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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

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Delegated Powers and Law Reform Committee
The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015
Draft, 47th Report, 2015 (Session 4)

Committee Membership

Convener
Nigel Don
Scottish National Party

Deputy Convener
John Mason
Scottish National Party

Richard Baker
Scottish Labour

John Scott
Scottish Conservative
and Unionist Party

Stewart Stevenson
Scottish National Party

Note: The membership of the Committee changed during the period covered by this report, as follows:
Richard Baker joined the Committee on 2 September 2015, replacing Margaret McCulloch (Labour, Central Scotland)
Introduction

1. At its meeting on 8 September 2015, the Committee took evidence from the Cabinet Secretary for Education and Lifelong Learning on the following instrument —

   The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 [draft]

2. The Committee’s recommendations are set out below.
Recommendations

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 [draft]

3. The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 (“the draft Order”) makes changes to the current Rehabilitation of Offenders Act 1974 (Exclusion and Exceptions) (Scotland) Order 2013, as amended (“the 2013 Order”). The 2013 Order currently disapplies, in specified circumstances, certain protections in relation to an individual’s spent conviction(s) which are set out in the 1974 Act.

4. The purpose of the draft Order is to adjust the existing rules governing the responsibilities of individuals to self-disclose previous criminal activity in certain situations including when an individual is seeking to work with vulnerable groups. The draft Order also adjusts the existing rules as to when information about an individual’s previous criminal activity can be used against an individual, (e.g. a decision not to employ an individual). Further detail of the existing regime for higher level disclosure, together with an explanation of the changes made by the draft Order, is contained in Annexe A to this report.

5. The draft Order will operate alongside a separate order (the proposed Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (“the remedial Order”) (which has been shared with the Parliament in draft). This will provide for associated changes to the system of disclosure of an individual’s previous criminal activity by Disclosure Scotland. The Scottish Government intends to make this order if the draft Order is approved. The remedial Order will come into force when it is made. The process applying to the remedial Order (under the Convention Rights Compliance (Scotland) Act 2001) allows for retrospective scrutiny and an opportunity for a revised order to be laid to take account of any issues arising out of that retrospective scrutiny.

6. The Parliament has agreed on the recommendation of the Bureau to refer the draft Order directly to the Chamber following scrutiny by the Delegated Powers and Law Reform Committee, under Standing Order (Rule 10.1.3.) as it is an urgent matter (as explained in the policy note to the instrument). The Cabinet Secretary for Education and Lifelong Learning provided evidence on the instrument, to inform the Committee’s consideration.

7. The Committee notes that the approach the Parliament has agreed for consideration of the draft Order does not allow for detailed scrutiny of the draft Order. Although the draft Order was only laid on Monday 7 September consideration of the draft Order will be concluded by Decision Time on Wednesday 9 September.
8. The Committee has sought to undertake effective scrutiny of the draft Order, but given that the draft Order was laid the afternoon of Monday 7 September and the Committee's only opportunity to consider it was the morning of Tuesday 8 September, there has understandably been a limit to the extent of scrutiny that the Committee has been able to apply.

9. This is most unusual approach to the consideration of an order and it is not one the Committee would wish to see becoming common practice.

10. In scrutinising the instrument, the Committee considered whether the proposed new regime for self-disclosure of spent convictions, as read with the proposed new scheme for the disclosure of such convictions by Disclosure Scotland, is capable of operating in a manner which is compatible with Convention rights, in particular with Article 8 (the right to respect for an individual’s private and family life). In doing so, it took account of the views of the United Kingdom Supreme Court (UKSC) in its 2014 judgement regarding the disclosure under the law of England and Wales of information regarding spent convictions (*R (on the application of T and another) (FC) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35). A summary of the tests laid down by the UKSC in that case is included at Annexe B to this report.

