POLICY NOTE

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSIONS AND EXCEPTIONS) (SCOTLAND) AMENDMENT (NO. 2) ORDER 2022

SSI 2022/XXX

The above instrument was made in exercise of the powers conferred by sections 4(4), 10(1) and 10A(1) of the Rehabilitation of Offenders Act 1974. The instrument is subject to affirmative procedure.

Summary Box

This Order amends schedules A1 and B1 of the Rehabilitation of Offenders Act (Exclusions and Exceptions) (Scotland) Order 2013 ("the 2013 Order")[1].

These amendments are a consequence of changes being made to schedules 8A and 8B of the Police Act 1997 ("the 1997 Act") by the Police Act 1997 (Offences in Schedules 8A and 8B) Amendment (Scotland) Regulations 2022 ("the 2022 Regulations") which affect higher level disclosures (standard and enhanced disclosures under the 1997 Act; and scheme record disclosure under the Protection of Vulnerable Groups (Scotland) Act 2007) ("the 2007 Act") issued by Disclosure Scotland on behalf of the Scottish Ministers.

This is to ensure there is ongoing consistency between the statutory frameworks for self and state disclosure. That is, the obligation placed on an individual to admit to previous spent convictions for the excepted professions, offices, employments and occupations prescribed in the 2013 Order is the same as those spent convictions that can be included in a higher level disclosure issued by Disclosure Scotland under the 1997 Act.

Policy Objectives

1. If an offence is not listed in either schedule A1 or B1 of the 2013 Order, a spent conviction for such an offence need not be self-disclosed by an individual seeking an excepted profession, office, employment or occupation. This Order makes various amendments to the offence lists in schedules A1 and B1 of the 2013 Order to add offences, move offences between the lists and to remove some offences from schedule B1.

2. The Disclosure (Scotland) Act 2020 ("the 2020 Act") will replace many of the provisions of the 1997 Act, including schedules 8A and 8B which contain the offence lists relevant to higher level disclosures. Full commencement of the 2020 Act is expected to take place in late 2023 / early 2024. In advance of this, the 2022 Regulations are amending schedules 8A and 8B of the 1997 Act in order to ensure the offence lists are appropriate and up to date, and to reduce any safeguarding risks that might arise in the interim period. As consistency between the state and self-disclosure must be maintained, this Order is amending the 2013 Order concurrently with the amendments to the offence lists in the 1997 Act.

[1] The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013

Background to state and self-disclosure

3. The disclosure system in Scotland comprises two broadly aligned parts: self and state disclosure. The Rehabilitation of Offenders Act 1974 ("the 1974 Act") and the 2013 Order regulate self-disclosure: the obligation placed on an individual to admit to previous convictions if asked by a prospective employer. Self-disclosure by the individual is verified by disclosures provided by the state. Disclosure Scotland, an executive agency of the Scottish Ministers, carries out functions on behalf of the Scottish Ministers under the 1997 Act and the 2007 Act in relation to the system for state disclosure of an individual's previous criminal history.

4. A conviction may become spent if a certain length of time has elapsed since the date of conviction, with different periods of time applying to different disposals, as set out in section 5 of the 1974 Act. Once a conviction is spent, an individual becomes a "protected person". The 1974 Act provides that such a person is not normally required to disclose their spent conviction and that they generally cannot be prejudiced by its existence. The purpose of this approach is to appropriately allow an individual to move away from their past criminal activity so that they can contribute effectively to society while also ensuring that people with a legitimate interest, such as employers, are able to understand an individual's background.

5. Section 4 of the 1974 Act sets out the effect of becoming a protected person. Broadly speaking, section 4 permits such persons not to disclose spent convictions when asked to do so (e.g. by a prospective employer), prevents others from asking about those spent convictions and prohibits reliance on spent convictions in certain legal proceedings or to prejudice an individuals in an employment context.

