

# MANAGEMENT OF OFFENDERS (SCOTLAND) ACT 2019

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## EXPLANATORY NOTES

### THE STRUCTURE AND A SUMMARY OF THE ACT

#### Part 2 – Disclosure of Convictions

##### Rules relating to disclosure

##### *Section 17 - Effect of expiry of disclosure periods*

64. Section 17 of the Bill amends section 1 of the Rehabilitation of Offenders Act 1974, (“the 1974 Act”), by substituting subsection (1) with new subsections (1), (1A), (1B) and (1C).
65. New section 1(1) provides that new subsections 1(1A) and 1(1B) will apply where:
  - an individual has at any time been convicted of any offence, and
  - an excluded sentence was not imposed on the individual in respect of the conviction.
66. ‘At any time’ in new section 1(1)(a) retains the effect of the opening words of the current section 1(1) which refers to an individual having been convicted of an offence “whether before or after the commencement of this Act”. New section 1(1)(b) refers to an ‘excluded sentence’ rather than a ‘sentence excluded from rehabilitation’ in accordance with the changes made to the terminology used in the 1974 Act by the Bill. An “excluded sentence” is one that is never treated as spent for the purposes of the 1974 Act. Other changes made to the terminology used in the 1974 Act are also reflected, with references now being to ‘disclosure period’ and ‘protected person’ as opposed to ‘rehabilitation period’ and ‘rehabilitated person’.
67. The application of new section 1(1A) and (1B) changes the effect of receiving an excluded sentence. This is to ensure it will only be ‘excluded sentences’ that can never become spent (subject to the rules under the 1974 Act). This means that any conviction other than an ‘excluded sentence’ can become spent even if a subsequent conviction results in an excluded sentence being given during the disclosure period for a previous conviction. The 1974 Act currently provides that any subsequent conviction resulting in an excluded sentence, during a period in which a person was still required to disclose earlier convictions would mean that neither the earlier nor later conviction could become spent.
68. New section 1(1A) provides that, after the disclosure period applicable to a conviction has expired, the convicted person shall be treated as a protected person and their conviction is to be treated as spent. Section 6(4) of the 1974 Act sets out the rules for when one conviction can extend the disclosure period of another. Section 1(1A) makes clear that the reference to the expiry of a disclosure period includes any period extended under section 6(4).

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69. New section 1(1B) ensures that, where a person's conviction would have been spent prior to commencement of the 1974 Act, they are not a protected person and the conviction is not spent, until commencement of the 1974 Act. This is to retain the effect of existing section 1(1).
70. New section 1(1C) provides that the new subsections (1) to (1B) are subject to subsections (2), (5) and (6) in the same way subsection 1(1) is currently subject to these subsections.

***Section 18 - Sentences excluded from becoming spent***

71. Section 18 of the Bill amends section 5(1) of the 1974 Act, which sets out sentences that are 'excluded sentences' for the purposes of the 1974 Act. An excluded sentence, as noted, is one which cannot become spent under the 1974 Act, and so is excluded from the protections of the 1974 Act.
72. Section 18 amends section 5(1) of the 1974 Act to change when certain custodial sentences become excluded sentences, from a period of 30 months to a period of 48 months. This means that convictions attracting a sentence of up to and including a period of 48 months will now be capable of becoming spent.
73. Section 18 also contains provision to remove references in section 5(1) to repealed disposals, such as under the Criminal Procedure (Scotland) Act 1975; to update the references in section 5(1) to reflect current disposals available to the courts under the Criminal Procedure (Scotland) Act 1995; and repeal references to disposals which are not available to Scottish courts. However, no changes are made to disposals specified under the Armed Forces Act 2006.

