

# Business and Regulatory Impact Assessment

## Title of Proposal

The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (“Remedial (No. 2) Order”)

## Purpose and intended effect

- **Background**

In June 2014, the UK Supreme Court in a judgment relating to the disclosure of cautions issued by the police in England and Wales for minor offences found that the system under the Police Act 1997 (“the 1997 Act”) as it applied in England and Wales breached a person’s article 8 rights under ECHR. The UKSC was clear that it was appropriate for a system of higher level disclosures to operate when that person wanted to work in certain roles involving contact with vulnerable groups or in other sensitive roles. However, the UKSC accepted that when a conviction becomes spent within the meaning of the Rehabilitation of Offenders Act 1974 it should usually become part of private personal history and that the system of automatic disclosure of all such spent convictions in higher level disclosures breached article 8.

In light of the decision, Scottish Ministers undertook a detailed assessment of the operation of the 1997 Act as it applied in Scotland and concluded that changes should be made to it to take account of the UKSC decision. Scottish Ministers also undertook a detailed assessment of the closely related Protecting Vulnerable Groups Scheme operated under the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) and concluded that it should also be amended.

The Scottish Government agreed that a remedial order under the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”) should be used as it allows Ministers to use secondary legislation to address actual or potential ECHR compliance problems, even when these occur in primary legislation. In this case a remedial order had the advantage that at the point when it was made, the amended law was brought into force immediately, resulting in a minimal impact on the operational processes.

The Scottish Government considered there to be no good justification for continuing the previous system of higher level disclosures once the more proportionate regime was in place. It is for that reason that the Scottish Government used the urgent procedure for the remedial order which involves a 60 day consultation period for interested groups and individuals to make written observations after the order was made, rather than before. The procedure specifies that Parliament will consider the order after it comes into force and any suggested changes could be taken into account in a revised order.

The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (“the 2015 Order”) came into force on 10 September 2015. It amended the 1997 Act and the 2007 Act. It also made

consequential amendments to the Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010 (“the 2010 Regulations”). Due to the parliamentary procedure for the 2015 Order (which is set out in section 14 of the 2001 Act), a second modified order can be laid if necessary, once consideration has been given to written observations received within the 60 day consultation period. If no amendments had been made, the 2015 Order would have remained in force subject to approval by the Scottish Parliament by no later than 8 February 2016.

- **Objective**

This Remedial (No. 2) Order amends certain provisions of the 1997 and 2007 Acts (as well as making consequential changes to the 2010 Regulations) as Ministers consider that the provisions of the 1997 and 2007 Acts may be incompatible with the ECHR following the UKSC decision.

The overarching objective of both remedial orders is to introduce a disclosure system in Scotland that strikes the right balance between public protection and an individual's right to a private life. The Remedial (No. 2) Order makes some minor modifications to the provisions which were contained in the 2015 Order. The modifications are explained in the Policy Note to the Remedial (No. 2) Order.

- **Rationale for Government intervention**

The Scottish Government undertook a review of the current disclosure regime. It concluded that the 1997 and 2007 Acts should be amended. The amended regime will strike a balance between the interests of public protection and the rights of individuals with a criminal record to respect for their private life.

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

- **Public & Business Consultation**

A formal consultation took place from 10 September to 24 November. This was sent to over 200 business and organisations. A total of 27 responses were received. The majority of respondents were generally supportive of the amendments made to the disclosure regime in Scotland.

Some concerns were raised about the process of application to a sheriff causing a delay in recruitment which could result in costs for employers. A

few organisations stated that they did not envisage any additional costs for businesses.

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

Scottish Government raised the amendments at the Disclosure Scotland Stakeholder Advisory Board on 29 October 2015, attended by representatives from the voluntary sector, NHS, Local Authorities and the private sector.

## **Options**

The following options were considered

### **Option 1 – Do Nothing**

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

### **Option 2 – Introduce the amended legislation**

This involved amendment of the current Rehabilitation of Offenders legislation and the 1997 and 2007 Acts by means of two separate Scottish Statutory Instruments - a draft affirmative order made under the Rehabilitation of Offenders Act 1974 and a remedial order under the 2001 Act.

By means of these two orders the system of higher level disclosures would be amended so that not all spent convictions would require to be disclosed either by individuals themselves when applying for jobs or by Scottish Ministers when issuing disclosures. Certain spent convictions will become protected convictions and will no longer require to be disclosed.

### **Sectors and groups affected**

The proposed amendments will impact on those with conviction information applying for higher level disclosures because of the work 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 on higher level disclosures.

There is likely also to be an impact on the sheriff courts as there is a provision included in the amendments which will allow individuals to make an application to the sheriff in certain circumstances for an order for a new disclosure certificate with spent conviction information removed from it or for an order requesting the removal

of spent vetting information from a PVG scheme record.

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 changes and no legislation is required. The status quo would simply be maintained.

