

POLICY NOTE

THE POLICE ACT 1997 AND THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 REMEDIAL (NO. 2) ORDER 2015

SSI 2015/423

Introduction

1. The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 No. 2 Remedial Order 2015 (“the No. 2 Order”) revokes the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (“the 2015 Order”) (SSI 2015 No 330). The No. 2 Order also amends Part V of the Police Act 1997 (“the 1997 Act”) and Part 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”). It also makes a consequential amendment to the Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010 (“the 2010 Regulations”).

Background

2. On 18 June 2014, in the case *R (on the application of T and another) (FC) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35, the United Kingdom Supreme Court (“UKSC”) made a declaration of incompatibility under section 4 of the Human Rights Act 1998 that the provisions of sections 113A and 113B of the Police Act 1997 (as applicable in England and Wales) were incompatible with article 8 (the right to respect for private and family life) of the European Convention on Human Rights (“the Convention”) because the requirements in those sections in relation to blanket disclosure of all spent convictions were not in accordance with the law. In Scotland, similar provisions of the 1997 Act apply to the issue of disclosure certificates. These functions under the 1997 Act and related legislation are devolved to Scottish Ministers and are exercised through Disclosure Scotland.

3. In light of the UKSC ruling, the Scottish Government assessed the operation of the 1997 Act in Scotland and concluded that changes should be made to the 1997 Act to ensure that it strikes a fair balance between an individual’s right to respect for their private life and the interests of public protection. In addition, the Scottish Government concluded that the 2007 Act (an Act of the Scottish Parliament which established the Protecting Vulnerable Groups Scheme – “PVG Scheme”) should also be amended. These changes were effected by the 2015 Order which came into force on 10 September 2015.

4. The 2015 Order came into force at the same time as the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 which provided for associated changes to the system of self-disclosure of previous criminal convictions by an individual under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013.

Parliamentary Procedure

5. The 2015 Order came into force under the procedures specified in section 14 of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”). Section 14(2) of the

2001 Act provides that Scottish Ministers must, after making such an order, give appropriate public notice of its contents, and invite written observations to be made within 60 Parliamentary sitting days of the day the order was made.

6. The 2015 Order came into effect on 10 September 2015 and Scottish Ministers gave public notice of it on that day and invited observations to be made in writing within 60 days.

7. In accordance with sections 14(3) and (4) of the 2001 Act, Scottish Ministers have considered all written observations made; and laid a statement before the Scottish Parliament summarising these comments and specifying the modifications which they consider it appropriate to make to the 2015 Order. That Statement is appended to this Policy Note at Annex A. The modifications to the 2015 Order are contained in the No. 2 Order which, in accordance with section 14(6) of the 2001 Act, will replace the 2015 Order with effect from 8th February 2016.

Policy objectives

8. In its decision the UKSC accepted that a conviction or caution would usually become part of someone's private life once it became spent (as set out in the 1974 Act). The UKSC accepted that information about unspent convictions could continue to be disclosed as the disclosure of those did not interfere with article 8 rights since they were not yet part of someone's private life. Article 8 of the Convention sets out the right to respect for private and family life –

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

9. The UKSC ruled that the requirements in sections 113A and 113B of the 1997 Act on the Disclosure and Barring Service (“DBS”) to operate by means of blanket disclosure of information about spent convictions and spent cautions held on the Police National Computer (“PNC”) were not in accordance with the law as the 1997 Act had failed to make any distinction on the basis of any or all of the following criteria in its operation in England and Wales:

- the nature of the offence
- the disposal in the case
- the time that has elapsed since the offence took place
- the relevance of the disclosure information to the employment sought.

10. The UKSC also referred to other factors which could be taken into account such as the circumstances in which the person committed an offence, the age when they committed an offence and their perpetration of further offences (Lord Wilson in paragraph 41 of the decision).

11. The 2015 Order took into account these factors in the reforms which it introduced to the disclosure regime in Scotland. Introduction of these reforms resulted, on a case-by-case basis, in changes to the content of a standard or an enhanced disclosure issued under the 1997 Act, and a PVG scheme record issued under the 2007 Act. In other words, since 10 September there has no longer been blanket disclosure of all spent convictions on these disclosures.

12. In addition, the 2015 Order changed the content of the short scheme record under section 53 of the 2007 Act, and the tests applied by the chief officer of a relevant police force when considering a request from the Scottish Ministers for other relevant information under either section 113B(4) of the 1997 Act or section 49(1)(c) of the 2007 Act.

13. Lastly, the 2015 Order amended the 1997 and 2007 Acts to require Scottish Ministers, in certain circumstances, to provide the applicant with the opportunity to see their disclosure before it is issued to a third party. In cases where that opportunity is offered, the applicant is able to intimate an intention to Scottish Ministers to make an application to a sheriff for an order for the issue of a new disclosure certificate (the 1997 Act), or an order for the removal of vetting information from their PVG scheme record (the 2007 Act) if the sheriff considers that the details are not relevant to the purpose for which the disclosure was requested. Where such intimation of an application to the sheriff is received by Scottish Ministers, the third party will not see the copy of the disclosure until the court application is finally determined.

Summary of the No. 2 Order

14. The No. 2 Order:

- provides that certain spent convictions will continue always to be disclosed due to the serious nature of the offence - article 3(2)(c)(ii) inserts a new paragraph (a) in the definition of “relevant matter” in section 113A(6) of the 1997 Act; this definition relies on the concept of a protected conviction which is defined in new section 126ZA of the 1997 Act (inserted by article 3(7) of the No. 2 Order);
- section 126ZA makes reference to lists of offences contained in new schedules 8A and 8B of the 1997 Act (inserted by article 3(8) of the No. 2 Order); new schedule 8A lists serious offences for which spent convictions will always be disclosed;
- sets out rules to be applied to certain spent convictions to determine the content of standard and enhanced disclosures under the 1997 Act and the PVG scheme record disclosure under the 2007 Act (these disclosures are collectively referred to as ‘higher level disclosures’). These rules will mean that certain spent convictions (within the meaning given in the 1974 Act) will no longer be disclosed - new schedule 8B lists offences for which spent convictions will be disclosed subject to the application of rules relating to the age of the person at the time of the conviction and the length of time since the date of conviction as well as the disposal which was given. These rules are set out in new section 126ZA(2);
- provides that certain spent convictions will no longer be disclosed routinely due to the minor nature of the offence - new section 126ZA(1) provides that a spent conviction is a protected conviction if it is listed in neither new schedule 8A nor

8B of the 1997 Act and such convictions will therefore no longer fall routinely within the definition of “relevant matter”;

- provides that all spent cautions (within the meaning given in schedule 3 of the 1974 Act) will never be disclosed - article 3(2)(c)(ii) inserts a new paragraph (b) in the definition of “relevant matter” in section 113A(6) of the 1997 Act which means that only unspent cautions fall within the meaning of “relevant matter” and can be disclosed;
- provides individuals who have a spent conviction for certain offences which have not yet reached the point at which the rules would prevent disclosure of the conviction (which are therefore not yet protected convictions) with the possibility to indicate to Scottish Ministers that they intend to make an application to a sheriff for an order for a new disclosure certificate (the 1997 Act) or the removal of vetting information from a PVG scheme record (the 2007 Act) – article 3(4) of the No. 2 Order inserts new section 116ZB into the 1997 Act which sets out the requirements for making such an application and sets out what the sheriff can order in such an application; article 4(6) inserts a new section 52A into the 2007 Act to make similar provision in relation to PVG scheme records;
- in those cases where the intention to make an application to the sheriff is indicated, this prevents the issue of a higher-level disclosure to the person who countersigned the disclosure application or request until that application to the sheriff is finally determined - article 3(4) of the No. 2 Order inserts new section 116ZA which sets out when a copy of a higher level disclosure can be issued to the person who countersigned the application; article 4(6) inserts a new section 52 into the 2007 Act to make similar provision in relation to PVG scheme records;
- amends the test in section 113B(4) of the 1997 Act and section 49(1)(c) of the 2007 Act for the provision of other relevant information by the chief officer of a relevant police force in connection with higher-level disclosure applications (article 3(3)(b));
- article 4(3) makes a similar amendment to section 49(1)(c) of the 2007 Act; article 3(3)(c) of the 2015 Order also repeals section 113B(5) of the 1997 Act which allowed the police to provide other relevant information only to the person who countersigned the application and not the applicant;
- revises the information that can be included on the short scheme record disclosure issued under section 53 of the 2007 Act so that a short scheme record can be issued only where the scheme member’s scheme record does not include vetting information (article 4(7)(c) and (d));
- allows Scottish Ministers to treat certain short scheme record disclosure requests as if they were a disclosure request for a scheme record when the scheme member’s scheme record includes vetting information (article 4(7)(a) and (b) , and makes consequential amendments to the 2010 Regulations to deal with instances of this treatment (article 11) to provide for a waiver of the fee for a scheme record disclosure;

- sets out transitional provision for the 1997 Act, the 2007 Act and the Police Act (Criminal Records) (Registration) (Scotland) Regulations 2010 (articles 5 to 10); and
- revokes the 2015 Order.

