

POLICY NOTE

THE CHILDREN'S HEARINGS (SCOTLAND) ACT 2011 (REHABILITATION OF OFFENDERS) (TRANSITORY PROVISIONS) ORDER 2013

SSI 2013/146

1. The above instrument is brought forward by the Scottish Ministers in exercise of the powers conferred by section 205 of the Children's Hearings (Scotland) Act 2011 (the 2011 Act). The instrument is subject to the negative procedure in the Scottish Parliament. The order will come into force when section 7 of the 2011 comes into force.
2. The purpose of the instrument is to make transitory provisions to the Rehabilitation of Offenders Act 1974 (the 1974 Act) for Scotland.

Background

3. Under the terms of the 1974 Act anyone who has been convicted of a criminal offence and sentenced to prison for less than two and a half years can be regarded as rehabilitated after a specified period provided no other offences have been committed. After the specified period, the original conviction is considered to be spent. The effect of a conviction becoming spent is that the offender will be treated for all purposes in the law as a person who has not committed or been charged with the offence. Generally, once the specified period has come to an end the offender is not required to reveal any information in relation to the offence and should not be prejudiced by it.
4. However, the 1974 Act recognises that in certain circumstances a different balance requires to be struck for particular sectors of employment where the public interest in the knowledge of previous convictions outweighs the interest in allowing an offender to live down his past (for example, positions involving the care of children or adults at risk). These exceptions were introduced via the power contained in section 7(4) of the 1974 Act and are listed in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (the 2013 Order) which consolidated the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 (the 2003 Exclusions Order). Accordingly where the 2013 order applies, offenders cannot conceal any conviction regardless of its age.
5. Section 109 of the Criminal Justice and Licensing (Scotland) Act 2010 inserted a new section (8B) and new Schedule 3 into the 1974 Act which extended the protection under the 1974 Act to include individuals who have been given an alternative to prosecution (ATP) in respect of an offence in Scotland. New section 8B defines an ATP for the purposes of these provisions and defines the circumstances under which a person has been given an ATP. Schedule 3 essentially mirrors the provisions in sections 4-7 of the 1974 Act with appropriate modifications to apply them to ATPs.
6. Paragraph 1 of the Schedule defines when an ATP becomes spent. Paragraph 4 provides that if a person who has a spent ATP is asked a question seeking specific information, other than during court proceedings that may lead to the disclosure of the ATP or any ancillary circumstances, they are not required to answer it. Under paragraph 5 any obligation imposed by a rule of law or provisions in an agreement or arrangement to disclose

information does not extend to spent ATPs and ancillary circumstances and a person cannot be dismissed or excluded from any office, profession, occupation or employment, or be prejudiced in any way as a result of having a spent ATP or for failing to disclose this information. Paragraph 6 (a) provides the Scottish Ministers with the power to make an order to exclude or modify the application of the provision in paragraph 4 and paragraph 6 (b) provides the Scottish Ministers with the power to provide for exceptions to the provisions in paragraph (5). Paragraph (8) provides for limitations on the effect of rehabilitation under the 1974 Act for an ATP in a similar way to section 7 of that Act for convictions and sets out the circumstances where the protection under certain provisions of the 1974 Act will not apply.

7. At the moment the acceptance or establishment of the grounds of an ‘offence-based’ referral to a children’s hearing is treated as a conviction by virtue of section 3 of the 1974 Act and, as a result, the provisions of the 2013 Order apply. In addition, any child who accepts (or has established) offence grounds which results in a supervision requirement will have that offence disclosed until they reach age 40. The implications are the same regardless of whether the offence is minor or serious in nature. There is also an inequality within the current arrangements as two children committing the same offence could be referred to a children’s hearing but receive different disposals. One child may be given a supervision requirement, with the consequences set out above, while the other’s case may be discharged (no further action), even where the grounds have been accepted or established, resulting in information being recorded differently and the disposal not disclosable after a relatively short period of time (6 months after discharge).

8. The issue of the disclosure of offences by children came up during the 2011 Act’s stage 1 evidence session and debate. The (then) Education, Lifelong Learning and Culture Committee were keen for the Scottish Ministers to take action on this issue and Ministers’ made a commitment to do so. The outcome of this commitment, agreed by the Scottish Parliament at stage 2 on 27 October 2010, is reflected in the provisions set out in the Annex to this Note. These provisions, in effect, (a) re-define certain children’s hearings disposals from convictions to ATPs and (b) provide the Scottish Ministers with the power (paragraph 2 of the Annex refers) to make an order (the Offences Order) under the Police Act 1997 (the 1997 Act) specifying those offences which Disclosure Scotland can access automatically whilst carrying out their functions on behalf of the Scottish Ministers under the 1997 Act and the Protection of Vulnerable Groups (Scotland) Act 2007. The Minister for Children and Young People indicated during the stage 2 debate that the offences to be included in the offences order would comprise only serious violent or serious sexual offences and that the order would be subject to affirmative procedure so it would come back to the Scottish Parliament for debate.

