

## Equality Impact Assessment - Results

### THE POLICE ACT 1997 AND THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 REMEDIAL ORDER 2018

Title of Policy	The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (“the Draft Remedial Order”)
Summary of aims and desired outcomes of Policy	To ensure we have a disclosure regime in Scotland that strikes a fair balance between the individual’s right to respect for their private life and the interests of public protection in compliance with the European Convention on Human Rights (ECHR).
Directorate: Division: Team	Disclosure Scotland; Protection Services: Policy Team

#### Executive Summary

The main purpose of the equality screening exercise is to identify whether the provisions contained within the proposals will adversely impact any particular group of individuals and to consider how this work can better promote equality of opportunity and foster good relations between groups.

The proposals are brought forward as a result of Lord Pentland’s ruling in *P v Ministers* ([2017] CSOH 33) in which it was held that insofar as they required automatic disclosure of the petitioner’s conviction before the Children’s Hearing, the provisions for higher level disclosures unlawfully and unjustifiably interfered with the petitioner’s right under Article 8 of the European Convention on Human Rights.

#### 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 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’<sup>1</sup>); schedule 8B lists certain offences, spent convictions for which are to be disclosed subject to rules depending on the length of

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

time since conviction and the disposal of the case (sometimes referred to as the 'Rules List').

In the case *P v Scottish Ministers*, 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, 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 1998 Act for nine months (to 17 February 2018) to allow Ministers to remedy the legislation.

The Remedial Order sets out the proposed amendments to the 1997 and 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 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.

### **The Scope of the EQIA**

An initial framing exercise for the EQIA was carried out involving a range of internal stakeholders from Disclosure Scotland.

This exercise helped to identify the potential impact of the legislation on other Scottish Government policy areas and on those in protected groups. It also assisted in identifying available existing evidence.

Due to the nature of the legislative process for the remedial order which is set out in section 13 of the Convention Rights (Compliance) (Scotland) Act 2001 ("the 2001 Act"), a formal consultation was launched on 11 September 2017, where we invited written observations on the proposals, including any potential impact it may have on any particular groups of people. The consultation ran for the statutory 60 day period. Respondents were invited to comment on the remedial order and the amendments it makes, the partial Equalities Impact Assessment, the partial Business and Regulatory Impact Assessment and the partial Child Rights and Wellbeing Impact Assessment.

The scope of this EQIA is the impact of the legislation on those requiring a higher level disclosure who have one or more protected characteristics, as set below.

A variety of information sources were used in compiling this EQIA, which includes, but is not exclusive of:

- Scotland's Population 2016 - The Registrar General's Annual Review of Demographic Trends
- Scottish Household Survey (2015)
- Annual Population Survey, results for year to 31 March 2017, ONS
- Scottish Government labour Market Briefing August 2017
- Disclosure Scotland Management Information Database

The proposals will affect individuals where an employer or other organisation is entitled to request a higher level disclosure. There will be no impact on those seeking to apply for a basic disclosure under the 1997 Act. There will be an impact on some employers and organisations as they may receive less conviction information than previously. There could be a benefit for some applicants as their disclosure certificate could contain less conviction information in the future.

To understand the different needs and expectations of those affected by these amendments, we have gathered the following initial evidence on protected characteristics. This is supplemented by the responses to the consultation, this allowed for a full consideration of the proposals on equality.

The initial evidence gathered and consultation responses are set out below along with a discussion on the main points raised.

The protected characteristics we have information on are age and gender. For other protected characteristics including disability, race, religion and belief and lesbian, gay, bisexual and transgender there is no information available as Disclosure Scotland does not collect any information on these characteristics as they have no bearing on the conduct of disclosure checks.

## **Age**

There are 1,087,200 members of the PVG scheme, this equates to 20% of the population of Scotland. Members of the PVG scheme vary in age, from 14 years to 85+ years.

In 2016/17 Disclosure Scotland completed just over 304,500 applications for all higher level disclosure, the applicants' ages varied from 15 years to 85+ years. The majority of applicants fell within 35 – 49 year age range.

In 2016/17 35 – 49 year olds accounted for 29.2% of all higher level disclosures completed, 16 – 24 year olds accounted for 24.3% of all higher level disclosures, 25 – 34 year olds accounted for 23.5% and 50 – 64 year olds accounted for 19.4% of all higher level disclosures completed. Applicants aged under 16 and over 65 accounted for 0.2% and 3.5% respectively of all higher level disclosure completed in 2016/17.

