

EXECUTIVE NOTE

DRAFT : THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSION AND EXECEPTIONS) (SCOTLAND) AMENDMENT ORDER 2009

The above instrument will be made in exercise of the powers conferred by virtue of sections [4(4), 7(4) and 10(1) of the Rehabilitation of Offenders Act 1974 c.53]. The instrument is subject to draft affirmative resolution procedure.

Policy Objectives

1. The purpose of the instrument is to amend the current Rehabilitation of Offenders Act 1974 (Exclusion and Exceptions) (Scotland) Order 2003 to add (1) a new category of work to the excepted professions, offices, employments and occupations to Part 2 of schedule 4 of the 2003 Order, (2) insert a definition of a social care service within the Interpretation section of Schedule 3 of the 2003 Order, and (3) insert within the Interpretation section of Schedule 3 of the 2003 clarification that an ‘adult at risk’ has the meaning given by the Police Act 1997(Criminal Records) (Scotland) Regulations 2006.

2. The key policy objective of these proposed amendments to the 2003 Order is to ensure that an organisation delivering social care services which involves their staff (paid or unpaid) having unsupervised one-to-one contact with adults at risk as part of their normal duties can legitimately seek an enhanced disclosure. By definition, these are adults who are at risk of harm. Permitting organisations to seek the level and type of information afforded by the highest level of disclosure check will give organisations any conviction information and relevant non-conviction information to be used by them as part of their recruitment and retention decisions for work with adults at risk. The link to the ROA 2003 Order means that spent convictions - or the failure to disclose a spent conviction – can be a proper ground for dismissing or excluding a person from a specified profession, office employment or occupation.

Background

3. The Rehabilitation of Offenders Act 1974 (ROA) sets out to improve the rehabilitation prospects of people who have been convicted of a criminal offence, served their sentence and have since lived on the right side of the law. The ROA provides that anyone who has been convicted of a criminal offence and sentenced to less than two and a half years in prison can be regarded as rehabilitated after a specified period with no further convictions. After the specified period the original conviction is considered to be spent.

4. The general rule is that, once a conviction is spent the convicted person does not have to reveal it and cannot be prejudiced by it. However, there are some categories of employment to which the Act does not apply and for the purposes of which convictions otherwise defined as spent have still to be disclosed. These categories of employment are defined as “exceptions”. Basically, “exceptions” relate to particular employments or professions. The types of employment where questions about spent convictions can be asked include work in the financial sector, in child care positions, care services, and health professions.

5. Enhanced disclosure checks can only be undertaken in line with current legislation. Entitlement to seek a check at this level depends on whether a particular position is (a) exempted from the provisions of the Rehabilitation of Offenders Act 1974 and (b) is a position which, in relation to paid or unpaid work with adults at risk, meets the criteria specified within regulations 9 and 10 of the Police Act 1997(Criminal Records) (Scotland) Regulations 2006(SI 2006/96).

6. It has come to light that some voluntary and charitable sector positions fall outwith the criteria set out in current legislation. The problem stems from having no defined meaning of a social care service. The nub of the issue is that there are individuals working in the social care sector who, until recently, have been getting enhanced disclosure checks because of a misinterpretation of existing regulations when they are only entitled to basic disclosure checks. Types of positions within services that now fall outwith the present criteria include providing advocacy support services, befriending, social inclusion-type support, homelessness, and where services are provided due to age or condition i.e. due to disability, health or age-related circumstances. The nature of this work often places the worker in a position where they will have unsupervised one-to-one contact with adults at risk, and the policy is that it is appropriate that such positions should be eligible for an enhanced level disclosure check.

Consultation

The imperative is to ensure that social care provider organisations can legitimately seek enhanced disclosure checks for those they employ to work with adults at risk. Although there is no requirement to consult on such an instrument, it is considered good practice to consult with interested bodies. The need to expedite this change means there has been no opportunity for a full and comprehensive consultation on the proposals. In the time available however, officials have discussed the proposals with relevant Scottish Government policy interests, Disclosure Scotland and Central Registering Body for Scotland staff to ensure that they are content with and can implement the proposed change. They have also met with representatives of the Scottish Council for Voluntary Organisations and Women's Royal Voluntary Services, and they have endorsed our proposed approach.

Financial Effects

All types of Disclosure Scotland checks have the same fee – £20. This instrument does not increase or decrease that fee. The instrument restores the position on access to enhanced disclosures prior to the matter of entitlement being identified. As regards volunteers delivering social care services to adults at risk, the Scottish Government will, as previously, continue to provide enhanced disclosure checks at no cost to volunteers in the voluntary sector delivering social care services to adults at risk.

Scottish Executive - Health & Wellbeing Directorate
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