11. In the time available to it to consider the draft Order, the Committee has not formed the view that the instrument raises a devolution issue. Nor however can the Committee be confident that no such issue arises. The Committee considers that some of the policy choices which have been made in the draft Order require further investigation with regard to the tests laid down by the UKSC in the *T and another* case. Further, in the evidence gathered to date, Members recognised that within the range of potentially Convention-compatible solutions, distinct policy choices have been made which the relevant lead Committees will wish to explore.

12. The Committee notes that such further scrutiny will take place through the operation of the Parliamentary procedure under the Convention Rights Compliance (Scotland) Act 2001 as it applies to the remedial Order, and the Committee intends to take full part in that process. In particular the Committee will return to the question of the relevance of spent conviction information to the purpose for which it is to be disclosed, and to the question of how the scheme will be capable of striking an appropriate balance in individual cases. Finally the Committee notes that should changes be required to the remedial Order, it is likely that a further affirmative order under the 1974 Act will be laid in the Parliament to incorporate similar changes.

13. While recognising the further opportunity for scrutiny of the draft Order, the Committee notes that should the Parliament approve the draft Order, as of Thursday this will be the law and further consideration by the Committee will be undertaken in that context.
Annexe A

The rehabilitation of offenders regime

1. 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 Rehabilitation of Offenders Act 1974 (“the 1974 Act”). For example a court imposed fine takes five years before the conviction is spent.

2. 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 Scottish Government explains that 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.

3. 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, and these are contained in the 2013 Order.

4. By disapplying those protections in the circumstances specified, the 2013 Order in effect requires self-disclosure of spent convictions as part of the higher level disclosure regime. That disapplication currently applies to all spent convictions, no matter what they were for, when they occurred or what relevance they might have to the circumstances in which disclosure is required.

The state disclosure system

5. Disclosure Scotland operates a disclosure scheme on behalf of the Scottish Ministers. It does so in accordance with provision in sections 113A and 113B of the Police Act 1997, and under the Protection of Vulnerable Groups (Scotland) Act 2007. That scheme mirrors the self-disclosure regime. It therefore currently provides that, where higher-level disclosure is requested (i.e. for appointments in specific areas, for example involving an individual being placed in a position of trust or responsibility), all spent convictions are disclosed on a certificate issued to the prospective employer (or other relevant body which asked the disclosure question).
6. On 18 June 2014 the United Kingdom Supreme Court ("UKSC") made a declaration of incompatibility under section 4 of the Human Rights Act 1998 that the provisions of sections 113A and 113B of the Police Act 1997 (as applicable in England and Wales) were incompatible with article 8 (the right to respect for private and family life) of the European Convention on Human Rights ("the Convention") because the requirements in those sections in relation to blanket disclosure of all spent convictions were not in accordance with the law. In Scotland, similar provisions of the 1997 Act apply to the issue of disclosure certificates.

7. In the court’s view, sections 113A and 113B of the Police Act 1997 (as applicable in England and Wales) failed to meet the requirement of being necessary in a democratic society. Specifically, in the court’s view, they did not contain any safeguards that would enable the proportionality of the interference caused by disclosure to be adequately examined and balanced again the right to private life.

8. In light of the UKSC ruling, the Scottish Government has indicated that it assessed the operation of the 1997 Act in Scotland and concluded that changes should be made to the 1997 Act to ensure that Scottish Ministers do not act in contravention of Convention rights, in particular article 8, following the UKSC ruling. In addition, the Scottish Government concluded that the Protection of Vulnerable Groups (Scotland) Act 2007 (which established the Protecting Vulnerable Groups Scheme – "PVG Scheme") should also be amended to ensure that Scottish Ministers do not act in contravention of article 8 of the Convention. That consideration has led to the Government's intention to bring forward the remedial order later this week.

