

DISCLOSURE (SCOTLAND) ACT 2020

EXPLANATORY NOTES

PROVISION BY PROVISION COMMENTARY

Part 2: Protection of vulnerable groups

Scheme membership

Section 70: Participation in Scheme

133. Section 70 substitutes a new section 45 (Participation in Scheme) into the PVG Act. The new section 45(1) provides that an individual aged 16 or over may apply to participate in the PVG Scheme (the “Scheme”), or if already a scheme member apply to renew their membership. This is read with section 45(2) which sets out the type of regulated roles in relation to which an individual can participate in the Scheme i.e. individuals may participate in the Scheme in relation to regulated roles with children, regulated roles with adults, or both types of regulated role. The new section 45(3) states that Ministers must allow membership unless the person is under the age of 16, or barred from carrying out the type of regulated role to which their application to join, or renew their membership of, the Scheme relates.
134. For the avoidance of doubt, while individuals under the age of 16 years cannot participate in the PVG Scheme, they can still carry out activities that would amount to a regulated role if they were aged 16 or over. As set out below (see paragraph 144), the offence provisions for individuals, organisations and personnel suppliers do not apply in relation to individuals under the age of 16 years. This means that individuals under the age of 16 are not within scope of the mandatory scheme. It would be at the discretion of an employing organisation to assess what activities may be appropriate for a person under 16 and to put in place any suitable safeguarding measures both for the individual undertaking the role and any children or protected adults they were working with.

Section 71: Duration of Scheme membership

135. Section 71 inserts a new section 45A (Duration of Scheme membership) into the PVG Act. Section 45A(1) sets the length of PVG scheme membership at five years. Section 45A(3)(a) requires Ministers to contact the persons mentioned in subsection (4) (namely, the scheme member and each organisation, personnel supplier and relevant regulatory body for which they know the scheme member is carrying out a regulated role) three months before membership is due to expire to alert them that expiry is approaching. Section 45A(3)(b) allows Ministers to notify a person other than an organisation (for example, an individual employing a personal carer through self-directed support) that expiry is approaching.
136. Section 45A(5) and (6) work together to ensure that information about a scheme member who participates in the Scheme for both types of regulated roles but notice of expiry relates to only one of those types of regulated role. In that case, the notice in relation to that type of regulated role to the organisation (see definition in section 97(1) of the PVG Act), personnel supplier, relevant regulatory body or any other person for

whom the scheme member is doing a regulated role must not disclose information about the scheme member's participation in the Scheme in relation to that other type of regulated role (or the fact that the scheme member participates in the Scheme in relation to that other type of regulated role).

137. In cases where a scheme member has applied for renewal of membership before the date of expiry, and where Ministers have not determined the application, then membership must continue until Ministers' determination of the renewal application occurs (see subsection (7)).

Section 72: Failure to apply for renewal of Scheme membership

138. Section 72 inserts a new section 45B (Failure to apply for renewal of Scheme membership) into the PVG Act. This section sets out the rules around what happens when a scheme member fails to apply to renew membership before the expiry date. Ministers cannot end scheme membership unless they are satisfied that the scheme member is no longer carrying out a regulated role. So membership is extended by 4 weeks, referred to as the "extended membership period", to enable Ministers to satisfy themselves of that fact (see subsection (2)).
139. If Ministers cannot be so satisfied before the extended membership period lapses, they may extend membership for six months – referred to as the "discretionary membership period" (see subsection (3)(b)). Where Ministers do this, they must notify the scheme member and any organisation, personnel supplier or relevant regulatory body for whom they know the scheme member is carrying out a regulated role. They may also notify a person other than an organisation for whom a scheme member is carrying out a regulated role. If during that discretionary membership period the scheme member does not apply to renew their membership and Ministers are satisfied that the scheme member is no longer carrying out a regulated role then the individual can be removed from the Scheme (see subsection (6)).
140. If the scheme member does not apply to renew their membership of the scheme and Ministers believe that the scheme member is still carrying out a regulated role they must place the individual under consideration for listing in the children's list or the adults' list (or both) if they consider that it may be appropriate for the scheme member to be included in that list, regardless of the type of regulated role for which they participate in the Scheme (see subsections (7) and (8)).
141. Where an application is made by a scheme member to renew their membership to continue to participate in the Scheme during either the extended or discretionary membership period, Ministers must allow ongoing participation in the Scheme until the application is determined by them. Ministers can refuse to consider an application by an individual for a Level 2 disclosure (or a confirmation of scheme membership under section 54 of the PVG Act) that is made by the scheme member during any discretionary membership period (see subsection (11)). It is intended that this will encourage individuals who require to remain in the Scheme to do so by renewing their membership at the appropriate time. An application for a Level 2 disclosure made by a scheme member during the discretionary membership period may be disregarded in which case the individual would not be able to share a Level 2 disclosure or confirmation of their membership with, for example, an employer. This could prevent them from performing or continuing to perform a regulated role.

