

POLICY NOTE

THE POLICE ACT 1997 and THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 REMEDIAL ORDER 2018

SSI 2018/52

Introduction

1. The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (“the 2018 Remedial Order”) 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”).

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”) declared that disclosure certificates issued under sections 113A and 113B of the 1997 Act as it applied in England and Wales were capable of being incompatible with Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (“the Convention”). In Scotland, similar provisions of the 1997 Act applied to the issue of disclosure certificates. These functions under the relevant legislation are devolved to Scottish Ministers and are exercised through Disclosure Scotland.

3. In light of the UKSC ruling, the Scottish Ministers assessed the operation of the 1997 Act in Scotland and concluded that changes should be made to the 1997 Act to ensure that Scottish Ministers did not act in contravention of Convention rights, in particular article 8, following the UKSC ruling. In addition, the Scottish Ministers also concluded that the 2007 Act (the Act of the Scottish Parliament which established the Protecting Vulnerable Groups Scheme – “PVG Scheme”) should be amended.

4. The change in the law was delivered initially by the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (“the 2015 Order”), which came into force on 10 September 2015. The 2015 Order was then subject to a 60-day period for written observations. Thereafter, Ministers took account of the written observations received and finalised the reforms in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (“the (No. 2) 2015 Order”). The (No. 2) 2015 Order came into force on 8 February 2016, and at that date the 2015 Order was revoked.

5. Subsequently, there was a judicial review in the Court of Session which challenged the operation of the 2007 Act as amended by the (No. 2) 2015 Order. In the case *P v Scottish Ministers* [2017] CSOH 33, 28 February 2017, Lord Pentland declared that, insofar as they require automatic disclosure of the petitioner’s conviction before the Children’s Hearing, the provisions of the 2007 Act, as amended, unlawfully and unjustifiably interfered with the petitioner’s rights under Article 8 of the European Convention on Human Rights, and Scottish Ministers had no power to make the provisions in terms of section 57(2) of the Scotland Act 1998 (“the 1998 Act”). The effect of the court order (except in relation to the

petitioner) was suspended under section 102 of the Scotland Act 1998 for nine months (until 17 February 2018) to allow Ministers to remedy the legislation.

Parliamentary Procedure

6. The Court of Session judgment found that provisions in the 2007 Act were incompatible with rights under the European Convention on Human Rights (“Convention rights”), and Ministers are using a remedial order made under section 12(1) and (3) of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”) to effect the remedy, which is subject to the “general” procedure under section 13 of the 2001 Act.

7. The 2018 Remedial Order was published as a proposed draft remedial order and as such was subject to a period of public consultation between 11 September 2017 and 26 November 2017. After the 60-day consultation period ended, Scottish Ministers laid a draft of the 2018 Remedial Order in Parliament on 15 December 2017. A Statement by Scottish Ministers (in accordance with section 13(4) of the Convention Rights (Compliance) (Scotland) Act 2001) summarising observations received and their response to them was laid on that same date. The Statement is attached as an Annex 1 to this Policy Note. The Statement provides a response to those observations to which the Scottish Ministers had regard and details the very minor changes that have been made to proposed draft remedial order which was subject to the consultation prior to the draft 2018 Remedial Order being laid in Parliament.

Policy objective

8. The policy objective is that the reforms to the 1997 and 2007 Acts made by (No. 2) 2015 Order should remain in force. Standard and enhanced disclosures are issued under the 1997 Act and disclosures of PVG scheme records are issued under the 2007 Act - these types of disclosures are referred to collectively as ‘higher-level disclosures’. The (No. 2) Order 2015 amended the 1997 and 2007 Acts in relation to the spent conviction information which could be disclosed in a higher-level disclosure. It introduced lists of offences into schedules 8A and 8B of the 1997 Act. Schedule 8A listed certain offences spent convictions for which will continue always to be disclosed due to the serious nature of the offence (sometimes referred to as the ‘offences which must always be disclosed’ list); schedule 8B lists certain offences spent convictions for which are to be disclosed depending on the length of time since conviction and the disposal of the case (sometimes referred to as the ‘offences which are to be disclosed subject to rules’ list).

9. The 2018 Remedial Order will, however, further refine those reforms so as to bring a benefit to individuals who have a spent conviction for an offence included in schedule 8A of the 1997 Act (‘Offences which must always be disclosed’). 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 for offences included in schedule 8A indefinitely will end.

10. Providing the possibility of an application to a sheriff for spent convictions described in paragraph 9 above will address Lord Pentland’s concern at paragraph 46 of his judgment:

“The fundamental deficiency in the system, as it applied in the petitioner’s case, was that it automatically generated disclosure of the conviction information without affording the petitioner any opportunity to challenge disclosure on the basis that it would be disproportionate to disclose in the particular circumstances of his case.”;

and his conclusion (paragraph 65) that:

“... The automatic disclosure of the conviction information constituted, in my judgment, an unlawful and unjustifiable interference with his rights under Article 8 of the European Convention on Human Rights. ...”

11. The 2018 Remedial Order also addresses two issues in the (No. 2) 2015 Order identified by the Scottish Parliament’s Delegated Powers and Law Reform Committee (“DPLRC”) in its 4th Report, 2016 (Session 4) SP Paper 869 published on 13 January 2016.

Summary of 2018 Remedial Order

12. The 2018 Remedial Order sets out rules to be applied to spent convictions for offences included in schedule 8A of the 1997 Act to determine the content of higher-level disclosures.

