

POLICY NOTE

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSIONS AND EXCEPTIONS) (SCOTLAND) AMENDMENT ORDER 2016

SSI 2016/XXX

1. The above instrument will be made in exercise of the powers conferred by sections 4(4), 7(4) and 10(1) of the Rehabilitation of Offenders Act 1974 (c.53) (“the 1974 Act”). The instrument is subject to the affirmative procedure. For the purposes of this note, the instrument will be called “the 2016 amendment Order”.

Policy objectives

2. The purpose of the 2016 amendment Order is to amend the offence lists in Schedules A1 and B1 to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, (“the 2013 Order”), as inserted by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2015, (“the 2015 Order”). These amendments are necessary because of changes being made to the offence lists in Schedules 8A and 8B of the Police Act 1997, as inserted by the Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015, (“the first remedial Order”). The reason why the 2016 amendment Order is necessary is to ensure there is consistency between the offence lists associated with self-disclosure, (Schedules A1 and B1), and the offence lists associated with state disclosure by Disclosure Scotland, (Schedules 8A and 8B).

3. Therefore, the 2016 amendment Order should be considered alongside the changes being made by the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No 2.) Order 2015 (“the second remedial Order”). Further to this, the reasons why the offence lists in the 2013 Order are being amended are the same as those set out in the policy note for the second remedial Order.

General background

4. A conviction may become spent if a certain length of time has elapsed since the date of conviction, with different periods of time applying to different disposals as laid down in the 1974 Act. For example, a court imposed fine results in a conviction becoming spent after five years.

5. Once a conviction is spent, the 1974 Act provides that an individual is not normally required to disclose the conviction and cannot be prejudiced by its existence. The purpose of this approach is to appropriately allow an individual to move away from their past criminal activity so that they can contribute effectively to society while also ensuring that people with a legitimate interest, such as employers, are able to understand an individual’s background.

6. It is section 4 (Effect of Rehabilitation) of the 1974 Act, that embodies the main principle of the Act for convictions in terms of what it means to be a 'rehabilitated person'. Broadly speaking therefore, those protections in the 1974 Act permit individuals not to disclose spent convictions when asked to do so, (e.g. by a prospective employer), prevent others from asking about those spent convictions and prohibit reliance on spent convictions in certain legal proceedings or to prejudice an individual in an employment context. However,

there are certain exceptions and exclusions to this general approach when the interests of public safety are paramount.

7. 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. Scottish Ministers made the 2013 Order in exercise of those powers.

8. Prior to its amendment in 2015, articles 3 and 4 of the 2013 Order specified types of proceedings and circumstances which are excluded from protection under section 4(1) and (2) of the 1974 Act and where details of all spent convictions therefore required to be self-disclosed. For example, a person when applying for licences under the Private Security Industry Act 2001 was required to reveal all spent convictions.

9. There were also some categories of professions, offices, employments and occupations which were wholly excepted from the protections set out in section 4(3)(b) of the 1974 Act. Spent conviction information or failure to disclose such information was therefore a proper ground for dismissing or excluding a person from such employment.

10. The 2013 Order was amended by the 2015 Order to remove the legal requirement for all spent convictions to be self-disclosed by an individual when asked for any of the purposes specified in the 2013 Order. This was to ensure only appropriate spent convictions are required to be self-disclosed by an individual for those purposes. In other words, the amendments made by the 2015 Order restricted the requirement for self-disclosure. The current effect of the 2013 Order, as amended, can be described as follows.

Article 3 of the 2013 Order

11. Article 3 of the 2013 Order states that the application of section 4(1) of the Act is entirely excluded in relation to a number of the types of proceedings specified in Schedule 1 to the Order. What this means is that a person may be asked about any or all spent convictions, and that information can be taken into account, in those proceedings.

12. For certain other forms of proceedings specified in article 3 (including, to a certain extent, those listed in Part 1 of Schedule 2) the application of section 4(1) is excluded only in relation to convictions which are not protected convictions. That means that a person may be asked in those proceedings about any spent convictions which are not protected convictions, but not about protected convictions.

Article 4 of the 2013 Order

13. Article 4 of the 2013 Order states that section 4(2)(a) and (b) of the Act is excluded in relation to questions put in the circumstances set out in Schedule 3.

