

Final Business and Regulatory Impact Assessment

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

February 2018

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Title of Proposal

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

Purpose and intended effect

• Background

Standard and enhanced disclosures are issued under the Police Act 1997 ("the 1997 Act") and disclosures of PVG scheme records are issued under the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act") - these types of disclosures are referred to collectively as 'higher level disclosures'. In 2015, the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 ("the 2015 Remedial Order") amended the 1997 and 2007 Acts in relation to the spent conviction information which could be disclosed in a higher level disclosure. That 2015 Remedial Order introduced lists of offences into schedules 8A and 8B of the 1997 Act. Schedule 8A lists certain offences, spent convictions for which will continue always to be disclosed due to the serious nature of the offence (sometimes referred to as the 'Always Disclose List'¹); schedule 8B lists certain offences, spent convictions which are to be disclosed subject to rules depending on the length of time since conviction and the disposal of the case (sometimes referred to as the '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 Always Disclose List. 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 2015 Remedial Order unlawfully and unjustifiably interfered with the petitioner's right under Article 8 of the European Convention on Human Rights (ECHR), and Scottish Ministers had no power to make the provisions in terms of section 57(2) of the Scotland Act 1998 ("the 1998 Act").

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

• Objective

The Draft Remedial Order sets out the proposed amendments to the 1997 and the 2007 Acts. The effect of the amendments will be that recipients of higher level disclosures under those Acts whose disclosure contains information about a conviction for an offence listed in the Always Disclose List will in certain specified

¹ 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).

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.

They will have this right where the conviction for a schedule 8A offence is spent, and either–

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

We are satisfied that this policy provides an ECHR compliant system.

- **Rationale for Government intervention**

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

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

Consultation

- **Within Government**

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

- **Public & Business Consultation**

A 60 day formal consultation ran from 11 September 2017 to 26 November 2017. Notification of the publication of the Proposed Draft Remedial 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 major stakeholders.

Observations on the consultation were received from local authorities, health boards, charities and advocate groups, professional bodies, Police Scotland and a number of individuals.

Our formal Statement in response to the written observations received on the Proposed Draft Remedial Order was laid in the Parliament on 15 December 2017. Fifty-one responses were received during the consultation period, this consisted of

- 37 responses (72%) in favour of the proposals
- eight responses in opposition (16%)
- six respondents (12%) who did not express a view.

The majority of supportive views were from organisations: 32 of the 39 (82%) who responded favoured the proposal. There were 12 responses from individuals with five (42%) of those expressing their support for the amendments.

A copy of these responses and the Statement to Parliament can be found on the Scottish Government website.

The partial BRIA, published alongside the consultation, highlighted the potential for minimal impact to employers due to recruitment delays caused by the length of time an application to a Sheriff could take. This impact on employers and the provision of services was also commented on by a number of consultation respondents. Those who commented felt that rather than a minimal impact, the recruitment delays would be likely and have a direct cost for businesses who would as a consequence require overtime or agency workers to fill recruitment gaps.

Some respondents raised concerns about the risk to public safety of employing an individual who has unbeknown to the employer successfully appealed for conviction removal. Others noted that if such risks were realised there could be financial and reputational consequences for the employer.

The positive impact on businesses, from the consultation responses, is the potential for employers to recruit from a wider pool of candidates. The proposals may encourage interest in employment opportunities from individuals with convictions who may otherwise have avoided employment requiring a higher level disclosure.

Other, specific comments made in response to the partial BRIA published highlight the need for adequate funding for voluntary groups supporting people with learning difficulties making an application to a Sheriff.

No changes have been made to the Draft Remedial Order in light of the responses to the consultation.

Options

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

Option 1 – Do Nothing

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

Option 2 – Introduce the amended legislation

This will require amendment of the 1997 Act and 2007 Act to address the concerns raised by the court and ensure that the disclosure provisions are compatible with ECHR.

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

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

Sectors and groups affected

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

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

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

Option 1 – Do Nothing

Benefits

No operational change, and no legislation is required. The status quo would simply be maintained, however, this would mean that Disclosure Scotland would be acting incompatibly with ECHR and this position would not be sustainable. Disclosure Scotland would have to stop processing higher level certificates.

Costs

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

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

Option 2 – Introduce the new legislation

Benefits

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

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

Costs

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

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

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

Scottish Firms Impact Test

We were unable to identify any specific businesses which would be detrimentally impacted by this piece of legislation. Businesses were, however, able to contribute to the formal consultation.

As noted above, the proposals were mainly supported by organisations responding to the consultation. The impact of delayed recruitment might affect businesses generally rather than one specific type of business. As described in the partial BRIA, it is difficult to determine the impact of the delay to employers, however, we expect this impact to be very low with approximately two applications per month to a Sheriff. Scottish Ministers accept that an application to a Sheriff can delay an organisation's recruitment decisions and can cause uncertainty for the individual concerned. The issue of how applications for removal should be dealt with most appropriately will form part of the wider PVG review to be carried out.

Competition Assessment

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

Test run of business forms

These proposals do not introduce any new business reforms.

Legal Aid Impact Test

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

The amendments will allow recipients of higher level disclosures under the 1997 and 2007 Acts whose disclosure contains information about a conviction for an offence listed in schedule 8A of the 1997 Act in certain specified circumstances to apply to a Sheriff in order to seek removal of that conviction information before their disclosure is sent to a third party such as an employer.

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

We reached the figure of 24 using the evidence we have at hand in relation to the current figures for applications made to a Sheriff under the 1997 Act, or the 2007 Act for removal of information about convictions for offences listed in schedule 8B of the 1997 Act.

Based on the estimates given by Disclosure Scotland, of appeals per year of around 24, the Scottish Legal Aid Board would suggest an increase in expenditure from the Legal Aid Fund of around £21,000 to £28,000 per year. They have used an average case cost of £560 and assuming a legal aid eligibility rate of 75%-100%.

Enforcement, sanctions and monitoring

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

Implementation and delivery plan

There have been no changes to the implementation plan as published in the Partial BRIA. No changes were made to the Draft Remedial Order following the consultation.

The delivery and implementation plan includes the 60-day period for written observations (as set out in section 13 of 2001 Act) which commenced on 11 September 2017 and finished on 26 November 2017. The Remedial Order was laid in draft before Parliament on 15 December 2017, (*Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) Amendment (Scotland) Order* was laid in draft on same date) using the standard Parliamentary affirmative procedure (Parliament to approve within 40 days of laying). It is anticipated that the Remedial Order and ROA Order will be made with a commencement date of 17 February 2018.

- Post-implementation review**

We will monitor the number of appeals and the types of offences two years post implementation. The appeals mechanism for both schedule 8A and schedule 8B offences will form part of the PVG review.

Summary and recommendation

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

Introducing this amendment to the legislation will provide a fairer disclosure regime whilst ensuring safeguarding is paramount. There are no costs to individuals or businesses using Disclosure services, however there will be a cost to the individual in making the appeal. There may be some cost to the legal aid budget. There may be some impact to employers if recruitment delays arise as a result of the process for application to a Sheriff, however, we expect that this impact will be very low with approximately two applications per month made to a Sheriff.

Declaration and publication

The Cabinet Secretary or Minister responsible for the policy (or the Chief Executive of non departmental public bodies and other agencies if appropriate) is required to sign off all BRIs prior to publication.

Sign-off for Final BRIs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:**Date:** 8th February 2018 .**Minister's name:** MAREE TODD .**Minister's title:** MINISTER FOR CHILD CARE AND EARLY YEARS .**Scottish Government Contact point:**

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