

Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018

September 2017

Dear Sir or Madam

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

I enclose a copy of a notice in relation to the Proposed Draft Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (“the 2018 Proposed Draft Order”) which will make amendments to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007.

Scottish Ministers are making this proposed draft order under the Convention Rights Compliance (Scotland) Act 2001. In line with the requirements of section 13(3) of that Act, the attached notice invites you to make written observations on the 2018 Proposed Draft Order.

Responding to this Consultation

We invite responses to this consultation by 26 November 2017.

Please respond to this consultation using the Scottish Government’s consultation platform, Citizen Space. You can view and respond to this consultation online at <http://consult.scotland.gov.uk>. You can save and return to your response while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 26 November 2017.

If you are unable to respond via Citizen Space please send your response with the completed Respondent Information Form (see “Handling your response” below) to Disclosure Scotland’s Policy Team:

By email to: DisclosureScotland2018Order@gov.scot

We would prefer to receive electronic copies. If, however, you would like to respond in writing please address your response to:

Policy Team
Disclosure Scotland
Pacific Quay
Glasgow
G51 1DZ

Handling your response

If you respond using Citizen Space (<http://consult.scotland.gov.uk>), you will be directed to the Respondent Information Form. Please indicate how you wish your response to be handled, in particular, whether you are happy for your response to be published.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document. If you ask for your

response not to be published, we will regard it as confidential and will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002. We would therefore have to consider any request made under that Act for information relating to responses to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to enable Ministers to decide if any changes should be made to the 2018 Proposed Draft Order. Responses will be published, where we have been given permission to do so, no later than 20 working days after the consultation closes. Scottish Ministers are required under section 13(4) of the Convention Rights Compliance (Scotland) Act 2001 to lay before Parliament a statement summarising all observations and specifying any modifications they might make to the 2018 Proposed Draft Order.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them by email to: DSPolicyTeam@disclosurescotland.gsi.gov.uk or in writing to:

Policy Team
Disclosure Scotland
Pacific Quay
Glasgow
G51 1DZ

Scottish Government consultation process

Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<https://www.ideas.gov.scot>).

Responses will be analysed and used as part of the policy development process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the response received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Yours faithfully

Lynne McMinn
Head of Policy
Disclosure Scotland

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

Purpose

This document gives public notice of the proposed draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (“the 2018 Proposed Draft Order”) under section 13(3)(b) of the Convention Rights Compliance (Scotland) Act 2001. This document also seeks written observations on the 2018 Proposed Draft Order.

We welcome your written observations on all aspects of the 2018 Proposed Draft Order. The last date on which we will accept written observations is 26 November 2017.

All observations will be considered by Scottish Ministers and, as soon as practicable after 26 November 2017, we intend to lay a statement before the Scottish Parliament together with a draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018. That statement will summarise all the observations received and will also specify whether or not any modifications have been made to the draft Order and the reasons for those changes.

A copy of the 2018 Proposed Draft Order and the associated Policy Note which explains the amendments in detail can be found below.

Introduction

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 inserted 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 (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 (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^a). 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

^a 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).

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, 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.

Following the court’s decision, 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.

The 1997 Act and the 2007 Act regulate what is disclosed in a higher level disclosure. But the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) together with the Rehabilitation of Offenders Act (Exclusions and Exceptions) (Scotland) Order 2013 (“the 2013 Order”) regulate what convictions an individual must disclose when asked about their previous convictions in certain circumstances. Following the end of this consultation, when the draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 is laid before the Scottish Parliament, the Scottish Ministers also intend to lay a draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order. That draft Order will ensure that the requirements on individuals to self-disclose convictions will align fully with the amended disclosure provisions of the 1997 Act and the 2007 Act.

Summary of the 2018 Proposed Draft Order

The 2018 Proposed Draft Order sets out proposed amendments to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007. It provides that individuals who have been convicted of offences which are listed in schedule 8A (offences which must always be disclosed) should 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. This will provide similar, although more limited, right to apply to the sheriff as currently exists in relation to offences listed in schedule 8B of the 1997 Act.

The proposed policy to remedy the legislation is that higher level disclosure recipients will be able to apply to a sheriff for removal of schedule 8A convictions in the following specified circumstances:-

- 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.

The offences listed in schedule 8A will remain unchanged and the list therefore continues to comprise serious offences. The new right to apply to the sheriff will allow an application for removal of convictions after a period of time has passed since conviction for a schedule 8A offence. This application can be made:-

- 15 years from the date of conviction, where the person was aged 18 or over at the date of conviction, or
- 7.5 years from the date of conviction, where the person was aged under 18 at the date of conviction.