13. Article 3(2) amends section 116ZA of the 1997 Act, and also inserts a new subsection (1A) into that section. The new subsection (1A)(a) sets out the rules to be applied to determine if an individual should be offered the opportunity of an application to a sheriff about the content of their standard or enhanced disclosure, prior to a copy of their disclosure being issued to a relevant person (that is, the person who countersigned the application) in cases where they have a spent conviction for an offence included in schedule 8A of the 1997 Act.

14. To be offered the right to apply to a sheriff for removal from a higher-level disclosure of a conviction for an offence included in schedule 8A, the individual’s conviction must be spent and either:

- 7 years and six months must have passed from the date of conviction if the individual was under 18 years of age at the date of conviction; or
- 15 years must have passed from the date of conviction if the individual was aged 18 years of age or over at the date of conviction.

15. The time periods are the same as those for spent convictions for offences included in the rules list (in schedule 8B of the 1997 Act). But in the case of a schedule 8A offence, the time period determines when the right arises to make an application to a sheriff for removal of a spent conviction. For schedule 8B offences, the time period determines when a spent conviction can become protected. The concept of ‘protected conviction’ (as defined in section 126ZA of the 1997 Act) is not extended to schedule 8A offences as Scottish Ministers believe that the offences listed in schedule 8A are sufficiently serious that they should only be removed from the possibility of disclosure when a sheriff has reviewed the full circumstances of the conviction in question.

16. The rules for disclosure of a spent conviction for an offence included in schedule 8B of the 1997 Act (offences which are to be disclosed subject to rules) are unchanged. These are explained in paragraph 29 of the Policy Note to the (No. 2) 2015 Order, and for ease are repeated here:

“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.”

17. Article 3(3) amends and extends the effect of section 116ZB of the 1997 Act (which sets out the requirements for making applications to the sheriff) to schedule 8A of the 1997 Act and maintains that effect for schedule 8B.

18. Article 3(4) amends the title of schedule 8A of the 1997 Act from ‘Offences which must always be disclosed’ to ‘Offences which must be disclosed unless a sheriff orders otherwise’.

19. Article 3(5) amends paragraphs 75 and 81 of schedule 8B of the 1997 Act to deal with the DPLRC’s concerns expressed in relation to the (No.2) 2015 Order; at paragraph 75 the word ‘or’ is substituted for the word ‘and’; and at paragraph 81, sub-paragraph (c) is deleted, as is the word ‘and’ immediately before that sub-paragraph.

20. The principle set out in the (No. 2) 2015 Order remains, namely that in cases where an individual has multiple convictions for offences included in schedule 8A, each conviction will be considered separately and the rules will be applied as if it was the only conviction on the record.

21. Article 4(2) amends section 52ZA of the 2007 Act, and also inserts a new subsection (4) into that section. The amendments ensure that in cases where a scheme member requests correction of their copy of a scheme record and Ministers make such a correction that the scheme record cannot be disclosed if it now contains information that is within the scope of subsection 52ZA(4). In other words, if the copy of the scheme record now contains information about a spent conviction for an offence listed in either schedule 8A or schedule 8B of the 1997 Act that meets the criteria, as the case may be, the scheme member must be offered the opportunity to make an application to a sheriff for removal of the conviction.

22. Article 4(3) amends section 52 of the 2007 Act, and also inserts a new subsection (2A) into that section. The new subsection (2A) sets out the rules to be applied to determine if an individual should be offered the opportunity to make an application to a sheriff about the content of their copy of a PVG scheme record, prior to disclosure of that PVG scheme record in cases where the scheme record contains information about a spent conviction for an offence included in schedule 8A of the 1997 Act. The rules are exactly the same as those set out in paragraph 15 above in relation to the 1997 Act.

23. Article 4(3) also has the effect of ensuring that subsections 52(4) to (9) of the 2007 Act (which sets out the requirements for making applications to the sheriff) apply to an offence listed in schedule 8A of the 1997 Act and that effect continues for an offence listed in schedule 8B.

24. Article 4(4) amends section 57A of the 2007 Act in order to insert a reference to section 52ZA of the 2007 Act which also relies on the definition of ‘conviction’ and ‘protected conviction’ as set out in section 57A. This corrects an omission in the current drafting of section 57A.

25. Articles 5 to 8 set out transitional provisions to deal with applications for higher-level disclosures (and requests for corrections of disclosures) under the 1997 Act and the 2007 Acts. Any applications or requests which have been received prior to the coming into force of the 2018 Remedial Order, but are not yet completed, are to be treated as having been received after the coming into force of the 2018 Remedial Order. This means that the new section 116ZA(1A) of the 1997 Act and the new sections 52ZA(4) and 52(2A) of the 2007 Act will have effect when all of these applications or requests are completed.

Rehabilitation of Offenders Legislation

26. The 2015 Order and the (No. 2) 2015 Remedial Order both came into force at the same time as associated changes made by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Orders 2015 and 2016. The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 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.

27. These amendments ensured that the self-disclosure regime under the Rehabilitation of Offenders legislation and the state disclosure regime under the 1997 and 2007 Acts continued to operate in tandem and required disclosure of the same information by an individual and by the state. This means that an order under the 1974 Act, the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2018 (“the 2018 Amendment Order”) is required to make further associated changes to the system of self-disclosure of previous spent criminal convictions.

28. The 2018 Amendment Order was laid in draft in the Scottish Parliament on 15 December 2017. It is intended that there will be no requirement to self-disclose a spent conviction for schedule 8A offences where:

- 7 years and six months must have passed from the date of conviction if the individual was under 18 years of age at the date of conviction; or
- 15 years must have passed from the date of conviction if the individual was aged 18 years of age or over at the date of conviction.

