



Disclosure (Scotland) Bill – stage 3 briefing

The Law Society of Scotland is the professional body for almost 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

As a professional body, we have experience of the current disclosure system. The scheme is integral to how we promote and maintain professional principles as a regulator - on admission to the profession, re-entry to the profession or as part of our anti-money laundering regulation. Any reforms to the current disclosure system must not diminish the protection to the public, while respecting the rights of the individual and ensuring that the process is clear, predictable and certain to all involved.

We provided a [written response](#) to the call for evidence from the Education and Skills Committee of the Scottish Parliament; we subsequently provided [oral evidence](#) to the Committee on the Bill.

Our role

We are the professional body statutorily required to represent the interests of the solicitor profession and the interests of the public in relation to the profession¹. We are also required to have regard to regulatory objectives, including protecting and promoting the interests of consumers and the public interest generally and promoting and maintaining adherence to the professional principles.

An effective disclosure regime is crucial to our role, allowing us to admit individuals who are fit and proper to the profession. This differs from the employer and employee relationship, and the role of solicitor, as an officer of the court, differs from other types of employment.

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.

Supporting simplification

We support the development of a simplified regime for disclosure in Scotland, balancing an individual's right to privacy with protection of the public interest. The current disclosure regime is complex and can be difficult to navigate. We also appreciate the reasons for changing the way in which offences committed before the age of 18 are treated. However, the Bill proposes significant changes to the disclosure system which, if enacted, may restrict the information which will be disclosed to us through future disclosure certificates. Allowing electronic processing of disclosure applications, subject to appropriate safeguards around the security of sensitive personal information, will make the process quicker and more accessible.

The two-part test: 'relevant' and 'ought to be disclosed'

Whether a particular conviction will be disclosed may depend on the offence; the age of the offender at commission; the amount of time which has elapsed since the conviction; and an assessment (initially by Disclosure Scotland but reviewable – at the instance of the subject of the certificate only - by an independent reviewer and the sheriff) as to whether the conviction is "relevant" for the purpose for which the certificate is



sought and “ought to be disclosed”. The role of solicitor is broad and we are keen to ensure, in particular, that there is greater detail around the relevance of any convictions to ensure that we can discharge our functions effectively in the public interest.

Scottish Government and Disclosure Scotland have outlined the approach around guidance, both statutory and non-statutory, that would support the two part test in practice and we are keen to contribute to this work, to ensure that the disclosure regime provides effective protection and balance between the competing needs of the system overall. Though there may be some additional elements of information provided in the new disclosure products that would previously have been only available through the enhanced disclosure process previously, such as other relevant information provided by the police, we remain concerned that the information that we receive overall to discharge our functions becomes more limited as a result of this legislation. We hope to be able to engage with Scottish Government and Disclosure Scotland further as the new scheme is implemented, to ensure that the code and any guidance are effective and meet the needs of organisations tasked with safeguarding the public.

We also welcomed the recommendation in the stage 1 report from the Education and Skills Committee that high-level principles could be included in the Bill, and the amendment from the Scottish Government at stage 2 of the Bill process, which we believe will provide greater certainty for individuals and organisations involved in the disclosure process.

Lists of offences

The Bill separates criminal offences, largely depending on their seriousness, into List A and List B offences. There is the capacity to amend these lists by regulations, for instance, to follow the work of the Scottish Sentencing Council around sentencing outcomes. We had highlighted some of the inconsistencies around the classification of the offences and note that amendments during the passage of the Bill dealt with a number of these concerns. There is the ability to amend further through time, and it will be important to consider, should new offences be enacted, how these would be classified for the purposes of disclosure, taking into account the severity of these and the public

Childhood offending

There are undoubtedly challenges around the employability of people requiring to disclose previous convictions, for both childhood and adult offending. We appreciate the policy direction of this Bill and previous legislation, such as the Age of Criminal Responsibility (Scotland) Act 2019, in its aims to treat childhood as a distinct stage for these purposes.

Conclusion

We support the simplification of the disclosure process overall, which we believe will bring greater certainty for individuals and organisations engaging with the disclosure process. Allowing electronic processes for the disclosure system will make the process quicker and more effective.

The introduction of principles at stage 2 of the Bill will also provide a greater degree of certainty around the decision-making involved in the process, though we remain concerned that the information provided as a result of this legislation may be more limited than available previously to discharge our functions. However, we look to engage with Scottish Government and Disclosure Scotland to ensure that code and guidance available for this process are able to assist in effective safeguarding of the public.