If no application to a sheriff is made, automatic disclosure of a spent conviction for an offence on schedule 8A will continue indefinitely.

These changes will ensure that the rules for disclosure of spent convictions take further account of the age of the person at the time of the conviction as well as the time which has elapsed since conviction. Before removing a conviction from a higher level disclosure a sheriff would need to be satisfied that the conviction is not relevant to the purpose of the standard or enhanced disclosure, or (for PVG disclosures) not relevant to regulated work with children or protected adults. In dealing with such an application the sheriff could also consider the circumstances of the offence. This new right to apply to a sheriff in relation to schedule 8A convictions strikes a fair balance between an individual's right to respect for their private life and the interests of public protection.

Impact Assessments

In line with usual practice, partial Impact Assessments have been prepared. We have prepared a partial Business and Regulatory Impact Assessment (BRIA), a partial Equality Impact Assessment (EQIA) and a partial Child Rights and Wellbeing Impact Assessment (CRWIA).

A partial BRIA, EQIA and CRWIA are available with this consultation.

Legislation

A copy of the Police Act 1997, the Protection of Vulnerable Groups (Scotland) Act 2007 and the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (Scottish Statutory Instrument 2015 No. 423) can be found at:

<http://www.legislation.gov.uk/ukpga/1997/50/contents>
<http://www.legislation.gov.uk/asp/2007/14/contents>
<http://www.legislation.gov.uk/ssi/2015/423/contents/made>



Title

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
 No

Proposed Draft Police Act 1997 and the Protection of Vulnerable Groups Act (Scotland) 2007 Remedial Order 2018

QUESTION 1

Do you have any views / observations on this Proposed Draft Order?

Comment

QUESTION 2

In relation to the partial Equality Impact Assessment, please tell us about any potential impacts, either positive or negative; you feel the amendments to legislation in this consultation document may have on any particular groups of people?

Comment

QUESTION 3

In relation to the partial Equality Impact Assessment, please tell us what potential there may be within these amendments to legislation to advance equality of opportunity between different groups and to foster good relations between different groups?

Comment

QUESTION 4

In relation to the partial Business Regulatory Impact Assessment, please tell us about any potential impacts you think there may be to particular businesses or organisations?

Comment

QUESTION 5

In relation to the partial Child Rights and Wellbeing Impact Assessment, please tell us about any potential impacts you think there may be on children's wellbeing.

Comment

List of Consultees

Education

Principals and Vice-Principals of Scotland's Colleges and Universities
The Open University in Scotland
Educational Institute of Scotland
General Teaching Council Scotland

Health

Health Boards
Special Health Boards
British Medical Association
General Dental Council
General Medical Council
General Pharmaceutical Council
Royal College of Psychiatrists

Local Authorities

Chief Executives
Directors of Social Work
Directors of Education
Association of Directors of Education
Association of Directors of Social Work
CoSLA
SoLACE

Justice

Chief Executive, Crown Office and Procurator Fiscal Service
Chief Executive, Scottish Court Service
Children's Hearings Scotland
Faculty of Advocates
Law Society of Scotland
Lord President and Lord Justice General
Parole Board for Scotland
Sheriff Principals
Sheriffs' Association
Scottish Law Commission
Scottish Committee of the Council of Tribunals
Scottish Children's Reporter Administration

Police

Chief Constable of Police Scotland
Scottish Police Authority
Scottish Police Federation
Association of Scottish Police Superintendents
HM Inspectorate of Constabulary Scotland

Prisons

Chief Executive, Scottish Prison Service
HM Inspectorate of Prisons

Scottish Prison Officers Association

Other Organisations including Voluntary Organisations

Apex Scotland

Care Inspectorate

Children 1st

CJSW Dumfries and Galloway

Coalition of Care and Support Providers Scotland

Disclosure Scotland Stakeholder Advisory Board

Howard League for Penal Reform

NSPCC Scotland

Recruit With Conviction

SACRO

Scottish Churches Committee Safeguarding Representatives

Scottish Commission for Human Rights

Scottish Commissioner for Children and Young People

Scottish Council of Jewish Communities

SCVO

Social Work Scotland

Sports Scotland

Strathclyde Partnership for Transport

SSSC

Unlock

Victim Support Scotland

Volunteer Scotland Disclosure Services

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2018 No.

