The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

EDUCATION AND CULTURE COMMITTEE

Tuesday 26 January 2016

Session 4

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EDUCATION AND CULTURE COMMITTEE
3rd Meeting 2016, Session 4

CONVENER

*Stewart Maxwell (West Scotland) (SNP)

DEPUTY CONVENER

*Mark Griffin (Central Scotland) (Lab)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Chic Brodie (South Scotland) (SNP)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)
Liam McArthur (Orkney Islands) (LD)
*John Pentland (Motherwell and Wishaw) (Lab)
*Mary Scanlon (Highlands and Islands) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Angela Constance (Cabinet Secretary for Education and Lifelong Learning)
Nigel Graham (Scottish Government)
Ailsa Heine (Scottish Government)
Diane Machin (Disclosure Scotland)

CLERK TO THE COMMITTEE

Terry Shevlin

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Education and Culture Committee

Tuesday 26 January 2016

[The Convener opened the meeting at 10:03]

Decision on Taking Business in Private

The Convener (Stewart Maxwell): Welcome to the third meeting in 2016 of the Education and Culture Committee. I remind everybody to ensure that all electronic devices are switched off.

Our first agenda item is to decide whether to take in private at our next meeting consideration of our work programme. Do members agree to take that in private?

Members *indicated agreement.*

Subordinate Legislation

Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No 2) Order 2015 (SSI 2015/423)

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016 [Draft]

10:03

The Convener: Our next item is evidence on two pieces of subordinate legislation. I welcome Angela Constance, the Cabinet Secretary for Education and Lifelong Learning, and her accompanying officials. After we have taken evidence on the instruments, we will debate the motions in the name of the cabinet secretary, under items 3 and 4. Officials are, of course, not permitted to contribute to the formal debate on the motions.

I invite the cabinet secretary to make some opening remarks on both instruments.

The Cabinet Secretary for Education and Lifelong Learning (Angela Constance): I am grateful to the committee for allowing me to contribute to your discussions on the orders. I thank Parliament, the committee, officials and business managers for their support in timetabling Parliament's consideration of the orders.

Members will recall that the Government and Parliament reformed Scotland's state disclosure and self-disclosure regime on 10 September last year. The procedure for the remedial order that took forward the state disclosure aspects of the reforms required that stakeholders be given an opportunity to make written observations on it. On 11 September, we invited stakeholders to do that, and the opportunity to do so ran until 24 November. We received 28 responses, which were broadly in favour of the reforms that we had put in place.

Ministers were required to take account of the observations that were received, publish a statement responding to them and indicate whether we intended to make further changes. The Government's statement, which was laid in Parliament, addressed the comments that were received and set out the modifications that we proposed to make. Those modifications are in the orders that we are discussing today.

The underlying principle behind the September reforms was to put in place an appropriate system of state disclosure and self-disclosure, reflecting the relevant United Kingdom Supreme Court decision in the area. The reformed system that

was put in place in September, which meant that individuals should no longer have to self-disclose certain spent convictions and that the state—Disclosure Scotland—should no longer disclose those, remains. The orders that are before the committee today refine those arrangements, but do not make fundamental changes.

It might be helpful to briefly remind members that both orders contain two lists of offences. Those lists are identical in both orders. One is a list of offences that require always to be disclosed through state disclosure and self-disclosure—they include rape, for example. The second is a list of offences that require to be disclosed subject to the application of certain rules, including assault, for example.

The key changes in the two orders that are before the committee are that a number of offences have been added to the two lists of offences in the orders; some offences have been moved between the lists in the orders; and the time that is allowed to take forward an application to the sheriff for removal of a spent conviction from a disclosure has been reduced from six months to three months.

Members will recall that the orders operate in tandem, so it is necessary to amend both earlier orders to ensure that state and self-disclosure continue to be aligned. If Parliament approves the orders, the original remedial order will be replaced in its entirety, although the vast majority of content remains the same as before. In addition, the two offence lists in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 will have amendments made to them.

The convener wrote to me on 24 November following evidence that the committee took from officials about the reforms, and I replied on 6 December. I hope that that letter satisfactorily answered members' questions.

Once again, I put on record my thanks for Parliament's assistance in taking forward these important reforms. I look forward to answering any questions.

The Convener: I will kick off the questions, if members do not mind.

We have had a number of submissions on the orders. I will begin with some questions from the Scottish Council of Jewish Communities. You will have noticed from its submission that it has questions and concerns about a number of areas. The first is about the date from which the notification period should be counted. The council states that there is an inconsistency in the way that that is laid out in the orders. In article 3(4) of the remedial order, proposed new section 116ZB(3)(a) states that an individual is allowed

"10 working days beginning with the date of the issue of the certificate".

However, in article 4(5), proposed new section 52A(3)(a) states that the relevant period will be

"10 working days beginning with the date on which the scheme record was sent to the scheme member".

That sounds inconsistent to me. Which of those is it, or is there a reason why there are two different descriptions of when the period of 10 working days begins?

Angela Constance: There is complexity to this, so I will ask my official Ailsa Heine to be clear about that.

