

POLICY NOTE

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSIONS AND EXCEPTIONS) (SCOTLAND) AMENDMENT ORDER 2018

SSI 2018/51

1. The above instrument will be made in exercise of the powers conferred by sections 4(4) and 10(1) of the Rehabilitation of Offenders Act 1974 (c.53) (“the 1974 Act”). The instrument is subject to the affirmative procedure. For the purposes of this note, the instrument will be called “the 2018 amendment Order”.

Policy objectives

2. The purpose of the 2018 amendment Order is to amend the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, (“the 2013 Order”), as amended by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015, (“the 2015 Order”) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016, (“the 2016 Order”).
3. These amendments are necessary because of changes being made to the Police Act 1997 (“the 1997 Act”) and the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) by the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018, (“the remedial Order”). The reason why the 2018 amendment Order is necessary is to ensure there is consistency between the system of self-disclosure under the Rehabilitation of Offenders Act 1974 and state disclosure by Disclosure Scotland under the 1997 and 2007 Acts.
4. The remedial Order sets out the proposed amendments to the 1997 and 2007 Acts. The amendments made by it will have the effect of allowing individuals who have been convicted of offences listed in schedule 8A of the 1997 Act in certain specified circumstances to apply to a Sheriff in order to seek removal of that conviction information before their disclosure is sent to a third party such as an employer.
5. Therefore, the remedial order will further refine previous reforms to the system of higher level disclosures (this term is used to describe: the standard disclosure, and the enhanced disclosure under the 1997 Act, and the PVG scheme record under the 2007 Act) so as to bring a benefit to individuals who have a spent conviction for an offence included in schedule 8A. The refinements will provide the possibility of the disclosure recipient making an application to a sheriff in cases where an individual has a spent conviction for an offence included in schedule 8A subject to certain criteria being met. It means that the practice of automatically disclosing all spent convictions by the state for offences included in schedule 8A indefinitely will end.
6. The specified circumstances for an application to the sheriff are:
 - a) the conviction for a schedule 8A offence is spent; and either

- b) where the person was aged under 18 at the date of conviction, 7 years and 6 months have passed since the date of the conviction; or
 - c) where the person was aged 18 or over at the date of conviction, 15 years have passed since the date of the conviction.
7. As a result of the changes being made to disclosure by the state by the remedial order, the system of self-disclosure needs to be amended to ensure an individual is protected from self-disclosing a schedule A1 offence under the 2013 Order, ('Offences which must always be disclosed'), during the process of application to the sheriff. The amendments will also ensure a person is not prejudiced if they fail to disclose the schedule A1 offence during this process.
 8. However, once this process has ended and if the decision of the sheriff is that the disclosure of the spent conviction for the schedule A1 offence is appropriate, then the protections under the 1974 Act will no longer apply, the person will have to disclose the spent conviction and an employer will be able to take the spent conviction into account when making an employment decision. It should be noted that schedule A1 offences are exactly the same as schedule 8A offences.
 9. Therefore, the 2018 amendment Order should be considered alongside the changes being made by the remedial order. Further to this, the reasons why the 2013 Order are being amended are the same as those set out in the policy note for the remedial order.

General background

10. A conviction may become spent if a certain length of time has elapsed since the date of conviction, with different periods of time applying to different disposals as laid down in the 1974 Act. For example, a court imposed fine results in a conviction becoming spent after five years.
11. Once a conviction is spent, the 1974 Act provides that an individual is not normally required to disclose the conviction and cannot be prejudiced by its existence. The purpose of this approach is to appropriately allow an individual to move away from their past criminal activity so that they can contribute effectively to society while also ensuring that people with a legitimate interest, such as employers, are able to understand an individual's background.
12. It is section 4 (Effect of Rehabilitation) of the 1974 Act, that embodies the main principle of the Act for convictions in terms of what it means to be a 'rehabilitated person'. Broadly speaking therefore, those protections in the 1974 Act permit individuals not to disclose spent convictions when asked to do so, (e.g. by a prospective employer), prevent others from asking about those spent convictions and prohibit reliance on spent convictions in certain legal proceedings or to prejudice an individual in an employment context. However, there are certain exceptions and exclusions to this general approach when the interests of public safety are paramount.
13. The 1974 Act provides the Scottish Ministers with powers to make by order exceptions and exclusions to the protections under section 4 of the 1974 Act which would otherwise permit an individual not to disclose spent conviction information and prevent any other

person requiring the disclosure of such information or prejudicing the individual on account of any such disclosure or, indeed, failure to disclose. The Scottish Ministers made the 2013 Order in exercise of those powers.

