



Law Society
of Scotland

Consultation Response

Proposed Draft Police Act 1997 and Protection of
Vulnerable Groups (Scotland) Act 2007 Remedial
Order 2018

22 November 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our criminal law and family committees welcome the opportunity to consider and respond to the Scottish Government consultation: Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007. The sub-committees have the following comments to put forward for consideration.

1. Do you have any views / observations on this Proposed Draft Order?

We welcome the opportunity to respond on this consultation on the Proposed Draft Police Act 1997 (1997 Act) and Protection of Vulnerable Groups (Scotland) Act 2007 (2007 Act) Remedial Order 2018 (2018 Remedial Draft Order).

We note that the consultation is in response to the decision of the judicial review in the case of *P v Scottish Ministers* [2017] CSOH 33 regarding the requirement for criminal convictions to be disclosed. The decision determined that the provisions in the 1997 Act and the 2007 Act Remedial (No.2) Order 2015 breached the petitioner's rights under Article 8 of the European Convention on Human Rights (ECHR) and held that Scottish Ministers had no power to make these provisions in terms of section 57(2) of the Scotland Act 1988.

The court decision was suspended to allow Scottish Ministers to consider how best to remedy the legislation. The 2018 Remedial Draft Order has been put forward as a means resolving the issues. We note that it is also intended to lay a draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order to ensure that the requirements on individuals to self-disclose convictions will align fully with the now amended disclosure provisions of the 1997 Act and the 2007 Act.

We agree with and would support the amendments put forward by the 2018 Proposed Draft Order. These are of course required in order for the legislation to be ECHR compliant. Whether there may be more potential ECHR compliance challenges will be of course a matter for Scottish Ministers. The 2018 Remedial Draft Order will enable individuals who have been convicted of offences which are listed in schedule 8A (offences which must always be disclosed) of the 1997 Act in certain specified circumstances

to have the right to apply to a sheriff in order to seek removal of that conviction information before their disclosure is sent to a third party.

This right is to be provided seven and a half years following the conviction for those under 18 at the time of the offence and 15 years following for those 18 or over at the time of the offence.

There are two opposing interests to consider in relation to any disclosure of convictions. There is a need to strike a balance. That balance lies between the interests of protection of the public where individuals have significant convictions and want to apply for specific roles where disclosure is required and the right of an individual to move on with their life. We address both interests as follows:-

The amendments provide a means for individuals who have been convicted of relevant offences listed under schedule 8A in certain circumstances to apply for the removal of such convictions before the disclosure of a conviction is sent to a third party such as an employer.

Whether to make such an application will be for the individual to decide. The right does not arise automatically where the circumstances are met. Making it proactive for the applicant seems perfectly reasonable as the applicant will be the best placed to be aware that he has a relevant conviction which may be disclosed that might adversely affect his future employment in relation to certain categories of work. There must be information available for applicants on the disclosure form as to their rights to apply for non-disclosure of a relevant conviction so they are aware of the relevant processes.

When considering sentence in relation to the circumstances of a conviction, there is a question whether this is a matter which a sheriff could specifically address, when convicting, as part of the sentencing process. Certainly, one could envisage a situation where a specific and perhaps unusual sentence disposal such as an absolute discharge was merited because of the unique circumstances of the case as the sheriff found proved. Notwithstanding the schedule 8A conviction, it might therefore follow that would be the sort of conviction when an application would be made in relation to the 2018 Remedial Draft Order where its disclosure would in any event not be ordered by a sheriff. There was a suggestion when sentencing offenders within the age group of 16-18, this sort of consideration might apply at the actual time of sentencing. That might on reflection be a complicated scheme to administer and would be seen as a somewhat arbitrary age period.

Providing a mechanism for an application to a sheriff to consider removal of a conviction seems to provide an equitable basis and means of decision making. A sheriff will be best placed to consider the respective merits of the application on the balance of probabilities. We do question if the policy intentions under the 'Summary of the 2018 Proposed Draft Order' have been fully reflected with regard to schedule 8A convictions. That indicates a sheriff would require to consider the nature of the proposed work and the circumstances of the offence before allowing such an application.

