It is critical that the aim of giving children the opportunity to make something of their lives in adulthood free from the weight of childhood indiscretions does not, itself, lead to those children in fact being in a worse position in adulthood.

Question 72: Do you agree that Ministers should have a power to issue statutory guidance to Police Scotland on the processes governing the generation and disclosure of ORI, including seeking representations from the individual before issuing it for inclusion on an enhanced disclosure or PVG scheme record?

Yes. We refer to our response above that sets out clearly why we agree. The interest of fairness supports this. In particular, we agree with the proposal that an individual should have the opportunity to challenge any ORI and have it removed or adapted before it is disclosed to a prospective employer.

Question 73: Do you agree with Ministers' proposals to allow for representations to the chief constable before disclosure of ORI to a third party and for providing the individual with the option to appeal to an independent reviewer before ORI is disclosed?

Yes. We refer to our response above.

Question 74: Do you agree that the independent reviewer being appointed under the ACR Bill should be used for reviewing ORI?

We refer to our answer at Question 72. In addition, the introduction of the role of independent reviewer is significant, and welcomed. Consistency with the ACR Bill makes sense, subject to the existence of similarly robust guidance for the independent reviewer. It introduces – short of the prior opportunity for judicial review (the scope of which itself is very limited) – a chance to have a full reconsideration of a decision by someone other than the decision maker.

Question 75: Should there be specific provisions reducing the possibility of the state disclosure of criminal convictions accrued by young people 12 years or older on all types of disclosure?

Yes. We refer to our response above. This is in line with the policy intentions behind the ACR Bill.

Question 75a: If there should, what age range should the special provisions apply to?

We do not have any specific views on the relevant age.

Questions 76: Should there be a presumption against the disclosure of all convictions accrued between 12 and a specified upper age, with the only possibility being police disclosure as ORI after ratification by the Independent Reviewer on the Level 2 and PVG Level disclosures?

or

Question 77: Should there be no state disclosure of any conviction between the age of 12 and the specified upper limit, except where the conviction is for an offence listed in schedule 8A or 8B?

We refer to our response above.

Question 78: If there is a disclosure of an 8A or 8B conviction(s) should all other unspent convictions be disclosed even if the other unspent convictions are for offences not listed in schedule 8A or 8B?

Yes. We refer to our earlier comments about our procedures and our fitness and properness guidance which includes the matter of multiple minor offences potentially demonstrating a disregard for the rule of law. It is important that all unspent offences are disclosed to us.

Question 79: Should disclosure applicants with 8A and 8B convictions be able to apply immediately to a sheriff (or other authority) to have those treated as protected regardless of the passage of time?

No. If the processes require that a time limit is applied, then that time limit should be applied to any applicant for a PVG or disclosure check. Time passed should not be one of the criteria considered by the sheriff.

Question 80: When including ORI on any disclosure about conduct between the age of 12 and the upper age limit should the police only be able to refer to matters they reasonably considered to be serious?

We refer to our response above.

Question 81: Do you agree with the proposal to place a lower age limit on applicants for criminal record checks?

We refer to our response above.

Question 82: In what circumstances should a criminal record check for a child under 16 be permitted?

There is a need to consider where and when this would be required in the public interest. We refer to our response above.

Question 83: Do you have any concerns with this proposal?

Yes. We refer to our response above.

Question 84: Do you think a supported person arranging self-directed social care should have access to vetting information which could include details about previous convictions relating to a prospective carer?

This question is best answered by those providing social care.

Question 85: Do you think this approach is correct?

This relates to private individuals working with children and/or protected adults. This question is best answered by the relevant education authorities.

Question 86: Do you think that it should be?

It depends on the scope of the role. This is best explained by those familiar with undertaking such work. We can see why it might need to be regulated.

Question 87: Should vetting information be available if the arrangements are being made by a private individual?

Possibly but this depends on compliance with GDPR.

Question 88: Do you agree that the law be changed to sort this anomaly?

Yes.

Question 89: Do you think that provision should be made to bring into force the amendment at section 78(1) of the 2007 Act?

Yes.

Question 90: Please tell us about any potential impacts, either positive or negative; you feel the proposals in this consultation document may have on any particular groups of people?

Please see previous comments about our own processes. The Admission as Solicitor (Scotland) Regulations 2011 requires us to establish the fitness and properness of any individual seeking to become a solicitor. We also have statutory requirements to make similar tests at other stages of solicitors' careers for anti-money laundering and other purposes.

Question 91: Please tell us what potential there may be within these proposals to advance equality of opportunity between different groups and to foster good relations between different groups?

No comment.

Question 92: Please tell us about any potential impacts you think there may be to particular businesses or organisations?

No comment.

Question 93: Please tell us about any potential impacts you think there may be to an individual's privacy?

Convictions are a matter of public record. Where there are discretionary requirements, such as ORI, there is of course a need to consider a person's privacy but it is about maintaining a balance between a person's privacy rights and the public interest in relation to any information being disclosed.

Overall, and subject to our comments on specific proposals, we feel that the proposed changes will represent a better balance between the interests of society in having a safeguarding process in place with the privacy rights of those involved.

Question 94: Please tell us about any potential impacts, either positive or negative; you feel the proposals in this consultation document may have on children?

We have no specific comment.

Section 7 – Non Legislative Changes

We note that there are no questions regarding the Section 7 of the consultation. We refer to our observations above. There is in our view a need for guidance that can easily be understood as these areas of legislation are complex and will require to be understood by the public in the interest of fairness.

A number of persons will be impacted by disclosure, be it as an individual affected or as the organisation making the disclosure request. The system needs to be accessible. It should not require those legally qualified to interpret.

We would endorse the need for a comprehensive and appropriate programme to ensure that all who require to know about disclosure requirements are properly informed once the changes are made.

We appreciate the need to digitalise the processes. Such processes need to comply with a high level of security as well as compliant with GDPR requirements.

The consultation contains no information about the proposed availability of legal aid for the right to seek review via the independent reviewer. It would be critical that regulations were put in place guaranteeing the availability in principle (subject to means and merits testing) of such funding to ensure that there was an effective scheme to exercise these important rights. Nowhere will this be more important than in relation to child offending. The availability of legal aid is particularly important given the recognition that whatever changes may be made that the PVG scheme will remain necessarily complex, involving the balancing of different rights and significant legal issues. Without appropriate funding, the right of review offered runs the risk of being ineffective.

We hope that this response is helpful for your purposes. We would stress as the process goes forward following the consultation, we would welcome more detailed discussion with the Scottish Government when looking specifically at disclosure and the requirement for the Society with its regulatory functions to be able to determine whether an individual is a fit and proper person.

For further information, please contact:

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