29. The requirement to self-disclose such conviction information will therefore only arise once the conviction appears on a higher-level disclosure that has been issued to the person

who countersigned your application. This ensures that a higher-level disclosure recipient is not required to self-disclose such a spent conviction, and will have the opportunity to exercise their right to apply to a sheriff for removal of the spent conviction before they are required to self-disclose the spent conviction to a third party. This process will operate in the same way as the current provisions for self-disclosure of convictions for offences listed in schedule 8B.

30. If an individual has a spent conviction for an offence listed in schedule 8A of the 1997 Act which does not meet either of the bullet points at paragraph 28 above, then they will be required to self-disclose that conviction if asked in connection with recruitment to a role where a higher-level disclosure can be requested.

Public Notice

31. Scottish Ministers gave public notice of the 2018 Remedial Order (as required under section 13(3)(b) of the 2001 Act) by publication of a proposed draft remedial order on the Scottish Government website, the Disclosure Scotland area of the MyGov Scotland website, and through Disclosure Scotland's Twitter feed. These platforms provide a link to the formal consultation that has been published on the Scottish Government's Consultation Hub. Information about the proposed draft remedial order was sent by email to the organisations listed in Annex 2, which is Appendix 1 to the Statement in Annex 1.

Business Impact

32. A Business and Regulatory Impact Assessment has been prepared. This will be published on the Scottish Government's website.

Equality Impact

33. An Equality Impact Assessment has been prepared. This will be published on the Scottish Government's website.

Children's Welfare

34. A Children's Rights and Wellbeing Impact Assessment has been prepared. This will be published on the Scottish Government's website.

Privacy

35. A Privacy Impact Assessment has been prepared. This will be published on the Scottish Government's website.

Strategic Environmental

36. A Strategic Environmental Impact Assessment is not necessary.

Scottish Government
February 2018

STATEMENT OF THE SCOTTISH MINISTERS SUMMARISING WRITTEN OBSERVATIONS ON THE PROPOSED DRAFT POLICE ACT 1997 AND PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 REMEDIAL ORDER 2018

This Statement is laid before the Scottish Parliament in accordance with section 13(4) of the Convention Rights (Compliance) (Scotland) Act 2001.

Introduction

This Statement contains a summary and analysis of the written observations received in response to the public notice given in relation to the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (“the 2018 Proposed Draft Order”). The Statement confirms that Scottish Ministers do not intend to make any changes to the proposed draft remedial order that was consulted on other than to change some minor points noted by the Scottish Parliament’s Delegated Powers and Law Reform Committee.

Background

The policy change proposed in the 2018 Proposed Draft Order is in response to the ruling by Lord Pentland in the case *P v Scottish Ministers* [2017] CSOH 33, 28 February 2017. P raised a petition for judicial review in relation to the disclosure of a previous conviction on his PVG scheme record. Although the conviction was spent, the offence had been included in P’s scheme record due to it being listed in schedule 8A of the Police Act 1997 (the list of offences that must always be disclosed).

On 17 May 2017 the court declared that, insofar as they require automatic disclosure of P’s conviction before the Children’s Hearing, the provisions of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (“the 2015 remedial order”) unlawfully and unjustifiably interfered with the petitioner’s right under Article 8 of the European Convention on Human Rights, and Scottish Ministers had no power to make the provisions in terms of section 57(2) of the Scotland Act 1998.

The effect of the court order (except in relation to P) was suspended under section 102 of the Scotland Act 1998 for nine months (to 17 February 2018) to allow Ministers to remedy the legislation. A remedial order under Convention Rights (Compliance) (Scotland) Act 2001 using the standard procedure is being used to do that.

The consultation process

Notification of the publication of the 2018 Proposed Draft Order was given on 11 September 2017 on the Scottish Government’s website, the Citizen Space website, and by broadcasting on Disclosure Scotland’s twitter account. Notice was also sent by email to the major stakeholders listed in Appendix 1 to this Statement.

Responses

Fifty-one written observations were received. The majority of respondents 37 (72%) supported the proposals, though several did so with qualifications. Eight respondents (16%) were opposed to the proposals and six respondents (12%) did not express a view.

Thirty-three organisations and individuals agreed to have their written observations published on Citizen Space with their name:

Angus Council
 Mr Stuart Bain
 Care Inspectorate
 Central Baptist Church
 Centre for Youth and Criminal Justice, University of Strathclyde
 Children 1st
 Children and Young People's Commissioner Scotland
 City of Edinburgh Council
 Clan Childlaw
 Community Pharmacy Scotland
 Company Chemists' Association Ltd
 Delegated Powers and Law Reform Committee, Scottish Parliament
 East Renfrewshire Council
 Education Scotland
 General Pharmaceutical Council
 Glasgow Health and Social Care Partnership
 Holy Corner Community Playgroup
 Law Society of Scotland
 NHS Health Scotland
 Perth and Kinross Council
 Police Scotland
 Renfrewshire Council
 Scottish Borders Council
 Scottish Children's Reporter Administration
 Scottish Churches Committee
 Scottish Courts and Tribunals Service
 Scottish Independent Advocacy Alliance
 South Lanarkshire Council
 Unlock
 Victim Support Scotland
 Volunteer Edinburgh
 Volunteer Scotland Disclosure Services
 Who Cares? Scotland

A further 11 individuals have agreed to have their response published without their name being attributed. Seven respondents did not want their response published.

