

POLICY NOTE

THE MANAGEMENT OF OFFENDERS (SCOTLAND) ACT 2019 (COMMENCEMENT NO. 4 AND SAVING PROVISION) REGULATIONS 2020

SSI 2020/245 (C. 20)

The above instrument was made by the Scottish Ministers in exercise of the powers conferred by section 63(2) and (3) of the Management of Offenders (Scotland) Act 2019 and all other powers enabling them to do so. The instrument is laid with no procedure.

Purpose of instrument:

To bring into force various provisions of Part 2 of the Management of Offenders (Scotland) Act 2019 which amend the Rehabilitation of Offenders Act 1974.

Saving provision is made in respect of those amendments in relation to Licencing Boards.

Policy Objectives

1. To bring into force the provisions of Part 2 of the Management of Offenders (Scotland) Act 2019 (“the 2019 Act”) which amend the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) in Scotland.
2. The saving provision in regulation 3, in relation to Licencing Boards, is to ensure that, until section 52 of the Air Weapons and Licencing (Scotland) Act 2015 is commenced, for the purposes of any “relevant matter”, the amendments made by Part 2 of the 2019 Act have no effect in relation to a conviction.

Amendment to the 1974 Act

3. The provisions being commenced by this instrument relate to the 1974 Act. The 1974 Act sets out rules for determining when a conviction is “spent” for the purposes of that Act. The effect of a conviction being spent is that the protections set out in section 4 of the 1974 Act apply in respect of that conviction.
4. The provisions in Part 2 of the 2019 Act reform the 1974 Act so that it achieves a more appropriate balance between the rights of people not to disclose their previous offending behaviour and to move on with their lives while ensuring the rights of the public to be protected are effectively maintained. The provisions also increase the clarity of the legislation and make it more accessible to those required to understand it.
5. The provisions can be split into the following five broad areas:
 - reduce the period of disclosure for the majority of sentences,
 - bring more people within the scope of the protections under the 1974 Act,
 - provide an enabling power to bring forward regulations to create an independent review mechanism for certain sentences greater than 48 months,

- increase the clarity and accessibility of the legislation, and
 - change the terminology used within the legislation to reduce confusion about the purpose of disclosure.
6. The disclosure periods will be much clearer to understand as a result of removing redundant provisions and not referring to specific legislative references under an amended section 5. The revised disclosure periods associated with each disposal are clearly set out and in an accessible way which will help with understanding the 1974 Act. **Annex A** below sets out the specific changes to the disclosure periods.
 7. The rules relating to disclosure periods under section 6 of the 1974 Act will also be much clearer. This will make it much easier to understand when someone is convicted of more than one offence or where they get convicted of a further offence before the disclosure period for their previous conviction ends.
 8. The changes to the terminology will also make the 1974 Act much clearer as to the purposes of a disclosure requirement. The 2019 Act makes the following changes to the terminology in the 1974 Act:
 - “rehabilitated person” will become “protected person”.
 - “rehabilitation period” will become “disclosure period”.
 - “sentence excluded from rehabilitation under this act” will become “excluded sentence”.
 - “a sentence subject to rehabilitation under this Act” will become “disclosable sentence”.
 - “rehabilitated living persons” will become “living protected persons”.
 9. By making the changes to the terminology it is expected that where a potential employee discloses a conviction in future to an employer, that can be the start of a dialogue between the potential employee and employer about the suitability of the potential employee rather than an employer automatically rejecting an application.
 10. These amendments to the 1974 Act are the most far-reaching changes to the general system of disclosure since the 1970s. The Scottish Government considers that the changes to the disclosure system made under Part 2 of the 2019 Act can make a difference in helping people move away from their previous offending behaviour and move on with their lives. It is therefore considered reform of the 1974 Act will be an aid to tackling inequality and prevent those already marginalised in our society becoming more marginalised due to a lack of employment opportunities which may result in them remaining involved with the criminal justice system.

Regulation 2

11. Regulation 2 of these Regulations appoints 30 November 2020 for the coming into force of the provisions of the 2019 Act specified in the schedule of these Regulations. Those are: sections 17 to 31, 33 to 38 and schedule 2 of the 2019 Act.
12. Sections 17 to 30, 38 and schedule 2 of the 2019 Act amend the 1974 Act to change the length of time it takes before a conviction becomes spent and the rules which apply to determine when a conviction becomes spent. The provisions also make changes to the

terminology used in the 1974 Act, for instance the 1974 Act will refer to “disclosure period” instead of “rehabilitation period”.