***Section 19 - Disclosure periods for particular sentences***

74. Section 19 further amends section 5 of the 1974 Act.
75. New section 5(2A) relates to the disclosure periods for the sentences set out in new Table A and signals that the columns of Table A provide different disclosure periods for those below the age of 18 at the date of their conviction and those 18 or over at the date of their conviction. Currently section 5(2) of the 1974 Act provides that those under the age of 18 at the date of their conviction have to disclose their conviction for half the period that applies to a person who was 18 or over. Although this age distinction is retained in Table A, some of the disclosure periods set out in the table for under 18's are not a simple 50% reduction of the period applicable to persons aged 18 or above. The distinction between under 18s and persons that age or over also applies to the sentences in Table B, by virtue of new subsection (2C).
76. New subsection (2B) restates the current rule that the disclosure period for a sentence starts from the date of the conviction for which the sentence was imposed.
77. New subsections (2D) and (2E) are included to prescribe a disclosure period for certain court orders. These are orders which are not mentioned in subsections (1) to (2C) of section 5, including Table A or Table B, or in sections 5C to 5J (as inserted by sections 22 to 29 of the Bill). They are imposed by a court as part of its dealing with a person for their conviction and they impose a disqualification, prohibition, requirement or restriction or, in some other way, regulate the person's behaviour. This broadly captures orders currently provided for under section 5(8) of the 1974 Act.
78. However, new subsections (2D) and (2E) will also include orders now available to the courts in Scotland which were not available when the 1974 Act was commenced. They will include those which are preventative in character as well as those which are penal. For example, this could include non-harassment orders imposed under section 234A of the Criminal Procedure (Scotland) Act 1995. The disclosure period for such orders which is set out in the new section (2E) begins on the date of conviction and ends when the order ceases to have effect. If the order is imposed indefinitely, then section (2E)

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- (a)(ii) will apply with the effect that it is disclosed until revocation or until the person is deceased.
79. In the case of any other order the disclosure period will be two years from the date of conviction with this disclosure period being set out in the proposed new subsection (2E) (b) of the 1974 Act. This will therefore apply in a scenario where it is not possible to determine the point at which the conditions of the order no longer require to be complied with.
80. New subsection (2F) replaces the current sections 5(9)(b), (5)(9)(c) and 5(9)(d) of the 1974 Act.
81. New subsection (2F)(a) and (b) replaces section 5(9)(b) and explains when consecutive or concurrent sentences are to be treated as a single term. This is not intended to change the effect of existing section 5(9)(b); rather it is to clarify the rules in relation to when a sentence can be treated as a single term.
82. Consecutive terms of imprisonment or detention as provided for in new section 5(2F) (a) can be treated as a single term whether they are imposed in the same or in different proceedings. Terms of imprisonment or detention which are wholly or partly concurrent can only be single termed if they are in respect of offences for which a person was convicted in the same proceedings.
83. The effect of sentences being treated as a single term is that the accumulation of sentences which are not, individually, excluded sentences, can mean that taken together, they would amount to an excluded sentence. For example, if a person was sentenced on four different occasions to a custodial sentence which exceeded 12 months, each one to run consecutively to the last, this could be treated as a single term and would result in a custodial sentence which exceeded 48 months, which would be an excluded sentence.
84. New section 5(2F)(d) retains the 'closest equivalent rule'. However this rule is amended by this Bill and now provides that a sentence imposed by a court outside Scotland shall be treated as a sentence mentioned in the relevant provision to which it most closely corresponds. This is because as a result of changes made to the 1974 Act there is no longer a single text for all sections of the 1974 Act which applies to the whole of Great Britain. Instead, in some places there are two sets of texts, one of which is the law in Scotland and the other, the law in England and Wales. It is therefore necessary to make provision for convictions not just from outwith Great Britain, but for convictions from England and Wales too.
85. New section 5(2G) recognises that whilst there are disposals which are no longer available to the courts, (for example because they were statutory disposals and have since been repealed), there may be people to whom these disposals have been given, prior to their repeal. To ensure that they still qualify for the protections of the 1974 Act, new section 5(2G) provides that any disposals which have been superseded by a newer disposal specified in an enactment will be covered by the rule that applies to the newer disposal.
86. Section 19(3) of the Bill amends the power contained in current section 5(11) of the 1974 Act. This power enables the Secretary of State, (and by virtue of the operation of the Scotland Act 1998, the Scottish Ministers in relation to devolved matters), to amend the periods set out in current section 5 of the 1974 Act and the age mentioned in subsection (2A)(a) of the 1974 Act. The amendments made to section 5(11) do not modify the power or what it can be used for; however, they are necessary as a consequence of the structural changes made to the 1974 Act which mean that the periods which can be amended using this power are no longer confined to section 5.
87. Section 19(4) inserts a new section 5(12) into the 1974 Act which includes definitions. It states that Table A means the table in section 5A, Table B means the table in section 5B and it defines what a custodial sentence and sentence of imprisonment means for the purposes of the section 5 of the 1974 Act as amended.