POLICE

CHILDREN AND YOUNG PERSONS

PROTECTION OF VULNERABLE ADULTS

**The Police Act 1997 and the Protection of Vulnerable Groups
(Scotland) Act 2007 Remedial Order 2018**

Made - - - -

Coming into force - -

The Scottish Ministers make the following remedial Order in exercise of the powers conferred by section 12(1) and (3) of the Convention Rights (Compliance) (Scotland) Act 2001^(a) (“the 2001 Act”) and all other powers enabling them to do so.

The Scottish Ministers consider the provision made by this Order to be necessary or expedient in consequence of provisions in the Police Act 1997^(b) and the Protection of Vulnerable Groups (Scotland) Act 2007^(c), insofar as they require automatic disclosure of certain convictions, being incompatible with Convention rights^(d).

In accordance with section 12(2) of the 2001 Act the Scottish Ministers are of the opinion that there are compelling reasons for making a remedial order as distinct from taking any other action.

In accordance with section 13(3) of the 2001 Act the Scottish Ministers laid before the Scottish Parliament a copy of the proposed draft Order, together with a statement of their reasons for proposing to make the Order, gave such public notice of the proposed draft Order as they considered appropriate, invited observations on it and had regard to observations submitted.

^(a) 2001 asp 7.

^(b) 1997 c.50. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).

^(c) 2007 asp 14.

^(d) The “Convention rights” has the meaning given by section 1 of the Human Rights Act 1998 (c.42). In the case of *P v Scottish Ministers [2017] CSOH 33*, the court declared that, insofar as they require automatic disclosure of the disposal of the petitioner’s case before the Children’s Hearing on 14 October 1987, the provisions contained in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order (SSI 2015/423) (“the legislation”) unlawfully and unjustifiably interfered with the petitioner’s rights under and in terms of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and that the Scottish Ministers did not, to that extent, have power to make the provisions. The court made an order in terms of section 102(2)(b) of the Scotland Act 1998, suspending the effect of the declarator, except in relation to the petitioner, for a period of nine months or such shorter period as may be required for the defect in the legislation to be corrected and for that correction to take effect. The legislation amended both the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007.

(3) In section 116ZB (application for an order for a new criminal record certificate or enhanced criminal record certificate)^(a), in subsection (1)(b), for the words from “for” to the end substitute “which falls within section 116ZA(1A)”.

(4) The title of schedule 8A (offences which must always be disclosed)^(b) becomes “Offences which must be disclosed unless a sheriff orders otherwise”.

(5) In schedule 8B (offences which are to be disclosed subject to rules)^(c)—

(a) in paragraph 75, for “and” substitute “or”;

(b) in paragraph 81, sub-paragraph (c) and the word “and” immediately preceding it are repealed.

Amendment of the 2007 Act

4.—(1) The 2007 Act is amended as follows.

(2) In section 52ZA (procedure following correction of inaccurate scheme record)^(d)—

(a) in subsection (1)(c), for the words from “for” to the end substitute “which falls within subsection (4)”;

(b) after subsection (3) insert—

“(4) A conviction falls within this subsection if it is—

(a) a conviction for an offence listed in schedule 8A of the 1997 Act which is a spent conviction and either—

(i) the person was aged under 18 on the date of conviction and at least 7 years and 6 months have passed since the date of conviction, or

(ii) the person was aged 18 or over on the date of conviction and at least 15 years have passed since the date of conviction,

(b) a conviction for an offence listed in schedule 8B of the 1997 Act which is—

(i) a spent conviction, but

(ii) not a protected conviction.”.

(3) In section 52 (disclosure of scheme records)^(e)—

(a) in subsection (2), for the words from “for” to the end substitute “which falls within subsection (2A)”;

(b) after subsection (2) insert—

“(2A) A conviction falls within this subsection if it is—

(a) a conviction for an offence listed in schedule 8A of the 1997 Act which is a spent conviction and either—

(i) the person was aged under 18 on the date of conviction and at least 7 years and 6 months have passed since the date of conviction, or

(ii) the person was aged 18 or over on the date of conviction and at least 15 years have passed since the date of conviction,

(b) a conviction for an offence listed in schedule 8B of the 1997 Act which is—

(i) a spent conviction, but

(ii) not a protected conviction.”;

(c) in subsection (4), for the words from “for” to the end substitute “which falls within subsection (2A)”.

