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

Delegated Powers and Law Reform Committee response

Introduction

1. A proposed draft of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (“the Proposed Draft Order”) was laid before the Parliament on 11 September 2017 for consideration.

2. The Delegated Powers and Law Reform Committee considered the Proposed Draft Order at its meetings on 3 and 31 October and 21 November 2017. The Committee submits this response to the Scottish Government for the purposes of section 13(3) of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”).

3. At its meeting on 31 October the Committee took oral evidence from officials from the Scottish Government and from Disclosure Scotland. The Committee also received written submissions from Scottish Independent Advocacy Alliance and from the Faculty of Advocates. The evidence received helps to inform this response.

Background

Remedial orders under the 2001 Act

4. The Proposed Draft Order is made in response to the judgement of the Court of Session in P v the Scottish Ministers, which found that certain provisions of the Protection of Vulnerable Groups (Scotland) Act 2007 were incompatible with Article 8 of the European Convention on Human Rights (“ECHR”).

5. The Proposed Draft Order is made under a power in section 12 of the 2001 Act. This power allows the Scottish Ministers to make changes to legislation in order to remedy an incompatibility with rights protected by the ECHR. An order making such changes is known as a ‘remedial order’. The power under section 12 may be used where the Scottish Ministers are of the opinion that there are compelling reasons for making a remedial order (as distinct from taking any other action).

6. Remedial orders can follow two processes: the general procedure under section 13 of the 2001 Act or the urgent procedure under section 14. In this case, the Scottish Government is using the general procedure.

1 https://www.scotcourts.gov.uk/search-judgments/judgment?id=70d42ba7-8980-69d2-b500-f0000d74aa7
7. Under the general procedure, the Scottish Ministers begin by laying a proposed draft of the remedial order before the Scottish Parliament for 60 days, together with a statement of their reasons for proposing to make it. The Scottish Ministers must also consult on the draft order during that period.

8. At the end of the 60 days, the Scottish Ministers are required to have regard to any written observations submitted by the Parliament or by the wider public within the consultation period.

9. Following that consideration, the Scottish Ministers must then lay a finalised draft remedial order before the Parliament subject to the usual affirmative procedure. This must be accompanied by a statement summarising all the comments received and specifying any changes made to the proposed draft order as it was originally laid.

10. The Proposed Draft Order is therefore laid before the Parliament at this stage for the initial 60 day consultation phase, before the finalised draft of the Order is laid at a later date.

The incompatibility which the Proposed Draft Order would correct

11. The following explanation of the legislative background and summary of the Court of Session judgement in *P v the Scottish Ministers* is important to set the Committee’s scrutiny of the Proposed Draft Order in context.

*The higher level disclosure regime*

12. Convictions become spent after prescribed periods of time under the Rehabilitation of Offenders Act 1974. 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.

13. 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 ("the 2007 Act"). They include certain types of professions and posts (such as teaching, healthcare, work as a police officer, work with vulnerable groups etc.) This is not a comprehensive list and a large number of roles are specified under the legislation.

14. The higher level disclosure system operates on the dual basis of responsibilities on individuals to self-disclose information (under the Rehabilitation of Offenders legislation referred to above), and the responsibility of Disclosure Scotland to issue certificates containing information held on central records about the person (under the Police Act 1997 regime). 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 (under the 2007 Act).

**2015 review of higher level disclosure**

15. In 2015, the Scottish Government carried out a review of the higher level disclosure system as it then operated in Scotland. The Scottish Government’s review was carried out in light of a 2014 ruling by the UK Supreme Court. In that ruling, the Supreme Court held that equivalent provisions operating in England and Wales in relation to higher level disclosures were incompatible with rights protected by Article 8 of the ECHR (right to private and family life).