Ailsa Heine (Scottish Government): There is different wording. However, the 10 days are counted from the date that the disclosure is issued and sent out to the applicant. The date of issue and the date of sending out are the same.

The Convener: Can you guarantee that, 100 per cent of the time, the date of issue and the date of sending out are the same? For example, can you guarantee that no certificate is issued late on a Friday afternoon but not posted until the Monday?

Ailsa Heine: I would have to ask the policy official about that.

Diane Machin (Disclosure Scotland): The term "issued" means the point at which the item leaves Disclosure Scotland. The terms "issued" and "sent" are the same. Of course, we have no control over how long it takes for the item to be delivered.

The Convener: I will come on to that.

I am not quite sure why you use different wording to mean the same thing.

Ailsa Heine: The wording is different simply because the wording in the parent acts—the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007—is different. Throughout the 2007 act, the wording is "sent", whereas the 1997 act refers consistently to the issuing of disclosures. If we had tried to use the same wording, we would have run the risk of creating confusion about what was meant. Our view is that "issued" and "sent" mean the same thing—they refer to the point at which Disclosure Scotland has exercised its function and issued the disclosure to the person. Under the 1997 act, until a disclosure goes out the door, Disclosure Scotland has not fulfilled its function, because it has not issued the disclosure.

The Convener: So the period of 10 working days begins at the point at which the disclosure leaves the building. Is that correct?

Diane Machin: Yes.

The Convener: How would the individual who receives a disclosure know when the clock started ticking? How would they know when the 10 days started? Is the day of issue—the day on which a disclosure leaves the building—day 1, or is it the following day?

Diane Machin: The day on which it leaves the building is day 1 of the 10 days.

The Convener: In practical terms, if a disclosure is posted out on a Friday evening, that is day 1.

Diane Machin: Yes.

The Convener: If the individual gets it on the Monday, that is day 2.

Diane Machin: Yes, because the 10 days are 10 working days.

The Convener: If the Monday is a public holiday and the individual gets it on the Tuesday, is that still day 2?

Diane Machin: Yes.

The Convener: In that case, how would they know that they were on day 2?

Angela Constance: Information is certainly sent to the applicant by Disclosure Scotland. I do not have the exact wording in front of me, but efforts are made to inform applicants of their rights and, in particular, of their right to appeal to a sheriff if they so wish.

The Convener: I understand that, but if I am waiting for a disclosure and it arrives in the post—it is there when I go home this evening—how will I know how many of the 10 days I have left?

Diane Machin: The certificate will have a date on it, which is the date on which the disclosure process was concluded and the certificate printed. That date will always be a date in advance of the day on which an applicant receives the disclosure, because it takes time for it to be delivered, but it will give the applicant an indication of when the 10 days started. An applicant could assume that the 10 days started the day after the date on the certificate.

The Convener: I want to go through this very carefully, because people's lives and employment prospects are at stake. If a certificate is printed on a Friday, what can the applicant assume?

Diane Machin: If a certificate is printed on a Friday, it would not be posted until the Saturday, because a certificate is never posted on the same day that it is printed. If it was delivered on the Monday—we have no control over that part of the process, which is why we cannot specify exactly when the 10-day period starts—the applicant would know that the 10 days had not started until the day after the print date.

The Convener: No—you can say categorically when the 10 days start. You did that a moment ago—you said that the 10 days start when the disclosure leaves the building.

As the recipient of a disclosure, how do I know how many days I have left? I do not want to make an assumption; I want to know exactly when my 10 days are up.

Diane Machin: The best way for you to find that out would be to contact Disclosure Scotland—you could ask our customer liaison team specifically when the 10-day period would be up. I do not see how we can put that on the certificate.

The Convener: An individual who receives a disclosure certificate knows that they have a period of 10 working days to appeal to the sheriff.

Diane Machin: No—they have 10 working days to notify Disclosure Scotland.

The Convener: Sorry—that was a slip of the tongue. It would be nice for such an individual to know for certain when their 10-day period was up. Is that not reasonable?

10:15

Angela Constance: It is reasonable, convener. Following the action that we took in September, Disclosure Scotland updated its website, and information goes out with the certificates. There are also dedicated customer service officers who answer people's telephone and email inquiries when they need further clarity.

The Convener: When you send the certificate out, does it say, "If you want to know when the 10 days is up, contact this number"?

Diane Machin: It says, "If you want to notify us of your intent to appeal you must do that within 10 working days." There will always be a date on the certificate, which gives the applicant an indication of when that 10—

The Convener: No, you said that before. It does not tell them when the 10 days is up, does it?

Diane Machin: It does not.

The Convener: I am asking whether you tell people, "If you want to know when the 10 days is up you have to contact us."

Diane Machin: We do not specify that—

The Convener: You do not specify that.

Diane Machin: —in the insert.

The Convener: Do you think that that is an issue? I think that it is.

Diane Machin: The evidence so far suggests that it may not be. People notify us within 10 working days—they notify us in plenty of time within that period. However, there may well be other people who, for whatever reason, have not looked at their certificate soon after it has been received and they may not know that they are still within the 10 working days.