6. There are some categories of employment and proceedings to which the rules in the 1974 Act do not apply as it is considered appropriate that disclosure of spent conviction information continues to be available. This is because the employment positions and proceedings involve a high degree of sensitivity or there is an expectation of integrity or for the purposes of public protection. These positions and proceedings can be subject to higher level disclosures.

Amendments to the 2013 Order

The Disclosure (Scotland) Act 2020

7. These amendments are to align the offence lists in schedules A1 and B1 of the 2013 Order with schedules 8A and 8B of the 1997 Act, as they are amended by the 2022 Regulations, in order to replicate the offence lists (List A and List B respectively) in the 2020 Act.

8. The rationale that informed the offence lists in the 2020 Act was based upon the rationale from September 2015 that was used when the offence lists were added to the 2013 Order and the 1997 Act for the first time.

9. In developing and modifying the offence lists, the Scottish Ministers gave careful consideration the attributes required for roles requiring higher level disclosure. Such roles place the individuals filling them in a position of power and responsibility. Ministers decided that a conviction for a criminal offence that:

- resulted in serious harm to a person;
- represented a significant breach of trust and/or responsibility;
- demonstrated exploitative or coercive behaviour;
- demonstrated dishonesty against an individual;
- abused a position of trust; or
- displayed a degree of recklessness that resulted in harm or a substantial risk of harm

was evidence that a person's conduct had caused harm to an individual and/or was evidence of misconduct in a position of authority. This evidence of past behaviour is important information for employers when determining whether an individual is suitable for a role for which higher level disclosure is applicable. The protection of vulnerable groups and the need to prevent fraudulent activity (in roles where a higher level disclosure would be appropriate) must be balanced against any presumption that spent convictions ought not to be disclosed.[2]

10. In developing the proposals for the 2020 Act these factors were again considered in order to classify offences as either serious or less serious, the passage of time from the date of conviction was then applied to determine at what point it would be appropriate to allow an application to a sheriff to have a spent conviction removed from a higher level disclosure. This resulted in the offence lists in the 2020 Act differing in a number of ways from the offence lists in the existing legislation (schedules 8A and 8B of the 1997 Act and the 2013 Order).

11. This Order moves a number of offences between schedules A1 and B1 of the 2013 Order to correspond to their positions in Lists A and B in the 2020 Act which reflects the further consideration of the nature and relevance of those offences.

12. The updates to the offence lists in the 2020 Act also included the addition of a number of new statutory offences (generally created since the last update to the offence lists in 2015) which are of a nature that requires them to be subject to the disclosure rules. This Order adds those offences to the lists in schedules A1 and B1 of the 2013 Order.

13. Some offences, which do not feature in List B of the 2020 Act, are correspondingly removed from schedule B1 by this Order. In the course of developing the 2020 Act consideration was given to each previously listed offence and it was determined that, having regard to the relevance and proportionality to the purposes for which higher level disclosures are used, that these offences should no longer be affected by the rules allowing disclosure once spent.

14. A full list of the offences which are added or moved between the lists in schedules A1 and B1, as well as those being removed from schedule B1, are included in the Annex to this note.

Further amendments

15. In addition to the changes to align the 2013 Order with the 2020 Act, a number of further necessary amendments to the offence lists are made by this Order.

[2] There is information about the rationale in the Policy Memorandum Disclosure (Scotland) Bill from paragraph 278 and in the policy note to The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 from paragraph 15.

Amendments that were intended to be lodged at stage 3 of Disclosure (Scotland) Bill

16. The first set relates to changes to the listing of five offences that were intended to be brought forward by way of amendments during stage 3 of the Disclosure (Scotland) Bill. Those could not be not taken forward at that time due to the COVID pandemic.