^(a) Section 116ZB was inserted by article 3(4) of S.S.I. 2015/423.

^(b) Schedule 8A was inserted by article 3(8) of S.S.I. 2015/423.

^(c) Schedule 8B was inserted by article 3(8) of S.S.I. 2015/423.

^(d) Section 52ZA was inserted by article 4(5) of S.S.I. 2015/423.

^(e) Section 52A was inserted by article 4(6) of S.S.I. 2015/423.

(4) In section 57A (meaning of “conviction” and “protected conviction”)^(a), after “sections” insert “52ZA,”.

Transitional provision

Current applications for criminal record certificates and enhanced criminal record certificates under sections 113A, 113B, 114 and 116 of the 1997 Act

5.—(1) Paragraph (2) of this article applies where the Scottish Ministers—

- (a) have, before the relevant date, received an application for—
 - (i) a criminal record certificate under section 113A (criminal record certificates) or, as the case may be, section 114 (criminal record certificates: Crown employment) of the 1997 Act; or
 - (ii) an enhanced criminal record certificate under section 113B (enhanced criminal record certificates) or, as the case may be, section 116 (enhanced criminal record certificates: judicial appointments and Crown employment) of the 1997 Act; and
- (b) have not by that date issued the certificate.

(2) An application referred to in paragraph (1) is to be treated for all purposes as having been received after the relevant date.

Current applications for new certificates under section 117 of the 1997 Act

6.—(1) Paragraph (2) of this article applies where the Scottish Ministers—

- (a) have, before the relevant date, received an application for a new criminal record certificate or, as the case may be, a new enhanced criminal record certificate under sections 113A to 116 of the 1997 Act in accordance with section 117 (disputes about accuracy of certificates) of the 1997 Act; and
- (b) have not by that date issued the new certificate.

(2) An application referred to in paragraph (1) is to be treated for all purposes as having been received after the relevant date.

Current disclosure requests under sections 52 and 53 of the 2007 Act

7.—(1) Paragraph (2) of this article applies where the Scottish Ministers—

- (a) have, before the relevant date, received a request for—
 - (i) disclosure of a scheme member’s scheme record under section 52 (disclosure of scheme records) of the 2007 Act; or
 - (ii) disclosure of a scheme member’s short scheme record under section 53 (disclosure of short scheme records) of the 2007 Act; and
- (b) have not by that date disclosed the scheme record or, as the case may be, short scheme record.

(2) Any request for a disclosure referred to in paragraph (1)(a) is to be treated for all purposes as having been received after the relevant date.

^(a) Section 57A was inserted by article 4(8) of S.S.I. 2015/423.

Correction of scheme records under sections 51 and 52ZA of the 2007 Act

8.—(1) Paragraph (2) of this article applies where the Scottish Ministers—

(a) have, before the relevant date, received—

- (i) a notification of changes under section 50 (duty to notify certain changes) of the 2007 Act;
- (ii) a request from a scheme member for correction of a scheme record under section 51 (correction of inaccurate scheme record) of the 2007 Act; or
- (iii) a request from a scheme member for correction of a scheme record under section 52ZA (procedure following correction of inaccurate scheme record) of the 2007 Act; and

(b) have not by that date corrected the scheme record.

(2) A notification or, as the case may be, a request referred to in paragraph (1) is to be treated for all purposes as having been received after the relevant date.

St Andrew's House,
Edinburgh
Date

Name
A member of the Scottish Government

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes amendments to the Police Act 1997 (“the 1997 Act”) and the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) to remove any incompatibility with the European Convention on Human Rights (“the Convention”) arising from the automatic disclosure of certain criminal convictions under the 1997 Act and the 2007 Act.

Article 3 amends the 1997 Act. Article 3(2) amends section 116ZA of the 1997 Act which sets out the circumstances in which Scottish Ministers must, or, as the case may be, must not, send a copy of a criminal record certificate and enhanced criminal record certificate to a relevant person. Article 3(2) contains a new provision restricting the type of conviction details which section 116ZA(2) requires Scottish Ministers automatically to send to a relevant person. A new subsection (1A) sets out the conviction details to which section 116ZA(2) does not apply. Those details now also include spent convictions which are listed in schedule 8A of the 1997 Act and either, 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, where the person was aged 18 or over at the date of conviction, 15 years have passed since the date of the conviction. Article 3(3) amends section 116ZB of the 1997 Act to extend the right to make an application to the sheriff for an order to issue a new disclosure certificate where the disclosure contains the conviction details set out in the new section 116ZA(1A) of the 1997 Act. Article 3(4) amends the title of schedule 8A of the 1997 Act. Article 3(5) corrects minor drafting errors in paragraphs 75 and 81 of schedule 8B of the 1997 Act.

