

Partial Business and Regulatory Impact Assessment

Title of Proposal

The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015

Purpose and intended effect

- **Background**

In June 2014, the UK Supreme Court (UKSC) issued a decision which stated that the disclosure by the Disclosure and Barring Service in England and Wales of convictions on standard or enhanced disclosures under the Police Act 1997 as it applied in England and Wales that are considered spent under the Rehabilitation of Offenders Act 1974, violated Article 8 of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”). Article 8 grants a right to respect for private and family life. The UKSC accepted that when a conviction becomes spent it should usually become part of a person’s private life and that the system of automatic disclosure of all such convictions in higher level disclosures in England and Wales was in breach of Article 8.

The wider implications of this decision about the disclosure of all criminal convictions in higher level disclosures have been carefully considered as to their relevance for the Scottish system. In Scotland higher level disclosures means standard and enhanced disclosures issued under the Police Act 1997 (“the 1997 Act”) as well as Protecting Vulnerable Groups (PVG) scheme records under the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”). Since the 2014 UKSC decision the Scottish Government has identified a policy and operational approach to deliver an amended disclosure system for Scotland. This takes account of both the duty placed on the individual to self-disclose convictions and the duty on Scottish Ministers (acting through Disclosure Scotland) to disclose convictions under the 1997 and 2007 Acts.

In relation to the requirements on self-disclosure, we have amended the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (“the 2013 Order”) using an affirmative order under the Rehabilitation of Offenders Act 1974.

In relation to the requirements on the Scottish Ministers, we have amended the 1997 Act for standard and enhanced disclosures and the 2007 Act for ‘PVG scheme record’ disclosures. Scottish Ministers have decided that these amendments to the 1997 and 2007 Acts should be made by a remedial order using the urgent procedure under section 14 of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”).

- **Objective**

This remedial order amends certain provisions of the 1997 and 2007 Acts (as well as making consequential changes to the Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010 as Ministers consider that the provisions of the 1997 and 2007 Acts may be incompatible with the ECHR following the UKSC decision.

- **Rationale for Government intervention**

The Scottish Government undertook a review of the current disclosure regime. It concluded that the 1997 and 2007 Acts should be amended. The amended regime will strike a balance between the interests of public protection and the rights of individuals with a criminal record to respect for their private life.

Consultation

- **Within Government**

Scottish Government officials liaised with the Access to Justice Team, Scottish Legal Aid Board (SLAB) and the Scottish Courts and Tribunals Service. There have also been discussions with Criminal Justice Division and Youth Justice and Children's Hearings Unit as this may impact in their policy area. Scottish Government officials also liaised with the Disclosure and Barring Service in England and Wales and Access Northern Ireland.

- **Public & Business Consultation**

No informal public or business consultation has taken place. A formal period (set out in the 2001 Act) for written observations on the remedial order will run from 10 September 2015 for 60 days. Notification about it will be sent to key stakeholders.

Options

Option 1 – Do Nothing

Doing nothing could risk the possibility of individuals with a criminal record challenging the Scottish Ministers on the basis that their rights under Article 8 have been breached as a result of the disclosure of all their spent convictions.

Option 2 – Introduce the amended legislation

This involves amendment of the current Rehabilitation of Offenders legislation and the 1997 and 2007 Acts by means of two separate Scottish statutory instruments - a draft affirmative order made under the Rehabilitation of Offenders Act 1974 and a remedial order under the 2001 Act.

By means of these two orders the system of higher level disclosures would be amended so that not all spent convictions would require to be disclosed either by individuals themselves when applying for jobs or by Scottish Ministers when issuing disclosures. Certain spent convictions will become protected convictions and will no longer require to be disclosed.

Sectors and groups affected

The proposed amendments will impact on those with conviction information applying for higher level disclosures because of the work they want to do, and on those organisations seeking employees in areas of employment which entitle them to request higher level disclosures. For example, people wanting to become members of certain professions (e.g. solicitors, accountants, doctors and various other health professionals), people wanting to become police officers or prison officers, or to work in financial services or to work with vulnerable groups such as in a nursery or a school or a care home. These amendments will result in some cases in less information being disclosed to employers on higher level disclosures. There is likely also to be an impact on the sheriff courts as there is a provision included in the amendments which will allow individuals to make an application to the sheriff in certain circumstances for an order for a new disclosure certificate with conviction information removed from it or for an order requesting the removal of vetting information from a PVG Scheme Record.

Option 1 – Do Nothing

Benefits

No operational changes and no legislation is required. The status quo would simply be maintained.

Costs

There could be costs associated with any claims arising from individuals who challenge Scottish Ministers under Article 8 of ECHR.