Once the 2018 Remedial Draft Order is enacted, it will take time until there is a body of case law on how far a sheriff's discretion will extend when deciding exactly where and in what circumstances disclosure of a schedule 8A offence would still be required. Ensuring clarity as to exactly what factors the sheriff has to consider is essential as there does require to be consistency in approach across the sheriffdoms,

especially where it is noted that the legislation does specify the intended finality of the sheriff's decision. There does not seem to be any review mechanism with regard to any appeal to the sheriff's decision (section 52A (8) of the 2007 Act).

As far as the age of the individual and time limits of the offence are concerned, we wonder if these are being set at the appropriate levels. An individual's early twenties is an important stage in life when applications are being made to university, college and jobs. Seven and a half years may still be significant period of time before any application can actually be made. That could still mean that an applicant may still be restricted from making an application. This is relevant as this is a key stage of his life and may result in restricted opportunities if such offences are still required to be disclosed.

We recognise that in the spirit of the legislation that a balance must be struck where schedule 8A offences will qualify for an application to be made. Where to set that level is for the Scottish Government to decide.

Representing the interests of the public, we do of course have regulatory powers with regard to persons who may apply to become solicitors in terms of the application of the fit and proper person test. (<https://www.lawscot.org.uk/media/1640/fit-and-proper-guidance-july-2016.pdf>). Regard would be had to whether they held any previous convictions in assessing the merits of their application. We therefore identify with the requirements that the presumption for schedule 8A offences to be disclosed unless the conditions as to the time period since conviction are met and the application is successful.

There will be situations where a young person will continue to pose a threat and disclosure will remain appropriate. However, as the proposal is for an application to the sheriff, the sheriff's discretion subject to clarification over the factors which the sheriff can take into account, should adequately address any concern on this point.

Consideration was given as to whether Children's Hearing decisions should be disclosed. Having regard to the offences listed in schedule 8A, a number of these offences listed would most likely be prosecuted only in the sheriff court. However it is noted that the question may be pertinent in relation to an offence which could be the subject of a Children's Hearing such as a breach of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 which could arise in either context.

The position of children will be strengthened under the forthcoming changes under the Criminal Justice (Scotland) Act 2016 where children will be required to have the attendance of a solicitor at the police station, for instance, when being interviewed about an offence. Currently, following the *Cadder* reforms (the right of advice of a lawyer at the police station), children have been obliged to speak to solicitors but not required to take any advice. There is a question whether prior to *Cadder* reforms, where there was no right to the advice of a solicitor, whether that had an impact on the number of convictions which may now become relevant for the purposes of the 2018 Proposed Draft Order.

2. In relation to the partial Equality Impact Assessment, please tell us about any potential impacts, either positive or negative; you feel the amendments to

legislation in this consultation document may have on any particular groups of people?

We have had sight of the partial Equality Impact Assessment. We note that in certain circumstances the employers may receive less information than they did previously. Conversely it may mean that certain individuals could benefit from less information being available on their disclosure certificate and enhance their employability prospects. We do not have any information on the impact on any of the protected groups.

3. In relation to the partial Equality Impact Assessment, please tell us what potential there may be within these amendments to legislation to advance equality of opportunity between different groups and to foster good relations between different groups?

We refer to our answer to Question 2.

4. In relation to the partial Child Rights and Wellbeing Impact Assessment, please tell us about any potential impacts you think there may be on children's wellbeing.

We would refer to our statement under Question 1. We refer to whether the time periods in relation to schedule 8A applications are set out at the appropriate level but we consider that to be a matter for the Scottish Government.

Looking at the broader picture of applicants who may have been affected by conduct when they were vulnerable or a child, this does provide a means of a sheriff reviewing the schedule 8A conviction to ascertain if it should be disclosed. Having a court means to review provides a safeguard and an opportunity to consider the question of proportionality in relation to reintegration and punishment on an individual basis rather than collectively.

5. In relation to the partial Business regulatory Impact Assessment please tell us about any potential impacts you think there may be to particular businesses or organisations?

We have seen the Business and Regulatory Impact Assessment. We agree with the observations that there may well be delays in recruitment as certain applicants may take action to ensure that schedule 8A convictions are not disclosed in certain circumstances. Inevitably such applications take time to be heard

through the court process. There should however, be no restriction as to the right of access to legal advice. Consideration seems already to have been given to the likely effect on the Legal Aid Fund.

What is vital for a proactive scheme, is that the applicants who may be affected are aware of their rights and can obtain access to justice to obtain advice and to exercise their rights.



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