

# Business and Regulatory Impact Assessment

## Title of Proposal

**PROPOSED DRAFT POLICE ACT 1997 AND PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 REMEDIAL ORDER 2018**

## Purpose and intended effect

- **Background**

Standard and enhanced disclosures are issued under the Police Act 1997 (“the 1997 Act”) and disclosures of PVG scheme records are issued under the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) - these types of disclosures are referred to collectively as ‘higher level disclosures’. In 2015, the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 amended the 1997 and 2007 Acts in relation to the spent conviction information which could be disclosed in a higher level disclosure. That Order introduced lists of offences into Schedules 8A and 8B of the 1997 Act. Schedule 8A lists certain spent convictions which will continue always to be disclosed due to the serious nature of the offence (sometimes referred to as the ‘offences which must always be disclosed’ list); schedule 8B lists certain spent convictions which are to be disclosed depending on the length of time since conviction and the disposal of the case (sometimes referred to as the ‘offences which are to be disclosed subject to rules’ list).

In the case *P v Scottish Ministers* [2017] CSOH 33, P raised a petition for judicial review in relation to the disclosure of a previous conviction for lewd and libidinous practices on his PVG scheme record. Although the conviction was spent, the offence had been included in P’s scheme record due to it being in the list of offences that must always be disclosed (the “Always Disclose List” as listed in schedule 8A of the 1997 Act<sup>1</sup>). On 17 May 2017 the court declared that, insofar as they require automatic disclosure of P’s conviction before the Children’s Hearing, the provisions of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (“the remedial order”) unlawfully and unjustifiably interfered with the petitioner’s right under Article 8 of the European Convention on Human Rights (ECHR), and Scottish Ministers had no power to make the provisions in terms of section 57(2) of the Scotland Act 1998 (“the 1998 Act”).

The effect of the court order has been suspended under section 102 of the Scotland Act 1998 Act for nine months (to 17 February 2018) to allow Ministers to remedy the legislation.

- **Objective**

The 2018 Proposed Draft Order sets out the proposed amendments to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007. The effect of the amendments will be that recipients of higher level disclosures under those Acts whose disclosure contains information about a conviction for an offence listed in schedule 8A of the Police Act 1997 (offences which must always be disclosed) will in certain specified circumstances have the right to apply to a sheriff in order to seek removal of that conviction information before their

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<sup>1</sup> Schedule 8A was inserted into the Police Act 1997 by *the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015* (Scottish Statutory Instrument 2015 No. 423).

disclosure is sent to a third party such as an employer. They will have this right where the conviction for a schedule 8A offence is spent and –

- (a) where the person was aged under 18 at the date of conviction, 7 years and 6 months have passed since the date of the conviction; or
- (b) where the person was aged 18 or over at the date of conviction, 15 years have passed since the date of the conviction.

We consider that this policy should provide an ECHR compliant system.

- **Rationale for Government intervention**

Following the court's decision in *P v Scottish Ministers*, the Scottish Ministers undertook an assessment of the 1997 Act and the PVG Scheme operated under the 2007 Act and concluded that the legislation should be amended further to limit the circumstances in which convictions are automatically disclosed. The functions of the Scottish Ministers under the 1997 Act and the 2007 Act are exercised through Disclosure Scotland.

This policy contributes to the Scottish Government Strategic Objectives of a “wealthier and fairer Scotland” and a “safer and stronger Scotland”.

## **Consultation**

- **Within Government**

Scottish Government officials liaised with the Access to Justice Team, Scottish Legal Aid Board and the Scottish Courts and Tribunals Service. There have also been discussions with Criminal Justice Division and Youth Justice and Children's Hearings Unit as this may impact in their policy area. Scottish Government officials also liaised with the Disclosure and Barring Service in England and Wales and Access Northern Ireland.

- **Public & Business Consultation**

No informal public or business consultation has taken place. A formal consultation will run for 60 days (set out in section 13 of the Convention Rights (Compliance) (Scotland) Act 2001) from 11 September 2017 to 26 November 2017. Notification about the consultation will be sent to key stakeholders.