16. At the time of the Supreme Court ruling, the higher level disclosure scheme operating both in England and Wales and in Scotland called for a blanket disclosure of all spent convictions to a prospective employer. The Supreme Court ruled that this requirement for blanket disclosure of spent convictions was incompatible with Article 8. The Court’s view was that, instead of a blanket disclosure, factors such as the nature of the offence and the time which had elapsed since the offence took place should be taken into account, when deciding whether spent convictions should or should not be disclosed.

17. As a result of this ruling, the Scottish Government concluded that changes should be made to the higher level disclosure system operating in Scotland, with a view to ensuring compatibility with Article 8 ECHR.

**2015 Remedial Order changes**

18. The Scottish Government brought forward a remedial order (the 2015 Remedial Order), amending the requirements of the Police Act 1997 (as it relates to disclosure certificates) and the Protection of Vulnerable Groups (Scotland) Act 2007 (as it relates to the PVG scheme). The Scottish Government also brought forward an order, under the affirmative procedure, making related changes to the self-disclosure regime under the Rehabilitation of Offenders legislation.

19. The changes introduced by the 2015 Remedial Order aimed to create a more tailored approach to disclosure, focusing on more serious, recent or relevant crimes. The changes created three tiers of spent convictions, known as ‘Schedule 8A convictions’, ‘Schedule 8B convictions’ and ‘protected convictions’.

20. ‘Schedule 8A convictions’ and ‘Schedule 8B convictions’ are spent convictions for offences set out in either Schedule 8A or Schedule 8B to the Police Act 1997. Those offences listed in Schedule 8A are serious offences which will always be disclosed, despite the conviction being spent.

21. Those offences in Schedule 8B are less serious than those in Schedule 8A. Schedule 8B convictions are subject to special rules on disclosure and may become ‘protected convictions’ (i.e. not be disclosed) due to the passage of time or the sentence imposed.
22. ‘Protected convictions’ are spent convictions which will never be disclosed. They either relate to minor offences which are not listed in Schedules 8A or 8B, or they relate to Schedule 8B offences but have been ‘filtered out’ either because of the very minor nature of the sentence imposed or because of the length of time which has passed since conviction. Where a conviction is spent and at least 15 years have passed since the date of the conviction (or 7.5 years, if the person was under 18 on the date of conviction) a Schedule 8B offence is filtered out and becomes a ‘protected conviction’ i.e. it will not be disclosed.

**Schedule 8B sheriff appeals**

23. As mentioned above, Schedule 8B convictions are subject to special rules on disclosure. This includes a right to appeal to the sheriff against disclosure. Where a potential employer makes a request for a higher level disclosure and the certificate contains spent conviction information about a Schedule 8B offence, the individual who is the subject of the certificate has the right to apply to the sheriff for a new certificate which excludes that information.

24. A certificate containing spent conviction information about a Schedule 8B offence is initially sent to the individual only. The individual then has 10 working days in which to notify Disclosure Scotland of an intention to apply to the sheriff. If the individual does not notify such an intention within the 10 day period, the certificate is sent to the employer with the Schedule 8B conviction information included.

25. An application to the sheriff must be made within 3 months of the notification to Disclosure Scotland of an intention to make such an application. Following an application, the sheriff may decide that the Schedule 8B conviction information should be disclosed, in which case the certificate is sent to the employer with the Schedule 8B conviction information included.

26. Alternatively, the sheriff may order removal of the Schedule 8B conviction information if the sheriff considers that it is not relevant to the purpose for which the disclosure was requested. Disclosure Scotland must then implement the ruling and issue a certificate with the relevant information removed. The sheriff’s decision on an application is final.

**P v Scottish Ministers**

27. As mentioned above, in February 2017 the Court of Session, in the case of *P v the Scottish Ministers*, ruled that the higher level disclosure regime, as amended by the 2015 Remedial Order, was incompatible with Article 8 of the ECHR.

28. The case concerned an individual who applied for work in a nursing home but who was refused employment due to the disclosure of certain information on the individual’s higher level disclosure record. The record disclosed that, almost 30 years earlier, the individual had been the subject of a one-year
supervision requirement imposed at a Children's Hearing for the offence of 'lewd and libidinous practices'.

