

Discussion Paper on the Rehabilitation of Offenders Act 1974

DISCUSSION PAPER ON THE REHABILITATION OF OFFENDERS ACT 1974

CONTENTS

Ministerial Foreword and Executive Summary	1
CHAPTER 1 - Historical perspective on the development of rehabilitation of offenders legislation	
	*
1.1. Background to rehabilitation of offenders legislation	î
1.2. The 1974 Act, (as commenced)	ï
1.3. Reviews of the 1974 Act	J
1.4. Wider issues and reviews relating to the 1974 Act	F€
1.4.1. Bichard Inquiry	F€
1.4.2. Criminal records regime review	F€
1.5. Recent changes to the 1974 Act in England & Wales	FF
1.5.1. Criminal Justice & Immigration Act 2008	FF
1.5.2. Legal Aid, Sentencing & Punishment of Offenders Act 2012	1G
1.5.3. Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England & Wales) Order 2013	1H
1.6. Recent changes to the 1974 Act in Scotland	1I
1.6.1. Criminal Justice & Licensing (Scotland) Act 2010	1I
1.7. Rehabilitation of Offenders Act 1974 (Exclusions & Exceptions) (Scotland) Order 2013	1Í
1.8. Treatment of children’s hearings disposals under the 1974 Act	1Ë
1.8.8. Changes to the 1974 Act (and 1997 Act) under the Children’s Hearings (Scotland) Act 2011	1Ì
CHAPTER 2 - Disclosure of a person’s previous criminal activity by the state and the Rehabilitation of Offenders Act 1974: Overview of how it works	
	1-
2.1. Introduction	1J
2.2. Police Scotland’s recording, retention and weeding rules	G1
2.3. Disclosure Scotland	2G
2.4. What is a disclosure?	2G
2.5. Types of disclosure	2G
2.6. Legislation governing disclosure, including details of basic disclosures, standard disclosures and enhanced disclosures	2I
2.7. Protection of Vulnerable Groups (Scotland) Act 2007 and the PVG Scheme	2Ì
2.8. Disclosure and rehabilitation arrangements in other countries	2J

CHAPTER 3 - Key definitions and policy concepts contained within the 1974 Act	3'
3.1. Introduction and some general questions	3H
3.2. Definitions	3Í
3.3. What is meant by sentence	3Í
3.4. What is meant by an excluded sentence	3Î
3.5. What is meant by conviction	3Ï
3.6. What is meant by alternative to prosecution, (AtP)	3Ï
3.7. What is meant by service disciplinary proceedings	3J
3.8. What is meant by proceedings before a judicial authority	I €
3.9. What is meant by circumstances ancillary to a conviction	I €
3.10. What is meant by circumstances ancillary to an AtP	4F
3.11. Questions	4F
3.12. What is meant by rehabilitated person	4G
3.13. Questions	4Í
 CHAPTER 4 - Rehabilitation periods	 4*
4.1. Introduction	4Î
4.2. Where a single sentence has been received	4Î
4.3. Where more than one sentence has been received	Í €
4.4. Where a person breaches a conditional discharge or probation order	5G
4.5. Where a person is convicted of a further offence before rehabilitation period ends for a previous sentence	5G
4.6. Where a person is convicted of an offence for conduct that had originally resulted in an AtP	5I
4.7. Conviction data and sentencing trends since the 1974 Act came into force	5Î
4.8. Questions	64
 CHAPTER 5 - The protections given to spent convictions and alternatives to prosecution	 68
5.1. Introduction	68
5.1.1. Effect of Rehabilitation	68
5.2. Convictions	68
5.2.1. Proceedings before a judicial authority	68
5.2.4. Questions put outwith proceedings before a judicial authority	69
5.3. Alternatives to prosecution	71
5.3.5. Proceedings before a judicial authority	71
5.3.6. Questions put outwith proceedings before a judicial authority	72
5.4. Questions	73

CHAPTER 6 - Where the protections given to spent convictions do not or may not apply	75
6.1 Introduction	75
6.2 Prohibitions to becoming a 'rehabilitated person'	75
6.2.1 Excluded sentences	75
6.2.2 Subsequent conviction/s	75
6.2.4 Not served or complied with sentence	76
6.3 Limitations for rehabilitated persons	77
6.3.1 Convictions	77
6.3.4 Protections disapplied in specified proceedings	78
6.3.6 Proceedings before a judicial authority	79
6.3.9 Secondary legislative powers to exclude the application of the general protections of the Act	80
6.3.11 Alternatives to prosecution	80
6.4 Excluding and modifying the general operation of the 1974 Act through the 2013 Order	82
6.4.2 Alternatives to Prosecution	82
6.4.3 Convictions	82
6.5 Questions	85
CHAPTER 7 - How defamation is provided for within the 1974 Act	88
7.1 Summary	88
7.7 Questions	89
CHAPTER 8 - Unauthorised disclosure of spent convictions/AtPs from official records	90
8.1 Summary	90
8.9 Questions	91
CHAPTER 9 – Next steps	92
9.1 What happens next	92
Appendix A - The Scottish Government Consultations	93
Appendix B - Executive Summary and respondent information form with questionnaire	95
Appendix C - List of Consultees	122

MINISTERIAL FOREWORD



Where people break the law, it is entirely right that they can be held to account for their offending behaviour through our justice system. Our criminal courts are empowered to decide what an appropriate sentence should be for someone's offending behaviour. In addition, our prosecutors and police have powers to deal directly with more minor types of offending behaviour.

However, once a sentence is served, a long standing question has been for what period of time should the aftermath of previous criminal activity linger for someone who has fulfilled the requirements placed on them by the justice system.

It is clear that there is a minority of offenders whose previous criminal activity means that they are likely to pose a significant and on-going potential risk to public safety and this is especially apparent if they seek to work in particular roles. I believe it is important that our system for the disclosure of a person's previous criminal activity takes account of the need for proportionate arrangements to protect society and, in particular, vulnerable groups and individuals.

However, a disclosure scheme of a person's previous criminal activity fit for the 21st century Scotland needs to succeed in achieving the right balance between protecting the public from those whose offending behaviour makes them a potential future risk while also enabling offenders who want the chance of gainful employment or education, to put their previous offending behaviour behind them and to make a positive contribution to Scottish society. Ensuring this correct balance between rehabilitation and public safety will support our priorities for reducing re-offending; increasing public confidence; strengthening community resilience; and achieving sustainable economic growth.

We are issuing this paper to have as wide a discussion as possible to gather the evidence and views necessary to help us consider what changes may be required to modernise and improve the legislation. We do not hold a fixed view about how the regime might be modernised and reformed and this discussion paper is designed to provide all those with potential interest the chance to influence how specific proposals for modernisation and reform might be developed.

A handwritten signature in black ink that reads "Kenny MacAskill". The signature is written in a cursive, slightly slanted style.

Kenny MacAskill MSP
Cabinet Secretary for Justice
27 August 2013

EXECUTIVE SUMMARY

Key facts

Over one-third of the adult male (18+) population in Scotland is likely to have at least one criminal conviction.

Nearly one-tenth of the adult female (18+) population is likely to have at least one criminal conviction.

Breach of the peace is the most common offence for which people have a previous conviction. Since 1969, 23% of court convictions have been for breach of the peace.

In 2011-12, a total of 108,336 people were convicted in Scottish courts. The majority (55%) received a financial penalty with 16% receiving a community based sentence and 15% receiving a custodial sentence. The rest, 14%, received some other form of sentence such as an admonition.

Around 2% of the adult male population and 0.2% of the adult female population have committed a crime which has led to a prison sentence.

Currently, less than 0.1% of the adult population are on the sex offenders register (approx. 99% of these are male and 1% are female).

[Source: Scottish Government: Justice Analytical Services, 2013]

1. Having to disclose previous criminal activity¹ affects many people in our society. The consequences of having to do so can have an on-going impact on people's ability to gain employment; attend university or college; volunteer; secure an apprenticeship or get insurance or a bank account; etc.
2. We know that some of the key factors that influence people not to re-offend include having stable employment, access to education, having positive family relationships and having normal lifestyle choices. Public safety and the interests of wider society are, therefore, best served by encouraging and enabling people to move on from their offending behaviour as much as possible.
3. However, a minority of offenders pose a significant and on-going potential risk to public safety or in particular roles. In these circumstances, employers and others with a legitimate interest need to have relevant information about previous convictions available to assess appropriately the level of risk.
4. The current arrangements under the **Rehabilitation of Offenders Act 1974** ("the 1974 Act") have been criticised as not being effective in achieving the necessary balance between public safety and enabling people who do not pose any on-going risk to move on.

¹ Conviction in the above table refers to court convictions, excluding most motoring offences (e.g. speeding).

Case for Reviewing the 1974 Act

5. It has been argued for some time that the current rehabilitation periods are not appropriate and do not reflect the point at which reoffending tails off following previous criminal activity. Some consider the legislation to be too complicated and therefore poorly understood and, as a result, not properly applied in practice. There is also some concern that the regime has not kept pace with wider changes in legislation to protect public safety, including the Protection of Vulnerable Groups legislation.

6. During 2012, Scottish Government officials undertook, therefore, initial discussions with interested stakeholders about whether it is time to consider modernisation and reform of the 1974 Act in Scotland. Officials spoke to organisations such as Apex Scotland, Sacro, the Police, local government and employer organisations to hear their views on how the 1974 Act operates in Scotland. Disclosure Scotland, the executive agency that delivers Scottish Ministers' functions to disclose information about a person's previous criminal activity, also offered views.

7. An important outcome that emerged was that stakeholders believed that the fundamental principles of the legislation (i.e. helping offenders put past offending behaviour behind them while protecting the public) are still sound and as relevant today as they were in the 1970s. However, there was also general support among stakeholders for the 1974 Act to be reformed in some way with all arguing it is no longer fit for purpose in a modern Scotland.

8. There was no single view on how best the 1974 Act should be reformed. The majority of stakeholders found the 1974 Act complex and most felt that this was one of the main barriers to previous offenders gaining employment. Another key theme most stakeholders agreed was that the rehabilitation periods and the scope of the Act needed to be reconsidered. Many stakeholders felt that the current rehabilitation periods were out of date and did not reflect current sentencing practices in Scotland. However, there was less agreement on what those rehabilitation periods should be or how far the scope of the Act should be revised.

9. As a result of previous research and analysis and our informal discussions with stakeholders, we consider that there is a compelling need to review the principles and operation of the 1974 Act in its current form in Scotland.

10. In order to help us do that, we want to gather further evidence as to how that should be achieved. Therefore, we have prepared a discussion paper to ask for views about the current operation of the 1974 Act in Scotland and how it might be reformed. This will provide us with the evidence to find Scottish solutions to the various issues and to ensure all interested parties have a chance to contribute. We will use the evidence gathered to begin to formulate a policy response that strikes the right balance between supporting the rehabilitation of offenders and ensuring continuing protection for the public and for vulnerable groups in particular.

11. The discussion paper is organised into the following chapters:

Chapter 1: A historical perspective on the development of the 1974 Act

This chapter puts the 1974 Act in a historical context. It explains why the 1974 Act was created and how it has been amended over time. It also briefly talks about the reviews and the inquiries that have taken place that have had an influence on it. It also briefly explains what has happened to the Act in England & Wales and the different approach taken in Scotland.

Chapter 2: Disclosure and the 1974 Act: How it works

This chapter looks at how the 1974 Act works in practice in relation to the actual disclosure of a person's previous criminal activity. It discusses how the 1974 Act interacts with the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 and how Disclosure Scotland puts all this legislation into practice in order to provide a disclosure service in Scotland.

Chapter 3: Key definitions and policy concepts contained within the 1974 Act

This chapter explains some of the key definitions and concepts used in the 1974 Act. This includes the important concept of someone with previous criminal activity becoming a 'rehabilitated person'.

Chapter 4: Rehabilitation periods

This chapter looks at how quickly someone with previous criminal activity becomes a rehabilitated person, including for different sentences and where further criminal activity takes place.

Chapter 5: The protections given to spent convictions and alternatives to prosecution

This chapter provides details of what it means to be a rehabilitated person in terms of the protections afforded. This includes people with previous criminal activity which gave rise to a conviction and people with previous criminal activity which gave rise to an alternative to prosecution.

Chapter 6: Where the protections given to spent convictions do not or may not apply

This chapter explains the circumstances in which the protections given to spent convictions do not apply and the circumstances in which those protections are subject to certain limitations.

Chapter 7: How defamation is provided for within the 1974 Act

This chapter summarises how defamation law is catered for within the 1974 Act regime.

Chapter 8: Unauthorised disclosure of previous criminal activity from official records

This chapter details how unauthorised disclosure of sensitive information relating to previous criminal activity can be dealt with under the 1974 Act.

Chapter 9: Next steps

This chapter explains what is likely to happen following consideration of the views offered in response to this discussion paper.

Responding to this discussion paper

12. The document includes a series of both general and specific questions throughout the chapter. The questions are set out in the formal respondent information document. We are inviting written responses to this discussion paper by **19 November 2013**. Please send your response with the completed Respondent Information Form to:

Rehabilitationofoffendersact1974.consultation@scotland.gsi.gov.uk

or

Nigel Graham
Justice Directorate
Criminal Law & Licensing Division
Scottish Government
Area 2W, St Andrews House
Regent Road
Edinburgh EH1 3DG

If you have any queries contact Nigel Graham on 0131 244 1843.

27 August 2013

CHAPTER 1 - A HISTORICAL PERSPECTIVE ON THE DEVELOPMENT OF REHABILITATION OF OFFENDERS LEGISLATION

1.1 Background to rehabilitation of offenders legislation

- 1.1.1 In 1972, the independent Gardiner Committee, set up jointly by the UK Government's Justice Department the Howard League for Penal Reform and Nacro, observed that, '*most civilised countries recognise that it is in their interest to accept back into the community a person who, despite one or more convictions, goes straight for a sufficient number of years.*'¹ At that time the UK was the only member of the Council of Europe without a system limiting disclosure requirements for people with criminal convictions.
- 1.1.2 It is important to note that the Gardiner Committee was not generally focused on the minority of persistent offenders, but rather was focused on the many who offend once or twice, serve their sentence, then try to settle down to a law abiding life².
- 1.1.3 Brian Harris, OBE, QC, in his book, 'A Guide to the Rehabilitation of Offenders Act 1974', observed that the Gardiner Committee's report started from the basis that there were about a million people in England & Wales who had a criminal record but had not been convicted again for at least 10 years. He added that a survey of 4,000 males arrested in London in 1957 suggested that nine out of 10 of those who go straight for five years were still on the right side of the law after 10 years, after which the chance of their being convicted again is minimal.
- 1.1.4 Mr Harris further commented that the Gardiner Committee's report stated that, such people are none-the-less faced with great difficulties, especially in the field of employment and insurance, and in the courts, however exemplary their lives may have been for many years. This is because at any time, malice or chance may put an end to their rehabilitation. In general terms, it is in society's interest, the report argued, that when someone has done all they can to live down their past, and enough time has passed to establish their sincerity, their record should no longer be held against them so long as they do not offend again.
- 1.1.5 The Gardiner Committee took the view that the best way to encourage society to treat as rehabilitated those who have rehabilitated themselves by their conduct is, in fact, for the law itself to treat them in that way. The simplest way of achieving this end, they suggested, was to provide that where a person has so rehabilitated themselves, the law of the land will also treat them in this way and the law should not

¹ Living it down – the problem of old convictions. A report of the Gardiner Committee, London, Stevens & Sons, 1972.

² Breaking the Circle – A Report of the review of the Rehabilitation of Offenders Act – July 2002

therefore, with certain exceptions, allow the contrary to happen by allowing previous criminal activity to be used against a person.³

1.1.6 Therefore, the Gardiner Committee Report proposed a law that would “*restore the offender to a position in society no less favourable than that of one who has not offended*”⁴.

1.1.7 This report led to the introduction of the Rehabilitation of Offenders Act 1974 (“the 1974 Act”).

1.2 The 1974 Act, (as commenced)

1.2.1 The 1974 Act is explained in more detail later on in this discussion paper. Briefly however, the 1974 Act introduced new concepts of spent convictions, rehabilitated persons, and rehabilitation periods. The rehabilitation periods varied from six months to 10 years and are set according to the sentence passed by the court.

1.2.2 The scope of the Act did not include anyone sentenced to custody for over 30 months. Therefore, anyone receiving a sentence of over 30 months must always disclose that fact, when asked, for the rest of their life as the sentence never becomes spent.

1.2.3 During the rehabilitation period a person must disclose their previous convictions when asked to do so. However, provided that they are not reconvicted during the rehabilitation period, the conviction(s) become ‘spent’ once the rehabilitation period has expired. In practical terms this means that the rehabilitated person is no longer required to disclose the spent conviction(s). If anyone chooses to do so or discloses without realising they do not need to disclose, the person should not be prejudiced by it and so, for example, an employer may not use a spent conviction as a reason to reject a job application, or as grounds for dismissal from employment.

1.2.4 There are both civil and criminal sanctions against the unlawful disclosure of spent convictions. A malicious disclosure can give rise to an action for damages. It is also an offence to corruptly obtain details of spent convictions, or to disclose them from criminal records otherwise than in the course of a person’s official duties.

1.2.5 The 1974 Act contains a provision whereby certain exclusions and exceptions can be made, via secondary legislation, to the protections given to spent convictions. This is in order to protect the public and, in particular, the most vulnerable members of our communities. The power to make these exclusions and exceptions by secondary legislation was first used in 1975. Essentially, the effect of the secondary legislation was that the protection offered by the 1974 Act,

³ A Guide to the Rehabilitation of Offenders Act 1974 – Brian Harris, OBE, QC, Barry Rose, 1999.

⁴ Living it down – the problem of old convictions. A report of the Gardiner Committee, London, Stevens & Sons, 1972.

A Discussion Paper on the Rehabilitation of Offenders Act 1974

by not requiring disclosure of previous convictions after a specified period, is not available in respect of applications for a range of professions and occupations involving a particular level of trust. In other words, persons who want to work in one of the exempted professions or occupations must disclose all their convictions including spent convictions. These professions and occupations include such areas as work with children, work with vulnerable adults, and employment involving the administration of justice, national security and financial services.

- 1.2.6 In respect of these specified professions and occupations, an employer is entitled to know about all previous convictions, both spent and unspent, and to take them into account in assessing an individual's suitability for the work.
- 1.2.7 It is important to note however, that nothing in the secondary legislation made under the 1974 Act, or indeed the 1974 Act itself, debars any person from undertaking any job or profession. However, it does help inform decisions that may be made about whether to employ specific persons in specific areas of employment by allowing access to spent conviction information.
- 1.2.8 When it came into force in 1975, the 1974 Act applied across the UK, though there were some minor differences for Scotland to reflect our different justice system. Following devolution, legislating to modernise and reform the 1974 Act falls within the devolved competence of the Scottish Parliament.

The case for change

- 1.2.9 The 1974 Act has been on the statute book for nearly 40 years. It has been argued by many that some fundamental concerns with how the 1974 Act operates can be traced back to its inception when it was introduced by the then Conservative MP, Piers Dixon, as a private members' Bill. One of the reasons for such an opinion is that as soon as it was introduced, the legislation received considerable criticism and was opposed by many key interests such as Justices' Clerks' Society, the Bar Council, APEX, the Society of Authors, the Institute of Journalists and the Guild of British Newspaper Editors.
- 1.2.10 Due to the many criticisms of the Bill, it was amended heavily by Parliamentary Committee as it progressed through the Parliamentary process. While such amendments would have been motivated by those with an interest in trying to improve the legislation, it is the case that the Act as passed was very complex and many consider that it was filled with ambiguities which made it difficult to understand easily.

1.3 Reviews of the 1974 Act

- 1.3.1 A key question back when the legislation was being developed in the 1970s remains a key question today; namely how to balance the competing priorities of allowing offenders, who have adhered to the terms of their sentences, move away from their previous criminal activity while ensuring the public is appropriately protected by having access to information about previous criminal activity where appropriate.
- 1.3.2 Since its commencement, the 1974 Act has been criticised by many as cumbersome and ineffective in meeting its aim of assisting those with a record of previous criminal activity to leave their offending past behind them. Further to this, it has also been argued that the rehabilitation periods are too long and do not reflect the general statistical evidence that rates of reoffending tail off following a conviction. It has also been argued that the threshold at which a sentence never becomes spent (i.e. 30 months) is too low given that sentencing lengths are generally longer today than when the 1974 Act was introduced. Many consider the legislation is unnecessarily complicated, poorly understood, and, as a result, not properly applied in practice. It has also been said to be increasingly out of step with sentencing law and contemporary sentencing practice in Scotland.
- 1.3.3 In 1999, the Better Regulation Taskforce recommended the UK Government review the rehabilitation periods. As a result, a fundamental review of the 1974 Act was undertaken in 2001-2 by the UK Government. The key focus of the review was how best to remove the barrier to employment that a person's previous criminal activity presents by devising disclosure periods that are specifically related to the likely risk presented to an employer. The Home Office-led review concluded that the 1974 Act was not achieving the right balance between resettlement of offenders and protection of the public. The recommendations were published in the review report, 'Breaking the Circle'⁵, in July 2002.
- 1.3.4 The Breaking the Circle report set out proposals for a scheme that the authors of the report indicated would offer a more effective balance between the competing demands of protection and rehabilitation into the community. In the circumstances where the risk of further offending by a person is low, it was recommended the requirement to disclose should be significantly reduced, and the disclosure periods simplified and shortened. It was also recommended the exceptions to the scheme should remain largely unchanged, ensuring that information is disclosed to employers in circumstances where there is a particular risk inherent in the post, for example, posts allowing unsupervised access to children and vulnerable adults. The report also recommended that the exceptions that apply to criminal proceedings

⁵<http://www.unlock.org.uk/userfiles/file/roa/breaking%20the%20circle%20rehab%20of%20offenders.pdf>

and some civil proceedings, where there are no restrictions on the use of spent convictions by the police for crime prevention and detection purposes should not change.

- 1.3.5 At the time, the report was generally welcomed by consultees, and the recommendations largely accepted in principle by the UK Government⁶. However, legislation to take forward reforms of the Act was not brought forward at that time either by the then UK Government or the then Scottish Executive.

1.4 Wider issues and reviews relating to the 1974 Act

1.4.1 Bichard Inquiry

- 1.4.1.1 Following the conviction of Ian Huntley in December 2003 for the murders of 10 year old Jessica Chapman and 10 year old Holly Wells, the UK Government Home Secretary at the time, the Rt Hon David Blunkett MP, asked Sir Michael Bichard to lead an independent inquiry into;

- Child protection,
- Record keeping,
- Vetting, and
- Information sharing between Humberside Police and Cambridgeshire Constabulary.

- 1.4.1.2 This independent inquiry was set up because Ian Huntley worked as a caretaker at a school in the village of Soham, Cambridgeshire where the murders took place and he was able to work in a school even though there had been a string of allegations of criminal activity made against him in the past, including some concerning sexual offences against children. Despite these allegations, he was still able to obtain a job as a school caretaker.

- 1.4.1.3 The Bichard Inquiry Report⁷, published in June 2004, made 31 recommendations. Recommendation 19 stated that "new arrangements should be introduced requiring those who wish to work with children, or vulnerable adults, to be registered." The Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act") was the Scottish Government's response to that recommendation (further information on the PVG scheme is given in the next chapter).

1.4.2 Criminal records regime review

- 1.4.2.1 In October 2010, the UK Government commissioned an independent review of the Criminal Records Regime (CRR), which was led by the

⁶http://www.unlock.org.uk/userfiles/file/roa/breaking_the_circle_-_government_response_to_the_report_of_the_review_of_the_rehabilitation_of_offenders_act_1974.pdf
⁷<http://dera.ioe.ac.uk/6394/1/report.pdf>

Independent Advisor for Criminality Information, Mrs Sunita Mason. Under the terms of reference for this review, she was asked to;

- examine whether the CRR was striking the right balance between respecting civil liberties and protecting the public, and
- examine actions that may be needed to rebalance the system.

1.4.2.2 The review was undertaken in two phases.

1.4.2.3 The first phase looked at how employers access information about a person's previous criminal activity to help them make informed decisions about an individual's suitability for employment, especially in relation to working with children and vulnerable adults⁸.

1.4.2.4 The second phase looked at wider issues concerning the criminal records landscape, such as definitions, management access to criminal records (both by individuals and law enforcement agencies) and also international criminal record information exchange⁹.

UK Government response to Sunita Mason's reviews

1.4.2.5 The UK Government gave a detailed response to the recommendations¹⁰. In general, the UK Government considered all the recommendations arising from both phases of the review against its objectives on safeguarding, as well as wider issues such as reducing burdens on business and supporting economic growth and decided that the large majority of the recommendations should be accepted, either unconditionally or in principle.

1.5 Recent changes to the 1974 Act in England and Wales

1.5.1 Criminal Justice and Immigration Act 2008

1.5.1.1 In England and Wales, as in Scotland, not all criminal activity is handled by the courts. In England and Wales, the police have a range of alternatives they can use to address less serious criminal activity. For adults, these alternatives include:

- simple cautions
- conditional cautions
- cannabis warnings
- penalty notices for disorder
- fixed penalty notices (for driving offences).

⁸ Full phase 1 report can be found at <http://www.homeoffice.gov.uk/publications/crime/criminal-records-review-phase1/common-sense-approach?view=Binary>

⁹ Full phase 2 report can be found at <http://www.homeoffice.gov.uk/publications/crime/criminal-records-review-phase2?view=Binary>

¹⁰ <http://www.homeoffice.gov.uk/publications/crime/gov-resp-indep-rev-crim-records?view=Binary>

1.5.1.2 For youths aged 10 to 17, the options include:

- reprimands
- final warnings
- penalty notices for disorder, although only for those aged 16-17.

