Delegated Powers and Law Reform Committee

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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; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.

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Introduction

1. The Delegated Powers and Law Reform Committee considered the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order (SSI 2015/330) at its meetings on 6 and 27 October, and 3 and 17 November. The Committee submits this report to the Parliament.

2. The Committee also submits this report to the Scottish Government for the purposes of section 14(2)(a) of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”).

3. At its meeting on 27 October 2015 the Committee took oral evidence on the Order from officials from the Scottish Government and Disclosure Scotland, and at its meeting on 3 November 2015 took oral evidence from Laura Dunlop QC, representing the Faculty of Advocates Committee on Human Rights and the Rule of Law. The Committee also received a written submission from Unlock, a charity based in England and Wales which deals with the ongoing effects of criminal convictions. The evidence received helps to inform this report.
Background

Remedial orders under the 2001 Act

4. On 18 June 2014 the United Kingdom Supreme Court 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 ("the 1997 Act") as applicable in England and Wales were incompatible with Article 8 of the European Convention on Human Rights, which concerns the right to respect for private and family life. Sections 113A and 113B of the 1997 Act require the disclosure of spent conviction information in response to an application by an individual for a standard or enhanced criminal record certificate. It was held that the requirements under those sections for blanket disclosure of all spent convictions were not in accordance with the law. In Scotland, similar provisions of the 1997 Act applied to the issue of criminal record certificates.

5. In light of the Supreme Court ruling, the Scottish Government assessed the operation of the 1997 Act in Scotland and concluded that changes should be made to the 1997 Act to ensure that the Scottish Ministers do not act in contravention of Convention rights, in particular Article 8. In addition, the Scottish Government concluded that the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act") (which established the Protecting Vulnerable Groups Scheme – "PVG Scheme") should also be amended to ensure that the Scottish Ministers do not act in contravention of Article 8 of the Convention. They also concluded that corresponding changes should be made to the responsibilities of individuals to self-disclose spent criminal convictions under the Rehabilitation of Offenders Act 1974 (Exclusion and Exceptions) (Scotland) Order 2013 ("the 2013 Order").

6. The Scottish Government chose to make the amendments to the 1997 and 2007 Acts by remedial order under the 2001 Act. Changes to the 2013 Order were made by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 (SSI 2015/329) ("the Rehabilitation of Offenders Act Amendment Order") as explained further in Annex A to this report.

7. The remedial Order was made on 9 September 2015. It was laid before the Scottish Parliament on 10 September 2015 and came into force on that date.

8. Section 12(1) of the 2001 Act confers power on the Scottish Ministers to make remedial orders and defines the scope of that power. Remedial orders can follow two processes: the general procedure as provided for in section 13; and the urgent procedure as provided for in section 14. In this instance the Scottish Government is using the urgent procedure.

9. Under the urgent procedure the Scottish Ministers begin by making the remedial order. The remedial order is then laid before Parliament along with the reasons for
making it. The order can be brought into force immediately as was the case here. Parliament and the wider public is given 60 days in which to comment on the remedial order.

10. At the end of the period of 60 days, the Scottish Ministers are required by the 2001 Act to have regard to any written observations submitted within the consultation period. Following that consideration the Scottish Ministers must lay before Parliament a statement summarising the responses and specifying what changes (if any) they propose to make to the remedial order.

11. Where they propose to lay a revised remedial order then this must be laid before Parliament replacing the original remedial order. The revised order is subject to the affirmative procedure and must be approved by resolution of the Parliament within 120 days of the original remedial order being laid, or the remedial order ceases to have effect.

12. Equally, if no replacement remedial order is laid within 120 days of the original remedial order being laid, the original order must be approved by resolution of the Parliament or it ceases to have effect.

The incompatibility which the Order corrects

13. The following explanation of the legislative background and summary of the Supreme Court decision (and other related court decisions in England and Wales, and Northern Ireland) is important to set the Committee’s scrutiny of the order in context.

14. Convictions become spent after prescribed periods of time under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). Normally an individual is not required to disclose the existence of spent convictions, however there are exceptions to this rule where ‘higher level disclosure’ is required. Higher level disclosure is the phrase used to describe the overall system that allows for additional scrutiny of a person’s criminal convictions if they apply to work in certain positions or roles considered to involve a certain degree of trust or responsibility.

15. The Parliament has decided what these types of positions are, and they are set out in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, and in the Protection of Vulnerable Groups (Scotland) Act 2007. They include certain types of professions and posts (such as teaching, healthcare, work as a police officer or in prisons, financial services work), voluntary work of a similar nature (such as sports coaching for children), the adoption or fostering of children, and applications to hold certain licences such as a firearms or explosives licence. This is not a comprehensive list and a large number of roles are specified under the legislation.
16. The system operates on the basis of responsibilities on individuals to disclose information and the responsibility of the state (in Scotland Disclosure Scotland, and in England and Wales the Disclosure and Barring Service) to issue certificates containing information held on central records about the person (under the Police Act 1997 regime). In Scotland, Disclosure Scotland also operates the protection of vulnerable groups (PVG) regime used to vet and potentially bar people from working with children or protected adults.

17. In the United Kingdom Supreme Court case referred to above (T and another v Secretary of State for the Home Department and another), the Court held that spent convictions represent an aspect of individuals’ private lives, respect for which is protected by Article 8 of the European Convention on Human Rights. 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.

18. Article 8 rights are not absolute and the state is permitted to interfere with those rights subject to the limits set out in the Convention. In the T and another case the Court accepted that having a disclosure regime was a legitimate aim and extremely important in providing protection to various members of society. This was particularly the case in relation to vulnerable groups such as the elderly and children but also could extend to the protection of consumers of financial advice from exposure to persons able and likely to mistreat, neglect or defraud them.

19. However the Court found that the blanket nature of the disclosure regime did not contain sufficient safeguards that would enable the proportionality of the interference to an individual’s rights caused by disclosure to be adequately examined and balanced against the public interest aim of protecting the vulnerable.