9. The draft affirmative order makes associated changes to the system of self-disclosure of previous criminal convictions by an individual. That system relates to a mixture of reserved and devolved matters, and as such cannot be amended in the remedial order under the powers in the Convention Rights (Compliance) (Scotland) Act 2001. In order to allow for the rules of disclosure of spent convictions to be applied universally across devolved and reserved matters in Scotland, the UK Parliament transferred competence to the Scottish Ministers to use the executive powers under the 1974 Act for this purpose. Hence the need for an affirmative order. Provision in the affirmative order is informed by consideration of the Article 8 issues set out in the T and another case in the same way as the remedial order is so informed.

Changes made by the amendment order

10. The amendment order changes the scheme for self-disclosure so that, in the specified circumstances set out in the 2013 Order (relating to proceedings and appointments for positions of trust or responsibility), individuals are no longer
required to disclose all spent convictions in every case. Instead a more nuanced or tailored approach is created, which according to the Government is designed to ensure that only offences which are sufficiently serious, recent or relevant are requires to be disclosed by the individual.

Protected convictions

11. The order introduces the concept of protected convictions. In certain specified circumstances, an individual no longer has to self-disclose the existence of a protected conviction. Those circumstances are discussed below, but it is helpful to look at the definition of a protected conviction first.

12. A protected conviction is a spent conviction which is either:

(a) a conviction for an offence not listed in either Schedule A1 or B1 of the order; or
(b) a conviction for an offence which is listed in Schedule B1 but which is ‘filtered out’ because at least one of the following conditions applies:

- the sentence imposed was admonition or absolute discharge, or
- the person was under 18 years of age at the time the offence was committed and at least 7 years 6 months have passed since the date of that conviction, or
- the person was over 18 years at the time the offence was committed and at least 15 years have passed since the date of that conviction.

13. The offences listed in Schedule A1 are serious offences. In the Scottish Government’s view, the serious nature of the person’s criminal conduct in relation to such offences is such that the passage of time will not diminish the relevance of the information to a prospective employer or organisation. As such, they cannot become protected convictions and a person’s responsibility to self-disclose them under the 2013 exclusions order will remain unaffected.

14. The offences listed in Schedule B1 are not minor offences but they are less serious than those in Schedule A1. The Scottish Government’s view in relation to convictions for these offences is that the passage of time means that they are irrelevant to a prospective employer or organisation.

15. The upshot of the above is that, broadly speaking, convictions for minor offences and for offences committed the requisite number of years ago are protected and do not have to be disclosed, save in the circumstances outlined in the order.

Non-protected Schedule B1 convictions

16. There remains a class of spent convictions which do not fall into the ‘must always be disclosed’ category, but which are not protected. These are Schedule B1
convictions in relation to which none of the 3 specified conditions applies. An example would be a conviction for a Schedule B1 offence in respect of which an individual (being 18 or over at the time) was subject to a court fine. That person may apply for a particular position 16 years after the date of conviction. The conviction is not protected. Whether or not the person requires to disclose it is subject in part to the rules set out in the amendment order, and in part to rules to be contained in the remedial order.

17. The draft remedial order provides that where a request for higher level disclosure is made and the certificate contains spent conviction information about a non-protected Schedule B1 offence, the person to whom the conviction applies will have a right to apply to the sheriff for a new certificate in which that information will be excluded from disclosure. Certificates containing such spent conviction information will be sent initially to the individual only. The requirement to send a copy of the certificate to the requester will apply only if the individual has not indicated an intention to Disclosure Scotland to make an application to the sheriff, or once the sheriff’s decision has been made. The individual will have 10 working days in which to notify Disclosure Scotland of an intention to apply to the sheriff.

18. An application to the sheriff must be made within 6 months of notification to Disclosure Scotland of the intention to make such an application. The sheriff may order removal of the conviction information if the sheriff considers that it is not relevant to the purpose for which the disclosure was requested. The sheriff’s decision on an application is final. At the conclusion of the sheriff court proceedings, Disclosure Scotland will implement the ruling and issue a certificate with the appropriate information.

19. The interaction between this new system for state disclosure of non-protected B1 convictions and the system of self-disclosure is further explained below, in relation to the circumstances covered in articles 3, 4 and 5 of the draft amendment order.