29. Although both the conduct in question and the supervision requirement imposed were relatively minor, the information nonetheless fell into the category of 'Schedule 8A convictions', and so the conviction information was automatically disclosed.

30. The Court found that, in this case, the amended higher level disclosure regime gave rise to an arbitrary outcome and therefore amounted to an unlawful and unjustifiable interference with the individual's Article 8 rights.

31. The Court found that the central problem with the disclosure regime, as it applied in this case, was that it required automatic disclosure of the conviction information without affording the individual any opportunity to challenge that disclosure as disproportionate. This problem was compounded by the absence of any procedure requiring a judgement to be made about the relevance of the conviction to the individual's prospective employment.

32. The Court's finding of incompatibility with Article 8 rights was suspended until 17 February 2018 to allow the Scottish Ministers to remedy the legislation.

Proposed changes to the higher level regime

33. The changes introduced by the Proposed Draft Order aim to remedy this defect. The proposed changes would amend the higher level disclosure regime as it applies to the disclosure of Schedule 8A convictions. Under the new rules, the right to apply to a sheriff, which currently exists only in respect of the disclosure of spent convictions under Schedule 8B, would be extended to cover also the disclosure of spent convictions under Schedule 8A, in certain circumstances.

34. The provisions of the Proposed Draft Order are discussed in more detail below.

Parallel changes to self-disclosure rules

35. The system for self-disclosure of spent convictions under the Rehabilitation of Offenders legislation, which is discussed at paragraph 14 above, operates in tandem with the disclosure regime operated by Disclosure Scotland. Therefore, any changes to the disclosure regime operated by Disclosure Scotland require to be replicated in the self-disclosure system. For this reason, a draft affirmative instrument will be required in addition to the Proposed Draft Order in order to replicate the new changes in self-disclosure system.

36. The Scottish Government proposes to lay that affirmative instrument in draft before the Parliament following the end of the initial 60-day consultation period for the Proposed Draft Order. The draft Policy Note supplied with the Proposed Draft Order gives further details as to the related changes to the
self-disclosure system which it is intended will be introduced by that affirmative instrument.

Wider review of Disclosure Regime

37. The Scottish Government’s Statement of Reasons, which was laid together with the Proposed Draft Order as required by section 13(3) of the 2001 Act, mentions the Scottish Ministers’ wider review of the higher level disclosure regime. The Statement of Reasons notes that the changes introduced by the Proposed Draft Order “do not exclude the possibility of further policy changes being developed” in this area.

38. In oral evidence, the Committee asked the Scottish Government and Disclosure Scotland to explain more about this review and how it might impact on the changes being made by the Proposed Draft Order. This is discussed in more detail below.

Role of the Committee

39. The Committee has scrutinised the Proposed Draft Order in the same manner it would any other Order, applying the reporting grounds set out in rule 10.3 of the Standing Orders. These include consideration of whether there is a doubt that 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 Proposed Draft Order would give effect.

40. The Committee submits this response to the Scottish Government for its consideration during the initial 60 day consultation period, for the purposes of section 13(3) of the 2001 Act.

The Order

Explanation for making a remedial Order

41. Section 12 of the 2001 Act provides a power for the Scottish Ministers to make changes to legislation, by way of a remedial order, in order to remedy an incompatibility with rights protected by the ECHR, where the Scottish Ministers are of the opinion that there are compelling reasons for making a remedial order (as distinct from taking any other action).

42. The Statement of Reasons explains that the Scottish Ministers are of the opinion that there are compelling reasons for making a remedial order. It explains that the proposed changes would add a further refinement to the provisions in relation to the higher level disclosure regime which are already in place, but without making substantial amendments to that regime.

