POLICY NOTE

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSIONS AND EXCEPTIONS) (SCOTLAND) AMENDMENT ORDER 2013

SSI 2013/XXX

1. The above instrument is brought forward by the Scottish Ministers in exercise of the powers conferred by sections 4(4), 7(4) and 10(1) of the Rehabilitation of Offenders Act 1974 (the 1974 Act). The instrument is subject to the affirmative procedure in the Scottish Parliament.

2. The purpose of the order is to make two amendments to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (the 2013 Order). It is intended that the Order will come into force on the day after the day on which it is made. The instrument will come into force on the same day as section 7 of the 2011 Act. The date will be 24 June 2013.

Background

3. The background to the 2013 Order is explained in the Policy Note which accompanied that order and which is reproduced in the Annex to this Policy Note.

Policy objectives

4. Section 4(1) of the 1974 Act provides that spent convictions may not be admissible in evidence in any proceedings before a judicial authority nor shall a person be asked or required to answer any question in such proceedings about his or her spent convictions. At the moment any proceedings under Part II of the Children (Scotland) Act 1995 (the 1995 Act) are excluded from the protection of section 4(1) of the 1974 Act by virtue of section 7(2)(cc) of that Act. The 2011 Act repeals much of Part II of the 1995 Act and there is nothing in the 2011 Act which amends section 7(2)(cc) to include proceedings under that Act. Section 7(2)(cc) needs to be retained because section 76 of the 1995 Act, which relates to exclusion orders and hearings by a sheriff in relation to such orders, is within Part II of the 1995 Act and is not being repealed. The order therefore amends Schedule 1 to the 2013 order so as to exclude the application of section 4(1) of the 1974 Act in relation to all proceedings under the 2011 Act. This means that spent convictions are admissible in these proceedings and questions can be asked about them.

5. The other amendment involves the deletion of paragraph 19 from Part 2 of Schedule 4 (Principal Reporter or other officers appointed to assist the Principal Reporter). An exception listed in Part 2 means that section 4(3)(b) of the 1974 Act does not apply. Article 4 of the Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Children) (Children's Hearings) Order 2013 inserts a new paragraph into Schedule 2 to the 2007 Act to bring various personnel within the children's hearings system under the 2011 Act within the scope of regulated work with children. Paragraph 11 of Part 2 of Schedule 4 to the 2013 Order specifies "regulated work with children" as being an exception to section 4(3)(b). The Principal Reporter and officers appointed to assist the Principal Reporter are included in those personnel so paragraph 19 is being removed to avoid duplication.

Consultation

6. No consultation has been carried out as the order is consequential to the implementation of the 2011 Act.

Financial Effects

7. The Order does not place additional burdens or costs on local authorities, businesses or other stakeholders, nor does it reduce or transfer costs or burdens.

Children Young People and Social Care Directorate
April 2013

ANNEX

POLICY NOTE
THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSIONS AND EXCEPTIONS) (SCOTLAND) ORDER 2013

SSI 2013/50

1. The above instrument will be made in exercise of the powers conferred by virtue of sections 4(4), 7(4) and 10(1) of the Rehabilitation of Offenders Act 1974(c.53). The instrument is subject to draft affirmative resolution procedure.

Policy objectives

2. The main purpose of this instrument is to consolidate the current Rehabilitation of Offenders Act 1974 (Exclusion and Exceptions) (Scotland) Order 2003, as amended ("the 2003 Order"). In addition, a number of minor changes to the Order are being made in relation to other recent legislative changes.

Background

3. Under the terms the Rehabilitation of Offenders Act 1974 ("the 1974 Act"), anyone who has been convicted of a criminal offence and sentenced to prison for less than two and a half years or received an alternative to prosecution (AtP) can be regarded as rehabilitated after a specified period provided he or she receives no further convictions. After the specified period, the original conviction or AtP is considered to be spent. The general rule is that, once a conviction or AtP is spent that individual does not have to reveal it and cannot be prejudiced by it. This means that if an ex-offender whose convictions or AtPs are all spent is asked on a job application form, or at a job interview, whether they have a criminal record, they do not have to reveal or admit its existence. Moreover, an employer cannot refuse to employ someone or dismiss someone because of a spent conviction or AtP.

4. However, there are some categories of employment and proceedings to which the 1974 Act does not apply as it is considered appropriate that access to spent conviction information continues to be available 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 Act and therefore where disclosure of spent convictions is required. The main purpose of the 2003 Order is to protect the public. The intention is not to directly debar ex-offenders from types of work set out in the Order, but instead allow a potential/actual employer to be informed about spent convictions if the work is covered by the 2003 Order. Positions involving a particular level of trust, such as work in the childcare and health professions, are excluded from the normal application of the 1974 Act to ensure there is adequate protection for children and vulnerable people in particular by allowing employers to be informed about the background of potential/actual employees.

