

Business and Regulatory Impact Assessment

**The Police Act 1997 (Offences in Schedules 8A
and 8B) Amendment (Scotland) Regulations
2022**

**The Rehabilitation of Offenders Act 1974
(Exclusions and Exceptions) (Scotland)
Amendment (No. 2) Order 2022**

October 2022

Final Business and Regulatory Impact Assessment

Title of Proposal

The Police Act 1997 (Offences in Schedules 8A and 8B) Amendment (Scotland) Regulations 2022

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment (No. 2) Order 2022

Purpose and intended effect

- **Background**

The Police Act 1997 (Offences in Schedules 8A and 8B) Amendment (Scotland) Regulations 2022 (“the 2022 Regulations”) amend schedules 8A and 8B of the Police Act 1997 (“the 1997 Act”) which affect higher level disclosures (standard and enhanced disclosures under the 1997 Act; and scheme record disclosure under the Protection of Vulnerable Groups (Scotland) Act 2007) (“the 2007 Act”) issued by Disclosure Scotland on behalf of the Scottish Ministers.

Connected and similar amendments to the statutory framework in relation to self-disclosure are made by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment (No. 2) Order 2022 (“the 2022 Amendment Order”), which was also laid in draft on 24 October 2022. This Order amends schedules A1 and B1 of the Rehabilitation of Offenders Act (Exclusions and Exceptions) (Scotland) Order 2013 (“the 2013 Order”) and will ensure that the rules on self-disclosure and state disclosure of convictions are aligned.

If an offence is not listed in either schedule A1 or B1 of the 2013 Order, a spent conviction for such an offence need not be self-disclosed by an individual seeking an excepted profession, office, employment or occupation. The 2022 Amendment Order makes various amendments to the offence lists in schedules A1 and B1 of the 2013 Order to add offences, move offences between the lists and to remove some offences from schedule B1.

The Disclosure (Scotland) Act 2020 (“the 2020 Act”) will replace many of the provisions of the 1997 Act, including schedules 8A and 8B which contain the offence lists relevant to higher level disclosures. Full commencement of the 2020 Act is expected to take place in late 2023 / early 2024. In advance of this, the 2022 Regulations are amending schedules 8A and 8B of the 1997 Act in order to ensure the offence lists are appropriate and up to date, and to reduce any safeguarding risks that might arise in the interim period. As consistency between the state and self-disclosure must be maintained, the 2022 Amendment Order is amending the 2013 Order concurrently with the amendments to the offence lists in the 1997 Act.

There is a single policy behind the two instruments so a combined BRIA has been completed.

The disclosure regime in Scotland

The disclosure system in Scotland comprises two broadly aligned parts: self and state disclosure. The Rehabilitation of Offenders Act 1974 (“the 1974 Act”) and the 2013 Order regulate self-disclosure: the obligation placed on an individual to admit to previous convictions if asked by a prospective employer. Self-disclosure by the individual is verified by disclosures provided by the state. Disclosure Scotland, an executive agency of the Scottish Ministers, carries out functions on behalf of the Scottish Ministers under the 1997 Act and the 2007 Act in relation to the system for state disclosure of an individual’s previous criminal history.

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 set out in section 5 of the 1974 Act. Once a conviction is spent, an individual becomes a “protected person”. The 1974 Act provides that such a person is not normally required to disclose their spent conviction and that they generally 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.

Section 4 of the 1974 Act sets out the effect of becoming a protected person. Broadly speaking, section 4 permits such persons not to disclose spent convictions when asked to do so (e.g. by a prospective employer), prevents others from asking about those spent convictions and prohibits reliance on spent convictions in certain legal proceedings or to prejudice an individuals in an employment context.

There are some categories of employment and proceedings to which the rules in the 1974 Act do not apply as it is considered appropriate that disclosure of spent conviction information continues to be available. This is because the employment positions and proceedings involve a high degree of sensitivity or there is an expectation of integrity or for the purposes of public protection. These positions and proceedings can subject to higher level disclosures.

- **Objective**

The 2022 Regulations and the 2022 Amendment Order work together to ensure that offence lists in schedules A1 and B1 of the 2013 Order and the offence lists in schedules 8A and 8B of the 1997 Act are aligned.

The aim of the policy is to make changes to these offence lists ahead of substantive commencement of the 2020 Act in late 2023/early 2024 to:

- replicate the offence lists (List A and List B respectively) in the 2020 Act
- bring forward amendments that were not able to be lodged at stage 3 of the Disclosure (Scotland) Bill due to the COVID pandemic
- include new offences created since the 2020 Act completed Parliamentary passage
- add new offences following a general ongoing review of the offence lists in the 1997 Act

The rationale that informed the offence lists in the 2020 Act and which informs the changes now being made was based upon the rationale from September 2015 that was used when the offence lists were added to the 2013 Order and the 1997 Act for the first time.