Overview of amended disclosure regime

15. The decision about whether or not a spent conviction on an applicant's criminal record should be disclosed will be determined by a two-stage process. The first stage of the process will be determined by the nature of the offence. Two lists of offences have been developed – a list of 'offences which must always be disclosed' and a list of 'offences which are to be disclosed subject to rules'. These lists of offences are set out in article 3(8) of the No. 2 Order as amendments to the 1997 Act. Two new schedules – schedules 8A and 8B – are added to the 1997 Act. New schedule 8A sets out the list of offences which must be disclosed. New schedule 8B sets out the list of offences which can be disclosed subject to the application of rules.

16. In developing these lists of offences careful consideration was given to the attributes required for roles requiring higher level disclosure. Such roles place the individuals filling them in a position of power and responsibility. A conviction for a criminal offence that:

- resulted in serious harm to a person;
- represented a significant breach of trust and/or responsibility;
- demonstrated exploitative or coercive behaviour;
- demonstrated dishonesty against an individual;
- abused a position of trust; or
- displayed a degree of recklessness that resulted in harm or a substantial risk of harm

is evidence that a person's conduct has caused harm to an individual and/or is evidence of misconduct in a position of authority. This evidence of past behaviour is important information for employers when determining whether an individual is suitable for a role for which higher level disclosure is applicable. The protection of vulnerable groups and the need to prevent fraudulent activity (in roles where a higher level disclosure would be appropriate) must be balanced against any presumption that spent convictions ought not to be disclosed.

17. Where the serious nature of a person's criminal conduct is such that the passage of time will not diminish the relevance of the information to a prospective employer or organisation, Disclosure Scotland will always disclose those spent convictions. These offences comprise the 'Offences which must always be disclosed' list (schedule 8A list). It should be noted that conviction of such an offence will often result in a disposal which means it would never become spent under the 1974 Act. These convictions would continue always to be disclosed as unspent convictions, as under the current legislation. For example, a conviction for murder requires the imposition of a mandatory life sentence and therefore a conviction for murder will never be spent. However, there may be instances where the specific circumstances of the conviction result in the imposition of a sentence which is capable of becoming spent under the 1974 Act. The inclusion of these offences on the 'Offences which must always be disclosed' list means that no matter how old the conviction is, it will always be disclosed on a higher level disclosure.

18. Where the nature of a person's less serious criminal conduct is such that the passage of time, coupled with the age of the person at the date of conviction, means that certain convictions are no longer relevant to a prospective employer or organisation, Disclosure Scotland will not routinely disclose those convictions. These offences comprise the 'Offences which are to be disclosed subject to rules' list (schedule 8B list) in the No. 2 Order.

19. Where the nature of a person's criminal conduct is of a minor nature, these convictions cease to be relevant to a prospective employer or organisation once they are spent convictions under the 1974 Act, and Disclosure Scotland will not routinely disclose those spent convictions. These offences will be on neither the 'Offences which must always be disclosed' list (schedule 8A list) nor the 'Offences which are to be disclosed subject to rules' list (schedule 8B list).

20. The lists of offences in new schedules 8A and 8B will be applied to all types of higher level disclosure. This is because regulated work within the PVG Scheme and those posts which attract enhanced and standard disclosures under the 1997 Act require a degree of trust to be placed in the individual who will hold a role that places them in a position of power and responsibility. This sets these roles apart from other jobs but is the same across the types of higher level disclosure. Attempting to apply different lists to different types of disclosure would make the disclosure regime opaque to applicants and unwieldy to deliver. It could also give rise to suggestions that within types of disclosure the varied posts mean that different convictions would be of greater or lesser interest to the person making the request for disclosure and so different lists should be applied to different posts. This would introduce an undesirable element of discretion and significant scope for error in deciding which list to apply to each application.

21. The offence lists have been developed using multiple sources of information. The starting point was the Scottish Government published Recorded Crime in Scotland Classification of Crimes and Offences. Thereafter the Scottish Government considered all Scottish Criminal History System ("CHS") and PNC recorded offences that have appeared on higher level disclosures since 2007. We considered the DBS list of offences that will never be filtered from a DBS certificate and Access Northern Ireland's filtering list. Finally, we considered the detailed ISCJIS charge codes published on the Scottish Government website.

22. The offence lists will be made publicly available on the Disclosure Scotland website. Ministers will have a power to amend the list of offences by affirmative order (new section 126ZB of the 1997 Act as inserted by article 3(7)).

Rules for the 'Offences which are to be disclosed subject to rules' list

23. Having first determined that the conviction is spent and then that the offence is not included on the 'Offences which must always be disclosed' list, the rules will be applied and those convictions which are protected convictions within the meaning of new section 126ZA of the 1997 Act will not be disclosed. For each spent conviction on the applicant's record the second stage of the process will involve consideration of the age of the conviction and the age of the person at the date of conviction, as well as the means of disposal of the conviction.

24. If the conviction is more than 15 years old at the date of disclosure and the person was aged 18 years or over at the date of the conviction, it will not be disclosed. If the person was

under the age of 18 years at the date of conviction and the conviction is more than 7.5 years old at the date of disclosure, it will not be disclosed.

25. The periods of 15 and 7.5 years have been derived within the context of current rehabilitation periods under the 1974 Act and CHS retention periods operated by Police Scotland so as to strike a balance between the rights of the individual and the rights of those they are seeking to work with. Under the 1974 Act, the longest period that must elapse before a conviction resulting in any sentence of less than 30 months imprisonment can become spent is 10 years where the offender was aged 18 years or over at the date of conviction and 5 years where the offender was aged under 18 years at the date of conviction. Disclosure periods of 15 and 7.5 years for higher level disclosures avoid the possibility of the provision being redundant due to it being a necessary condition of whether or not a conviction can be regarded as 'protected' that it must first be spent. That could have happened if a period of time the same as or shorter than the longest rehabilitation period in the 1974 Act, that is 10 years, had been prescribed.

26. In addition, Police Scotland currently applies a 30/70 'weeding rule' to certain conviction information stored on CHS. This means that the subject to whom the conviction applies has to be 70 years old and the information has to have been on record for at least 30 years (both conditions must be met) before CHS will perform an automated weed on the data. This rule is used if the conviction is on indictment or the disposal was a custodial sentence. A 15 year disclosure period represents half of the minimum period that the conviction will be held on CHS for any purpose and reflects that information is being used for the more limited purpose of disclosure to inform employment decisions.

27. It is reasonable to bind up the consideration of age of the person with the time elapsed since the conviction. There is precedent for this combined approach in the 1974 Act where different timeframes for convictions to be spent are specified depending on the age of the offender, and in the PVG scheme where the time limits in relation to applications for removal from the children's or adults' lists depend on the age of the individual when they were listed.

28. Any applicant whose record contains multiple spent convictions will have each conviction considered separately and the rules will be applied to each conviction as though it is the only conviction on the record. Disclosure Scotland will, however, continue to issue information about spent convictions for multiple offences which form part of one conviction due to the way in which the offences were charged and recorded.

29. Where a conviction for an offence on the 'Offences which are to be disclosed subject to rules' list is less than 15 years old (or 7.5 years as appropriate) then the disposal of the conviction will also be taken into account. Convictions that result in no punishment or intervention (other than the record of the matter) being imposed will not be disclosed, that is, any conviction for which the court imposes a sentence of admonition or absolute discharge (the meaning of which includes a discharge from a children's hearing relating to an offence ground referral) will not be disclosed even where the conviction is less than 15 years old (or 7.5 years as appropriate). This means that the process takes into account cases where the individual circumstances are so unusual that at sentencing the judge chose to impose no punishment.

Cautions

30. In relation to any applicant whose record contains spent cautions within the meaning of schedule 3 of the 1974 Act these will never be disclosed. Only unspent cautions will fall within the definition of “relevant matter”. This means that the process takes into account cases where the circumstances of the offence did not lead to prosecution when the individual had received a caution. Cautions are not used in Scotland. They are used in England, Wales and Northern Ireland.

Application to sheriff for order to issue new certificate under the 1997 Act with conviction information excluded or for order to request removal of information from a scheme record under the 2007 Act

31. Where spent conviction information about an offence on the ‘Offences which are to be disclosed subject to rules’ list is not included in a standard or enhanced disclosure under the 1997 Act, the copy of the certificate will be issued to the countersignatory at the same time as it is sent to the applicant. But applicants for a standard or enhanced disclosure under the 1997 Act whose certificate contains spent conviction information about an offence on the ‘Offences which are to be disclosed subject to rules’ list will have a right to apply to the sheriff for a new certificate from which that information is removed from their disclosure. Certificates containing such spent conviction information will be sent initially to the applicant only. The requirement to send the copy of the disclosure to the countersignatory will apply only if the applicant has not indicated an intention to the Scottish Ministers that they would like to make an application to the sheriff. The copy of any such certificate will be withheld for 10 working days before issue to the countersignatory.

32. Where a scheme member requests a disclosure under section 52 of the 2007 Act and their scheme record contains spent conviction information about an offence on the ‘Offences which are to be disclosed subject to rules’ list the scheme member will have a right to apply to the sheriff for removal of that information from their scheme record under new section 52A of the 2007 Act (inserted by article 4(6) of the No. 2 Order).