***Section 20 - Table A – disclosure periods: ordinary cases***

88. Section 20 amends the 1974 Act so as to insert a new section 5A, containing Table A into the 1974 Act.
89. This new Table A sets out the revised disclosure periods and sentence bands for custodial sentences, fines and compensation orders. It maintains the current disclosure period for an endorsement for a road traffic offence, which is currently captured by the last entry in existing table A. It also sets out a revised ‘default’ disclosure period of 12 months (6 months for persons under 18 at date of conviction) for any sentence not mentioned in Table A, Table B, section 5(2D) or any sections 5C to 5J.
90. New Table A provides a disclosure period for those who are under 18 at the date of their conviction. This is done by halving the “buffer period” attached to the length of the custodial sentence rather than halving the rehabilitation period under the current 1974 Act. This approach is necessary because of the way disclosure periods for custodial sentences will be calculated under a reformed 1974 Act. That is the length of sentence plus a buffer period rather than a set disclosure period associated with a sentence band.

***Section 21 - Table B – disclosure periods: service sentences***

91. Section 21 inserts a new section 5B after section 5A. Section 5B adds a new Table B to replace the current Table B in section 5 of the 1974 Act.
92. This new table deals only with disposals given to an individual as a result of a service disciplinary offence. It does not amend the disclosure period for these disposals. The only change is that now, rather than being separated across Table A and Table B, all are located in Table B. .

***Section 22- Disclosure period: caution for good behaviour***

93. Section 22(2) inserts a new section 5C after section 5B. New section 5C provides a disclosure period for a person who is ordered to find caution for good behaviour, (sentence provided for under section 227 of the 1995 Act). A “bond of caution” is a sum of money lodged with the court by the person who has been convicted, as security of their being of “good behaviour” for a certain stated period, (“the caution period”). If the individual is of good behaviour for the specified period, the money is returned and the sentence has been served. The person is required to disclose their conviction for a period of 6 months from the date of conviction (three months if under 18) or, if longer, the length of the caution period.
94. The current disclosure period for such an order, no matter what the age of a person, is one year or the length of the order, whichever is the longer.

***Section 23 - Disclosure period: particular court orders***

95. Section 23(1) provides for amendments to the 1974 Act
96. Section 23(2) inserts a new section 5D after section 5C. Section 5D sets out the new disclosure periods for a community payback order, a drug treatment and testing order and a Restriction of Liberty Order.
97. Currently section 5 of the 1974 Act does not make any specific reference to these three community orders. Therefore, the disclosure period for these disposals is the current default period in existing Table A of 5 years or 2½ years if the person was under 18 at date of conviction.
98. New section 5D(1) of the 1974 Act sets out the disclosure period for these 3 disposals and section 5D(2) describes what these orders are. Section 5D(1)(a) sets the disclosure period for a person 18 years or older at date of conviction, that being one year from date of conviction or, if longer, a period beginning with date of conviction and ending

when the order ceases to have effect. Section 5(1)(b) sets the disclosure period where the person was under 18 at the date of conviction.