9. In order to fully deliver the policy intention behind the Offences Order it is necessary to make an Order under paragraph 6 of Schedule 3 to the 1974 Act. This is to ensure that only those individuals with children’s hearings ATPs in respect of offences set out in the Offences Order are compelled to tell an employer that they have a spent children’s hearings ATP and will bring the requirement to tell employers about previous ATPs into line with what will be disclosed on standard and enhanced disclosure certificates and PVG Scheme records. The Order specifies the types of employment and proceedings that are excluded from the 1974 Act and, therefore, where disclosure of spent ATPs is required. Some of the types of employment (e.g. registered teacher, doctor, nurse, midwife, firearms dealer) and some proceedings (e.g. certain proceedings under the Firearms Act 1968, the Proceeds of Crime Act 2002 and Control of Explosive Regulations 1991) fall within reserved areas.

10. Prior to the making of the 2003 Exclusions Order, an order under section 63 of the Scotland Act was sought and made thereby conferring the section 4(4) and 7(4) powers of the 1974 Act on the Scottish Ministers. This enabled the Scottish Ministers to provide for the disclosure of spent convictions in reserved areas.

11. While we have the power to legislate for changes to the disclosure regime in relation to offence based children's hearings disposals because they are currently classed as convictions, by decriminalising them and making them ATPs we move into territory where do not appear to have equivalent competence to act where that would impact on some reserved areas. It would seem that an Order under the Scotland Act would again be the appropriate vehicle to make similar provision in respect of ATPs. This Order will be drafted shortly and the Parliamentary process will be followed at that point.

Policy objectives

12. It will not be possible for section 187, and as a consequence, section 188 of the 2011 Act to be brought into effect until such time as an Order has been made under the Scotland Act. This Order, therefore, carries forward the existing disclosure arrangements in respect of offence based children's hearings disposals by amending the 1974 Act to recognise a compulsory supervision order made under the 2011 Act as a disposal by a children's hearing so that such a disposal, where a child has committed an offence, will for the time being be treated as a criminal conviction in the same way as a disposal under the Children (Scotland) Act 1995.

Consultation

13. No consultation has been carried out because of the technical nature of the Order.

Financial Effects

14. It is not envisaged that there will be any significant financial implications/costs as a result of this Order.

Children Young People and Social Care Directorate
May 2013

CHILDREN'S HEARINGS (SCOTLAND) ACT 2011 AND REHABILITATION OF OFFENDERS ACT 1974 – CHILDREN'S HEARINGS ALTERNATIVES TO PROSECUTION

1. Section 187 of the 2011 Act amends the 1974 Act by inserting into section 8B new subsections (1A)-(1E) which provide for, among other things, certain matters to be treated as an ATP under the 1974 Act and so benefit from the protections contained in that Act. In terms of the 1974 Act, as amended, a child is to be treated as having been given an ATP where, following a referral on offence, the ground has been accepted or established and a compulsory supervision order has been made, varied or continued or the referral has been discharged. Similar provision is made in relation to offence proceedings under the Children (Scotland) Act 1995 and the Social Work (Scotland) Act 1968. Section 187 also amends Schedule 3 to the 1974 Act by making provision for an ATP to become spent after a period of 3 months of the offence grounds being accepted or established, or of a compulsory supervision order being made, and so no longer requires to be disclosed by the individual in situations where ATPs require to be disclosed by the individual.

2. Section 188 inserts new paragraphs ((ba)-(bc)) into section 113A(6) of the 1997 Act which (a) bringing certain ATPs in the new subsections 8B(1A) and (D) of the 1974 Act within the meaning of "relevant matter" in section 113A as well as supervision requirements and discharges made under the Social Work (Scotland) Act 1968, (b) provide the Scottish Ministers with the power to make an order specifying to which offences (resulting in an ATP following a Children's Hearing) the definition of "relevant matter" will apply and (c) enable any order to set out offences by level of seriousness. Paragraph 1 of Schedule 6 to the 2011 Act repeals the existing meaning in the 1974 Act (at section 3) which caused accepted or established offence referral grounds to be regarded as convictions.