Offences moved from schedule B1 to schedule A1

17. The following offences are deleted from schedule B1 and added to schedule A1 by this Order:

- Robbery
- Housebreaking with intent to steal
- An offence under the Official Secrets Act 1920
- An offence under the Official Secrets Act 1989
- An offence under section 67 of the Serious Organised Crime and Police Act 2005

18. Robbery and housebreaking are high tariff offences for which there are no low level equivalents and custodial sentences have been imposed in over 50% of the cases following conviction[3]. The offences under the Official Secrets Acts are deployed in cases of, for example, a threat to national security or where lives are put at risk. As similar offences are already included in schedule A1 these offences should be added to maintain consistency. Lastly, the offence under section 67 of the Serious Organised Crime and Police Act 2005 is comparable to the common law offence of perverting the course of justice which was moved into List A of the 2020 Act during the passage of the Disclosure (Scotland) Bill.

New offences created after the 2020 Act

19. A number of new offences, created since the 2020 Act completed the Parliamentary process in 2020, are added to the lists in schedules A1 and B1 where it is considered appropriate that those offences are reflected in the rules around disclosure.

Offences added to schedule A1

20. The following offences are added schedule A1 by this Order as they represent unacceptable and potentially violent behaviour against women and girls:

- an offence under any of the following provisions of the Health and Care Act 2022:
    - Section 140
    - Section 141
    - Section 142
    - Section 152
    - Section 153
    - Section 154

Offence added to schedule B1

21. The following offence is added to schedule B1 by this Order:

- An offence under section 75 of the Age of Criminal Responsibility (Scotland) Act 2019

[3] https://www.gov.scot/publications/criminal-proceedings-scotland-2020-21/pages/14/

22. This offence is considered similar to two offences already included in schedule B1:

- An offence under section 81 of the Children (Scotland) Act 1995 (offences in connection with orders etc. for the protection of children); and
- An offence under section 59 of the Children's Hearings (Scotland) Act 2011 (offences).

Existing offences

Offences added to schedule A1

23. This Order adds a number of statutory offences to schedule A1 as they are similar to offences in that schedule which are concerned with individuals pretending to be registered healthcare professionals or that they hold a licence to practice. In order to cover all medical professions the offences below are added to schedule A1:

- An offence under article 44 of the Nursing and Midwifery 2001
- An offence under section 28 of the Opticians Act 1989
- An offence under section 32 of the Osteopaths Act 1993
- An offence under section 32 of the Chiropractors Act 1994
- An offence under section 39 of the Health Professions Order 2001
- An offence under section 38 and 39 of the Dentists Act 1984

Offences added to schedule B1

24. This Order adds the following common law offence to schedule B1:

- Culpable and reckless conduct to danger to life.

25. Culpable and reckless conduct, culpable and reckless endangering of the public and culpable and reckless fire-raising are all included on List B currently. Given the similarity to these offences it is considered appropriate to include ‘culpable and reckless conduct to danger of life’ in schedule B1.

26. Two statutory offence are also being added to schedule B1:

- An offence under section 1 of the Malicious Communications Act 1988
- An offence under section 83 of the Postal Services Act 2000

27. In the case of the Malicious Communications Act 1988, that offence is similar to the offences included at paragraphs 86 and 87 of schedule B1. In the case of Postal Services Act 2000, that offence is similar to theft (which is also included in schedule B1) and is aggravated by the individual who commits it being in a position of trust.

Aggravations

28. In order to make clear that an offence of assault is within the list in schedule A1, if the conviction indicates it results in any of the following: disability, disfigurement (permanent or otherwise), impairment (permanent or otherwise), an additional category specifying this has been added to the ‘common law aggravations’ (new paragraph 59A of schedule A1 of the 2013 Order).

Consultation

29. The changes being made to the offence lists by the 2020 Act were part of the consultation about the Protecting Vulnerable Groups ("PVG") Scheme in 2018. There has not been any further consultation about this statutory instrument. The PVG consultation and the Scottish Government response can be found here: Protection of Vulnerable Groups and the Disclosure of Criminal Information - Consultation.

Impact Assessments

30. The following impact assessments have been completed for this instrument. These will be published on the Scottish Government website:

- Business and Regulatory Impact Assessment – prepared jointly for the Police Act 1997 (Offences in Schedules 8A and 8B) Amendment (Scotland) Regulations 2022, the instrument that amends the 1997 Act
- Equality Impact Assessment

31. A Child Rights and Wellbeing Impact Assessment was considered. It was concluded that it was not needed. A not required declaration has been completed.