Article 3

20. Article 3 of the draft Order amends article 3 of the 2013 exclusion order. Section 4(1) of the 1974 Act provides that evidence about spent convictions is not admissible in any proceedings before a judicial authority and that a person must not be asked in such proceedings about a spent conviction (and if asked may refuse to answer). (Proceedings before a judicial authority include not just ordinary court proceedings but proceedings before any tribunal, body or person having power to determine questions affecting the rights, privileges, obligations or liabilities of any person).

21. Article 3 of the 2013 exclusion order disapplies that protection in relation to specified proceedings (in Schedule 1 and Part 1 of Schedule 2 to that Order). In other words, spent convictions are admissible in these proceedings and must be
disclosed in response to a question put. Examples of those sorts of proceedings include:

- Proceedings for admission to, or disciplinary proceedings against a member of, a profession listed in Part 1 of Schedule 4 (includes health professionals, lawyers, teachers and social workers);
- Proceedings under the Firearms Act 1968;
- Proceedings before the Mental Health Tribunal for Scotland or the Mental Welfare Commission for Scotland;
- Proceedings relating to the regulation of financial services.

22. The amendment order before the Committee today provides that, in relation to a sub-category of those proceedings, there is no longer a requirement to self-disclose protected convictions. The effect is that evidence of such convictions will not be admissible in those proceedings and a person must not be asked (and if asked need not answer) any questions about such convictions in those proceedings.

23. The list of proceedings in relation to which convictions may be protected is set out in the Annex to the Policy Note. The proceedings which are listed in Schedules 1 and 2 to the 2013 Order but not listed in that Annex are the proceedings to which the exclusion continues to apply (i.e. in respect of which all spent convictions must be disclosed if asked for, irrespective of whether they would otherwise be ‘protected’).

24. It should be noted that there is no provision under article 3 for non-protected Schedule B1 convictions. Therefore this class of spent convictions must always be disclosed in relation to all of the specified proceedings (in Schedule 1 and Part 1 of Schedule 2 to the 2013 exclusions order).

**Article 4**

25. Article 4 amends article 4 of the 2013 exclusion order. Section 4(2) of the 1974 Act relates to questions about spent convictions asked outwith judicial proceedings, and provides that a person is entitled to treat such a question as if it does not relate to a spent conviction and must not be prejudiced by a failure to disclose a spent conviction in response to such a question.

26. Article 4 of the 2013 order excludes questions put in a range of specified circumstances from the protection given by section 4(2). The circumstances are listed in Schedule 3 to the 2013 Order and 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.
27. This means that, currently, 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.

28. The draft amendment order provides that this exclusion ceases to apply in respect of protected convictions. There will be no requirement to disclose a protected conviction in response to a question put (save in relation to firearm licence applications, explosive certificates and where questions about spent convictions are asked in the interests of national security (new article 4(3) of the 2013 order)).

29. It also provides that the exclusion ceases to apply in respect of non-protected Schedule B1 convictions which are not included in a higher level disclosure certificate sent by Disclosure Scotland (save again in relation to firearm licences, explosives certificates and the interests of national security). This ensures that a person is not required to disclose a non-protected Schedule B1 conviction in respect of which they might be entitled to apply to the sheriff for removal of that conviction from a higher level disclosure certificate before that certificate is sent, or in respect of which the person has already successfully applied for such removal.

30. This means that when asked about previous convictions in relevant circumstances, (e.g. an application form), a person may treat the question as not relating to any Schedule B1 conviction (whether a protected conviction or not). As such, they do not have to disclose any such conviction and cannot be prejudiced or subjected to any liability by reason of the failure to disclose that conviction until the higher level disclosure is sent and contains the spent conviction. It is only at the point when a higher level disclosure which contains information on a non-protected Schedule B1 conviction is sent to the requester (that is, the person who countersigned the disclosure application) that the individual will be liable to self-disclose. There are no consequences of failing to disclose the conviction while the person waits for a disclosure certificate to be issued.