1.5.1.3 The UK Government amended the 1974 Act so as to provide protection for people receiving cautions under the Act in England & Wales (section 49 and Schedule 10¹¹ of the Criminal Justice and Immigration Act 2008 (“the 2008 Act”)).

1.5.2 Legal Aid, Sentencing and Punishment of Offenders Act 2012

1.5.2.1 Further to the changes made by the 2008 Act, the UK Government recently amended elements of the 1974 Act under part 3, chapter 8 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the 2012 Act”)¹². However, as of August 2013, it should be noted that these reforms are yet to be commenced.

1.5.2.2 These reforms, when commenced, will extend the scope of the Act in England & Wales, which currently only allows for the rehabilitation of sentences of 30 months or under. The scope will be extended to include sentences of over 30 months up to and including 4 years. This means that individuals who could never be rehabilitated under the current regime will now be rehabilitated under these new reforms if they have received a sentence of between 30 months and 48 months.

1.5.2.3 There are a number of other reforms in the 2012 Act including:

- Rehabilitation periods are adjusted so as to reduce the length of time before a person’s previous criminal activity becomes spent and which therefore will need to be disclosed, including on a basic disclosure certificate. Specific changes include:
 - In relation to non-custodial disposals such as community orders and youth rehabilitation orders, the rehabilitation periods reduce from 5 years to 1 year and apply from the end of the order.
 - The rehabilitation period for a fine reduces from 5 years to 1 year.
 - An absolute discharge is spent immediately and other orders such as hospital orders and reparation orders have a rehabilitation period equivalent to the period of the order.
- Custodial sentences and community orders become spent following a “buffer period” after the end of a sentence. A “buffer period” is a period of time which will begin at the end of a sentence of

¹¹Further details of the amendment to the 1974 Act made under the 2008 Act can be found in the Explanatory notes for the 2008 Act at <http://www.legislation.gov.uk/ukpga/2008/4/notes/division/5/1/6/8/1>

¹²<http://www.legislation.gov.uk/ukpga/2012/10/part/3/chapter/8>

imprisonment (including any licence period), or at the end date of a community order or youth rehabilitation order.

- The new rehabilitation periods continue to be halved for offenders aged under 18. The only exception to this will be for a person under 18 at the date of conviction, who receives a custodial sentence of 6 months or less. The rehabilitation period in such cases will be 18 months from the date of conviction.

1.5.2.4 Although the changes extend to England and Wales, the amendments to the Act in England and Wales will also apply to offences committed in Scotland if the offender resides in England and Wales, as is currently the case.

1.5.3 Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013

1.5.3.1 In January 2013, three individuals took cases to the Court of Appeal¹³ in England & Wales following concerns about the operation of the Police Act 1997 (“the 1997 Act”) and the 1974 Act. The Court allowed two of the appeals. In allowing the two appeals, the Court said that the mandatory disclosure of all convictions and cautions under the 1997 Act under standard and enhanced disclosure was incompatible with article 8 of the European Convention on Human Rights (ECHR) (the right to a private and family life). In addition, the Court also ruled that the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (the 1975 Order) was incompatible with article 8.

1.5.3.2 In terms of the UK Government’s legislative response to the judgement, in May 2013 an amendment was made to the 1975 Order under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013¹⁴ which creates a ‘filtering’ system for specific cautions and convictions by making them ‘protected’ under the 1975 Order. Although the UK Government has made these legislative changes, they have also appealed this judgement and the appeal will be heard in the Supreme Court on 9 December 2013.

¹³ <http://www.judiciary.gov.uk/media/judgments/2013/r-t-chief-constable-greater-manchester-judgment-29012013>

¹⁴ <http://www.legislation.gov.uk/ukSI/2013/1198/contents/made>

1.5.3.3 The table below summaries what will be the effect of this ‘filtering’ system in England & Wales.

Disposal	Number of years before being protected ¹⁵	
	Adults	Under 18
Custodial sentences	no protection	no protection
Non-custodial sentences (e.g. Fine, Community Order)	11 yrs	5½ yrs
Cautions	6 yrs	2 yrs

1.5.3.4 It is important to note that these periods of time only apply once a caution or a conviction becomes spent. The protection will only apply if an individual has one conviction or one caution. If they receive a further conviction or caution then their previous protected conviction or caution will then be disclosed, (or will become unprotected), when a standard or enhanced disclosure check is requested.

1.5.3.5 It is also important to note that the UK Government has not changed the current system which requires the mandatory disclosure of spent convictions where a custodial sentence has been received. Further to this, sexual, violent and drug offences will not be protected at all. That is, someone who receives any sentence including, say, a community order for, say, a sexual offence will always have this conviction disclosed. Even if a sentence would lead to a conviction ordinarily being seen as a protected conviction, that will be overridden by the fact a sexual offence had been committed.

1.6 Recent changes to the 1974 Act in Scotland

1.6.1 Criminal Justice & Licensing (Scotland) Act 2010

Alternatives to Prosecution (AtP)

1.6.1.1 Alternatives to prosecution are, as the name suggests, options that fall short of prosecution which are available to Scottish police and Scottish prosecutors to deal with a person’s criminal activity. AtPs allow criminal activity to be dealt with appropriately and swiftly outwith the court system, helping free up court resources to focus on more serious offending behaviour. AtPs broadly fall into two categories.

1.6.1.2 ‘Category 1’ AtPs are warnings given by a constable or a procurator fiscal and fixed penalty notices given under section 129 of the Antisocial Behaviour (Scotland) Act 2004. These are AtPs that are given because the criminal activity is generally deemed to be relatively low level and also, in the case of police warnings and fixed penalty notices, do not require a person to admit guilt or otherwise accept them in order for them to be imposed.

¹⁵ The date of protection begins after rehabilitation period under the 1974 Act ends. That is, when the conviction or caution becomes spent.

- 1.6.1.3 'Category 2' AtPs are other types of non-court based disposals available to the police and prosecutors. They are fiscal fines, fiscal compensation orders, fiscal work orders and fiscal activity/treatment orders. In addition, there is a very specific type of AtP called a notice of intention to comply with a restoration order given under section 20A of the Nature Conservation (Scotland) Act 2004. These types of AtPs are generally given because the criminal activity is deemed more serious than the conduct that would warrant a category 1 AtP; although the conduct is still considered relatively minor in nature, hence no formal court prosecution is deemed necessary. All category 2 AtPs require a person to either accept or to have deemed to have accepted the offer of an AtP before it take effect (with "deemed to accept" being defined as someone not actively rejecting the AtP).
- 1.6.1.4 Section 109 of the Criminal Justice & Licensing (Scotland) Act 2010 ("the 2010 Act") was commenced in November 2011 and introduced AtPs into the 1974 Act. These changes were similar to the amendment made for the protection of spent cautions in England and Wales under the 2008 Act.
- 1.6.1.5 Section 8B of the 1974 Act, as inserted by the 2010 Act, introduces the concept of AtPs into the 1974 Act. Further to this, a new Schedule 3 of the 1974 Act was also created which takes the majority of long standing provisions on how criminal convictions are treated under the 1974 Act and applies them to the treatment of AtPs.
- 1.6.1.6 Prior to section 109 of the 2010 Act coming into force, the 1974 Act did not offer any protections to AtPs which meant that anyone who received one in the past for criminal activity would be required to disclose it if they were asked e.g. by an employer. By virtue of the changes contained in the 2010 Act, for the first time protections were afforded to spent AtPs under the 1974 Act with category 1 AtPs spent at the point they are given under the 1974 Act (i.e. immediately) and category 2 AtPs spent 3 months after they are given.

1.7 Rehabilitation of Offenders Act 1974 (Exclusions & Exceptions) (Scotland) Order 2013

- 1.7.1 As mentioned in paragraph 1.2.5, the 1974 Act contains a provision whereby certain exclusions and exceptions can be made, via secondary legislation, to the protections given to spent convictions. Although the power to make these exclusions and exceptions by secondary legislation was first used in 1975 by the UK Government, after devolution, the Scottish Government decided to make a Scottish version of this exclusions and exceptions Order. This Order was called the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003, ("the 2003 Order")¹⁶.

¹⁶ <http://www.legislation.gov.uk/ssi/2003/231/contents/made>

1.7.2 In February 2013, the Scottish Government made a decision to consolidate this 2003 Order. The reason why this consolidation exercise was undertaken was due to the number of modifying orders, (16 in total), that had been made since 2003. Along with consolidating the order, the Scottish Government also took the opportunity to make some minor changes to the content of the order including:

- removing outdated references to Independent Schools Tribunals following separate legislative changes made back in 2005;
- updating references relating to appeal procedures under the Lottery etc. Act 1993;
- widening conviction information available to the Financial Services Authority when authorising a person to carry out regulated activities;
- taking account of the commencement of the Electronic Money Directive by the UK Government;
- providing for a new category of institution, called 'payment institutions' created in 2009 by the Payment Services Directive implemented by the UK Government;
- permitting approved regulators under the Legal Services (Scotland) Act 2010 to consider spent convictions, where appropriate, as part of their assessment of the fitness of investors and those in certain named positions within licensed providers;
- ensuring the court is able to have access to information relating to the spent convictions of anyone who is seeking to become a 'lay representative' within the meaning of the Legal Services (Scotland) Act 2010;
- making consequential changes required by police reform;
- making consequential changes reflecting summary justice reform legislation and the role of signing justices of the peace, and
- altering the definition of actuary to reflect the merger of the Faculty of Actuaries and the Institute of Actuaries.

1.7.3 The Scottish Parliament considered that these amendments were necessary to ensure that the various agencies and bodies would be able to continue to fulfil their functions effectively. This new order which is called the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013¹⁷, ("the 2013 Order") came into force on 14 February 2013.

1.8 Treatment of children's hearings disposals under the 1974 Act

1.8.1 Special provision for the treatment of children's hearings¹⁸ in Scotland is included in the 1974 Act. Section 3 of the 1974 Act applies where;

- a child is referred to a children's hearing under the Children (Scotland) Act 1995;

¹⁷<http://www.legislation.gov.uk/ssi/2013/50/contents/made>

¹⁸http://www.scra.gov.uk/children_s_hearings_system/index.cfm

A Discussion Paper on the Rehabilitation of Offenders Act 1974

- the referral is on grounds that the child committed an offence; and
- that ground has either been accepted by the child or deemed established to the satisfaction of the sheriff.

- 1.8.2 In these circumstances, the acceptance or establishment of that ground is treated for the purposes of the 1974 Act (but not otherwise) as a conviction. The disposal of the case thereafter by the children's hearing is treated as a sentence for the purposes of the 1974 Act.
- 1.8.3 This provides the child or young person referred to a children's hearing on offence grounds the same type of protection as someone who has been convicted of an offence in a court and whose conviction has become spent. In other words, a child or young person will be treated for all purposes in law as a person who has not been referred, discharged or received a supervision requirement by a children's hearing after their children's hearing disposal becomes spent.
- 1.8.4 This means that if a person is asked any question about being referred to a children's hearing in the past by, say, an employer, they do not have to say anything about it and cannot be prejudiced by the failure to acknowledge it. This includes any question relating to the circumstances in which the child or young person was referred to a children's hearing i.e. the underlying criminal activity. These protections are, however, subject to the exceptions and exclusions set out in the 2013 Order.
- 1.8.5 Section 5 of the 1974 Act provides for two different rehabilitation periods for a child or young person that has been referred to a children's hearing. The rehabilitation period relating to a child or young person who has been referred but discharged is currently 6 months from the date of the referral. The rehabilitation period relating to a child or young person who has received a supervision order is currently 12 months.
- 1.8.6 Although these children's hearings referrals are to be treated as convictions only for the purposes of the 1974 Act, section 112(3) of the Police Act 1997 defines "conviction" as a "conviction" within the meaning of the 1974 Act (other than spent convictions). Prior to the 1997 Act, these referrals to children's hearings were treated as convictions purely for protection under the 1974 Act and not for any other purpose. However, the 1997 Act definition of 'conviction' means that these referrals to children's hearings are treated as convictions for the purposes of the 1997 Act.
- 1.8.7 The overall impact of the interaction of the 1997 Act and the 1974 Act in respect of children's hearings is that these children's hearings referrals have been shown as convictions on disclosure certificates. Following careful consideration, the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") contains provision which will alter this policy.

Changes to the 1974 Act (and the 1997 Act) under the Children's Hearings (Scotland) Act 2011

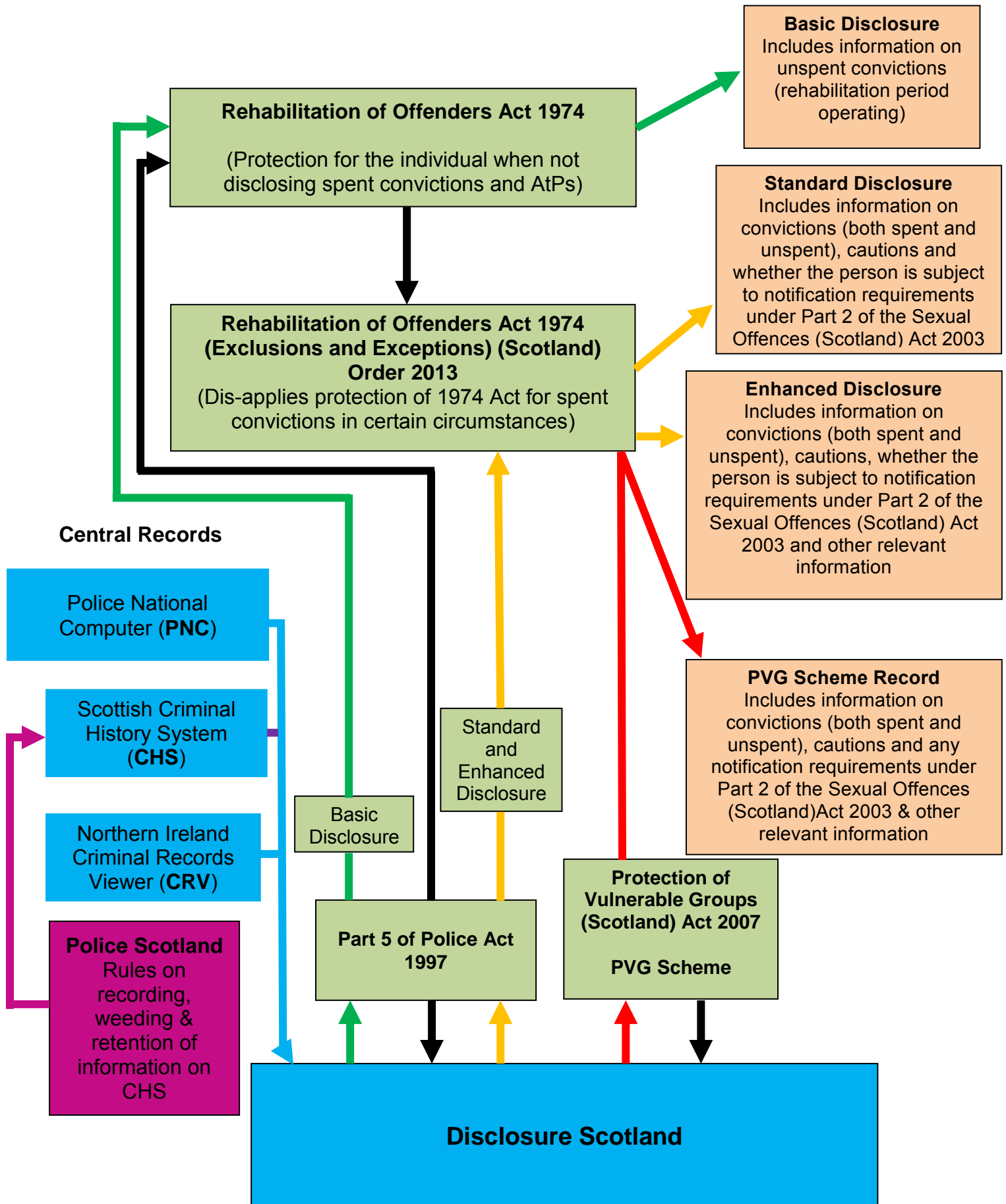
- 1.8.8 The 2011 Act contains provision (section 187 and schedule 6) that will mean that referrals to children's hearings on offence grounds will no longer be classed as convictions. These provisions will repeal section 3 of the 1974 Act, and will class these referrals to children's hearings as category 2 type AtPs. Once these provisions come into force, everyone who accepts offence grounds in a children's hearing, or has those grounds established, will have the disposal treated as an AtP for the purposes of the 1974 Act. These provisions will have retrospective effect so that everyone who has in the past been referred to a children's hearing on offence grounds will no longer be treated as having a conviction, but instead will be treated as if they had received an AtP.
- 1.8.9 The changes being made in the 2011 Act will also create a new link between children's hearing disposals and how Disclosure Scotland operate by making changes to the 1997 Act. The 2011 Act provides that children's hearings AtPs can only be disclosed automatically on standard and enhanced disclosure certificates and on PVG scheme records where the offence in question has been specified by the Scottish Ministers in secondary legislation. This will allow for the disclosure of children's hearings AtPs for more serious offences (as may be specified in the secondary legislation) while meaning that other less serious offences will no longer be disclosed automatically.
- 1.8.10 Although the 2011 Act was generally commenced in June 2013, sections 187 and 188 of, and Schedule 6 to the 2011 Act are not yet in force. Until section 187 of the 2011 Act is brought into force, the effect of section 3 of the 1974 Act is modified by the Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013, ("the Transitory Provisions Order"). The Transitory Provisions Order extends section 3 of the 1974 Act to cover children's hearings under the 2011 Act. This means that where a child has been referred to a children's hearing (either under the 1995 or 2011 Act) on grounds that the child has committed an offence, the acceptance or establishment of that ground will be classed as a conviction for the purposes of the 1974 Act until such time as the relevant provisions in the 2011 Act are brought into force.

CHAPTER 2 - DISCLOSURE OF A PERSON'S PREVIOUS CRIMINAL ACTIVITY BY THE STATE AND THE REHABILITATION OF OFFENDERS ACT 1974: OVERVIEW OF HOW IT WORKS

2.1. Introduction

- 2.1.1. The Rehabilitation of Offenders Act 1974 ("the 1974 Act") is the legislative regime that governs the responsibilities of individuals in respect of whether there is a need to disclose information about their previous criminal activity. How these responsibilities interact with the legislative regimes governing the disclosure of a person's previous criminal activity by the state is an important area to understand when considering how the 1974 Act operates and how it might be modernised and reformed.
- 2.1.2. While many people will act honestly and adhere to the terms of the 1974 Act, some people will not be honest about their previous criminal activity. Accordingly, alongside the regime for personal disclosure of information about previous criminal activity, there requires to be a complementary regime whereby the state may disclose information about a person's previous criminal activity. This ensures that those with legitimate interests in obtaining such information are provided with accurate information about a person's previous criminal activity.
- 2.1.3. This chapter looks at how the 1974 Act works in practice in relation to the disclosure of information about a person's previous criminal activity and how the 1974 Act interacts with the Police Act 1997 ("the 1997 Act"), the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act"). This chapter also looks at how Disclosure Scotland puts all this legislation into practice in order to provide a disclosure service in Scotland and briefly discusses the relevance of Police Scotland's policy on the recording, weeding and retention of information on Criminal History System, (CHS).
- 2.1.4. The purpose of this is to allow you to consider how the 1974 Act fits in with the wider disclosure regimes operated by the state and how the 1974 Act might be modernised and reformed in terms of the disclosure responsibilities of individuals.

A Discussion Paper on the Rehabilitation of Offenders Act 1974



- 2.1.5. The diagram on the previous page sets out how the 1974 Act operates alongside;
- the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, (“the 2013 Order”);
 - Part 5 of the Police 1997 Act;
 - the Protection of Vulnerable Groups (Scotland) 2007 Act; and
 - non statutory weeding and retention of information policies.
- 2.1.6. The diagram explains how each of the different strands of legislation interacts with the 1974 Act, including how Disclosure Scotland have the legal authority to issue basic, standard and enhanced disclosures containing criminal activity information as well as PVG scheme records. It also shows how Disclosure Scotland obtains this information from ‘central records’ and the different criminal history data sets that are prescribed as ‘central records’.

2.2. Police Scotland’s recording, retention and weeding rules

- 2.2.1. Information relating to a person’s criminal activity in Scotland is held in the Scottish Criminal History System (CHS). This can be in the form of conviction information (i.e. information relating to criminal activity where a conviction has resulted) or non-conviction information (i.e. information relating to criminal activity where use has been made of a non-court based option to deal with the offending behaviour such as an alternative to prosecution).
- 2.2.2. When criminal activity is undertaken and linked to a particular person, individual cases will be created on CHS and are treated as pending until a decision to prosecute or otherwise deal with the criminal activity is made. Once a decision is reached, it is then treated as a disposal.
- 2.2.3. Decisions about what information should be held on the CHS are made by reference to Police Scotland’s rules about recording, retention and weeding of information on the CHS. The operation of these non-statutory rules means that after certain criteria are met, information relating to old criminal activity is deleted from the system. Each case is weeded (i.e. completely removed) from the CHS on its individual merits based on the appropriate retention rule¹.
- 2.2.4. In England & Wales, it is only ‘recordable convictions’ that are held on their Police National Computer (PNC) and in Northern Ireland convictions are recorded on their Criminal Records Viewer (CRV). A recordable offence is one which is recordable on PNC as a conviction (as specified in legislation). These include all offences punishable by imprisonment, and other offences specified by the UK Government².

¹ Information on Police Scotland’s current recording, retention and weeding rules is available on their web page at: <http://www.scotland.police.uk/>.

² The English Statutory Instruments relating to PNC recording are; [2000/1139](#), [2003/2823](#), [2005/3106](#), [2007/2121](#) and [2012/1713](#)

2.3. Disclosure Scotland³

2.3.1. Disclosure Scotland issues certificates, known as 'disclosures', which give details of a person's previous criminal activity, or state that that a person does not have any previous criminal activity. Disclosure Scotland also manage the Protecting Vulnerable Groups Scheme ("the PVG Scheme"), on behalf of the Scottish Ministers. It is a service designed to enhance public safety. They provide potential employers and voluntary sector organisations with details of a person's previous criminal activity on individuals applying for posts. Disclosure Scotland was established in April 2002 to deliver Scottish Ministers' functions under Part 5 of the Police Act 1997.

2.4. What is a disclosure?

2.4.1. A 'disclosure' is a document which may contain sensitive personal criminal history information held by the police and government departments which can be used by employers to make informed recruitment decisions. Applications are made by the person whose criminal history is to be the subject of the disclosure and not the prospective employer. However, applications are often made by a person at the request of the prospective employer.

2.4.2. As standard, enhanced and PVG disclosures can contain very sensitive information, it is the case that they must be countersigned as being deemed necessary in line with statutory requirements, and usually this is done by the relevant employer in the specified profession and occupation where employment is being sought.

2.5. Types of disclosure

2.5.1. There are 3 types of disclosures under the 1997 Act. They are;

- A basic disclosure,
- A standard disclosure, and
- An enhanced disclosure.

2.5.2. The information included in the disclosure will depend on the type of disclosure applied for. Some brief information on the different types of disclosure is provided below, but further more detailed information can be found by accessing Disclosure Scotland's internet site⁴.

Basic disclosure

2.5.3. A basic disclosure contains information only about convictions which are considered unspent under the 1974 Act. No other information is included. In 2011-12, Disclosure Scotland received 1,056,122 disclosure applications in which 828,661 were for a basic disclosure. Only 26,064 of the applications

³ <http://www.disclosurescotland.co.uk/>

⁴ <http://www.disclosurescotland.co.uk/what-is-disclosure/>

issued with certificates contained unspent convictions. This was equal to just over 3% of the total basic applications completed in 2011-12.

- 2.5.4. Disclosure Scotland provide basic disclosures to people living in England and Wales as well as to people living in Scotland. They estimate that 12% to 15% of basic disclosure applications are from Scotland with approximately 85-88% coming from England and Wales⁵. Using 15% for Scotland and 85% for England and Wales, this would suggest there were 124,899 basic disclosure requests made in Scotland in 2011-12.
- 2.5.5. Table 1⁶ below shows that the number of applications being made to Disclosure Scotland has been increasing every year since 2008-09.

Table 1: The total number of applications for disclosure per annum (figures include basic disclosure applications from England and Wales)

Year	Total applications received
2011-12	1,056,122
2010-11	1,039,820
2009-10	946,728
2008-09	881,635

Source: Disclosure Scotland

Standard disclosure

- 2.5.6. A standard disclosure contains information about all convictions (spent and unspent) and cautions that may have been received in England and Wales. Information about Scottish alternatives to prosecution (whether spent or unspent) is not included in a standard disclosure.

Enhanced disclosure

- 2.5.7. An enhanced disclosure contains all the information contained in a standard disclosure and in addition contains any other information considered to be relevant by the police or other specified Government bodies. Information about Scottish alternatives to prosecution (spent or unspent) is not automatically included in an enhanced disclosure, but such information may be included if it is considered to be relevant information by the police or other specified Government bodies.

Regulated work

- 2.5.8. Regulated work⁷ is the term used by the 2007 Act to define the types of work which barred individuals must not do, and for which PVG Scheme membership is

⁵ Standard and enhanced disclosures are all for posts in Scotland. The same is true of PVG scheme applications, although a small number of PVG scheme records are used by Scottish organisations sending people overseas into work which would be regulated work if done in Scotland.