During the consultation process the Delegated Powers and Law Reform Committee of the Scottish Parliament conducted an inquiry on the 2018 Proposed Draft Order and received written evidence from the Faculty of Advocates and the Scottish Independent Advocacy

Alliance. That written evidence has also been considered by Scottish Ministers along with the other written observations received.

Findings

This section discusses the written observations received on the 2018 Proposed Draft Order, and Ministers' reasons for the conclusion that it is not necessary to make any amendments to the 2018 Proposed Draft Order other than to change some minor points noted by the Scottish Parliament's Delegated Powers and Law Reform Committee.

Comments on the 2018 Proposed Draft Order

The written observations received fell into eight broad areas as set out below. The Scottish Government's position follows each set of observations.

1. The 2018 Proposed Draft Order as a remedy of ECHR incompatibility following the court's ruling in *P v Scottish Ministers*, and striking a balance between public and private concerns

Response and Analysis

Comments on this matter from organisations were generally supportive of the proposals as a remedy for the incompatibility with Article 8 of the ECHR (right to respect to private life) while also balancing public safety concerns. However, some individuals who commented noted that the proposals do not go far enough in addressing ECHR concerns, or that in doing so public safety concerns are compromised.

Education Scotland found the proposals to be reasonable and appropriate given the court's findings in *P v Scottish Ministers* on the unlawful and unjustifiable interference of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 on the petitioner's ECHR Article 8 rights.

Police Scotland also noted that the opportunity the 2018 Proposed Draft Order provides for applicants to challenge the conviction information that can be included on a higher-level disclosure is in line with Article 8 of the ECHR.

The aim of the proposals, of providing in Scotland a disclosure regime which strikes a balance between the individual's right to respect for private life with the interests of public safety and compatibility with ECHR, was also welcomed by **Renfrewshire Council**.

Community Pharmacy Scotland found that the 2018 Proposed Draft Order takes a proportionate view to striking the balance between compatibility with ECHR and ensuring the public are protected. A similar response was provided by the **Scottish Churches Committee** in relation to the balance the 2018 Proposed Draft Order strikes between public and individual interests.

It was noted by **Unlock** that the proposals will create an ECHR compliant system but feels this is a missed opportunity to do more by creating a system that ensures individuals are not tied to their past through the disclosure of old, minor or irrelevant convictions.

The **Delegated Powers and Law Reform Committee ("DPLRC")** accepted that the proposed approach would answer the criticisms of the court in *P v Scottish Ministers*, but it nevertheless welcomed the perspective of the **Faculty of Advocates** in suggesting a method by which the proportionality of the approach could be strengthened. Comments provided by

the **Faculty of Advocates** state that the 2018 Proposed Draft Order partially addresses issues of ECHR compatibility; however, it considered that the ability to apply to a sheriff for conviction removal based on passage of time alone will not necessarily guarantee proportionality in every case. The **DPLRC** encouraged Scottish Ministers to explore further the views of the **Faculty of Advocates** in its wider review of the higher-level disclosure regime.

A concern was noted by one respondent that the human rights of people who have a criminal conviction are being given greater priority than the rights of vulnerable people to be protected from harm. In the respondent's view, serious conviction information should continue to be disclosed and employers should be required to adhere to Disclosure Scotland's Code of Practice and not unfairly discriminate against individuals with convictions.

Clan Childlaw and one other respondent provided responses which stated that the proposals do not go far enough in satisfying Article 8 ECHR, particularly in relation to those convicted under the age of 18.

City of Edinburgh Council commented that the 2018 Proposed Draft Order strikes a balance between public protection and ensuring an individual's right to private life is respected. Further, they feel that the proposals provide a fairer and more flexible system by removing automatic and indefinite disclosure for schedule 8A offences. They noted that this will enable more effective rehabilitation for offenders.

Perth and Kinross Council found the 2018 Proposed Draft Order to be a balanced solution which respects the rights of individuals with convictions to move on but also ensures protection to vulnerable people.

Victim Support Scotland felt that with the involvement of a sheriff considering application for removal, the proposals strike a fair balance between public and private concerns.

Conversely, it was felt by the **Company Chemists' Association ("CCA")** that the benefits of the amendment are disproportionately geared towards the individual and that given the groups of people the CCA service, the respondent believes it would be beneficial to create a list of professions for which non-disclosure of an offence would be inappropriate.

Two respondents commented that the 2018 Proposed Draft Order did not strike the correct balance and that public safety would be compromised on many levels. One added that the proposals are inappropriate as all convictions are relevant and should be disclosed to allow an employer to make an informed recruitment decision.

Scottish Government position

In bringing forward the 2018 Proposed Draft Order, Scottish Ministers were conscious of the ECHR incompatibility issue identified by the Court of Session and the need to address the judgment. Ministers recognise that the majority of respondents support the approach taken.

It is also noted that some respondents believe the proposals do not go far enough, and that the incremental nature of the refinements to the higher-level disclosure regime in Scotland is unhelpful to individuals affected by it. Some respondents believe that public safety will be compromised by the proposals. Ministers do not believe that to be the case, as in all cases where someone applies to have a conviction removed from their disclosure, a sheriff will have to decide if a conviction should be removed. There is no provision for a spent conviction for an offence listed in schedule 8A to become protected automatically after a certain period of time as is the case with schedule 8B; there will always have to be an express

decision by a sheriff that the conviction is not relevant in relation to the purpose for which the disclosure has been requested.

The landscape is not static, and changes proposed to the minimum age of criminal responsibility, and the rehabilitation of offenders legislation will change it further. Ministers are ensuring that these cross-cutting issues are taken forward in a joined-up way.