20. 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 to demonstrate this 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.
21. The remedial Order introduced reforms to the Scottish regime to the effect that the blanket disclosure of all spent convictions, irrespective of their relevance to the aims behind the regime, has been discontinued. The result is that some spent conviction information which would have been disclosed had the remedial Order not been made is no longer disclosed, in accordance with rules laid down in the remedial Order. Those rules are considered in detail below.

22. The Committee notes that the higher level disclosure regime in England and Wales, along with the regime in Northern Ireland, was amended in 2013, prior to the Supreme Court’s decision in *T and another*. The amendments introduced a more tailored system for the disclosure of spent conviction information in those jurisdictions, the effect of which is that certain types of convictions do not require to be disclosed. The applicable rules differ from those which apply in Scotland by virtue of the remedial Order. The Committee is aware of further court decisions in relation to the application of these rules in these jurisdictions. It has had regard to the principles discussed in these cases in so far as they raise common issues for the remedial Order in addition to the Supreme Court case of *T and another* in considering the compatibility of the remedial Order with Article 8 of the Convention.

23. The Committee has scrutinised the draft Order in the same manner it would any other Order, applying the reporting grounds set out in rule 10.3 of Standing Orders. These include consideration of whether there appears to be a doubt whether it is intra vires, whether it raises a devolution issue, whether the drafting of the Order appears to be defective or contains any minor errors and whether the Order clearly gives effect to the Government’s stated policy intention. It is not within the Committee’s remit to consider the merits of the policy to which the Order gives effect.
The Order

Explanation for making a remedial order as opposed to other action, and explanation for making an urgent remedial order

24. Section 14 of the 2001 Act provides that the Scottish Ministers may use the urgent procedure where it appears to the Scottish Ministers that, for reasons of urgency, it is necessary to make a remedial order without following the procedure under section 13(2) to (4).

25. Section 14(2)(b) of the 2001 Act requires the Scottish Ministers to provide a statement of reasons to accompany the Order to explain the reasons for making the Order.

26. In this instance the statement of reasons includes no particular justification for adopting the urgent procedure.

27. The Committee explored with officials why it was felt in this instance that the choice of the urgent procedure was justified. Officials explained that—

> The Scottish Government felt that it was necessary to use the urgent procedure simply to provide certainty from the point at which the new legislation was brought into force. Although some time had passed since the UK Supreme Court judgment, the fact was that it took some time to consider the policy solution and the implications of what the UK Supreme Court had said in relation to the cases in England and Wales.

28. As noted earlier, the remedial Order makes changes to the information the state needs to disclose in relation to spent convictions and cautions. The Rehabilitation of Offenders Act Amendment Order deals with the information individuals need to disclose in relation to any spent convictions and cautions. The Scottish Government assessed that it was critical that these two orders came into force at the same time and there were therefore particular considerations about when this could happen borne out of two separate processes.

29. Officials explained to the Committee why the particular date was chosen—

> It could not have been done in the two or three months before, because that was recess. Unfortunately, it was impossible to do it prior to recess, simply because of the practical and legal considerations in preparing the operational solution and drafting the legislation. The date chosen was as soon as possible after recess had ended. We were conscious that it could not be much later, because of the dissolution of Parliament in March next year and the fact that we needed 120 days for the Order to go through the parliamentary process. There were a lot of practical considerations around the date. Recess prevented it from being done any earlier over the summer.
and a later date could have led to difficulties towards the end of the process, because we would have run into timing difficulties. There were a lot of practical issues around the date that we chose, as we had to make sure that it fitted in with the parliamentary process.

30. Further to this the Committee explored with officials why this legislative change was being pursued by way of this package of instruments (the remedial Order and the Rehabilitation of Offenders Act Amendment Order) rather than by way of primary legislation.

31. Officials set out three grounds on which it had been determined that the remedial order approach was preferable to primary legislation.

32. Firstly, officials contended that using the remedial order process, and in particular the urgent procedure, offered certainty about the date on which the changes took effect in terms of what people were required to self-disclose and what the state was required to disclose. Officials argued that this certainty of timescale could not be achieved through primary legislation as there would be uncertainty as to how long it would take the Bill to pass through the Parliament.

33. Secondly, officials advanced that the use of the remedial order process provided for greater parliamentary scrutiny given that there was the opportunity to take on board the views Parliament expressed during the 60 day period for consultation. If the changes had been made by way of a bill then that bill would, in their view, have necessarily been done by way of an expedited process limiting parliamentary scrutiny. The officials highlighted that the Rehabilitation of Offenders Act (Exclusions and Exceptions) (Scotland) Amendment Order 2015 had already been undertaken by way of an expedited process and suggested that it would be inappropriate for both matters to be pursued by way of an expedited process.

34. Thirdly, and finally, the officials noted that there could not have been primary legislation to make the provisions that were in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015, because the powers do not exist to make that as primary legislation, not being within legislative competence. As such, there would have remained the need for the affirmative Order irrespective of whether or not the matters covered in the remedial Order were given effect to in primary legislation.

35. The Committee accepts that making these changes to the disclosure system by way of a remedial Order has allowed this Committee greater opportunity for scrutiny of the matters contained in the Order than would have been available had there been primary legislation subject to an expedited process.

36. The Committee also accepts the argument that the remedial order approach has provided for greater certainty about the timescale in which these changes to the state disclosure process have taken effect, which may not have been possible if the changes had been pursued in primary legislation.
37. Nonetheless this approach has meant that changes were made to what the state is required to disclose without the Parliament’s approval. It has also not allowed for Parliament as a whole to debate the specifics of the matters covered in the remedial Order before they came into force.

38. The test in section 12 of the 2001 Act is that the Scottish Ministers must be of the view that there are compelling reasons for adopting the remedial order process.

39. The Committee recognises that the 2001 Act requires that it is the Scottish Ministers and not the Committee that are to be of the view that there are compelling reasons for adopting the remedial order process. But the Committee has a supervisory role to scrutinise why that view was taken and it will exercise that role robustly in every case. To that end, the Committee would have found it helpful if the accompanying statement had specifically addressed the question of compelling reasons more fully.