## **Options**

The following options were considered informed by the court in *P v Scottish Ministers* that the provisions in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 are, insofar as they require automatic disclosure of certain convictions, not compatible with the ECHR and Ministers therefore did not have the powers to make the provisions. The effect of the court judgment has been suspended under section 102 of the Scotland Act 1998 only until 17 February 2018.

### **Option 1 – Do Nothing**

Disclosure Scotland have been informed by the court in *P v Scottish Ministers* that the provisions in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act

2007 are, insofar as they require automatic disclosure of certain convictions, not compatible with the ECHR and Ministers therefore did not have the powers to make the provisions. The effect of the court judgment has been suspended under section 102 of the Scotland Act 1998 only until 17 February 2018.

In addition, doing nothing could risk the possibility of individuals with a criminal record challenging Scottish Ministers on the basis that their rights under Article 8 have been breached as a result of automatic disclosure of certain convictions.

### **Option 2 – Introduce the amended legislation**

This will require amendment of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 to address the concerns raised by the court and ensure that the disclosure provisions are compatible with ECHR .

The effect of the amendments will be that recipients of higher level disclosures under those Acts whose disclosure contains information about a conviction for an offence listed in schedule 8A of the Police Act 1997 (offences which must always be disclosed) will in certain specified circumstances have the right to apply to a Sheriff in order to seek removal of that conviction information before their disclosure is sent to a third party such as an employer.

Scottish Ministers are making this proposed draft order under sections 12 and 13 of the Convention Rights Compliance (Scotland) Act 2001, using the standard procedure.

### **Sectors and groups affected**

The proposed amendments will impact on those with conviction information applying for higher level disclosures because of the work or other activities that they want to do, and on those organisations seeking employees in areas of employment which entitle them to request higher level disclosures. For example, people wanting to become members of certain professions (e.g. solicitors, accountants, doctors and various other health professionals), people wanting to become prison officers, or to work in financial services or to work with vulnerable groups such as in a nursery or a school or a care home. These amendments will result in some cases in less information being disclosed to employers or other organisations on higher level disclosures.

There is likely also to be an impact on the sheriff courts as the amendments will allow individuals to make an application to the sheriff in certain circumstances for an order for a new disclosure certificate with conviction information removed from it.

It is possible there may be minimum impact to employers due to recruitment delays caused by the length of time the application to the sheriff process could take.

### **Option 1 – Do Nothing**

#### **Benefits**

No operational changes and no legislation is required. The status quo would simply be maintained.

**Costs**

Disclosure Scotland have been informed by the court in *P v Scottish Ministers* that the provisions in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 are, insofar as they require automatic disclosure of certain convictions, are not compatible with ECHR and Ministers therefore did not have the powers to make the provisions.

There could be costs associated with any claims arising from individuals who challenge Scottish Ministers under article 8 of ECHR.

**Option 2 – Introduce the new legislation****Benefits**

The remedial order under the Convention Rights Compliance (Scotland) Act 2001, amends the system of higher level disclosures in Scotland which ensures that a fair balance is struck between the rights of individuals with a criminal record to respect for their private life and the public interest in ensuring that organisations wishing to employ people in sensitive positions still receive sufficient information about relevant spent convictions to inform their recruitment decisions. This amended system provides that, in certain specified circumstances, individuals will have the right to apply to a Sheriff in order to seek removal of that conviction information before their disclosure is sent to a third party such as an employer.

The major benefit is to the individual who's rights under Article 8 of ECHR will be protected. Scottish Ministers, in issuing higher level disclosures, will be acting compatibly with the ECHR.

**Costs**

If an individual chooses to make an application to the Sheriff, they will incur a cost; however there is potential benefit as they may have conviction information removed from their disclosure.

Businesses will not incur any direct costs as a result of the changes. However, there may be some additional costs for some business/organisations due to delays in recruitment, but until we fully understand the numbers involved in submitting applications to the sheriff, it will be difficult to understand what this impact might be if any.