⁶ These figures include basic disclosure applications from England and Wales.

⁷ Section 91 of the 2007 Act provides an interpretation of regulated work. <http://www.legislation.gov.uk/asp/2007/14/section/91>

available. Although the PVG Scheme is in force (which therefore governs disclosure for regulated work with children or protected adults), Disclosure Scotland continue to process applications for enhanced disclosures that remain under the 1997 Act for purposes other than the PVG Scheme.

- 2.5.9. Table 2 below shows the number of applications per annum broken down by application type for years 2008-09 to 2011-12. As can be seen from these figures, the number of standard and enhanced disclosure applications has been falling since 2008-09. The latest figures show that in 2011-12, Disclosure Scotland received 22,008 applications for standard and enhanced disclosures and this represented a massive decrease from 2010-11. However, the drop in these applications for the year 2011-12 is likely to be as a direct consequence of the PVG Scheme replacing standard and enhanced disclosure for individuals undertaking regulated work.

Table 2: The total number of applications received per annum, broken down by application type

Application Type	Total applications received			
	2008-09	2009-10	2010-11	2011-12
Basic	501,279	582,952	738,340	828,661
Standard/ Enhanced	380,356	363,776	295,742	22,008
PVG			5,738	205,453
Total	881,635	946,728	1,039,820	1,056,122

*Note PVG came into force on 28 February 2011

2.6. Legislation governing disclosure, including details of basic disclosures, standard disclosures and enhanced disclosures

- 2.6.1. There are two main pieces of legislation which govern how Disclosure Scotland disclose information about an individual's previous criminal activity. These are the 1997 Act and the 2007 Act.

The Police Act 1997⁸ - Basic disclosure

- 2.6.2. Section 5 of the 1974 Act sets out the rehabilitation periods for particular sentences received as a result of a criminal conviction and Schedule 3, paragraph 1 of the 1974 Act sets out the rehabilitation periods for receiving particular AtPs.⁹
- 2.6.3. It is the rehabilitation periods that determines when a conviction/AtP becomes spent. As such, it is the length of these periods that are essential in determining whether or not Disclosure Scotland disclose the conviction on a basic disclosure certificate. It is only unspent convictions that are disclosed on a basic disclosure certificate. Therefore, once the rehabilitation period has run its course and the conviction becomes spent, the conviction will not show up on a basic disclosure certificate.

⁸ <http://www.legislation.gov.uk/ukpga/1997/50/part/V>

⁹ AtPs are currently not included in a basic disclosure.

A Discussion Paper on the Rehabilitation of Offenders Act 1974

- 2.6.4. It is section 112 of the 1997 Act that provides the definition for a basic disclosure (or, as it is referred to in the 1997 Act, a criminal conviction certificate - for the purposes of this document, we will refer to a basic disclosure).
- 2.6.5. A basic disclosure is a certificate which;
- a) gives the prescribed details of every conviction of the applicant which is recorded in central records, or
 - b) states that there is no such conviction.
- 2.6.6. The Scottish Ministers are statutorily obliged under the 1997 Act to issue a basic disclosure to any individual who;
- a) makes an application, and
 - b) pays the applicable fee.
- 2.6.7. The 1997 Act also defines 'central records' and a 'conviction' for the purposes of disclosure. 'Central records' means such records of convictions held for the use of police forces generally as may be prescribed (details of central records can be found on the left hand side of the diagram found at the start of this chapter).
- 2.6.8. Disclosure Scotland accesses the Scottish Criminal History System, (CHS), the English & Welsh Police National Computer, (PNC) and the Northern Ireland Criminal Records Viewer, (CRV) to determine whether an individual who applies for a basic disclosure has any unspent convictions. It should be noted that for people living in Scotland seeking a basic disclosure, it is not just Scottish unspent convictions that are relevant but also unspent convictions that may have been received in England & Wales and Northern Ireland.
- 2.6.9. An important link the 1997 Act makes to the 1974 Act is the meaning of conviction under the 1997 Act. For the purposes of section 112 of the 1997 Act, a 'conviction' means a conviction within the meaning of the 1974 Act, other than a spent conviction. In other words, it is only unspent convictions that are relevant for inclusion in a basic disclosure.
- 2.6.10. Disclosure Scotland, on behalf of the Scottish Ministers, have the legal authority to issue a basic disclosure under section 112 of the 1997 Act, read alongside the rehabilitation periods specified in section 5 of the 1974 Act (this is represented by the green arrow going from Disclosure Scotland, via the 1997 Act through to the 1974 Act and ending up on the basic disclosure on the far top right of the diagram).

The Police Act 1997 - Standard disclosure

- 2.6.11. A standard disclosure (also known as a criminal record certificate – for the purpose of this document, we will refer to standard disclosure) is a certificate which:
- a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records or states that there is no such matter; and
 - b) states whether the applicant is subject to notification requirements under Part 2 of the Sexual Offences (Scotland) Act 2003
- 2.6.12. Under the 1997 Act, ‘relevant matter’ means convictions within the meaning of the 1974 Act (including spent convictions) and cautions. ‘Central records’ means such records of convictions and cautions held for the use of police forces generally as may be prescribed by the Scottish Ministers.
- 2.6.13. The Scottish Ministers are statutorily obliged under the 1997 Act to issue a standard disclosure to any individual who makes an application under this section countersigned by a registered person¹⁰ and who pays the applicable fee.
- 2.6.14. As a standard disclosure can contain very sensitive information relating to spent convictions, an application under this section must be accompanied by a statement by the registered person that the certificate is required for the purposes of an exempted question. Under the 1997 Act, an ‘exempted question’ means a question in relation to which section 4(2)(a) or (b) of the 1974 Act (effect of rehabilitation) has been excluded by an order of the Scottish Ministers under section 4(4) of that Act. This is a link to the 2013 Order which disapplies the general protections provided under the section 4 of the 1974 Act; the exempted questions are found in Schedule 3 to the 2013 Order.¹¹

The Police Act 1997 - Enhanced disclosure

- 2.6.15. An enhanced disclosure (also known as an enhanced criminal record certificate – for the purposes of this document, we will refer to an enhanced disclosure) is a certificate which;
- a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records or states that there is no such matter;
 - b) if the applicant is subject to the notification requirements under the Sexual Offences (Scotland) Act 2003, states that fact; and
 - c) includes information provided by the chief officer of every relevant police force which, in the chief officer’s opinion might be relevant to the purpose of the certificate and ought to be included in the certificate.

¹⁰ A registered person is set out under section 120 of the 1997 Act. <http://www.legislation.gov.uk/ukpga/1997/50/part/V>

¹¹ Further information can be found in chapter 3 of this paper.

- 2.6.16. The disclosure system in Scotland does not allow for the automatic disclosure of spent AtPs under standard or enhanced disclosure. This is because, although the concept of AtPs was introduced by section 109 of the Criminal Justice & Licensing (Scotland) Act 2010, a policy decision was made that spent AtPs should not be disclosed automatically in a standard or enhanced disclosure. However, AtPs (both spent and unspent) may still be disclosed in an enhanced disclosure if they are considered to be relevant information by the chief officer of a relevant police force (the Chief Constable of the Police Service of Scotland being such an officer).
- 2.6.17. The Scottish Ministers are obliged under the 1997 Act to issue an enhanced disclosure to any individual who;
- a) makes an application countersigned by a registered person, and
 - b) pays the applicable fee.
- 2.6.18. An application for an enhanced disclosure must be accompanied by a statement by the registered person that the certificate is required for a prescribed purpose. The prescribed purposes for which an enhanced disclosure can be requested are set out in the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168).
- 2.6.19. The Scottish Ministers are obliged to request the chief officer of every relevant police force to provide the “relevant information” referred to in bullet point (c) of paragraph 2.6.15 above. The Scottish Ministers are also obliged to request the chief officer of every relevant police force to provide any information which, in the chief officer’s opinion;
- a) might be relevant for the prescribed purpose described in the statement made in the application;
 - b) ought not to be included in the certificate, in the interests of the prevention or detection of crime; and
 - c) can, without harming those interests, be disclosed to the registered person.
- 2.6.20. Once all the checks have been made, Disclosure Scotland send to the registered person who countersigned an application;
- a) a copy of the enhanced disclosure, and
 - b) any additional information which is not to be included in the certificate.
- 2.6.21. ‘Central records’, ‘exempted question’ and ‘relevant matter’ have the same meaning as for a standard disclosure. Further to these definitions, ‘relevant police force’, in relation to an application for an enhanced disclosure, means a

police force which is a relevant police force in relation to that application under regulations made by the Scottish Ministers.

Other relevant information

2.6.22. The vast majority of issued Enhanced and PVG Scheme Membership (including updating) do not include 'relevant information' from the police. For example, in 2011-12, only 8 enhanced disclosures contained other relevant information provided by a police force, which was equal to 0.29% of the total enhanced disclosures issued. Further to this, a total of 628 PVG Scheme Record Disclosures contained other relevant information provided by a police force. This was equal to 0.35% of the total PVG Scheme Records completed.

2.7. The Protection of Vulnerable Groups (Scotland) Act 2007 and the PVG Scheme

2.7.1. In February 2011, the Scottish Government introduced a new membership scheme under the 2007 Act¹² to replace and improve upon the disclosure arrangements for people who work with vulnerable groups.

2.7.2. The PVG Scheme is designed to;

- help to ensure that those who have regular contact with children and protected adults through paid and unpaid work do not have a known history of harmful behaviour.
- be quick and easy to use, reducing the need for PVG Scheme members to complete a detailed application form every time a disclosure check is required.
- strike a balance between proportionate protection and robust regulation and make it easier for employers to determine who they should check to protect their client group.

2.7.3. The PVG Scheme is managed and delivered by Disclosure Scotland which includes taking decisions, on behalf of the Scottish Ministers, about who should be barred from doing regulated work with vulnerable groups. For the purpose of enabling or assisting them to decide whether to list an individual, Disclosure Scotland take information from the 'central records' and from the chief officer of every relevant police force. It is sections 17 to 20 of the 2007 Act¹³ that sets out the type of information that is relevant to making a listing decision.

2.7.4. The triggers for a consideration for listing are: a referral from an organisation; a referral from a court; new vetting information; or an individual being named in a relevant inquiry report. For an organisation to make a referral, the individual must be doing regulated work¹⁴ with children or protected adults, the individual

¹² Protection of Vulnerable Groups (Scotland) Act 2007. <http://www.legislation.gov.uk/asp/2007/14/contents>

¹³ <http://www.legislation.gov.uk/asp/2007/14/part/1/crossheading/information-relevant-to-listing-decisions>

¹⁴ The definition of regulated work can be found at Part 6, 'Interpretation' of the 2007 Act. <http://www.legislation.gov.uk/asp/2007/14/part/6>

must have done something harmful or inappropriate in respect of a child or protected adult and the organisation must have dismissed or transferred the person from doing that regulated work.

- 2.7.5. At first consideration, it may not be that apparent how the 2007 Act links in with the 1974 Act and the 2013 Order. What may be clear however is that for spent convictions to be disclosed in a PVG Scheme record, the general protections for spent convictions under section 4 of the 1974 Act have to be dis-applied. The way this is done is via Schedule 4 of the 2013 Order. It is paragraph 11, (any regulated work with children) and paragraph 25 (any regulated work with adults) of Schedule 4 of the 2013 Order that provide the link between the rehabilitation of offenders legislation and the PVG Scheme and which permits the inclusion of spent AtPs in a PVG Scheme record.
- 2.7.6. In 2011-12, 14,039 applications to join the PVG Scheme were issued with certificates containing conviction information. This was equal to 8% of the total applications to join the PVG Scheme completed in 2011-12.
- 2.7.7. The PVG Scheme introduced Scheme Record Update applications which are applications by people who are already in the Scheme. In 2011-12, Disclosure Scotland received 17,443 of these which was 8% of the total PVG applications. The Scheme Record Update contains scheme membership information. It does not include vetting information such as convictions and cautions.
- 2.7.8. As at October 2012, a total of 811 individuals were barred from doing regulated work with children and/or protected adults – 644 (79%) with children, 45 (6%) with protected adults and 122 (15%) with both groups.
- 2.7.9. Further guidance¹⁵ on how the PVG Scheme works in practice can be found on Disclosure Scotland's web page.

2.8. Disclosure and rehabilitation arrangements in other countries

- 2.8.1. A system which governs the responsibilities of individuals to disclose previous criminal activity and the system which governs how the state discloses information about previous criminal activity needs to strike a balance between protecting the public and the rehabilitation of offenders.
- 2.8.2. In order to aid consideration of this important issue, we have highlighted the different types of arrangements adopted by a selection of countries around the world to give a flavour of the different approaches to the disclosure of previous criminal activity in other jurisdictions¹⁶.

¹⁵ <http://www.disclosurescotland.co.uk/guidance/index.html>

¹⁶ The summaries have been taken from 'The use and impact of the Rehabilitation of Offenders Act (1974)' by Paul McGuinness, Fergus McNeill and Sarah Armstrong, University of Glasgow, 2013. Further information on the disclosure arrangements in other countries can be found by accessing the following documents;

(1) KPMG, 2009a, i, Disclosure of Criminal Records in Overseas Jurisdictions Countries A-E March 2009¹⁶. Available at: www.cpni.gov.uk/documents/publications/2009/2009-criminal_records_disclosure_countriesa-e_march09.pdf?epslanguage=en-gb

(2) KPMG, 2009b ii, Disclosure of Criminal Records in Overseas Jurisdictions Countries R-U March 2009¹⁶. Available at: http://www.cpni.gov.uk/documents/publications/2009/2009-criminal_records_disclosure_countriesr-u_march09.pdf

Australia

- 2.8.3. There is no obligation on Australian police forces to destroy criminal records information at any time. Criminal records information may not be disclosed where the conviction is spent.
- 2.8.4. Spent convictions legislation varies from jurisdiction to jurisdiction within the different Australian states. However, in most cases, the rehabilitation period after which convictions are considered spent is 10 years (5 for juveniles) for less serious offences. More serious offences (e.g. those incurring a prison sentence of at least 30 months) may remain unspent.

Belgium

- 2.8.5. An individual's convictions are permanently removed from the criminal registry once the individual has been granted "rehabilitation". There is no set time frame for rehabilitation in Belgium. After a prison sentence has been served, the individual can apply for rehabilitation. This is accorded at the discretion of the courts and normally takes a minimum of several months.

Czech Republic

- 2.8.6. Technically, criminal convictions remain on record in state records for an indefinite period. However, they may no longer appear on excerpts disclosed from state records under certain conditions.
- 2.8.7. These include convictions expunged on the basis of a request by the convicted person provided the sentence has been served and certain statutory conditions have been fulfilled. Copies of Entry from the Penal Register, on the other hand, will show all convictions, whether conditional or unconditional, served or being served, including any that have been expunged.

Denmark

- 2.8.8. In Denmark, judgments will be removed from a criminal record after 2, 5, 10 or 20 years, or at the age of 80 if no recent convictions have been added. The length of time a judgment remains disclosable is prescribed in Danish legislation (Declaration of the Treatment of Individuals' Information in the Central Criminal Register) and depends on the type of criminal records disclosure requested.
- 2.8.9. In respect of a Private Penal Certificate, the relevant information is as follows: Custodial sentences remain disclosable 5 years from date of release; suspended sentences remain disclosable 3 years from date of decision; discontinued charges with conditions remain disclosable 2 years from date of decision; fines remain disclosable 2 years from date of decision. In the case of individuals aged between 15 and 18 years, discontinued charges and fines, where these are first-time offences they will remain disclosable for 1 year.

Estonia

- 2.8.10. Decisions will be removed from the Punishment Register and archived after a period of 1, 2, 3, 5 or 10 years, or after death (or cessation of activities, in the case of legal entities).
- 2.8.11. The length of time that different categories of conviction remain disclosable is;
- Custodial sentences (3-20 years) 10 years from date of release,
 - Custodial sentences (up to 3 years) 5 years from date of release,
 - Community service 3 years from date of performance,
 - Probation/conditional release from 3 years from date of period end/release a fine,
 - Fines for criminal offences 3 years from date of decision,
 - Enforced psychiatric treatment/sanctions 2 years from date of termination/ imposed on a minor application,
 - Fines or detentions imposed for 2 years from date of decision misdemeanours in relation to tax offences,
 - Fines/detentions imposed for 1 year from date of decision misdemeanours.

Where disclosure is sought for a position that involves working with children, a check will be made of both registered and archived convictions.

Slovenia

- 2.8.12. The Penal Code of the Republic of Slovenia governs rehabilitation of individuals. Under this legislation, a conviction of a criminal offence can be regarded as expunged provided that no further criminal offences are committed within the prescribed time period.
- 2.8.13. The same applies for sentences that are lapsed or discharged. Technically, details of expunged convictions remain on record for an indefinite period. A conviction is not expunged until the period of rehabilitation has lapsed. Once expunged, the rehabilitated person is under no obligation to reveal their past history of association to a criminal record. Guidance issued by the legislation states that the length of the rehabilitation period depends on the sentence of the offence.

Spain

- 2.8.14. Once convictions have expired they can be removed from the Certificate of Convictions only upon the individual's request for cancellation.
- 2.8.15. Expiry periods vary according to the type of punishment and range from six months (for minor offences) to five years (for serious offences) provided no further offence has been committed in the meanwhile.

Sweden

2.8.16. In Sweden, most judgments are deleted from the Criminal Records Registry after 3, 5, or 10 years, if no recent convictions have been added. The length of time that a conviction remains on record depends on the type of sentence passed. The maximum duration is 20 years.

2.8.17. The relevant details are;

- Custodial sentences 10 years from date of release,
- Enforced psychiatric treatment 10 years from date of release,
- Youth detention 10 years from date of release,
- Suspended sentences 10 years from date of decision,
- Discontinued charges (adults) 10 years from date of decision,
- Fines 5 years from date of decision,
- Discontinued charges (minors) 3 years from date of decision.

Switzerland

2.8.18. Convictions are removed after a specified time period which is dependent on the type of punishment. Expiry periods for convictions to be removed are governed by Section 369 of the Swiss Penal Code. If two-thirds of a sentence has been spent it will no longer appear on the Extract.

2.8.19. Different removal policies apply to convictions involving punitive measures or convictions involving a suspended or partially suspended sentence. Convictions are no longer reported on the Criminal Record Extract once subjects have fulfilled the terms of their suspension period. Data that is removed is completely destroyed and not archived.

2.8.20. Expiry periods vary according to the type of punishment as follows;

- 20 years for prison sentences of at least five years,
- 15 years for prison sentences from one to five years,
- 10 years for prison sentences of less than one year or fines.

USA

2.8.21. In the United States, criminal records generally remain on record without termination, with certain exceptions.

2.8.22. Exceptions can include a record or conviction occurring while an individual is legally minor, (generally under the age of 18). Such juvenile police or criminal records will be sealed and are not accessible, other than to authorised law enforcement agencies.

2.8.23. It is possible, but difficult and relatively rare, for an adult to obtain expungement or sealing of police or criminal records, through application to the courts via legal counsel.

CHAPTER 3 - KEY DEFINITIONS AND POLICY CONCEPTS CONTAINED WITHIN THE 1974 ACT

3.1. Introduction and some general questions

- 3.1.1. As briefly explained in chapter one, the terms of the 1974 Act mean that anyone who has been convicted of a criminal offence and sentenced to prison for less than 30 months or anyone who has received an alternative to prosecution (AtP) can be regarded as rehabilitated after a specified period of time has elapsed provided they receive no further convictions. The specified period will depend on the sentence they have received. After the specified period has elapsed, the original conviction or AtP is considered to be spent. The general rule is that, once a conviction or AtP is spent that person does not have to reveal it and cannot be prejudiced by it.
- 3.1.2. However, there are some categories of employment and proceedings to which the general 1974 Act regime does not apply as it is considered appropriate that access to spent conviction (but not spent AtP) information should continue to be available automatically for the purposes of public protection. The 1974 Act provides an Order making power to specify the types of employment and proceedings that are excluded from the protections of the 1974 Act and therefore where disclosure of spent convictions is required. The main purpose of this secondary legislation made under the 1974 Act is to protect the public. The intention is not to directly debar an individual with a previous conviction from types of work set out in the Order, but instead allows a potential/actual employer to be informed about spent convictions if the work is covered by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions)(Scotland) Order 2013 (“the 2013 Order”).
- 3.1.3. This chapter will discuss in more detail the main definitions used within the 1974 Act, but it would be helpful at this point to receive any general views on the 1974 Act.
- 3.1.4. The purpose of this is to hear your general views about:
- the 1974 Act and associated legislation,
 - the general development of policy in this area, and
 - the principle that there should be a balance struck between the disclosure and non-disclosure of previous criminal activity.

3.1.5. Questions

Q1. Is there a continuing need for legislation that enables people to be rehabilitated¹ such that they do not have to disclose certain previous criminal convictions after fixed timescales?

Yes No

Comments

Q2. Is the 1974 Act still fit for purpose in protecting the public and supporting rehabilitation?

Yes No

Q3. If your answer to Q2 is “no”, does the 1974 Act require minimal updating or a major overhaul?

Minimal Updating Major Overhaul

Comments

Q4. Do the 1974 Act and subsequent public protection legislation strike the right balance in protecting public safety?

Yes No – (Too little emphasis on public safety)

No – (Too much emphasis on public safety)

Comments

Q5. Do the 1974 Act and subsequent public protection legislation strike the right balance in enabling offenders to be rehabilitated and move on from their offending behaviour?

Yes No – (Too little emphasis on rehabilitation)

No – (Too much emphasis on rehabilitation)

Comments

¹ See paragraph 3.12 of discussion paper for an explanation of the definition “rehabilitated person”.

Q6. Are the responsibilities on offenders, employers and others under the 1974 Act sufficiently clear?

Yes No

Comments

Q7. Are there any aspects of the 1974 Act, you would prioritise for reform?

Yes No

Q7a. If answered 'Yes', what are they?

Comments

3.2. Definitions

- 3.2.1. One of the main criticisms of the 1974 Act is that it is unnecessarily complicated, poorly understood, and, as a result, not properly applied in practice. Therefore, in order for us to understand in more detail the areas of the legislation considered to be problematic and complex, this section breaks down the 1974 Act down into a number of key underlying definitions that underpin it.
- 3.2.2. In the following pages, each definition is explained with examples provided in some places to aid understanding. We have also set out some questions to receive your views on these definitions.
- 3.2.3. The main definitions and concepts that underpin the 1974 Act are as follows:
- What is meant by sentence
 - What is meant by an 'excluded' sentence
 - What is meant by conviction
 - What is meant by alternative to prosecution
 - What is meant by service disciplinary proceedings
 - What is meant by proceedings before a judicial authority
 - What is meant by circumstances ancillary to a conviction/AtP
 - What is meant by rehabilitated person.

3.3. What is meant by sentence

- 3.3.1. The 1974 Act defines a sentence² as including any order made by a court in dealing with a person in connection with any offence or offences subject to some specified exceptions. Essentially, the definition includes

² Section 1(3) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/1>

any order made by a court after a person has been convicted of a criminal offence, subject to some exceptions.

- 3.3.2. Where a sentence contains a number of elements e.g. a custodial sentence and fine, the 1974 Act operates in such a way so that the rehabilitation period is the longer or longest of those applicable to any of the individual elements of the overall sentence³.
- 3.3.3. A sentence imposed by a court outside Great Britain is treated as a sentence which most nearly corresponds to the Scottish equivalent sentence for the purposes of determining the appropriate rehabilitation period⁴.
- 3.3.4. A sentence of imprisonment includes a sentence of detention under section 207 (detention of young offenders) of the Criminal Procedure (Scotland) Act 1995⁵ and a sentence of penal servitude⁶.
- 3.3.5. The definition of a sentence does not include the following types of order that can be made by a court in dealing with an individual in respect of their conviction:
- a) an order for committal or any other order made in default of payment of any fine or other sum adjudged to be paid by or imposed on a conviction, or for want of sufficient distress to satisfy any such fine or other sum, or
 - b) an order dealing with a person in respect of a suspended sentence of imprisonment⁷.
- 3.3.6. No account is taken in the 1974 Act of any subsequent variation, made by a court in dealing with an individual in respect of a suspended sentence of imprisonment, in relation to the term originally imposed⁸.

3.4. What is meant by an excluded sentence

- 3.4.1. There are certain types of sentences that are 'excluded' from rehabilitation under the 1974 Act⁹. The reason for their exclusion is because a determination has been made that the serious nature of the offences committed that resulted in an individual receiving such a sentence should exclude that person being able to be 'rehabilitated'. This means anyone receiving one of those 'excluded' sentences cannot become a 'rehabilitated person' under the 1974 Act.

³ Section 6(2) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/6>

⁴ Section 5(9)(d) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/5>

⁵ Section 207 of the Criminal Procedure (Scotland) Act 1995.

<http://www.legislation.gov.uk/ukpga/1995/46/section/207>

⁶ Section 5(9)(a) of 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/5>

⁷ Section 1(3)(a) & (b) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/1>

⁸ Section 5(9)(c) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/5>

⁹ Section 5(1) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/5>

3.4.2. Sentences excluded from rehabilitation are described in section 5(1) of the Act. Essentially, they can be categorised into the following sentences;

- A sentence of imprisonment, youth custody detention in a young offender institution or corrective training, for a term of more than 30 months.
- Where the equivalent of a life sentence has been imposed, such as a sentence of imprisonment for life, a sentence of preventive detention, detention during Her Majesty's pleasure or for life, a sentence of custody for life.
- A sentence of detention for more than 30 months in the case of a youth convicted of a grave crime.
- Certain court-martial and military punishments.