The Convener: Okay. Why did you choose a period of 10 days as the notification period? You have just stated that you do not know how long it would take for the certificate to arrive—how long the post takes depends on bank holidays, the Christmas post and all the rest of it. Why did you choose 10 days?

Diane Machin: We chose 10 days because we thought that that was a reasonable period of time in which to allow people to notify us, given that the certificates are generally requested for employment purposes and because we withhold the counter-signatory's copy of the certificate until the notification period has passed. We felt that 10 days was a sufficient period of time in which to withhold that, because that holds up the employment decision.

The Convener: What would happen if somebody was on holiday?

Diane Machin: They would miss the 10 days.

The Convener: They would miss the 10 days.

Diane Machin: Yes.

The Convener: Is that reasonable?

Diane Machin: We have to draw a line in the sand. If somebody is away on holiday for a month, does that mean that we should allow a month for—

The Convener: No, I am not saying that. I think that that is a rather facetious answer. Most people go on holiday for a week, 10 days or a fortnight. If you chose 20 days as the period you would catch 90 or 99 per cent of people—you would even catch those who went on holiday during that period. I do not know many people who go on a month's holiday, but perhaps you do. Is it reasonable that if somebody is on holiday they miss the 10 days and therefore their right to indicate that they wish to appeal?

Diane Machin: We felt that 10 days was a reasonable period of time.

The Convener: That was not my question.

Diane Machin: I would say that it is reasonable.

The Convener: If somebody is on holiday and comes back to find the certificate and misses the 10 days, is that it? They have missed their right to notify their wish to appeal.

Diane Machin: Yes.

The Convener: And you think that that is reasonable.

Diane Machin: Yes.

The Convener: Cabinet secretary, do you think that that is reasonable?

Angela Constance: If somebody is applying for a protected post—for example, certain positions in financial services, a post as a solicitor, an accountant, a doctor or a social worker, or other posts in which they would be working with vulnerable children and vulnerable adults—they will be well aware of the importance of the disclosure process and alert to any potential issues in their own background. Taken in the round, I think that the period is reasonable.

The Convener: Well, I do not. Someone may have a holiday booked and then they see a job advertised for which they apply and for which they have to go through the disclosure process. The fact that they happen to be on holiday should not be a reason why they are then disadvantaged.

Angela Constance: They will know if there is something in their background that is likely to be disclosed. People know whether they have a previous conviction, do they not?

The Convener: They do, but they do not know that a job is about to be advertised that they would wish to apply for when they have a family holiday booked.

Angela Constance: When someone applies for a job, they will receive an application form, which kicks off a process. They will be aware of the obligations relating to high-level disclosures.

The Convener: I understand that. What I do not understand is why being on a family holiday should disadvantage someone in the application process. Someone has a family holiday booked and then, before that family holiday, a job comes up that they wish to apply for, although there might be something in their background. Why should taking a holiday disadvantage that person?

Angela Constance: I accept that people do indeed go on holiday; that is not unreasonable. If someone is concerned because they know that they will be out of the country when correspondence is likely to come from Disclosure Scotland, they can make arrangements. People make all sorts of arrangements prior to going on holiday if they are expecting important post. It would be open to people to discuss their concerns with Disclosure Scotland prior to going on holiday.

The Convener: In such an eventuality, if I was going on holiday could I notify Disclosure Scotland, in advance of receiving its

correspondence, that I might wish to put in an appeal?

Diane Machin: You could notify us. A better course of action would be to discuss with the person who is countersigning the application form the most desirable point at which to submit the application.

Nigel Graham (Scottish Government): You have to fill in the application form first and it has to go to the employer. The employer has to consider whether they are going to employ you. How long that takes can depend on how many applications there are, and the registered person has to decide whether they want to undertake all that. There may be an interview process, so it might take longer than two weeks from when the person sees the job advertised.

The key thing is to talk to the employer and say, "I'm taking a holiday and I've applied for this job. Is there any flexibility around when you are likely to interview me?" It is not just about Disclosure Scotland; it is about the person who is applying for a job and going on holiday having that discussion with the employer. Surely that is important as well.

The Convener: It is all important. I am just trying to make sure that individuals are not disadvantaged unfairly. That is why I am asking the question.

Cabinet secretary, can you confirm why there does not seem to be a process that allows an individual to indicate that they have changed their mind after they have said that they may wish to appeal to a sheriff within the 10 working days? They may decide later that they will not appeal.

Angela Constance: I ask Diane Machin to answer that.

Diane Machin: If an applicant notifies us within the 10 working days that they intend to submit an application to a sheriff, they receive an acknowledgment email from Disclosure Scotland that sets out the steps that they need to go through and the implications of those steps. The email reiterates the information that they have already been sent.

The person can then notify us within the 10 working days that they want to withdraw the notification of their intention to appeal. If they do that within the 10 working days, we will withdraw that notification and the counter-signatory's copy will be sent out. If they do not do that within the 10 working days, it is correct that there is no provision for the applicant to withdraw the notification of their intention to appeal.