14. The circumstances in Schedule 3 include the assessment of a person's suitability for a profession, office, employment or occupation set out in Schedule 4, or to hold a licence, certificate or permit set out in paragraph 3(3) of Schedule 3. Provision is made in Schedule 3

for other special circumstances that arise in the context of child minding, adoption and fostering, national security, financial services and the National Lottery Commission.

15. The exclusion applies only in respect of spent convictions for offences listed in Schedule A1 to the 2103 Order or to convictions for offences which are not protected convictions and which are included in a higher level disclosure sent in connection with the purpose for which the question is put. This means that where questions are asked of a person in the circumstances set out in Schedule 3, the person must disclose any spent convictions they may have which fall into either of these categories. Any conviction not falling into these categories, (i.e. a protected conviction or a conviction for an offence listed in Schedule B1 which is not protected and does not appear on a higher level disclosure), need not be disclosed.

16. Certain questions are not covered by these special rules about protected convictions, (e.g. questions asked to assess suitability to hold a firearms certificate or for the purposes of national security), meaning that all spent convictions must be disclosed, whether protected or otherwise.

Article 5 of the 2013 Order

17. Article 5 of the 2013 Order states that the professions, offices, employments and occupations set out in Schedule 4 are excepted from the protections in section 4(3)(b) of the Act. It also states that action taken to safeguard national security and decisions taken by persons specified in Part 1 of Schedule 2 to do anything specified in that Part are also excepted from those protections.

18. The exception applies only in respect of spent convictions for offences listed in Schedule A1 to the 2103 Order or to convictions for offences which are not protected convictions and which are included in a higher level disclosure sent in connection with the office, employment, occupation, decision or proposed decision to which the exception would otherwise apply. Any conviction not falling into these categories, (i.e. a protected conviction or a conviction for an offence listed in Schedule B1 which is not protected and does not appear on a higher level disclosure), is not subject to the exception.

19. The effect of this is to remove the general prohibition in section 4 of the Act against using the existence of, or the failure to disclose, certain spent convictions as a ground for dismissing or excluding a person or for prejudicing them in any way in any occupation or employment specified in the 2013 Order.

20. Certain occupations, actions, etc. are not covered by these special rules about protected convictions, (e.g. action taken for the purpose of safeguarding national security or work as a registered firearms dealer), meaning that all spent convictions may be considered when making decisions in those contexts.

Protected convictions

21. It will be noted that the new rules centre on the concept of a “protected conviction”. The 2015 Order introduced this concept through new article 2A of the 2013 Order. That provides that a spent conviction is a conviction for an offence not listed in new Schedules A1, (such convictions must always be disclosed in the circumstances set out in the 2013 Order),

or B1 or a conviction for an offence listed in Schedule B1 in respect of which one of a number of specified conditions (set out in article 2A(2) or (3)) has been met. The amendments being made by this instrument relate primarily to those lists of offences in Schedules A1 and B1.

22. These changes to the system of self-disclosure of spent convictions were made to address the issues raised by the UK Supreme Court's judgment in (R(T) v the Secretary of State for the Home Department [2014] UKSC 35).

Changes being made to the offence lists

23. In developing the offence lists contained in Schedules A1 and B1 to the 2013 Order and the equivalent Schedules introduced by the first remedial Order, a rationale was developed to underpin the allocation of offences to each Schedule. This rationale took account of the attributes required for roles requiring higher level disclosure and identified offences that:

- Resulted in serious harm to a person;
- Represented a significant breach of trust and/or responsibility;
- Demonstrated exploitative or coercive behaviour;
- Demonstrated dishonesty against an individual;
- Abused a position of trust; or,
- Displayed a degree of recklessness that resulted in harm or a substantial risk of harm.

24. It was considered offences with these characteristics demonstrate evidence that a person's conduct has caused harm to an individual and/or is evidence of misconduct in a position of authority. Each of the criteria was considered in allocating offences to the lists of offences to be disclosed always, (Schedule A1 to the 2013 Order), or to be disclosed subject to rules, (Schedule B1 to the 2013 Order).

25. As part of the quality assurance work undertaken during the 60 day post-making consultation period the rationale was re-visited to consider whether it remained appropriate in light of the experience of allocating offences to Schedules.

26. The rationale was re-affirmed as continuing to be appropriate and was then re-applied to all offences on the lists of offences contained in the two Schedules. This led to a limited number of proposed changes to add and relocate some offences in both Schedules A1 and B1 to reflect equivalent changes being made by the second remedial Order. The proposed amendments following this further consideration are set out in **annex A** below.