Discussion with the Scottish Courts and Tribunals Service has indicated that the numbers of applications to the sheriff courts which might be anticipated are likely to have a minimal impact on the sheriff courts. There may be some additional cost to the Scottish Legal Aid Board but until more accurate figures on applications to the sheriff are available the actual costs are difficult to determine.

**Scottish Firms Impact Test**

We have not directly contacted any businesses this far in the policy development, however, businesses will be able to contribute to the formal consultation.

We have been unable to identify any specific businesses which would be detrimentally impacted by this piece of legislation.

There will be no financial cost to businesses or organisations requiring disclosures.

The only potential impact to employers is if there is a delay in recruitment due to applications to the sheriff. It will be difficult to determine the impact of any delay on employers. However, we envisage this impact to be very low, with approximately 2 application per month to a sheriff.

### **Competition Assessment**

Using the four Competition and Markets Authority competition assessment questions we have concluded that the legislation will neither directly nor indirectly limit the number or range of suppliers to compete or reduce suppliers' incentives to compete vigorously.

### **Test run of business forms**

These regulations do not introduce any new business forms.

### **Legal Aid Impact Test**

The amended provisions allow an application to be made to the sheriff for an order for a new certificate or for the removal of vetting information from a higher level disclosure. This could impact on the legal aid budget.

The amendments will allow recipients of higher level disclosures under the Police Act 1997 or the Protection of Vulnerable Groups (Scotland) Act 2007 whose disclosure contains information about a conviction for an offence listed in schedule 8A of the Police Act 1997 (offences which must always be disclosed) in certain specified circumstances to apply to a Sheriff in order to seek removal of that conviction information before their disclosure is sent to a third party such as an employer.

Based on the evidence we have, we would anticipate a figure of around 24 such applications to a sheriff per year. The available data do not suggest that the figure would be higher than this. We will be able to monitor closely the figures for applications to the sheriff once the provisions are implemented as the applicant will have to inform Disclosure Scotland prior to making the application to a sheriff, and therefore we will be able to keep this under review.

We reached the figure of 12 using the evidence we have at hand in relation to the current figures for applications made to a sheriff under the Police Act 1997 or the Protection of Vulnerable Groups (Scotland) Act 2007 for removal of information about convictions for offences listed in schedule 8B of the Police Act 1997.

Based on the estimates given by Disclosure Scotland, of appeals per year of around 24, the Scottish Legal Aid Board would suggest an increase in expenditure from the

Legal Aid Fund of around £21,000 to £28,000 per year. They have used an average case cost of £560 and assuming a legal aid eligibility rate of 75%-100%.

### **Enforcement, sanctions and monitoring**

There will be no enforcement, sanctions or monitoring requirements on those seeking higher level disclosures.

### **Implementation and delivery plan**

60-day period for written observations (as set out in section 13 of Convention Rights (Compliance) (Scotland) Act 2001) will commence on 11 September 2017 and finish on 26 November 2017

Remedial Order laid in draft before Parliament on 15 December 2017,  
(*Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) Amendment (Scotland) Order* would be laid in draft on same date)

- standard Parliamentary affirmative procedure (Parliament to approve within 40 days of laying)

Remedial Order and ROA Order made with a commencement date of 17 February 2018

- **Post-implementation review**

We will monitor the number of appeals and the types of offences two years post implementation.

### **Summary and recommendation**

The Scottish Government has taken forward option 2. It considers this approach the most appropriate as option 1 was not feasible. Scottish Ministers cannot operate a disclosure system that has the potential of being incompatible with ECHR.

Introducing this amendment to the legislation will provide a fairer disclosure regime whilst ensuring safeguarding is paramount. There are no costs to individuals or businesses using Disclosure services, however there will be a cost to the individual in making the appeal. There may be some cost to the legal aid budget. There may be some minimal impact to employers if recruitment delays arise as a result of the process for application to a sheriff.

**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

**Signed:**

**Date:**

**John Swinney**

**Deputy First Minister and Cabinet Secretary for Education and Skills**

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