The purpose of that is that we did not feel that we could cater for every possible eventuality in relation to people changing their minds or the point at which people might do that. If somebody said that they intended to apply to a sheriff, we would not send out the counter-signatory's copy. If they then came back to us three or four months later and said that they had changed their mind, we would then be required to send out the counter-signatory's copy, potentially to no purpose.

The Convener: Yes, but if an individual notifies you that they intend to appeal within 10 working days and then they change their mind within the 10 working days and decide not to appeal, do they have to inform you?

Diane Machin: That they have changed their mind?

The Convener: Yes.

Diane Machin: Yes, they have to inform us in order to authorise us to send out the counter-signatory's copy of the certificate.

The Convener: How would you know that they had decided not to appeal? If you received nothing back, would you just sit for the three months and wait?

Diane Machin: We would not know. If they did not notify us that they had decided not to appeal, we would not know.

The Convener: So why have you not put in place a provision that tells people that they must inform you that they are withdrawing?

Diane Machin: We did not feel that that was an approach that we could enforce.

The Convener: Section 33 of the Protection of Vulnerable Groups (Scotland) Act 2007 makes it an offence for individuals not to notify Disclosure Scotland of certain changes in circumstances. Would not the same sort of rule have fitted here?

Ailsa Heine: I do not think that we could have created a new criminal offence.

The Convener: I have just said that section 33 of the Protection of Vulnerable Groups (Scotland) Act 2007 makes it an offence for individuals not to notify Disclosure Scotland of changes in circumstance. Why could you not have done the same thing here?

Ailsa Heine: Section 33 applies only in relation to the circumstances listed and any other circumstances that we have prescribed, but that is in relation to a process that takes place when ministers are considering whether to list someone. Section 33 does not apply to part 2 of the act, which is about the disclosure process.

The Convener: It was a general point, not a specific one. Given that it is an offence for individuals not to notify Disclosure Scotland of certain changes—

Ailsa Heine: Yes, but we could not have created a new criminal offence in the context of the remedial order.

The Convener: No, I know that you could not have put that through in the remedial order; I understand that. I am asking why, in general, it was not done. Why would you not put that in place to ensure that individuals had to inform you of that change in circumstance, given that you have done it elsewhere?

Ailsa Heine: The offence provision was done in primary legislation.

The Convener: I understand that. I am asking a general question about why it was not done in that circumstance.

Ailsa Heine: We had no powers to make it a criminal offence in that circumstance.

The Convener: You are obviously misunderstanding me. Given that you have done it before—using primary legislation, I accept; I am not suggesting for a moment that you could do it through the secondary legislation that we are discussing today—why in one set of circumstances would you create an offence for individuals who did not notify Disclosure Scotland of changes in circumstances, if you would not do it in this case?

Ailsa Heine: The requirement in section 33 is quite different, because the person is being considered for listing. It is therefore important that Disclosure Scotland, as it considers the person for listing, is aware of changes of address. My recollection is that we have not prescribed any other circumstances in which they have to notify us.

The Convener: Do you accept that you could have done?

Ailsa Heine: We could perhaps have made it a requirement that someone had to notify us, but it would have been unenforceable, because we cannot make it a criminal offence in that context.

The Convener: Is section 33 unenforceable?

Ailsa Heine: No, it is not. Section 33 is not unenforceable, but it applies in a completely different context.

The Convener: I am not sure what the context has to do with it, but if I am not going to get anywhere with that question, I will move on to my final question, which is about the job description that has to be put on the application form for a scheme record. You have to put down your job title. That is correct, is it not?

Diane Machin: Yes.

The Convener: As I understand it, the job title on the form goes into a box or a set of boxes 64 characters long. If somebody puts down “youth football coach”, how does that allow the sheriff, or Disclosure Scotland, to decide whether a previous conviction should be disclosed?

Diane Machin: Disclosure Scotland has no discretion over what is disclosed in terms of what is in the lists, so the fact that somebody has put down “youth football coach” makes no difference to the offences that are in either schedule 8A, which must always be disclosed, or in schedule 8B, which must be disclosed subject to rules, or not on either of those lists, because we determined in the legislation that the offences on those lists are relevant to all types of roles for which a higher-level disclosure is required.

The Convener: So if somebody had previous road traffic convictions, which are listed under paragraph 108 of schedule 8B, how would you know whether they should be allowed not to have those disclosed if the job is youth football coach?

10:30

Diane Machin: If the offences are listed in schedule 8B of the 1997 act, the rules in the order determine that the convictions should be disclosed, because they ought to be of relevance to the consideration of employment for a role that requires a higher-level disclosure.

The Convener: Sorry. If the person is applying for a job that does not involve driving—it is just a job as a football coach—given that another job as a football coach may involve driving, how would you know whether the offences should be disclosed?

Angela Constance: Because when the list of offences was drawn up, consideration was given to the fact that there is not a correlation between different types of jobs and what may or may not be disclosed when. The issue is whether a crime of dishonesty has been committed, whether a person has been in a position of trust or whether there has been reckless behaviour.