99. Section 5D(3) sets out what is meant by ‘when the order ceases to have effect’. For community payback orders (CPO)s this a reference to when the requirement imposed by the order ceases or ceased to have effect or otherwise requires or required to be complied with. This is because CPOs may include elements, such as a compensation requirement, which has to be complied with within a set time frame, however may be complied with prior to expiry of this timeframe.
100. For drug treatment and testing orders and for restriction of liberty orders, this is when the requirement that is imposed by the order ceases (or ceased) to have effect.

#### ***Section 24 - Disclosure period: adjournment or deferral***

101. Section 24(1) provides for further amendments to be made to the 1974 Act.
102. Section 24(2) inserts a new section 5E after section 5D. Section 5E provides that adjournments and deferrals are to be treated as a sentence for the purposes of the 1974 Act. The disclosure period is set out by section 5E(2) of the 1974 Act and is a period beginning with the date of conviction and ending on the date a ‘relevant sentence’ in respect of the conviction is imposed on the person.
103. Section 5E(3) of the 1974 Act defines a ‘relevant sentence’ as any sentence which is not an adjournment or a deferral. This means that once a person is given the ‘relevant sentence’ for being convicted of the offence the disclosure period will be determined by that sentence, (e.g a fine or CPO), and will run from the date of conviction for that disposal. For the purposes of disclosure under the Police Act 1997, this provision means that a person’s conviction will be disclosed, even if sentence is deferred or the case is adjourned, from the date of conviction.

#### ***Section 25 - Disclosure period: mental health orders***

104. Section 25 inserts new section 5F into the 1974 Act which makes provision for the disclosure period applicable to certain mental health disposals. This section does not deal with compulsion orders if they are made alone, without a restriction order, as they are provided for elsewhere.
105. Currently, section 5(7) of the 1974 Act makes provision for a scenario where, in respect of a conviction, a hospital order under Part 3 of the Mental Health Act 1983 or Part 6 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), was made. The Mental Health Act 1983 does not extend to Scotland. Further, hospital orders have been replaced by compulsion orders. Accordingly, the 1974 Act requires to be updated in order to reflect the current law in relation to mental health disposals.
106. Section 5F(1), read with section 5F(2), sets out the relevant disclosure period when a restriction order is made in addition to a compulsion order under section 59 of the 1995 Act. Section 5F(3), read with section 5F(4), sets out the relevant disclosure period when a restriction order is made in addition to a compulsion order under section 57 of the 1995 Act. In either case, the restriction order must be disclosed from the date of conviction until such time as it ceases or ceased to have effect, at which point, the related compulsion order will fall to be treated under the provisions governing disclosure of relevant compulsion orders. As the compulsion order will become a ‘relevant compulsion order’ at the point at which the restriction order is revoked, the person subject to the order will be entitled to apply to the Mental Health Tribunal for a determination of their disclosure obligations in respect of a CO once a period of 12 months has elapsed from revocation of the restriction order.
107. Sections 5F(5), (6) and (7) deal with disclosure periods applicable to an assessment order, a treatment order and an interim compulsion order, each imposed under separate provisions of the 1995 Act.

108. The disclosure period for these orders is set out in section 5F(5) and states it will be a period beginning with the date of the conviction and ending on the date a ‘relevant sentence’ in respect of the conviction is imposed on the person. Section 5F(6) describes what these orders are and section 5F(7) defines ‘relevant sentence’ as any sentence other than an assessment order, a treatment order and an interim compulsion order (or, where applicable, a further such order). In effect, these orders are to be treated in the same way as adjournments and deferrals.