40. In scrutinising the use of the urgent procedure in this instance the Committee reflects that the UK Supreme Court decision to which this remedial Order responds was made in June 2014. To that extent it could be argued that the justification for the use of the urgent procedure is debatable.

41. However, the Scottish Government has argued that the challenges of developing a response to the UK Supreme Court decision has meant that this has been the earliest point at which the Government has been in a position to lay the Order since the UK Supreme Court’s decision. The Scottish Government has also argued that it was essential that the Order took effect as soon as it was laid and this was only possible by way of the urgent procedure.

42. The test in section 14 of the 2001 Act for the use of the urgent procedure is that it appears to the Scottish Ministers that, for reasons of urgency, it is necessary to make a remedial order without following the procedure under section 13(2) to (4). As noted earlier, it is for the Scottish Ministers and not the Committee to be of the view that there are compelling reasons for adopting the remedial order process and that view has now been expressed to the Committee in oral evidence.

43. It is, however, disappointing that the accompanying statement did not address the question of compelling reasons more fully. This is particularly disappointing given that the Committee raised the same concerns about the absence of such information when it considered the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 (SG 2013/261). The Committee would hope that the Scottish Government would be mindful to include such information in accompanying statements to any future remedial orders.
Operation of the Order

Provision

44. The Order sets out a number of rules governing whether or not spent conviction information will be disclosed by Disclosure Scotland. (Unspent conviction information will continue to be disclosed in full as before). The rules apply both to the issuing of criminal record certificates and enhanced criminal record certificates under the Police Act 1997 and to the disclosure of scheme records under the Protection of Vulnerable Groups (Scotland) Act 2007 (i.e. to all higher level disclosures).

45. The Order inserts new section 126ZA in the 1997 Act to make provision about ‘protected convictions’. A protected conviction is a spent conviction which is either:

(a) a conviction for an offence not listed in either new Schedule 8A or 8B to the 1997 Act; or

(b) a conviction for an offence which is listed in Schedule 8B 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 on the date of conviction and at least 7 years 6 months have passed since that date, or
- the person was over 18 years of age on the date of conviction and at least 15 years have passed since that date.

46. Protected convictions will not be disclosed on a criminal record certificate or on a PVG scheme record. The effect of these rules is therefore as follows:

47. Spent convictions for the offences listed in new Schedule 8A to the 1997 Act cannot become protected convictions and must accordingly always be included on disclosure records issued by Disclosure Scotland. These are considered to be serious offences. According to the Policy Note, the Scottish Government considers that the serious nature of the person’s criminal conduct in relation to such offences is such that the passage of time will never diminish the relevance of the information to a prospective employer or organisation. They will accordingly always be disclosed on a higher level disclosure, no matter how old the conviction is.

48. The offences listed in new Schedule 8B are not minor offences but they are less serious than those in Schedule 8A. The Scottish Government considers that the nature of a person’s less serious criminal conduct as demonstrated in conviction for one of these offences is such that the passage of time, coupled with the age of the person at the date of conviction, may mean that the conviction is no longer relevant to a prospective employer or organisation. Where the passage of time rules apply (i.e. where the conviction is 15 years old or older, or 7.5 years or older
where the person was under 18 at the time of conviction), the conviction information will be protected.

49. In addition, where a person was merely admonished or absolutely discharged in respect of one of the offences on Schedule 8B, and the conviction has become spent, that will also in the Scottish Government’s view render the conviction information irrelevant, even where there has not been a significant passage of time since the date of conviction. In these circumstances the conviction information will again be protected.

50. Convictions for offences which are in neither the Schedule 8A nor Schedule 8B list are viewed as demonstrating criminal conduct of a minor nature. The Scottish Government considers that information about such convictions will cease to be relevant to an employer or organisation once the convictions are spent. Spent conviction information in relation to such offences is accordingly protected.

51. Where a spent conviction for an offence in Schedule 8B is not protected (because the rules regarding the passage of time do not apply, and the sentence imposed was more serious than an admonition or absolute discharge), the Order provides for the possibility of a review of the relevancy of the conviction information. It does so by providing that where a request for higher level disclosure is made and the certificate contains spent conviction information about a non-protected Schedule 8B offence, the person to whom the conviction applies has a right to apply to the sheriff court for a new certificate in which that information will be excluded from disclosure.

52. Certificates containing such spent conviction information are sent initially to the individual only. The requirement to send a copy of the certificate to the requester applies 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 has 10 working days in which to notify Disclosure Scotland of an intention to apply to the sheriff.

53. 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 must implement the ruling and issue a certificate with the appropriate information.

54. No such review of the relevancy of convictions for offences on the Schedule 8A list is available, as conviction for an offence on this list is considered by the Scottish Government always to be relevant for the purposes of higher level disclosure.

55. Finally, the Order makes transitional provision to the effect that any application for higher level disclosure under the 1997 or 2007 Acts which was received prior to
the date the Order came into force (10 September 2015) but not yet completed by that date is to be treated as having been received after the coming into force of the Order. This means that the new rules on protected convictions, and the opportunity to apply to the sheriff in respect of a non-protected Schedule 8B conviction, will apply to such applications.

Applying these criteria to the whole range of offences which exist in Scots law, both at common law and under statute, it identified certain offences that fall within one or other of those criteria and which are considered to be so serious that they should always be disclosed. Those offences appear on the list in Schedule 8A.

56. In the oral evidence session, the Committee asked Scottish Government and Disclosure Scotland officials to explain the general approach taken to devising the amended rules on disclosure of spent convictions.

57. As a first consideration, officials noted that conviction for the most serious offences would carry lengthy sentences, with the result that such convictions would never be spent under the Rehabilitation of Offenders Act regime and as such would always be disclosed.

