

# **Statement of the Scottish Ministers Summarising Written Observations on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018**

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# **STATEMENT OF THE SCOTTISH MINISTERS SUMMARISING WRITTEN OBSERVATIONS ON THE PROPOSED DRAFT POLICE ACT 1997 AND PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 REMEDIAL ORDER 2018**

This Statement is laid before the Scottish Parliament in accordance with section 13(4) of the Convention Rights (Compliance) (Scotland) Act 2001.

## **Introduction**

This Statement contains a summary and analysis of the written observations received in response to the public notice given in relation to the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (“the 2018 Proposed Draft Order”). The Statement confirms that Scottish Ministers do not intend to make any changes to the proposed draft remedial order that was consulted on other than to change some minor points noted by the Scottish Parliament’s Delegated Powers and Law Reform Committee.

## **Background**

The policy change proposed in the 2018 Proposed Draft Order is in response to the ruling by Lord Pentland in the case *P v Scottish Ministers* [2017] CSOH 33, 28 February 2017. P raised a petition for judicial review in relation to the disclosure of a previous conviction on his PVG scheme record. Although the conviction was spent, the offence had been included in P’s scheme record due to it being listed in schedule 8A of the Police Act 1997 (the list of offences that must always be disclosed).

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 2015 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 effect of the court order (except in relation to P) was suspended under section 102 of the Scotland Act 1998 for nine months (to 17 February 2018) to allow Ministers to remedy the legislation. A remedial order under Convention Rights (Compliance) (Scotland) Act 2001 using the standard procedure is being used to do that.

## **The consultation process**

Notification of the publication of the 2018 Proposed Draft Order was given on 11 September 2017 on the Scottish Government’s website, the Citizen Space website, and by broadcasting on Disclosure Scotland’s twitter account. Notice was also sent by email to the major stakeholders listed in Appendix 1 to this Statement.

## Responses

Fifty-one written observations were received. The majority of respondents 37 (72%) supported the proposals, though several did so with qualifications. Eight respondents (16%) were opposed to the proposals and six respondents (12%) did not express a view.

Thirty-three organisations and individuals agreed to have their written observations published on Citizen Space with their name:

Angus Council  
Mr Stuart Bain  
Care Inspectorate  
Central Baptist Church  
Centre for Youth and Criminal Justice, University of Strathclyde  
Children 1st  
Children and Young People's Commissioner Scotland  
City of Edinburgh Council  
Clan Childlaw  
Community Pharmacy Scotland  
Company Chemists' Association Ltd  
Delegated Powers and Law Reform Committee, Scottish Parliament  
East Renfrewshire Council  
Education Scotland  
General Pharmaceutical Council  
Glasgow Health and Social Care Partnership  
Holy Corner Community Playgroup  
Law Society of Scotland  
NHS Health Scotland  
Perth and Kinross Council  
Police Scotland  
Renfrewshire Council  
Scottish Borders Council  
Scottish Children's Reporter Administration  
Scottish Churches Committee  
Scottish Courts and Tribunals Service  
Scottish Independent Advocacy Alliance  
South Lanarkshire Council  
Unlock  
Victim Support Scotland  
Volunteer Edinburgh  
Volunteer Scotland Disclosure Services  
Who Cares? Scotland

A further 11 individuals have agreed to have their response published without their name being attributed. Seven respondents did not want their response published.

During the consultation process the Delegated Powers and Law Reform Committee of the Scottish Parliament conducted an inquiry on the 2018 Proposed Draft Order and received written evidence from the Faculty of Advocates and the Scottish

Independent Advocacy Alliance. That written evidence has also been considered by Scottish Ministers along with the other written observations received.

## Findings

This section discusses the written observations received on the 2018 Proposed Draft Order, and Ministers' reasons for the conclusion that it is not necessary to make any amendments to the 2018 Proposed Draft Order other than to change some minor points noted by the Scottish Parliament's Delegated Powers and Law Reform Committee.