33. When the certificate is issued or the copy of the scheme record is sent to the individual, they will be advised that if they intend to apply to the sheriff for removal of any spent conviction information on the certificate or scheme record they must notify Disclosure Scotland of their intention to do so within 10 working days of the date of issue of the certificate or scheme record. If no intimation of such an intent to make an application to the sheriff is received by Disclosure Scotland after 10 working days from the date on the certificate the countersignatory’s copy of the certificate will be issued or the scheme record will be disclosed.

34. An application to the sheriff must be made within 3 months of the notification to Disclosure Scotland of the intention to make such an application. The sheriff’s decision on an application is final. At conclusion of the appeal, Disclosure Scotland will implement the ruling. Irrespective of the sheriff’s decision, in all cases where an application has been made to the sheriff in relation to inclusion of a spent conviction on their certificate or scheme record, their application for a certificate, or for a scheme record will be re-vetted at the conclusion of the appeal. If the sheriff ordered certain spent convictions to be removed, these will be removed before the new certificate or the copy of the scheme record is issued. Lastly, the applicant will be given a further opportunity (again 10 working days) to consider their

revised certificate or scheme record before a copy is sent to the countersignatory. A further application could be made to the sheriff if there is new conviction information on the certificate or scheme record about which they could make an application, for example if a conviction has become spent since the issue of the original certificate or scheme record.

Short scheme record disclosures

35. The information included on a short scheme record is being amended by article 4(7) of the No. 2 Order. When a request for disclosure of a short scheme record is made, and if the PVG scheme member does not have vetting information in their scheme record, a short scheme record which states that no vetting information is included in the scheme member's scheme record will be sent to the scheme member and the countersignatory.

36. PVG scheme members with vetting information on their current scheme record who request disclosure of a short scheme record will be deemed to have made a request for disclosure of a scheme record. Any PVG scheme members whose record contains vetting information that includes a spent conviction from the 'Offences which are to be disclosed subject to rules' list will be sent a copy of the scheme record disclosure. Only the individual's copy of the scheme record will be issued in the first instance and they will be notified of their right to apply to the sheriff for removal of the spent conviction information from the scheme record. If no intimation of an intention to make such an application is received by Disclosure Scotland after 10 working days from the date of issue of the scheme record, the scheme record will be disclosed to the countersignatory.

37. The scheme record will not be issued to the countersignatory until any application to the sheriff is concluded.

38. Where a request for a short scheme record disclosure is treated as a new scheme record disclosure to be issued (that is, any scheme record containing vetting information that requires to be disclosed), the fee for the disclosure of the scheme record will be waived and it will be charged at the same rate as the short scheme record disclosure (that is, £18).

Other Relevant Information

39. A small proportion of enhanced disclosures and PVG scheme records (around 0.5% or 1,100 certificates per annum) contain Other Relevant Information ("ORI") provided to the Scottish Ministers by the police. Powers in the 1997 and 2007 Acts allow the chief officer of a relevant police force to include information that he or she thinks 'might be relevant' (in the case of the 2007 Act) and which 'might be relevant' and 'ought to be included' in the case of the 1997 Act. Consideration was given to whether section 113B(4) of the 1997 Act and section 49(1)(c) of the 2007 Act should be amended and changes are now made by the No. 2 Order to both Acts so that the test for provision of the ORI by the police is that the chief officer 'reasonably believes information to be relevant' and 'ought to be included in the disclosure certificate / disclosure of the scheme record'. The same test will also apply when the police are asked under section 117(4) of the 1997 Act or section 51(5) of the 2007 Act to review whether ORI should be disclosed.

Consultation

40. Notification of the publication of the 2015 Order was given on 10 September 2015 on the Scottish Government's website and on Disclosure Scotland's website. Notice was also sent to major stakeholders. A list of the organisations to whom notification of the publication of the 2015 Order was given is attached at Appendix 2 of the Statement at Annex A. There will not be a further consultation on the No. 2 Order. It will, however, be subject to Parliamentary scrutiny under section 14(6) of the 2001 Act.

Modifications to content of the 2015 Order

41. The modifications which have been made to the 2015 Order by means of the No. 2 Order are as follows:

- in article 3(4) the new section 116ZB(3)(b) is amended to reduce - from 6 months to 3 months - the time limit within which an applicant must make an application to the sheriff requesting removal of a conviction from a standard or an enhanced disclosure. This time limit has been amended due to concerns raised during the consultation regarding possible delays in recruitment if an applicant has 6 months within which to make an application.
- article 3(5)(a) inserts a new section 117(4) into the 1997 Act requiring the chief officer of a police force, when considering a request for review of ORI still reasonably to believe that the information is relevant to the purpose of the disclosure and still to think that the information ought to be included in the certificate. This now fully reflects the test which the chief officer of a police force must apply when providing ORI for an enhanced disclosure under section 113B(4).
- article 3(8) has been amended to make the changes to the lists of offences in schedules 8A and 8B. Some new offences are added, and some offences are moved from schedule 8B to 8A. Examples of offences being added to schedule 8A are assault to the danger of life and section 31 of the Counter-Terrorism Act (2008) (offences aggravated by terrorism). Examples of offences being moved from schedule 8B to 8A include offences under the Firearms Act 1968, the Medicines Act 1968 section 67(1A) & (1B) and sections 12, 19, 21A, 21D, 38B and 39 of the Terrorism Act 2000. A list of these amendments to the lists of offence is contained within Appendix 1 of the Statement at Annex A
- article 4(4)(a) inserts a new section 51(5) into the 2007 Act requiring the chief officer of a police force, when considering a request for review of ORI still reasonably to believe that the information is relevant to the type of regulated work in relation to which the person is a member of the PVG scheme and still to think that the information ought to be included on the certificate. This now fully reflects the test which the chief officer of a police force must apply when providing ORI for a scheme record when requested under section 49(1)(c).
- article 4(5) inserts a new section 52ZA into the 2007 Act which applies when a scheme member asks for information in a PVG scheme record to be corrected and, following a correction by Scottish Ministers, the corrected information includes a spent conviction for an offence listed on schedule 8B which is not a protected

conviction. In those circumstances the request for disclosure of the PVG scheme record is to be treated as not yet having been complied with and as having been made as at the date of the correction. The effect of this is that it will be dealt with as a new application to ensure that the applicant receives an opportunity to make an application to the sheriff for removal of the spent conviction listed in schedule 8B.

- in article 4(6) the new section 52A(3)(b) is amended to reduce - from 6 months to 3 months - the time limit within which an applicant must make an application to the sheriff requesting removal of a conviction from a PVG scheme record. This time limit has been amended due to concerns raised during the consultation regarding possible delays in recruitment if an applicant has 6 months within which to make an application.
- articles 10(1)(a)(ii) and 11 contain minor amendments in response to the comments made in the report on the 2015 Order published on 18 November 2015 by the Delegated Powers and Law Reform Committee of the Scottish Parliament.
- article 12 of the No. 2 Order revokes the 2015 Order from the coming into force of the No. 2 Order (8th February 2016).

Regulatory Impact

42. A final Business and Regulatory Impact Assessment has been prepared.

Equality Impact

43. A final Equality Impact Assessment has been prepared.

Scottish Government
10 December 2015

STATEMENT OF THE SCOTTISH MINISTERS SUMMARISING WRITTEN OBSERVATIONS ON AND MODIFICATIONS TO THE POLICE ACT 1997 AND THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 REMEDIAL ORDER 2015

This Statement is laid before the Scottish Parliament in accordance with section 14(4) of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”).

Introduction

This Statement contains a summary and analysis of the written observations received in response to the public notice given in relation to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (“the 2015 Order”) (SSI 2015 No 330) and specifies the modifications which Scottish Ministers consider appropriate to make to it. The modifications are listed at Appendix 1 to this Statement.

Background

On 18 June 2014, in the case *R (on the application of T and another) (FC) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35, the United Kingdom Supreme Court (“UKSC”) made a declaration of incompatibility under section 4 of the Human Rights Act 1998 that the provisions of sections 113A and 113B of the Police Act 1997 (as applicable in England and Wales) were incompatible with article 8 (the right to respect for private and family life) of the European Convention on Human Rights (“the Convention”) because the requirements in those sections in relation to blanket disclosure of all spent convictions were not in accordance with the law. In Scotland, similar provisions of the 1997 Act apply to the issue of disclosure certificates. These functions under the 1997 Act and related legislation are devolved to Scottish Ministers and are exercised through Disclosure Scotland.

In light of the UKSC ruling, the Scottish Government assessed the operation of the 1997 Act in Scotland and concluded that changes should be made to ensure that it strikes a fair balance between an individual’s right to respect for their private life and the interests of public protection. In addition, the Scottish Government concluded that the 2007 Act (an Act of the Scottish Parliament which established the Protecting Vulnerable Groups Scheme – “PVG Scheme”) should also be amended. The amendments were made by the 2015 Order.

The 2015 Order came into force on 10 September 2015. Section 14(2) of the 2001 Act provides that Scottish Ministers must, after making such an order, give appropriate public notice of its contents, and invite written observations to be made within 60 Parliamentary sitting days of the day the order was made.