58. With regard to spent convictions and consideration of which offences to include in each of the lists in Schedules 8A and 8B, officials explained that Disclosure Scotland:

- identified offences that result in serious harm to a person, that represent a significant breach of trust and/or responsibility, that demonstrate exploitative or coercive behaviour, that demonstrate dishonesty against an individual [or] abuse of a position of trust, or that display a degree of recklessness.

59. Applying these criteria to the whole range of offences which exist in Scots law, both at common law and under statute, it identified certain offences that fall within one or other of those criteria and which are considered to be so serious that they should always be disclosed. Those offences appear on the list in Schedule 8A.

60. Disclosure Scotland then considered that “there was another set of offences that contained an element of those behaviours but which were not as serious as the first set.” In Disclosure Scotland’s view, the passage of time may well diminish the relevance of those offences to the person making the decision whether to employ or appoint a person, hence their inclusion in the list in Schedule 8B.

61. Officials acknowledged that “there are some offences that could easily be in one list or another and that some offences, such as fraud, can cover a range of behaviour from less serious to extremely serious”. However the lists had gone through a lengthy process of review and scrutiny both within and outwith Disclosure Scotland and the Scottish Government, and regard had also been had to comparative approaches elsewhere in the UK. Government officials considered that the resulting lists, taken together with the other rules applicable to disclosure under the Scottish regime, struck the correct balance between the protection of the public and vulnerable groups on the one hand and protection of the private
lives of rehabilitated individuals whose convictions have become spent on the other.

62. The Committee also asked about the choice of a 15-year period (or 7.5 years in the case of a conviction given when the individual was under 18 years of age) before a spent conviction for an offence in Schedule 8B becomes protected from disclosure. Officials explained that Disclosure Scotland looked at the maximum rehabilitation periods under the Rehabilitation of Offenders Act 1974 as it applies in Scotland, under which the longest period of time it takes for any offence to become spent is 10 years. For practical reasons it was therefore considered that the legislation could not impose a disclosure period of 10 years or less.

63. The longest disclosure period which could be contemplated was 30 years, because after 30 years spent convictions may be automatically weeded from the Criminal History System, depending on the age of the individual concerned. Within this bracket of 10 to 30 years, it was considered necessary to exercise judgement on the appropriate period. Officials explained the choice of 15 years as follows: “15 years is half of the 30 years for which something stays on the record and it covers the time during which people are likely to be seeking employment or voluntary roles, so we opted for that.”

64. With regard to the selection of the 15 (and 7.5) year periods, the Committee notes the view expressed by Unlock that the disclosure periods of 15 years and 7.5 years are “unnecessarily long and disproportionate”. The Committee also notes that rehabilitation periods are not set in stone, and in fact are lower in England and Wales. The Committee expresses no views on the appropriateness of the current rehabilitation periods as they apply in Scotland. However it notes that, where the maximum rehabilitation period is taken as the starting point for devising a proportionate period for disclosure of spent convictions, the rehabilitation period itself must necessarily feature in an assessment of the proportionality of the disclosure regime as a whole. It is not adequate to say that the disclosure period must be greater than the rehabilitation period if the rehabilitation period is not itself proportionate to the objective which is being pursued.

65. The Committee notes further in this regard the view expressed by Laura Dunlop QC in her evidence to the Committee on behalf of the Faculty of Advocates that: “It is conceivable that that argument [regarding proportionality of the length of the disclosure period in Scotland] could be strengthened by a comparison with a similar case in England, because the maximum period that has been chosen for England is 11 years, rather than 15” (although the Committee acknowledges that there are other differences between the two regimes which under some circumstances would favour an individual in a similar case in Scotland). For these reasons the Committee asks the Scottish Government to keep under review the question of whether a 15 year disclosure period, when taken with the other features of the new disclosure regime as given effect by the Order, strikes a fair balance between the competing public and private interests.
66. The Committee also asked Government officials how the regime takes account, in individual cases, of the relevance of the conviction information to the employment or other post which is being applied for. Officials confirmed that Disclosure Scotland applies the rules as set out in the Order, and does not exercise any discretion in individual cases. According to Diane Machin of Disclosure Scotland, “considerations of relevancy apply primarily at the point of development of the offence lists. Careful consideration was given to the attributes that are required for roles that require higher level disclosure, and the offence lists were developed on the basis of those attributes.” Ms Machin added that the Government believes that “the offences that are on the lists are relevant to any of the roles for which a higher level disclosure is made”.

67. There would also in the Government’s view be practical difficulties in operating a different list of offences for every particular role. It would be extremely difficult to apply such lists in a practical way, introducing huge scope for error in ensuring the right list was applied to the right role, and it would also make it very difficult for members of the public to understand which list applied to the role with which they were concerned.

68. The Committee asked about ‘hard cases’, for example where an individual has a conviction for an offence on the Schedule 8B list which is 14 years and 6 months old and for which they received a fine. Applying the rules in the Order, such a conviction would always be disclosed in connection with the individual’s application for higher level disclosure. The Government pointed out in this connection that, having received the disclosure certificate, “it is up to the employer to look at the conviction on the record and decide whether it should be taken into account in the employment decision.”

69. The Committee is not persuaded by that view. While an employer may have discretion regarding whether or not to employ someone following receipt of conviction information from Disclosure Scotland, that cannot in the Committee’s view be a factor relevant to the assessment of the Article 8 compatibility of the state disclosure system. In this regard, the Committee notes Laura Dunlop QC’s comment that:

> In many situations in which someone commits an act that is unlawful, there is the opportunity for somebody else further down the line to rescue that situation. However, the fact that that possibility exists does not alter the character of the initial breach.

70. In the Committee’s view therefore, the ability of an employer to employ an individual in spite of the information which appears on their disclosure certificate is of no weight in assessing the proportionality of the regime.