## Comments on the 2018 Proposed Draft Order

The written observations received fell into eight broad areas as set out below. The Scottish Government's position follows each set of observations.

### 1. The 2018 Proposed Draft Order as a remedy of ECHR incompatibility following the court's ruling in *P v Scottish Ministers*, and striking a balance between public and private concerns

#### Response and Analysis

Comments on this matter from organisations were generally supportive of the proposals as a remedy for the incompatibility with Article 8 of the ECHR (right to respect to private life) while also balancing public safety concerns. However, some individuals who commented noted that the proposals do not go far enough in addressing ECHR concerns, or that in doing so public safety concerns are compromised.

**Education Scotland** found the proposals to be reasonable and appropriate given the court's findings in *P v Scottish Ministers* on the unlawful and unjustifiable interference of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 on the petitioner's ECHR Article 8 rights.

**Police Scotland** also noted that the opportunity the 2018 Proposed Draft Order provides for applicants to challenge the conviction information that can be included on a higher-level disclosure is in line with Article 8 of the ECHR.

The aim of the proposals, of providing in Scotland a disclosure regime which strikes a balance between the individual's right to respect for private life with the interests of public safety and compatibility with ECHR, was also welcomed by **Renfrewshire Council**.

**Community Pharmacy Scotland** found that the 2018 Proposed Draft Order takes a proportionate view to striking the balance between compatibility with ECHR and ensuring the public are protected. A similar response was provided by the **Scottish Churches Committee** in relation to the balance the 2018 Proposed Draft Order strikes between public and individual interests.

It was noted by **Unlock** that the proposals will create an ECHR compliant system but feels this is a missed opportunity to do more by creating a system that ensures individuals are not tied to their past through the disclosure of old, minor or irrelevant convictions.

The **Delegated Powers and Law Reform Committee (“DPLRC”)** accepted that the proposed approach would answer the criticisms of the court in *P v Scottish Ministers*, but it nevertheless welcomed the perspective of the **Faculty of Advocates** in suggesting a method by which the proportionality of the approach could be strengthened. Comments provided by the **Faculty of Advocates** state that the 2018 Proposed Draft Order partially addresses issues of ECHR compatibility; however, it considered that the ability to apply to a sheriff for conviction removal based on passage of time alone will not necessarily guarantee proportionality in every case. The **DPLRC** encouraged Scottish Ministers to explore further the views of the **Faculty of Advocates** in its wider review of the higher-level disclosure regime.

A concern was noted by one respondent that the human rights of people who have a criminal conviction are being given greater priority than the rights of vulnerable people to be protected from harm. In the respondent’s view, serious conviction information should continue to be disclosed and employers should be required to adhere to Disclosure Scotland’s Code of Practice and not unfairly discriminate against individuals with convictions.

**Clan Childlaw** and one other respondent provided responses which stated that the proposals do not go far enough in satisfying Article 8 ECHR, particularly in relation to those convicted under the age of 18.

**City of Edinburgh Council** commented that the 2018 Proposed Draft Order strikes a balance between public protection and ensuring an individual’s right to private life is respected. Further, they feel that the proposals provide a fairer and more flexible system by removing automatic and indefinite disclosure for schedule 8A offences. They noted that this will enable more effective rehabilitation for offenders.

**Perth and Kinross Council** found the 2018 Proposed Draft Order to be a balanced solution which respects the rights of individuals with convictions to move on but also ensures protection to vulnerable people.

**Victim Support Scotland** felt that with the involvement of a sheriff considering application for removal, the proposals strike a fair balance between public and private concerns.

Conversely, it was felt by the **Company Chemists’ Association (“CCA”)** that the benefits of the amendment are disproportionately geared towards the individual and that given the groups of people the CCA service, the respondent believes it would be beneficial to create a list of professions for which non-disclosure of an offence would be inappropriate.