The policy note details the principles that informed the devising of the two lists. It refers to instances in which people are going into positions of trust and/or positions of authority and instances in which we would be interested in offences that relate to recklessness or serious harm. If an individual is in dispute over a previous offence that is listed in the new version of schedule 8B of the 1997 act, they can take the matter to the sheriff. The sheriff will draw on all the resources that sheriffs draw on in deciding what is reasonable and how to apply the law, and case law will come forthwith.

The Convener: That is what I am asking, cabinet secretary. What information beyond the job description would be available?

Nigel Graham: If the role is regulated work with children and it falls under schedule 4 of the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, a higher-level disclosure will be required. In the past, all spent convictions would be disclosed because the role is regulated work with children, so a protecting vulnerable groups check would be required. Now, offences under schedule 8A of the 1997 act or schedule A1 of the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 will always be disclosed, but the disclosure of offences in schedule B1 of the 2013 order or schedule 8B of the 1997 act is subject to rules, so if the conviction is under 15 years old and the person was over 18 when they got it, it will be disclosed, if the offence is on those rules lists. If the person was admonished or given an absolute discharge, the conviction will not be disclosed once spent.

However, as the cabinet secretary has said, the person has the opportunity to say, "That thing that I had is not relevant to this specific thing, even though the rules say that it has to be disclosed because it is part of the rules and the exceptions order says that the job that I am doing is regulated work." The sheriff can consider the circumstances of the person and say, "We do not want to disclose it," and the conviction will not be disclosed.

The Convener: Right, so the relevance is the question in the context of the individual who is making the application.

Nigel Graham: The relevance depends on whether the job is excluded from the protections under the Rehabilitation of Offenders Act 1974 by the Rehabilitation of Offenders Act (Exclusions and Exceptions) (Scotland) Order 2013. The key thing that kicks into the PVG check is schedule 4 of the 2013 order, which refers to regulated work with children or regulated work with adults. If the person's employment falls under those descriptions, a higher-level disclosure is required. There is other employment for which standard or enhanced disclosure is required rather than a PVG disclosure. The 2013 order disapplies the protections and allows disclosure of spent convictions.

The Convener: So in the example that I gave of somebody putting down "youth football coach", where the job does not involve driving but they have a previous conviction for a road traffic offence, could they apply for the conviction not to be disclosed?

Nigel Graham: It depends on what the driving offence was. If the driving offence was so serious that the sentence was more than two and a half years, the conviction will never be spent, so it would always be disclosed. If the offence is in the rules list but the conviction is under 15 years old, it would be disclosed but the person has a right to appeal that. If the person was under 18 at the time of the offence, the conviction would be disclosed if it was under seven and a half years old. If the person was admonished for the thing that they did, the conviction would not be disclosed once spent and, if they had an absolute discharge, the conviction would not be disclosed once spent.

It depends on whether the specific job title falls under the PVG rules as a result of the role involving regularly working with children. If it does, a higher-level disclosure is required. If the offence that the person committed is on the rules list, they obviously have the right to appeal the disclosure of the conviction to the sheriff and the sheriff can make a decision.

The Convener: That was my question—so the person can appeal the disclosure.

Nigel Graham: Yes.

The Convener: In the circumstances that you describe.

Nigel Graham: Yes.

The Convener: Following on from that, given that Disclosure Scotland can determine whether a subsequent scheme record application has been

"made for the same purpose for which the application for the other certificate was made"—

so, in my example, it has been made in relation to another youth football coach job for another employer—how would you know that the job description, in effect, was the same in both cases?

Ailsa Heine: In relation to the application for a scheme record, it is in relation to the type of regulated work, not the purpose of each individual disclosure—it is for the type of regulated work that the appeal provisions operate for PVG. The Police Act 1997 provisions are slightly different.

The Convener: I am sorry—I just want clarity. If an individual applies in the circumstances that I described previously and they do not have to disclose a conviction under the Road Traffic Act 1991 following an appeal, and they then apply for a different job that has exactly the same job title, Disclosure Scotland can rule that a scheme application is made for the same purpose. How would Disclosure Scotland know that the second job had a different job description involving other activities—for example, driving the children around—that the first one did not have?

Angela Constance: So what you are asking, convener, is that if a sheriff has ruled that an offence is not disclosable in the first set of

circumstances, does that apply for ever? Does it mean that Disclosure Scotland can never—

The Convener: Not for ever. I am talking about circumstances in which somebody applies for a job with the same job title, but it happens to be the case that driving is part of the second job.

Angela Constance: I think that the phrase "the same job title" is a bit misleading because, as Nigel Graham says, the issue is not so much about the job title; it is about whether the job is regulated and protected, so—

The Convener: I am asking how Disclosure Scotland would know.

Ailsa Heine: Disclosure Scotland does not know the details of each individual job that people apply for. It looks to see whether jobs fall within the scope of regulated work, and the job of youth football coach would.

On the appeal provisions, if somebody had appealed against the disclosure and the driving conviction was removed from it on appeal, the conviction would be removed from their PVG scheme record in relation to the type of regulated work that they had applied for. If it was regulated work with children, their scheme record in relation to regulated work with children would have that driving conviction removed.