As set out in the policy note to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No.2) Order 2015¹, in developing the offence lists careful consideration was given to the attributes required for roles requiring higher level disclosure. Such roles place the individuals filling them in a position of power and responsibility. Ministers decided that a conviction for a criminal offence 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

was evidence that a person's conduct has caused harm to an individual and/or was evidence of misconduct in a position of authority. This evidence of past behaviour is important information for employers when determining whether an individual is suitable for a role for which higher level disclosure is applicable. The protection of vulnerable groups and the need to prevent fraudulent activity (in roles where a higher level disclosure would be appropriate) must be balanced against any presumption that spent convictions ought not to be disclosed.

- **Rationale for Government intervention**

¹ [The Police Act 1997 and the Protection of Vulnerable Groups \(Scotland\) Act 2007 Remedial \(No. 2\) Order 2015](#)

Options

The alternative to bringing forward these statutory instruments would be to do nothing. There are a number of offences that do not appear on schedules A1 and B1 of the 2013 Order and schedules 8A and 8B of the 1997 Act but are included in the equivalent lists in the 2020 Act. This means that in the period before the 2020 Act is fully commenced that these convictions cannot be disclosed after they become spent. Doing nothing presents an unacceptable level of risk to vulnerable groups, undermines the integrity of the higher level disclosure regime and is contrary to the spirit of the exceptions provided for in the 1974 Act.

Sectors and groups affected

With this option, organisations who rely upon the higher level disclosure regime (such as regulated work employers) would be denied access to information about relevant spent convictions. Scottish Ministers (or Disclosure Scotland on their behalf) could not rely upon these convictions to determine if an individual should be considered for inclusion in either of the PVG barred lists. Children and protected adults across Scotland are therefore exposed to an unacceptable level of risk.

Benefits

By bringing forward these instruments, Scottish Ministers have ensured the offence lists are appropriate and up to date, and reduced any safeguarding risks that might arise in the interim period.

Costs

None.

Scottish Firms Impact Test

There has not been any consultation with businesses. Due to the narrow scope of the legislation, we were unable to identify any specific businesses which would be detrimentally impacted.

Competition Assessment

These proposals do not impact on competition.

Consumer Assessment

These proposals do not impact on goods and services including essential services such as gas, water and electricity.

A Data Protection Impact Assessment has been produced for these proposals.

Test run of business forms

These proposals do require any new forms to be introduced.

Digital Impact Test

These proposals take account of Disclosure Scotland’s strategic vision set out in its Business Plan DS25 which will see a move towards increased online services.

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Legal Aid Impact Test

These proposals are amending the existing offences lists in the 1997 Act which form the basis on which applications can be made to a sheriff to have spent convictions removed from higher level disclosures. In the seven years since the reforms came into effect, there have been a small number of applications for legal aid. We do not expect these proposals to create additional demand for legal aid.

Enforcement, sanctions and monitoring

Disclosure Scotland and Scottish Government staff are involved when an individual initiates and takes forward the right to apply to a sheriff to have a spent conviction removed from a higher level disclosure.

Implementation and delivery plan

Subject to Parliament’s approval of the legislation, Disclosure Scotland will implement the changes in full with effect from 19 December 2022.

- **Post-implementation review**

The changes will remain in place until such time as the 2020 Act comes into force in late 2023/early 2024, at which point the 1997 Act will be repealed. There is no plan to review the changes in the intervening period.

Summary and recommendation

Which option is being recommended and why? Refer to analysis of the costs and benefits in reaching the decision. Summarise, using the table below, the information gathered for each option.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social
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		- policy and administrative
1 – Bring forward the SSIs described above	There are two benefits: (i) safeguarding, supported by the use of Disclosure Scotland checks, is improved; (ii) more proportionality is introduced into the higher level disclosure system in Scotland	There may be some modest admin costs to the Scottish Government, the Scottish Courts and Tribunal Service if the changes to the offence lists lead to additional applications being made to a sheriff. We do not expect any impact on the Scottish Legal Aid budget. On the other hand, the removal of some offences from the offence lists could cause a reduction in the number of applications to the sheriff.
2 – Do nothing	There are no benefits.	There is no change in the current admin costs to the Scottish Government or other public sector organisations.

Declaration and publication

The Cabinet Secretary or Minister responsible for the policy (or the Chief Executive of non-departmental public bodies and other agencies if appropriate) is required to sign off all BRIAs prior to publication. Use appropriate text from choices below:

• Sign-off for Final BRIAs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Clare Haughey MSP

Date: 20 October 2022

Minister's name CLARE HAUGHEY

Minister's title MINISTER FOR CHILDREN AND YOUNG PEOPLE

Scottish Government Contact point: Kevin Lee or James Laing