### ***Section 26 - Disclosure period: compulsion orders***

109. Section 26(2) inserts a new section 5G after section 5F of the 1974 Act. This new section provides that convictions for which compulsion orders are given are to be disclosed from the date of conviction until the order ceases or ceased to have effect. However, this disclosure period will be subject to a new process which will allow an application to be made to the Mental Health Tribunal for Scotland by a patient or the patient’s named or listed person in order to ask for the disclosure of that conviction to end. (See sections 138 and 257A of the Mental Health (Care and Treatment) (Scotland) Act 2003, (“the 2003 Act”) for meanings of named and listed persons).
110. In order for this application process to take place, amendments to the 2003 Act are also necessary. New section 5G(2) states that section 5G(1), (i.e. the default disclosure period for a compulsion order as the length of the order), will be subject to new sections 164A and 167A of the 2003 Act.
111. Section 5G(3) states that if the Tribunal determines, as a result of receiving an application, that disclosure of the conviction which resulted in the compulsion order is no longer necessary then the person will be treated for the purposes of the 1974 Act as a ‘protected person’ and the conviction will be treated as spent.
112. Section 5G(4) ensures the rule in section 6(2) of the 1974 Act which enables a sentence with a longer disclosure period to extend the disclosure period of another sentence, applies to such a compulsion order, even if a determination has been made by the Tribunal.
113. Section 26 also amends the 2003 Act.
114. Section 26(4) inserts new section 164A after section 164 of the 2003 Act. It is this new section that allows a patient, the patient’s named or listed person to apply to the Mental Health Tribunal Scotland for the disclosure of the conviction which resulted in a compulsion order to come to an end. Section 164A(2) and (3) states who is able to apply to the Tribunal.
115. When a compulsion order with a restriction order is given, an application cannot be made to the Tribunal whilst the restriction order remains in force. Once the restriction order is revoked, section 198 of the 2003 Act says that Part 9 of that Act shall apply to the patient as if the compulsion order were a relevant compulsion order made on the day on which the order revoking the restriction order has effect in accordance with section 196 of the 2003 Act. This means the person will be eligible to apply to the Tribunal once a period of 12 months has passed from revocation of the restriction order.
116. Section 164A(4) of the 2003 Act sets out the time frame for when an application can be made to the Tribunal for a determination on the issue of disclosure. That is, an application cannot be made to the Tribunal until at least 12 months have passed after the date the relevant compulsion order was made.
117. Section 164A(5) sets out the time period for making a further application to the Tribunal if a previous application was not successful. That is, when an application has been refused by the Tribunal, a new application can be made after a period of 12 months has elapsed from the date the application was refused. Section 164A(6) confers a power on the Scottish Ministers to prescribe, by regulations, documents which accompany any application made. This power is subject to negative procedure.



118. Section 26(5) inserts new sections 167A and 167B after section 167 of the 2003 Act. Section 167A sets out the test the Tribunal must apply when determining whether the disclosure period for a compulsion order should be brought to an end. It also sets out who can make representations to the Tribunal during the application process. The Tribunal must consider whether, without the provision of medical treatment to the person who is subject to the compulsion order, there would be a significant risk to the safety of other persons. This applies one element of the test that the Tribunal currently requires to consider when reviewing a person's compulsion order under section 139 of the 2003 Act.
119. New section 167B of the 2003 Act provides that the Scottish Ministers may require the Tribunal to provide information to them regarding whether a determination or a refusal has been given in respect of an identified person. This information will indicate whether the conviction continues to require to be disclosed. The reference is to the Scottish Ministers but the function will be undertaken by Disclosure Scotland, which is an executive agency of the Scottish Government, whose statutory functions relate to disclosure of criminal convictions.
120. Sharing this information is necessary only where a request is received by the Tribunal from Disclosure Scotland. Such a request will be made when an enquiry is made by Disclosure Scotland to the Tribunal as a result of receiving a basic disclosure application by the patient or their named person. The Tribunal must respond to Disclosure Scotland within 15 working days of receiving the request.

#### ***Section 27 – Disclosure period: juvenile offenders***

121. Section 27 inserts a new section 5H into the 1974 Act in relation to the disclosure period for orders under section 61 of the Children and Young Persons (Scotland) Act 1937. New section 5H provides a disclosure period of one year for such an order. The purpose of this is to maintain the protections for such orders under the 1974 Act.