Two respondents commented that the 2018 Proposed Draft Order did not strike the correct balance and that public safety would be compromised on many levels. One added that the proposals are inappropriate as all convictions are relevant and should be disclosed to allow an employer to make an informed recruitment decision.

#### Scottish Government position

In bringing forward the 2018 Proposed Draft Order, Scottish Ministers were conscious of the ECHR incompatibility issue identified by the Court of Session and the need to address the judgment. Ministers recognise that the majority of respondents support the approach taken.

It is also noted that some respondents believe the proposals do not go far enough, and that the incremental nature of the refinements to the higher-level disclosure regime in Scotland is unhelpful to individuals affected by it. Some respondents believe that public safety will be compromised by the proposals. Ministers do not believe that to be the case, as in all cases where someone applies to have a conviction removed from their disclosure, a sheriff will have to decide if a conviction should be removed. There is no provision for a spent conviction for an offence listed in schedule 8A to become protected automatically after a certain period of time as is the case with schedule 8B; there will always have to be an express decision by a sheriff that the conviction is not relevant in relation to the purpose for which the disclosure has been requested.

The landscape is not static, and changes proposed to the minimum age of criminal responsibility, and the rehabilitation of offenders legislation will change it further. Ministers are ensuring that these cross-cutting issues are taken forward in a joined-up way.

## **2. Impact of 2018 Proposed Draft Order on those under the age of 18 at date of conviction**

### Response and Analysis

The majority of respondents expressed general support for the provisions the 2018 Proposed Draft Order makes for those convicted of an offence under the age of 18. However, a number of bodies whose work is centred on children and young people highlighted concerns not only with the 2018 Proposed Draft Order but the whole disclosure regime in Scotland.

The **Scottish Borders Council, Education Scotland, City of Edinburgh Council, Holy Corner Community Playgroup, Renfrewshire Council, South Lanarkshire Council, East Renfrewshire Council, the Care Inspectorate, the Centre for Youth and Criminal Justice (“CYCJ”)** and the **Scottish Independent Advocacy Alliance** all provided similar comments on the positive impact the 2018 Proposed Draft Order will have to individuals convicted of a schedule 8A offence when under the age of 18. Comments on this positive impact focused on how the amendments supported rehabilitation by allowing individuals to move on and put their past behind them; secure employment; enable them to integrate and feel part of their communities; and reduce the impact of interactions with state authorities at a young age.

It was noted by **Mr S Bain** that the approach to schedule 8A convictions seems appropriate for those convicted under the age of 18. However, he noted reservations about, for example, convictions relating to sexual misconduct perpetrated by those over 18, and that perhaps a separate list of always disclose offences for that age group should be considered.

**Who Cares? Scotland** commented that the 2018 Proposed Draft Order will marginally improve the PVG Scheme and in particular its application to care experienced people. However, they believe that the 2018 Proposed Draft Order, or further legislative change, should go much further. In fact, the respondent suggested that criminal information should not appear on disclosures for behaviours that took place before the age of 16, and that anything which takes place at a Children’s Hearing should not appear on a PVG certificate.

**Who Cares? Scotland** and a number of other respondents including **Children and Young People’s Commissioner Scotland (“CYPCS”)** **Clan Childlaw**, **Scottish Children’s Reporter Administrator** and one other respondent noted the impact of the Children’s Hearing System on young offenders. They note that despite their informal setting and their child-centred approach Children’s Hearings can lead to young people gaining a criminal record. They also noted that at these Hearings young people are frequently without legal representation and lack knowledge on their rights and the resources available to them. The above respondents all described how children and young people may have little understanding of the long term impact of admitting to, or having grounds established, at a Children’s Hearing. Further, respondents also noted their frustration and disappointment that section 187 and 188 of the Children’s Hearing (Scotland) Act 2011 have yet to be enacted, this would to allow some offences dealt with through the Children’s Hearing to be recorded as Alternatives to Prosecution. For the purpose of this legislation (to be made under the Children’s Hearing (Scotland) Act 2011) the offences were to be categorised into two lists to ensure more serious offences continue to be disclosed while less serious offence are removed more quickly. However, they note that these lists which had been proposed do not mirror those contained in schedules 8A and 8B. It was noted by **CYPCS** and one other respondent that the schedules 8A and 8B do not take account of the context in which the offending behaviour took place citing the example of the schedule 8A offence of ‘Threatening and Abusive Behaviour’, an offence wide in scope which is most commonly used for children committing extremely minor infractions.