2. Impact of 2018 Proposed Draft Order on those under the age of 18 at date of conviction

Response and Analysis

The majority of respondents expressed general support for the provisions the 2018 Proposed Draft Order makes for those convicted of an offence under the age of 18. However, a number of bodies whose work is centred on children and young people highlighted concerns not only with the 2018 Proposed Draft Order but the whole disclosure regime in Scotland.

The **Scottish Borders Council, Education Scotland, City of Edinburgh Council, Holy Corner Community Playgroup, Renfrewshire Council, South Lanarkshire Council, East Renfrewshire Council, the Care Inspectorate, the Centre for Youth and Criminal Justice (“CYCJ”)** and the **Scottish Independent Advocacy Alliance** all provided similar comments on the positive impact the 2018 Proposed Draft Order will have to individuals convicted of a schedule 8A offence when under the age of 18. Comments on this positive impact focused on how the amendments supported rehabilitation by allowing individuals to move on and put their past behind them; secure employment; enable them to integrate and feel part of their communities; and reduce the impact of interactions with state authorities at a young age.

It was noted by **Mr S Bain** that the approach to schedule 8A convictions seems appropriate for those convicted under the age of 18. However, he noted reservations about, for example, convictions relating to sexual misconduct perpetrated by those over 18, and that perhaps a separate list of always disclose offences for that age group should be considered.

Who Cares? Scotland commented that the 2018 Proposed Draft Order will marginally improve the PVG Scheme and in particular its application to care experienced people. However, they believe that the 2018 Proposed Draft Order, or further legislative change, should go much further. In fact, the respondent suggested that criminal information should not appear on disclosures for behaviours that took place before the age of 16, and that anything which takes place at a Children’s Hearing should not appear on a PVG certificate.

Who Cares? Scotland and a number of other respondents including **Children and Young People’s Commissioner Scotland (“CYPCS”)** **Clan Childlaw, Scottish Children’s Reporter Administrator** and one other respondent noted the impact of the Children’s Hearing System on young offenders. They note that despite their informal setting and their child-centred approach Children’s Hearings can lead to young people gaining a criminal record. They also noted that at these Hearings young people are frequently without legal representation and lack knowledge on their rights and the resources available to them. The above respondents all described how children and young people may have little understanding of the long term impact of admitting to, or having grounds established, at a Children’s Hearing. Further, respondents also noted their frustration and disappointment that section 187 and 188 of the Children’s Hearing (Scotland) Act 2011 have yet to be enacted, this would to allow some offences dealt with through the Children’s Hearing to be recorded as Alternatives to Prosecution. For the purpose of this legislation (to be made under the

Children’s Hearing (Scotland) Act 2011) the offences were to be categorised into two lists to ensure more serious offences continue to be disclosed while less serious offence are removed more quickly. However, they note that these lists which had been proposed do not mirror those contained in schedules 8A and 8B. It was noted by **CYPCS** and one other respondent that the schedules 8A and 8B do not take account of the context in which the offending behaviour took place citing the example of the schedule 8A offence of ‘Threatening and Abusive Behaviour’, an offence wide in scope which is most commonly used for children committing extremely minor infractions.

One respondent stated that the current legislation tries to impose a disclosure regime built for the criminal justice system on the Children’s Hearing System without recognising the different underlying principles. The respondent concluded that the 2018 Proposed Draft Order is a move in the right direction but is wholly inadequate to bring the law into line with ECHR or the issues raised by the court in *P v Scottish Ministers*; this could be more effectively done by bringing into force sections 187 and 188 of the Children’s Hearing (Scotland) Act 2011.

Children 1st broadly supported the changes, particularly as they will offer young people who obtained convictions through the Children’s Hearing System the opportunity, in some cases, to make an application to a sheriff.

Scottish Government position

Most respondents were positive about the benefit the changes would bring for under 18s. The support was qualified in several cases with comments that the proposals did not go far enough for children. Some concern was expressed about treating all offences in schedule 8A in the same way, and that sections 187 and 188 of the Children’s Hearings Scotland Act 2011 (“the 2011 Act”) had not yet been commenced.

Sections 187 and 188 of the 2011 Act are not expected to be commenced as the policy of reducing the need for disclosure is being fulfilled in a number of ways which supersede the provisions made. This includes the positive impact of the higher-level disclosure regime and proposals in the Management of Offenders (Scotland) Bill that offence grounds established in the Children’s Hearings be spent immediately for the purposes of rehabilitation. This will be kept under review and consideration will be given to repealing the sections of the 2011 Act which are not commenced.

3. Time limit before applications can be made to a sheriff

Response and Analysis

A number of comments provided on this matter suggest that the amount of time that must pass before an application can be made to a sheriff may be too long, particularly for those under 18 at the time of offence.

In the context of an individual’s age at the time of conviction and the length of time that must elapse before an application can be made to a sheriff, the **Law Society of Scotland** questions whether these are being set at the appropriate levels. They comment that 7.5 years may be a significant period before an application can be made and that as a result an individual may find themselves restricted during a period of their lives when they seek opportunities in employment or higher education. The **Law Society** recognises however that a line must be drawn somewhere and that is for the Scottish Government to decide.

The **CYPCS** provided a similar comment stating that the provisions of the 2018 Proposed Draft Order require children and young people to wait for an extended period of time before an application to the sheriff is possible. **CYPCS** note they have heard anecdotal evidence that some young people are deterred for pursuing opportunities for further education due to the inclusion of convictions from childhood on disclosures. The respondent further noted a concern that where a young person committed an offence while under the age of 18, but is not convicted until the age of 18 could create an unfair system where they are penalised in having to wait until 15 years passed instead of 7.5 years for factors outwith their control such as court delays. This point was also made by **Children 1st** who encouraged the Scottish Government to further consider this impact.