3.5. What is meant by conviction

3.5.1. The 1974 Act states¹⁰ that references to a conviction, however expressed, include references to:

- a) a conviction by or before a court outside Great Britain,
- b) any finding, other than a finding linked with a finding of insanity or a finding that a person is not criminally responsible under section 51A of the Criminal Procedure (Scotland) Act 1995, in any criminal proceedings that an individual has committed an offence or done the act or made the omission charged.

3.5.2. Although section 247 of the Criminal Procedure (Scotland) Act 1995 provides that an absolute discharge should generally not be deemed as a conviction, this requirement is overridden by section 1(4)¹¹ of the 1974 Act. The effect therefore is that section 1(4) provides that an absolute or conditional discharge should be treated as a conviction for the purposes of the Act. The reason for this is to allow such Orders to have a rehabilitation period and this allows a person who receives such an Order to become a 'rehabilitated person' for the purposes of the 1974 Act.

3.5.3. The definition of conviction is further expanded in section 2¹² of the 1974 Act. This section states that for the purposes of the Act, any finding that an individual is guilty of an offence in respect of service disciplinary proceedings should also be classed as a conviction. Again, this is to allow those in receipt of such a finding to become a 'rehabilitated person' under the Act.

¹⁰ Section 1(4) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/4>

¹¹ Section 1(4) of the 1974 Act.

¹² Rehabilitation of persons dealt with in service disciplinary proceedings.
<http://www.legislation.gov.uk/ukpga/1974/53/section/2>

Children's hearings

- 3.5.4. As discussed in paragraphs 1.8 to 1.8.10, section 3 of the 1974 Act provides that, where a child was referred to a children's hearing under the Children (Scotland) Act 1995 on grounds that the child committed an offence, the acceptance or establishment of that ground is a conviction for the purposes of the 1974 Act and the disposal by the hearing is a sentence. Section 3 is to be repealed by Schedule 6 to the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") and section 187 of the 2011 Act will provide for certain disposals by children's hearings to be regarded as AtPs. These provisions of the 2011 Act are not yet in force.
- 3.5.5. Until section 187 of the 2011 Act is brought into force, the effect of section 3 of the 1974 Act is modified by the Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013, ("the Transitory Provisions Order"). The Transitory Provisions Order extends section 3 of the 1974 Act to cover children's hearings under the 2011 Act. This means that where a child has been referred to a children's hearing (either under the 1995 or 2011 Act) on grounds that the child has committed an offence, the acceptance or establishment of that ground will be classed as a conviction for the purposes of the 1974 Act.

3.6. What is meant by alternative to prosecution

- 3.6.1. As discussed in paragraphs 1.6.1.1 to 1.6.1.6, alternatives to prosecution (AtPs) were introduced into the 1974 Act¹³ by the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act").
- 3.6.2. A person can be given/offered an AtP in respect of criminal activity they have undertaken and the effect of receiving an AtP is that a person is not prosecuted in court for the offence. There are various types of AtP defined in the 1974 Act as being where a person:
- a) has been given a warning in respect of an offence by;
 - i. a constable in Scotland, or
 - ii. a procurator fiscal.
 - b) has accepted, or is deemed to have accepted;
 - i. a conditional offer issued in respect of an offence from the procurator fiscal ("fiscal fine") or
 - ii. a fiscal compensation order issued by a procurator fiscal in respect of an offence,
 - c) has had a fiscal work order made against them by a procurator fiscal in respect of an offence,

¹³ Section 109 of the 2010 Act inserted section 8B into the 1974 Act.
<http://www.legislation.gov.uk/asp/2010/13/section/109>

- d) has given notice of intention to comply with a restoration order given under section 20A of the Nature Conservation (Scotland) Act 2004¹⁴;
- e) has been given a fixed penalty notice by a constable in Scotland for a fixed penalty offence,¹⁵
- f) has accepted an offer made by a procurator fiscal in respect of an offence to undertake an activity or treatment or to receive services or do any other thing as an alternative to prosecution, or
- g) has been given or has accepted or has deemed to have accepted, in respect of an offence under the law of a country or territory outside Scotland, anything corresponding to a warning, offer, order or notice falling within paragraphs (a) to (f) above under the law of that country or territory.

Children's hearings

3.6.3. The general approach taken in the 2011 Act, once the relevant provisions come into force, will be to classify certain disposals by children's hearings as AtPs. Section 187 of the 2011 Act, once it comes into force, provides that where;

- a child is referred to a children's hearing;
- the referral is on grounds that the child committed an offence; and
- the ground is either accepted or established,

certain disposals by that children's hearing will be classed as AtPs.

3.6.4. The disposals in question are the making, continuing or varying of a compulsory supervision order or the discharge of the hearing (once section 187 comes into force, the transitional arrangements described in paragraphs 1.8.8 to 1.8.10 will come to an end and section 3 of the 1974 Act will be repealed).

3.7. What is meant by service disciplinary proceedings

3.7.1. Section 2¹⁶ of the 1974 Act applies to any person who is dealt with in service disciplinary proceedings. Any finding of guilt in such proceedings is treated as a conviction and any punishment awarded is treated as a sentence for the purposes of the 1974 Act.

3.7.2. Section 2(5)¹⁷ sets out the types of proceedings that are to be regarded as "service disciplinary proceedings" for the purposes of the 1974 Act.

¹⁴ Inserted by section 40 of the Wildlife and Natural Environment (Scotland) Act 2011. <http://www.legislation.gov.uk/asp/2011/6/section/40>

¹⁵ That is, a fixed penalty notice in respect of the offence under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8). <http://www.legislation.gov.uk/asp/2004/8/section/129>

¹⁶ <http://www.legislation.gov.uk/ukpga/1974/53/section/2>

¹⁷ Section 2(5) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/2>

3.8. What is meant by proceedings before a judicial authority

- 3.8.1. Proceedings before a judicial authority include proceedings before any of the ordinary courts of law and proceedings before any tribunal, body or person having power to determine questions affecting the rights, privileges, obligations or liabilities of any person¹⁸. The disclosure of spent convictions in proceedings before a judicial authority is not required by operation of section 4(1) of the 1974 Act. This protection for spent convictions does not affect the determination of any issue or prevent the admission or requirement of any evidence relating to a person's spent convictions (or ancillary circumstances) in the proceedings listed in section 7(2) of the 1974 Act.

3.9. What is meant by circumstances ancillary to a conviction

- 3.9.1. Any of the following are 'circumstances ancillary to a conviction'¹⁹ under the 1974 Act:
- a) the offence or offences which were the subject of that conviction,
 - b) the conduct constituting that offence or those offences,
 - c) any process or proceedings preliminary to that conviction,
 - d) any sentence imposed in respect of that conviction,
 - e) any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and
 - f) anything done in pursuance of or undergone in compliance with any such sentence.
- 3.9.2. The way the 1974 Act operates is that circumstances ancillary to a spent conviction are treated in much the same way as the spent conviction itself. Therefore, the circumstances ancillary to a conviction are covered by the general protections of the 1974 Act if the conviction itself is spent.
- 3.9.3. For example, we can take the case of a person who is convicted for a breach of the peace and receives a court fine. Once the conviction is spent for the purposes of the 1974 Act, then both the conviction itself and all ancillary circumstances relating to the conviction are subject to the protections set out in section 4 of the 1974 Act. If this were not to be the case, then a person might receive protection under the 1974 Act for the fact that they received a court fine that is now spent, but would not receive protection in respect of the criminal activity that gave rise to the court fine (i.e. an employer could use against an individual the fact they undertook criminal activity that amounted to a breach of the peace even though the fine imposed in respect of the conviction is spent).

¹⁸ Proceedings before a judicial authority is defined in section 4(6) of the 1974 Act.

<http://www.legislation.gov.uk/ukpga/1974/53/section/4>

¹⁹ Section 4(6) of the 1974 Act sets out the circumstances ancillary to a conviction.

<http://www.legislation.gov.uk/ukpga/1974/53/section/4>

3.10. What is meant by circumstances ancillary to an AtP

3.10.1. Any of the following are ‘ancillary circumstances in relation to an AtP²⁰’ under the 1974 Act:

- a) the offence in respect of which the AtP is given or the conduct constituting the offence,
- b) any process preliminary to the AtP being given (including consideration by any person of how to deal with the offence and the procedure for giving the AtP),
- c) any proceedings for the offence which took place before the AtP was given (including anything that happens after that time for the purpose of bringing the proceedings to an end),
- d) any judicial review proceedings relating to the AtP, and
- e) anything done or undergone in pursuance of the terms of the AtP.

3.10.2. As with convictions and circumstances ancillary to a conviction, the way the 1974 Act operates is that circumstances ancillary to an AtP are treated in much the same way as the AtP itself. Therefore, the circumstances ancillary to an AtP are covered by the general protections of the 1974 Act if the AtP itself is spent.

3.11. Questions

Q8. Are all, some or none of the definitions in the 1974 Act clear and understandable?

All Some None

Comments

Q8b. If you answered ‘some’ or ‘none’, what changes could be made to make the definitions clearer?

Comments

Q9. Do you agree it is necessary to include these definitions within the 1974 Act?

Yes No

Q9a. If not, why not?

Comments

²⁰ Schedule 3, paragraph 2(1) sets out the circumstances ancillary to an AtP.
<http://www.legislation.gov.uk/asp/2010/13/section/109>

3.12. What is meant by rehabilitated person

Convictions – unspent and spent

- 3.12.1. A person can become a ‘rehabilitated person²¹’, after a specified period, if they have been convicted of a criminal offence and either sentenced to prison for less than 30 months or received a non-custodial sentence. The specified period is defined in the 1974 Act as the ‘rehabilitation period’. This is provided the person:
- a) did not receive, in respect of that conviction, a sentence which is excluded from rehabilitation;
 - b) has not received a further sentence in accordance with section 6(4) of the 1974 Act²², and
 - c) has not received a further sentence during the rehabilitation period which is excluded from rehabilitation.
- 3.12.2. Until the expiry of the rehabilitation period, the conviction is not spent and is not covered by the protections given to spent convictions which are set out in the 1974 Act.
- 3.12.3. After the end of the applicable ‘rehabilitation period’, a person will be a ‘rehabilitated person’ and will be treated, for all purposes in law, as a person who has not;
- a) committed the offence in question,
 - b) been charged with or prosecuted for the offence in question,
 - c) been convicted of the offence in question, or
 - d) been sentenced for the offence in question.
- 3.12.4. Where only one sentence is imposed in respect of a conviction, and the sentence is not an ‘excluded sentence²³’, the rehabilitation period will be the period applicable to that sentence in accordance with section 5 of the 1974 Act.

Example 1

An individual, who is 18, is convicted of an offence and sentenced to 3 months imprisonment. The rehabilitation period for such a sentence is 7 years from the date of conviction. Therefore, if they do not commit a further offence they will become a rehabilitated person when they become 25 (i.e. 7 years later).

²¹ Section 1(1) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/1>

²² Section 6(4) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/6>

²³ There are certain types of sentences that are ‘excluded’ from rehabilitation under the 1974 Act. The reason for their exclusion is because of the serious nature of the offences committed that resulted in an individual receiving such a sentence. Section 5(1) of the 1974 Act sets out those sentences that are excluded from the 1974 Act. Section 5(1) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/5>

- 3.12.5. The 'rehabilitation period' for a person can be extended as a result of them receiving a further sentence before the rehabilitation period for the initial sentence has elapsed.

Example 2

An individual, who is 18, is convicted of an offence and sentenced to 3 months imprisonment. The rehabilitation period for such a sentence is 7 years from the date of conviction. However, when the individual is 22 (i.e. 3 years before they are due to become rehabilitated), that individual is convicted of a further offence and receives a community payback order, which has a rehabilitation period of 5 years from the date of conviction. As such, the individual will not become a 'rehabilitated person' in relation to both sentences until the rehabilitation period for the later conviction has expired.

The result of this is that the rehabilitation period for the first sentence is extended by 2 years and the individual is not rehabilitated until they are 27 years old.

Please note: Excluded sentences and extensions to rehabilitation periods will be discussed in more detail later in this chapter.

- 3.12.6. If a person is convicted and receives a sentence which is subject to rehabilitation under the 1974 Act but, during the rehabilitation period for that conviction, is convicted again and receives a sentence which is 'excluded' from rehabilitation, then neither conviction ever becomes spent.

Example 3

An individual, who is 18, is convicted of an offence and sentenced to 3 months imprisonment. The rehabilitation period for such a sentence is 7 years from the date of conviction. However, when the individual is 22 (i.e. 3 years before they are due to become rehabilitated), that individual is convicted of a further offence in the High Court and receives a 4 year custodial sentence. As the subsequent sentence is one which is excluded from rehabilitation under the 1974 Act, the individual never becomes a 'rehabilitated person' in relation to both sentences.

Alternatives to prosecution (AtP) – unspent and spent

- 3.12.7. A person can be regarded as a 'rehabilitated person', after a specified rehabilitation period, if they have been given an AtP in respect of an offence in Scotland provided they receive no further convictions²⁴. This also applies to people who have been given anything corresponding to an AtP in respect of an offence under the law or territory of a country outside

²⁴ Schedule 3, paragraph 1 of the 1974 Act. <http://www.legislation.gov.uk/asp/2010/13/section/109>

Scotland. This could be, for example, someone who receives an English caution which was issued prior to the raising of criminal proceedings.

- 3.12.8. After the end of the applicable ‘rehabilitation period’, a person will become a ‘rehabilitated person’ and will be treated, for all purposes in law, as a person who has not;
- a) committed the offence in question;
 - b) been charged with or prosecuted for the offence in question; or
 - c) been given an AtP for the offence in question.
- 3.12.9. Therefore, where only one AtP is given in respect of an offence, the rehabilitation period will be the period applicable to that AtP in accordance with Schedule 3 to the 1974 Act.

Example 4

An individual commits an offence and the decision of the procurator fiscal is to give them a fiscal warning which is accepted. This type of AtP is spent at the point the warning is given. Therefore, there is no rehabilitation period applied to this AtP and it is spent immediately.

Example 5

An individual commits an offence and the decision of the procurator fiscal is to issue them with a fiscal fine which is accepted. The relevant period in relation to this AtP is the period of 3 months beginning on the day on which this AtP is given after which the AtP is spent*.

*The Police Act 1997

- 3.12.10. The previous chapter explained how Disclosure Scotland operates the regime in the Police Act 1997 (“the 1997 Act”) to disclose criminal activity information. It should be noted that Disclosure Scotland provide disclosures on behalf of the Scottish Ministers under the powers given to Ministers in the 1997 Act. Disclosure Scotland are not currently empowered, on behalf of the Scottish Ministers, to disclose information about AtPs as they are not included in the list of information which falls to be disclosed in basic disclosures²⁵, standard disclosures²⁶ or enhanced disclosures²⁷.
- 3.12.11. Although a person is required to disclose any AtP which is unspent (i.e. category 2 AtPs for a period of 3 months from receipt), it should be noted that unspent and spent AtPs will never show up on a basic or a standard disclosure. However, there is the possibility of an unspent or spent AtP showing up on an enhanced disclosure if it was thought appropriate to do

²⁵ <http://www.legislation.gov.uk/ukpga/1997/50/section/112>

²⁶ <http://www.legislation.gov.uk/ukpga/1997/50/section/113>

²⁷ <http://www.legislation.gov.uk/ukpga/1997/50/section/115>

so by a Chief Constable under their discretionary powers contained under Part V of the Police Act 1997. Part V of the 1997 Act would require to be amended if information about AtPs was to be automatically disclosed by Disclosure Scotland in basic, standard or enhanced disclosures.

3.13. Questions

Q10. Is it clear what a 'rehabilitated person' means under the 1974 Act after undertaking previous criminal activity?

Yes No

Comments

Q10a. If not, what changes could be made to make the meaning of a 'rehabilitated person' clearer?

Comments

Q11. Is the difference between a conviction and an AtP²⁸ clear?

Yes No

Comments

Q11a. If not, what changes could be made to make this clearer?

Comments

²⁸ Section 109 of the Criminal Justice & Licensing (Scotland) Act 2010, (commenced in November 2011) introduced AtPs into the 1974 Act <http://www.legislation.gov.uk/asp/2010/13/section/109>

CHAPTER 4 - REHABILITATION PERIODS

4.1. Introduction

- 4.1.1. This chapter looks at the importance of the operation of rehabilitation periods within the 1974 Act. Chapters 5 and 6 go on to look at how the 1974 Act gives protections to spent convictions and where such protections do not or may not apply.
- 4.1.2. In particular, this chapter looks at rehabilitation periods where:
- a single sentence has been received;
 - more than one sentence has been received;
 - a person breaches a conditional discharge or probation order;
 - a person is convicted of further offence before rehabilitation period ends for a previous sentence; and
 - a person is convicted of an offence that had originally resulted in an AtP.
- 4.1.3. In addition, this chapter includes some statistical data relating to criminal convictions and sentencing trends which may be helpful in considering the questions asked at the end of this chapter.

4.2. Where a single sentence has been received

- 4.2.1. The rehabilitation periods for particular sentences are set out under section 5¹ of the 1974 Act and replicated in tables A, B and C below. However, section 5 of the 1974 Act has not kept pace with changes in sentencing law and contemporary sentencing practice in Scotland. As such, section 5 of the 1974 Act does not explicitly make reference to all current disposals available in Scotland². This can make it difficult for people receiving a disposal not currently mentioned in section 5 to work out what the rehabilitation period should be for that particular sentence.
- 4.2.2. It is important to note that the rehabilitation periods for a conviction run from date of conviction. However, the 'limitations of rehabilitation' for convictions, referred to in chapter 6 of this paper, may have an effect on the rehabilitation periods in any given case.

¹ <http://www.legislation.gov.uk/ukpga/1974/53/section/5>

² Further information on current Scottish disposals can be found at <http://www.scotland.gov.uk/Publications/2012/11/5336/13>

TABLE A – REHABILITATION PERIODS FOR MAIN SENTENCES AVAILABLE TO SCOTTISH COURTS		
Sentence	Rehabilitation period	Rehabilitation period (under 18)
A sentence of imprisonment or youth custody or corrective training for a term exceeding six months but not exceeding thirty months.	10 yrs	5 yrs
A sentence of cashiering, discharge with ignominy or dismissal with disgrace from Her Majesty's service.	10 yrs	5 yrs
A sentence of imprisonment or youth custody for a term not exceeding six months	7 yrs	3½ yrs
A sentence of dismissal from Her Majesty's service.	7 yrs	3½ yrs
Any sentence of service detention within the meaning of the Armed Forces Act 2006, or any sentence of detention corresponding to such a sentence in respect of a conviction in service disciplinary proceedings.	5 yrs	2½ yrs
A fine or any other sentence subject to rehabilitation under the 1974 Act, not being a sentence to which table B below or section 5(3) to (8) applies.	5 yrs	2½ yrs

Offending committed by those under the age of 18

- 4.2.3. Where a person under the age of 18 is convicted in a criminal court, the protections given to spent convictions under the 1974 Act apply. For certain sentences, (as in Table A above), the rehabilitation period is reduced by half where the offender is under 18 at the time of conviction. In addition, table B below provides details of certain sentences which are only available to young offenders which have their own specified rehabilitation periods.

TABLE B – REHABILITATION PERIODS FOR CERTAIN SENTENCES CONFINED TO YOUNG OFFENDERS	
Sentence	Rehabilitation period
A sentence of borstal training ³	7 yrs
A variety of armed forces offences committed by young individuals, including offences committed by civilians ⁴	3 to 7 yrs

- 4.2.4. There are also rehabilitation periods associated with a number of other sentences used in Scottish courts.

³ Borstal training is no longer available as a sentence, but is mentioned in the 1974 Act so is listed for completeness.

⁴ <http://www.legislation.gov.uk/ukpga/1974/53/section/5>

A Discussion Paper on the Rehabilitation of Offenders Act 1974

TABLE C – REHABILITATION PERIODS FOR A NUMBER OF MISCELLANEOUS SENTENCES AVAILABLE TO SCOTTISH COURTS		
Sentence	Rehabilitation period	Rehabilitation period (under 18)
Absolute Discharge ⁵	6 months	6 months
Conditional discharge ⁶	1 yr. or date of order (the longer of)	1 yr. or date of order (the longer of)
Community Order/Service Community Order ⁷	5 yrs	2½ yrs
Referral Order ⁸		Length of order
An Order extending period for which a youth offender contract has effect ⁹		Length of order
An Order under section 1(2A) of the Street Offences Act 1959 ¹⁰	6 months	6 months
A variety of Order imposed on those mainly under 18 ¹¹		1 yr. from date of conviction or length of Order (the longer of)
An Order for custody in a remand home, approved school Order, Attendance centre Order, A secure Training Order ¹²		Length of Order plus 1 yr.
Detention & Training Orders ¹³		Length of Order plus 1 yr. or 5 yrs from date of conviction, depending on age of offender
Hospital Order ¹⁴	5 yrs or length of Order plus 2 yrs (the longer of)	5 yrs or length of Order plus 2 yrs (the longer of)

Rehabilitation periods where a sentence includes an order disqualifying etc. a person from undertaking certain activity

- 4.2.5. Section 5(8) of the 1974 Act provides that where in respect of a conviction, an order is made imposing on the person convicted any disqualification, disability, prohibition or other penalty, the rehabilitation period applicable to the sentence is the period beginning with the date of conviction and ending on the date on which the disqualification, disability, prohibition or penalty (as the case may be) ceases or ceased to have effect.

Foreign convictions

- 4.2.6. For the purposes of section 5, a foreign conviction, (not including Northern Ireland), is treated as the equivalent to the Scottish sentence which most nearly corresponds to it¹⁵.

ⁱ Section 5(3) of the 1974 Act

ⁱ Section 5(4) of the 1974 Act

⁷ Section 5(4)(A) of the 1974 Act

⁸ Section 5(4)(B) of the 1974 Act

⁹ Section 4C of the 1974 Act

¹⁰ Section 4D of the 1974 Act

¹¹ Section 5(5) of the 1974 Act

¹² Section 5(6) of the 1974 Act

¹³ Section 6A of the 1974 Act

¹⁴ Section 5(7) of the 1974 Act

¹⁵ Section 5(9)(d) of the 1974 Act

Powers to vary rehabilitation periods

- 4.2.7. Section 5(11) of the 1974 Act gives the Scottish Ministers the power, via secondary legislation, to vary any of the rehabilitation periods mentioned in sections 5(1) to 5(8), and to vary the threshold age of offenders for which certain rehabilitation periods may be halved.

Children's hearings

- 4.2.8. As discussed at paragraphs 1.8 to 1.8.10 and 3.5.4 to 3.5.5, where a child is referred to a children's hearing on grounds that the child committed an offence, the acceptance or establishment of that ground is currently treated as a conviction for the purposes of the 1974 Act. This is by virtue of section 3 of the 1974 Act read along with the Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013, (the Transitory Provisions Order").
- 4.2.9. The Transitory Provisions Order also modifies the operation of section 5 of the 1974 Act to provide for specific rehabilitation periods in relation to these kinds of convictions. Where a child has been referred to a children's hearing on grounds that the child committed an offence and the ground has been accepted or established:
- the discharge of the hearing will carry a 6 month rehabilitation period; and
 - a compulsory supervision order imposed on the child will carry a rehabilitation period of either one year or a period equal to the length of the order, whichever is the longer.
- 4.2.10. Once section 187 of the 2011 Act has been brought into force, these disposals by a Children's Hearing will be classed as AtPs and the rehabilitation periods applicable to those AtPs will be 3 months.
- 4.2.11. In addition, section 188 of the Children's Hearings (Scotland) Act 2011, once it has been brought into force, will amend section 113A of the 1997 Act to provide that children's hearings AtPs will only be disclosed automatically on standard and enhanced disclosure certificates and PVG scheme records where the offence in question has been specified by the Scottish Ministers in an Order. This will allow for the disclosure of children's hearings AtPs for more serious offences (as will be defined in the Order) while meaning that other less serious offences will not be disclosed automatically. As section 188 of the 2011 Act proceeds on the basis that these disposals by a Children's Hearing are classed as AtPs, that section must be brought into force at the same time as section 187.

Alternatives to prosecution

- 4.2.12. The rehabilitation periods for particular AtPs are set out in paragraph 1 of Schedule 3¹⁶ to the 1974 Act. These rehabilitation periods are set out in the table below. The rehabilitation periods for an AtP run from the date the order is given.

Type	Rehabilitation period
Category 1 AtP	Spent immediately
Category 2 AtP	3 months

- 4.2.13. ‘Category 1’ AtPs are warnings given by a constable or a procurator fiscal and fixed penalty notices given under section 129 of the Antisocial Behaviour (Scotland) Act 2004. ‘Category 2’ AtPs are other types of non-court based disposals available to the police and prosecutors. They are fiscal fines, fiscal compensation orders, fiscal work orders and fiscal activity/treatment orders and a notice to comply with a restoration order.

4.3. Where more than one sentence has been received

- 4.3.1. Where more than one sentence is imposed in respect of a conviction (whether or not in the same proceedings) and none are ‘excluded sentences’, then, if the ‘rehabilitation periods’ differ in length in accordance with section 5 of the Act, the rehabilitation period for the person applicable to the conviction will be the longer or the longest of those periods¹⁷.