71. The Committee was more persuaded by the evidence regarding the possibility in hard cases of obtaining a review of the relevance of the conviction information to the purposes of the disclosure. We turn to this aspect of the system now.
Review of relevancy of non-protected convictions

72. The Committee asked firstly whether the option of an internal review of relevancy of non-protected convictions by Disclosure Scotland has been considered, either as an alternative or in advance of application to the sheriff. Officials explained that it would be very difficult for Disclosure Scotland to obtain sufficient information about the role a person is applying for to enable it to reach a fair and accurate decision about relevancy. It would be reliant on the information provided by the applicant in that regard. In addition, it would be difficult for Disclosure Scotland to obtain independent information about the offence which was committed, particularly if the conviction was quite old. In the Government’s view a sheriff on the other hand would be able to obtain that information from sources other than the applicant.

73. The Committee accepts that, without additional powers being conferred on it to obtain documents or compel witnesses, Disclosure Scotland may be less likely than a sheriff to obtain information on which to base a decision about relevancy. However it considers it important to stress that, while a sheriff can compel witnesses and documents, it can do so only on the application of one or other of the parties to the case. The sheriff does not have an investigatory role and his or her decision is based solely on the evidence which the parties to the case put before the court.

74. The Committee welcomes the creation of a mechanism for application to the sheriff as a significant factor in favour of the proportionality of the system. Drawing on its consideration of the cases in other UK jurisdictions and evidence given by the Faculty of Advocates, the Committee considers that inclusion of the review mechanism is extremely important in ensuring that the regime as a whole goes no further than necessary to achieve the aim of safeguarding the public interests served by the disclosure regime. However the Committee notes that there are restrictions and limitations on that process which it brings to the attention of the Parliament and the Scottish Government in the following paragraphs of this report.

75. Most obviously there is no option to seek review of the relevancy of Schedule 8A convictions, as the Scottish Government has determined that they should always be disclosed. The Committee considers it vital that the list of offences in that Schedule is kept under review, to ensure that these offences are necessarily and in all circumstances relevant to the purposes of higher level disclosure and accordingly represent a proportionate interference with Article 8 rights.

76. As regards review of non-protected convictions for offences in Schedule 8B, the Committee agrees with the statement in the written submission given by Unlock that “access to, and operation of this review process is…critical to striking an appropriate balance in individual cases.” The Committee welcomes the Government’s assurance that civil legal aid will be available to applicants meeting the relevant criteria. However it considers that applicants may also need practical
assistance in negotiating the review process, and that the Scottish Government may wish to consider making guidance available on its website for this purpose.

77. The Committee also notes that it is open to Disclosure Scotland to oppose an individual’s application for review of the relevancy of a Schedule 8B conviction. Officials gave evidence to the effect that Disclosure Scotland would look at each individual case and decide whether or not to oppose the application. The Committee assumes that opposition would be on the basis that the conviction is not protected by virtue of the rules and is therefore in the Scottish Government’s view necessarily relevant to the purposes of disclosure. The Committee considers that individuals should be made aware that Disclosure Scotland may oppose their application to the court, and may lead evidence in court regarding the relevant offence and conviction, and the post the individual has applied for.

78. Further, in the Committee’s view it appears unlikely that a sheriff could make a decision about the relevancy of a Schedule 8B conviction without evidence about the nature of the post applied for being led. However the applicant may not wish to lead such evidence from his or her prospective employer due to the potential for disclosure of the conviction information to the employer as a result of the court process. This is in the Committee’s view a very real risk which might dissuade an individual from bringing an application at all.

79. Officials gave evidence that: “The court will not need to disclose to the employer what offence is being considered or whether more than one offence is being considered, but it could ask the employer what the nature of the role is. It will then become apparent to the employer that there is an appeal on-going against a disclosure certificate, but the employer will not have the details of the offence that the person is asking to have removed from their certificate”.

80. While the Committee accepts that it may be possible to lead evidence from an employer without informing them of the details of an offence, it notes that the court may have limited control over disclosure to the employer. Were evidence to be led from the employer by the Scottish Ministers (on behalf of Disclosure Scotland), the Committee considers that the Scottish Ministers would have some responsibility in relation to ensuring that details of the conviction were not inadvertently disclosed to the employer.

81. A further drawback of the system as discussed by Laura Dunlop QC is that, whether or not evidence is led from the employer, the length of time taken to progress a disclosure application where there is an appeal to the sheriff might cause employers to draw the inference that there must be an appeal process ongoing and therefore that there is a non-protected conviction on the individual’s certificate. The Committee accepts that this may be the lesser of two evils (the alternative being that the conviction information is simply disclosed to the employer without the opportunity for the sheriff to exclude it) but recommends that the Scottish Government explores with the Scottish Courts and Tribunals Service the possibility of expediting such applications, to ensure that they are dealt with as
quickly as possible and that the impact of the review process on the individual's application for employment is minimised.

82. Overall, the Committee supports the inclusion in the remedial Order of a review by the sheriff court of the relevance of conviction information, provided that the operation of the system for review and access to it is monitored. The Committee agrees with the view expressed to it by Laura Dunlop QC regarding the right of review by a sheriff that “notwithstanding the drawbacks that you have identified, on which I agree with you, it is still better to have that right than not to have it.” The Committee recommends that the Scottish Government considers taking the steps outlined above to mitigate those drawbacks.

Delegated power

83. Section 126ZB of the 1997 Act (inserted by article 3(7) of the Order) confers power on the Scottish Ministers by regulations to modify Schedule 8A or 8B of the Act. Exercise of the power is subject to the affirmative procedure.

84. The Committee considers that it is appropriate to delegate power to modify the list of offences without recourse to primary legislation or a further remedial order. It appears to be prudent to have a power to add new offences to the lists. The Committee also welcomes the possibility that offences could be moved between, or removed from, the lists in the light of further consideration by the Government and stakeholders, or the emergence of sheriff court decisions on convictions for types of offences which are not considered relevant.

85. Given the significance of the subject matter, detailed parliamentary scrutiny of the addition or removal of offences from the lists, or movement of offences between lists, would be critical. As such the Committee finds the affirmative procedure to be appropriate.

Operation of the Order: Summary and recommendations

86. In the Supreme Court’s decision in the T and another case, the Court found the relevance of disclosure information to the employment or appointment sought to be a significant factor, among others, in assessing the proportionality of the regime for disclosure of convictions.