Clan Childlaw also expressed concern regarding disclosure of offences for young offenders within the initial period of 7.5 years with no route for application to a sheriff within this period.

It was noted by **Unlock** that the rationale behind the time periods are unclear. The respondent, reflecting on their submission for the 2015 remedial order, commented that the time period is unnecessary and disproportionate. Given the amendments are based on a system where a sheriff must be satisfied that a conviction is not relevant for the purpose of the disclosure, the time limits are an unnecessary barrier.

A number of other respondents also commented on the time limits within the 2018 Proposed Draft Order before an appeal can be made to a sheriff for conviction removal: two respondents remarked that the timescales were reasonable and workable, respectively. Conversely, an individual respondent felt the timescales involved to be excessive and as such the 2018 Proposed Draft Order does not go far enough in satisfying ECHR considerations.

The **DPLRC** also provided comment in respect of the time that must pass before appeal is possible. The **Committee** noted that the time period before an application can be made to a sheriff mirrors the time that must pass before a schedule 8B conviction becomes 'protected'. The **Committee** acknowledged that it is not a requirement that there is a right of appeal in every case and that the Government is entitled to draw the line somewhere regarding offences which must always be disclosed in the interest of public safety. However, public protection must be balanced with the rights of the individual, therefore, the **Committee** suggested that any time period of time that limits access to an appeal must be subject on continued scrutiny to ensure its objectives are achieved. The **Committee** recommended keeping under review the question of whether the time period that must pass before application to a sheriff strikes a fair balance between public and individual concerns. The **Committee** further suggested that this question could form part of the wider review of higher-level disclosures in Scotland.

Scottish Government position

Scottish Ministers noted that there were mixed views from respondents about whether the periods of 7.5 and 15 years were appropriate.

Scottish Ministers followed the principle of 7.5 years and 15 years from the provisions which apply for offences in schedule 8B. While the timescales in relation to schedule 8B offences exist for a different purpose (to determine when a conviction for an offence listed in schedule 8B becomes a protected conviction), the underlying rationale for the time periods chosen is based on the rehabilitation periods under the Scots law version of the Rehabilitation of Offenders Act 1974, and Police Scotland weeding and retention rules. Scottish Ministers consider that this rationale remains sound for determining the periods of time which must elapse before an application can be made to the sheriff for removal of convictions.

There are reforms to the Rehabilitation of Offenders legislation being considered by Ministers as part of a Management of Offenders (Scotland) Bill which will be brought forward during the next Parliamentary year. In light of that, Ministers will look again at the time periods which apply to offences listed in both schedules 8A and 8B as part of the forthcoming PVG Review.

4. Alternative criteria for an application to a sheriff

Response and Analysis

The **DPLRC**, reflecting on views submitted to it by the **Faculty of Advocates**, considered that, in the interests of strengthening the proportionality of the disclosure regime, alternative criteria to the requirement for the passage of a specified period of time before an application to a sheriff is made could be beneficial. In particular, the **Faculty of Advocates** suggested that the right to make an application to the sheriff for removal of schedule 8A convictions could be based on alternative criteria, such as the level of the sentence imposed, or the relevance of the conviction to the employment being sought. The **DPLRC** stated that it welcomed this suggestion and encouraged Scottish Ministers to explore the suggestions further as part of the wider PVG Review.

In their response, the **Law Society of Scotland** also made reference to disposals. They considered whether it would be possible for a sheriff to pass a specific or unique sentence for a schedule 8A offence due to the specific circumstances and then make the decision at the time for that conviction not to be disclosed on a higher-level disclosure. The **Law Society** noted that they considered this option specifically in relation to those aged 16-18 at the time of conviction, but accept this may be seen as an arbitrary age limit as well as being a difficult system to administer overall.

Scottish Government position

Scottish Ministers understand the rationale behind the approach contemplated by the Law Society. It does, however, risk the situation that subsequent behaviour during the rehabilitation period of that first conviction which impacts on its rehabilitation period, could call into question the earlier direction of a sheriff. Scottish Ministers agree that for this reason, as well as for other practical reasons, such a system would be difficult to administer. Decisions of a sheriff on disclosure of previous convictions might have to be reassessed every time the person received a subsequent conviction.

Ministers believe that the correct time for a decision about disclosure of a conviction is after a request for higher-level disclosure has been made either for a specific purpose (if is a standard or enhanced disclosure) or for regulated work with children or protected adults (if it is a PVG scheme record disclosure). The sheriff will then be dealing with a spent conviction and will be able to assess the relevance of it to the purpose for which the disclosure was requested. The risk of the balance, between the right of someone to move on with their life, and the interests of public protection, being wrongly struck should be reduced by having the decision-making process at the time of disclosure.

5. Role of the sheriff in determining an application for removal of a conviction

Response and Analysis

A number of respondents report taking reassurance from the 2018 Proposed Draft Order's requirement to make an application to a sheriff who will determine if a schedule 8A conviction should be removed from a higher-level disclosure. However, the majority of respondents sought clarification on what factors will be considered by a sheriff. Many commented on the need for clear guidance to be set down to assist sheriffs in making a decision.

Positive comments were received by **City of Edinburgh Council**, **Victim Support Scotland** and **Community Pharmacy Scotland** who feel assured and encouraged by the involvement of a sheriff as a means of ensuring the balance between public and individual concerns is struck.