One respondent stated that the current legislation tries to impose a disclosure regime built for the criminal justice system on the Children’s Hearing System without recognising the different underlying principles. The respondent concluded that the 2018 Proposed Draft Order is a move in the right direction but is wholly inadequate to bring the law into line with ECHR or the issues raised by the court in *P v Scottish Ministers*; this could be more effectively done by bringing into force sections 187 and 188 of the Children’s Hearing (Scotland) Act 2011.

**Children 1<sup>st</sup>** broadly supported the changes, particularly as they will offer young people who obtained convictions through the Children’s Hearing System the opportunity, in some cases, to make an application to a sheriff.

#### Scottish Government position

Most respondents were positive about the benefit the changes would bring for under 18s. The support was qualified in several cases with comments that the proposals did not go far enough for children. Some concern was expressed about treating all offences in schedule 8A in the same way, and that sections 187 and 188 of the Children’s Hearings Scotland Act 2011 (“the 2011 Act”) had not yet been commenced.

Sections 187 and 188 of the 2011 Act are not expected to be commenced as the policy of reducing the need for disclosure is being fulfilled in a number of ways which supersede the provisions made. This includes the positive impact of the higher-level disclosure regime and proposals in the Management of Offenders (Scotland) Bill that offence grounds established in the Children’s Hearings be spent immediately for the purposes of rehabilitation. This will be kept under review and consideration will be given to repealing the sections of the 2011 Act which are not commenced.

### 3. Time limit before applications can be made to a sheriff

#### Response and Analysis

A number of comments provided on this matter suggest that the amount of time that must pass before an application can be made to a sheriff may be too long, particularly for those under 18 at the time of offence.

In the context of an individual's age at the time of conviction and the length of time that must elapse before an application can be made to a sheriff, the **Law Society of Scotland** questions whether these are being set at the appropriate levels. They comment that 7.5 years may be a significant period before an application can be made and that as a result an individual may find themselves restricted during a period of their lives when they seek opportunities in employment or higher education. The **Law Society** recognises however that a line must be drawn somewhere and that is for the Scottish Government to decide.

The **CYPCS** provided a similar comment stating that the provisions of the 2018 Proposed Draft Order require children and young people to wait for an extended period of time before an application to the sheriff is possible. **CYPCS** note they have heard anecdotal evidence that some young people are deterred for pursuing opportunities for further education due to the inclusion of convictions from childhood on disclosures. The respondent further noted a concern that where a young person committed an offence while under the age of 18, but is not convicted until the age of 18 could create an unfair system where they are penalised in having to wait until 15 years passed instead of 7.5 years for factors outwith their control such as court delays. This point was also made by **Children 1<sup>st</sup>** who encouraged the Scottish Government to further consider this impact.

**Clan Childlaw** also expressed concern regarding disclosure of offences for young offenders within the initial period of 7.5 years with no route for application to a sheriff within this period.

It was noted by **Unlock** that the rationale behind the time periods are unclear. The respondent, reflecting on their submission for the 2015 remedial order, commented that the time period is unnecessary and disproportionate. Given the amendments are based on a system where a sheriff must be satisfied that a conviction is not relevant for the purpose of the disclosure, the time limits are an unnecessary barrier.

