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Report of the Education and Skills Committee on Subordinate Legislation Considered on 24 January 2018



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Education and Skills Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Education and Skills.



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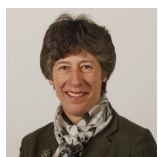
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Introduction

1. At its meeting on the 24 January 2018 the Committee considered the following instruments—
 - [The Police Act 1997 and the Protection of Vulnerable Groups \(Scotland\) Act 2007 Remedial Order 2018 \[draft\]](#); and
 - [The Rehabilitation of Offenders Act 1974 \(Exclusions and Exceptions\)\(Scotland\) Amendment Order 2018 \[draft\]](#).
2. At this stage of the process, both instruments were subject to the affirmative procedure. The Minister for Childcare and Early Years, Maree Todd MSP, attended the meeting to give evidence on the instruments and also to move the relevant motions recommending approval of the instruments. ¹

The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 [draft]

3. This order was made by Scottish Ministers under powers in the Convention Rights (Compliance) (Scotland) Act 2001 ("the 2001 Act").
4. A remedial order is required after a judicial review (*P v. Scottish Ministers* [2017] CSOH 33) found that, in some circumstances, the automatic disclosure of spent convictions breached European Convention on Human Rights, Article 8 (protection of private life). The Scottish Parliament has until 17 February 2018 to amend the legislation.²
5. When a person applies for certain types of employment, such as working with children, information about previous criminal convictions will be disclosed to their prospective employers.
6. Until 2015, spent convictionsⁱ were automatically disclosed if someone wanted to work or volunteer in certain roles, such as working with children or vulnerable adults. Following a Supreme Court case in relation to the equivalent English legislation, *R(T) v Secretary of State for the Home Department* [2014] UKSC 35 ('T'), the Scottish legislation was amended in 2015 and 2016 so that only spent convictions for serious offences were automatically disclosed. Less serious spent convictions either were not disclosed or only disclosed subject to additional rules.
7. This remedial order seeks to further restrict the disclosure of spent convictions. In broad terms, it will allow a sheriff to decide whether or not a conviction on a list of serious offences should be disclosed. A person will have to apply for this decision to be made. For people aged 18 or over at the time of the conviction, this review process applies if the conviction is more than 15 years old. If they were under 18 at the time, they can ask the sheriff to review if the conviction is 7½ years old.

Remedial Order process

8. Remedial orders can follow two processes: the general procedure under section 13 of the 2001 Act or the urgent procedure under section 14. In this case, the Scottish Government used the general procedure.
9. Under the general procedure, the Scottish Ministers begin by laying a proposed draft of the remedial order before the Scottish Parliament for 60 days, together with a statement of their reasons for proposing to make it. The Scottish Ministers must also consult on the draft order during that period.

ⁱ Under the Rehabilitation of Offenders Act 1974, some criminal convictions can be treated as 'spent' after a certain length of time. The length of time depends on the offence and the sentence.

10. At the end of the 60 days, the Scottish Ministers are required to have regard to any written observations submitted by the Parliament or by the wider public within the consultation period.
11. Following that consideration, the Scottish Ministers must then lay a finalised draft remedial order before the Parliament subject to the usual affirmative procedure. This must be accompanied by a statement summarising all the comments received and specifying any changes made to the proposed draft order as it was originally laid.
12. The Scottish Government laid a 'proposed draft order' of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 on 11 September 2017 for consideration by the Scottish Parliament.

Consideration of the Proposed Draft Order

13. The Delegated Powers and Law Reform Committee ("DPLRC") sought views on the Proposed Draft Order in Autumn 2017 and received two responses from the Scottish Independent Advocacy Alliance³ and the Faculty of Advocates⁴.
14. DPLRC took evidence from Scottish Government and Disclosure on the proposed draft order on 31 October 2017.⁵ DPLRC wrote to the Scottish Government on 21 November 2017 with its views on the Proposed Draft Order.⁶

Consideration of the Draft Order

15. Following the consultation on the proposed draft order, the Scottish Government laid the the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 [draft] on 15 December 2017.
16. DPLRC considered the instrument on 16 January 2018 and raised no points in relation to it.⁷
17. The Education and Skills Committee took evidence on the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 [draft] on 24 January 2018 from the Minister for Childcare and Early Years, Maree Todd MSP, and officials from the Scottish Government and Disclosure Scotland.¹ The Committee raised a number of points in relation to both this instrument and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2018 [draft]. The Minister agreed to follow up on these matters with the Committee in writing. A copy of the Minister's letter of 1 February 2018 in relation to these instruments can be found in the [Annexe to this report](#).
18. Following the evidence session, Maree Todd MSP, Minister for Childcare and Early Years, moved—
 - S5M-9985— That the Education and Skills Committee recommends the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 [draft] be approved.