Article 4 amends the 2007 Act. Article 4(2) amends section 52ZA of the 2007 which sets out how Scottish Ministers must treat a corrected scheme record where that scheme record includes certain vetting information. Article 4(2) contains a new provision which extends the type of vetting information to which section 52ZA applies so that it now also applies to spent convictions which are listed in schedule 8A of the 1997 Act and either 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, where the person was aged 18 or over at the date of conviction, 15 years have passed since the date of the conviction. Article 4(3) amends section 52 of the 2007 Act which sets out the circumstances in which Scottish Ministers must, or, as the case may be, must not, disclose scheme records. Article 4(3)(b) contains a new provision restricting the type of vetting information which section 52(3) requires Scottish Ministers automatically to disclose. A new subsection (2A) sets out the vetting information to which section 52(3) does not apply. That vetting information now also includes spent convictions which are listed in schedule 8A of the 1997 Act and either, 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, where the person was aged 18 or over at the date of conviction, 15 years have passed since the date of the conviction. This means that section 52A(2) of the 2007 Act will now include the right to make an application to the sheriff for an order to remove vetting information from a scheme record where the scheme record contains the vetting information set out in the new section 52(2A) of the 2007 Act.

Articles 5 to 8 make transitional provision. Any applications for criminal record certificates and enhanced criminal record certificates under sections 113A, 113B, 114 and 116 of the 1997 Act (article 5(1) and (2)), applications for new certificates under section 117 of the 1997 Act (article 6), disclosure requests under sections 52 and 53 of the 2007 Act (article 7) and requests for correction of scheme records under section 51 and section 52ZA of the 2007 Act (article 8) which have been received prior to the coming into force of this Order and are not yet completed are to be treated as having been received after the coming into force of this Order. This means that the new section 116ZA(1A) of the 1997 Act and the new sections 52ZA(4) and 52(2A) of the 2007 Act will have effect when all of these applications or requests are completed.

DRAFT POLICY NOTE

THE POLICE ACT 1997 and THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 REMEDIAL ORDER 2018 – PROPOSED DRAFT ORDER

SSI 2018/???

Introduction

1. The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (“the 2018 Proposed Draft Order”) amends Part V of the Police Act 1997 (“the 1997 Act”), and Part 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”).

Background

2. On 18 June 2014, in the case *R (on the application of T and another) (FC) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35, the United Kingdom Supreme Court (“UKSC”) declared that disclosure certificates issued under sections 113A and 113B of the 1997 Act as it applied in England and Wales were capable of being incompatible with Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (“the Convention”). In Scotland, similar provisions of the 1997 Act applied to the issue of disclosure certificates. These functions under the relevant legislation are devolved to Scottish Ministers and are exercised through Disclosure Scotland.

3. In light of the UKSC ruling, the Scottish Ministers assessed the operation of the 1997 Act in Scotland and concluded that changes should be made to the 1997 Act to ensure that Scottish Ministers did not act in contravention of Convention rights, in particular article 8, following the UKSC ruling. In addition, the Scottish Ministers also concluded that the 2007 Act (the Act of the Scottish Parliament which established the Protecting Vulnerable Groups Scheme – “PVG Scheme”) should be amended.

4. The change in the law was delivered initially by the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (“the 2015 Order”), which came into force on 10 September 2015. The 2015 Order was then subject to a 60-day period for written observations. Thereafter, Ministers took account of the written observations received and finalised the reforms in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (“the (No. 2) 2015 Order”). The (No. 2) 2015 Order came into force on 8 February 2016, and at that date the 2015 Order was revoked.

5. Subsequently, there was a judicial review in the Court of Session which challenged the operation of the 2007 Act as amended by the (No. 2) 2015 Order. In the case *P v Scottish Ministers* [2017] CSOH 33, 28 February 2017, Lord Pentland declared that, insofar as they require automatic disclosure of the petitioner’s conviction before the Children’s Hearing, the provisions of the 2007 Act, as amended, unlawfully and unjustifiably interfered with the petitioner’s rights under Article 8 of the European Convention on Human Rights, 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 (except in relation to the petitioner) was suspended under section 102 of the Scotland Act 1998 for nine months (until 17 February 2018) to allow Ministers to remedy the legislation.