A number of other respondents also commented on the time limits within the 2018 Proposed Draft Order before an appeal can be made to a sheriff for conviction removal: two respondents remarked that the timescales were reasonable and workable, respectively. Conversely, an individual respondent felt the timescales involved to be excessive and as such the 2018 Proposed Draft Order does not go far enough in satisfying ECHR considerations.

The **DPLRC** also provided comment in respect of the time that must pass before appeal is possible. The **Committee** noted that the time period before an application can be made to a sheriff mirrors the time that must pass before a schedule 8B conviction becomes 'protected'. The **Committee** acknowledged that it is not a requirement that there is a right of appeal in every case and that the Government is entitled to draw the line somewhere regarding offences which must always be

disclosed in the interest of public safety. However, public protection must be balanced with the rights of the individual, therefore, the **Committee** suggested that any time period of time that limits access to an appeal must be subject on continued scrutiny to ensure its objectives are achieved. The **Committee** recommended keeping under review the question of whether the time period that must pass before application to a sheriff strikes a fair balance between public and individual concerns. The **Committee** further suggested that this question could form part of the wider review of higher-level disclosures in Scotland.

#### Scottish Government position

Scottish Ministers noted that there were mixed views from respondents about whether the periods of 7.5 and 15 years were appropriate.

Scottish Ministers followed the principle of 7.5 years and 15 years from the provisions which apply for offences in schedule 8B. While the timescales in relation to schedule 8B offences exist for a different purpose (to determine when a conviction for an offence listed in schedule 8B becomes a protected conviction), the underlying rationale for the time periods chosen is based on the rehabilitation periods under the Scots law version of the Rehabilitation of Offenders Act 1974, and Police Scotland weeding and retention rules. Scottish Ministers consider that this rationale remains sound for determining the periods of time which must elapse before an application can be made to the sheriff for removal of convictions.

There are reforms to the Rehabilitation of Offenders legislation being considered by Ministers as part of a Management of Offenders (Scotland) Bill which will be brought forward during the next Parliamentary year. In light of that, Ministers will look again at the time periods which apply to offences listed in both schedules 8A and 8B as part of the forthcoming PVG Review.

#### **4. Alternative criteria for an application to a sheriff**

##### Response and Analysis

The **DPLRC**, reflecting on views submitted to it by the **Faculty of Advocates**, considered that, in the interests of strengthening the proportionality of the disclosure regime, alternative criteria to the requirement for the passage of a specified period of time before an application to a sheriff is made could be beneficial. In particular, the **Faculty of Advocates** suggested that the right to make an application to the sheriff for removal of schedule 8A convictions could be based on alternative criteria, such as the level of the sentence imposed, or the relevance of the conviction to the employment being sought. The **DPLRC** stated that it welcomed this suggestion and encouraged Scottish Ministers to explore the suggestions further as part of the wider PVG Review.

In their response, the **Law Society of Scotland** also made reference to disposals. They considered whether it would be possible for a sheriff to pass a specific or unique sentence for a schedule 8A offence due to the specific circumstances and then make the decision at the time for that conviction not to be disclosed on a higher-level disclosure. The **Law Society** noted that they considered this option specifically in relation to those aged 16-18 at the time of conviction, but accept this

may be seen as an arbitrary age limit as well as being a difficult system to administer overall.

#### Scottish Government position

Scottish Ministers understand the rationale behind the approach contemplated by the Law Society. It does, however, risk the situation that subsequent behaviour during the rehabilitation period of that first conviction which impacts on its rehabilitation period, could call into question the earlier direction of a sheriff. Scottish Ministers agree that for this reason, as well as for other practical reasons, such a system would be difficult to administer. Decisions of a sheriff on disclosure of previous convictions might have to be reassessed every time the person received a subsequent conviction.