AMENDMENTS TO THE LIST OF OFFENCES

SCHEDULE A1

Amendment

Reference to section 22 of the Anti-social Behaviour, Crime and Policing Act 2014 to be amended to section 122.

Offences added

Assault to danger of life.

Medical Act 1983 section 49A (penalty for pretending to hold a licence to practice).

Pharmacy Order 2010 article 38 (offences related to the register).

Medicines Act 1968 section 78 (restrictions on use of titles, descriptions and emblems).

Counter-Terrorism Act (2008) section 31 (offences aggravated by terrorism).

Aiding, abetting, counselling, procuring or inciting murder.

Attempting or conspiring to commit murder.

Common law aggravators – child and sexual.

Offences moved from Schedule B1 (rules) to Schedule A1 (always)

An offence under section 83 of the Adults with Incapacity (Scotland) Act 2000 (offence of ill-treatment and wilful neglect).

An offence under the Firearms Act 1968

- Firearms Act 1968 section 4 (conversion of weapons)
- Firearms Act 1968 section 5 (weapons subject to a general prohibition)
- Firearms Act 1968 section 19 (carrying firearms in a public place)
- Firearms Act 1968 section 20 (trespass with firearm)
- Firearms Act 1968 section 21 (possession of firearm by persons previously convicted of crime)
- Firearms Act 1968 section 24 (supplying firearms to minors)
- Firearms Act 1968 section 25 (supplying firearm to person drunk or insane)
- Firearms Act 1968 section 28A(7) (certificates: supplementary)
- Firearms Act 1968 section 29 (variation of firearm certificates)
- Firearms Act 1968 section 30D(3) (failure to surrender certificate)
- Firearms Act 1968 section 39 (registration offences)
- Firearms Act 1968 section 40 (compulsory register of transactions in firearms)

- Firearms Act 1968 section 46(5) (intentionally obstruct officer)
- Firearms Act 1968 section 47 (powers of constables to stop and search)
- Firearms Act 1968 section 48 (production of certificates)

Medicines Act 1968 section 67(1A) & (1B) (offences under part III).

An offence under the Official Secrets Act 1911

Criminal Law (Consolidation) (Scotland) Act 1995 section 7 (procuring).

Criminal Law (Consolidation) (Scotland) Act 1995 section 11 (trading in prostitution and brothel – keeping).

Criminal Law (Consolidation) (Scotland) Act 1995 section 12 (allowing child to be in brothel).

Road Traffic Act 1988 section 1 (causing death by dangerous driving)

Road Traffic Act 1988 section 3ZC (causing death by driving: disqualified drivers).

Road Traffic Act 1988 section 3A (causing death by careless driving when under influence of drink or drugs).

Terrorism Act 2000 section 12 (support)

Terrorism Act 2000 section 19 (disclosure of information: duty)

Terrorism Act 2000 section 21A (failure to disclose: regulated sector)

Terrorism Act 2000 section 21D (tipping off: regulated sector)

Terrorism Act 2000 section 38B (information about acts of terrorism).

Terrorism Act 2000 section 39 (disclosure of information, &c).

Counter-Terrorism Act 2008 section 2 (offence of obstruction).

Counter Terrorism Act 2008 paragraph 30A of Schedule 7 offences: relevant person circumventing requirements).

paragraph 31 of that schedule (offences in connection with licences).

SCHEDULE B1

Offences added

Robbery (common law)

Crime and Disorder Act 1998 section 96 (offences racially aggravated).

Criminal Justice (Scotland) Act 2003 section 74 (offences aggravated by religious prejudice).

Customs and Excise Management Act 1979 in relation to goods prohibited to be imported or exported under section 3(1) of the Misuse of Drugs Act 1971 (restriction of importation and exportation of controlled drugs);

- a) section 50(2) (penalty for improper importation of goods);
 - b) section 68(2) (offences in relation to exportation of prohibited or restricted goods);
- and

Common law aggravators – religious and racial.

Offences moved from Schedule A1 (always) to Schedule B1 (rules)

An offence under section 6 of the Child Abduction Act 1984 (offence in Scotland of parent, etc. taking or sending child out of UK).

Offences deleted

Medicines Act 1968 section 45 (offences under Part II) but only in relation to section 7(2) (general provisions as to dealing with medical products).

Civic Government (Scotland) Act 1982 paragraph 19(3) of Schedule 2 (enforcement).

**Criminal Justice Division
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