Parliamentary Procedure

6. As the Court of Session judgment found that provisions of the 2007 Act were incompatible with rights under the European Convention on Human Rights (“Convention rights”), Ministers are using a remedial order made under section 12(1) and (3) of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”) to effect the remedy. The 2018 Proposed Draft Order is subject to the “general” procedure under section 13 of the 2001 Act. Annex 1 to this draft Policy Note provides the Statement of Reasons which was laid before the Scottish Parliament, in accordance with section 13(3)(a) of the 2001 Act.

7. Upon laying the Proposed Draft Order under section 13(3)(a), section 13(3)(b) of the 2001 Act requires that Scottish Ministers must give public notice of the order, and invite comments to be made in writing about it within 60 calendar days (which excludes days when the Scottish Parliament is dissolved or is in recess for more than four days). Once the 60 day

consultation period has expired, the Scottish Ministers will publish a report summarising observations received and what, if any, modifications they consider appropriate to make to the proposed draft order.

8. Thereafter, Scottish Ministers will lay the 2018 Order in draft before the Scottish Parliament, for it to be approved by resolution of the Parliament.

Policy objective

9. The policy objective is that the reforms to the 1997 and 2007 Acts made by (No. 2) 2015 Order should remain in force. Standard and enhanced disclosures are issued under the 1997 Act and disclosures of PVG scheme records are issued under the 2007 Act - these types of disclosures are referred to collectively as 'higher level disclosures'. The (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. It 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).

10. The 2018 Proposed Draft Order will, however, further refine those reforms so as to bring a benefit to individuals who have a spent conviction for an offence included in schedule 8A of the 1997 Act ('Offences which must always be disclosed'). The refinements will provide the possibility of the disclosure recipient making an application to a sheriff in cases where an individual has a spent conviction for an offence included in schedule 8A subject to certain criteria being met. It means that the practice of automatically disclosing all spent convictions for offences included in schedule 8A indefinitely will end.

11. Providing the possibility of an application to a sheriff for spent convictions described in paragraph 9 above will address Lord Pentland's concern at paragraph 46 of his judgment:

“The fundamental deficiency in the system, as it applied in the petitioner’s case, was that it automatically generated disclosure of the conviction information without affording the petitioner any opportunity to challenge disclosure on the basis that it would be disproportionate to disclose in the particular circumstances of his case.”;

and his conclusion (paragraph 65) that:

“... The automatic disclosure of the conviction information constituted, in my judgment, an unlawful and unjustifiable interference with his rights under Article 8 of the European Convention on Human Rights. ...”

12. The 2018 Proposed Draft Order also addresses two issues in the (No. 2) 2015 Order identified by the Scottish Parliament’s Delegated Powers and Law Reform Committee (“DPLRC”) in its 4th Report, 2016 (Session 4) SP Paper 869 published on 13 January 2016.

Summary of 2018 Proposed Draft Order

13. The 2018 Proposed Draft Order sets out rules to be applied to spent convictions for offences included in schedule 8A of the 1997 Act to determine the content of higher level disclosures.

14. Article 2(2) amends section 116ZA of the 1997 Act, and also inserts a new subsection (1A) into that section. The new subsection (1A)(a) sets out the rules to be applied to determine if an individual should be offered the opportunity of an application to a sheriff about the content of their standard or enhanced disclosure, prior to a copy of their disclosure being issued to a relevant person in cases where they have a spent conviction for an offence included in schedule 8A of the 1997 Act.

15. To be offered the right to apply to a sheriff for removal from a higher level disclosure of a conviction for an offence included in schedule 8A, the individual’s conviction must be spent and either:

- 7 years and six months must have passed from the date of conviction if the individual was under 18 years of age at the date of conviction; or
- 15 years must have passed from the date of conviction if the individual was aged 18 years of age or over at the date of conviction.

16. The time periods are the same as those for spent convictions for offences included in the rules list (in schedule 8B of the 1997 Act). But in the case of a schedule 8A offence, the time period determines when the right arises to make an application to a sheriff for removal of a spent conviction. For schedule 8B offences, the time period determines when a spent conviction can become protected. The concept of ‘protected conviction’ (as defined in section 126ZA of the 1997 Act) is not extended to schedule 8A offences as Scottish Ministers believe that the offences listed in schedule 8A are sufficiently serious that they should only be removed from the possibility of disclosure when a sheriff has reviewed the full circumstances of the conviction in question.