The **Central Baptist Church** commented that they have no objection to the 2018 Proposed Draft Order subject to assent by a sheriff following consideration of the grounds for conviction removal and associated risks.

The **Scottish Churches Committee** provided similar comments, stating that provided a sheriff is obliged to consider the individual circumstances of the case and the relationship between the position applied for and the conviction information to be removed, they would not consider the situation to be high risk.

A number of respondents including **Angus Council**, **Children 1st**, **Renfrewshire Council**, the **Care Inspectorate** and the **CYCJ** all stated the importance of developing guidelines to support decision making for sheriffs as well as for transparency and consistency. The respondents noted that they would take reassurance from the application of such guidelines to the decision-making process. The **Faculty of Advocates**, in its written submission to the **DPLRC**, noted the need for consistency is especially pertinent as one sheriff's decision is not binding on another.

The **Law Society of Scotland** stated that the ability to make applications to a sheriff appears to provide an 'equitable basis and means of decision making'. They also highlighted that it will take time until a body of case law is developed on the extent of a sheriff's discretion in determining the circumstances in which a schedule 8A offence is still required to be disclosed. Further, the **Law Society** noted that ensuring consistency of approach through clarification of factors to be considered by a sheriff is essential, particularly, as the respondent noted, the legislation specifies the finality of the sheriff's decision without apparent route for appeal (here the respondent refers to section 52A(8) of the Protection of Vulnerable Groups (Scotland) Act 2007).

East Renfrewshire Council and **Angus Council** sought clarification on the information sheriffs will have access to in order to make a decision such as the role applied for and who will provide this, for example, the applicant's solicitor.

In the **Care Inspectorate's** view a decision on conviction removal should be made in conjunction with 'soft' intelligence available from the police which may indicate whether the relevant conviction is a 'one off' or demonstrates a pattern of behaviour. For a sheriff to consider removal of a conviction without this information would, in the **Care Inspectorate's** opinion, constitute an unacceptable risk. The respondent concluded that it would be beneficial to the 'interests of transparency and effective judicial decision-making' to establish the criteria that sheriffs must apply.

Children 1st noted that it is unclear whether applications will be made on a case-by-case basis or whether a one-time successful application within a particular set of circumstances means that the individual need not apply again to a sheriff for future disclosures. **Glasgow Health and Social Care Partnership** also sought clarification on this point, asking if the conviction is permanently removed could the individual subsequently apply for other roles without being subject to the same scrutiny.

In its comments the **DPLRC** made reference to concerns raised by the **Committee** during scrutiny of the 2015 remedial order over potential limitations of the application to sheriffs for schedule 8B offences. The **Committee** noted that those previous concerns could apply equally to the 2018 Proposed Draft Order for schedule 8A offences. These concerns relate to the need for assistance in understanding and navigating the appeals process and whether embarking on an application to a sheriff could indicate to an employer the existence of spent convictions. This could prevent individuals from launching an appeal and would therefore be counterintuitive to the aims of the 2018 Proposed Draft Order.

The **DPLRC** noted that there having been few appeals launched to sheriffs in respect of the schedule 8B offences may suggest an underlying issue with the current mechanism that dissuades applicants from embarking on an appeal. The **Committee** therefore recommends that the appeals mechanism is thoroughly explored to ensure its fitness for purpose and note this may form part of the future PVG Review.

Comments were also provided by **Volunteer Edinburgh** and the **Scottish Independent Advocacy Alliance** on the need to provide guidance for applicants embarking on an appeal and that the appeals process should be clear and accessible.

In their response **Unlock** also make reference to the need for user-friendly guidance. They also encourage that to ensure the sheriff based system is effective the Scottish Government should undertake an evaluation of this process and publish its findings.

Perth and Kinross Council provided comments regarding the need to clearly emphasis the role of the sheriff to prevent any misrepresentations of the process which could reduce trust in the process by the people it is meant to protect.

The **Faculty of Advocates** response to the **DPLRC** highlighted the practical issue of the applicant's name appearing on a published list of court proceedings, whether legal aid would be available to an applicant and if so how long would it take to process a request for this.

Scottish Government position

The test which a sheriff applies in determining an application for removal of a conviction is whether the conviction is relevant to the type of regulated work in relation to which a person is a member of the PVG Scheme, or is relevant to the purpose for which the disclosure certificate was requested (standard and enhanced disclosures under the Police Act 1997).

Scottish Ministers confirm that legal aid is available to individuals who qualify for it in relation to these applications for removal of convictions. It will be a matter for the individual making the application, having sought legal advice, to determine what evidence to lead with a view to persuading a sheriff that the conviction information is not relevant.

Scottish Ministers do not believe that it would be appropriate to set out how sheriffs should handle the applications for removal of convictions. It will be possible in due course for sheriffs to draw some guidance from previously decided cases on applications for removal of convictions, although these applications will often turn on the facts of each individual case.

The issue of how applications for removal of conviction information should be dealt with will be part of the PVG Review.

6. General comments

Response and Analysis

One respondent commented on a preference for the status quo which allows employers to have conversations with potential employees about their convictions. And in a similar vein, another expressed concern over convictions that could be withheld following successful appeal to a sheriff.

Two respondents expressed general support for the 2018 Proposed Draft Order but felt, respectively, that it did not address concerns about schedule 8A, mainly that it is too extensive and includes offences which are not serious in nature; and that the 2018 Draft Proposed Order did not go far enough in satisfying ECHR compatibility as there is still the chance that ORI could be disclosed to the detriment of an individual seeking to carry out regulated work.