Example 6

An individual commits 2 separate offences and is sentenced to 3 months imprisonment for the first offence and fined for the second offence. The rehabilitation period for the custodial sentence is 7 years and the rehabilitation period for the fine is 5 years.

As a result of this rule the rehabilitation period for both will be 7 years. The effect of this is the rehabilitation period for the fine has been extended by 2 years.

¹⁶ <http://www.legislation.gov.uk/asp/2010/13/section/109>

¹⁷ Section 6(2) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/6>

Sentences served concurrently (at the same time)

- 4.3.2. If concurrent sentences are imposed, whether or not in the same proceedings, the longest applicable rehabilitation period will apply¹⁸.

Example 7

An individual commits two separate offences and receives a 4 month prison sentence and a 6 month prison sentence. The court orders these to run concurrently. This will count as a single term of 6 months which carries a rehabilitation period of 7 years.

Sentences served consecutively (one after the other)

- 4.3.3. If consecutive sentences are imposed in the same proceedings, the sentences will be added together to calculate the rehabilitation period¹⁹.

Example 8

An individual is given a 4 month and 6 month prison sentence ordered to run consecutively. This will count as a 10 month sentence which carries a rehabilitation period of 10 years.

Example 9

However, if the sentences in example 8 above were 12 months and 20 months imprisonment. The two sentences together will count as one sentence of 32 months. Therefore, this would be above the 30 months threshold and as such, both convictions would have to be disclosed for ever.

- 4.3.4. However, it should be noted that if consecutive sentences are imposed in separate proceedings, each conviction will be treated separately with the effect that whatever sentence given for each conviction has the longest rehabilitation period applying will extend the rehabilitation period for the other sentence.

¹⁸ Section 6(2) and 6(4) of the 1974 Act.

¹⁹ Section 5(9) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/5>

4.4. Where a person breaches a conditional discharge or probation order

- 4.4.1. Where a person is given a conditional discharge or a probation order, and after becoming rehabilitated, they are later dealt with by a court for breaching the conditions of either sentence, this can affect their status as a 'rehabilitated person' for the offence for which they received the conditional discharge or probation order.
- 4.4.2. The 1974 Act states that in such cases, that person will no longer be deemed to have become rehabilitated in respect of the original conviction if a further sentence is imposed which attracts a longer rehabilitation period than the one which has already expired²⁰. In such cases, the rehabilitation period for the original conviction becomes the rehabilitation period for the sentence imposed following the breach. This rule is without prejudice to the rule in relation to multiple sentences contained in section 6(2) of the Act.

Example 10

An individual is convicted of theft and is given a conditional discharge. The rehabilitation period for such an order is either 1 year from the date of conviction or a period beginning with that date and ending when the conditional discharge ceases to have effect. It is the longest period of the two that will be the actual rehabilitation period. In this case the longest period is 2 years.

The individual breaches the conditions of the conditional discharge and is taken back to court and sentenced to 3 months imprisonment for the original theft offence for which they received the conditional discharge. The custodial sentence given following the breach has a longer rehabilitation period than the conditional discharge (7 years rather than 2 years) and this longer period is now the rehabilitation period.

4.5. Where a person is convicted of a further offence before rehabilitation period ends for a previous sentence

- 4.5.1. Where, during the rehabilitation period applicable to a conviction, a person is convicted of a further offence and receives a sentence which;
- is not excluded from rehabilitation, and
 - is not disregarded in terms of section 6(6) of the 1974 Act,

the 1974 Act operates in such a way as meaning neither of the convictions become spent until both rehabilitation periods have been completed.²¹

²⁰Section 6(3) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/6>

²¹Section 6(4) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/6>

- 4.5.2. This means that, if the rehabilitation periods for either of the convictions would have ended earlier, the shorter rehabilitation period is extended in order for both to end at the same time. Essentially this can mean that a person, if they keep undertaking criminal activity that leads to them being convicted before their current rehabilitation period ends, may continually have their rehabilitation period extended in such a way that they never become a 'rehabilitated person'.

Example 11

An individual gets convicted in court for assault and fined £500. The rehabilitation period for this sentence is 5 years. 1 month before they become rehabilitated, the individual is convicted of aggravated assault and sentenced to 2 years imprisonment. The rehabilitation period for this sentence is 10 years.

As a result, the rehabilitation period for the fine will end at the same time as the rehabilitation period for the 2 year prison sentence. The effect is that the rehabilitation period for the fine is extended by 9 years and 11 months.

Some 3 years after completing their prison sentence, the individual will still have 5 years before they are rehabilitated. However, the individual is convicted again of a further offence and sentenced to a further 2 years imprisonment.

The effect is that the rehabilitation period for the fine and the previous 2 years imprisonment will end at the same time as the rehabilitation period for the second term of imprisonment of 2 years. The individual will not be rehabilitated for all 3 convictions until 10 years after the date of conviction for the final offence.

- 4.5.3. If the sentence imposed for the third conviction is one which is excluded from rehabilitation (e.g. a custodial sentence of more than 30 months or a life sentence), then none of the convictions which have yet to become spent will ever become spent.

Example 12

An individual gets convicted in court for assault and fined £500. The rehabilitation period for this sentence is 5 years. 1 month before they become rehabilitated, they are convicted of aggravated assault and sentenced to 3 years imprisonment.

As the second sentence is more than 30 months, this sentence is excluded from being rehabilitated under the 1974 Act and is never spent.

The effect of this is that the fine never becomes spent either.

- 4.5.4. However, if a person receives an 'excluded' sentence after the rehabilitation period for a previous conviction has expired, this will have no effect on the spent conviction.

Example 13

An individual gets convicted in court for assault and fined £500. The rehabilitation period for this sentence is 5 years. Some 6 years later (when they have become rehabilitated for the fine), they are convicted of aggravated assault and sentenced to 3 years imprisonment.

The effect of this is that only the 3 year prison sentence is never spent and will therefore show up on a basic disclosure for life. The fine remains spent.

- 4.5.5. If the further conviction is a disregarded conviction in terms of section 6(6) of the 1974 Act, this will not extend the rehabilitation period for the earlier conviction. However, the disregarded conviction may carry its own rehabilitation period, but this will not affect or be affected by the rehabilitation period for any earlier conviction.

Example 14

An individual gets convicted for breach of the peace and is fined £500. The rehabilitation period for this sentence is 5 years. 1 month before they become rehabilitated, they are convicted again for a further breach of the peace and receive a community payback order. This has a rehabilitation period of 5 years, but is also a disregarded conviction.

From the point the individual is convicted for the second time, the effect of this is that the individual will be rehabilitated for the fine after 1 further month, but will have 5 years before they become rehabilitated for the community payback order.

4.6. Where a person is convicted of an offence for conduct that had originally resulted in an AtP

- 4.6.1. The 1974 Act states that if a person is given an AtP (other than a fiscal or police warning) in respect of an offence and is then prosecuted and convicted of the offence, the rehabilitation period²² for the AtP will end at the same time as the rehabilitation period for the offence. This can arise, for example, where a person is subsequently prosecuted after they accepted an AtP, but then fail to adhere to its terms.

²² In Schedule 3 of the 1974 Act, the rehabilitation period for a fiscal fine, fiscal compensation order and fiscal work or treatment order is referred to as the 'relevant period'. In relation to an alternative to prosecution is the period of 3 months beginning on the day on which the alternative to prosecution is given.

- 4.6.2. Further to this, for those AtPs with a rehabilitation period of 3 months²³, if the conviction occurs after the end of the 3 month rehabilitation period, the AtP will be treated as not having become spent until the rehabilitation period for the offence ends. The period between the end of the rehabilitation period for the AtP and the subsequent conviction is therefore not to be treated as a period where the AtP was spent.

Example 15

A procurator fiscal receives a report that a relevant offence where use of an AtP can be considered. A relevant offence is one that can be prosecuted in the summary courts. Following consideration, the procurator fiscal decides it is appropriate to send that individual a notice which offers them the opportunity of performing unpaid work (a fiscal work order) as an AtP. The offer is for 30 hours unpaid work and the individual accepts this offer. The rehabilitation period for this is 3 months if they complete the fiscal work order.

The individual doesn't complete the fiscal work order and as a result gets prosecuted for the original offence. The sentence is a community payback order which has a rehabilitation period of 5 years.

The rehabilitation period for the AtP will now end at the same time as the community payback order and that is 5 years rather than 3 months.

- 4.6.3. If a person, who is over 16 years of age, is given a fixed penalty notice (FPN) by a constable for criminal activity and is subsequently prosecuted and convicted of the offence which gave rise to the FPN, the FPN;
- (a) becomes spent at the end of the rehabilitation period for the court imposed sentence for the offence, and;
 - (b) is to be treated as not having become spent in relation to any period before the end of that rehabilitation period.

Example 16

An individual is given a fixed penalty notice by a constable. This AtP is spent at the point at which it is given (immediately).

They challenge this and the matter goes to court. They are found guilty of the offence for the criminal activity which gave rise to the FPN and are fined £300. The rehabilitation period for this sentence is 5 years.

The rehabilitation period for both the fixed penalty notice and the sentence received from the court will be 5 years.

²³ Section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004.
<http://www.legislation.gov.uk/asp/2004/8/section/129>

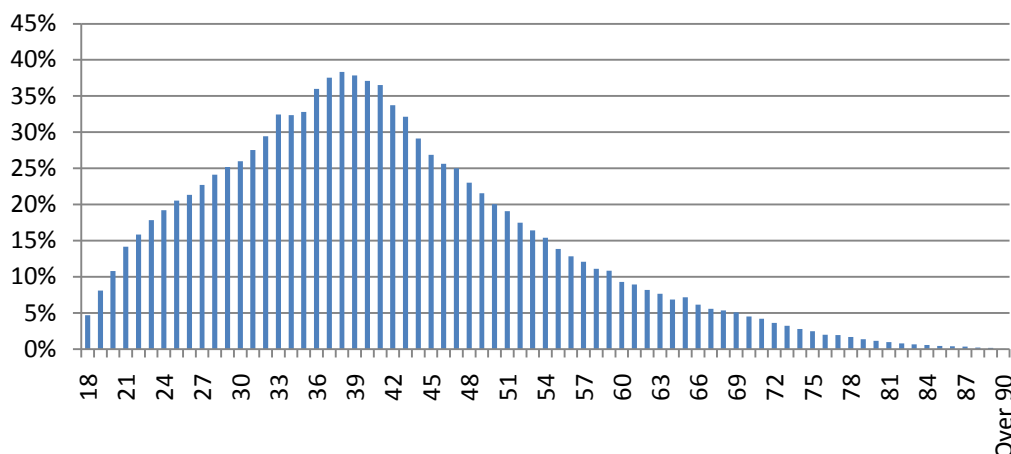
4.7. Conviction data and sentencing trends since the 1974 Act came into force

- 4.7.1. To aid consideration of how the 1974 Act operates and how it might be modernised and reformed, we have set out below some key statistics showing the extent to which people have undertaken criminal activity in Scotland. This includes the number of number of adults in Scotland with a known criminal conviction and some analysis of the different type of offences those individuals have committed in order to get a criminal conviction.
- 4.7.2. This information should assist the reader to help understand how many people the 1974 Act affects and helps illustrate the wider impact of the 1974 Act, including the proportion of people who commit relatively minor offences compared with those who commit more serious offences.
- 4.7.3. We have also provided some analysis of the way sentencing trends have changed since the 1974 Act was commenced. This should assist the reader to understand more about how underlying sentencing trends, including for particular disposals, will have impacted on the disclosure of convictions through the operation of rehabilitation periods.

Conviction data

- 4.7.4. Figure 1 shows that there is a significant proportion of adult males with a known criminal conviction in Scotland. For the period 1989 to 2011, over 30% of men aged between 33 to 43 had at least one known criminal conviction²⁴ between 1989 and 2011, peaking at over 38% for those born in 1973.

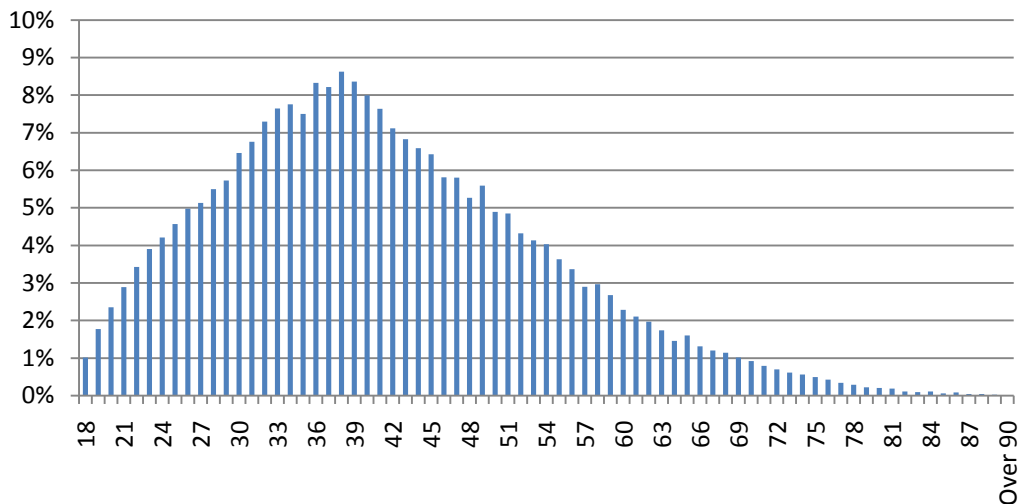
Figure 1: Proportion of adult male population with a known criminal conviction (post 1989), by age band



²⁴ Source: Scottish Offenders Index. This excludes experience in the Children’s Hearing System, convictions before 1989, and convictions for most motoring and some other minor offences; all of these, if included, would tend to increase the prevalence of convictions.

- 4.7.5. As the data in the Scottish Offenders Index only goes back to 1989, the figures appear to drop off quite quickly for those born prior to 1973. However, courts data from earlier periods shows that there were actually many more court convictions in earlier periods, particularly during the 1970's, when there were much larger numbers of court convictions for relatively low-level offences such as breach of the peace and drunkenness. Based on a conservative estimate of the conviction rate for older cohorts, Scottish Government analysts have projected that at least one-third of the adult male population is likely to have a criminal record.
- 4.7.6. Figure 2 shows that women undertake less criminal activity than men and therefore have less involvement in the criminal justice system than men. Again for the period 1989 to 2011, known criminal convictions peak at around 9% for those women born in 1973. Generalising this to the population as a whole, this suggests that nearly one in ten of the adult female population is likely to have a criminal record.

Figure 2: Proportion of adult female population with a known criminal conviction (post 1989), by age band



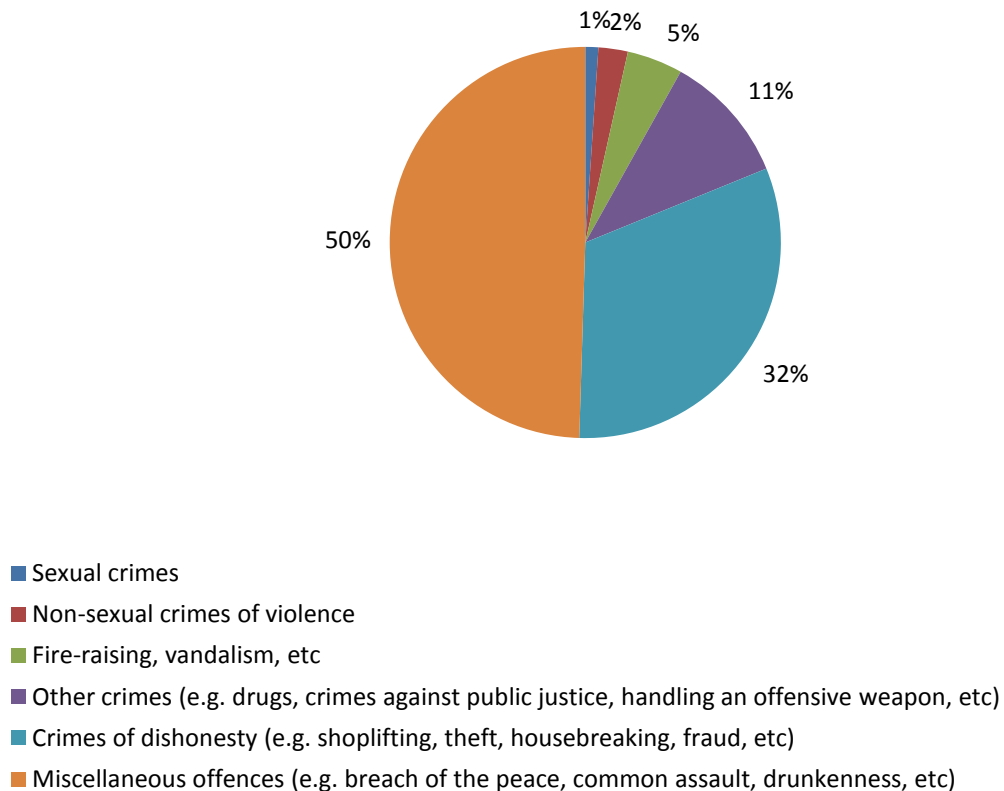
- 4.7.7. These levels of prevalence of criminal convictions in Scotland offer a broadly similar comparison with a study of convictions in the population of England and Wales showing one-third of 48 year old men had a criminal conviction²⁵. That study also found that for those who received a conviction, for the majority of people that would be their only conviction - about half of the men and three-quarters of the women with convictions only have one conviction.
- 4.7.8. These data show that having to potentially disclose previous criminal activity is not simply an issue for a small and hard-core minority, but something which affects a significant proportion of people throughout Scottish society. For women, nearly one in ten of those at the prime

²⁵ Prime, J. White, S. Liriano, S. and Patel, K. (2001) Criminal careers of those born between 1953 and 1978, England and Wales Home Office Research Paper 4/01 (12 March 2001).

career ages have to deal with a criminal history when applying for a job and for men, that figure increases to one in three.

- 4.7.9. Figure 3 below shows the distribution of crimes and offences found amongst criminal conviction data in Scotland over the period 1974 to 2012. As can be seen, most convictions involve offences, which it could be argued, tend to be of the less serious type.
- 4.7.10. 50% of convictions were for offences such as breach of the peace and drunkenness. The next highest category (32% of convictions) includes crimes such as shoplifting, theft and housebreaking. 1% of convictions between 1974-75 to 2011-12 were for sexual crimes.
- 4.7.11. In considering how the 1974 Act operates, we think it is important for the reader to note the nature of criminal activity, which can result in a conviction, does obviously vary in seriousness. What is clear from this data is that criminal records are an issue not only for people with the most experience of our criminal justice system (e.g. repeat offenders and those who receive custodial sentences), but also for many people in our society who may only offend once in their lives for whatever reason and then seek to move away from their previous criminal activity and build a law abiding life and help contribute to Scottish society.

Figure 3: Total number of convictions 1974-75 to 2011-12, by crime type (excluding motoring offences)



Sentencing trends

- 4.7.12. We have detailed below how the use of the three main sentencing options in Scottish courts has changed over time.
- 4.7.13. Since the 1974 Act was introduced, there has been a notable increase in the use of both custodial and community sentences which is illustrated in figures 4 and 5 below.

Figure 4: Number of custodial sentences by year

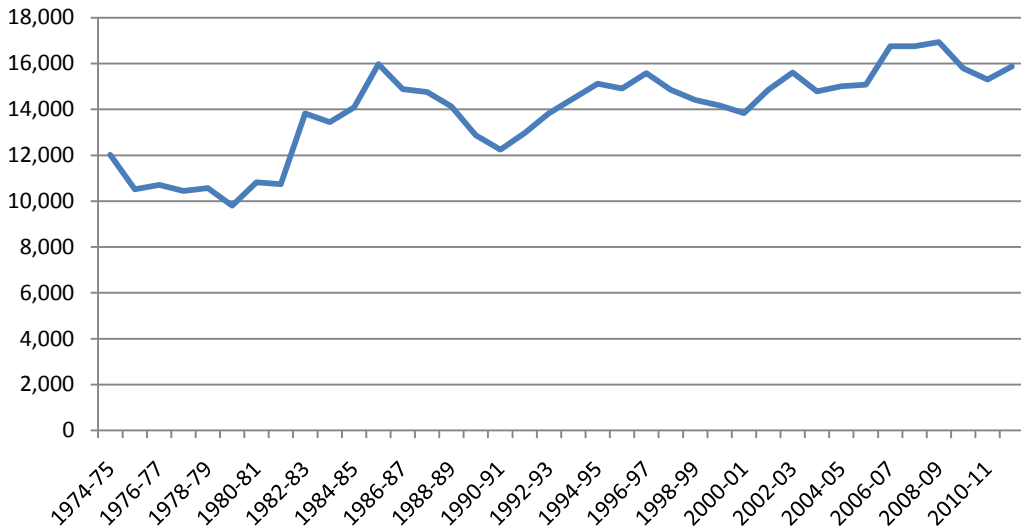
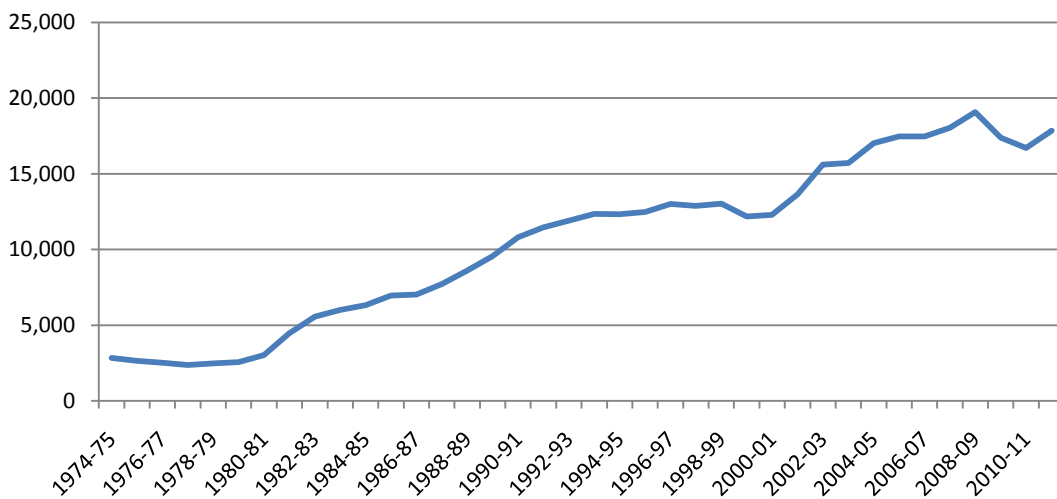
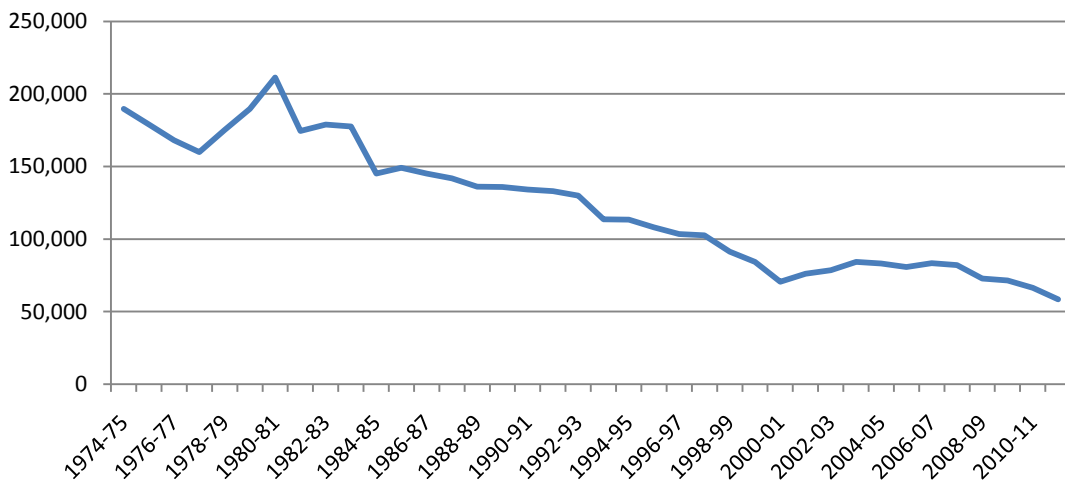


Figure 5: Number of community orders by year



4.7.14. Conversely, however, there has been a substantial reduction in the use of court fines which is illustrated in figure 6 below. Although some of the reduction in more recent years in the use of the fine as a court disposal will likely to have been due to reductions in the number of crimes and offences committed, it is also the case that changes over many years in how less serious criminal activity, such as motoring offences, is dealt with in terms of an increased use of non-court disposals will have contributed to the reductions in the use of the fine as a court disposal.

Figure 6: Number of fines by year

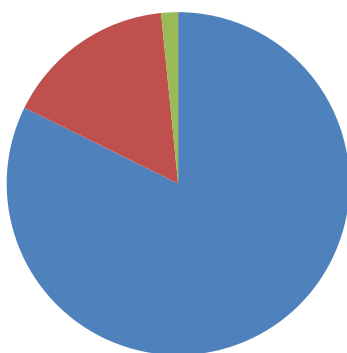


Custodial sentence lengths

4.7.15. As can be seen in figures 7 and 8, since the 1974 Act was introduced average custodial sentence lengths have risen quite significantly.