In accordance with sections 14(3) and (4) of the 2001 Act Scottish Ministers must consider all written observations made; and lay a statement before the Scottish Parliament summarising these comments and specifying the modifications (if any) they consider it appropriate to make to the 2015 Order.

The 2015 Order came into force at the same time as the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 which provided for associated changes to the system of self-disclosure of previous criminal convictions by an

individual under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013.

The consultation process

Notification of the publication of the 2015 Order was given on 10 September 2015 on the Scottish Government’s website and on Disclosure Scotland’s website. Notice was also sent to major stakeholders. A list of the organisations to whom notification of the publication of the 2015 Order was given is attached at Appendix 2 to this Statement. There will not be a further consultation on the No. 2 Order. It will, however, be subject to normal Parliamentary scrutiny under section 14(6) of the 2001 Act.

Responses

Twenty-seven responses were received. The majority of the respondents were generally supportive of the changes to the disclosure regime.

The following organisations and individuals agreed to have their responses published on Citizen Space:

- The Police Service of Scotland
- The Faculty of Advocates
- The Law Society of Scotland
- Mrs G Robertson
- Mr JP Smith
- Mr BJ Morgan
- The Care Inspectorate
- Fife Council
- Recruit with Conviction
- Argyll and Bute Council
- Volunteer Scotland Disclosure Services
- Strathclyde Partnership for Transport
- Scottish Social Services Council
- Scottish Children’s Reporter Administration
- The General Pharmaceutical Council
- General Medical Council
- Coalition of Care and Support Providers in Scotland
- Scottish Council of Jewish Communities
- Social Work Scotland
- NHS Lothian
- Children and Young People’s Commissioner Scotland
- CJSW Dumfries and Galloway
- Unlock

Findings

This section discusses the written observations received in response to the content of the 2015 Order, and specifies the modifications the Scottish Ministers consider appropriate to make to it in light of them. All of the modifications which are to be made to the 2015 Order are specified in Appendix 1 to this Statement.

Comments on the 2015 Order

Response and Analysis

West Dunbartonshire Council sought clarity about the need to invite comments on the 2015 Order since it had already been made, laid, and brought into force on 10 September. **Key Community Supports** stated that the consultation should have taken place prior to any change in the legislation. **NHS Lothian** stated that this was more an opportunity to pass comment than to consult. **Children and Young People's Commissioner Scotland** stated that the approach taken towards bringing these changes via section 14 of the 2001 Act, rather than through primary or secondary legislation, has meant that the full implications of the 2015 Order on children and young people have yet to be fully explored.

Scottish Government position

The 2015 Order was made in exercise of powers conferred by sections 12 and 14 of the 2001 Act. The purpose of Part 6 of the 2001 Act is to enable legislative changes to be made without the need for primary legislation where Scottish Ministers consider that it is necessary or expedient to do so in consequence of legislation which is or may be incompatible with the European Convention on Human Rights without the need for primary legislation. In urgent cases, it allows Scottish Ministers to make an order and bring it into force, subject to further public consultation for 60 days. After that period the Scottish Ministers can revoke the order and replace it with a modified order to take account of any written observations raised by respondents. The Scottish Ministers felt it was necessary to use the remedial order to introduce reforms to the disclosure regime. 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 of the disclosure regime and maintaining public confidence in the disclosure system from the point at which the 2015 Order was made. Respondents have had the chance to make observations on the 2015 Order and Scottish Ministers have taken these into account in the preparation of the modified remedial order which will be laid before the Parliament.

Lists of offences in schedules 8A and 8B of the Police Act 1997 - General comments

Response and Analysis

The General Medical Council, The General Pharmaceutical Council, NHS Lothian and NHS Greater Glasgow and Clyde commented that they may no longer receive information which the judicial system considers to be relatively minor but which they may consider relevant in determining an individual's fitness to undertake certain healthcare associated roles. **The General Pharmaceutical Council** also stated that there should be a full

consultation on the offence lists and the rules for disclosure of offences on schedule 8B at an appropriate time.

The Police Service of Scotland, The Care Inspectorate and The Law Society of Scotland have stated that the offence lists should be kept under review and updated to reflect any changes to the law. **The Police Service of Scotland** also stated that they would welcome the opportunity to contribute to any future review of these lists.

Key Community Supports also had some concerns about how the offence list was derived, they stated that some of the convictions on the list of those which are subject to rules are very concerning and that they see no detailed consideration or analysis of how it was developed.

The Care Inspectorate considered that the process for identifying the list of offences which will never be filtered from a certificate and those which should be disclosed subject to the rules has been thorough.

West Dunbartonshire Council and Social Work Scotland raised the issue of relevance of the offence to the role, and how the vetting team at Disclosure Scotland will determine what is relevant without knowledge of the role. **Unlock** also stated that although the approach taken in Scotland is more flexible than in England and Wales, it still takes little account of the specific reasons for the disclosure check and the specific nature of applicants' criminal records. **Scottish Social Services Council** on the other hand stated that they welcome the unity of the current legislative framework as it does not restrict entitlement to conviction information on the basis of profession or type of role.

Two organisations, **Key Community Supports** and **Coalition of Care and Support Providers in Scotland**, raised concerns about the possibility of an increase in risk to vulnerable adults and children. **Key Community Supports** believe that instead of withholding information from responsible employers, the strategy should be to hold to account those irresponsible employers who do not carry out a fair risk assessment and unfairly discriminate against people who have vetting information on their disclosures. **Coalition of Care and Support Providers in Scotland** had concerns that non-disclosure of some spent convictions will make it more difficult for providers of care and support to recruit safely and with confidence.

Coalition of Care and Support Providers in Scotland and **Volunteer Scotland Disclosure Services** commented that employers did not sometimes find it easy to understand from the two lists what offences would be disclosed. **Coalition of Care and Support Providers in Scotland** felt it would assist employers to have access to a plain English version. **Volunteer Scotland Disclosure Services** also stated that there needs to be clear guidance on what the employer can ask and what the applicant can disclose.

Scottish Children's Reporter and **Children and Young People's Commissioner Scotland** referred to the complexity of the disclosure system and the difficulties that may be faced by children and young persons in understanding the impact on them. Both asked for the Scottish Government to consider child-friendly information.

Unlock welcomed that the list of offences that could become protected (schedule 8B) has been published on the Disclosure Scotland website. However, they stated that the list of

offences in schedule 8A is too rigid and requires more flexibility and that these offences should not always be disclosed.

The Police Service of Scotland considered it beneficial that there are published rules setting out those convictions which are protected from disclosure.

Recruit with Conviction raised concerns about the complexity of the approach to protected convictions and whether or not applicants will understand what they should and should not self-disclose. They also raised concerns that employers may discriminate or ask leading questions about protected convictions. They stated guidance will ease some of these problems.

Scottish Government position

The offence lists have been developed using multiple sources of information. These include the Scottish Government published Recorded Crime in Scotland Classification of Crimes and Offences, all CHS and PNC recorded offences that have appeared on higher level disclosures since 2007, the Disclosure and Barring Service's (DBS) list of offences that will never be filtered from a DBS certificate and Access Northern Ireland's filtering list and the detailed ISCJIS Charge Codes approved by the Crown Office and Procurator Fiscal Service and published on the Scottish Government website.

We have given careful consideration to the attributes required for roles, including all health care related roles, requiring higher level disclosure and identified offences that:

- Resulted in serious harm to a person;
- Represented a significant breach of trust and/or responsibility;
- Demonstrated exploitative or coercive behaviour;
- Demonstrated dishonesty against an individual;
- Abused a position of trust; or
- Displayed a degree of recklessness that resulted in harm or a substantial risk of harm.

We consider that offences with these characteristics demonstrate evidence that a person's conduct has caused harm to an individual and/or is evidence of misconduct in a position of trust or authority. We revisited the rationale and offence lists during the 60 day consultation period and concluded that the rationale remains appropriate. We then reconsidered every offence on schedules 8A and 8B and considered whether they continue to be in the right place. As a result of this process a small number of amendments will be made to the lists of offences contained in schedules 8A and 8B.

Staff within Disclosure Scotland will not determine whether convictions on an individual application are relevant to the particular role they are applying for. The rules will apply automatically for all disclosures. Once the employer receives the disclosure, it is for the employer to risk assess the applicant's suitability. The 2015 Order did not change this position.

The same lists will be applied to all types of higher level disclosure. This is because regulated work within the PVG scheme and those posts which attract enhanced and standard disclosures require a degree of trust to be placed in the individual who will hold a role that places them in a position of power and responsibility. These factors are the same across the

classes of higher level disclosure and they set these roles apart from other jobs covered by the basic disclosure check.

The Scottish Government has sought to strike the right balance between public protection and an individual's right to a private life and consequently employers now receive relevant conviction information only. The UKSC was clear in its ruling in relation to the law applicable in England and Wales that the blanket disclosure of spent convictions to an employer was a breach of an individual's right to a private life. The UKSC also made it clear it was not the role of an employer, in receiving conviction information, to determine whether the use of that conviction information would contravene a potential employee's human rights. The UKSC ruling is clear that it is for the Government to legislate for a disclosure regime which is not capable of operating so as to violate rights under article 8, therefore the provision of training for employers in handling conviction information was not an option which the Scottish Government could have considered.