The Convener: Irrespective of what job they subsequently applied for. The conviction would always be removed.

Ailsa Heine: It would always be removed, because the disclosure relates to the type of regulated work. That is why the list of offences covers various types of offence, because it applies across the ambit of regulated work.

The Convener: So it would always be removed irrespective of the fact that the first job did not involve driving children around but the second job did.

Nigel Graham: Insurance companies only consider driving convictions until they are spent, so they consider them for five years. If someone gets fined and endorsed, the conviction will be spent within five years. If we are looking at whether it is right that someone is driving as part of their job, insurance companies obviously think that once a conviction is spent, it is okay—

The Convener: Sorry, but I think that that is irrelevant. I want to go back to my question, which is nothing to do with insurance companies. If it is ruled that the conviction does not have to be disclosed, I am asking the question—or rather, I asked the question—would that permanently be the situation? The answer was yes, so I am asking you whether you think it is reasonable—if I am correct in my interpretation of the reply—that, given that in the first job no driving of vulnerable groups of children or anybody else was involved but in the second job driving was involved, the previous driving conviction would not be disclosed in either circumstance.

Ailsa Heine: That is right. It could not be disclosed because the sheriff has ordered that it be removed from the person's scheme record in relation to regulated work with children. The sheriff, in making the decision to remove the driving conviction from the record, has to be satisfied that the driving conviction would not be relevant, not to the job that the person applied for at that time but to the type of regulated work in which they participate in the scheme.

It is for the sheriff to consider, when he or she is looking at removing something from someone's record, that although at the moment they are not doing a job that involves driving, at some point in the future they could be doing regulated work with children that involves driving. The sheriff has to take that into account when making a decision.

The Convener: So would the sheriff take into account all possible future circumstances?

Ailsa Heine: The sheriff would have to do that, because the sheriff is required to remove the conviction from the scheme record, so they would be aware that the conviction is being removed for all time coming. The test is higher than being to do simply with the job in question.

The Convener: Thank you; that is helpful.

Chic Brodie (South Scotland) (SNP): I have a couple of questions about the list of offences. Looking at the list of offences that is being added to schedule 8A, I am slightly confused as to why they were not included in order 1. The list includes aiding, abetting, counselling, procuring or inciting murder, attempting or conspiring to commit murder, assault to danger of life and so on. What criteria were used in preparing the list for order 1?

Angela Constance: We looked at a broad range of information in preparing order 1. The Scottish Government publishes classifications of crimes and statistics and we looked at all that. We looked at the criminal histories system, the police national computer, offences listed in the disclosure and barring service in England and offences that are listed in Northern Ireland. The matter was debated in the chamber and we were very clear that there would be post-legislative scrutiny to ensure that the detail on both lists—the list of offences always to be disclosed and the list of offences to be disclosed subject to rules—would be subject to further scrutiny and quality assurance.

Mr Brodie mentions particular offences such as aiding, abetting, counselling, procuring and

inciting, and danger of life, which are all known as aggravations to serious offences. We wanted to put it beyond any doubt that such offences should always be disclosed. Although it is likely that the punishment would always mean that such offences would be disclosed for ever and would never be spent, after further reflection, scrutiny and quality assurance, we decided that we wanted to put that absolutely beyond doubt. We have added to schedule 8A as a result of that. That removes the risk of a lesser sentence meaning that some offences may not always be disclosed.

There was a lengthy and detailed process prior to order 1. We have taken the opportunity to go through the process again with each individual offence. We have benefited from the consultation period and from feedback from the Faculty of Advocates. It is important to note that for the offences that have been added, in the latter part of last year there were no requests—except on one occasion—for higher-level disclosures, because the conviction would always be disclosed because of the sentence that was given.

Chic Brodie: Thank you for that comprehensive answer.

Looking at schedule 8B, particularly in the current environment, the offences to be added are, first, those that are racially aggravated and, secondly, those that are aggravated by religious prejudice. Why are those offences in schedule 8B rather than schedule 8A, given the current landscape?

Angela Constance: One of the things that we did in the 60-day post-order consultation period was to give further consideration to the Equality Act 2010. The aggravations that Mr Brodie mentioned have been added to schedule 8B in the same way that aggravations involving children or sexual motivations have been added to schedule 8A.

Those are all serious aggravations and it is important to remember that, under a schedule 8B or schedule B1 disclosure, it will be 15 years before an offence that is committed by someone who is over 18 will be considered to be spent. That is a lengthy period of time.

10:45

Chic Brodie: Why is it reasonable to bind consideration of the age of the person with the time that has elapsed since their conviction? Given the current demography and the 1974 act, I do not understand why that is reasonable.

Angela Constance: That was one of the factors raised in the original UK Supreme Court case. As we know, that case led to our having to refine our disclosure procedures to ensure that they were more proportionate. Age is a factor in the Rehabilitation of Offenders Act 1974, but the UK Supreme Court judgment accepted that having a system of high-level disclosures was appropriate and that there are offences that could be considered spent in some contexts but not in others. It also pointed to factors that contributed to a fairer, reasonable and more proportionate system, and one of those factors was age.