#### ***Section 28 – Disclosure period: service discipline***

122. Section 28 inserts a new section 5I into the 1974 Act after section 5H to move certain service disciplinary disposals in the current 1974 Act to a new location.
123. Section 5I(1), (2) and (3) restate the current service disciplinary orders and associated disclosure periods for these disposals currently set out in sections 5(4A), 5(5)(g) and 5(6A) respectively. No changes to the disposals or the disclosure periods are being made by the amendment.

#### ***Section 29 - Sentences to which no disclosure period applies***

124. Section 29 inserts a new section 5J into the 1974 Act after section 5I, listing the disposals for which there is no disclosure period applicable. Section 5J(1) sets out the types of disposals where no disclosure period will apply under an amended 1974 Act.
125. Section 5J(2) makes it clear that the disclosure periods for these disposals should be read as if the period of time is nil. These will all become spent immediately on imposition.

#### ***Section 30 - Disclosure periods applicable to convictions***

126. Section 30 of the Bill amends section 6 of the 1974 Act. Section 6 of the 1974 Act makes provision for ascertaining the disclosure period applicable to a conviction.
127. Section 30(2) substitutes the words “section 5” in each of section 6(1) and section 6(2) with “sections 5 to 5I” to reflect the structural changes being made to the 1974 Act.
128. If one sentence is imposed in respect of a conviction, the disclosure period is as set out in the relevant sections of the 1974 Act, as amended by the Bill. Section 6(2) means that if more than one sentence is imposed in respect of a conviction (for example, a fine and a

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custodial sentence), and the two sentences have a different disclosure period attributable to them, the conviction requires to be disclosed in accordance with the longer or longest of these periods.

129. Section 30(3) repeals the current section 6(3) but provision for conditional discharges will continue to be made by section 30(4) of the Bill, which inserts new subsections (3ZA) to (3ZD) into section 6 of the 1974 Act.
130. Although a conditional discharge is not a disposal under Scots Law, the absence of a specific Scottish equivalent means that the reference is retained to ensure that the amendments do not create a gap in the regime for people in Scotland who have received this disposal elsewhere in Great Britain. These new provisions replicate the existing rule in section 6(3) but extend it to apply to specific Scottish disposals. The disposals to which it applies are set out in section 6(3ZC) and are an order for conditional discharge (a non-Scottish disposal), a CPO, a drug treatment and testing order and a restriction of liberty order.
131. The applicable rule is set out in new section 6(3ZA) and (3ZB) of the 1974 Act. This applies if a person is given one of the orders listed in section 6(3ZC) for an offence (“offence A”) and the person breaches the order and, as a result of this breach, the person is sentenced for offence A after the disclosure period for the order has ended. The person is not to be treated as a protected person, and the conviction is not spent, until the disclosure period for that second sentence has expired.
132. To use the example of a CPO, in some circumstances where there has been a breach of the order, the court may revoke the order and deal with the person in respect of offence A as if the order had not been imposed. In this case, the disclosure period for the conviction resulting in the CPO would end at the point of revocation. However, the effect of new section 6(3ZB) is that the person will not be treated as a ‘protected person’ in respect of the conviction until the expiry of the disclosure period applicable to how the person is dealt with by the court as a result of breaching the CPO and the conviction will not be treated as spent until that period has expired.
133. Section 6(3ZD) of the 1974 Act gives the Scottish Ministers the power by regulations, subject to the affirmative procedure, to modify the list of orders set out under section 6(3ZC).
134. Section 30(5) of this Bill substitutes the current rule under section 6(4) of the 1974 Act. The rule applies where a person is convicted of one offence and during the disclosure period for that offence, is convicted of a further offence. Without this rule the disclosure period for the two convictions would end on different dates. However, under this rule, the disclosure period applicable to both convictions will end at the same time, in accordance with whichever period is the longer or longest.
135. For example, if conviction A has a disclosure period which would end 6 months prior to the disclosure period for conviction B, conviction A’s disclosure period will be extended to end at the same time as conviction B’s. However, this is subject to exceptions.
136. The first exception, inserted by section 30(6) of the Bill, which inserts new 6(4A)-6(4C), applies where, in respect of the first conviction, the court adjourns the case or defers sentence, and during the disclosure period for the period of adjournment or deferral, the person is convicted of a second offence. In this case if, when sentencing the person for the first offence, the court imposes a sentence which has no disclosure period, section 6(4) does not apply to extend the disclosure period of the first conviction to accord with the second conviction. In other words, the first conviction will be able to become spent on imposition of the sentence, irrespective of the sentence imposed for the second conviction.
137. Section 30(7) of this Bill substitutes the current rule under section 6(5) of the 1974 Act with an updated rule set out in new section 6(5) to (5B), maintaining a further exception