87. The Committee notes the consideration which appears to have gone in to devising the rules on offences which may or may not be protected, informed by the experience of the Scottish Government, Disclosure Scotland and their counterparts elsewhere in the UK in relation to this area of law and policy. As Laura Dunlop QC observed in her evidence: “There has been an attempt to abstract those offences that possess characteristics that are in a general sense relevant to posts involving how other people are treated and how one behaves in a position of trust.”
88. The Committee accepts in principle that a system of general rules regarding convictions which are relevant to the purpose of higher level disclosure as a whole may be capable of achieving a proportionate balance between the interests which the disclosure system is designed to protect on the one hand, and the interests of individuals in gaining employment or voluntary responsibilities after their convictions become spent. In other words, scrutiny of the relevance of individual conviction information to every post applied for is not necessarily required for the scheme to strike a fair balance in individual cases. The Committee stresses that it reaches that conclusion in the context of consideration of the higher level disclosure regime as a whole, including in particular the right in certain circumstances to review by a sheriff.

89. Notwithstanding its acceptance of the general rules in principle, the Committee considers that the lists of offences in both Schedules 8A and 8B should be kept under review by the Scottish Government.

90. In relation to the offences in Schedule 8A, it notes that the regime operates in such a way that convictions for such offences will always be disclosed. There is no possibility of seeking review by the sheriff of the relevancy of such convictions. That is the case even where, for example, a person was under 18 at the time of the conviction and a significant period of time (which may be far in excess of the 15 years which applies to protected convictions) has passed since the date of conviction. The Committee considers it vital that the list of offences in that Schedule is kept under review, to ensure that these offences are necessarily and in all circumstances relevant to the purposes of higher level disclosure and accordingly represent a proportionate interference with Article 8 rights.

91. The list of offences in Schedule 8B should also be kept under review, particularly in light of any sheriff court decisions on the relevance of convictions for particular offences to the purposes of higher level disclosure. The Committee considers such a monitoring exercise to be necessary in order to ensure that the system as a whole goes no further than necessary to achieve the objective and amounts to a proportionate interference with Article 8 rights.

92. With regard to the selection of the 15 (and 7.5) year periods, the Committee notes that rehabilitation periods are not set in stone, and in fact are lower in England and Wales. The Committee expresses no views on the appropriateness of the current rehabilitation periods as they apply in Scotland. However it notes that, where the maximum rehabilitation period is taken as the starting point for devising a proportionate period for disclosure of spent convictions, the rehabilitation period itself must necessarily feature in an assessment of the proportionality of the disclosure regime as a whole. In the Committee’s view the overarching requirement is that the interference posed to individual’s private lives by the disclosure regime must be
proportionate to the public protection objective. It is therefore not adequate simply to adopt the position that the disclosure period must be greater than the rehabilitation period. For that reason the Committee asks the Scottish Government to keep under review the question of whether a 15 year disclosure period, when taken with the other features of the new disclosure regime as given effect by the Order, strikes a fair balance between the competing public and private interests.

93. The Committee finds the possibility of seeking a review by the sheriff of the relevancy of non-protected convictions to posts or positions applied for key to ensuring that the system is capable of striking a proportionate balance in individual cases, and in particular that it goes no further than necessary to achieve the aim of safeguarding the public interests served by the disclosure regime.

94. In that regard, the Committee agrees with the statement in the written submission given by Unlock (at Annexe C) that “access to, and operation of this review process is…critical to striking an appropriate balance in individual cases.” The Committee makes the following observations about the limitations and potential drawbacks of that system, and where relevant recommends steps which might be taken to mitigate those drawbacks:

- The Committee considers it important to stress that while a sheriff can compel witnesses and documents, the sheriff can do so only on the application of one or other of the parties to the case. The sheriff does not have an investigatory role and his or her decision is based solely on the evidence which the parties to the case put before the court.

- The Committee welcomes the Scottish Government’s assurance that civil legal aid will be available to applicants meeting the relevant criteria. However it considers that applicants may also need practical assistance in negotiating the review process, and that the Scottish Government may wish to consider making guidance available on its website for this purpose.

- The Committee considers that individuals should be made aware that Disclosure Scotland may oppose their application to the court, and that it may lead evidence in court regarding the relevant offence and conviction, together with the post the individual has applied for.

- In the Committee’s view it appears unlikely that a sheriff could make a decision about the relevancy of a Schedule 8B conviction without evidence about the nature of the post applied for being led. However the applicant may not wish to lead such evidence from his or her prospective employer due to the potential for disclosure of the conviction information to the employer as a result of the court
process. This is in the Committee’s view a very real risk which might dissuade an individual from bringing an application at all.

- Further, while the Committee accepts that it may be possible to lead evidence from an employer without informing them of the details of an offence, it notes that the court may have limited control over disclosure to the employer. Were evidence to be led from the employer by the Scottish Ministers (on behalf of Disclosure Scotland), the Committee considers that the Scottish Ministers would have some responsibility in relation to ensuring that details of the conviction were not inadvertently disclosed to the employer.

- In relation to the length of time taken to progress a disclosure application where there is an application to the sheriff and the adverse inferences which might be drawn from that by a prospective employer, the Committee recommends that the Scottish Government explores with the Scottish Courts and Tribunals Service the possibility of expediting such applications, to ensure that they are dealt with as quickly as possible and that the impact of the review process on the individual’s application for employment is minimised.

95. The Committee finds the delegated power inserted by the Order as section 126ZB to be acceptable in principle and is content that it is subject to the affirmative procedure.

Guidance

96. The Committee asked Scottish Government and Disclosure Scotland officials what guidance has been made available to individuals applying for higher level disclosure, and to employers, on the changes to the disclosure regime. Diane Machin of Disclosure Scotland explained:

> We have, on the Disclosure Scotland website, provided fairly extensive guidance. There is basic background guidance on how the system works and there is a “Frequently asked questions” section, which we update regularly. Within Disclosure Scotland’s customer liaison team, we are keeping a log of all inquiries and the particular issues that people are raising. We then provide lines for the customer liaison team to use when they respond to people. Those are the main pieces of guidance on our website.