Ministers believe that the correct time for a decision about disclosure of a conviction is after a request for higher-level disclosure has been made either for a specific purpose (if it is a standard or enhanced disclosure) or for regulated work with children or protected adults (if it is a PVG scheme record disclosure). The sheriff will then be dealing with a spent conviction and will be able to assess the relevance of it to the purpose for which the disclosure was requested. The risk of the balance, between the right of someone to move on with their life, and the interests of public protection, being wrongly struck should be reduced by having the decision-making process at the time of disclosure.

## 5. Role of the sheriff in determining an application for removal of a conviction

### Response and Analysis

A number of respondents report taking reassurance from the 2018 Proposed Draft Order's requirement to make an application to a sheriff who will determine if a schedule 8A conviction should be removed from a higher-level disclosure. However, the majority of respondents sought clarification on what factors will be considered by a sheriff. Many commented on the need for clear guidance to be set down to assist sheriffs in making a decision.

Positive comments were received by **City of Edinburgh Council**, **Victim Support Scotland** and **Community Pharmacy Scotland** who feel assured and encouraged by the involvement of a sheriff as a means of ensuring the balance between public and individual concerns is struck.

The **Central Baptist Church** commented that they have no objection to the 2018 Proposed Draft Order subject to assent by a sheriff following consideration of the grounds for conviction removal and associated risks.

The **Scottish Churches Committee** provided similar comments, stating that provided a sheriff is obliged to consider the individual circumstances of the case and the relationship between the position applied for and the conviction information to be removed, they would not consider the situation to be high risk.

A number of respondents including **Angus Council**, **Children 1<sup>st</sup>, Renfrewshire Council**, the **Care Inspectorate** and the **CYCJ** all stated the importance of developing guidelines to support decision making for sheriffs as well as for transparency and consistency. The respondents noted that they would take reassurance from the application of such guidelines to the decision-making process. The **Faculty of Advocates**, in its written submission to the **DPLRC**, noted the need for consistency is especially pertinent as one sheriff's decision is not binding on another.

The **Law Society of Scotland** stated that the ability to make applications to a sheriff appears to provide an 'equitable basis and means of decision making'. They also highlighted that it will take time until a body of case law is developed on the extent of a sheriff's discretion in determining the circumstances in which a schedule 8A offence is still required to be disclosed. Further, the **Law Society** noted that ensuring consistency of approach through clarification of factors to be considered by a sheriff is essential, particularly, as the respondent noted, the legislation specifies the finality of the sheriff's decision without apparent route for appeal (here the respondent refers to section 52A(8) of the Protection of Vulnerable Groups (Scotland) Act 2007).

**East Renfrewshire Council** and **Angus Council** sought clarification on the information sheriffs will have access to in order to make a decision such as the role applied for and who will provide this, for example, the applicant's solicitor.

In the **Care Inspectorate's** view a decision on conviction removal should be made in conjunction with 'soft' intelligence available from the police which may indicate whether the relevant conviction is a 'one off' or demonstrates a pattern of behaviour. For a sheriff to consider removal of a conviction without this information would, in the **Care Inspectorate's** opinion, constitute an unacceptable risk. The respondent

concluded that it would be beneficial to the ‘interests of transparency and effective judicial decision-making’ to establish the criteria that sheriffs must apply.

**Children 1<sup>st</sup>** noted that it is unclear whether applications will be made on a case-by-case basis or whether a one-time successful application within a particular set of circumstances means that the individual need not apply again to a sheriff for future disclosures. **Glasgow Health and Social Care Partnership** also sought clarification on this point, asking if the conviction is permanently removed could the individual subsequently apply for other roles without being subject to the same scrutiny.

In its comments the **DPLRC** made reference to concerns raised by the **Committee** during scrutiny of the 2015 remedial order over potential limitations of the application to sheriffs for schedule 8B offences. The **Committee** noted that those previous concerns could apply equally to the 2018 Proposed Draft Order for schedule 8A offences. These concerns relate to the need for assistance in understanding and navigating the appeals process and whether embarking on an application to a sheriff could indicate to an employer the existence of spent convictions. This could prevent individuals from launching an appeal and would therefore be counterintuitive to the aims of the 2018 Proposed Draft Order.