The Committee agreed to the motion.

19. The Education and Skills Committee recommends that Parliament approve the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 [draft].

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2018 [draft]

20. The Scottish Government laid the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2018 [draft] in the Scottish Parliament on 15 December 2017.

21. The accompanying Policy Note explains how this order is connected to the remedial order discussed above. The Policy Note stated—

” These amendments are necessary because of changes being made [by the remedial order]. The reason why the 2018 amendment Order is necessary is to ensure there is consistency between the system of self-disclosure under the Rehabilitation of Offenders Act 1974 and state disclosure by Disclosure Scotland under the 1997 and 2007 Acts

Source: Scottish Government, 2017⁸

22. DPLRC considered the instrument on 16 January 2018 and raised no points in relation to it.⁷

23. On 24 January 2018, the Education and Skills Committee took evidence on the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2018 [draft] from the Minister for Childcare and Early Years, Maree Todd MSP.¹

24. As noted above, the Minister subsequently wrote to the Committee and her letter is reproduced in the [Annexe to this report](#).

25. Following the evidence session, Maree Todd MSP, Minister for Childcare and Early Years, moved—

- S5M-9984—That the Education and Skills Committee recommends that the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2018 [draft] be approved.

The Committee agreed to the motion.

26. The Education and Skills Committee recommends that Parliament approve the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2018 [draft].

ANNEXE - Letter from Maree Todd MSP, Minister for Childcare and Early Years, 1 February 2018

EDUCATION AND SKILLS COMMITTEE MEETING 24 JANUARY 2018

**Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007
Remedial Order 2018 [Draft]**

**Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland)
Amendment Order 2018 [Draft]**

During the evidence session on the above draft Orders considered by the Committee last Wednesday, I agreed to write to you to clarify a number of points.

As you are aware the draft Orders are a response to the recent case *P v Scottish Ministers*. We believe that the approach set out in the draft Orders balances safeguarding and the rights of the individual. The previous reforms in 2015 ensured that the blanket disclosure of all spent conviction information on higher level disclosures ended. The reforms in the draft Orders further nuance this approach, while still maintaining a balance between public protection and the rights of individuals to a private life.

[Annex A](#) provides you with some background on our future plans with regard to the disclosure of childhood offending - encompassing rehabilitation of offenders legislation, the review of the PVG Scheme, and the age of criminal responsibility Bill, all of which are intrinsically linked. It shows this Government's commitment to reforming the current rehabilitation periods and the disclosure system in Scotland.

[Annex B](#) explains the rationale behind the non-implementation of sections 187 and 188 of the Children's Hearings (Scotland) Act 2011.

Please get in touch with my office if you feel that the Committee needs further information.

I hope that this letter is helpful.

MAREE TODD

Annex A

DISCLOSURE PROVISIONS FOR CHILDREN'S OFFENCES

BACKGROUND CONTEXT AND LEGISLATIVE CHANGE

Law and policy in this area seek to balance the rights of people who have previous convictions, after a sufficient period has elapsed, to have their past offences become part of their private life; with the essential requirement that employers and safeguarding organisations have access to the necessary information to keep people safe.

The process to change the age of criminal responsibility (ACR) in Scotland from 8 to 12 years has crystallised these issues in respect of children and young people. Several

parallel policy developments and judicial processes have had an impact, or will shortly do so.

Looking across those efforts, we consider it important to introduce a clear, orderly reform journey in this Parliamentary term. We plan to deliver sound policy responses both to safeguarding issues and to concerns over individual rights to rehabilitation and reintegration, especially for young people or for people whose offending dates back to their childhood.

Related work already in train or due to deliver this Parliamentary Session

A number of live strands impact as follows:

A: The two draft Orders considered by last week's Committee. The draft Orders represent the Government's response to the recent Judicial Review in the Court of Session (*P v Scottish Ministers*), of the 2015 Remedial Orderⁱⁱ, itself responding to the 2014 UKSC ruling that the blanket disclosure of all criminal convictions on higher level disclosures (under the law of England) had the potential to interfere with article 8 rights. These draft Orders introduce a right to apply to the Sheriff for removal from higher level disclosures of spent convictions for offences listed in the Always Disclose List (introduced by the 2015 Remedial Order) that would previously have been subject to lifelong disclosure.

The 2015 Remedial Order listed offences (the Rules List) spent convictions for which will only be disclosed subject to rules, setting this at 15 years disclosure for adults, but only 7½ years for the same convictions for those under the age of 18. Once that period has elapsed, the convictions become protected convictions and are no longer subject to disclosure. In addition where a non-punishment disposal (an absolute discharge, admonishment, and discharge from a children's hearing) is given for an offence in the Rules List, the conviction becomes a protected conviction as soon as it is spent.

