Justice Committee

Management of Offenders (Scotland) Bill

Written submission from the Faculty of Advocates

4. Overall, do you support Part 2 of the Bill? The Scottish Government’s view is that it will provide a more appropriate balance between the public’s right to protection and a former offender’s right to “move on” with their life, by, overall, reducing the legal need for disclosure. Do you agree?

In general terms, the proposal appears proportionate in its aim to reduce the legal requirement for disclosure against a background of general increases in the length of sentences and the impact of disclosure on a significant part of the population seeking work or study.

Part 2 includes some appropriate factors to evaluate whether the disclosure is proportionate including the age of the offender and the length of the sentence (P R(on the application of P) v. the Secretary of State for the Home Department ([2017] 2 Cr. App. R. 12 para. 39-42). While there is no review mechanism for standard disclosure, the cumulative effect of the aforementioned safeguards should normally provide a relevant link between the disclosure and the public interest of protecting the public and allowing former offenders to “move on”.

It should be remembered, however, that any assessment of proportionality should focus on the individual case and not the system as a whole (P. v. Scottish Ministers, 2017 SLT 271, para. 61). Furthermore, Part 2 does not consider the relevance of the disclosure to employment or study, so there may be cases where the scheme is not deemed to strike an appropriate balance.

5. Do you agree with the Scottish Government that other reforms in Part 2 will make the law on disclosure of convictions more intelligible, clear and coherent?

The changes to terminology to improve the Act’s drafting are welcome. Nevertheless, there is still perhaps some way to go before the law on disclosure of previous convictions can be said to be sufficiently intelligible, clear and coherent. We note that the Law Commission of England and Wales recently concluded that there is a “compelling case” for a review of the disclosure system as a whole (https://www.lawcom.gov.uk/project/criminal-records-disclosure/). In this respect, the interplay between the Management of Offenders legislation, including orders made under it, and the Police Act 1997 may be a suitable area for review.

6. Do you have any further views on law and policy around disclosure of convictions?

We refer to the our response to the call for written evidence on the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 dated 24 October 2017 that sets out legal considerations for higher level disclosure.