Scottish Government position

Scottish Ministers are required to make amending legislation to address the issues raised in the Court of Session judgment. It is important to stress that spent convictions for offences on schedule 8A will not be removed automatically. Only a sheriff can instruct removal of these convictions if they are not relevant to the type of regulated work in relation to which a person is a member of the PVG Scheme, or is not relevant to the purpose for which the disclosure certificate was requested (standard and enhanced disclosures under the Police Act 1997).

With regard to the points that the changes do not go far enough, Ministers are conscious of the need to balance the competing interests of public protection and the right for a person to move on with their life. Ministers believe the proposals consulted on strike an appropriate balance.

7. Impact

Response and Analysis

Respondents considered the impact of these proposals both positive and negative on specific groups.

The majority of respondents felt the proposals will have a positive impact on those with schedule 8A convictions who will be able to make an application to a sheriff for removal of a conviction from a higher-level disclosure. Positive impact is mentioned by way of the opportunities removal of conviction information will provide for employment, education and moving on from past behaviour. Respondents who commented on this include **the Care Inspectorate, Glasgow Health and Social Partnership, East Renfrewshire Council, South Lanarkshire Council, Edinburgh Council and two others.**

Glasgow Health and Social Care Partnership, the Company Chemists' Association and four other respondents highlighted the potential negative impact the proposals may have on children or protected adults if convictions are not disclosed.

Scottish Government position

The proposals will have a positive impact for some individuals. It is important to stress that spent convictions for offences on schedule 8A will not be removed automatically. Only a sheriff can instruct removal of these convictions if they are not relevant to the type of regulated work in relation to which a person is a member of the PVG Scheme, or is not relevant to the purpose for which the disclosure certificate was requested (standard and enhanced disclosures under the Police Act 1997).

Ministers are conscious of the need to balance the competing interests of public protection and the right for a person to move on with their life. Ministers believe the proposals consulted on strike an appropriate balance and that there will, therefore, not be a negative impact on vulnerable groups if convictions are not disclosed.

8. Other considerationsResponse and Analysis

Some respondents noted the delay to the overall disclosure process an application to a sheriff may cause. In many cases this is due to a concern that this delay may prompt a prospective employer to infer the existence of a spent conviction, but a number of respondents also mentioned this in practical terms as a hindrance to a recruitment campaign that may result in cost to an employer and delay in the provision of important services.

Respondents who noted these concerns included **Mr S Bain, Volunteer Scotland Disclosure Services, Glasgow Health and Social Care Partnership, Scottish Churches Committee, the Law Society of Scotland and two others.**

Volunteer organisation responses on the impact of the 2018 Proposed Draft Order to them were mixed. **Volunteer Edinburgh** felt that the amendments will give organisations that recruit volunteers the potential to increase their staffing and recruit a more diverse range of volunteers. **Volunteer Scotland Disclosure Services** do not see there being any major impact on the voluntary sector by the proposed changes. An alternative view noted concern that the changes may disproportionately impact on organisations with a strong reliance on volunteers.

Community knowledge about individuals and their previous offending behaviour was highlighted by **one respondent**. In many instances, even if the conviction information is removed from a disclosure there may still be local knowledge of this conviction.

The **DPLRC** noted three minor points in the 2018 Proposed Draft Order which it recommended should be changed. They suggested that in footnote (d) on page 1 of the 2018 Proposed Draft Order, the word “term” is missing from the first line (“The “Convention rights” has the meaning given by..”). They also suggested that for consistency with Articles 5(2), 6(2) and 8(2), it appears that Article 7(2) should refer to paragraph (1) rather than to paragraph 1(a) and that, in the Explanatory Note, the word “Act” is missing from the first line of the third paragraph.

Scottish Government position

It is worth noting that around 90% of higher-level disclosures are issued without any conviction information included. That, however, does not seek to minimise the impact of the disclosure regime on those who do have conviction information, and who are offered the

opportunity of an application to a sheriff for removal of such information before it is disclosed to a third party

Scottish Ministers accept that an application to a sheriff can delay an organisation's recruitment decision, and that it can also cause uncertainty for the individual concerned. The issue of how applications for removal of conviction information should be dealt with most appropriately will be part of the PVG Review.

Scottish Ministers would re-iterate that even if information is not disclosed on a higher-level disclosure by Disclosure Scotland, an organisation that happens to learn about a person's previous behaviour must consider the requirements of the Rehabilitation of Offenders legislation and should not use that information, or prejudice the individual by it.

Scottish Ministers will change the 2018 Proposed Draft Order to incorporate the changes to the three minor points suggested by the DPLRC.

Notice of publication of the 2018 Proposed Draft Order was given to the following organisations

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
General Pharmaceutical Council
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 Court Service
Children's Hearings Scotland
Faculty of Advocates
Law Society of Scotland
Lord President and Lord Justice General
Parole Board for Scotland
Sheriff Principals
Sheriffs' Association
Scottish Law Commission
Scottish Committee of the Council of Tribunals
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
Care Inspectorate
Children 1st
CJSW Dumfries and Galloway
Coalition of Care and Support Providers Scotland
Disclosure Scotland Stakeholder Advisory Board
Howard League for Penal Reform
NSPCC Scotland
Recruit With Conviction
SACRO
Scottish Churches Committee Safeguarding Representatives
Scottish Commission for Human Rights
Scottish Commissioner for Children and Young People
Scottish Council of Jewish Communities
SCVO
Social Work Scotland
Sports Scotland
Strathclyde Partnership for Transport
SSSC
Unlock
Victim Support Scotland
Volunteer Scotland Disclosure Services