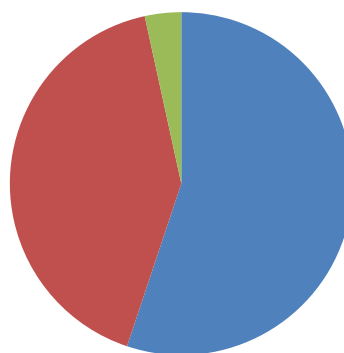
Sentence length breakdowns

Figure 7 – 1974-75



■ Up to 6 months
 ■ 6 months up to 4 years
 ■ 4 years and over

Figure 8 – 2011-12



■ Up to 6 months
 ■ 6 months up to 4 years
 ■ 4 years & over

4.7.16. As can be seen from figures 9 and 10 below, whilst the number of sentences imposed each year of up to 6 months has remained broadly static, the number of sentences imposed each year of 6 months to 30 months has more than doubled since the mid-1980's²⁶. This has substantially increased the proportion of ex-prisoners affected by the 10 year rehabilitation period rather than the 7 year rehabilitation period.

Figure 9: Number of sentences of up to 6 months by year

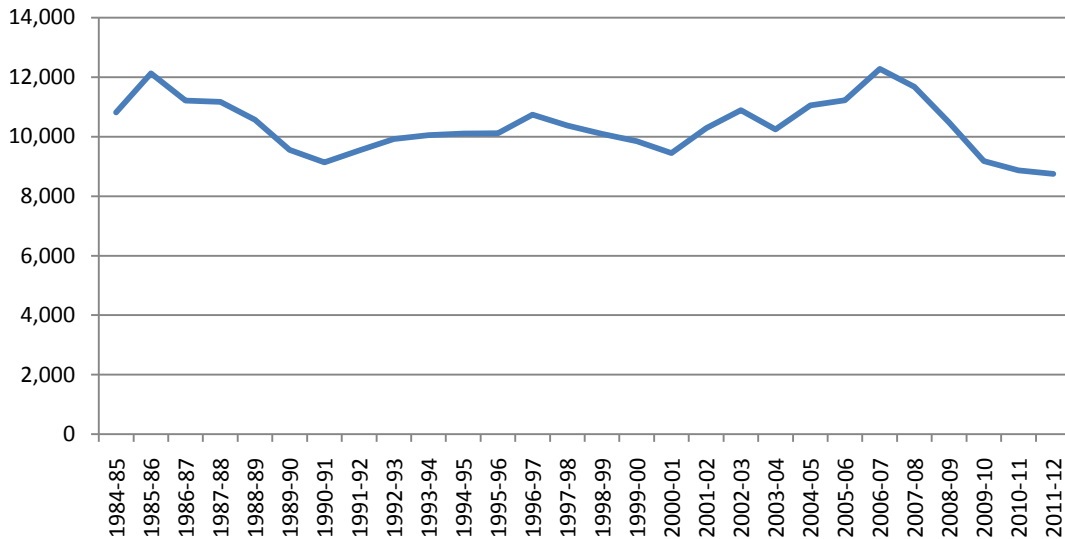
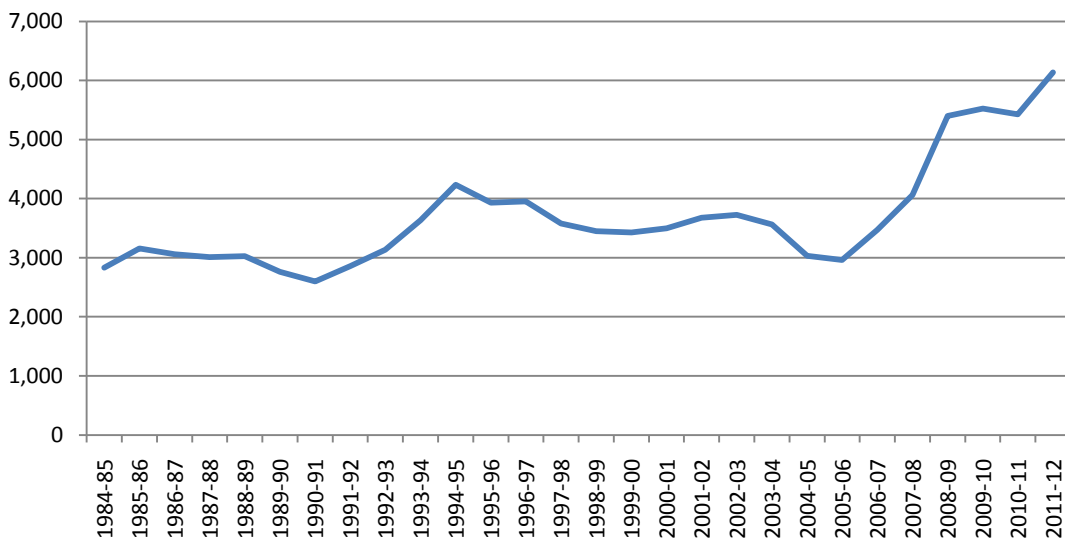


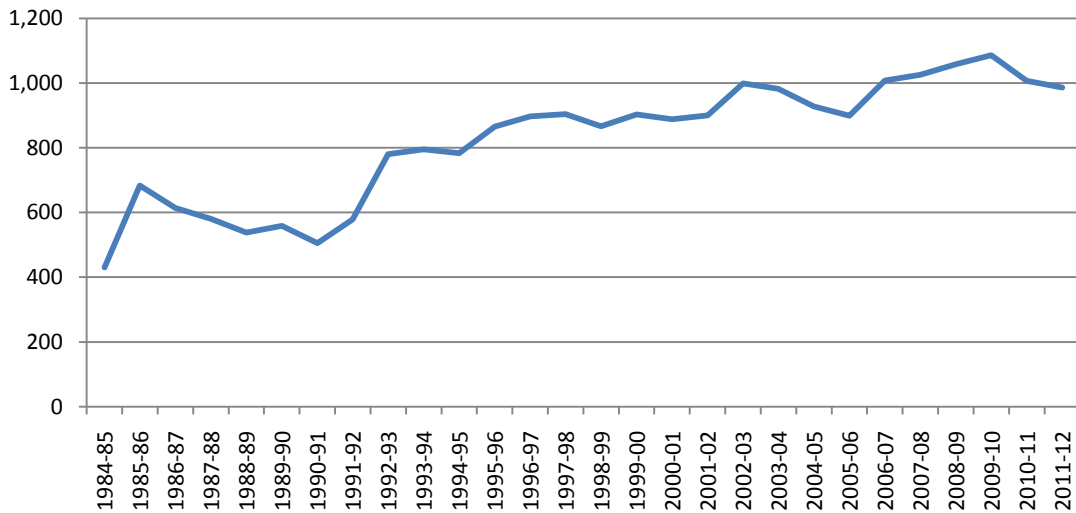
Figure 10: Number of sentences of 6 months to 30 months by year



²⁶ Detailed data on sentence lengths of over 30 months is not available for earlier periods.

- 4.7.17. Similarly, figure 11 shows that the number of sentences imposed each year that will never be spent (i.e. sentences of 30 months or more) has also more than doubled since the mid-1980's.

Figure 11: Number of sentences over 30 months by year



Reconvictions

- 4.7.18. Within the 1974 Act, different types of disposals received for criminal activity attract differential rehabilitation treatment in terms of the periods that apply before the criminal activity becomes spent. For example (and as explained in more detail earlier in the chapter), a court imposed fine has a rehabilitation period of 5 years and a custodial sentence of up to 6 months has a rehabilitation period of 7 years. Generally speaking (though there are clearly exceptions), the more serious the criminal activity that has been undertaken by a person, the more likely it is that a more punitive disposal will be imposed and that more punitive disposal will then trigger a longer rehabilitation period in line with the 1974 Act.
- 4.7.19. We have explained that the underlying purpose of the rehabilitation of offenders regime is to try and balance the rights of ex-offenders who want to move on from their previous criminal activity so that they can lead a purposeful, law abiding life in society with the rights of employers to be informed about a person's previous criminal activity when making employment decisions. Given the variety of factors that influence a person's life and their future prospects, it is both difficult and probably largely uninformative to make any direct (or even indirect) correlation between the likelihood of reconviction and rehabilitation periods.
- 4.7.20. For general context however, we provide below some high level information on reoffending. Data shows that it is those who receive the longest custodial sentences (more than 4 years) who have the lowest reconviction rates for all types of disposal. For example, 2009-10 data shows that prisoners released from sentences of 6 months or less were

more than 3 times as likely to be reconvicted within a year than prisoners released from sentences of 4 years or more. However, while the risk of long term prisoners re-offending upon release is lower than for all other types of disposals, it should be noted that the impact of re-offending when such prisoners do commit further offences is generally higher than for offenders who re-offend after receiving other types of disposal i.e. long term prisoners who re-offend will generally commit more serious offences than short term prisoners who re-offend.

- 4.7.21. More generally looking at all disposals, high level data shows that the risk of an offender re-offending is highest immediately at completion of their sentence and the average risk of re-offending for an ex-offender will have approximately halved after a period of 4 years following completion of their sentence.
- 4.7.22. The ability of an ex-offender to move away from their previous criminal activity is greatly enhanced if they can gain employment and have a positive and stable family environment once they have completed their disposal. Yet it is at the point of completion of disposal when virtually all ex-offenders will have unspent criminal activity which requires to be disclosed. Some would argue that the current system of having to disclose virtually all criminal activity for a period of time immediately after completion of a disposal runs directly counter to assisting the rehabilitation prospects of ex-offenders as this is a key period of time for ex-offenders who want to move away from their previous criminal activity and build a law abiding life.

Summary

- 4.7.23. Over time and even with the fundamentals of the 1974 Act remaining largely unchanged, the impact of the 1974 Act on those people who have undertaken previous criminal activity has changed. For example, the increase in the average length of sentences has meant that more offenders now never become rehabilitated under the 1974 Act than was the case when the legislation was brought in.

4.8. Questions

Q12. Do you think some criminal offences or crimes should never be rehabilitated under the 1974 Act, (i.e. a person would always have to disclose it)?

Yes No Depends on the offence or crime

Comments

Q13. If answered, 'Yes' or 'Depends on the crime or offence', what offences or crimes do you think should never be rehabilitated?

Homicide Other violent offences Sexual offences

Housebreaking/theft Fraud/bribery/corruption

Criminal damage Drugs offences

Public order offences Driving offences

Other (please specify below)

Comments

Q14. Is a sentence of 30 months the appropriate point at which an offender will never become rehabilitated under the 1974 Act?

Yes No

Comments

Q14a. If you answered 'no', should it be shorter or longer?

Shorter Longer

Comments

A Discussion Paper on the Rehabilitation of Offenders Act 1974

Q15. What do you think the appropriate rehabilitation period should be for the following disposals set out in the table below? (e.g. spent immediately or 1, 2, 3 months etc or 1, 2, 3 years etc.)

Custodial Sentence ²⁷	Rehabilitation period	Rehabilitation period (under 18)
A sentence for a term exceeding thirty months but not exceeding 48 months.		
A sentence for a term exceeding six months but not exceeding thirty months.		
A sentence for a term not exceeding six months		
Any other range of sentence lengths, e.g. over 48 months and above (please specify)		
Community Sentence ²⁸	Rehabilitation period	Rehabilitation period (under 18)
Probation		
Community Service Order		
Supervised attendance Order		
Restriction of liberty Order		
Drug treatment & testing Order		
Community reparation Order		
Anti-Social behaviour Order		
Community Payback Order		
A fine		
Compensation Order		
Financial Penalty	Rehabilitation period	Rehabilitation period (under 18)
Fine		
Compensation Order		
Other sentence ²⁹	Rehabilitation period	Rehabilitation period (under 18)
Insanity, hospital, guardianship Order		
Admonition ³⁰		
Absolute Discharge		
Conditional discharge		
Alternative to Prosecution	Rehabilitation period	Rehabilitation period (under 18)
Warnings given by a constable		
Warnings given by Procurator Fiscal		
Fixed penalty notices given under section 129 of the Antisocial Behaviour (Scotland) Act 2004		
Fiscal fines		
Fiscal compensation Orders		
Fiscal work Orders		
Fiscal activity/treatment Orders		
Notice to comply with a restoration Order		

²⁷ <http://www.victimsofcrimeinscotland.org.uk/the-justice-process/after-the-verdict/sentences/>

²⁸ <http://www.scotland.gov.uk/Topics/Justice/public-safety/offender-management/offender/community/examples>

²⁹ <http://www.scotland-judiciary.org.uk/29/0/Glossary>

³⁰ Where a person has pleaded guilty or been convicted of an offence, in some circumstances the court may admonish the offender not to do it again and impose no other penalty.

A Discussion Paper on the Rehabilitation of Offenders Act 1974

Q15a. If you have stated in Q15 above that some of the above custodial (prison) sentences should be spent immediately, please explain why.

Comments

Q15b. If you have stated in Q15 above that individuals under the age of 18, receiving a custodial sentence, should have shorter rehabilitation periods than those aged 18 and above for equivalent criminal activity, please explain why.

Comments

Q15c. If you have stated in Q15 above that individuals receiving a custodial sentence of over thirty months should be able to be rehabilitated under the 1974 Act, please specify the length of the custodial sentence and your reasons why you think this would be appropriate.

Comments

Q15d. If you have stated in Q15 above that some of the above non-custodial sentences should be spent immediately, please explain why.

Comments

Q15e. If you have stated in Q15 above that individuals under the age of 18, receiving an non-custodial sentence, should have shorter rehabilitation periods than those aged 18 and above for equivalent criminal activity, please explain why.

Comments

Q16. What changes are needed to be made to section 5 of the 1974 Act to make the rehabilitation periods easier to understand?

Comments

Q17. Is it clear and understandable what happens to the rehabilitation period when more than one sentence is imposed in respect of a conviction?

Yes No

Comments

Q17a. If not, what changes could be made to make this clearer?

Comments

Q18. Is it clear and understandable what happens to the rehabilitation period when an individual is convicted of a further offence before a rehabilitation period ends?

Yes **No**

Comments

Q18a. If not, what changes could be made to make this clearer?

Comments

Q19. Do you think the rehabilitation period for the first offence should be extended if the offender commits a further offence?

Yes **No**

Comments

Q20. Is it clear and understandable how rehabilitation periods are set where an individual initially receives an AtP for criminal activity, but then is convicted for the criminal activity after either a) failing to adhere to the terms of the AtP or b) refusing the AtP?

Yes **No**

Comments

Q20a. If not, what changes could be made to make this clearer?

Comments

CHAPTER 5 - THE PROTECTIONS GIVEN TO SPENT CONVICTIONS & ALTERNATIVES TO PROSECUTION

5.1. Introduction

- 5.1.1. Section 4¹ (Effect of Rehabilitation) of the 1974 Act embodies the main principle of the Act for convictions in terms of what it means to be a 'rehabilitated person'. As explained previously in the paper, what this means in practice is that, subject to certain exceptions, a 'rehabilitated person' is to be treated for all purposes in law as if they had never committed, been charged with, or prosecuted for, or convicted of or sentenced for the offence concerned². Recent reform has brought alternatives to prosecution within the scope of the 1974 Act so people with alternatives to prosecution can also become rehabilitated persons under the 1974 Act. This chapter explains what these protections mean for people who are rehabilitated persons and asks for views on how these arrangements operate.

Example 17

An individual was convicted of an offence and fined £300. The rehabilitation period for this sentence is 5 years.

After 5 years, that individual is asked whether they have a previous conviction. They can answer no and should not be subject to any prejudice as a result of this previous conviction.

5.2. Convictions

Proceedings before a judicial authority

- 5.2.1. Section 4 of the 1974 Act also provides that no evidence is admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain to prove that any rehabilitated person has committed, been charged with or prosecuted for or convicted of or sentenced for any offence which is the subject of a spent conviction³.
- 5.2.2. Therefore, a person shall not be asked any question in judicial proceedings about their past which cannot be answered except by referring to a spent conviction, or any circumstances ancillary to that spent conviction. If an individual is nonetheless asked such a question, they are not required to answer it⁴.

¹ <http://www.legislation.gov.uk/ukpga/1974/53/section/4>

² Section 4(1) of the 1974 Act.

³ Section 4(1)(a) of the 1974 Act.

⁴ Section 4(1)(b) of the 1974 Act.

Example 18

An individual was convicted of assault and fined. The rehabilitation period for this sentence is 5 years. Some 6 years later after the conviction has become spent and when working as an electrician, his employers find out he has a previous conviction.

He is asked to attend an interview with Human Resources to answer questions about this, with the apparent potential outcome being dismissal. However, he is entitled not to answer any questions about his spent conviction and, as we will see later, his employer will be unable to take any action against him as regards his previous conviction.

- 5.2.3. However, there are certain exceptions⁵ to this general approach which are provided for under the 1974 Act which will be discussed later in this paper under 'Limitations on rehabilitation'.

Questions put out-with proceedings before a judicial authority

- 5.2.4. Section 4(2) of the 1974 Act states⁶ that where a question seeking information about a person's previous convictions, offences, conduct or circumstances is put to them otherwise than in proceedings before a judicial authority;
- a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and
 - b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.
- 5.2.5. What this means is, subject to exceptions provided in the 2013 Order, a person who is questioned in, say, a job interview, about their past is entitled to treat such questions as not relating to spent convictions and may reply accordingly (i.e. they do not need to disclose them). Further to this, the person will not be subject to any liability or otherwise prejudiced in law in respect of any spent convictions.
- 5.2.6. In addition to this, section 4(3) of the 1974 Act provides, subject to exceptions provided in the 2013 Order, that;
- a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent

⁵ Section 7(2) of the 1974 Act and the 2013 Order.

⁶ Section 4(2)(a) & (b) of the 1974 Act.

conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's), and⁷

- b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment⁸.

- 5.2.7. This means that any obligation to disclose any matters to someone else should not be taken to include disclosing a spent conviction. This also means that because a person has a spent conviction and/or does not disclose a spent conviction or the circumstances ancillary to it, that is not a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing them in any way in any occupation or employment.

Example 19

An individual is convicted and sentenced to 3 months imprisonment. After 7 years, with no other convictions, that individual applies for a job and is asked in the application form whether they have any previous convictions. A sentence of 3 months imprisonment has a rehabilitation period of 5 years so after 7 years, the conviction is spent.

Therefore, in completing the form, the individual is entitled to leave that section blank or answer no. If the potential employer finds out about the spent conviction through some other means, they are required to ignore it when deciding on whether to interview them and/or deciding whether to employ them.

We can assume the employer did not find out about the spent conviction and the individual gets interviewed and gets the job. However, 4 weeks later, their new employers happen to find out that they have in fact got a previous conviction but it is spent. Again, they can do nothing about this and cannot dismiss the individual for not disclosing the spent conviction.

- 5.2.8. Contravention by an employer of the 1974 Act in this area (i.e. using information relating to a spent conviction in making a decision to not employ a person or dismiss a person from employment) is not a criminal offence. It is however the case that a person whose spent convictions have either prejudiced him or her in their employment or have been taken into consideration in a recruitment process could raise civil proceedings against the employer.

⁷ Section 4(3)(a) of the 1974 Act.

⁸ Section 4(3)(b) of the 1974 Act.

5.3. Alternatives to prosecution

- 5.3.1. An amendment was made under the 2010 Act⁹ to include AtPs in the 1974 Act for the first time. This change extended the protections provided in the 1974 Act to include AtPs¹⁰. It also gave protection to people who have been given anything corresponding to an AtP in respect of an offence under the law of a country or territory outside Scotland¹¹.
- 5.3.2. Schedule 3 of the 1974 Act provides the protection for people who have been given an AtP in Scotland. With some minor differences, Schedule 3 to the 1974 Act essentially operates for AtPs as the rest of the Act operates for convictions in terms of offering protection to people who have undertaken criminal activity in the past and received an AtP so that they can become a rehabilitated person.
- 5.3.3. Therefore, when a person's AtP becomes spent, they are treated as a person who has not committed, been charged with or prosecuted for, or been given an AtP in respect of, the offence¹².
- 5.3.4. It should be noted that AtPs are not covered by the 2013 Order and so there is no disapplication of the general protections given to spent AtPs within the 1974 Act.

Example 20

An individual commits a minor offence and the procurator fiscal gives them a fiscal warning. This AtP is spent immediately.

The effect is that individual will never have to disclose this AtP on job applications for any post, including for the exempted professions and occupations specified in the 2013 Order.

Proceedings before a judicial authority

- 5.3.5. Evidence of a spent AtP is not admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland¹³. The 1974 Act also provides that a person must not, in any such proceedings, be asked any questions in relation to their past which cannot be answered without acknowledging or referring to an AtP that has become spent or any ancillary circumstances relating to that AtP. If they are asked such a question in any such proceedings, they are not required to answer it¹⁴. However, there are some modifications to this rule which will be discussed later in this chapter.

⁹ <http://www.legislation.gov.uk/asp/2010/13/section/109>

¹⁰ Section 8B of the 1974 defines an AtP for the purposes of the 1974 Act.

¹¹ Section 8B, paragraph 1(f) of the 1974 Act.

¹² Schedule 3, paragraph 3(1) of the 1974 Act.

¹³ Schedule 3, paragraph 3(2)(a) of the 1974 Act.

¹⁴ Schedule 3, paragraph 3(2)(b) of the 1974 Act.

Example 21

An individual commits a minor offence involving dishonesty and is given a fiscal fine by the procurator fiscal. The individual accepts this fiscal fine. The rehabilitation period is 3 months for this AtP.

Some 6 months later, that individual witnesses an accident at work where one of his colleagues is severely injured. The case goes to a tribunal and they are called as a witness in the case.

The 1974 Act ensures that no evidence will be admissible before the tribunal in relation to the spent AtP in an attempt to show the witness has previously been dishonest.

Questions put outwith proceedings before a judicial authority

- 5.3.6. Where a person is asked a question, for example on an application form or at a job interview, about any previous criminal activity, the question should be treated as not relating to an AtP that has become spent or any ancillary circumstances relating to the spent AtP. This is also the case if the person is asked a question about another person's previous criminal activity relating to a spent AtP.
- 5.3.7. The person is not to be subjected to any liability or otherwise prejudiced in law because they failed to acknowledge or disclose a spent AtP or any ancillary circumstances relating to the AtP when answering the question¹⁵.
- 5.3.8. Further to this, any obligation imposed on that person by a rule of law or by the provisions of an agreement or arrangement to disclose any matter to another individual does not extend to requiring them to disclose a spent AtP or any ancillary circumstances.
- 5.3.9. It is also important to note, that the existence of a spent AtP or any ancillary circumstances, any failure to disclose a spent AtP or ancillary circumstances is not a ground for dismissing or excluding an individual from any office, profession, occupation or employment, or for prejudicing that individual in any way in any occupation or employment¹⁶.

¹⁵ Schedule 3, paragraph 4 of the 1974 Act.

¹⁶ Schedule 3, paragraph 5 of the 1974 Act.

Example 22

An individual who commits an offence is given a fiscal work order. This is accepted and they complete the 30 hours unpaid work to the satisfaction of the procurator fiscal. Some 6 months later, with no new convictions having been acquired, that individual applies for a job and is asked in the application form whether they have ever undertaken any criminal activity and received any form of disposal.

That individual is entitled to leave that section blank or answer no. If the potential employer finds out about the spent AtP through some other means, they are required to ignore it when deciding on whether to interview them and/or employ them.

We can assume the employer does not find out about the spent AtP and individual gets interviewed and gets the job. Some 4 weeks later, their new employers find out that they have in fact got a spent AtP.

Again, the employer can do nothing about this and cannot dismiss the individual for not disclosing the spent AtP during the application process or at the interview stage.

- 5.3.10. However, as previously mentioned, there are also some, but not as many, exceptions to the effect of rehabilitation for an individual who is given an AtP under the 1974 Act. This will be discussed in more detail later in this paper.

5.4. **Questions**

Q21. Are the protections given to spent convictions/AtPs clear and understandable?

Yes No

Q21a. If not, what would make this clearer?

Comments

Q22. Should employers be prevented from using spent convictions/AtPs against an employee?

Yes No

Q22a. If you answered 'no', why not?

Comments

Q23. Do you think it should be a criminal offence if an employer does not comply with the principle of not using spent conviction/AtP information against an employee?

Yes No

Comments

Q23a. If you answered 'Yes', what sanctions would you like to see imposed and why?

Comments

Q24. Do you agree that spent convictions/AtPs should not be disclosed in proceedings before a judicial authority?

Yes No

Q24a. If you answered 'no' please explain why.

Comments

Q25. Do you agree that spent convictions/AtPs should be disclosed in proceedings before a judicial authority?

Yes No

Comments

CHAPTER 6 - WHERE THE PROTECTIONS GIVEN SPENT CONVICTIONS DO NOT OR MAY NOT APPLY

6.1. Introduction

- 6.1.1. There are a number of exceptions to the rules on becoming a 'rehabilitated person' that can prevent a person from becoming rehabilitated under the 1974 Act. This chapter explores what these exceptions are and also discusses the limitations on the protections given to spent convictions before some questions are asked.

6.2. Prohibitions to becoming a rehabilitated person

Excluded sentences

- 6.2.1. There are certain types of sentences that are 'excluded' from rehabilitation under the 1974 Act¹. The reason for their exclusion is a policy decision, made as the 1974 Act was being developed, that people receiving such sentences will have committed such serious offences that they should not be considered to be rehabilitated for the purposes of the 1974 Act. This means anyone receiving one of those 'excluded' sentences cannot become a 'rehabilitated person' under the 1974 Act and therefore never receives protection under the legislation.

Example 23

An individual, who is 18, is convicted of carrying a knife in public. They are sentenced to 36 months imprisonment.