Section 73: Compulsory Scheme membership

142. Section 73 inserts five new sections: sections 45C, 45D, 45E, 45F and 45G into the PVG Act. The new section 45C (Individuals must be scheme members to carry out regulated roles) makes it an offence under subsection (1) for an individual to carry out, or agree to carry out, a regulated role if not a scheme member. Subsection (2) makes it clear, in relation to an offence under subsection (1), that an individual is not deemed to have agreed to carry out a regulated role if that agreement is subject to the individual

joining the PVG Scheme for that type of role. It is a defence if the person did not know they were carrying out a regulated role, or if they did not know that their membership had not been renewed. The offence does not apply to any individual who is barred from the type of regulated role in question (although the offence under section 34 of the PVG Act may be triggered), or who is under the age of 16 years of age.

143. The offence also does not apply in relation to any individual who is barred from the type of regulated role in question (although section 35 of the PVG Act may apply), or who is under the age of 16 years of age (see paragraph 134 of these notes).
144. The new section 45D (Organisations not to use individuals for regulated roles without confirming scheme membership) makes it an offence for an organisation to offer a regulated role to a person unless the organisation has first had PVG scheme membership confirmed by Disclosure Scotland issuing a Level 2 disclosure to them. It is a defence if the organisation can prove that it did not know, and could not be expected to have known, that the person was not a scheme member. An organisation which had offered a role conditional on receipt of a disclosure does not commit an offence. The offence also does not apply in relation to any individual who is barred from the type of regulated role in question (although section 35 of the PVG Act may apply), or who is under the age of 16 years of age.
145. The new section 45E (Power to require organisations to stop using individuals for regulated roles without scheme membership) makes it an offence for an organisation to fail to comply with regulations made under subsection (1). Subsection (1) provides the Scottish Ministers with a regulation making power (subject to the affirmative procedure by virtue of the amendment in section 73(3)) to prohibit organisations from permitting an individual to carry out a regulated role or to require organisations to remove an individual from a regulated role where the individual is not a scheme member. This is to address behaviour by organisations continuing to employ someone to carry out a regulated role where that person is not or is no longer a scheme member. Regulations may impose prohibitions or requirements in relation to particular types of organisations or in relation to particular kinds of regulated roles.
146. Section 45E ensures there is an ongoing impetus on organisations to check whether their employees remain scheme members. It does so by ensuring that there is a consequence for an organisation that does nothing following receipt of a notification under the new section 45B stating that a scheme member's membership has lapsed. Under subsection (4) it is a defence for an organisation charged with an offence under subsection (3) to prove that it did not know, and could not reasonably be expected to have known, that the individual was not a scheme member.
147. Section 45F (Personnel suppliers not to supply individuals for regulated roles without confirming scheme membership) makes provision, in relation to personnel suppliers offering an individual to carry out a regulated role for an organisation. A personnel supplier commits an offence by offering or supplying a person for a regulated role in an organisation unless the personnel supplier has first had PVG scheme membership confirmed by Disclosure Scotland issuing a Level 2 disclosure to them. The offence does not apply in relation to any individual who is barred from the type of regulated role in question (but see section 36 of the PVG Act), or who is under the age of 16 years.
148. The new section 45G (Penalties for offences relating to regulated roles by individuals not in Scheme) sets out the penalties for the offences introduced by sections 45C, 45D, 45E and 45F.

Regulated roles

Section 74: Regulated roles

149. Section 74 substitutes a new section 91 (Regulated roles) into the PVG Act to replace the concept of regulated work in the current section 91. Schedules 3 and 4 in the Act set

out the meaning of “regulated roles with children”, and “regulated roles with adults”, substituting the existing schedules 2 and 3 of the PVG Act. Part 2 of schedule 5 of the Act makes various consequential amendments arising from the substituted concept of regulated roles.