43. The Statement of Reasons further explains that the use of the general procedure for making the remedial order will allow the Scottish Ministers to
consult on the proposed amendments to the higher level disclosure regime, and then to introduce the changes within the period during which the court has suspended the effect of its judgement. Given the time constraints imposed by the court, the Scottish Ministers consider that a remedial order is the most appropriate means of bringing forward the required changes.

44. The Committee further explored with officials the reasons for using the remedial order process. Officials explained that:

“We felt that a remedial order was the most appropriate way of responding to a court judgment identifying the specific defect. The Convention Rights (Compliance) (Scotland) Act 2001 gives the Scottish Ministers powers to remedy primary legislation in these circumstances, and the court gave us nine months to fix the defect. Therefore, it seemed to us that this approach was the most appropriate means of introducing legislation. It allows us not only to respond within the timescale but to use the general procedure, which gives an opportunity for full consultation to be undertaken before any amendments to the primary legislation come into force.”

45. The Committee considers that the approach taken by the Scottish Government in bringing forward the proposed changes by way of a remedial order under the general procedure appears to be justified in the circumstances.

46. The Committee is therefore satisfied that the remedial order appears to be the appropriate vehicle for bringing forward these changes.

Operation of the Order

47. As mentioned above, the changes introduced by the Proposed Draft Order would amend the higher level disclosure regime by extending the right to apply to a sheriff against disclosure, which currently exists only in respect of Schedule 8B convictions, to cover also Schedule 8A convictions, in certain circumstances.

48. Whether or not a right to apply to the sheriff will arise in respect of a Schedule 8A conviction will depend on the length of time which has passed since conviction. Where the conviction is spent, and at least 15 years have passed since the date of the conviction (or 7.5 years, if the person was under 18 on the date of conviction) then the right to apply to the sheriff against disclosure of the information will arise. These are the same time periods which are used to determine when a Schedule 8B conviction will become a ‘protected conviction’, under the existing rules.

49. The system proposed for applications to the sheriff against the disclosure of Schedule 8A convictions mirrors the existing system for applications to the sheriff against the disclosure of Schedule 8B convictions. The detail of this system is set out in paragraphs 23 to 26 above. The existing rules in relation

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to the disclosure of Schedule 8B convictions and ‘protected convictions’ are unchanged by the Proposed Draft Order.

50. The Proposed Draft Order also makes provision dealing with the transition from the existing regime to the proposed new regime. This provides that any applications or requests for higher level disclosures which have been received prior to the coming into force date of the Proposed Draft Order, but in respect of which a disclosure certificate has not been issued by that date, will be subject to the new rules.

51. Finally, the Proposed Draft Order addresses (at Article 3(5)) two points in respect of which the previous DPLR Committee, during its scrutiny of the 2015 Remedial Order, reported that the meaning of that Order could have been clearer.

Consideration and recommendations

52. In oral evidence, the Committee explored the approach taken by the Scottish Ministers in responding to the judgement in P v Scottish Ministers. The various matters discussed are set out below, together with the Committee’s recommendations.

Time period for application to sheriff

53. The proposed changes would provide that a period of 15 years from the date of conviction (or 7.5 years if the person was under 18 on the date of conviction) must pass before the disclosure of Schedule 8A spent conviction information may be appealed to the sheriff. This mirrors the period of time which must pass before a Schedule 8B conviction become ‘protected’ under the existing rules.

54. The Committee explored with the Scottish Government and Disclosure Scotland why this period of time was chosen to apply in respect of Schedule 8A convictions. The officials explained:

“The new provision in relation to the schedule 8A offences ties in to an extent with the provisions that relate to schedule 8B, and it relates to the periods in the Rehabilitation of Offenders Act 1974 after which convictions become spent.

The longest period of rehabilitation under the Rehabilitation of Offenders Act 1974 for someone aged over 18 is 10 years. Therefore, if we had chosen a period of less than 10 years, the conviction would not actually be spent before the person was able to appeal. We feel that, given the maximum 10-year rehabilitation period, 15 years is an appropriate period before someone has the right to make an application for removal of the conviction.”