14. Prior to its amendment by the 2015 Order, articles 3 and 4 of the 2013 Order specified types of proceedings and circumstances which are excluded from protection under section 4(1) and (2) of the 1974 Act and where details of all spent convictions therefore required to be self-disclosed. For example, a person when applying for licences under the Private Security Industry Act 2001 was required to reveal all spent convictions.
15. There were also some categories of professions, offices, employments and occupations which were wholly excepted from the protections set out in section 4(3)(b) of the 1974 Act. Spent conviction information or failure to disclose such information was therefore a proper ground for dismissing or excluding a person from such employment.
16. The 2013 Order was amended by the 2015 Order to remove the legal requirement for all spent convictions to be self-disclosed by an individual when asked for any of the purposes specified in the 2013 Order. This was to ensure only appropriate spent convictions are required to be self-disclosed by an individual for those purposes. In other words, the amendments made by the 2015 Order restricted the requirement for self-disclosure. The 2013 Order was further amended by the 2016 Order the purpose of which was to amend the offence lists in schedule A1, (“offences which must always be disclosed”) and schedule B1, (“offences which are to be disclosed subject to rules”).
17. The current effect of the 2013 Order, as amended, can be described as follows.

Article 3 of the 2013 Order

18. Article 3 of the 2013 Order states that the application of section 4(1) of the Act is entirely excluded in relation to a number of the types of proceedings specified in schedule 1 to the Order. What this means is that a person may be asked about any or all spent convictions, and that information can be taken into account, in those proceedings.
19. For certain other forms of proceedings specified in article 3, (including some of those listed in schedule 1 and Part 1 of schedule 2), the application of section 4(1) is excluded only in relation to convictions which are not protected convictions. That means that a person may be asked in those proceedings about any spent convictions which are not protected convictions, but not about protected convictions.

Article 4 of the 2013 Order

20. Article 4 of the 2013 Order states that section 4(2)(a) and (b) of the Act is excluded in relation to questions put in the circumstances set out in schedule 3.
21. The circumstances in schedule 3 include the assessment of a person’s suitability for a profession, office, employment or occupation set out in schedule 4, or to hold a licence, certificate or permit set out in paragraph 3(3) of schedule 3. Provision is made in schedule 3 for other special circumstances that arise in the context of child minding, adoption and fostering, national security, financial services and the National Lottery Commission.

22. The protections in section 4(2)(a) and (b) however continue to apply in respect of spent convictions which are protected convictions and convictions for offences listed in schedule B1 which are not protected convictions but which are not included in a higher level disclosure sent in connection with the purpose for which the question is put. This means that where questions are asked of a person in the circumstances set out in schedule 3, the person must disclose any spent convictions they may have which do not fall into either of these categories. Any conviction falling into these categories need not be disclosed.
23. Certain questions are not covered by these special rules about protected convictions and higher level disclosures, (e.g. questions asked to assess suitability to hold a firearms certificate or for the purposes of national security), meaning that all spent convictions must be disclosed, whether protected or otherwise.

Article 5 of the 2013 Order

24. Article 5 of the 2013 Order states that the professions, offices, employments and occupations set out in schedule 4 are excepted from the protections in section 4(3)(b) of the Act. It also states that action taken to safeguard national security and decisions taken by persons specified in Part 1 of schedule 2 to do anything specified in that Part are also excepted from those protections.
25. The effect of this is to remove the general prohibition in section 4 of the Act against using the existence of, or the failure to disclose, certain spent convictions as a ground for dismissing or excluding a person or for prejudicing them in any way in any occupation or employment
26. The protections in section 4(3)(b) however continue to apply in the same circumstances as those set out in paragraph 21 above.
27. Certain occupations, actions, etc. are not covered by these special exceptions about protected convictions and higher level disclosures (e.g. action taken for the purpose of safeguarding national security or work as a registered firearms dealer), meaning that all spent convictions may be considered when making decisions in those contexts.