#### **Costs**

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 new legislation introduces changes to 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 will ensure that individuals will not be required routinely to disclose all spent convictions and not all such convictions will require to be routinely disclosed by Disclosure Scotland when people wish to work in employment positions for which higher level disclosures are available.

#### **Costs**

Although the legislation imposes changed duties on individuals in relation to the convictions that they must disclose under the Rehabilitation of Offenders legislation, there are no additional costs which these individuals will incur as a result of these requirements. Equally businesses will not incur any additional costs as a result of the changes. 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 the sheriff are available the actual costs are difficult to determine.

Some businesses/organisations have highlighted that there may be some additional costs involving delays in recruitment, but until we fully understand the numbers involved in submitting applications to the sheriff, it will be difficult to understand what this impact might be if any.

### **Scottish Firms Impact Test**

We have been unable to identify any businesses which would be detrimentally impacted by this piece of legislation.

There will be no cost to businesses or organisations requiring disclosures. The

charging regime for disclosures is only amended in one minor respect to ensure that where a business pays for the disclosure they are not charged any more than they currently are for disclosures. Costs to individuals will not change for the same reason.

There may be a cost to employers if there is a delay in recruitment due to applications to the sheriff. Until we know the numbers involved in this process, it will be difficult to determine the impact of any delay on employers. We envisage this impact to be low, we estimate around 50 applications per year will be made to a sheriff.

### **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 suppliers' incentives to compete vigorously.

### **Test run of business forms**

These regulations do not introduce any new business forms.

### **Legal Aid Impact Test**

The amended provisions allow an application to be made to the sheriff for an order for a new certificate or for the removal of vetting information from a PVG scheme record. This could impact on the legal aid budget.

Under the amended system, two lists of offences have been created. One list contains offences considered so serious and/or relevant that they must always be disclosed ("Offences which must always be disclosed"). The second list contains offences that may be relevant with factors in relation to the length of time since conviction, age of offender at date of conviction and sentence received determining whether disclosure should take place ("Offences which are to be disclosed subject to rules").

It is impossible to determine in advance the number of people who will make use of this procedure for removal of spent convictions for offences; however, it will be available only for the "Offences which are to be disclosed subject to rules" list. Applicants will not be able to use the procedure in relation to any unspent conviction information or any of the spent conviction information disclosed from the "Offences which must always be disclosed" list.

Based on the evidence we have, we would anticipate a figure of around 50 such applications to the 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 the sheriff, and therefore we will be able to keep this under review.

We reached the figure of 50 using the evidence we have at hand in relation to appeals and dispute figures. In 2014-15 23% of all disclosure applications were higher level disclosures. In the same year there were 220 disputes. Therefore, proportionately, approximately 50 of them would have related to higher level certificates (23% of 220). There have been around 18 MACCs cases to Ministers regarding relevancy of certain conviction information on a disclosure since 2009. The Disclosure and Barring Service's regime in England and Wales has been subject to 3 judicial reviews since implementation in 2014.

The Scottish Legal Aid Board has stated that the basis for the estimated number of appeals per year (around 50) is reasonable. They have used an average case cost of £560 and assuming a legal aid eligibility rate of 75%-100%, this would suggest an increase in expenditure from the Legal Aid Fund of around £21,000 to £28,000 per year.

We can confirm that since the inception of the reforms on 10 September there have been 27 notifications to Disclosure Scotland about intent to apply to a sheriff. Disclosure Scotland is aware that three applicants have been in contact with their local sheriff court, however, we have not been made aware of any papers being lodged. Although the number of notifications seems relatively high, we believe this is an unnatural spike due to the regulations just coming into force and applicants being unaware of what the process of applying to the Sheriff actually entails. We will not get a clear understanding of the true numbers and the impact until we start receiving notification that papers have been lodged at the Sheriff Court.

#### **Enforcement, sanctions and monitoring**

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

#### **Implementation and delivery plan**

The first remedial order, the 2015 Order, came into force on 10 September 2015.

The second remedial order, Remedial (No. 2) Order, will be laid on 11 December 2015 and subject to Parliament's approval will come into force on 8 February 2016.

- **Post-implementation review**

There was a 60 day consultation for the first order, the 2015 Order, laid on 10 September. These responses have been analysed and Scottish Ministers will make a statement to Parliament responding to these observations.

Scottish Ministers have agreed to review regularly the offence lists set out in schedules 8A and 8B of Remedial (No. 2) Order and Disclosure Scotland will monitor continuously the numbers of applications to the sheriff for removal of spent conviction information from disclosures, as well as monitor the impact on recruitment costs. This monitoring exercise will determine whether a review of this process is required in the future and whether the BRIA will need updating.

#### **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 legislation will provide a fairer disclosure regime whilst ensuring safeguarding is paramount. There are no costs to individuals or businesses using Disclosure services. There may be some cost to the legal aid budget. There may be some minimal costs to employers if recruitment delays arise as a result of the process for application to a sheriff.

**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

**Signed:**

**Date:**

**Angela Constance  
Cabinet Secretary for Education and Lifelong Learning**

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