The Scottish Government agrees that the offence lists must be kept under review and they would welcome input from various stakeholders when reviewing the lists. The Scottish Government also agrees that clear guidance is required. There is guidance available on the Disclosure Scotland website along with a helpful range of Frequently Asked Questions. The Scottish Government is aware that additional guidance is required in this area and this work is being taken forward. The Scottish Government has noted that there is a need for guidance which is accessible to children and young persons.

Lists of offences in schedules 8A and 8B of the Police Act 1997 - Particular offences

Response and Analysis

The General Medical Council and The General Pharmaceutical Council also raised concerns that there appear to be some offences that are listed in England and Wales to be disclosed that do not appear on schedules 8A or 8B. One specific example given is an offence under section 67(1A) of the Medicines Act 1968.

The General Pharmaceutical Council also highlighted that the 2015 Order does not enable the disclosure of offences which could be imposed upon a body corporate or pharmacy owner. They said that they believe it is important for relevant convictions relating to those who own registered pharmacies to be available to them. Their view is that failing to disclose such convictions of any age could undermine their ability to regulate registered pharmacies. They also note that no reference is made within the 2015 Order to offences under section 78 of the Medicines Act 1968 which is the offence of using the protected title of pharmacist or pharmacy technician in connection with a business which is not a registered pharmacy.

The Faculty of Advocates noted that the common law offence of assault to the danger of life was not included in the list of offences in schedule 8A. They considered it to be as serious, if not more serious, than an offence of assault to severe injury and suggested it should be included.

Social Work Scotland asked for clarification that the list of offences that must always be disclosed was intended to include a banning order under the Adult Support and Protection (Scotland) Act 2007 since they considered that not to be an actual offence.

East Lothian Council, Mr JP Smith and Mrs G Robertson raised varied queries around the disclosure or non-disclosure of minor offences/disposals. **East Lothian Council** stated that the current disclosure process does not address the scenario where a fixed penalty is imposed in lieu of legal action and there are scenarios where this information should be recorded but is not required to be disclosed. **Mrs G Robertson** wanted clarity about the status of a fixed penalty or a fiscal fine as these are not convictions. **Mr JP Smith** raised a similar query about “No Further Action”, as these are not convictions and should never be disclosed.

Scottish Social Services Council had a concern that the admonishment and absolute discharge element of protected convictions may compromise public protection. They were concerned about circumstances where, for example, assault of a child led to a sentence of admonishment or absolute discharge, these would not be disclosed once spent.

Scottish Government position

The Scottish Government notes the General Medical Council and the General Pharmaceutical Council’s concerns. With regards to the offence in section 67(1A) of the Medicines Act 1968, the Scottish Government confirms that this offence was on the list of schedule 8B offences (in paragraph 79 of the 2015 Order) and it will therefore be disclosable for 15 years from the date of conviction. Due to the concerns raised by the General Medical Council, this offence has now been moved to the list of schedule 8A offences, meaning it will always be disclosed. The offence at section 78 of the Medicines Act 1968 was not previously included but has now been added to schedule 8A.

The Scottish Government agrees with the Faculty of Advocates that the offence of assault to the danger of life is a serious offence which should be always be disclosable and it has therefore been added to the list in schedule 8A.

The Scottish Government believes that Social Work Scotland have misinterpreted the 2015 Order. Paragraph 49 of schedule 8A of the 2015 Order includes, “Any offence where the conduct in respect of which the person was convicted also constitutes a breach of a banning order”. Therefore the person would have to have been convicted an offence that amounted to a breach of a banning order, rather than being convicted of breaching the banning order. The provision will therefore remain in the modified remedial order.

The Scottish Government agrees that minor offences and disposals should not be disclosed when spent. The Scottish Government also agrees that fixed penalty notices should not be disclosed as they are not convictions. However, this has not changed as a result of the changes made by the 2015 Order to the disclosure regime. Such penalty notices, fiscal fines and “no further actions” were never classed as “convictions”.

The Scottish Government agrees with the Scottish Social Services Council that there are circumstances when convictions resulting in an admonishment or absolute discharge should be disclosed, for the exact reason provided for in the example supplied by Scottish Social Services Council. The Scottish Government has modified the 2015 Order to ensure that in relation to convictions where the offence was aggravated by being against a child or where it had a sexual element will always be disclosed under schedule 8A.

Offences committed by children

Response and Analysis

The Children and Young People's Commissioner Scotland stated that it is not immediately apparent what consideration, if any, has been given to the lists created for the purposes of the Children's Hearings (Scotland) Act 2011; **Scottish Children's Reporter** also raised the question whether the lists of offences in schedules 8A and 8B have been developed mainly from the point of view of adult offenders and without the involvement of any stakeholders who might have been able to apply a more informed view of children's offending to the lists. **Scottish Children's Reporter** also stated that the changes fall short of what has already been agreed by Scottish Government and other relevant stakeholders.

Children and Young People's Commissioner Scotland stated that given the additional protections sections 187 and 188 of the Children's Hearings (Scotland) Act 2011 will offer to children and young people, the Scottish Government should consider what amendments (if any) may be required in light of the 2015 Order to ensure that these provisions can be commenced as soon as possible. **Scottish Children's Reporter** stated that the Children's Hearings (Scotland) Act 2011 should be enacted as quickly as possible. **The Police Service of Scotland** also stated that they would welcome further discussion with the Scottish Government on how these proposals may affect the pending changes in the Children's Hearing (Scotland) Act 2011 in respect of accepted or established findings on offence grounds.

Scottish Government position

The list referred to by the **Children and Young People's Commissioner Scotland** was published in the Scottish Government's response of March 2013 to the consultation on the offences to be included in a Police Act 1997 (Criminal Record Certificates – Children's Hearings) (Scotland) Order. This work was suspended pending resolution of an issue with Ministers' powers in relation to a related instrument under the Rehabilitation of Offenders Act 1974 and a Police Act Order was not put before the Parliament for its approval. The same issue meant that the enactment of sections 187 and 188 of the Children's Hearings (Scotland) Act 2011 was suspended. Undertaking further work on implementing the Children's Hearings (Scotland) Act 2011 was not something which could be done in the 2015 Order. It was also considered to be appropriate to wait until the parliamentary procedure for the remedial order was completed before undertaking further work on implementing the Children's Hearings (Scotland) Act 2011. The Scottish Government will separately take forward further work in relation to the Children's Hearings (Scotland) Act 2011.

In formulating the lists at schedules 8A and 8B, the Scottish Government did consider the list of offences which had been created for the proposed order under the 1997 Act. The majority of the offences are either covered by paragraph 42 of schedule 8A to the 2015 Order, listed separately in that schedule or listed in schedule 8B. The proposed order also contained historical offences and these are covered under paragraph 62 of schedule 8A (superseded offences). The Scottish Government and Disclosure Scotland will be considering how disclosure and rehabilitation of offenders legislation should address offending behaviour by children in the light of parliamentary scrutiny of the remedial orders. The report of the Advisory Group which was recently set up to address the implications of an increase in the minimum age of criminal responsibility may also be of relevance to this consideration.

Protected Convictions – General Comments

Response and Analysis

The General Medical Council, the Children and Young People’s Commissioner Scotland and Unlock raised concerns that the disclosure periods are out of step with England, Wales and Northern Ireland. **The General Medical Council** had concerns about the variations in how the different approaches operate across the UK and would welcome the opportunity to discuss with Scottish Ministers how they can successfully operate these different systems. They were concerned that the order introduces a variation in the types of offences that Scottish applicants are required to notify them of in comparison to applicants from England, Wales and Northern Ireland. These variations have a potential impact on their ability to fulfil their statutory function to register only doctors who are fit to practise and they will need to develop and implement guidance on the different regimes.

Police Service of Scotland stated that these differences will generate confusion among users of the PVG scheme and the Police Act disclosure regime, and could give rise to discrimination based on the location of an individual or an employer within the UK.

The Faculty of Advocates raised a similar concern that cross border differences in the Rehabilitation of Offenders Act (“the 1974 Act”) rehabilitation periods and disclosure periods could potentially raise issues as to whether the provisions are proportionate.

The General Medical Council raised concerns that there are distinctions in the disclosure of cautions, which they will need to reconcile in order to operate the schemes fairly in practice: in Scotland spent cautions will never be disclosed whereas in England, Wales and Northern Ireland spent cautions are disclosed unless they are deemed to be protected.

Scottish Government position

There have been differing disclosure regimes operating across the UK since May 2013 when DBS amended their regime in a way that made it wholly different to the regime operating in Scotland. The amendments to Scotland’s approach made on 10 September 2015 aligned the Scottish regime more closely to the regime in England, Wales and Northern Ireland. Proportionality and any ECHR compliance issues will only be determined in court. Scottish Government officials are happy to meet with the General Medical Council to discuss any concerns they have.

The Scottish Government does not believe that the blanket disclosure of spent cautions is proportionate or fair. All unspent cautions will continue to be disclosed.