**Article 5**

31. Article 5 makes similar provision to article 4 in relation to matters of employment, and admission to occupation and professions. It amends article 5 of the 2013 exclusion order. Section 4(3)(b) of the 1974 Act provides that a spent conviction or a failure to disclose it is not a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or otherwise prejudicing a person in respect of any of those things.

32. Article 5 of the 2013 order currently excludes the protection given by section 4(3)(b) in relation to the professions, offices, employments and occupations set out in Schedule 4 to that order. These include professions (such as solicitors, accountants, doctors and various other health professionals), employment as a police or prison officer, work in financial services or work with vulnerable groups...
such as in a nursery or a school or a care home. The effect is that all spent convictions must currently be self-disclosed in relation to applications to work in these areas.

33. The draft amendment order provides that the exclusion does not apply in respect of protected convictions, so that such convictions can never be grounds for prejudice in respect of employment etc. in the specified fields (save in relation to occupation as a firearms dealer and occupations requiring an explosives certificate – paragraph (3) of article 4 as amended).

34. It also once again disapplies the exception in respect of convictions for non-protected Schedule B1 convictions, which are not included in a higher level disclosure which has been sent in connection with the profession, office, employment, occupation, decision or proposed decision to which the exception would otherwise apply. This ensures that an individual may not be dismissed or excluded from any office, profession occupation or employment on the basis of a conviction listed in Schedule B1 which is not protected but in respect of which the individual may be entitled to apply for its removal from a higher level disclosure before it is sent, or in respect of which the individual has already successfully applied for such removal. This applies equally to any failure to disclose such a conviction.

35. The protection for an individual who fails to disclose such convictions (before a higher level disclosure certificate is sent) is as explained above in relation to article 4.
Annexe B

Article 8 European Convention of Human Rights

1. In the T and another case referred to above, the UKSC held that spent convictions represent an aspect of individuals’ private lives, respect for which is guaranteed by article 8. Laws requiring a person to disclose his or her previous convictions to a potential employer constitute an interference with that right, as do disclosures by the state in the form of higher level disclosure certificates.

2. For an interference with article 8 rights to be justified, it must be “in accordance with law” and “necessary in a democratic society…”. In considering necessity, the court applies a 4-stage test. It asks:

   1) Whether the objective behind the interference was sufficiently important to justify limiting the rights of the individual under article 8;
   2) Whether the measures proposed are rationally connected to the objective;
   3) Whether those measures go no further than necessary to accomplish the objective; and
   4) Whether they strike a fair balance between the rights of the individual and the interests of the community.

3. In the T and another case the Court held unanimously that disclosure of the applicant’s convictions failed the necessity test. The difficulty was not with stage 1 of the test, as the court accepted that having a disclosure regime was extremely important. Its aim was to protect various members of society, particularly vulnerable groups such as the elderly and children but also, for example, consumers of financial advice, from exposure to persons able and likely to mistreat, neglect or defraud them. In principle such measures fall within the scope of one or more of the legitimate aims listed in article 8.2 (i.e. “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”).

4. The difficulty rather was with the blanket nature of the disclosure regime, requiring as it did that all spent convictions be disclosed irrespective of the circumstances. The Court pointed to the lack of a rational connection between, for example, dishonesty as a child and the question of whether, as an adult, the person might pose a threat to the safety of children with whom they come into contact. The indiscriminate nature of the regime meant that it could not be said that the measures went no further than necessary to achieve the objective, or that they achieved a fair balance between the different rights and interests involved. Ultimately the regime failed the necessity test because it operated in a way which failed to make any distinction on the basis of any or all of the following criteria:
• The nature of the offence;
• The disposal (sentence) in the case;
• The time that has elapsed since the offence took place;
• The relevance of the disclosure information to the employment / appointment sought.