Financial Effects

32. A Business and Regulatory Impact Assessment has been completed and is being published on the Scottish Government website. This BRIA concludes that the amendments to the offence lists will have minimal financial implications for the Scottish Government, the Scottish Court and Tribunal Service, and the Scottish Legal Aid Budget.

Scottish Government
Children and Families Directorate

October 2022

ANNEX

Amendments to Schedules A1 and B1 of the 2013 Order to align with the Disclosure (Scotland) Act 2020

OFFENCES ADDED TO SCHEDULE A1

The following offences are added to schedule A1:

- An offence under section 3ZA of the Computer Misuse Act 1990
- An offence under section 76 of the Serious Crime Act 2015
- An offence under section 1 of the Domestic Abuse (Scotland) Act 2018
- An offence under section 44 of the Criminal Law (Consolidation) (Scotland) Act 1995
- An offence under section 1A of the Prevention of Crime Act 1953
- An offence under section 139AA of the Criminal Justice Act 1988 (threatening with article with blade or point or offensive weapon)
- An offence under section 9 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011
- An offence under any of the following provisions of Protection from Harassment Act 1997:
    - section 2
    - section 2A
    - section 4
    - section 4A
- An offence under section 3A of the Female Genital Mutilation Act 2003
- An offence under any of the following provisions of the Human Trafficking and Exploitation (Scotland) Act 2015:
    - section 1
    - section 4
    - section 32(1)
- An offence under any of the following provisions of the Insolvency Act 1986:
    - section 207
    - section 209
    - section 210
    - section 211
- An offence under section 67A of the Sexual Offences Act 2003
- An offence under any of the following provisions of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016:
    - section 2
    - section 24
    - section 34
    - section 37
- An offence under any of the following provisions of the Sexual Offences Act 2003:
    - section 103I
    - section 122H

- An offence under any of the following provisions of the Sexual Offences (Scotland) Act 2009:
    - section 54
    - section 54A
    - section 55
- An offence under section 69 of the Serious Crime Act 2015
- An offence under any of the following provisions of the Criminal Finances Act 2017:
    - section 45(1)
    - section 46(1)
    - An offence under section 58B of the Terrorism Act 2000
- An offence under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (offences aggravated where there is abuse of partner or ex-partner)
- An offence under section 5 of the Human Trafficking and Exploitation (Scotland) Act 2015 (aggravation by connection with human trafficking activity)
- Defeating the ends of justice

OFFENCES MOVED FROM SCHEDULE B1 TO SCHEDULE A1

The following offences are deleted from schedule B1 and added to schedule A1:

- Perverting the course of justice (by whatever means and however the offence is described), including in particular—
    - false accusation of a crime
    - perjury
    - prevarication on oath
    - prison breaking
    - subornation of perjury
- Wilful fire-raising
- Embezzlement
- An offence under the Bribery Act 2010
- An offence under any of the following provisions of the Forgery and Counterfeiting Act 1981:
    - Part 1
    - section 14
    - section 15
    - section 16
    - section 17
- An offence under section 234A of the Criminal Procedure (Scotland) Act 1995
- An offence under section 9 of the Protection from Harassment Act 1997
- An offence under any of the following provisions of the Insolvency Act 1986:
    - section 206
    - section 208
- An offence under any of the following provisions of the Proceeds of Crime Act 2002:
    - Part 7, other than section 339(1A)
    - Part 8

- An offence under section 51A of the Civic Government (Scotland) Act 1982
- An offence under any of the following provisions of the Criminal Law (Consolidation) (Scotland) Act 1995:
    - section 9
    - section 13(9)
- An offence under section 2 of the Domestic Abuse (Scotland) Act 2011
- An offence under the Solicitors (Scotland) Act 1980.