Section 75: Meaning of “protected adult”

150. Section 75 amends the meaning of ‘protected adult’ in section 94 of the PVG Act. There is a move away from the previous lengthy and complex definition to a narrower range of issues affecting a person’s wellbeing, capabilities and capacity. Section 75(2) of the Act substitutes into section 94 of the PVG Act a new subsection (1)(a) to (d). This provides the criteria which if satisfied will mean a person is a protected adult for the purpose of the PVG Act; these are alternatives and not cumulative.
151. The age a person must have attained to be regarded as a protected adult is changed from someone aged 16 or older, to someone aged 18 or older. This is to prevent an overlap between the children’s and protected adult’s workforces under the PVG Scheme.
152. New subsection (1)(a) provides that an individual who as a result of physical or mental disability, illness, infirmity or ageing has an impaired ability to protect themselves from physical or psychological harm or who requires assistance with activities of daily living, such as, personal care, is a protected adult for the purpose of the PVG Act.
153. New subsection (1)(b) makes provision for individuals who are homeless, or have experienced, are experiencing or are at risk of experiencing domestic abuse. However, such individuals are only brought within the meaning of protected adult in relation to a role that involves the carrying out of activities mentioned in paragraph 17 of the new schedule 3 of the PVG Act substituted by schedule 4 of the Act (provision of counselling, therapy, advice or guidance for protected adults).
154. New subsection (2A) defines “domestic abuse” for the purpose of subsection (1)(b) (ii). Domestic abuse is defined as behaviour, whether or not amounting to criminal behaviour, that is perpetrated between partners or ex-partners, whether in the home or elsewhere or by means of electronic or other forms of communications, and involves any form of physical, verbal, sexual, psychological, emotional or financial abuse of one of the partners or ex-partners by the other. New subsection (2B) makes clear that an individual is a person’s “partner” if they are married to each other, civil partners of each other, living with each other as if they were married to each other or otherwise in an intimate relationship with each other. “Ex-partner” is to be construed accordingly.
155. Individuals accessing health services provided by certain registered health professionals (to be prescribed by Ministers by regulations subject to the negative procedure) will also be protected adults while being provided with those services, by virtue of subsection (1) (c).
156. Individuals in receipt of a prescribed service of the type listed in new subsection (1)(d) will also be protected adults when being provided with any of those services. These are the same types of services provided under the section 94 definition of protected adult in the PVG Act.

Scheme members under consideration for listing

Section 76: Conditions imposed on scheme members under consideration for listing

157. Section 76 inserts three new sections into the PVG Act. The sections relate to Ministers’ new powers to impose conditions on a person who is under consideration for listing. New section 13A (Conditions imposed on scheme members under consideration for listing) contains powers for Ministers to impose prescribed conditions on scheme members who are under consideration for listing. The conditions are to be prescribed in regulations subject to the negative procedure in the Scottish Parliament. Ministers

will also be able to use their powers under section 42(1)(c) of the PVG Act to make further procedure about the procedure which is to be followed before making a decision to impose conditions on a scheme member who is under consideration for listing.

158. The conditions that Ministers impose can be based only on the information that led them to place the scheme member under consideration for listing, information gathered under section 18 to 20 of the PVG Act, or information gathered while performing their functions relating to the PVG Scheme.
159. Any conditions imposed last for an initial period to be prescribed by regulations subject to the negative procedure to be made by Ministers. They can be extended beyond that period subject to confirmation by a sheriff on application by Ministers under section 13B. The conditions will lapse at the end of the initial period prescribed by regulations unless they are confirmed by a sheriff.
160. Section 13A(5) requires Ministers to notify the persons listed in subsection (6) of the fact that conditions have been imposed, and what those conditions are. Ministers must inform the scheme member only of the reasons why the conditions are being imposed.
161. The new section 13B (Application to sheriff for confirmation of conditions) allows Ministers to apply to a sheriff to have conditions imposed by them approved by a sheriff. The scheme member on whom conditions have been imposed is entitled to be a party to proceedings before the sheriff (subsection (8)). An application must be made before the prescribed period under section 13A(4) expires. In cases where the application is made, the prescribed period extends until the sheriff determines the application (see new section 13B(3)). The application is to be made when it is lodged with the sheriff clerk (see subsection (10)). A sheriff can hear the application in private (see subsection (11)).
162. Subsections (4) to (7) specify the decisions that a sheriff may make on an application; that any variation of a condition or imposition of a new condition cannot go beyond what Ministers could have imposed under section 13A; that if the sheriff approves the application (with or without variation, or imposition of a new condition) the conditions will remain in place while Ministers are considering whether to list the scheme member in the adults' list or the children's list (as they case may be); and, where the sheriff removes that condition imposed by Ministers, that removal takes effect from the date of the sheriff's decision. The persons to be notified of a sheriff's decision are set out in subsection (9), and they are the same persons as were notified under section 13A(6).
163. The new section 13C (Breach of conditions: offences) makes it an offence for a scheme member to fail to comply with a condition imposed. It is also an offence for a person mentioned in subsection (3), namely an organisation or personnel supplier employing or supplying the scheme member in a regulated role, to fail to take action to prevent a condition imposed being adhered to. It is a defence for a scheme member or any employer or personnel supplier that they did not know, and could not reasonably be expected to have known, that a condition was imposed. The penalties for the offences are set out in subsection (5).