Chic Brodie: The elephant in the room is, of course, ORI—in other words, other relevant information. What recourse will an individual have with regard to the other relevant information that Police Scotland might submit to militate against a spent conviction not being disclosed?

Angela Constance: The police have always had the authority over and above the high-level disclosure system to disclose any information that is considered to be proportionate, reasonable and relevant.

Chic Brodie: Who decides that? Who decides what is proportionate?

Angela Constance: It would be the senior police officers, and they have to take cognisance of the European convention on human rights in making that decision. Ultimately, people have recourse to the courts if they wish to challenge that.

The Convener: I just want to check that. Are you confident that the ORI stuff is ECHR-compliant?

Angela Constance: It has not been challenged and it was not subject to the UK Supreme Court case. Under the ECHR, people have the right to challenge many aspects of our criminal justice and public protection system. The orders before you today make it clear that, if people ask the police to review their decision, the police have to apply the same tests that they would have had to apply in the first place. The orders do not deal with the principle of the police being able to release other relevant information. We are clarifying that, if an individual seeks a review, the police have to apply the same tests that already exist.

The Convener: I am really thinking of the context. I think that it is fair to say that the reform that we are looking at today has arisen in the context of responses to ECHR concerns. I know that you have tightened up how the police operate in this area and the release of information, but it seems—to this layman, at least—slightly odd that the police still have the right to provide information about spent convictions or even information about stuff that is not a spent conviction over and above what is disclosed in the certificates, especially given the ECHR context, which is the reason why we are here today.

Angela Constance: It has to be proportionate. We have to strike the right balance between being reasonable, being proportionate and using relevant information, and then those factors have to be balanced with public safety considerations.

George Adam (Paisley) (SNP): My question goes back to some of the convener's earlier questions about someone applying for a position. The only time I have needed an enhanced disclosure, an individual came back to me and said, "Mr Adam, you did not disclose your appearance at Dingwall sheriff court." The reason for that appearance was not quite as exciting as you are all thinking—I had not paid the Skye bridge toll. I managed to tell the person that and he just said, "That's okay then."

Given some of the things that are already on the disclosure, should someone who has had, say, a road traffic offence not be able to have that conversation when they actually apply for a job, a position such as a youth coach or whatever? Would those not be the kinds of conversations that would be had if such minor offences were involved?

Angela Constance: Ultimately, the matters that you describe are ones for employers. What we as the Government have to do, in accordance with the UK Supreme Court ruling, is to establish a system of rules that apply to what is disclosed, when it is disclosed and under what circumstances it is disclosed. When employers get that information, they will make the judgment about an individual's fitness to work.

George Adam: I just framed mine and put it up in my office.

Mary Scanlon (Highlands and Islands) (Con): I want to raise a point of clarification, convener, but first of all I apologise for being late. As I mentioned last week, I have been at the Health and Sport Committee, speaking to nine amendments on the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill on wilful neglect, ill treatment and abuse. As I was coming in to the meeting, I heard Chic Brodie's question, so I apologise if my own question has already been answered for the rest of the committee.

I seek some clarity about the offence of ill treatment and wilful neglect being moved from schedule 8B to schedule 8A of the 1997 act. What is the consequence of that? Does it strengthen the offence? Given that the Health and Sport Committee is considering a bill that deals with ill treatment and wilful neglect, is there any further tie-in between the subordinate legislation going through this committee today and the bill now going through stage 2 that Maureen Watt is in charge of? I ask because I presume that moving the offence of ill treatment and wilful neglect as a result of this subordinate legislation is meant to strengthen the offence in some way. I am just seeking some clarity around those issues, as I have been looking at them for the last couple of days.

Angela Constance: The short answer is that it will strengthen the position. We needed to make the mental health legislation and the adults with incapacity legislation compatible, and that is why that movement upwards, if you like, has taken place.

Diane Machin: We are aware of the new offences that are proposed in the health bill. We intend to seek to add them to one of the schedules in due course, but we cannot do so at this point, because they are not yet enacted.

Mary Scanlon: I appreciate that, but are you saying that they will be added in due course?

Diane Machin: It is our intention to do so.

Mary Scanlon: Thank you.

The Convener: I seek two quick clarifications. I presume that for any new offences that are created in the future, you will just introduce new orders and, in effect, add them through the normal process. Will that be the standard way of dealing with such matters?

Angela Constance: Yes. Disclosure Scotland will also in three years' time undertake a formal review of any case law that has been established as a result of appeals.

The Convener: For absolute clarity, I note that, in response to Chic Brodie, you talked about the serious offences that have been added to order 2, as well as the ones that are being moved from schedule 8B to schedule 8A of the 1997 act. You have mostly talked about the aggravations—in other words, the stuff that has effectively been added because of aggravating factors—but some of these things are not aggravations. Some—for example, assault to danger of life—are new offences that have been added straight into schedule 8A. Why were those new offences that have now been added to schedule 8A—not the aggravations—not in the original order? Why were they not in order 1?