OFFENCES ADDED TO SCHEDULE B1

The following offences are added to schedule B1:

- An offence under any of the following paragraphs of schedule 4 of the Space Industry Act 2018—
    - paragraph 1 (hijacking)
    - paragraph 2 (destroying, damaging or endangering safety of spacecraft)
    - paragraph 3 (other acts of endangering or likely to endanger safety of spacecraft)
    - paragraph 5 (offences in relation to certain dangerous articles)
- Any offence under the following provisions of the Computer Misuse Act 1990:
    - section 1
    - section 2
    - section 3
    - section 3A
- An offence under the Fraud Act 2006
- An offence under section 993 of the Companies Act 2006
- An offence under the Laser Misuse (Vehicles) Act 2018.
- An offence under any of the following provisions of the Offensive Weapons Act 2019:
    - section 1
    - section 6
    - section 11(5)
- An offence under section 5A of the Road Traffic Act 1988
- An offence under any of the following provisions of the Proceeds of Crime Act 2002:
    - section 339(1A)
    - section 453A
- An offence under any of the following provisions of the Criminal Finances Act 2017:
    - section 45(1)
    - section 46(1)
- An offence under any of the following provisions of the Psychoactive Substances Act 2016:
    - section 5 (supplying, or offering to supply, a psychoactive substance) – this should also include offences in relation to which section 6 (aggravation of offence under section 5) applies
    - section 7
    - section 8

    - section 9
    - section 48
- An offence under section 31 of the Air Weapons and Licensing (Scotland) Act 2015
- An offence under section 68(1) of the Crime, Justice and Public Order Act 1994

OFFENCES MOVED FROM SCHEDULE A1 TO SCHEDULE B1

The following offences are deleted from schedule A1 and added to schedule B1:

- hijacking
- piracy
- treason
- uttering threats
- An offence under the Piracy Act 1837
- An offence under any of the following provisions of the Aviation Security Act 1982:
    - section 1
    - section 2
    - section 3
    - section 4
- An offence under section 9 of the Maritime Security Act 1990
- An offence under article 265 of the Air Navigation Order 2016 in respect of contravention of article 240 of that Order
- The following offences under the Firearms Act 1968:
    - section 28A(7)
    - section 29
    - section 30D(3)
    - section 39
    - section 40
- An offence under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010

OFFENCES REMOVED FROM SCHEDULE B1

The following offences are deleted from schedule B1:

- mobbing and rioting
- An offence under the Rabies (Importation of Dogs, Cats and Other Mammals) Order 1977
- An offence under any of the following provisions of Wildlife and Countryside Act 1981:
    - Section 1
    - Section 5
    - Section 9
    - Section 11
    - Section 11A, 11B and 11C
    - Section 14ZC
    - Section 15A

    - Section 18 but only in relation to the offences under this Act already listed
- An offence under the Dangerous Dogs Act 1991
- An offence under the Protection of Badges Act 1992
- An offence under any of the following provisions of the Conservations (Natural Habitats, &c.) Regulations 1994:
    - Regulation 39
    - Regulation 41
- An offence under the Welfare of Animals (Slaughter or Killing) Regulations 1995
- An offence under the Wild Mammals Protection Act 1996
- An offence under the Protection of Wild Mammals (Scotland) Act 2002
- An offence under the Animal Health and Welfare (Scotland) Act 2006
- An offence under any of the following provisions under the Aviation Security Act 1982:
    - Section 20B
    - Section 21FA
- An offence under section 51 of the Criminal Law Act 1977
- An offence under the following provisions of the Immigration Act 1971:
    - Section 24
    - Section 24A
    - Section 25
    - Section 25A
    - Section 25B
    - Section 26
    - Section 26A
    - Section 27
- The following offences under the Immigration and Asylum Act 1999:
    - Schedule 12, paragraph 3
    - Schedule 12, paragraph 4
    - Schedule 12, paragraph 5
    - Schedule 12, paragraph 6
- An offence under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012
- An offence under section 41 of the Prisons (Scotland) Act 1989
- An offence under any of the following provisions of the Veterinary Act 1996:
    - Section 19
    - Section 20