55. The Committee also asked officials to confirm whether any concerns have been raised regarding the proportionality of the 15-year time period in respect

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of schedule 8B offences, since the 2015 Remedial Order came into force. Officials confirmed that no concerns have been raised during that period.

56. In connection with the 15-year time limit, the Committee explored with officials the issue of ‘hard cases’ which fall only slightly short of the required time period for taking an appeal to the sheriff. Officials explained that:

“wherever we draw the line, there will be a potential hard case that falls on the other side of it. The courts have been clear that the Government is entitled to draw bright lines, and they have also made it clear that it is not necessary for a right of appeal to be provided in every individual case.”

57. Officials also explained that the offences listed in Schedule 8A are serious offences involving serious harm to victims, a breach of trust or violence or reckless conduct causing potential or actual harm:

“With all of the offences on the list, the behaviour involved is highly relevant to disclosure when someone is being employed in regulated work with children or protected adults or in other professions or situations where higher-level disclosure is required. Therefore, where the conviction is not particularly old, disclosure is appropriate to protect the rights of vulnerable groups.”

58. The Committee notes the rationale behind the Scottish Government’s choice of the 15 year time period in relation Schedule 8A convictions, and further notes that no concerns have been raised in relation to the corresponding time period for disclosure of Schedule 8B convictions since the 2015 Remedial Order came into force. The Committee accepts that it is not a requirement that a right of appeal must be provided in every case and that the Government is entitled to impose ‘bright line’ rules, in terms of offences which must always be disclosed, in the interests of public protection.

59. Nonetheless the Committee is mindful of the overarching requirement that the disclosure regime must strike a fair balance between individual rights and the public protection objective. The Committee considers that any time period, however it may be chosen, which limits the availability of a right to appeal to the sheriff against disclosure must be subject to rigorous and ongoing scrutiny to ensure it meets this objective.

60. The Committee therefore recommends that the Scottish Government keeps under review the question of whether the 15 year time period before disclosure of a Schedule 8A conviction may be appealed strikes a fair balance between the competing public and private interests. The Committee considers that this is something that the Government could consider exploring further in its wider review of the higher level disclosure regime.

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Possible alternative criteria

61. The Proposed Draft Order would introduce an appeal to the sheriff against the disclosure of Schedule 8A offences based on the period of time which has passed since conviction. The Committee explored with the Scottish Government and Disclosure Scotland whether any consideration was given to providing for a right to appeal based on alternative criteria, such as the level of the sentence imposed, or the relevance of the conviction to the employment being sought.

62. Officials explained that:

“We considered whether there should be any other criteria for making an application to the sheriff and we concluded that it was sufficient to provide for an application simply on the basis of the length of time since the conviction and the age at the time of conviction.”

63. In terms of the relevance of the conviction, officials further explained that Schedule 8A lists serious offences which, in the Government’s view, will always be relevant to employers seeking a high-level disclosure in respect of a prospective employee.

64. The Committee explored with officials whether providing for a right to appeal based on such alternative criteria could be beneficial in helping to ensure the proportionality of the disclosure scheme. Officials explained that it is not considered necessary to make any additional provision, since in the case of *P v Scottish Ministers* the court suggested that a possible solution could be to apply a cut-off date for automatic disclosure of convictions after the expiry of an appropriate length of time. The Government therefore considers that the Proposed Draft Order satisfactorily addresses the issue of incompatibility which was identified by the court.

65. The Committee notes the view of the Faculty of Advocates on this point, who expressed that:

“Given that the proposed changes do not consider such factors as the nature of the disposal and the relevance of the disclosure to the employment, there may be still be cases where the scheme is deemed to go further than necessary or does not strike a fair balance between the rights of the individual and the community.”

66. In the Faculty’s view, the absence of such provision is problematic because, while no one particular safeguard will work in every case, the level of disposal has consistently been cited by the courts as one of the factors that may ensure that the proportionality of the disclosure is adequately examined. As such, the Faculty considers that such a provision would be beneficial.