to the rule in section 6(4). Section 30(7) updates this rule in section 6(5) to take account of the orders which will be provided for in new section 5(2D) and (2E) of the 1974 Act, inserted by section 19 of the Bill. It provides that where the disclosure period applicable to a conviction is as a result of an order being imposed under new section 5(2D) of the 1974 Act, this will not extend the disclosure period of another conviction.

138. Under new section 6(5), if the only sentence for a conviction is a sentence mentioned in new section 5(2D), the disclosure period for another conviction is never extended to match the disclosure period for that sentence. For example, if a non-harassment order with a disclosure period of 5 years (but no other sentence) is imposed for conviction 1, the disclosure period for a fine with a disclosure period of (say) 12 months for conviction 2 is not extended to match the five-year period.
139. However if, in addition to the non-harassment order for conviction 1, a custodial sentence with a disclosure period in excess of 12 months were imposed, this would extend the disclosure period for conviction 2 (although the disclosure period for the non-harassment order would effectively be ignored in determining the length of the extension). This is the effect of new subsections (5A) and (5B) of section 6.
140. Section 30(8) of the Bill amends the 1974 Act to update the legislative reference as it relates to Scotland. The effect is to leave paragraph (a) of section 6(6) in place and replace paragraph (b) with a reference to Scottish courts of summary jurisdiction. The reason for this is that the current references in section 6(6)(b) are outdated. The effect of this is that the rule in section 6(4) of the 1974 Act is subject to a further exception, which is that a conviction from a Scottish court in summary proceedings is not capable of extending the disclosure period of another conviction.

## **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.

## **Transitional, schedule and definition**

### ***Section 37 – Transitional provision***

153. Section 37 of the Bill contains transitional provisions. Amendments made to the 1974 Act by Part 2 of the Bill which refer in any way to a sentence apply to sentences imposed in respect of a conviction before the date on which the amending provision

comes into force. Similarly, any amendment referring to a conviction applies in relation to a conviction before the date on which the amending provision comes into force. Both also apply in respect of a conviction on or after that date. This means that the changes to disclosure periods will apply in relation to convictions and sentences before and after the commencement of Part 2 of the Bill, and to convictions on the date of commencement.

154. Section 37(3) means that section 37(2) will also apply to a provision referring to a court's convicting of a person as it applies to a conviction.
155. Section 37(4) of the Bill says that the 1974 Act applies as if the amendments mentioned in section 37(1) and (2) had always had effect. However, this has to be read subject to section 37(5) to (9) of the Bill. This means that if, by virtue of section 37(4), a person would have been a protected person before the commencement of the relevant provisions of the Bill, and if their conviction would have been spent before such date, they are not in fact to be treated as a protected person, and their conviction is not to be treated as spent, until the date that the relevant amending provision comes into force. These provisions prevent the amendments made by Part 2 of the Bill from having retrospective application.

### ***Section 38 – Remainder of amendments***

156. Section 38 introduces schedule 2 which makes minor and consequential amendments to the 1974 Act.

### ***Section 39 – Meaning of the 1974 Act***

157. Section 39 makes it clear that any references to “the 1974 Act” in Part 2 of the Bill means the Rehabilitation of Offenders Act 1974.