Section 77: Notice of consideration for listing

164. Section 77 amends section 30 of the PVG Act relating to notice of listing. Subsection (2) extends Ministers' notification duty under section 30(3) of the PVG Act to personnel suppliers. Subsection (3) inserts new subsections (3A), (3B) and (3C) into section 30. Together, subsections (3A) and (3B) give Ministers a discretionary power to notify an individual who employs other persons but not in the course of business, for example a parent who is employing a music tutor to give their child piano lessons or an individual employing a carer within the context of self-directed care, that a scheme member is being considered for listing, and where appropriate give notice of any conditions imposed on the individual. Subsection (3C) allows Ministers to notify such persons of the outcome of the consideration for listing process.

Section 78: Withdrawal from Scheme when under consideration for listing

165. Section 78(2) inserts a new section 59A (Withdrawal from Scheme when under consideration for listing) into the PVG Act. This new section is contingent on Ministers having removed an individual from the PVG Scheme under section 59 of the PVG Act (where the scheme member has applied to be removed from the register and Ministers are satisfied that the scheme member is not carrying out a regulated role), and the removal occurring while the individual was under consideration for listing in the children's list or the adults' list or both. Ministers can decide whether to continue with the consideration case after removal takes place. A decision under section 59A(2) does not amount to a decision not to list the individual for the purpose of the notification provisions under section 30(3C) or (4) of the PVG Act,
166. Subsection (3) amends section 60 of the PVG Act to require that a notice under section 60(1), advising of removal from the Scheme, must give information about any decision under section 59A(2) where appropriate.

Notice of barred status

Section 79: Notice of barred status

167. Section 79 inserts a new section 46A (Notice of barred status) into the PVG Act. Section 46A(2) provides that Ministers must advise an accredited body that an individual has been refused scheme membership due to their being listed in either the children's list, the adults' list or both lists. This notification can be made only when Ministers know the person has sought or agreed to carry out a regulated role from which they are barred.

Listing

Section 80: Reference by chief constable

168. Section 80 inserts a new section 6A (Reference by chief constable) into the PVG Act. This new power enables the chief constable of Police Service of Scotland to make a referral to Ministers if the chief constable considers an individual is or has been carrying out a regulated role without being a PVG scheme member (which will now be an offence under the new section 45C of the PVG Act). This power exists independently of the powers the chief constable has to investigate whether an offence has been committed by the individual. Subsection (3) inserts a new paragraph (aa) into section 10(1) of the PVG Act so that Ministers can take action on such a referral by the chief constable, and if appropriate place the individual under consideration for listing.

Section 81: Removal of references by court

169. Section 81 repeals a number of provisions in the PVG Act to bring to an end the requirement for court referrals upon conviction for a relevant offence. This process is no longer necessary in light of the new mandatory scheme requirement for all regulated roles.

Section 82: Reference by councils or integration joint boards

170. Section 82 extends the power to make a referral to Ministers to Scottish local authorities and integration joint boards. To achieve this, section 8 of the PVG Act is amended. The referrals can be made only in connection with issues that arise in exercise of certain statutory functions by these bodies. These functions are listed in subsection (3).

Section 83: Application for removal from list

171. Subsections (2) and (3) change the test in section 25 of the PVG Act so that it more explicitly reflects the filtering nature of the provision, such that an application for removal will only be competent if Ministers are satisfied that there has been a change

in circumstances since the applicant was listed or last made an application for removal from the list which is relevant to the question of their suitability to carry out a regulated role.

172. Subsection (4) repeals references to a quashed conviction in 25(5) and 25(6) of the PVG Act. The repeal of these subsections does not necessarily mean that a quashed conviction will no longer be treated as a relevant change of circumstances. It may still be a relevant change in circumstances leading to a competent application for determination under section 26 of the PVG Act, but it will not always be relevant. This resolves any ambiguity for individuals who may think that a conviction being quashed will automatically lead to someone's removal from the list. This is not the case, since there are different standards of proof for a criminal finding of guilt (beyond reasonable doubt) and the civil standard for listing decisions (balance of probabilities).