Minor convictions for offences not listed in either the Always Disclose List or the Rules List will not be disclosed once spent.

B: The Management of Offenders Bill will reform the Rehabilitation of Offenders Act 1974.

These reforms were announced in the Programme for Government in September 2017 with a Bill due to be brought forward in this Parliamentary year. The exact detail of the Bill will be known when it is introduced, but it will be based on previously announced Scottish Government proposals to reduce the length of disclosure needed under the basic system of disclosure for a wide variety of different sentences. Changes will in addition be made to severely restrict the need for disclosure by young people who have received a disposal from children's hearings with the full details being available shortly.

C: Work to increase the Age of Criminal Responsibility to 12.

These reforms were announced in the Programme for Government in September 2017 with a Bill due to be brought forward in this Parliamentary year. The exact detail of the Bill will be known when it is introduced, but it will be based on the Advisory Group Report on the minimum age of criminal responsibility.

D: The PVG Review.

ii The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (SSI 2015 No. 423)

As part of the PVG Review, the findings of the 2016 Advisory Group on minimum age of criminal responsibility that a more nuanced approach - one that recognises the differences of culpability between a younger child of 12 and a near-adult aged 17½ - will be considered. It will also review the current Always Disclose and Rules Lists, the rules applied to the offence lists, and the process for applications to a Sheriff for removal of spent conviction information. The terms of reference for the review can be found [here](#). A formal consultation on any proposed changes to the current disclosure system is expected to take place later this year.

Taken together, these activities represent a steady progression of reform across the Parliamentary term that will seek to engage the Parliament, the public, and key professional concerns, at all stages.

Annex B

THE CHILDREN'S HEARINGS (SCOTLAND) ACT 2011

Repeal of sections 187 and 188 of the Children's Hearings (Scotland) Act 2011

The disclosure provisions in sections 187 and 188 of (and schedule 6 of) the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") have not yet been commenced. We have now passed the point where there is any real value in bringing these provisions into force.

The Children's Hearings (Scotland) Act 2011 – sections 187 and 188

These provisions would:

(a) change the way that children's hearings disposals resulting from offending behaviour were defined. These would no longer have been categorised as "convictions" and instead would have been called "alternatives to prosecution", and

(b) provide the Scottish Ministers with the power to make an order (the Police Act 1997 Order) specifying offences which would always have been disclosable for the purpose of the disclosure system. It was intended that the offences to be included in the Police Act Order would comprise serious violent and serious sexual offences.

However, in the course of implementation of the 2011 Act a difficulty related to a legislative competence issue meant that the enabling powers which were required to fully implement these sections were outside the legislative competence of the Scottish Parliament. This meant that these sections could not be implemented alongside the rest of the 2011 Act in June 2013 until this legislative competence issue was resolved.

This legislative competence issue was resolved at Westminster in the Criminal Justice and Courts Act 2015. In oral evidence we said that a section 104 order under the Scotland Act 1998 was used, this was incorrect, and we would like the Committee to note this point. The 2015 Remedial Order then put in place the changes to the disclosure system and it was not considered appropriate for the disclosure provisions in the 2011 Act to be implemented until the impact of the 2015 Remedial Order could be assessed.

Reasons for not commencing 2011 Act sections 187 and 188

The changes to the disclosure regime introduced by the 2015 Remedial Order (and the related Rehabilitation of Offenders Act Exclusions and Exceptions Order) provide for:

- i) a list of offences which are always disclosable (the Always Disclose List),
- ii) a list of offences which are disclosable subject to rules (the Rules List), and
- iii) that all other offences to be disclosable only while they are ‘unspent’.

The 2015 Remedial Order applies to all convictions, including those resulting from a children’s hearing. Section 188 of the 2011 Act would have allowed Ministers to provide that children’s hearings disposals in respect of a list of offences would have always been disclosable and that children’s hearings disposals in respect of all other offences would have been disclosable only while they are unspent. So unlike the 2015 Remedial Order, the 2011 Act would not have allowed Ministers to specify offences which would have been disclosable subject to rules.

Since the development of the 2011 Act provisions, case law and policy has moved on. What is required is a more refined approach to the disclosure of convictions, so that, among other things, convictions for different offences are disclosable for different lengths of time. The 2015 Remedial Order implemented a more refined system than would have been possible using the 2011 Act powers. The 2011 Act powers were very blunt – an offence was either disclosable for life or was disclosable for 3 months.

- [1] Education and Skills Committee. (2018). Official Report 24 January 2018. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11329&mode=pdf>
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