As this sentence is greater than 30 months imprisonment, it is an 'excluded' sentence.

The effect of this is that this individual will have to disclose this conviction for the rest of their life if asked and the conviction will always show up on basic, standard and enhanced disclosure and a PVG scheme record .

Subsequent conviction/s

- 6.2.2. If a person is convicted and receives a sentence which is subject to rehabilitation under the 1974 Act but, during the rehabilitation period for that conviction, is convicted again and receives a sentence which is 'excluded' from rehabilitation, then neither conviction ever becomes spent.

¹ Section 5(1) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/5>

Example 24

An individual has a previous conviction for theft and was fined £300. The rehabilitation period for this sentence is 5 years. After 4 years that individual is convicted of carrying a knife in public. They are sentenced to 36 months imprisonment. This sentence is 'excluded' from the 1974 Act.

The effect is that both the fine and the 36 month sentence will be disclosed for the rest of their life and both convictions will always show up on basic, standard and enhanced disclosures and a PVG scheme record.

- 6.2.3. However, if a person receives an 'excluded' sentence after the rehabilitation period for a previous conviction has expired, this will have no effect on the previous conviction (i.e. that previous conviction will remain spent).

Example 25

An individual has a previous conviction for theft and was fined £300. The rehabilitation period for this sentence is 5 years. After 5½ years that individual is convicted of carrying a knife in public. They are sentenced to 36 months imprisonment. This sentence is 'excluded' from the 1974 Act

The effect is that the 36 month sentence for knife possession will never be spent and will require to be disclosed for the rest of their life, but the conviction for theft will be spent.

Not served or complied with sentence

- 6.2.4. The general rule is that a person will not become a rehabilitated person for the purposes of the 1974 Act in respect of a conviction unless they have served or otherwise undergone or complied with any sentence imposed on them in respect of that conviction².
- 6.2.5. However, there are some circumstances where a failure to comply with the terms of a sentence in itself will not prevent a person from becoming a rehabilitated person for the purposes of the 1974 Act³. These circumstances are as follows:
- a) a failure to pay a fine or other sum adjudged to be paid by or imposed on a conviction⁴, or

² Section 1(2) of the 1974 Act

³ Section 1(2) of the 1974 Act.

⁴ Section 1(2)(a) of the 1974 Act. <http://www.legislation.gov.uk/ukpga/1974/53/section/1>

- b) a breach of a bond of caution to keep the peace or be of good behaviour⁵, or
- c) a breach of condition of a 'recognizance'⁶, or
- d) a breach of any condition or requirement related to a sentence, where as a result of the breach, the individual is dealt with for the original offence for which the sentence was imposed⁷.

6.2.6. The 1974 Act also states that rehabilitation will be unaffected for a failure to comply with any requirement of a Suspended Sentence Supervision Order⁸. Such Orders are only given in England and Wales and there is no equivalent Order in Scotland.

6.2.7. However, if the court imposes a further sentence as a result of the breaches mentioned above, the person will not become a rehabilitated person until both rehabilitation periods have been completed.

6.3. Limitations for rehabilitated persons

Convictions

6.3.1. Section 7⁹ of the 1974 Act sets out various circumstances and functions where the general protections given to spent convictions under the Act do not apply, or may not be applied.

6.3.2. Section 4(1) of the 1974 Act provides that a 'rehabilitated person' is to be treated for all purposes in law as if they had never committed, been charged with, or prosecuted for, or convicted or sentenced for the offence concerned. Further to this, no evidence relating to a spent conviction is admissible in any proceedings before a judicial authority in Great Britain and if asked a question in those proceedings, the person is not required to answer it.

6.3.3. However, section 7(1) of the 1974 Act provides that the general protections given to spent convictions in section 4(1) of the Act does not affect:

- a) "any right of Her Majesty, by virtue of Her Royal prerogative or otherwise, to grant a free pardon, to quash any conviction or sentence, or to commute any sentence;
- b) the enforcement by any process or proceedings of any fine or other sum adjudged to be paid by or imposed on a spent conviction;

⁵ Section 1(2)(a) of the 1974 Act

⁶ Section 1(2)(a) of the 1974 Act. 'Recognizance is a formal agreement or undertaking.

⁷ Section 1(2)(b) of the 1974 Act

⁸ Section 1(2)(c) of the 1974 Act.

⁹ <http://www.legislation.gov.uk/ukpga/1974/53/section/7>

- c) the issue of any process for the purpose of proceedings in respect of any breach of a condition or requirement applicable to a sentence imposed in respect of a spent conviction; or
- d) the operation of any enactment by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification, disability, prohibition or other penalty the period of which extends beyond the rehabilitation period applicable in accordance with section 6 above to the conviction.”

Protections disapplied in specified proceedings

- 6.3.4. Section 7(2) of the 1974 Act also provides that nothing in section 4(1) of the Act will affect the determination of any issue, or prevent the admission of evidence or requirement of any evidence, relating to a person’s previous convictions or circumstances ancillary thereto in the following types of proceedings¹⁰:
- a) in any criminal proceedings before a court in Great Britain (including any appeal or reference in a criminal matter)¹¹,
 - b) in any service disciplinary proceedings or in any proceedings on appeal from any service disciplinary proceedings¹²,
 - c) in any proceedings under Part 2 of the Sexual Offences Act 2003, or on appeal from any such proceedings;
 - d) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 or any appeal under section 6 of that Act¹³,
 - e) in any proceedings relating to parental responsibilities or parental rights, guardianship, adoption or the provision by any person of accommodation, care or schooling for children under the age of 18 years¹⁴,
 - f) in any proceedings under Part II of the Children (Scotland) Act 1995,
 - g) in any proceedings in which an individual is a party or a witness, provided that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, the individual consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section 4(1) of the Act¹⁵.

¹⁰ Section 7(2) of the 1974 Act.

¹¹ Section 7(2)(a) of the 1974 Act.

¹² Section 7(2)(b) of the 1974 Act.

¹³ Section 7(2)(bc) of the 1974 Act.

¹⁴ Section 7(2)(c) of the 1974 Act.

¹⁵ Section 7(2)(f) of the 1974 Act.

- 6.3.5. The examples below demonstrate how these provisions operate in practice in a range of types of proceeding.

Example 26

An individual is convicted of housebreaking. As part of the sentencing process, it will be necessary for the court to know about any previous spent convictions. For example, it may show it is the individual's first offence or it may show they have 20 previous convictions. The court will be appropriately informed in making their sentencing decision by having access to this information.

A soldier is in front of a court martial for a serious offence. It is appropriate for the court martial to know whether they have any previous convictions for sentencing purposes.

A determination is being made on whether an individual should get a Risk of Sexual Harm Order. It would be appropriate to know about any previous sexual offences that may have become spent in order to make the most appropriate decision.

A member of a child's family wishes to get a guardianship order. It will be appropriate to have details of whether this individual has any previous convictions that may have relevance for the decision on guardianship.

A child is referred to a children's hearing on offence grounds. It will be appropriate to know about any previous offending behaviour.

An individual is a witness and it may be appropriate for details of their criminal past to be disclosed. This can happen, but only with their consent.

Proceedings before a judicial authority

- 6.3.6. Section 7 of the 1974 Act also gives a judicial authority the power to admit evidence of a spent conviction in proceedings before it even although such proceedings are not set out in section 7(2) of the Act or in the 2013 Order.
- 6.3.7. However, this can only happen when the judicial authority is satisfied that justice cannot be done in the case except by allowing or requiring such a disclosure¹⁶.
- 6.3.8. In addition, section 7 also provides that only court orders relating to a person's convictions can be included in any list or statement about a person's previous convictions which is given to any court when considering how to deal with that individual in respect of any offence¹⁷.

¹⁶ Section 7(3) of the 1974 Act.

¹⁷ Section 7(5) of the 1974 Act.

Secondary legislative powers to exclude the application of the general protections of the Act

- 6.3.9. Section 7(4)¹⁸ of the 1974 Act gives secondary legislative powers to the Scottish Ministers to exclude the general protections given to spent convictions in the Act in relation to any proceedings specified in that Order. Section 4(4)¹⁹ also gives the Scottish Ministers powers to provide by Order for exclusions and exceptions from the protections given to spent convictions in the Act, for the purposes of the employment situations specified in the Order.
- 6.3.10. These secondary legislative powers under section 7(4), together with the secondary legislative powers under section 4(4) to disapply the protections in section 4, have been exercised by the Scottish Ministers in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, (“ the 2013 Order”).

Alternatives to prosecution

- 6.3.11. There are certain limitations on the protections given to spent AtPs under the Act.
- 6.3.12. Paragraph 6 of Schedule 3 provides secondary legislative powers to the Scottish Ministers to exclude or modify the application of paragraph 4 in relation to questions put in such circumstances as may be specified in the Order. This enables Ministers to provide for the disclosure of spent AtPs and/or the ancillary circumstances giving rise to the AtP in response to questions otherwise than in judicial proceedings.
- 6.3.13. Paragraph 6 of Schedule 3 also provides secondary legislative powers to provide for exceptions from any of the provisions of paragraph 5 in such cases or classes of case, or in relation to AtPs of such descriptions, as may be specified in the order. This enables Ministers to provide that, in certain circumstances, there is to be no prohibition on the use of spent AtPs as grounds for dismissal from any office, profession, occupation or employment or for prejudicing a person in any occupation or employment.
- 6.3.14. Paragraph 8 of Schedule 3 applies the provisions of section 7 of the Act to AtPs. This ensures that paragraph 3 of Schedule 3 does not prevent the disclosure of spent AtPs and ancillary circumstances in most of the judicial proceedings listed in section 7(2) of the Act.
- 6.3.15. The main difference between the operation of section 7(2) for spent convictions and the operation of that section for spent AtPs is that details of spent AtPs are not allowed in any service disciplinary proceedings or in any proceedings on appeal from any service disciplinary proceedings. This is different to spent convictions which can be disclosed in service disciplinary proceedings.

¹⁸ Section 7(4) of the 1974 Act.

¹⁹ <http://www.legislation.gov.uk/ukpga/1974/53/section/4>

- 6.3.16. The overall effect of these various provisions is that, as with spent convictions, spent AtPs must be disclosed in the following proceedings;
- a) in any criminal proceedings before a court in Great Britain (including any appeal or reference in a criminal matter),
 - b) in any proceedings under Part 2 of the Sexual Offences Act 2003, or on appeal from any such proceedings;
 - c) in any proceedings on an application under section 2, 4 or 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 or any appeal under section 6 of that Act,
 - d) in any proceedings relating to parental responsibilities or parental rights, guardianship, adoption or the provision by any person of accommodation, care or schooling for children under the age of 18 years,
 - e) in any proceedings under Part II of the Children (Scotland) Act 1995; in any proceedings in which an individual is a party or a witness, provided that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, the individual consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section 4(1) of the Act.
- 6.3.17. Further to this, the limitations expressed in section 7(3) of the Act, which give a judicial authority the power to admit evidence of a spent conviction in proceedings before it if justice cannot be done except by allowing such a disclosure, also applies to spent AtPs (i.e. spent convictions and spent AtPs are treated exactly the same in this area).
- 6.3.18. Paragraph 8 of Schedule 3 to the 1974 Act applies section 7(4) of the 1974 Act for the purpose of excluding the application of paragraph 3. This means that Ministers can use the secondary legislative powers in section 7(4) to prescribe proceedings in which the protections given to spent AtPs in paragraph 3 of Schedule 3 will not apply. However, it is important to note that the Scottish Ministers have not used these powers in relation to AtPs.
- 6.3.19. Therefore, in Scotland there is no automatic disclosure of spent AtPs in a standard or enhanced disclosure. That means the protections given to spent AtPs in the 1974 Act (such as the non-disclosure of spent AtPs in judicial proceedings or in response to questions asked out with judicial proceedings and the prohibition of using spent AtPs as a ground for dismissal from or prejudice in employment) continue to apply and are not excluded in relation to the proceedings and circumstances specified in the 2013 Order.

- 6.3.20. Disclosure of spent AtPs can only take place by virtue of an enhanced disclosure issued under section 113B of the Police Act 1997. A spent AtP could be classed as relevant information at the discretion of the police under the powers contained in section 113B(4) of the Police Act 1997 and included in an enhanced disclosure. Before issuing an enhanced disclosure, Disclosure Scotland shall request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion, might be relevant or ought to be included in such an enhanced disclosure.

6.4. Excluding and modifying the general operation of the 1974 Act through the 2013 Order

- 6.4.1. As discussed at paragraphs 6.3.9 and 6.3.10, the 1974 Act gives secondary legislative powers to exclude or modify the general protections given to spent convictions in the Act²⁰.

Alternatives to Prosecution

- 6.4.2. As explained at paragraphs 6.3.18, the Scottish Ministers have not exercised the powers in the Act to modify the protections given to spent AtPs. Therefore, there is no automatic disclosure of spent AtPs in Scotland in a standard or enhanced disclosure.

Convictions

- 6.4.3. The Scottish Ministers have exercised their powers under the 1974 Act to exclude or modify the general protections given to spent convictions in the 1974 Act.
- 6.4.4. These powers are available for use where it is considered appropriate that information about spent convictions should be available for the purposes of public protection. As such, there are some categories of proceedings and employment to which the general protections given to spent convictions in the 1974 Act don't apply.
- 6.4.5. These powers have been exercised by the Scottish Ministers in the Rehabilitation of Offenders Act 1974 (Exclusions & Exceptions) (Scotland) Order 2013²¹, ("the 2013 Order").
- 6.4.6. This Order specifies the types of proceedings in which spent convictions can be disclosed, the types of questions in response to which spent convictions have to be disclosed and the types of employment in which spent convictions may be used as a ground for dismissal.

²⁰ The powers are contained in sections 4(4) and 7(4) of the 1974 Act for convictions. The powers in relation to AtPs are found in section 7(4) of the Act (by operation of paragraph 8 of Schedule 3) and in paragraph 6 of schedule 3 to the Act.

²¹ <http://www.legislation.gov.uk/ssi/2013/50/contents/made>

- 6.4.7. The intention of the 2013 Order is not to directly debar people with previous convictions from the types of work set out in the Order, but instead allow potential/actual employers to be informed about a person's spent convictions if the area of work is covered by the 2013 Order.
- 6.4.8. Positions involving a particular level of trust, such as work in the childcare and health professions, are excluded from the general protections given to spent convictions in the 1974 Act. This is to ensure there is adequate protection for children and vulnerable people by allowing employers to be informed about the background of potential/actual employees including, crucially, previous criminal activity information that would not otherwise be disclosed (i.e. spent conviction information). Other professions and occupations where it is considered appropriate to exclude the general protections given to spent convictions in the 1974 Act includes work involving the administration of justice, national security and financial services.
- 6.4.9. The 2013 Order excludes the general protections given to spent convictions in the 1974 Act in relation to:
- certain proceedings (as specified in the 2013 Order); and
 - any proceedings with respect to a decision or a proposed decision (as specified in the 2013 Order) to the extent that an issue relating to spent convictions is to be determined in those proceedings.
- 6.4.10. This means that, in the relevant proceedings, a 'rehabilitated person' does not require to be treated as if they had never committed, been charged with, or prosecuted for, or convicted or sentenced for the offence (i.e. spent convictions can be taken into account as deemed appropriate). This also means that evidence relating to a person's spent convictions could be admissible in the relevant proceedings and if a person is asked a question in such proceedings about a spent conviction, they are required to answer it.
- 6.4.11. The 2013 Order also excludes the general protections provided for spent convictions in relation to the questions put in certain circumstances (as specified in Schedule 3). This means that where questions are asked of a person in certain circumstances, the person must disclose any spent convictions they may have.
- 6.4.12. The 2013 Order also excludes the general protections given to spent convictions in relation to:
- any profession, office, employment or occupation (as specified in Schedule 4);
 - any action taken for the purpose of safeguarding national security; and
 - any decision or proposed decision taken by people in certain proceedings (as specified in in Part 1 of Schedule 2) to do or to refuse to do anything specified in that Part.

- 6.4.13. The effect of this part of the 2013 Order is to remove the general prohibition in section 4 of the Act against using the existence of, or the failure to disclose, a spent conviction as a ground for dismissing or excluding a person from the areas of employment specified in the 2013 Order. It also removes that prohibition in relation to actions taken to safeguard national security and certain decisions taken in the field of financial services.
- 6.4.14. In addition, the 2013 Order also removes the general prohibition in section 4 of the Act against using the existence of, or the failure to disclose, a spent conviction as a ground for prejudicing someone in the areas of employment specified in the 2013 Order. It also removes that prohibition in relation to actions taken to safeguard national security and in relation to certain decisions taken in the field of financial services.

Example 27

An individual is fined £500. Some 6 years later they want to take up clay pigeon shooting as a hobby. As such, they are required to apply for a firearms licence.

Although the conviction is spent, the 2013 Order makes it a requirement for this conviction to be disclosed as part of applying for a firearms licence.

The same individual wishes to become an ombudsman of the Financial Ombudsman Service. The 2013 Order requires them to disclose their spent conviction as part of applying for the post.

Example 28

An individual commits an offence and is given a Community Payback Order. This is spent after 5 years. Some 6 years later the individual commits a minor offence and is given a fiscal fine. This is spent within 3 months. Some 6 months after being given the fiscal fine, they decide to foster a child.

The 2013 Order requires them to disclose their spent conviction but not their spent AtP.

Example 29

An individual is convicted and is given a Community Payback Order. This is spent after 5 years. Some 6 years later, and with no other convictions, that individual applies for a job in financial services which is covered by Schedule 2 to the 2013 Order and is asked in the application form whether they have any previous convictions.

That individual is not entitled to leave that section blank or answer no. If the individual is interviewed for the position, the employer is entitled to ask questions about the spent conviction. That individual must disclose any spent convictions in response to such a question.

In addition, the employer is allowed to ask for a standard/enhanced disclosure on the individual to find out whether they have any spent convictions. If the employer does not seek a standard/enhanced disclosure, but finds out about the spent conviction either through the individual themselves or some other means, the employer is entitled to consider the spent convictions as they consider whether to employ the individual and/or whether for someone already employed should remain in their job.

6.5. Questions

Q26. Do you agree with the policy approach that limits the protections²² under section 4²³ of the 1974 Act?

Yes No

Comments

Q27. Is it clear and understandable how the limitations under the 1974 Act affect the disclosure of previous convictions?

Yes No

Comments

Q27a. If you answered 'no', what changes would you like to see to make it clearer?

Comments

²² See chapter 5 for further information on the protections under section 4 of the 1974 Act and chapter 6 for information on where these protections don't apply.

²³ <http://www.legislation.gov.uk/ukpga/1974/53/section/4>

Q28. Do you think these limitations are necessary?

Yes No

Please explain why.

Comments

Q29. Do you think that the 2013 Order²⁴ protects the public?

Yes No

Comments

Q30. Should certain occupations and professions have access to spent conviction information? (Please tick all that apply)

Yes No Depends on the offence or crime

Depends on the occupation or profession

Comments

Q30a. If you answered, 'Depends on the offence or crime', what types of offences or crimes do you think should be disclosed to occupations and professions even after they are spent?

Homicide Other violent offences Sexual offences

Housebreaking/theft Fraud/bribery/corruption

Criminal damage Drugs offences Public order offences

Driving offences Other

Comments

Q30b. If you answered, 'Depends on the occupation or profession', what types of occupations or professions do you think should have access to spent conviction information?

Comments

²⁴<http://www.legislation.gov.uk/ssi/2013/50/contents/made>

A Discussion Paper on the Rehabilitation of Offenders Act 1974

Q31. After a certain period of time, should spent convictions no longer be disclosed under the 2013 Order?

Yes No

Comments

Q31a. If you answered, 'Yes', after what period of time should convictions no longer be disclosed?

1 year 2 years 3 years 4 years 5 years

6 years 7 years 8 years 9 years 10 years

20 years Other

Comments

Q32. Should spent convictions be disclosed in the types of proceedings found in schedule 1 of the 2013 Order, (e.g. proceedings before the Parole Board for Scotland, proceedings before the Scottish Criminal Cases Review Commission)?

Yes No

Comments

Q33. Should certain occupations and professions have access to spent AtP information in the same way as convictions under the 2013 Order?

Yes No

Comments

Q34. Should spent AtPs be disclosed in the types of proceedings found in schedule 1 of the 2013 Order, (e.g. proceedings before the gambling commission, proceedings held in respect of an application for the grant, renewal, or cancellation of a licence to be a taxi driver or private hire driver)?

Yes No

Comments

CHAPTER 7 - HOW DEFAMATION IS PROVIDED FOR WITHIN THE 1974 ACT

Summary

- 7.1. Section 8 of the 1974 Act¹ applies to any action for defamation by a 'rehabilitated person' founding on the publication of any matter imputing that the rehabilitated person has committed or been charged with or prosecuted for or convicted of or sentenced for an offence which was the subject of a spent conviction.
- 7.2. It should be noted that none of the provisions of this section apply where the publication complained of took place before the conviction in question became spent.
- 7.3. Section 8(3) of the 1974 Act provides that section 4(1) of the 1974 Act does not prevent the defender in an action for defamation from relying on a defence of veritas (that the statement in question is true). In addition, section 4(1) of the Act does not restrict the matters that the defender may establish in support of any such defence. This means that, subject to certain qualifications set out in section 8, where a rehabilitated person raises a defamation action following the publication of that person's spent convictions, the defender can rely on the defence of veritas regardless of the general protections contained in section 4(1) of the Act.
- 7.4. However, section 8(5) of the Act provides that, in a defamation action to which section 8 applies, the defender is not, by virtue of section 8(3), entitled to rely upon the defence of veritas if the publication is proved to have been made with malice. Section 8(4) of the Act provides that where malice is alleged against a defender in a defamation action to which section 8 applies, and the defender is relying on a defence of qualified privilege (that there is a public interest in disclosure), nothing in section 4(1) shall restrict the matters the defender may establish in rebuttal of the allegation.
- 7.5. Section 8(6) of the Act provides that, in a defamation action to which section 8 applies, the defender cannot rely on any matter or require any evidence by virtue of section 8(3) to establish the defence that the matter published constituted a fair and accurate report of judicial proceedings if it is proved that the publication contained a reference to evidence which was ruled to be inadmissible in the proceedings (by virtue of section 4(1) of the 1974 Act). This means that a publication of spent convictions in a report of judicial proceedings could constitute defamation if the publication referred to evidence of spent convictions that was inadmissible under section 4(1) of the Act.

¹ <http://www.legislation.gov.uk/ukpga/1974/53/section/8>

7.6. However, the qualification in section 8(6) does not apply to;

- any report of judicial proceedings contained in a bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law; or
- any report or account of judicial proceedings published for bona fide educational, scientific or professional purposes, or given in the course of any lecture, class or discussion given or held for any of those purposes.

7.7. Questions

Q35. Is it clear and understandable how defamation is covered within the 1974 Act?

Yes No

Q35a. If not, what changes could be made to make it clearer?

Comments

CHAPTER 8 - UNAUTHORISED DISCLOSURE OF SPENT CONVICTIONS/AtPs FROM OFFICIAL RECORDS

Summary

- 8.1. Section 9¹ of the 1974 Act deals with the unauthorised disclosure or procurement of spent convictions from official records.
- 8.2. 'Official record' means a record kept for the purposes of its functions by any court, police force, Government department, local or other public authority in Great Britain or elsewhere, for the purposes of any of Her Majesty's forces, being in either case a record containing information about persons convicted of offences.
- 8.3. 'Specified information' means information imputing that a named or otherwise identifiable living person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which is the subject of a spent conviction.
- 8.4. Section 9(2) of the 1974 Act² applies to any person who:
- in the course of his or her official duties has or at any time has had custody of, or access to, 'official records' or the information contained in official records;
 - knows or has reasonable cause to suspect that specified information obtained in the course of official duties is specified information.
- 8.5. If any person to whom section 9(2) applies discloses, otherwise than in the course of official duties, the specified information he or she has obtained that person is guilty of an offence. Anyone guilty of the offence specified in section 9(2) shall be liable on summary conviction to a fine not exceeding level 4³ on the standard scale⁴.
- 8.6. However, in any proceedings for an offence under section 9(2), it is a defence for the accused to show that the disclosure was made;
- a) to the rehabilitated person or to another person at the express request of the rehabilitated person,
 - b) to a person whom he reasonably believed to be the rehabilitated person or to another person at the express request of a person whom he reasonably believed to be the rehabilitated person⁵.
- 8.7. Section 9(5)⁶ gives the secondary legislative powers to the Scottish Ministers to set out exceptions from section 9(2) where the disclosure of

¹ <http://www.legislation.gov.uk/ukpga/1974/53/section/9>

² Section 9(2) of the 1974 Act.

³ Section 9(6) of the 1974 Act.

⁴ Currently £2,500.

⁵ Section 9(3) of the 1974 Act.

⁶ Section 9(5) of the 1974 Act.

specified information derived from an official record would not be a criminal offence.

- 8.8. Section 9(4) provides for the criminal offence whereby any person obtains any specified information from any official record by means of any fraud, dishonesty or bribe⁷. The maximum penalty for this offence is, on summary conviction, a fine not exceeding level 5⁸ on the standard scale or imprisonment for a term not exceeding 6 months, or both.

8.9. Questions

Q36. Is it clear and understandable what and how the section on unauthorised disclosure of spent convictions of the Act works?

Yes No

Q36a. If not, what changes could be made to make it clearer?

Comments

⁷ Section 9(4) of the 1974 Act.

⁸ Currently £5,000.