The **DPLRC** noted that there having been few appeals launched to sheriffs in respect of the schedule 8B offences may suggest an underlying issue with the current mechanism that dissuades applicants from embarking on an appeal. The **Committee** therefore recommends that the appeals mechanism is thoroughly explored to ensure its fitness for purpose and note this may form part of the future PVG Review.

Comments were also provided by **Volunteer Edinburgh** and the **Scottish Independent Advocacy Alliance** on the need to provide guidance for applicants embarking on an appeal and that the appeals process should be clear and accessible.

In their response **Unlock** also make reference to the need for user-friendly guidance. They also encourage that to ensure the sheriff based system is effective the Scottish Government should undertake an evaluation of this process and publish its findings.

**Perth and Kinross Council** provided comments regarding the need to clearly emphasis the role of the sheriff to prevent any misrepresentations of the process which could reduce trust in the process by the people it is meant to protect.

The **Faculty of Advocates** response to the **DPLRC** highlighted the practical issue of the applicant’s name appearing on a published list of court proceedings, whether legal aid would be available to an applicant and if so how long would it take to process a request for this.

#### Scottish Government position

The test which a sheriff applies in determining an application for removal of a conviction is whether the conviction is relevant to the type of regulated work in relation to which a person is a member of the PVG Scheme, or is relevant to the purpose for which the disclosure certificate was requested (standard and enhanced disclosures under the Police Act 1997).

Scottish Ministers confirm that legal aid is available to individuals who qualify for it in relation to these applications for removal of convictions. It will be a matter for the individual making the application, having sought legal advice, to determine what evidence to lead with a view to persuading a sheriff that the conviction information is not relevant.

Scottish Ministers do not believe that it would be appropriate to set out how sheriffs should handle the applications for removal of convictions. It will be possible in due course for sheriffs to draw some guidance from previously decided cases on applications for removal of convictions, although these applications will often turn on the facts of each individual case. The issue of how applications for removal of conviction information should be dealt with will be part of the PVG Review.

## **6. General comments**

### Response and Analysis

One respondent commented on a preference for the status quo which allows employers to have conversations with potential employees about their convictions. And in a similar vein, another expressed concern over convictions that could be withheld following successful appeal to a sheriff.

Two respondents expressed general support for the 2018 Proposed Draft Order but felt, respectively, that it did not address concerns about schedule 8A, mainly that it is too extensive and includes offences which are not serious in nature; and that the 2018 Draft Proposed Order did not go far enough in satisfying ECHR compatibility as there is still the chance that ORI could be disclosed to the detriment of an individual seeking to carry out regulated work.

### Scottish Government position

Scottish Ministers are required to make amending legislation to address the issues raised in the Court of Session judgment. It is important to stress that spent convictions for offences on schedule 8A will not be removed automatically. Only a sheriff can instruct removal of these convictions if they are not relevant to the type of regulated work in relation to which a person is a member of the PVG Scheme, or is not relevant to the purpose for which the disclosure certificate was requested (standard and enhanced disclosures under the Police Act 1997).

With regard to the points that the changes do not go far enough, Ministers are conscious of the need to balance the competing interests of public protection and the right for a person to move on with their life. Ministers believe the proposals consulted on strike an appropriate balance.

## **7. Impact**

### Response and Analysis

Respondents considered the impact of these proposals both positive and negative on specific groups.

The majority of respondents felt the proposals will have a positive impact on those with schedule 8A convictions who will be able to make an application to a sheriff for removal of a conviction from a higher-level disclosure. Positive impact is mentioned by way of the opportunities removal of conviction information will provide for employment, education and moving on from past behaviour. Respondents who commented on this include **the Care Inspectorate, Glasgow Health and Social Partnership, East Renfrewshire Council, South Lanarkshire Council, Edinburgh Council and two others.**

**Glasgow Health and Social Care Partnership, the Company Chemists' Association and four other respondents** highlighted the potential negative impact the proposals may have on children or protected adults if convictions are not disclosed.