Consolidation of the 2003 Order

5. Since the 2003 Order was made, there have been a number of changes (16 in total) to the Order in a series of modifying statutory instruments. While none of these changes have significantly altered the 2003 Order, it has led to it becoming increasingly difficult to use

through the need to cross reference an ever increasing number of statutory instruments when using the Order. Therefore, we think it will be beneficial to users of the Order to consolidate the 2003 Order into one new Order.

Independent Schools Tribunals

6. Paragraph 7 of Schedule 1 to the Order previously referred to proceedings before an Independent Schools Tribunal in respect of matters relating to the suitability of a person to be a proprietor of an independent school under section 102 of the Education (Scotland) Act 1980. However, appeals to Independent Schools Tribunals were abolished with effect from 31 December 2005 by the School Education (Ministerial Powers and Independent Schools)(Scotland) Act 2004. As such, appeals now lie with the Sheriff Principal. We have amended paragraph 7 of Schedule 1 to reflect the fact that appeals now lie with the Sheriff Principal.

National Lottery Act appeals

7. Paragraph 14 of Schedule 1 to the Order previously referred to proceedings by way of an appeal to the Secretary of State against the revocation of a licence under part 1 of the National Lottery etc. Act 1993. However, the ability to appeal to the Secretary of State against a revocation of a licence under this Act has been replaced with a right of appeal to the Court of Session by the National Lottery Act 1998. We have amended paragraph 14 of Schedule 1 to reflect this change.

Financial Services Authority

8. There are a number of minor changes being made in this area. The 2003 Order currently allows the Financial Services Authority (FSA) to take spent convictions for relevant offences into account when authorising a person to carry out regulated activities under the Financial Services and Markets Act 2000 (FSMA). The "relevant offences" are defined in the existing 2003 Order. Although they cover a range of offences relevant to the FSA's considerations, the FSA advise that there are non-relevant offences which could impact their decisions. Accordingly, in 2007, England & Wales removed the limitation to "relevant offences" within their equivalent to the 2003 order. At the request of the FSA, this Order will enable the FSA to consider all spent convictions where Scots law applies and brings the Order in line with the position in England and Wales.

9. The UK Government has implemented the Electronic Money Directive (2009/110/EC) through the Electronic Money Regulations 2011 (EMRs) with the effect that electronic money institutions have to be authorised or registered to issue emoney under the EMRs, rather than under FSMA. As such, they fall outside the scope of the 2003 Order although they are regulated by the FSA in much the same way. We are making an amendment that will extend the provisions in the Order to electronic money institutions authorised or registered under the EMRs. This is a technical change rather than a policy change to maintain the status quo under the terms of the Order.

10. We are also extending the current exception to a new category of institution, called payment institutions, created in 2009 by the Payment Services Directive (2007/46/EC) implemented through the UK Government's Payment Services Regulations 2009. As such, a large number of firms have been brought within the scope of FSA regulation, but

anomalously fall outside the scope of the 2003 Order with potentially adverse consequences. The FSA advise that there is a weakness in the registration process for such institutions that needs to be addressed. The equivalent of the 2003 Order in England & Wales has been amended to address this issue and our amendment ensures the law will operate the same in Scotland as it currently does in England and Wales.

11. There was also a problem with the format of paragraph 5 of Part 1 of Schedule 2 to the Order. Paragraph 5 referred to the second sub-paragraph of paragraphs 8, 14 and 16 in the first column of the table in Part 2 of Schedule 2 but paragraph 14 had no second sub-paragraph. We have removed the reference to paragraph 14 from paragraph 5 of Part 1 of Schedule 2 and have made some changes to paragraph 6 in order to more accurately reflect the policy intention behind paragraph 5. Paragraph 6 now enables disclosure of spent convictions in proceedings relating to a decision by the Council of Lloyd's to dismiss a person who is, or to refuse to promote or exclude a person who is trying to become, an associate of a Lloyd's underwriting agent.

Legal services

12. Under the Legal Services (Scotland) Act 2010, licensed legal services providers are licensed and regulated by approved regulators. Approved regulators are required to ensure that non-solicitor investors in licensed providers are 'fit and proper' persons and can consider the suitability of those appointed to certain named positions such as heads of legal services, heads of practice and members of practice committees. Under the Legal Services (Scotland) Act 2010 an approved regulator is a professional or other body which is approved as such by the Scottish Ministers under section 7 of the Act. Currently, approved regulators are not able to take into account the spent convictions of non solicitor investors, under the 1974 Act. This is in contrast with those who can currently own law firms in Scotland (solicitors), and the equivalent of individuals in similar positions in Alternative Business Structure (ABS) entities in England and Wales.

13. The UK Government recently took steps to allow the consideration of spent convictions in relation to investors with a restricted interest in ABS entities and those acting as head of finance and administration or head of legal practice in a licensed body. This creates some inequality of treatment between solicitor and non-solicitor investors, and between those involved with ABS entities in Scotland and those in England and Wales.