Section 84: Ministers' powers to remove from list

173. Subsection (2) modifies section 28 of the PVG Act so that Ministers have a power to receive and consider late representations from an individual as to why they should not have been listed when it is appropriate to do so in the circumstances. This is to allow the listed individual to provide information to Ministers, which, if they had done before listing, would have led to a decision not to list.
174. Subsection (3) broadens section 29(1)(b) of the PVG Act so that Ministers have discretion to remove an individual from either of the lists at any time if they are satisfied that the individual is no longer unsuitable to carry out the relevant type of regulated role. This is in addition to the existing discretion to remove from the list if they are satisfied that the individual should not have been listed.

Section 85: Appeals and removals: information power

175. Sections 18 to 20 of the PVG Act relate to the information gathering powers available to Ministers when considering whether to list an individual (under sections 15 or 16) or whether to remove an individual from the list (under section 26). Section 85 of the Act adds a new section 29A to the PVG Act that expands the application of sections 18 to 20 so that the powers to obtain information also apply where Ministers are considering whether or not an individual *should not have been listed* or is *no longer unsuitable* to carry out regulated roles with children or adults. This consideration would take place when an individual raises an appeal, but also in other circumstances, e.g. when late representations are received or when Ministers become aware of information from another source which called into question the original listing decision.

Confirmation of PVG Scheme membership

Section 86: Confirmation of scheme membership under the PVG Act

176. Section 86 substitutes two sections in the PVG Act: 46 (Statement of scheme membership), and section 54 (Disclosure of scheme membership).
177. The new section 46 of the PVG Act requires Ministers to provide confirmation of scheme membership to each scheme member and sets out what the content is to be. The confirmation of scheme membership replaces what was previously a statement of scheme membership under the PVG Act. It is a form of disclosure which contains no vetting information (i.e. no details of criminal offences or police information). Under the new provisions, it can now also include information about conditions imposed on a scheme member who is under consideration for listing. The conditions are capable of being imposed under the new section 13A of the PVG Act (inserted by section 76 of the Act). Subsection (3) provides that a confirmation of scheme membership will always be provided to the individual when joining the Scheme, unless the individual makes an application under section 11 for a Level 2 disclosure (to which section 17 of the Act applies) at the same time.

178. The new section 54 of the PVG Act requires Ministers, if requested by the applicant, to provide the confirmation of scheme membership to a third party. This must be for the purpose of enabling the third party to consider a scheme member's suitability to carry out a regulated role. When Ministers make a confirmation of scheme membership available to a third party, they may also send a copy of the confirmation to the scheme member, if requested.

Miscellaneous

Section 87: Retention of scheme records after removal

179. Section 87 inserts a new subsection (3) into section 61 of the PVG Act, so that if Ministers decide under section 59A(1) of the PVG Act not to continue with a consideration case, they can retain information about the scheme member who applied to be removed from the Scheme under section 59 while under consideration for listing.

Section 88: Offences outside Scotland

180. Section 88 introduces sections 37A and 47G into the PVG Act. These sections ensure that Scottish courts have clear jurisdiction over offences under sections 34, 35, 36, 45C, 45D, 45E or 45F of the PVG Act where the acts constituting the offence take place outside Scotland. For instance, this will ensure that an offence under section 35 of the PVG Act, committed by a non-Scottish organisation of offering a barred individual for a regulated role in Scotland, can be prosecuted in Scotland.

Section 89: Guidance for chief constable

181. This section inserts section 84A into the PVG Act and provides that Ministers must issue guidance to the chief constable of the Police Service of Scotland about the chief constable's functions under Parts 1 and 2 of the PVG Act (see section 63 for guidance with regard to the chief constable's functions under Part 1 of the Act). Guidance can only be issued after Ministers have consulted the chief constable. The guidance can be reviewed as necessary. The chief constable must have regard to the guidance when exercising any functions under Part 1 or 2 of the PVG Act.

Section 90: Meaning of "conviction"

182. Section 90 inserts a definition of "conviction" into section 97(1) of the PVG Act, and also inserts the term into the Act's index in schedule 5. The meaning of conviction is derived from the 1974 Act. This ensures that a consistent definition of conviction applies throughout the PVG Act (previously the definition only applied for the purposes of Part 2).
183. The meaning of conviction now applies throughout the PVG Act, and "convicted" is construed accordingly except in relation to section 14. A narrower definition is needed for section 14, which deals with automatic listing, so that it does not include disposals by way of absolute discharge – see section 247 of the Criminal Procedure (Scotland) Act 1995.