Protected Convictions – Specific Comments

Response and Analysis

Mr BJ Morgan stated the disclosure period should be 10 years not 15 years.

Unlock believe that the disclosure time periods set in this order are unnecessarily long and disproportionate. They also stated that it is unclear how these periods have been arrived at

and what the justification is for these lengths. They also suggest that an alternative approach would be to set a particular time period starting from when the conviction becomes spent.

The Coalition of Care and Support Providers in Scotland raised concerns about a number of offences that will not be disclosed once spent and 15 years have passed. They also had concerns that certain convictions will not be disclosed after 7.5 years for those convicted when aged under 18 years. They suggested other ways are developed to reduce the risk of discrimination against those with spent convictions rather than to withhold information from employers.

They highlighted offences that they would always want to know about such as:

- Burglary inflicting or attempting to inflict grievous bodily harm
- Forging documents
- Any offence of culpable and reckless fire raising; any offence of wilful fire raising
- Any offence of assault
- Possession of ‘extreme pornography’
- Aggravated robbery
- Causing death by reckless or dangerous driving including when under the influence of drink or drugs.

NHS Lothian fears the order increases risk as the employer no longer has full control of the decision making process as they are no longer provided with information on all convictions. This may increase the risk to protected adults and children in a healthcare environment.

Children and Young People’s Commissioner Scotland stated that the Scottish Government should consider shorter time limits for those convicted under the age of 18. They also queried whether or not there are plans to expedite cases where the person is aged 17 at the time of the offence but not convicted until they are 18.

Scottish Government position

The Scottish Government believes it has struck the right balance between public protection and an individual’s right to a private life. The disclosure periods of 15 and 7.5 years have been derived within the context of current rehabilitation periods under the 1974 Act and the period of time that Police Scotland keep records of convictions on the Scottish Criminal History System. The Scottish Government believes that there is no increase in the risk to vulnerable adults and children by ending the practice of disclosing very old and/or minor spent convictions. The disclosure of relevant conviction information only should make employers recruitment decisions easier.

The Coalition of Care and Support Providers in Scotland raised concerns about a number of offences on schedule 8B. Burglary inflicting, or attempting to inflict, grievous bodily harm is not an offence in Scots law but the type of conduct would probably involve convictions for offences on schedule 8A; for example hamesucken or assault to severe injury could be similar offences and would always be disclosed regardless of the age of conviction. Causing death by reckless or dangerous driving including when under the influence of drink or drugs is currently on schedule 8B but will be moved to schedule 8A and will always be disclosed regardless of the age of conviction. While robbery is an offence listed in schedule 8B and will not be always disclosed, it may be that in some cases it involves a serious assault and

that would potentially mean the offence would in fact be listed on schedule 8A and would be disclosable for life.

The other offences referred to by the Coalition of Care and Support Providers in Scotland have not been moved as a conviction for these offences can cover very minor offending behaviour to very serious offending behaviour. If the offence was serious we would expect the disposal to reflect this, meaning that the conviction might never become spent if a sentence of imprisonment of more than 30 months was received.

Children and Young People's Commissioner Scotland queried time periods for the under 18s. The Scottish Government has ensured there is a provision within the legislation to allow shorter disclosure periods for under 18s with convictions. It would not be for the Scottish Government to make any plans to expedite cases where the person is aged 17 at the time of the offence but not convicted until they are 18.

Multiple convictions

Response and Analysis

Unlock stated that they are happy with the approach to multiple convictions. However the **Scottish Council of Jewish Communities** raised concerns with this approach. They believe the approach is particularly problematic in the case of someone with a series of similar convictions, since, while one offence may not be concerning, a course of conduct leading to multiple convictions may indicate traits that would make the individual unsuitable to work with vulnerable groups.

Scottish Government position

The Scottish Government does not agree with the approach to disclose all offences if an applicant has multiple offences. This would be disproportionate and could lead some very old and/or very minor offences continuing to be disclosed. It must also be remembered that all convictions will be disclosed while they are unspent, meaning that frequent recent offending will generally continue to be disclosed. For offences on schedule 8A, any pattern of offending will continue to be disclosed as offences are disclosable for life. For offences on schedule 8B, any pattern of offending over the past 15 years (or 7.5 years for under 18s) will continue to be disclosed.

Application to the sheriff for removal of conviction information - General comments

Response and Analysis

No responses stated that there should not be an appeal process. **Unlock**, **Recruit with Conviction** and the **Law Society of Scotland** all stated that they were pleased with the introduction of the appeal mechanism. **Unlock** stated they would prefer to see the possibility of an appeal widened to include schedule 8A offences. **Recruit with Conviction** stated that this mechanism to apply to a sheriff for removal of convictions should be available prior to the recruitment process.

Scottish Government position

The Scottish Government believes those offences in schedule 8A are so serious that they should always be disclosed on a higher level disclosure. The aim of the disclosure regime is to ensure that the appropriate balance is struck between the protection and safeguarding and an individual's right to a private life. Given that the offences on schedule 8A are serious offences, the view of the Scottish Government is that those offences will always be relevant information for disclosure on a higher level disclosure and that any provision to allow an applicant to request removal of schedule 8A offences is not required.

Within the current context of the legislation underpinning the disclosure regime an application for the disclosure of a PVG scheme record or for Police Act standard and enhanced disclosures must be made by an applicant, but must also be countersigned by a potential employer who must be entitled to see the conviction information as part the recruitment process. If PVG scheme record disclosures were available to individuals without such countersigning this would tend to undermine the civil liberties and human rights protections of the Rehabilitation of Offenders Act 1974 ("the 1974 Act") which allows individuals in most cases not to have to disclose spent convictions to an employer. The requirement for an employer who has a right to see the conviction information to countersign an application protects the individual from being pressurised to show any potential employer information about spent convictions – that is information that most employers are generally ineligible under the 1974 Act to know about.

Making PVG scheme record disclosures available to all without countersignature would inevitably inflate the size of the PVG Scheme and expose its members, who may not in fact be doing regulated work, to the possibility of being barred from work with children or protected adults if information arose on their record to suggest they may be unsuitable.

From a practical point of view, it would be very difficult to allow an application to the sheriff for removal of conviction information from a disclosure prior to any recruitment process, as it would be almost impossible for a sheriff to make a decision on the relevance of a conviction without knowing anything about the type of job for which the individual would be wanting to request a disclosure.

Application to the sheriff for removal of conviction information - Time Limits**Response and Analysis**

NHS Lothian, East Lothian Council, The Scottish Council of Jewish Communities, Recruit with Conviction, Fife Council and NHS Greater Glasgow and Clyde all raised concerns that the appeal process could result in a delay in recruitment. As there is no information on how long an appeal could take, if this is lengthy this could result in employers removing offers of employment. **Fife Council** stated that the 10 day delay in the countersignatory (CSG) certificate being issued to potential employers was understandable but could be considered by some employers as being too long. **East Lothian Council** stated that a decision will be required as to a reasonable length of time which a role can be held open for a candidate to mitigate any claims against employers for withdrawing an offer of employment. They also asked how the countersignatory will know when an appeal has been commenced in order to advise candidates / recruiting managers of timescales.

The Scottish Council of Jewish Communities stated that they felt the 10 days to notify Disclosure Scotland of an intention to apply to a sheriff was too short and that it did not factor in holidays etc. They suggested that it should be lengthened to 20 days. They also felt the 6 month period in which to lodge an application in the sheriff court was far too long, this is echoed in the delay in recruitment concerns raised by a number of organisations. **The Scottish Council of Jewish Communities** feels that the 6 month period should be reduced to 20 days. Any delay could be particularly problematic for small Third Sector organisations, especially if they have been awarded a time-limited grant to carry out a project that must be completed within six months or a year.

Scottish Government position

Although the current process does result in a 10 day delay in the distributing of the CSG copy of the certificate to a potential employer, the possibility for the applicant to apply to the sheriff for removal of conviction information that the applicant thinks is no longer relevant ensures that the applicant's right to a private life under article 8 of ECHR is not violated. Applicants need to be given a reasonable amount of time in which to indicate that they wish to apply to the sheriff. A period of less than 10 working days would not give sufficient time to applicants to consider what they want to do and a period of more than 10 working days would add to the delay in the provision of the CSG copy of the disclosure to a potential employer. The Scottish Government considers that a period of 10 working days is appropriate in the circumstances. We give applicants the opportunity to contact us and have their CSG copy of their certificate released earlier than the 10 day period if they know that they do not want to apply to a sheriff. To date there have been no complaints from applicants that the 10 day notice period has been too short to allow them to decide on their action.

The Scottish Government notes the concerns about the possible delay to recruitment and possible additional costs to employers. Currently it is too early to determine what impact the process of application to a sheriff will have. There have been 27 notifications of intention to apply to a sheriff for the removal of spent conviction information since the 10 September 2015, Disclosure Scotland are not aware of any of these applicants lodging papers and formally starting the appeal process. There have been 5,721 certificates with spent convictions on them processed since 10 September, the impact so far is very small. However, to alleviate concerns about delays in recruitment, the Scottish Government has reduced the time limit within which an applicant must apply to a sheriff for removal of conviction information. Instead of having 6 months from the date on which they notify Disclosure Scotland that they intend to make an application to the sheriff, applicants will now have 3 months from the date on which they give notification to Disclosure Scotland. The Scottish Government will continue to monitor the timescales for applications to the sheriff.