#### Scottish Government position

The proposals will have a positive impact for some individuals. It is important to stress that spent convictions for offences on schedule 8A will not be removed automatically. Only a sheriff can instruct removal of these convictions if they are not relevant to the type of regulated work in relation to which a person is a member of the PVG Scheme, or is not relevant to the purpose for which the disclosure certificate was requested (standard and enhanced disclosures under the Police Act 1997).

Ministers are conscious of the need to balance the competing interests of public protection and the right for a person to move on with their life. Ministers believe the proposals consulted on strike an appropriate balance and that there will, therefore, not be a negative impact on vulnerable groups if convictions are not disclosed.

## **8. Other considerations**

#### Response and Analysis

Some respondents noted the delay to the overall disclosure process an application to a sheriff may cause. In many cases this is due to a concern that this delay may prompt a prospective employer to infer the existence of a spent conviction, but a number of respondents also mentioned this in practical terms as a hindrance to a recruitment campaign that may result in cost to an employer and delay in the provision of important services.

Respondents who noted these concerns included **Mr S Bain, Volunteer Scotland Disclosure Services, Glasgow Health and Social Care Partnership, Scottish Churches Committee, the Law Society of Scotland and two others.**

Volunteer organisation responses on the impact of the 2018 Proposed Draft Order to them were mixed. **Volunteer Edinburgh** felt that the amendments will give organisations that recruit volunteers the potential to increase their staffing and recruit a more diverse range of volunteers. **Volunteer Scotland Disclosure Services** do not see there being any major impact on the voluntary sector by the proposed changes. An alternative view noted concern that the changes may disproportionately impact on organisations with a strong reliance on volunteers.

Community knowledge about individuals and their previous offending behaviour was highlighted by **one respondent**. In many instances, even if the conviction information is removed from a disclosure there may still be local knowledge of this conviction.

The **DPLRC** noted three minor points in the 2018 Proposed Draft Order which it recommended should be changed. They suggested that in footnote (d) on page 1 of the 2018 Proposed Draft Order, the word “term” is missing from the first line (“The “Convention rights” has the meaning given by..”). They also suggested that for consistency with Articles 5(2), 6(2) and 8(2), it appears that Article 7(2) should refer to paragraph (1) rather than to paragraph 1(a) and that, in the Explanatory Note, the word “Act” is missing from the first line of the third paragraph.

#### Scottish Government position

It is worth noting that around 90% of higher-level disclosures are issued without any conviction information included. That, however, does not seek to minimise the impact of the disclosure regime on those who do have conviction information, and who are offered the opportunity of an application to a sheriff for removal of such information before it is disclosed to a third party

Scottish Ministers accept that an application to a sheriff can delay an organisation’s recruitment decision, and that it can also cause uncertainty for the individual concerned. The issue of how applications for removal of conviction information should be dealt with most appropriately will be part of the PVG Review.

Scottish Ministers would re-iterate that even if information is not disclosed on a higher-level disclosure by Disclosure Scotland, an organisation that happens to learn about a person’s previous behaviour must consider the requirements of the Rehabilitation of Offenders legislation and should not use that information, or prejudice the individual by it.

Scottish Ministers will change the 2018 Proposed Draft Order to incorporate the changes to the three minor points suggested by the DPLRC.

**Notice of publication of the 2018 Proposed Draft Order was given to the following organisations**

**Education**

Principals and Vice-Principals of Scotland's Colleges and Universities  
The Open University in Scotland  
Educational Institute of Scotland  
General Teaching Council for 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 Courts and Tribunals 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  
sportscotland  
Strathclyde Partnership for Transport  
SSSC  
Unlock  
Victim Support Scotland  
Volunteer Scotland Disclosure Services



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