17. The rules for disclosure of a spent conviction for an offence included in schedule 8B of the 1997 Act (offences which are to be disclosed subject to rules) are unchanged. These are explained in paragraph 29 of the Policy Note to the (No. 2) 2015 Order, and for ease are repeated here:

“29. Where a conviction for an offence on the ‘Offences which are to be disclosed subject to rules’ list is less than 15 years old (or 7.5 years as appropriate) then the disposal of the conviction will also be taken into account. Convictions that result in no punishment or intervention (other than the record of the matter) being imposed will not be disclosed, that is, any conviction for which the court imposes a sentence of admonition or absolute discharge (the meaning of which includes a discharge from a children’s hearing relating to an offence ground referral) will not be disclosed even where the conviction is less than 15 years old (or 7.5 years as appropriate). This means that the process takes into account cases where the individual circumstances are so unusual that at sentencing the judge chose to impose no punishment.”

18. Article 2(3) amends and extends the effect of section 116ZB of the 1997 Act (which sets out the requirements for making applications to the sheriff) to schedule 8A of the 1997 Act and maintains that effect for schedule 8B.

19. Article 2(4) amends the title of schedule 8A of the 1997 Act from ‘Offences which must always be disclosed’ to ‘Offences which must be disclosed unless a sheriff orders otherwise’.

20. Article 2(5) amends paragraphs 75 and 81 of schedule 8B of the 1997 Act to deal with the DPLRC’s concerns; at paragraph 75 the word ‘or’ is substituted for the word ‘and’; and at paragraph 81, sub-paragraph (c) is deleted, as is the word ‘and’ immediately before that sub-paragraph.

21. The principle set out in the (No. 2) 2015 Order remains, namely that in cases where an individual has multiple convictions for offences included in schedule 8A, each conviction will be considered separately and the rules will be applied as if it was the only conviction on the record.

22. Article 3(2) amends section 52ZA of the 2007 Act, and also inserts a new subsection (4) into that section. The amendments ensure that in cases where a scheme member requests correction of their copy of a scheme record and Ministers make such a correction that the scheme record cannot be disclosed if it now contains information that is within the scope of subsection 52ZA(4). In other words, if the copy of the scheme record now contains information about a spent conviction for an offence listed in either schedule 8A or schedule 8B of the 1997 Act that meets the criteria, as the case may be, the scheme member must be offered the opportunity to make an application to a sheriff for removal of the conviction.

23. Article 3(3) amends section 52 of the 2007 Act, and also inserts a new subsection (2A) into that section. The new subsection (2A) sets out the rules to be applied to determine if an individual should be offered the opportunity to make an application to a sheriff about the content of their copy of a PVG scheme record, prior to disclosure of that PVG scheme record in cases where the scheme record contains information about a spent conviction for an offence included in schedule 8A of the 1997 Act. The rules are exactly the same as those set out in paragraph 15 above in relation to the 1997 Act.

24. Article 3(3) also extends the effect of subsections 52(4) to (9) of the 2007 Act (which sets out the requirements for making applications to the sheriff) to schedule 8A of the 1997 Act and maintains that effect for schedule 8B.

25. Article 3(4) amends section 57A of the 2007 Act in order to insert a reference to section 52ZA of the 2007 Act which also relies on the definition of ‘conviction’ and ‘protected conviction’ as set out in section 57A. This corrects an omission in the current drafting of section 57A.

26. Articles 5 to 8 set out transitional provisions to deal with applications for higher level disclosures (and requests for corrections of disclosures) under the 1997 Act and the 2007 Acts. Any applications or requests which have been received prior to the coming into force of the Proposed Draft Order, but are not yet completed, are to be treated as having been received after the coming into force of the Proposed Draft Order. This means that the new section 116ZA(1A) of the 1997 Act and the new sections 52ZA(4) and 52(2A) of the 2007 Act will have effect when all of these applications or requests are completed.