20,100 or 1.8% of PVG scheme members are aged 74 years and over. Of the 5520 enhanced disclosure applications completed in 2016/17, 40 or 0.7% were for people aged 74+ years.

The Scottish Government considers that the legislative changes would not have a disproportionately negative on any particular age group.

## **Gender**

In 2016, 51% of Scotland's population were female and 49% were male.

As of August 2017 79.2% of males aged 16-64 were in employment compared to 71.3% of women. Of those people in part time employment, 75% were female and 25% were male.

Analysis of PVG applications and membership since the inception of the PVG Scheme show that more women are PVG members and more women are applying to the PVG scheme.

PVG membership is comprised of 757,000 female members (69.6%) and 330,200 (30.4%) male members. In 2016/17, 206,300 (71%) PVG applications were from female applicants while 82,500 (29%) PVG applications were from male applicants.

Overall, in 2015, more women (30 per cent) than men (24 per cent) volunteered in the last 12 months

The Scottish Government considers that the legislative changes would not have a disproportionately negative impact on either gender

## **Consultation**

A 60 day formal consultation ran from 11 September 2017 to 26 November 2017. Notification of the publication of the 2018 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 response to the written observations received on the 2018 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 consultation statement to Parliament can be found on the Scottish Government website.

## **Key Findings**

Responses from the consultation mainly noted the positive benefits to individuals who received a conviction before the age of 18 to put their past behind them as a result of the possibility of the appeal to a Sheriff. Individuals convicted of a schedule 8A offence will have to wait a shorter amount of time once the conviction becomes spent before they are able to make an appeal.

In particular, respondents with an interest in the rights and wellbeing of children and young people commented on the amendment's positive impact on care experienced people. Care experienced individuals are often more likely to have had interactions with the criminal justice system at a young age and the changes offer an opportunity to limit the disclosure of criminal convictions to potential employers, allowing people to move on.

Conversely, a number of respondents noted concerns about the potential risk to the safety of service users, including children, if the full conviction history of those requiring a higher level disclosure for their role is not disclosed due to a successful schedule 8A application to a Sheriff. In respect of this concern, it should be noted that convictions will only be removed following a determination by a Sheriff on the relevance of the conviction to the regulated work or the purpose of the higher level disclosure requested. Where a Sheriff determines the conviction at issue is relevant it will be disclosed. Further, the number of appeals for schedule 8A offences will be small, we anticipate only 24 a year. The amendments apply only to disposals of offences within the scope of the Rehabilitation of Offenders Act 1974 and capable of becoming spent, disposals that can never become spent will continue to be disclosed. It should also be noted that a higher level disclosure is only one of the tools an employer should use when making safe recruitment decisions, employers should be using all the tools at their disposal.

Along similar lines to the above was the comment on the greater proportion of young men compared to young women interacting with the Children's Hearing process. As a consequence young men are more likely to be affected by the refinements to the disclosure regime.

The accessibility of the appeal process, navigating it and having adequate support in accordance with specific individual needs is essential to ensure there are no barriers to the right to appeal on members of particular groups, such as people with learning difficulties.

The consultation responses did not indicate a potential impact to other any other protected characteristics.

## Recommendations and Conclusions

Scottish Ministers are satisfied that the proposals provide an ECHR compliant system.

No changes have been made to the proposals as a result of the EQIA or the consultation. As described above, the proposals would not have a disproportionately negative impact on any group or protected characteristic.

As indicated by the consultation results, the proposals are potentially beneficial to individuals who received convictions before the age of 18, allowing those with childhood convictions to make an application to a Sheriff for conviction removal and move on from past offending. Further, the proposals may be of particular benefit to care experienced individuals who are more likely than their peers to have had interactions with the police and courts in their childhood.

The consultation results also point to a potential benefit to young men who are more likely than young women to have had dealing with the Children's Hearing System, however, this impact may be lessened by the fewer number of men overall applying for PVG membership.

The delivery and implementation plan includes the 60-day period for written observations (as set out in section 13 of the 2001 Act) which commenced on 11 September 2017 and finished on 26 November 2017. The *Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018* was laid in draft before Parliament on 15 December 2017, (*Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) Amendment (Scotland) Order 2018* 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 2018 Remedial Order 2018 and ROA Order will be made with a commencement date of 17 February.

Following implementation the appeals process will be monitored for two years. The appeals mechanism will be looked at as part of the wider PVG review.