Application to the sheriff – general comments

Response and Analysis

Recruit with Conviction suggested that to avoid delays for recruiters and applicants a more general mechanism to remove unprotected convictions may be more practical. They suggested Scottish Government look at the effective process designed by Scottish Social Services Council to determine fitness to practice, as this may be a more practical mechanism and this could be combined with more knowledge of regulated work compared to a sheriff.

The Faculty of Advocates also suggested that it would be possible to achieve greater consistency in decision-making if there were to be a process within Disclosure Scotland to review the need for disclosure of certain spent convictions, although they acknowledged that Disclosure Scotland deals with a large volume of applications and they were therefore not able to conclude that this suggestion would be a practicable possibility.

NHS Lothian and **The Scottish Council of Jewish Communities** stated that it would be helpful to have a better understanding of the assessment process undertaken by the sheriff when considering an application, in terms of deciding whether the conviction information is not relevant to the purpose for which the disclosure was requested. They asked if there would be provision in the legislation to allow the sheriff to ask Disclosure Scotland and employers for additional information.

NHS Lothian, Unlock, Recruit with Conviction, Volunteer Scotland Disclosure Services and **NHS Greater Glasgow and Clyde** all raised concerns about the lack of information available for applicants and employers in relation to the process for applying to a sheriff. They all stated that clear guidance was required.

Scottish Government position

The Scottish Government note **Recruit with Conviction's** suggestion of having some kind of review process prior to an application being made to a sheriff. This option was investigated thoroughly by the Scottish Government in developing the approach implemented by the 2015 Order, however, it was determined to be infeasible as it would have introduced an element of discretionary decision-making by Scottish Ministers that was considered not to be appropriate in the circumstances. It was considered, for example, that it could be difficult for an internal review mechanism to access sufficient information about convictions or about the intended employment role of an applicant in order to be able properly to take decisions about the relevancy of convictions, particularly given the high volume of applications received by Disclosure Scotland. It was considered that a sheriff would be best placed to take any decisions about whether convictions should be removed from a disclosure if they were no longer relevant to the purpose of the disclosure.

The Scottish Government agrees that a better understanding of the process is required, however, until cases actually go through the Sheriff Court we cannot give any clearer indications of timescales etc. There is guidance on Disclosure Scotland's website and Scottish Government Officials have also been engaging with the Scottish Courts and Tribunal Service in relation to additional information and advice which could be provided to applicants. The Scottish Government will continue to update and amend any guidance on the appeal process when they have additional information.

Application to the sheriff – withdrawal

Response and Analysis

Scottish Council of Jewish Communities highlighted that there is no provision in the 2015 Order covering a subsequent decision not to submit, or else to withdraw, an application to the sheriff after having notified Disclosure Scotland of an intention to submit such an application. They suggest that the 2015 Order should be amended to require individuals who

have advised Disclosure Scotland of their intention to submit an application to the sheriff but subsequently decide not to proceed, to notify Disclosure Scotland of their decision.

Scottish Government position

Currently Disclosure Scotland send out an email receipt notification to applicants who intimate within the 10 day period that they want to submit an application to a sheriff to have conviction information removed from their certificate. This email informs applicants that if they wish to intimate a change of mind, they have until the 10 day period has concluded to do so.

Application to the sheriff – under 18s

Response and Analysis

Children and Young People’s Commissioner Scotland asked for clarification on whether the process for application to the sheriff means that an applicant who was under 18 years at the point of conviction who then applies for a conviction to be removed in order to access a particular college / university course, e.g. 3-4 years after conviction, has their request refused, would then have no further option to apply for it to be removed until the 7.5 year period is complete. Alternatively, they asked whether it would be possible to make another approach to the sheriff, say if the young person subsequently chose to apply to study a different subject area.

Scottish Government position

In response to the Children and Young People’s Commissioner Scotland’s first question, after 7.5 years from the date of the conviction, the conviction would automatically no longer appear on the young person’s disclosure if they requested a new disclosure and therefore it is not necessary (nor possible) to apply for that conviction to be removed from the disclosure. In relation to the second question, an application to the sheriff can only be made after a person has made a new request for a standard or an enhanced disclosure or a PVG scheme record and it contains a spent conviction listed on schedule 8B. If before the end of the period of 7.5 years during which that conviction could continue to be disclosed on disclosures for the person asked about in the example, the person would be able to make a further application to the sheriff for removal of that conviction. But this would only be possible if they were applying for a standard or an enhanced disclosure for a different purpose or for a PVG disclosure for a different type of regulated work from the time when they made the previous application to the sheriff for removal of that conviction.

For example, in relation to standard and enhanced disclosures, if someone requests a disclosure certificate because they want to work in financial services and then later they request a disclosure certificate because they want to adopt a child – they could apply to a sheriff to have conviction information removed from each disclosure certificate. However, for a PVG scheme record an application to the sheriff can only be made about the same conviction if the subsequent disclosure request relates to a different type of regulated work, i.e. if the first application to the sheriff was related to a disclosure for regulated work with children only, then a second application to the sheriff could be possible for the same

conviction which had appeared on a subsequent disclosure in relation to regulated work with adults only.

Other Relevant Information

Response and Analysis

Volunteer Scotland Disclosure Services stated that, on those disclosure checks where Other Relevant Information (“ORI”) is disclosed by the police, they understand that the ORI does not fall within the same amended criteria as the conviction information, as the ORI is not classed as conviction information. They see this as being out of step with the other changes on the basis that conviction information will be removed after a set period of time but that for an individual was arrested, charged and then found not guilty in court the police may still be disclose ORI with no restrictions. **Children and Young People’s Commissioner Scotland** seeks clarification, however, as to whether other information connected to the case could potentially still appear as ORI.

The Police Service of Scotland noted that section 51(5) (which relates to disputes about ORI) of the 2007 Act has been amended to strengthen the test when reviewing information included in a scheme record, but that the Act has not been amended to include the second element of the test included in all other legislation.

Scottish Government position

Other Relevant Information is subject to separate rules for its disclosure in comparison to convictions. This has always been the position. By means of the 2015 Order the Scottish Government amended the test which the police must satisfy before they can provide ORI.

The test is therefore as follows:

- “the chief officer of police must reasonably believe information to be relevant for the purpose of the disclosure, and
- the information, in the chief officer’s opinion, ought to be included in the certificate”.

This should ensure only information that the police reasonably believe is relevant, and which ought to be included on a disclosure certificate is in fact disclosed. Although this test has been tightened, it could still result in spent conviction information that is not disclosed in the vetting information of the certificate being disclosed under ORI by the police.

The Scottish Government has noted the comments of the Police Service of Scotland in relation to section 51(5) of the 2007 Act. While we think that it is not essential to refer to the second part of the test – that information ought to be included in a certificate – in the provision which allows applicants to request a review of ORI, it would clarify what the police must be satisfied of in dealing with a request for review of ORI and therefore a new provision will be inserted as section 117(4) of the Police Act 1997 and also as section 51(5) of the 2007 Act to provide for this.

Other Points Raised

Response and Analysis

Mr JP Smith urges the Scottish Government to consider aligning any declarations of Scottish convictions for the purpose of foreign visas to that of the new rules introduced on the 10 September.

Scottish Government position

This is not something about which the Scottish Government could legislate. It is a matter for those countries to whom visa applications are being made to determine what convictions need to be declared on such applications.

Response and Analysis

NHS Greater Glasgow and Clyde stated that the speed at which the changes were implemented allowed for no time for consideration of the impact this would make to the current processes of pre-employment vetting and in particular what information can be legally provided to those making recruitment decisions within the board.

They also raised concerns about the possible impact on retrospective checking. Whilst they were not as yet clear if there is an impact to retrospective checking, they were conscious that the changes have been brought in before the completion of retrospective checking which they think might mean that there will be staff who had certificates issued prior to 10 September 2015 who will have had all spent convictions shown and those after 10 September who will not have all convictions disclosed.

Scottish Government position

There is no impact on retrospective checking. Employers who are concerned that certificates issued before 10 September 2015 contain spent conviction information that will no longer appear on a disclosure can, if they so wish, liaise with their employees to apply for an up to date higher level disclosure.

While the Scottish Government accepts that the changes were brought in relatively quickly, they considered the introduction of the legislation to be necessary in order to ensure that the disclosure regime in Scotland is compatible with the European Convention on Human Rights. In order to maintain public confidence in the system, it was the Scottish Government's view that there was a strong public interest in bringing these reforms into force as quickly as reasonably practicable after the necessary legal, policy and operational work required was concluded. The amended disclosure regime should have little impact on internal polices as recruitment processes should not have changed. Comprehensive guidance and examples have been provided on the Disclosure Scotland website and further guidance will be provided.