Rehabilitation of Offenders Legislation

27. The 2015 Order and the (No. 2) 2015 Remedial Order both came into force at the same time as changes made by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Orders 2015 and 2016. The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 provided for associated changes to the system of self-disclosure of previous criminal convictions by an individual under the Rehabilitation of Offenders Act 1974 and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Orders 2013. These amendments ensured that the self-disclosure regime under the Rehabilitation of Offenders legislation and the state disclosure regime under the 1997 and 2007 Acts continued to operate in tandem and required disclosure of the same information by an individual and by the state. A further Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order will be required to make further associated changes to the system of self-disclosure of previous spent criminal convictions. That order will be laid in draft at the same

time as the 2018 Draft Order is laid in the Scottish Parliament following the end of the period for written observations to be made. It is intended that there will be no requirement to self-disclose spent conviction for schedule 8A offences where -

- 7 years and six months must have passed from the date of conviction if the individual was under 18 years of age at the date of conviction; or
- 15 years must have passed from the date of conviction if the individual was aged 18 years of age or over at the date of conviction.

The requirement to self-disclose conviction information will therefore only arise once such convictions appear on a higher level disclosure. This ensures that a higher level disclosure recipient is not required automatically to self-disclose the spent conviction information and will have the opportunity to exercise their right to apply to a sheriff for removal of spent conviction information before they are required to self-disclose the spent conviction information to a third party.

Public Notice

28. Scottish Ministers have given public notice of the 2018 Proposed Draft Order (as required under section 13(3)(b) of the 2001 Act) by publication on the Scottish Government website, the Disclosure Scotland area of the MyGov Scotland website, and through Disclosure Scotland's Twitter feed. These platforms provide a link to the formal consultation that has been published on the Scottish Government's Consultation Hub. Information about the 2018 Proposed Draft Order has also been sent by email to the bodies and organisations listed in the consultation paper.

Business Impact

29. A Business and Regulatory Impact Assessment has been prepared [add hyperlink in due course].

Equality Impact

30. An Equality Impact Assessment has been prepared [add hyperlink in due course].

Children's Welfare

31. A Children's Rights and Wellbeing Impact Assessment has been prepared [add hyperlink in due course].

Privacy

32. A Privacy Impact Assessment has been prepared [add hyperlink in due course].

Strategic Environmental

33. A Strategic Environmental Impact Assessment is not necessary.

SIGNED

DATE

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

Statement of Reasons

This Statement of Reasons is provided by the Scottish Ministers in accordance with section 13(3)(a) of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”).

The Scottish Ministers are proposing to make the draft *Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018* for the following reasons—

On 28 February 2017, Lord Pentland (sitting in the Outer House of the Court of Session) issued a judgment in the case *P v Scottish Ministers* [2017] CSOH 33. Lord Pentland concluded that despite the reforms Scottish Ministers made to the disclosure regime by means of amendments to the Police Act 1997 (“the 1997 Act”) and the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) in September 2015, that on the facts of the case before him, unlawful and unjustifiable interference with the petitioner’s rights under Article 8 of the European Convention on Human Rights (“ECHR”) occurred.

On 17 May 2017, Lord Pentland issued an order giving effect to his judgment, but suspended the effect to the judgment under section 102 of the Scotland Act 1998 for nine months, except in relation to the petitioner, to allow Scottish Ministers to remedy the defects in the 1997 Act and the 2007 Act. Scottish Ministers have reviewed Lord Pentland’s judgment and subsequent order, and have concluded that issues raised in the judgment must be addressed.

Scottish Ministers note that it is important to strike a balance between the interests of public protection and the right of an individual to live down their past behaviour and so move on with their life. Scottish Ministers must also act compatibly with the requirements of the ECHR and they therefore propose to remedy the interference using the general procedure under section 13 of the 2001 Act.

Scottish Ministers consider that there are compelling reasons for making an order under section 12 of the 2001 Act as distinct from taking any other action. Legislative change is required to deal with the incompatibility of the 1997 and 2007 Acts following a court

judgment identifying a defect. The changes being proposed will add a further refinement to the provisions already in place in the 1997 and 2007 Acts, rather than setting out a substantially re-structured system. The 2001 Act contains bespoke powers for Scottish Ministers to make amendments to legislation which are necessary or expedient in consequences of provisions which are incompatible with rights under the ECHR. The use of these powers allows Scottish Ministers to consult on the proposed amendments to the 1997 and 2007 Acts and then introduce the changes within the period during which the court has suspended the effect of its judgment. Given that the changes further refine the existing disclosure regime without making substantial amendments and given the time constraints for making amendments, it is considered that a remedial order is the most appropriate means of effecting the changes required by the court judgment to ensure ECHR compatibility. In addition, this does not exclude the possibility of further policy changes being developed as part of Scottish Ministers' wider programme in relation to proposals on the minimum age of criminal responsibility, rehabilitation of offenders or the forthcoming review of the 2007 Act and the PVG Scheme.



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