Protected convictions

28. It will be noted that the new rules of self-disclosure under the 2013 Order centre on the concept of a “protected conviction”. The 2015 Order introduced this concept through new article 2A of the 2013 Order. That provides that a protected conviction is a spent conviction for an offence not listed in schedules A1, (such convictions must always be disclosed), or B1 or a spent conviction for an offence listed in schedule B1 in respect of which one of a number of specified conditions (set out in article 2A(2) and (3)) has been met.

Changes being made to the 2013 Order by the 2018 Order

29. As mentioned above, currently under the 2013 Order an individual with a spent conviction for a schedule A1 offence will always be required to disclose this, if asked,

and such a conviction will currently always be disclosed by Disclosure Scotland. This will change via the new appeal process for such offences, involving application to the sheriff. As such, amendments are required to be made to article 4 and article 5 of the 2013 Order to ensure parity between the system of state disclosure and self-disclosure.

30. These amendments will mean an individual will be protected from self-disclosing a schedule A1 offence under the 2013 Order during the process of application to the sheriff. The amendments will also ensure a person is not prejudiced if they fail to disclose the schedule A1 offence during this process.
31. However, once this process has ended and if the decision of the sheriff is that the disclosure of the spent conviction for the schedule A1 offence is appropriate, then the protections under the 1974 Act will no longer apply, the person will have to disclose the spent conviction and an employer will be able to take the spent conviction into account when making an employment decision.
32. It should be noted that no amendment to article 3 is necessary as this deals with questions and evidence in legal proceedings where the new appeal process for schedule A1 offences is not relevant.

Amendment to article 4

33. Article 2(2)(a) and (b) of the 2018 Order will amend article 4 of the 2013 Order to specify further categories of conviction which are brought back into the scope of the protections under section 4(2) of the 1974 Act. Those are spent convictions under schedule A1 of the 2013 Order where the person was aged under 18 on the date of conviction and at least 7 years and 6 months have passed since that date, and spent convictions under that schedule where the person was aged 18 or over on the date of conviction and at least 15 years have passed since that date.
34. These spent convictions are for most purposes only brought back within the protections under section 4(2) if they are not included in a higher level disclosure sent in connection with the purpose for which a question about the conviction has been put. But where these spent convictions are included in a relevant higher level disclosure, any failure to disclose them before that higher level disclosure was sent also remains subject to the protections in section 4(2). Article 2(2)(c) and (d) of the 2018 Order will amend the 2013 Order to give effect to that.

Amendment to Article 5

35. Article 2(3)(a) and (b) of the 2018 Order will amend article 5 of the 2013 Order to specify further categories of conviction which are brought back within the scope of the protections in section 4(3)(b) of the 1974 Act. Those are spent convictions under schedule A1 of the 2013 Order where the person was aged under 18 on the date of conviction and at least 7 years and 6 months have passed since that date, and spent convictions under that schedule where the person was aged 18 or over on the date of conviction and at least 15 years have passed since that date.
36. These spent convictions are for most purposes only brought back within the protection of section 4(3)(b) if they are not included in a higher level disclosure sent in connection with

the profession, office, type of employment, occupation, decision or proposed decision under consideration. But where these spent convictions are included in a relevant higher level disclosure, any failure to disclose them before that higher level disclosure was sent remains subject to the protection in section 4(3)(b) of the 1974 Act. Article 2(3)(c) and (d) of the 2018 Order will amend the 2013 Order to give effect to that.

37. The 2018 Order also addresses 2 issues in the 2016 Order identified by the Scottish Parliament's Delegated Powers and Legislative Reform Committee ("DPLRC") in its 4th report, 2016 (Session 4) SP Paper 869 published on 13 January 2016.
38. Article 2(5) amends paragraphs 75 and 81 of schedule B1 of the 2013 Order to deal with the DPLRC's concerns. At paragraph 75, the word "or" is substituted for the word "and", and paragraph 81(c) is omitted, as is the immediately preceding word "and".

Criminal Justice Division
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