13. Section 31 provides new powers for the Scottish Ministers in relation to alternatives to prosecution (“AtP”) under the 1974 Act. The powers will enable the Scottish Ministers to amend the list of circumstances in which a person is given an AtP for the purposes of the 1974 Act and also to amend, remove or add provision specifying when an AtP will become spent.
14. Sections 33 to 36 of the 2019 Act provide powers for the Scottish Ministers to bring forward regulations to create an independent review mechanism for certain sentences greater than 48 months. A conviction cannot become spent if an “excluded sentence” is imposed in respect of that conviction (section 5(1) of the 1974 Act). Section 33 will enable the Scottish Ministers to make regulations allowing a person who has a conviction for which a relevant excluded sentence was imposed to apply to be treated as a protected person in respect of that conviction and for that conviction to be treated as spent. A “relevant excluded sentence” is one listed in section 33(4) of the 2019 Act. Sections 34 to 36 provide further detail in connection with the exercise of this power.
15. Section 37 sets out transitional provision related to the amendments made to the 1974 Act by Part 2 of the 2019 Act. These provisions prevent the amendments made by Part 2 of the 2019 Act from having retrospective application.
16. Schedule 2 makes minor and consequential amendments to the 1974 Act. This includes changes to the terminology and titles where appropriate throughout the 1974 Act.

Saving provision

17. Section 52 of the Air Weapons and Licensing (Scotland) Act 2015 (“the 2015 Act”) amends the Licensing (Scotland) Act 2005 to repeal section 129(4) of that Act. In conjunction with amendments to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (“the 2013 Order”), commencement of section 52 of the 2015 Act would be one of the legislative steps necessary to enable Licensing Boards to consider a spent conviction for a relevant offence or a foreign offence (both of which are defined in section 129 of the 2005 Act, with relevant offences prescribed in the Licensing (Relevant Offences) (Scotland) Regulations 2007 (S.S.I. 2007/513)). Currently Licensing Boards cannot consider such convictions. Section 52 of the 2015 Act has not yet been commenced.
18. 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 current order in force is the 2013 Order. Therefore, to enable Licensing Boards to consider relevant spent convictions an amendment to the 2013 Order is required as well as commencement of section 52 of the 2015 Act.
19. As part of commencement planning work, the Scottish Government is engaging with licensing stakeholders to look into the possibility of adding alcohol licensing to the higher

level disclosure regime which will increase the amount of conviction information provided to Boards. To achieve the Scottish Government's policy objective in relation to alcohol licenses, separate work will be progressed in order to consider the conviction information needs of Licensing Boards. Consideration of the convictions of applicants is a key component in regulating those who apply for premises licences to sell alcohol and for personal licences to work in and manage such premises. The Scottish Government is engaging with representatives from Licensing Boards to consider a policy change in order for spent convictions to be included as a matter of routine, which would be achieved by bringing alcohol licensing within the higher level disclosure regime.

20. The Scottish Government is keen to ensure no changes are made to the current system of alcohol licensing pending this outcome of this work. As this is a complex issue, the Scottish Government is of the view that there should only be one period of legislative change for Licensing Boards (and also Police Scotland who provide conviction information to Licensing Boards).
21. Therefore, the Scottish Government considers it is necessary and appropriate for the amendments made to 1974 Act under Part 2 of the 2019 not to apply to Licensing Boards until this wider work has been completed. Accordingly these Regulations contain a saving provision in respect of Licensing Boards.

Regulation 3

22. Regulation 3 makes this saving provision. The effect is that, until section 52 of the 2015 Act is commenced, for the purposes of any "relevant matter" the amendments made by Part 2 of the 2019 Act have no effect in relation to a conviction. Relevant matters are applications under the 2005 Act, determinations of such applications, any notice given under the 2005 Act, proceedings before Licensing Boards under the 2005 Act and any appeal of a decision of a Licensing Board.
23. This means that the changes to the disclosure periods applicable to sentences and to convictions made by the provisions of Part 2 of the 2019 Act do not apply in respect of determining whether or not a conviction is spent for the purposes of any relevant matter. Instead, the 1974 Act will continue to apply to relevant matters as it did immediately prior to 30 November 2020.