CHAPTER 9 - Next steps

What happens next

- 9.1. Following receipt of views in response to this discussion paper, the Scottish Government will consider whether reform and modernisation of the 1974 Act is needed for Scotland.
- 9.2. Any specific proposals for modernisation and reform will take into account the views offered and it is likely that any specific Scottish Government proposals that are developed in this area would be subject to a future formal consultation before relevant legislation is brought before the Scottish Parliament.

27 August 2013

Appendix A

DISCUSSION PAPER ON THE REHABILITATION OF OFFENDERS ACT 1974

Responding to this consultation paper

We are inviting written responses to this discussion paper by **19 November 2013**. **Please send your response with the completed Respondent Information Form (see "Handling your Response" below) to:**

Rehabilitationofoffendersact1974.consultation@scotland.gsi.gov.uk

or

Nigel Graham
Justice Directorate
Criminal Law & Licensing Division
Scottish Government
Area 2W, St Andrews House
Regent Road
Edinburgh EH1 3DG

If you have any queries contact Nigel Graham on 0131 244 1843.

We would be grateful if you would use the discussion paper questionnaire provided as this will aid our analysis of the responses received.

This discussion paper, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

The Scottish Government has an email alert system for consultations, <http://register.scotland.gov.uk>. This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form at Appendix B** which forms part of the discussion paper questionnaire attached to this letter as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly. **Please note we will not accept any anonymous responses to this discussion paper.**

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library, (see the attached Respondent Information Form at Appendix B), these will be made available to the public. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on potential reform and modernisation of the Rehabilitation of Offenders Act 1974. Any specific Scottish Government proposals that are developed would be subject to a future formal consultation before relevant legislation is brought before the Scottish Parliament.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the same address referred to above.

Appendix B

EXECUTIVE SUMMARY

Key facts

Over one-third of the adult male (18+) population in Scotland is likely to have at least one criminal conviction.

Nearly one-tenth of the adult female (18+) population is likely to have at least one criminal conviction.

Breach of the peace is the most common offence for which people have a previous conviction. Since 1969, 23% of court convictions have been for breach of the peace.

In 2011-12, a total of 108,336 people were convicted in Scottish courts. The majority (55%) received a financial penalty with 16% receiving a community based sentence and 15% receiving a custodial sentence. The rest, 14%, received some other form of sentence such as an admonition.

Around 2% of the adult male population and 0.2% of the adult female population have committed a crime which has led to a prison sentence.

Currently, less than 0.1% of the adult population are on the sex offenders register (approx. 99% of these are male and 1% are female).

[Source: Scottish Government: Justice Analytical Services, 2013]

1. Having to disclose previous criminal activity¹ affects many people in our society. The consequences of having to do so can have an on-going impact on people's ability to gain employment; attend university or college; volunteer; secure an apprenticeship or get insurance or a bank account; etc.
2. We know that some of the key factors that influence people not to re-offend include having stable employment, access to education, having positive family relationships and having normal lifestyle choices. Public safety and the interests of wider society are, therefore, best served by encouraging and enabling people to move on from their offending behaviour as much as possible.
3. However, a minority of offenders pose a significant and on-going potential risk to public safety or in particular roles. In these circumstances, employers and others with a legitimate interest need to have relevant information about previous convictions available to assess appropriately the level of risk.
4. The current arrangements under the **Rehabilitation of Offenders Act 1974** ("the 1974 Act") have been criticised as not being effective in achieving the necessary balance between public safety and enabling people who do not pose any on-going risk to move on.

¹ Conviction in the above table refers to court convictions, excluding most motoring offences (e.g. speeding).

Case for Reviewing the 1974 Act

5. It has been argued for some time that the current rehabilitation periods are not appropriate and do not reflect the point at which reoffending tails off following previous criminal activity. Some consider the legislation to be too complicated and therefore poorly understood and, as a result, not properly applied in practice. There is also some concern that the regime has not kept pace with wider changes in legislation to protect public safety, including the Protection of Vulnerable Groups legislation.

6. During 2012, Scottish Government officials undertook, therefore, initial discussions with interested stakeholders about whether it is time to consider modernisation and reform of the 1974 Act in Scotland. Officials spoke to organisations such as Apex Scotland, SACRO, the Police, local government and employer organisations to hear their views on how the 1974 Act operates in Scotland. Disclosure Scotland, the executive agency that delivers Scottish Ministers' functions to disclose information about a person's previous criminal activity, also offered views.

7. An important outcome that emerged was that stakeholders believed that the fundamental principles of the legislation (i.e. helping offenders put past offending behaviour behind them while protecting the public) are still sound and as relevant today as they were in the 1970s. However, there was also general support among stakeholders for the 1974 Act to be reformed in some way with all arguing it is no longer fit for purpose in a modern Scotland.

8. There was no single view on how best the 1974 Act should be reformed. The majority of stakeholders found the 1974 Act complex and most felt that this was one of the main barriers to previous offenders gaining employment. Another key theme most stakeholders agreed was that the rehabilitation periods and the scope of the Act needed to be reconsidered. Many stakeholders felt that the current rehabilitation periods were out of date and did not reflect current sentencing practices in Scotland. However, there was less agreement on what those rehabilitation periods should be or how far the scope of the Act should be revised.

9. As a result of previous research and analysis and our informal discussions with stakeholders, we consider that there is a compelling need to review the principles and operation of the 1974 Act in its current form in Scotland.

10. In order to help us do that, we want to gather further evidence as to how that should be achieved. Therefore, we have prepared a discussion paper to ask for views about the current operation of the 1974 Act in Scotland and how it might be reformed. This will provide us with the evidence to find Scottish solutions to the various issues and to ensure all interested parties have a chance to contribute. We will use the evidence gathered to begin to formulate a policy response that strikes the right balance between supporting the rehabilitation of offenders and ensuring continuing protection for the public and for vulnerable groups in particular.

11. The discussion paper is organised into the following chapters:

Chapter 1: A historical perspective on the development of the 1974 Act

This chapter puts the 1974 Act in a historical context. It explains why the 1974 Act was created and how it has been amended over time. It also briefly talks about the reviews and the inquiries that have taken place that have had an influence on it. It also briefly explains what has happened to the Act in England & Wales and the different approach taken in Scotland.

Chapter 2: Disclosure and the 1974 Act: How it works

This chapter looks at how the 1974 Act works in practice in relation to the actual disclosure of a person's previous criminal activity. It discusses how the 1974 Act interacts with the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 and how Disclosure Scotland puts all this legislation into practice in order to provide a disclosure service in Scotland.

Chapter 3: Key definitions and policy concepts contained within the 1974 Act

This chapter explains some of the key definitions and concepts used in the 1974 Act. This includes the important concept of someone with previous criminal activity becoming a 'rehabilitated person'.

Chapter 4: Rehabilitation periods

This chapter looks at how quickly someone with previous criminal activity becomes a rehabilitated person, including for different sentences and where further criminal activity takes place.

Chapter 5: The protections given to spent convictions and alternatives to prosecution

This chapter provides details of what it means to be a rehabilitated person in terms of the protections afforded. This includes people with previous criminal activity which gave rise to a conviction and people with previous criminal activity which gave rise to an alternative to prosecution.

Chapter 6: Where the protections given to spent convictions do not or may not apply

This chapter explains the circumstances in which the protections given to spent convictions do not apply and the circumstances in which those protections are subject to certain limitations.

Chapter 7: How defamation is provided for within the 1974 Act

This chapter summarises how defamation law is catered for within the 1974 Act regime.

Chapter 8: Unauthorised disclosure of previous criminal activity from official records

This chapter details how unauthorised disclosure of sensitive information relating to previous criminal activity can be dealt with under the 1974 Act.

Chapter 9: Next steps

This chapter explains what is likely to happen following consideration of the views offered in response to this discussion paper.

Responding to this discussion paper

12. The document includes a series of both general and specific questions throughout the chapter. The questions are set out in the attached formal respondent information document. We are inviting written responses to this discussion paper by **19 November 2013**. Please send your response with the completed Respondent Information Form to:

Rehabilitationofoffendersact1974.consultation@scotland.gsi.gov.uk

or

Nigel Graham
Justice Directorate
Criminal Law & Licensing Division
Scottish Government
Area 2W, St Andrews House
Regent Road
Edinburgh EH1 3DG

If you have any queries contact Nigel Graham on 0131 244 1843.

We would be grateful if you would use the discussion paper questionnaire provided below as this will aid our analysis of the responses received.

Discussion paper on the Rehabilitation of Offenders Act 1974



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

<input type="text"/>		
<input type="text"/>		
<input type="text"/>		
<input type="text"/>		
Postcode	Phone	Email

3. Permissions - I am responding as...

Individual / Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick ONE of the following boxes

Please tick as appropriate

Yes No

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

DISCUSSION PAPER QUESTIONS

Questions – Discussion paper on the Rehabilitation of Offenders Act 1974

Q1. Is there a continuing need for legislation that enables people to be rehabilitated² such that they do not have to disclose certain previous criminal convictions after fixed timescales? (*chapter 3, page 34*)

Yes No

Comments

Q2. Is the 1974 Act still fit for purpose in protecting the public and supporting rehabilitation? (*chapter 3, page 34*)

Yes No

Q3. If your answer to Q2 is “no”, does the 1974 Act require minimal updating or a major overhaul? (*chapter 3, page 34*)

Minimal Updating Major Overhaul

Comments

² See paragraph 3.12 of discussion paper for an explanation of the definition “rehabilitated person”.

Q4. Do the 1974 Act and subsequent public protection legislation strike the right balance in protecting public safety? (*chapter 3, page 34*)

Yes No – (Too little emphasis on public safety)

No – (Too much emphasis on public safety)

Comments

Q5. Do the 1974 Act and subsequent public protection legislation strike the right balance in enabling offenders to be rehabilitated and move on from their offending behaviour? (*chapter 3, page 34*)

Yes No – (Too little emphasis on rehabilitation)

No – (Too much emphasis on rehabilitation)

Comments

A Discussion Paper on the Rehabilitation of Offenders Act 1974

Q6. Are the responsibilities on offenders, employers and others under the 1974 Act sufficiently clear? (*chapter 3, page 35*)

Yes No

Comments

Q7. Are there any aspects of the 1974 Act, you would prioritise for reform? (*chapter 3, page 35*)

Yes No

Q7a. If answered 'Yes', what are they? (*chapter 3, page 35*)

Comments

Q8. Are all, some or none of the definitions in the 1974 Act clear and understandable? (*chapter 3, page 41*)

All Some None

Comments

Q8b. If you answered 'some' or 'none', what changes could be made to make the definitions clearer? (*chapter 3, page 41*)

Comments

Q9. Do you agree it is necessary to include these definitions within the 1974 Act? (*chapter 3, page 41*)

Yes No

Q9a. If not, why not? (*chapter 3, page 41*)

Comments

Q10. Is it clear what a 'rehabilitated person' means under the 1974 Act after undertaking previous criminal activity? (*chapter 3, page 45*)

Yes No

Comments

Q10a. If not, what changes could be made to make the meaning of a 'rehabilitated person' clearer? (*chapter 3, page 45*)

Comments

Q11. Is the difference between a conviction and an AtP³ clear? (*chapter 3, page 45*)

Yes No

Comments

Q11a. If not, what changes could be made to make this clearer? (*chapter 3, page 45*)

Comments

³ Section 109 of the Criminal Justice & Licensing (Scotland) Act 2010,(commenced in November 2011) introduced AtPs into the 1974 Act <http://www.legislation.gov.uk/asp/2010/13/section/109>

Q12. Do you think some criminal offences or crimes should never be rehabilitated under the 1974 Act, (i.e. a person would always have to disclose it)? (*chapter 4, page 64*)

Yes **No** **Depends on the offence or crime**

Comments

Q13. If answered, 'Yes' or 'Depends on the crime or offence', what offences or crimes do you think should never be rehabilitated? (*chapter 4, page 64*)

Homicide **Other violent offences** **Sexual offences**

Housebreaking/theft **Fraud/bribery/corruption**

Criminal damage **Drugs offences**

Public order offences **Driving offences**

Other (please specify below)

Comments

A Discussion Paper on the Rehabilitation of Offenders Act 1974

Q14. Is a sentence of 30 months the appropriate point at which an offender will never become rehabilitated under the 1974 Act? (*chapter 4, page 64*)

Yes **No**

Comments

Q14a. If you answered 'no', should it be shorter or longer? (*chapter 4, page 64*)

Shorter **Longer**

Comments

A Discussion Paper on the Rehabilitation of Offenders Act 1974

Q15. What do you think the appropriate rehabilitation period should be for the following disposals set out in the table below? (e.g. spent immediately or 1, 2, 3 months etc or 1, 2, 3 years etc.) (*chapter 4, page 65*)

Custodial Sentence⁴	Rehabilitation period	Rehabilitation period (under 18)
A sentence for a term exceeding thirty months but not exceeding 48 months.		
A sentence for a term exceeding six months but not exceeding thirty months.		
A sentence for a term not exceeding six months		
Any other range of sentence lengths, e.g. over 48 months and above (please specify)		
Community Sentence⁵	Rehabilitation period	Rehabilitation period (under 18)
Probation		
Community Service Order		
Supervised attendance Order		
Restriction of liberty Order		
Drug treatment & testing Order		
Community reparation Order		
Anti-Social behaviour Order		
Community Payback Order		
A fine		
Compensation Order		
Financial Penalty	Rehabilitation period	Rehabilitation period (under 18)
Fine		
Compensation Order		
Other sentence⁶	Rehabilitation period	Rehabilitation period (under 18)
Insanity, hospital, guardianship Order		
Admonition ⁷		
Absolute Discharge		
Conditional discharge		
Alternative to Prosecution	Rehabilitation period	Rehabilitation period (under 18)
Warnings given by a constable		
Warnings given by Procurator Fiscal		
Fixed penalty notices given under section 129 of the Antisocial Behaviour (Scotland) Act 2004		
Fiscal fines		
Fiscal compensation Orders		
Fiscal work Orders		
Fiscal activity/treatment Orders		
Notice to comply with a restoration Order		

⁴ <http://www.victimsofcrimeinscotland.org.uk/the-justice-process/after-the-verdict/sentences/>

⁵ <http://www.scotland.gov.uk/Topics/Justice/public-safety/offender-management/offender/community/examples>

⁶ <http://www.scotland-judiciary.org.uk/29/0/Glossary>

⁷ Where a person has pleaded guilty or been convicted of an offence, In some circumstances the court may admonish the offender not to do it again and impose no other penalty.

A Discussion Paper on the Rehabilitation of Offenders Act 1974

Q15a. If you have stated in Q15 above that some of the above custodial (prison) sentences should be spent immediately, please explain why. (*chapter 4, page 66*)

Comments

Q15b. If you have stated in Q15 above that individuals under the age of 18, receiving a custodial sentence, should have shorter rehabilitation periods than those aged 18 and above for equivalent criminal activity, please explain why. (*chapter 4, page 66*)

Comments

Q15c. If you have stated in Q15 above that individuals receiving a custodial sentence of over thirty months should be able to be rehabilitated under the 1974 Act, please specify the length of the custodial sentence and your reasons why you think this would be appropriate. (*chapter 4, page 66*)

Comments

A Discussion Paper on the Rehabilitation of Offenders Act 1974

Q15d. If you have stated in Q15 above that some of the above non-custodial sentences should be spent immediately, please explain why. (*chapter 4, page 66*)

Comments

Q15e. If you have stated in Q15 above that individuals under the age of 18, receiving a non-custodial sentence, should have shorter rehabilitation periods than those aged 18 and above for equivalent criminal activity, please explain why. (*chapter 4, page 66*)

Comments

Q16. What changes are needed to be made to section 5 of the 1974 Act to make the rehabilitation periods easier to understand? (*chapter 4, page 66*)

Comments

Q17. Is it clear and understandable what happens to the rehabilitation period when more than one sentence is imposed in respect of a conviction? (*chapter 4, page 66*)

Yes No

Comments

Q17a. If not, what changes could be made to make this clearer? (*chapter 4, page 67*)

Comments

Q18. Is it clear and understandable what happens to the rehabilitation period when an individual is convicted of a further offence before a rehabilitation period ends? (*chapter 4, page 67*)

Yes No

Comments

Q18a. If not, what changes could be made to make this clearer? (*chapter 4, page 67*)

Comments

Q19. Do you think the rehabilitation period for the first offence should be extended if the offender commits a further offence? (*chapter 4, page 67*)

Yes No

Comments

Q20. Is it clear and understandable how rehabilitation periods are set where an individual initially receives an AtP for criminal activity, but then is convicted for the criminal activity after either a) failing to adhere to the terms of the AtP or b) refusing the AtP? (*chapter 4, page 67*)

Yes No

Comments

Q20a. If not, what changes could be made to make this clearer? (*chapter 4, page 67*)

Comments

Q21. Are the protections given to spent convictions/AtPs clear and understandable? (*chapter 5, page 73*)

Yes No

Q21a. If not, what would make this clearer? (*chapter 5, page 73*)

Comments

Q22. Should employers be prevented from using spent convictions/AtPs against an employee? (*chapter 5, page 73*)

Yes No

Q22a. If you answered 'no', why not? (*chapter 5, page 73*)

Comments

Q23. Do you think it should be a criminal offence if an employer does not comply with the principle of not using spent conviction/AtP information against an employee? (*chapter 5, page 74*)

Yes No

Comments

Q23a. If you answered 'Yes', what sanctions would you like to see imposed and why? (*chapter 5, page 74*)

Comments

Q24. Do you agree that spent convictions/AtPs should not be disclosed in proceedings before a judicial authority? (*chapter 5, page 74*)

Yes No

Q24a. If you answered 'no' please explain why. (*chapter 5, page 74*)

Comments

Q25. Do you agree that spent convictions/AtPs should be disclosed in proceedings before a judicial authority? (*chapter 5, page 74*)

Yes No

Comments

Q26. Do you agree with the policy approach that limits the protections⁸ under section 4⁹ of the 1974 Act? (*chapter 6, page 85*)

Yes No

Comments

Q27. Is it clear and understandable how the limitations under the 1974 Act affect the disclosure of previous convictions? (*chapter 6, page 85*)

Yes No

Comments

⁸ See chapter 5 for further information on the protections under section 4 of the 1974 Act and chapter 6 for information on where these protections don't apply.

⁹ <http://www.legislation.gov.uk/ukpga/1974/53/section/4>

Q27a. If you answered 'no', what changes would you like to see to make it clearer? (*chapter 6, page 85*)

Comments

Q28. Do you think these limitations are necessary? (*chapter 6, page 86*)

Yes No

Please explain why.

Comments

Q29. Do you think that the 2013 Order¹⁰ protects the public? (*chapter 6, page 86*)

Yes No

Comments

¹⁰ <http://www.legislation.gov.uk/ssi/2013/50/contents/made>

Q30. Should certain occupations and professions have access to spent conviction information? (Please tick all that apply) (*chapter 6, page 86*)

Yes **No** **Depends on the offence or crime**

Depends on the occupation or profession

Comments

Q30a. If you answered, 'Depends on the offence or crime', what types of offences or crimes do you think should be disclosed to occupations and professions even after they are spent? (*chapter 6, page 86*)

Homicide **Other violent offences** **Sexual offences**

Housebreaking/theft **Fraud/bribery/corruption**

Criminal damage **Drugs offences** **Public order offences**

Driving offences **Other**

Comments

Q30b. If you answered, 'Depends on the occupation or profession', what types of occupations or professions do you think should have access to spent conviction information? (*chapter 6, page 86*)

Comments

Q31. After a certain period of time, should spent convictions no longer be disclosed under the 2013 Order? (*chapter 6, page 87*)

Yes No

Comments

Q31a. If you answered, 'Yes', after what period of time should convictions no longer be disclosed? (*chapter 6, page 87*)

1 year 2 years 3 years 4 years 5 years

6 years 7 years 8 years 9 years 10 years

20 years Other

Comments

Q32. Should spent convictions be disclosed in the types of proceedings found in schedule 1 of the 2013 Order, (e.g. proceedings before the Parole Board for Scotland, proceedings before the Scottish Criminal Cases Review Commission)? (*chapter 6, page 87*)

Yes No

Comments

Q33. Should certain occupations and professions have access to spent AtP information in the same way as convictions under the 2013 Order? (*chapter 6, page 87*)

Yes No

Comments

A Discussion Paper on the Rehabilitation of Offenders Act 1974

Q34. Should spent AtPs be disclosed in the types of proceedings found in schedule 1 of the 2013 Order, (e.g. proceedings before the gambling commission, proceedings held in respect of an application for the grant, renewal, or cancellation of a licence to be a taxi driver or private hire driver)? (*chapter 6, page 87*)

Yes No

Comments

Q35. Is it clear and understandable how defamation is covered within the 1974 Act? (*chapter 7, page 89*)

Yes No

Q35a. If not, what changes could be made to make it clearer? (*chapter 7, page 89*)

Comments

Q36. Is it clear and understandable what and how the section on unauthorised disclosure of spent convictions of the Act works? (*chapter 8, page 91*)

Yes No

Q36a. If not, what changes could be made to make it clearer? (*chapter 8, page 91*)

Comments

End of Questionnaire

27 August 2013

APPENDIX C: LIST OF CONSULTEES

Aberdeen City Council
Aberdeen Cyrenians
Aberdeenshire Council
Action of Church Together Scotland
Alyn Smith MEP
Angus Council
Apex Scotland
Argyll and Bute Council
Association of British Insurers
Association of Scottish Police Superintendents
Bill Walker MSP
Catherine Stihler MEP
Catholic Parliamentary Office
CBI Scotland
Church of Scotland
Citizen Advice (Scotland)
City of Edinburgh Council
Clackmannanshire Council
COSLA
CrossReach
Crown Agent
Crown Office and Procurator Fiscal Service
David Martin MEP
Disclosure Scotland
Dr Cyrus Tata, University of Strathclyde
Dumfries and Galloway Council
Dundee City Council
East Ayrshire Council
East Dunbartonshire Council
East Lothian Council
East Renfrewshire Council
Economic Development Association Scotland
Edinburgh Cyrenians
Faculty of Advocates
Falkirk Council
Families Outside
Federation of Small Businesses - Scotland
Fife Council
George Lyon MEP
Glasgow City Council
Glasgow Community Planning Partnership
Glasgow Housing Association
Highland Council
Howard League (Scotland)
Ian Hudghton MEP
Institute of Directors Scotland
Interfaith Scotland
Inverclyde Council

Jean Urquhart MSP
John Finnie MSP
Joseph Rowntree Foundation
Journal of the Law Society of Scotland
Judicial Institute
Judicial Office for Scotland
Law Society of Scotland
Legal Services Agency
Lord President
Margo MacDonald MSP
Marriot Hotels
Michael Bromby, Glasgow Caledonian University
Midlothian Council
Moray Council
Mr Nick Moore
Muslim Council of Scotland
North Ayrshire Council
North Lanarkshire Council
Offshore Contractors Association
Orkney Council
Part Time Sheriffs Association
Perth and Kinross Council
Police Scotland
Positive Prison
Quarriers
Recruit with Conviction
Renfrewshire Council
Retailers Against Crime (Scotland)
Sacro
Scotland Against Criminalising Communities
Scotland's Commissioner for Children and Young People
Scots Law times
Scottish Association for the Study of Offending
Scottish Association of Social Work
Scottish Borders Council
Scottish Business in the Community
Scottish Business Resilience Centre
Scottish Centre for Crime and Justice Research
Scottish Chamber of Commerce
Scottish Children's Reporter Administration
Scottish Churches Parliamentary Office
Scottish Civic Forum
Scottish Community Safety Network
Scottish Conservative Party
Scottish Consortium for Crime and Criminal Justice
Scottish Council for Voluntary Organisations
Scottish Council of Jewish Communities
Scottish Court Service
Scottish Enterprise
Scottish Family Business Association

Scottish Green Party
Scottish Grocers Federation
Scottish Human Rights Commission
Scottish Justices Association
Scottish Labour Party
Scottish Law Commission
Scottish Legal Action Group
Scottish Legal Aid Board
Scottish Liberal Democrats
Scottish Licensed Trade Association
Scottish Police Authority
Scottish Police Federation
Scottish Prison Service
Scottish Women's Aid
Scottish Youth Parliament
Senscot
Shakti Women's Aid
Sheriffs' Association
Shetland Islands Council
Skills for Justice
Society of Solicitor Advocates
South Ayrshire Council
South Lanarkshire Council
Stirling Council
Struan Stevenson MEP
STUC
The Committee of Scottish Bankers
The Equality and Human Rights Commission (Scotland)
The Financial Conduct Authority
The Poverty Alliance
The Prudential Regulation Authority (PRA)
The Scottish Law Gazette
Tony McAlindin
Turning Point Scotland
Victim Support Scotland
West Dunbartonshire Council
West Lothian Council
Western Isles Council
Wood Group
Youth Community Support Agency
Youth Employment - Glasgow Works
Youth Scotland
YouthLink Scotland

In addition, the Scottish Government will also send this discussion paper to:

- The Justice Committee of the Scottish Parliament
- The six Legal Deposit or “Copyright” Libraries
- The Scottish Parliament Information Centre (SPICE)
- The Home Office and the Ministry of Justice



**The Scottish
Government**
Riaghaltas na h-Alba

© Crown copyright 2013

You may re-use this information (excluding logos and images) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or e-mail: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

ISBN: 978-1-78256-857-5 (web only)

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Government by APS Group Scotland
DPPAS14657 (08/13)

Published by the Scottish Government, August 2013

w w w . s c o t l a n d . g o v . u k