14. We are using this Order to permit the approved regulators 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. The policy aim is to ensure parity of treatment between solicitor and non-solicitor investors; increase the robustness of the fitness for involvement test; and ensure broad equivalence with the assessment of fitness in England and Wales.

Lay representatives

15. Sections 126 and 127 of the Legal Services (Scotland) Act 2010 ("the 2010 Act") amended the Court of Session's rule making powers so as to enable rules to be made permitting a lay representative to make oral submissions to the court on behalf of a party to the cause in any proceedings in the civil courts.

16. The Court of Session Rules Council have considered how best the role of lay representatives can be incorporated into the running of the civil courts. In particular, they have considered on what grounds the court will allow an individual to take on the role of a lay representative. The Court of Session Rules Council consider that it is important that court is entitled to refuse to allow any particular person to become a lay representative on specific grounds of character and conduct. With this in mind, the Act of Sederunt (Rules of the Court Session Amendment No. 3) (Miscellaneous) 2012 came into force on 9 July 2012 which includes a form that any person seeking to become a lay representative must complete. The form includes questions regarding any previous convictions a person has.

17. Further to a request from the Subordinate Legislation Committee during their consideration of the Act of Sederunt, the Lord President confirmed that it was intended that anyone who wished to become a lay representative – and who therefore was required to complete the form contained within the Act of Sederunt – should include details of both unspent and spent convictions under the meaning given in the 1974 Act.

18. Following discussion with the Lord President's Office, we have included lay representatives within this Order as a means of putting beyond doubt the *vires* of the court in seeking information on the spent convictions of anyone seeking to become a lay representative. Advocates and solicitors are already covered by the 2003 Order and we consider it is appropriate and reasonable that the court should have access to information relating to the spent convictions of anyone who is seeking to become a lay representative as they make a decision as to whether to allow someone to become a lay representative.

Persons appointed to assist the police

19. Section 9 of the Police (Scotland) Act 1967 ("the 1967 Act") allowed police authorities in Scotland to employ people to assist police officers in the carrying out of their functions. This was reflected in the wording of paragraph 6 of Part 2 of Schedule 4 of the 2003 Order which had the effect of ensuring that anyone who was employed for the purposes of assisting constables in the carrying out of their functions would be required to disclose spent convictions. Section 9 of the 1967 Act will be repealed by the Police and Fire Reform (Scotland) Act 2012 ("the 2012 Act") and will be re-enacted in section 26 of that Act. Although the underlying policy remains the same in the 2012 Act (i.e. persons can be appointed to assist police officers), section 26 of the 2012 Act is framed in a slightly different way from how section 9 of the 1967 Act. We have made consequential changes to paragraphs 6 and 8 of Part 2 of Schedule 4 of this Order to reflect the forthcoming repeal of section 9 of the 1967 Act (however, these technical changes do not require the 2012 Act to come into force before they can operate as they can also operate in conjunction with the existing 1967 Act provision). Overall, the policy of these paragraphs in this Order remains the same as the equivalent paragraph in the 2003 Order i.e. the policy of requiring persons appointed to assist the police to disclose their spent convictions remains unchanged.

Traffic wardens

20. Paragraph 8 of Part 2 of Schedule 4 of the 2003 Order refers to traffic wardens appointed under section 95 of Road Traffic Regulation Act 1984 ("the 1984 Act") or section 9 of the 1967 Act. There is no need for an explicit reference to the 1967 Act (or indeed to the 2012 Act with the repeal of the relevant provision in the 1967 Act) as the reference to section 95 of the 1984 Act is sufficient to ensure traffic wardens are covered by the terms of the

Order. We are therefore taking this opportunity to make a technical change to simplify the wording of the Order.

Signing functions

21. The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 ("the 2007 Act") made changes to the signing services of Justices of the Peace. A consequence of this change was that the number of Justices of the Peace reduced significantly and in order to ensure adequate access to signing services, section 76 of the 2007 Act provides that Councillors may also perform signing functions. We have therefore updated paragraph 3 of Schedule 4 to the Order to remove a redundant reference to 'signing justices' and to refer instead to justices of the peace and members of local authorities with signing functions under section 76 of the 2007 Act.

Definition of actuary

22. On 1 August 2010 the Faculty of Actuaries and the Institute of Actuaries merged to become the Institute and Faculty of Actuaries. We are using this Order to alter the definition of actuary to reflect this merger.

Consultation

23. The Scottish Government has discussed the details of the amendments with relevant bodies, with many of the changes being undertaken at the request of the bodies in question. We have not undertaken a full consultation due to the relatively minor and technical nature of the amendments.

Commencement

24. It is intended that the Order will come into force on the day after the day on which it is made.

Impact assessments

25. The consolidation of the existing 2003 Order in this Order does not raise any equality issues. The policy changes contained within this Order are relatively minor and, following careful consideration, we do not consider there are any equality issues arising from the terms of this Order.

Financial effects

26. It is not envisaged that there will be any significant financial implications/costs as a result of this Order.

Scottish Government
Criminal Law & Licensing Division
January 2013