97. The Committee also heard that there is a page on the Scottish Government’s website on the Rehabilitation of Offenders Act 1974 regime, and that it provides a link to the Disclosure Scotland website described.

98. Finally Diane Machin added that:
It is perhaps also worth noting that when applicants receive a certificate that has a spent conviction on it that is on the list of offences that are to be disclosed—subject to rules—they are also sent an insert that explains that they can, if they wish, apply to a sheriff. The insert explains the process and provides a link to guidance on the website and to the customer liaison team.

99. The Committee welcomes the guidance available on the Disclosure Scotland and Scottish Government websites, and the information given to individuals who have the option of applying to the sheriff for a review of their disclosure certificates. The Committee repeats its recommendations at paragraph 94 regarding the information which should be given to individuals considering applying for such a review.

100. The Committee also notes the evidence given by the Cabinet Secretary for Education and Lifelong Learning to the Committee on 8 September 2015 in connection with the Rehabilitation of Offenders Act Amendment Order. The Cabinet Secretary said that in addition to including updated guidance on the Disclosure Scotland website:

> We will also give consideration to other publications where such information should be sited… Individuals seek advice on such matters from a variety of sources; they might go to an MSP or a citizens advice bureau or they might speak to someone at the job centre, a criminal justice social worker or a lawyer. There is a particular range of stakeholders we could be targeting, and we could make people aware that plain English guidance will exist.

101. The Cabinet Secretary added that “There is a recognition that the landscape in this area is and has always been complex, and we take in good spirit the point that we need to ensure that clear guidance is available.”

102. The Committee accordingly recommends that the Scottish Government and Disclosure Scotland, in addition to having guidance on the relevant websites, engages with affected individuals, employers and public sector bodies (for example, those which hold quasi-judicial proceedings and are accordingly affected by changes to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013) on the new rules in both the remedial Order and the Rehabilitation of Offenders Act Amendment Order, with a view to raising awareness among those specific groups. That engagement might take place right away on the basis of the law as it currently stands or, if appropriate, be deferred subject to the Parliament’s approval of the final remedial order.
Clarity of drafting

103. **The Committee makes the following general observations in the interests of clarity of drafting.**


105. **The Committee asks the Scottish Government, in the interests of clarity, to specify a modification to article 3(8) of the remedial Order under section 14(4)(b) of the 2001 Act in order to correct the reference in paragraph 28 of Schedule 8A to the Police Act 1997.**

106. Article 10 of the Order makes transitional provision in respect of nominations under regulation 4 of the Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2010 (SSI 2010/383) (‘the 2010 regulations’). Article 10(1)(a)(ii) refers to representations received under paragraph (4) of regulation 4 of the 2010 regulations, however paragraph (4) does not make provision about representations. The Scottish Government has acknowledged that the reference in article 10(1)(a)(ii) should be to paragraph (6) of regulation 4 of the 2010 regulations.

107. **The Committee asks the Scottish Government, in the interests of clarity, to specify a modification to the remedial Order under section 14(4)(b) of the 2001 Act in order to correct the reference in article 10(1)(a)(ii) of the Order.**

108. Article 11 of the Order amends the Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010 (SSI 2010/167) (‘the 2010 PVG regulations’) by inserting new regulation 5A. New regulation 5A(a) refers to “section 53”, while new regulation 5A(b) refers to “section 53(1A)” and “section 52”. In each case, there is no reference to the Act to which the section numbers refer. The Committee considers that the words “of the Act” should appear after the references to section 53, section 53(1A) and section 52 in new regulation 5A, in the interests of clarity and consistency with other provision made in the 2010 PVG regulations.

109. **The Committee asks the Scottish Government, in the interests of clarity, to specify a modification to article 11 of the remedial Order under section 14(4)(b) of the 2001 Act in order to add the words “of the Act” after the references to section 53, section 53(1A) and section 52 in new regulation 5A of the 2010 PVG regulations.**
Annexe A

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 (SSI 2015/329) (“the Rehabilitation of Offenders Act Amendment Order”)

1. As mentioned earlier in this report, the remedial order interacts with the Rehabilitation of Offenders Act Amendment Order. In sum, the remedial Order deals with the information Disclosure Scotland and other parties need to disclose in relation to spent convictions. The Amendment Order deals with the information individuals need to disclose in relation to any spent convictions.

2. Changes to the regime for self-disclosure of convictions were not capable of being dealt with by way of remedial order. That is because the legislation governing disclosure by the individual (under the Rehabilitation of Offenders Act 1974) includes provision for reserved areas of employment such as financial services. The Scottish Parliament has competence by virtue of an order under the Scotland Act 1998 to make changes to that system by way of secondary legislation under the Rehabilitation of Offenders Act, but not by other means such as a remedial order. It is for this reason that two separate orders were necessary.

3. The Rehabilitation of Offenders Act Amendment Order was laid before the Parliament on 7 September 2015 and came into force on 10 September. The Committee’s only opportunity to consider it was on 8 September, and it was considered by the Parliament on 9 September.

4. In the time available, the Committee was not able to form a view as to whether the order raised a devolution issue. Nor however was the Committee confident that no such issue arose. The Committee recognised that some of the policy choices which had been made in the Amendment Order required further investigation with regard to the tests laid down in the Supreme Court ruling in T and another v Secretary of State for the Home Department and another.

5. In particular the Committee indicated that it would return, when scrutinising the remedial Order, 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 is capable of striking an appropriate balance in individual cases.

6. A commitment was given by the Scottish Government to re-visit the Amendment Order if relevant matters arose in the course of scrutiny of the remedial Order.