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7 Written submission by the Faculty of Advocates.
67. It is not the Committee’s role to comment on the merits of the policy changes being proposed to the higher level disclosure scheme. While the Committee accepts the view of the Scottish Government that the proposed approach would appear to answer the criticisms of the court in *P v Scottish Ministers*, nevertheless the Committee welcomes the perspective of the Faculty in suggesting a method by which the proportionality of the approach could be strengthened.

68. The Committee therefore encourages the Scottish Government to take account of the response of the Faculty of Advocates, which suggests that providing for a right to appeal against the disclosure of Schedule 8A convictions based on alternative criteria, such as the level of the sentence imposed, or the relevance of the conviction to the employment being sought, could be beneficial. The Committee considers that this is something that the Government could consider exploring further in its wider review of the higher level disclosure regime.

*Impact of sheriff review*

69. During scrutiny of the 2015 Remedial Order, the previous Delegated Powers and Law Reform Committee noted various potential limitations and drawbacks to the system for sheriff appeals as it would apply to Schedule 8B convictions.

70. Broadly, the previous committee’s concerns related, firstly, to the perceived need for practical assistance for individuals in understanding and negotiating the sheriff appeal procedure and, secondly, to whether the sheriff appeal procedure has the potential to alert a prospective employer to the existence of spent conviction information, and thus to dissuade individuals from bringing an application to the sheriff.

71. The Committee explored with officials whether any particular concerns have been identified with the existing system for appeals to the sheriff since it was brought into force, with a view to understanding whether any concerns could be envisaged in relation to the proposal to extend the sheriff appeal system to cover Schedule 8A convictions.

72. Officials explained that, while no specific concerns or issues about the existing appeal mechanism have been raised since the 2015 Remedial Order changes were brought into force, the numbers have been so small (there have been only 24 appeals thus far) that it has been difficult to draw any concrete conclusions. Officials noted, however, that as part of the review of the wider disclosure scheme Disclosure Scotland are contacting individuals who have intimated their intention to appeal to the sheriff, to request feedback on the process and to understand if there is any way the process can improved or made easier.

73. The Committee considers that the various potential limitations and drawbacks identified by the previous committee about the sheriff appeal procedure in relation to Schedule 8B convictions could apply equally to the newly proposed system of sheriff appeal procedure in relation to Schedule 8A convictions. The
Committee also notes the response from the Faculty of Advocates, which identifies various practical matters that have the potential to impact on the effectiveness of the appeal procedure.

74. Without further evidence it is impossible to evaluate how well the existing system is operating, and thus to understand any potential impact on applicants under the proposed extension to the existing right of appeal. However, the Committee considers that these matters, unless addressed, have the potential to dissuade individuals from bringing an application to the sheriff under the new rules.

75. The Committee notes in this regard the evidence from officials that:

“*We have had a substantial number of notifications of people going to appeal, but not all those people appeal so, presumably, their job applications are at an end. We do not have the information.*”

The Committee is concerned that this could indicate an underlying issue with the existing appeals mechanism that is discouraging applicants from proceeding with their appeal.

76. In light of these concerns, the Committee considers that the system of sheriff appeals should be thoroughly examined to ensure that it will be fit for purpose in terms of the proposed extension to the existing right of appeal.

77. The Committee therefore encourages the Scottish Government to keep these concerns in mind during the implementation of the proposed changes, and welcomes Disclosure Scotland’s intention to review the existing sheriff appeal process and to consider whether there is any scope for improving the system for applicants, as part of the wider review of the higher level disclosure regime.

*Operation of transitional provisions*

78. The Committee explored with officials the provisions contained in the Proposed Draft Order dealing with the transition from the existing regime to the proposed new regime.

79. Officials explained that Disclosure Scotland will continue to process applications under the existing regime until midnight on 16 February 2018 (the day before the Proposed Draft Order is intended to come into force). Any cases that are in the system but not yet processed by that cut-off point, and any new cases received from 17 February, will be processed under the new regime.

