

MANAGEMENT OF OFFENDERS (SCOTLAND) ACT 2019

EXPLANATORY NOTES

THE STRUCTURE AND A SUMMARY OF THE ACT

Part 2 – Disclosure of Convictions

Regulation-making and other powers

Section 31 – Powers as to alternatives to prosecution

141. Section 31 of the Bill provides new powers for the Scottish Ministers in relation to alternatives to prosecution (AtPs), under the 1974 Act. The powers are contained in a new section 8C of the 1974 Act which is inserted by section 31(2) of this Bill.
142. Section 8C(1) empowers the Scottish Ministers, by regulations, to modify the list of circumstances in section 8B(1) of the 1974 Act in which a person is given an AtP. Section 8C(2) enables modification of Schedule 3 of the 1974 Act by regulations. The effect of this is to enable the Scottish Ministers to amend, remove or add provision specifying when an AtP will become spent. These powers are subject to affirmative procedure.

Section 32 – How particular powers are exercisable

143. Section 32 amends the 1974 Act by inserting a new section 10A, (“Order-making powers: Scottish Ministers”) into the 1974 Act. The new section 10A is inserted to ensure orders made by the Scottish Ministers under the existing provisions of the 1974 Act (i.e. made by virtue of Ministers’ devolved competence under the Scotland Act 1998) can include different provision for different purposes and can include ancillary provision. In addition, section 10A(2) provides that the Scottish Ministers can make consequential provision modifying enactments in cases where, in exercise of their devolved competence, they exercise the order-making power in section 5(11) of the 1974 Act.

Section 33 – Excluded sentences: applications for convictions to be treated as spent

144. Section 33(1) enables the Scottish Ministers to make regulations for or in connection with the purpose of allowing a person on whom a relevant sentence was imposed to apply to be treated as a protected person in respect of that conviction and for the conviction to be treated as spent. Subsection (6) provides that references to protected persons and convictions being treated as spent are to be construed in accordance with the 1974 Act.
145. Subsection (3) provides a definition of what a “relevant sentence” is. That is,
 - a sentence mentioned in section 5(1)(b) or (da) of the 1974 Act, or

- a sentence imposed by a court outwith Scotland which, by virtue of section 5(2F) (d) of the 1974 Act, falls to be treated as such a sentence.

146. Subsection (4) provides the regulations must contain provision on certain matters including: that applications are to be made to a specified reviewer; that the application is to be determined by the specified reviewer; and that those subject to sex offender notification requirements cannot make an application. Under subsection (4), regulations must contain provision that an application cannot be made until the expiry of the “appropriate period”. Subsection (5)(a) defines the appropriate period as, 6 years plus the length of sentence for convictions obtained when aged 18 or older and 3 years plus the length of sentence for convictions obtained when under the age of 18 on date of conviction. Regulations made under subsection (1) must also contain provision setting, or for ascertaining, the “relevant date”. As defined by subsection (5)(b), the “relevant date” is the date from which the applicant’s conviction is to be treated as spent and on which the applicant is to be treated as a protected person in respect of that conviction.

Section 34 – Regulations under section 33: general details

147. Section 34 sets out further details on regulations made under section 33(1).
148. Section 34(1) sets out an indicative, and non-exhaustive, list of the matters which the regulations may contain provision on.
149. Subsection (2) provides that the regulations can contain provision relating to the operation of higher level disclosure in the area of when a conviction becomes a protected conviction following that conviction becoming spent by virtue of a determination by the specified reviewer.
150. Subsection (3) provides that references to “the specified reviewer” in sections 33 and 34 means whoever is specified in the regulations made under section 33.

Section 35 – Regulations under section 33: appropriate period

151. Section 35 provides an enabling power for the Scottish Ministers to modify aspects of the definition of “appropriate period” in section 33(5)(a). The power conferred by section 35 enables the Scottish Ministers to adjust either the age when different buffer periods apply or the length of buffer periods or both. The “buffer periods” refer to the number of years added to the length of the sentence for the purposes of determining the appropriate period in section 33(5)(a).

Section 36 – Regulations under sections 33 and 35: procedure etc.

152. Section 36(1) provides that regulations made under section 33 can modify any enactment (including the 1974 Act) and can make different provision for different purposes. Section 36(2) provides that regulations made under section 33 and section 35 are subject to affirmative procedure.