Angela Constance: I hoped that I had covered that comprehensively in my answer to Mr Brodie. There are intricacies with offences such as murder, which can never be spent, and we wanted to look very carefully at offences such as aiding and abetting, counselling and procuring and incitement to murder to make sure that we were capturing everything. We made it very clear when I went to Parliament that although we had done our best to ensure that everything was in the right list we were not going to arrogantly suggest that there was no need to have further scrutiny or to hear the

expert views of people such as members of the Faculty of Advocates.

Do my officials have anything to add?

Diane Machin: On the offence of assault to danger of life, we looked at the offences that had been disclosed on higher-level disclosures since 2011 and saw that that offence had not arisen as a free-standing one. Instead, we found that offences of very serious assault were almost always charged as assault to severe injury and danger of life, which is specified in schedule 8A and will therefore always be disclosed.

However, the Faculty of Advocates told us that, although it is certainly not common, it is not unheard of for such an offence to be charged with only the danger of life aggravator. We felt that, for the purposes of clarity and to be sure that it would always be captured in the event that such an offence ever received a sentence that could become spent, we should add it to the list.

The Convener: So they were just missed. Is that what you are saying?

Diane Machin: We had not come across that particular offence—assault to danger of life—as one that had been charged as a free-standing offence. It has always been included in the assault to severe injury offence.

The Convener: But you seem to be suggesting that, in order to create the first list, you went back and looked at the offences that had come up on disclosures. Is that right?

Diane Machin: That was one of the considerations. We also looked at the CHS list of every offence charge code in Scotland.

The Convener: What is the CHS?

Diane Machin: I am sorry—it is the criminal history system.

The Convener: The criminal history system?

Diane Machin: There is a very extensive list of in excess of 8,000 charge codes for offences in Scotland, and we went through that and looked at every single offence code.

The Convener: Were those offences not on the list?

Diane Machin: The assault to danger of life offence was on the list, but it was not something that had ever been disclosed since 2011 when the PVG scheme came into effect. However, we have disclosed lots of assault to severe injury and danger of life offences.

The Convener: In that case, are we now confident that we have captured on the lists everything that needs to be captured?

Angela Constance: Very extensive work was undertaken to bring the original order together, and that has been added to with even more detailed work in advance of the second order, which has been informed by consultation. We are as confident as we reasonably can be.

The Convener: Thank you.

Finally, is there any chance that people guilty of any of the offences that have been added to or moved in order 2 have been treated differently because they might have fallen into the gap between order 1 and order 2?

Angela Constance: I will ask officials to confirm this, but according to the briefings I have received, we have checked the disclosures that have been made between September and now to ensure that no one has been affected.

11:00

Diane Machin: That is correct. We looked at the data for every offence that we are proposing to add or move and whether there were any cases between 10 September and 30 November in which an applicant for a higher-level disclosure had one of those convictions on their record. There was an attempted murder on one applicant's record, but that had been disclosed anyway, because the sentence meant that the conviction would never be spent. We are expecting the impact of the changes to be virtually non-existent, and we have found no evidence of people being treated differently as a result of our moving offences between lists.

The Convener: That is helpful.

Actually, I have one final question that I should have asked earlier. The business and regulatory impact assessment estimated 50 such cases in 12 months, but there have been 27 cases in the first three months. Are you still confident that the figure for the year will be 50, given that the fact that we have had 27 already would suggest that it might be 100?

Diane Machin: Is the figure of 50 that you are referring to the number of appeals or applications to a sheriff? What does the figure of 50 relate to?

The Convener: I am sorry—it is the number of appeals.

Diane Machin: There is a distinct difference between those figures. On the basis of the available information, we expect to have 50 applications to a sheriff proceeding in the course of a year; the 27 was the number of notifications of intention to appeal that we had received. The current figure is actually 65; however, 19 have subsequently been withdrawn, which means that we have 41 extant notifications. To the best of our

knowledge, though, none of those notifications has yet transferred into an actual application to a sheriff. We are not expecting to exceed that estimate of 50 appeals over the year, because we have not yet had any applications to a sheriff.

The Convener: Okay. Thanks for clarifying that.

We now move to agenda item 3, which is the formal debate on the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No 2) Order 2015. I invite the cabinet secretary to speak to and move motion S4M-15403.

Angela Constance: Convener, I have nothing further to add that has not already been raised in the discussion or in my opening statement.

I move,

That the Education and Culture Committee recommends that the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (SSI 2015/423) be approved.

The Convener: The question is, that motion S4M-15403 be agreed to.

Motion agreed to.

The Convener: Agenda item 4 is the formal debate on the draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016.

Motion moved,

That the Education and Culture Committee recommends that the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016 [draft] be approved.—[*Angela Constance*.]

Motion agreed to.

The Convener: I thank the cabinet secretary and her officials for their attendance. For the committee's benefit, I should mention that James Brown, who has been with us for a short while, is attending his final meeting before he moves on to what I am sure will be better things in another part of the Parliament. We all wish James all the best and thank him for his work in supporting the committee over the past few months.

Meeting closed at 11:03.

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