80. The Committee explored why this approach has been taken. Officials explained that:

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“We think that that is the best way forward. It also reduces the amount of backlog and will ensure that we can move through the process and deal with the certificates quickly. Having a cut-off date makes it easier for us and the applicants.”

81. The Faculty of Advocates expressed support in its submission for this approach.

82. The Committee notes that the proposal for transition to the new regime allows no flexibility as regards how applications which are received on either side of the cut-off time are dealt with, which may be of concern for applicants who fall on the ‘wrong’ side of the line. However, the Committee accepts that the line must be drawn somewhere and that the proposed transitional provisions will avoid a delay in the processing of applications, which could be caused by a more gradual or tailored approach to the transition to the new regime. The Committee also notes that the transitional provisions accord with the approach of the court in *P v Scottish Ministers*, which suspended the effect of the judgement until 17 February 2018 in order to allow the Scottish Ministers time to remedy the defect.

83. **For these reasons, the Committee accepts the approach taken in the Proposed Draft Order as regards the transition to the new regime.**

**Wider review plans**

84. The Committee asked the Scottish Government and Disclosure Scotland for further details about the wider review of the higher-level disclosure system referred to in the Statement of Reasons, and how that review might impact on the changes that are being proposed.

85. Officials explained that the terms of reference for the review were published in February 2017 and that the review is currently in the pre-consultation phase, the intention being to move to formal consultation in the spring of 2018. It is intended that the review will look at the changes made by the 2015 Remedial Order, as well as any further changes which are ultimately made by the current Proposed Draft Order, and the operation of the sheriff appeal procedure.

86. In terms of any impact on the changes that are being made by the Proposed Draft Order, officials confirmed that:

   “it is unlikely that there will be any major changes to the disclosure regime any time soon. The immediate impact of the review on the remedial order is non-existent.”

   “it is a matter of the length of time that it takes to go through the consultation process. Obviously, if any changes to the legislation have to be made as a

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result of the review, we would have to go through a bill process, which would also take time.”

87. The Committee welcomes the wider review of the higher-level disclosure system in light of a number of legal challenges to the system (in England and Wales, Scotland and Northern Ireland) over the last few years on the basis of ECHR rights. The Committee also notes the view of the Faculty of Advocates, who have expressed that the amendments made by the Proposed Draft Order:

“will not necessarily guarantee that the disclosure system is in accordance with the law and proportionate in every case. It is possible that there may be further compatibility challenges before the courts. We note that the Law Commission for England and Wales has stated that there is a “compelling case” for a wider review of the disclosure system as a whole.”

88. The Committee considers that the wider review will provide a timely opportunity to take stock of the overall operation of the system of higher level disclosures in Scotland and to identify any ways in which that system could be strengthened in terms of proportionality and ECHR compatibility.

89. The Committee therefore encourages the Scottish Government to take advantage of the opportunity provided by the wider review to examine the overall approach to higher level disclosures in terms of the balance struck between the rights of individuals and the protection of the wider public and vulnerable groups. The Committee further encourages the Scottish Government, during the review, to examine the various issues of ECHR compatibility which have arisen in the courts, and the Committee’s suggestions above, and if appropriate to take steps to strengthen the protections for individuals which are already in place.

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11 Written submission by the Faculty of Advocates.
Annex A – Minor Points

1. In footnote (d) on page 1 of the Order, the word “term” is missing from the first line (“The “Convention rights” has the meaning given by..”).

2. For consistency with Articles 5(2), 6(2) and 8(2), it appears that Article 7(2) should refer to paragraph (1) rather than to paragraph 1(a).

3. In the Explanatory Note, the word “Act” is missing from the first line of the third paragraph.
Annex B – Written evidence

Written evidence was received from:

Scottish Independence Advocacy Alliance

Faculty of Advocates