Option 2 – Introduce the new legislation

Benefits

The new legislation introduces changes to the system of higher level disclosures in Scotland which ensures that a fair balance is struck between the rights of individuals with a criminal record to respect for their private life and the public interest in ensuring that organisations wishing to employ people in sensitive positions still receive sufficient information about relevant spent convictions to inform their recruitment decisions. This amended system will ensure that individuals will not be required routinely to disclose all spent convictions and not all such convictions will require to be routinely disclosed by Disclosure Scotland when people wish to work in employment positions for which higher level disclosures are available.

Costs

Although the legislation imposes changed duties on individuals in relation to the convictions that they must disclose under the Rehabilitation of Offenders legislation, there are no additional costs which these individuals will incur as a result of these requirements. Equally businesses will not incur any additional costs as a result of the changes. Discussions with the Scottish Courts and Tribunals Service has indicated that the numbers of applications to the sheriff courts which might be anticipated are likely to have a minimal impact on the sheriff courts. There may be some additional cost to the Scottish Legal Aid Board but until more accurate figures on applications to the sheriff are available the actual costs are difficult to determine.

Scottish Firms Impact Test

We have been unable to identify any businesses which would be detrimentally impacted by this piece of legislation.

There will be no cost to business or organisations requiring disclosures. The charging regime for disclosures is only amended in one minor respect to ensure that where a business pays for the disclosure they are not charged any more than they currently are for disclosures. Costs to individuals will not change for the same reason.

Competition Assessment

Using the four Competition and Markets Authority (CMA) competition assessment questions we have concluded that the legislation will neither directly nor indirectly limit the number or range of suppliers to compete or reduce suppliers' incentives to compete vigorously.

Test run of business forms

These regulations do not introduce any new business forms.

Legal Aid Impact Test

These regulations provide a new provision for an application to be made to the sheriff for an order of a new certificate or for the removal of vetting information from a PVG Scheme Record. This could impact on the legal aid budget.

Under the amended system, two lists of offences have been created. One list contains offences considered so serious and/or relevant that they must always be disclosed ("Offences which must always be disclosed"). The second list contains offences that may be relevant with factors in relation to the length of time since conviction, age of offender at date of conviction and sentence received determining whether disclosure should take place ("Offences which are to be disclosed subject to rules").

It is impossible to determine in advance the number of people who will make use of this procedure for removal of spent convictions for offences; however, it will be available only for the "Offences which are to be disclosed subject to rules" list. Applicants will not be able to use the procedure in relation to any unspent conviction information or any of the spent conviction information disclosed from the "Offences which must always be disclosed" list.

Based on the evidence we have, we would anticipate a figure of around 50 such applications to the sheriff per year. The available data do not suggest that the figure would be higher than this. We will be able to monitor closely the figures for applications to the sheriff once the provisions are implemented as the applicant will have to inform Disclosure Scotland prior to making the application to the sheriff, and therefore we will be able to keep this under review.

We reached the figure of 50 using the evidence we have at hand in relation to appeals and dispute figures. In 2014-15 23% of all disclosure applications were higher level disclosures. In the same year there were 220 disputes. Therefore, proportionately, approximately 50 of them would have related to higher level certificates (23% of 220). There have been around 18 MACCs cases to Ministers regarding relevancy of certain conviction information on a disclosure since 2009. The Disclosure and Barring Service's regime in England and Wales has been subject to 3 judicial reviews since implementation in 2014.

The Scottish Legal Aid Board has stated that the basis for the estimated number of appeals per year (around 50) is reasonable. They have used an average case cost of £560 and assuming a legal aid eligibility rate of 75%-100%, this would suggest an increase in expenditure from the Legal Aid Fund of around £21,000 to £28,000 per year.

Enforcement, sanctions and monitoring

There will be no enforcement, sanctions or monitoring requirements on those seeking higher level disclosures.

Implementation and delivery plan

This remedial order will come into force on 10 September 2015

- **Post-implementation review**

There will be a 60 day period once the remedial order is laid for organisations and individuals to submit written representations to the Scottish Ministers on it. The Scottish Ministers will make a statement to Parliament responding to any observations received and whether or not further changes to the remedial order will be made.

Disclosure Scotland will monitor continuously the numbers of applications to a sheriff for removal of conviction information from disclosures.

Summary and recommendation

Option 1 – Do Nothing

There are no benefits from doing nothing. There could be costs associated with any claims arising from individuals who challenged Scottish Ministers under Article 8 of ECHR.

Option 2 – Introduce the regulations

Introducing this legislation will provide a fairer disclosure regime whilst ensuring safeguarding is paramount. There are no costs to individuals or businesses using Disclosure services. There may be some cost to the legal aid budget.

BRIA specific questions will be asked in our public consultation, the responses from which should enable us to complete this section and the BRIA fully afterwards.

Recommendation**Option 2 is recommended.**

This will provide a fairer disclosure regime whilst ensuring safeguarding is paramount.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Angela Constance

Date: 9 September 2015

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