Consultation

24. The Scottish Government published a discussion paper¹ on the 1974 Act and ran stakeholder engagement events to explain how the legislation operates and to gather evidence and views to help consider what changes may be required to modernise and improve the legislation. Analysis of the feedback received to the Scottish Government's discussion paper² and analysis of the engagement³ events⁴ held as part of consideration of the discussion paper were published on the Scottish Government's web pages.

¹ <http://www.gov.scot/Publications/2013/08/6133>

² <http://www.gov.scot/Publications/2014/04/5167>

³ <http://www.gov.scot/Publications/2014/04/2819>

⁴ <http://www.gov.scot/Publications/2014/04/7017>

25. The Scottish Government also published a consultation paper in May 2015⁵ setting out specific proposals to allow more people who have engaged in previous criminal activity to be able to move away from their past offending behaviour and to reduce the length of time most people will have to disclose their previous criminal activity. The consultation closed on 12 August 2015 and the responses were published on 16 October 2015⁶. The analysis of the consultation responses was published on 22 December of 2015⁷.
26. Separate engagement with Licensing Boards is being progressed in respect of a re-assessment of the conviction information needs in the area of alcohol licensing. The saving provision within this SSI reflects the Scottish Government's intention that only one period of change should take place in this area for Licensing Boards.

Impact Assessments

27. An EQIA and a CRWIA in relation to the Bill for the 2019 Act were completed and published prior to the Bill being introduced into the Scottish Parliament.

Financial Effects

28. The financial effects of this policy are set out under the financial memorandum which accompanied the Bill for the 2019 Act. The Cabinet Secretary for Justice confirmed prior to the 2019 Act being introduced to Parliament that no BRIA was necessary.

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⁵ <http://www.gov.scot/Publications/2015/05/5592>

⁶ <http://www.gov.scot/Publications/2015/10/3324>

⁷ <http://www.gov.scot/Publications/2015/12/1435>

AMENDED DISCLOSURE PERIODS

Disposal	Current 1974 Act	MoO(S) Act 2019 (18 and over)
Custodial sentences		
Over 48 months	Always disclose	Always disclose. However, by regulation, a review will become available for relevant sentences after the length of sentence plus 6 ⁸ years.
48 months	Always disclose	10 years
36 months	Always disclose	9 years
24 months	10 years	6 years
12 months	10 years	3 years
6 months	7 years	2½ years
Non-custodial sentences		
A financial penalty e.g. fine, compensation order	5 years	1 year
Community Payback Order, Drug Testing & Treatment Order and Restriction of Liberty Order	5 years	12 months or length of order, whichever is the longer
Absolute discharge	6 months	Zero
Admonishment	5 years	Zero
Bond of caution	1 year or length of order, whichever is the longer	6 months, or length of order, whichever is the longer
Adjournment/Deferral after conviction	No disclosure as not treated as a sentence under this Act	Until relevant sentence given
Mental Health Orders	5 years or length of order plus 2 years, whichever is the longer	<ul style="list-style-type: none"> • Hospital Direction: not a sentence for the purposes of this Act therefore no disclosure • Guardianship Order: Zero • Assessment/Treatment Order: Length of order • Interim Compulsion Order: Length of order • Compulsion Order: Length of order but can make an application to the Mental Health Tribunal for Scotland for disclosure to end after 12 months • Compulsion Order with Restriction Order: Length of order
Ancillary Orders (e.g. harassment order)	Length of order	Length of order
Any other sentence not mentioned in section 5 or in new provisions inserted into the 1974 Act by the Bill	5 years	1 year
Children's hearing		
Discharge	6 months	Zero

⁸ 3 years if under 18 at date of conviction.

Compulsory supervision order	12 months or length of the order, whichever is the longer	Zero
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Note:

1. For under 18s, the disclosure period is halved for non-custodial sentences, (this is the current approach contained in the 1974 Act and no change to this existing policy has been made in the 2019 Act).
2. In respect of under 18s receiving a custodial sentence, it is only the ‘buffer period’ that is halved for under 18s in order to determine the appropriate disclosure period. That is because the disclosure periods for custodial sentences will be based on the length of sentence plus an additional ‘buffer period’ with the halving policy operating on the buffer period.
3. For example, the disclosure period for a 2 year custodial sentence will be 2 years plus a ‘buffer period’ of 4 years which will give an overall disclosure period of 6 years. If the person was under 18 at the date of conviction then the ‘buffer period’ is halved. Therefore, the disclosure period for a 2 year custodial sentence will be 2 years plus a ‘buffer period’ of 2 years which will give an overall disclosure period of 4 years.

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