7. The Committee’s report on the Amendment Order can be found here.\(^3\)
Annexe B

Minor points

1. The Committee observes the following minor points:

- In the italic headnote, the reference to section 14(5)(b) of the 2001 Act should be a reference to section 14(2)(b).
- In article 3(2)(c)(ii), in the text to be substituted in section 113A(6) of the 1997 Act, “schedule 3” should be “Schedule 3”.
- Throughout the order, references to “schedule 8A” and “schedule 8B” of the 1997 Act should be to “Schedule 8A” and “Schedule 8B”.
- In the Explanatory Note, in the last line on page 34, there is an unnecessary “to” after “the Scottish Ministers”.

Thank you for making contact to seek our views in relation to the above Remedial Order given the interest we have taken in the UK Government’s response to the judgement in R (on the application of T and another) (Respondents) v Secretary of State for the Home Department and another (Appellants), which introduced a filtering regime that protected certain convictions and cautions.

Given the short notice, we have set out some broad comments below, but understand that further work is ongoing in relation to this Order, and we would welcome the opportunity to contribute to these discussions.

As we understand it, the Committee’s remit means that its interest in this Order is limited to whether the approach taken by the Scottish Government is capable of operating in a manner that is compatible with ECHR and to that end whether the tests set out in the UKSC judgement have been met. In particular, I understand that the Committee has been interested in 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.

Unlock is an independent award-winning charity dealing with the ongoing effects of criminal convictions by providing trusted information, advice, training and advocacy in England & Wales. Our expertise, knowledge and insight helps us work with government, employers and others to change policies and practices to create a fairer and more inclusive society so that people with convictions can move on in their lives. I was a member of the Independent Advisory Panel on the Disclosure of Criminal Records, which was chaired by Sunita Mason. I have also made a witness statement in a further challenge to the filtering system as it operates in England & Wales.


The process set out in this Remedial Order varies significantly from that of England & Wales and we make the following comments based on observations of the Remedial Order:
1. Disclosure time periods – The periods of time that must have passed for a conviction to become protected in England & Wales (11 years as an adult, 5.5 years for under 18’s) are too long to be proportionate in our view. The Remedial Order proposes even longer periods (15 years and 7.5 years), which in our view are unnecessarily long and disproportionate. It is unclear how these periods have been arrived at and what the justification is for these increased lengths. If they are based on the retention periods for the Scottish Criminal History System, this would be a mistake, as it would be confusing a key difference between ‘retention’ and ‘disclosure’. If they are linked to periods it takes for convictions to become ‘spent’ under the Rehabilitation of Offenders Act, an alternative approach would be to set a particular time period starting from when the conviction becomes spent. It is also important to note that this legislation is currently subject to review by the Scottish Government.

2. Number of offences – In England & Wales, the limit to one ‘conviction’ (or even one ‘offence’) is a significant contributor in ruling many people out of the filtering regime. Our understanding is that this Remedial Order doesn’t have a similar limit, which we welcome.

3. List of offences – It is welcomed that a list of offences that could become protected has been published on the Disclosure Scotland website. This is something that the UK Government has still not done in relation to the operation of its equivalent filtering regime. However, the inflexible nature of the list of offences that will not become protected is present in this Remedial Order. It remains our view that, although a list of offences can be helpful as an indicator of whether or when a conviction could become protected, it can act as a blunt instrument and should not used as an ultimate test of whether an offence should become (or not be) protected. Individuals with offences that appear on the ‘Offences that will always be disclosed on Higher Level Disclosures’ should have recourse to the review process (see below) where they believe the offence is no longer relevant to the purposes for which they are applying for a disclosure.

4. Review process – We welcome the review process, taking place through application to a sheriff, that individuals can use if the relevant time period has not yet passed for an offence that could be protected. We believe this process should be widened to include a broader list of offences (see above). It also remains unclear how this application process will work in practice. There is no user-friendly guidance available on the Disclosure Scotland website. The access to, and operation of this review process is, in our view, critical to striking an appropriate balance in individual cases.

5. Determining relevance – In England & Wales there is a broad approach taken to ‘determining relevance’. The filtering approach applies across the board, to all types of standard and enhanced checks. This makes creating a proportionate filtering approach difficult and the result was that the rules were diluted to the lowest common denominator – i.e. it must be appropriate for the conviction/caution to have been filtered from all types of DBS check. Although the benefit of this was that it was easy for the DBS to implement, the outcome was a very arbitrary assessment of relevance, taking little account of the specific reasons for the disclosure check and the specific nature of applicants’ criminal record. If the review process in this Remedial Order was widened
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(see above), this would help to mitigate this issue and better ensure that only relevant spent conviction information is disclosed for the purpose for which it is being applied for.

We would also like to raise a couple of practical considerations which, although may be beyond the remit of this Committee, we believe are important when reflecting on the challenges we’ve identified with the current approach taken by the UK Government:

1. **Employer practice** – Over two years since the filtering process came into force in England & Wales (May 2013), employers continue to ask misleading questions on application forms. This results in many individuals disclosing significantly more information than legally required to. There is an important role for the Disclosure & Barring Service and Disclosure Scotland in informing employers of their responsibilities, and taking action where employers continue to act in such a way.

2. **Clarity on what’s ‘protected’** – It is not currently possible to obtain your own Disclosure & Barring Service disclosure certificate in advance of applying for employment or volunteering opportunities. Given the complexity of the filtering process and the lack of understanding by individuals of their own criminal record, the causes a number of difficulties for individuals when trying to determine what they do and not need to disclose.

3. **The review process interacting with recruitment** - Although it is unclear how the review process operates, it appears to come into effect after an application for a disclosure has taken place. Within the context of a specific recruitment cycle, it appears to create a number of logistical and practical problems for an individual that may be considering an application for review, in particular the length of time that it will take to process. This being the case, it would add weight to the importance of making this process available to an individual before they apply for a disclosure that relates to a particular job vacancy, instead applying in advance of applications in a particular area of employment.

We hope these comments are helpful to the Committee. We would welcome the opportunity to contribute to any further discussions on this issue.

2 R (on the application of T and another) v Secretary of State and another, [2014] UKSC 35