APPENDIX 1 TO THE STATEMENT

SPECIFICATION OF THE SCOTTISH GOVERNMENT'S
MODIFICATIONS TO THE 2015 ORDER

1. The modifications made to the 2015 Order by the No. 2 Order are as follows:
 - in article 3(4) the new section 116ZB(3)(b) is amended to reduce - from 6 months to 3 months - the time limit within which an applicant must make an application to the sheriff requesting removal of a conviction from a standard or an enhanced disclosure. This time limit has been amended due to concerns raised during the consultation regarding possible delays in recruitment if an applicant has 6 months within which to make an application.
 - article 3(5)(a) inserts a new section 117(4) into the 1997 Act requiring the chief officer of a police force, when considering a request for review of ORI still reasonably to believe that the information is relevant to the purpose of the disclosure and still to think that the information ought to be included in the certificate. This now fully reflects the test which the chief officer of a police force must apply when providing ORI for an enhanced disclosure under section 113B(4).
 - article 3(8) has been amended to make the changes to the lists of offences in schedules 8A and 8B. Some new offences are added, and some offences are moved from schedule 8B to 8A. Examples of offences being added to schedule 8A are assault to the danger of life and section 31 of the Counter-Terrorism Act (2008) (offences aggravated by terrorism). Examples of offences being moved from schedule 8B to 8A include offences under the Firearms Act 1968, the Medicines Act 1968 section 67(1A) & (1B) and sections 12, 19, 21A, 21D, 38B and 39 of the Terrorism Act 2000. A list of these amendments to the lists of offence is contained in paragraph 2 of below.
 - article 4(4)(a) inserts a new section 51(5) into the 2007 Act requiring the chief officer of a police force, when considering a request for review of ORI still reasonably to believe that the information is relevant to the type of regulated work in relation to which the person is a member of the PVG scheme and still to think that the information ought to be included on the certificate. This now fully reflects the test which the chief officer of a police force must apply when providing ORI for a scheme record when requested under section 49(1)(c).
 - article 4(5) inserts a new section 52ZA into the 2007 Act which applies when a scheme member asks for information in a PVG scheme record to be corrected and, following a correction by Scottish Ministers, the corrected information includes a spent conviction for an offence listed on schedule 8B which is not a protected conviction. In those circumstances the request for disclosure of the PVG scheme record is to be treated as not yet having been complied with and as having been made as at the date of the correction. The effect of this is that it will be dealt with as a new application to ensure that the applicant receives an opportunity to make an application to the sheriff for removal of the spent conviction listed in schedule 8B.

in article 4(6) the new section 52A(3)(b) is amended to reduce - from 6 months to 3 months - the time limit within which an applicant must make an application to the sheriff requesting removal of a conviction from a PVG scheme record. This time limit has been amended due to concerns raised during the consultation regarding possible delays in recruitment if an applicant has 6 months within which to make an application.

- articles 10(1)(a)(ii) and 11 contain minor amendments in response to the comments made in the report on the 2015 Order published on 18 November 2015 by the Delegated Powers and Law Reform Committee of the Scottish Parliament.
- article 12 of the No. 2 Order revokes the 2015 Order from the coming into force of the No. 2 Order (8th February 2016).

2. The modifications to the offences listed in schedules 8A and 8B to the 2015 Order are listed below:

SCHEDULE 8A

Correction

- Reference to section 22 of the Anti-social Behaviour, Crime and Policing Act 2014 to be amended to section 122.

Offences to be added

- Aiding, abetting, counselling, procuring or inciting murder.
- Attempting or conspiring to commit murder.
- Assault to danger of life.
- Counter-Terrorism Act (2008) section 31 (offences aggravated by terrorism).
- Medicines Act 1968 section 78 (restrictions on use of titles, descriptions and emblems).
- Medical Act 1983 section 49A (penalty for pretending to hold a licence to practice).
- Pharmacy Order 2010 article 38 (offences related to the register).
- Common law aggravators – Child and Sexual.

Offences to be moved from schedule 8B (rules) to schedule 8A (always)

- Adults with Incapacity (Scotland) Act 2000 section 83 (ill- treatment and wilful neglect).
- Criminal Law (Consolidation) (Scotland) Act 1995 section 7 (procuring).
- Criminal Law (Consolidation) (Scotland) Act 1995 section 11 (trading in prostitution and brothel – keeping).

- (Criminal Law (Consolidation) (Scotland) Act 1995 section 12 (allowing child to be in brothel).
- Firearms Act 1968 section 4 (conversion of weapons).
- Firearms Act 1968 section 5 (weapons subject to a general prohibition).
- Firearms Act 1968 section 19 (carrying firearm in a public place).
- Firearms Act 1968 section 20 (trespassing with firearm).
- Firearms Act 1968 section 21 (possession of firearm by persons previously convicted of crime).
- Firearms Act 1968 section 24 (supplying firearms to minors).
- Firearms Act 1968 section 25 (supplying firearm to person drunk or insane).
- Firearms Act 1968 section 28A(7) (certificates: supplementary).
- Firearms Act 1968 section 29 (variation of firearm certificates).
- Firearms Act 1968 section 30D(3) (failure to surrender certificate).
- Firearms Act 1968 section 39 (offences in connection with registration).
- Firearms Act 1968 section 40 (compulsory register of transactions in firearms).
- Firearms Act 1968 section 46(5) (power of search with warrant).
- Firearms Act 1968 section 47 (powers of constables to stop and search).
- Firearms Act 1968 section 48 (production of certificates).
- Medicines Act 1968 section 67(1A) & (1B) (offences under part III).
- An offence under the Official Secrets Act 1911.
- Road Traffic Act 1988 section 1 (causing death by dangerous driving).
- Road Traffic Act 1988 section 3ZC (causing death by driving: disqualified drivers).
- Road Traffic Act 1988 section 3A (causing death by careless driving when under influence of drink or drugs).
- Terrorism Act 2000 section 12 (support).
- Terrorism Act 2000 section 19 (disclosure of information: duty).
- Terrorism Act 2000 section 21A (failure to disclose: regulated sector).
- Terrorism Act 2000 section 21D (tipping off: regulated sector).
- Terrorism Act 2000 section 38B (information about acts of terrorism).
- Terrorism Act 2000 section 39 (disclosure of information, &c).
- Counter-Terrorism Act 2008 section 2 (offence of obstruction).
- Counter-Terrorism Act 2008 paragraph 30A of Schedule 7 (offences: relevant person circumventing requirements).
- Counter-Terrorism Act 2008 paragraph 31 of Schedule 7 (offences in connection with licences).

SCHEDULE 8B

Offences to be added

- Crime and Disorder Act 1998 section 96 (offences racially aggravated).
- Criminal Justice (Scotland) Act 2003 section 74 (offences aggravated by religious prejudice).

- Customs and Excise Management Act 1979 in relation to goods prohibited to be imported or exported under section 3(1) of the Misuse of Drugs Act 1971 (restriction of importation and exportation of controlled drugs):
 - (a) section 50(2) or (3) (penalty for improper importation of goods);
 - (b) section 68(2) (offences in relation to exportation of prohibited or restricted goods); and
 - (c) section 170 (fraudulent evasion of duty).
- Robbery (common law).
- Common law aggravators – Racial and Religious.

Offences to be moved from schedule 8A (always) to schedule 8B (rules)

- An offence under section 6 of the Child Abduction Act 1984 (offence in Scotland of parent, etc. taking or sending child out of UK).

Offences to be deleted

- Medicines Act 1968 section 45 (offences under Part II) but only in relation to section 7(2) (general provisions as to dealing with medical products).
- Civic Government (Scotland) Act 1982 paragraph 19(3) of Schedule 2 (enforcement).

APPENDIX 2 TO THE STATEMENT

Organisations to whom notice of publication of the remedial order was given**Education**

Principals and Vice-Principals of Scotland's Colleges and Universities
The Open University in Scotland
Educational Institute of Scotland
General Teaching Council Scotland

Health

Health Boards
Special Health Boards
British Medical Association
General Dental Council
General Medical Council
Mental Welfare Commission
Royal College of Psychiatrists

Local Authorities

Chief Executives
Directors of Social Work
Directors of Education
Association of Directors of Education
Association of Directors of Social Work
CoSLA
SoLACE

Justice

Chief Executive, Crown Office and Procurator Fiscal Service
Chief Executive, Scottish Courts and Tribunal Service
Children's Hearings Scotland
Faculty of Advocates
Law Society of Scotland
Lord President and Lord Justice General
Parole Board for Scotland
Sheriffs Principal
Sheriffs' Association
Scottish Law Commission
Scottish Children's Reporter Administration

Police

Chief Constable of Police Scotland
Scottish Police Authority
Scottish Police Federation
Association of Scottish Police Superintendents
HM Inspectorate of Constabulary Scotland

Prisons

Chief Executive, Scottish Prison Service

HM Inspectorate of Prisons
Scottish Prison Officers Association

Other Organisations including Voluntary Organisations

Apex Scotland
Barnardos
Children 1st
Howard League for Penal Reform
SACRO
Scottish Association for Mental Health
Scottish Commission for Human Rights
Scottish Commissioner for Children and Young People
Scottish Council for Voluntary Organisations
Scottish Social Services Council
The Prince's Trust
Victim Support Scotland
Volunteer Scotland Disclosure Services
Young Scot