POLICY NOTE

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSIONS AND EXCEPTIONS) (SCOTLAND) AMENDMENT ORDER 2015

1. The above instrument will be made in exercise of the powers conferred by sections 4(4), 7(4) and 10(1) of the Rehabilitation of Offenders Act 1974 (c.53) ("the 1974 Act"). The instrument is subject to the affirmative procedure. For the purposes of this note, the instrument will be called "the amendment Order".

Policy objectives

2. The purpose of the amendment Order is to adjust the existing rules governing the responsibilities of individuals to self-disclose previous criminal activity in certain situations including when an individual is seeking to work with vulnerable groups. The amendment Order also adjusts the existing rules as to when information about an individual's previous criminal activity can be used against an individual, (e.g. a decision not to employ an individual).

3. The amendment Order should be considered alongside the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 ("the 2015 Order") which provides for associated changes to the system of disclosure of an individual's previous criminal activity by Disclosure Scotland.

4. The amendment Order makes changes to the current Rehabilitation of Offenders Act 1974 (Exclusion and Exceptions) (Scotland) Order 2013, as amended ("the 2013 Order"). The 2013 Order currently disapplies, in specified circumstances, certain protections in relation to an individual's spent conviction(s) which are set out in the 1974 Act.

General background

5. 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 laid down in the 1974 Act. For example a court imposed fine takes five years before the conviction is spent.

6. Once a conviction is spent, the 1974 Act provides that an individual is not normally required to disclose the conviction and 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.

7. Broadly speaking therefore, those protections in the 1974 Act permit individuals not to disclose spent convictions when asked to do so, (e.g. by a prospective employer), prevent others from asking about those spent convictions and prohibit reliance on spent convictions in certain legal proceedings or to prejudice an individual in an employment context. However, there are certain exceptions and exclusions to this general approach when the interests of public safety are paramount.

8. By disapplying those protections in the circumstances specified, the 2013 Order in effect requires self-disclosure of spent convictions. That disapplication currently applies to

all spent convictions, no matter what they were for, when they occurred or what relevance they might have to the circumstances in which disclosure is required.

Overview of what the amendment Order does

9. The overarching policy objective of the amendment Order is to remove the legal requirement for all spent convictions to be self-disclosed by an individual when asked for the purposes specified in the 2013 Order, so as to ensure only appropriate spent convictions are required to be self-disclosed by an individual for those purposes. In other words, the amendment Order restricts the requirement for self-disclosure.

10. The amendment Order does so first by introducing the concept of a 'protected conviction'. New article 2A of the 2013 Order establishes the meaning of a 'protected conviction' for these purposes. Such convictions will not be required to be self-disclosed once spent, even in the circumstances narrated in the 2013 Order.

11. The amendment Order also amends articles 3, 4 and 5 of the 2013 Order, modifying the existing exclusions and exceptions to ensure that those exclusions and exceptions to the protections in the 1974 Act apply only to spent convictions where it is appropriate to require self-disclosure. Article 6 of the amendment Order introduces two new Schedules to the 2013 Order, one containing offences which must continue always to be self-disclosed, (i.e. offences for which a conviction can never become "protected"), and one containing a list of offences which *may* become "protected" if the conditions set out in new article 2A are satisfied. These changes to the system of self-disclosure of spent convictions are intended to address the issues raised by the UK Supreme Court's judgment in (*R(T) v the Secretary of State for the Home Department [2014] UKSC 35*).

12. The two cases that gave rise to this ruling took place elsewhere in the UK and involved the disclosure of information about spent cautions. These circumstances could not have arisen in Scotland as our system does not require the automatic self-disclosure of such information. However, the judgment raised questions about requirements for the blanket self-disclosure of spent conviction information, (such information being part of a person's private life), and in particular whether requiring all such information to be disclosed in all circumstances represents a proportionate interference with a person's rights under Article 8 of the ECHR.

Detailed background

13. Currently, under the terms the 1974 Act anyone who has been convicted of a criminal offence and sentenced to prison for less than two and a half years, has received a non-custodial sentence, or has received an alternative to prosecution (AtP) can be regarded as rehabilitated after a specified period provided he or she receives no further convictions during the rehabilitation period relative to their sentence. 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 individual 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.

14. Section 109 of the Criminal Justice & Licensing (Scotland) Act 2010 brought AtPs within the scope of the 1974 Act so people with AtPs could become rehabilitated persons under the 1974 Act. However, as AtPs are not included in the current 2013 Order and as such are simply not required to be self-disclosed when spent, this note only deals with the treatment of spent convictions.

Section 4 of the 1974 Act

15. It is section 4 (Effect of Rehabilitation) of the 1974 Act, that embodies the main principle of the Act for convictions in terms of what it means to be a 'rehabilitated person'.

16. **Section 4(1)** of the 1974 Act provides that no evidence is admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland 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 conviction. 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 person. There are, however, limits to the effect of this rehabilitation rule in respect of, for example, the admission of previous convictions in criminal proceedings, (section 7 of the 1974 Act).

17. Therefore, subject to those limitations, 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 it.

18. Any of the following are circumstances ancillary to a conviction 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.

19. The way the 1974 Act operates is that circumstances ancillary to a spent conviction are treated in 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.

20. **Section 4(2)** of the 1974 Act states that where a question seeking information about a person's previous convictions, offences, conduct or circumstances is put to them other 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.

21. 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.

Example 1

An individual was convicted of assault and given a court fine. 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, their employer finds out they have a previous conviction.

They are asked to attend an interview with Human Resources to answer questions about this, with an apparent potential outcome being dismissal. However, they are entitled not to answer any questions about their spent conviction and the employer will be unable to take any action against the individual as regards their previous conviction.

22. In addition to this, **section 4(3)(b)** of the 1974 Act provides, subject to exceptions provided in the 2013 Order, that;

- 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 them in any way in any occupation or employment.

23. This 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.

Exclusions and exceptions to the protections under section 4 of the 1974 Act

24. The 1974 Act provides the Scottish Ministers with powers to make by order exceptions and exclusions to the protections under section 4 of the 1974 Act which would otherwise permit an individual not to disclose spent conviction information and prevent any other person requiring the disclosure of such information or prejudicing the individual on account of any such disclosure or, indeed, failure to disclose.

25. Articles 3 and 4 of the 2013 Order, made under those powers, specifies types of proceedings and circumstances which are excluded from protection under section 4(1) and (2) of the 1974 Act and where details of all spent convictions therefore require to be self-disclosed. For example, a person when applying for licences under the Private Security Industry Act 2001 must reveal all spent convictions.

26. There are also some categories of professions, offices, employments and occupations which are excepted from the protections set out in section 4(3)(b) of the 1974 Act. Spent conviction information or failure to disclose such information is therefore a proper ground for dismissing or excluding a person from such employment. The main types of employment where questions about spent convictions can be asked include work in the financial sector, in child care positions, care services, health professions and certain other public offices.

Article 3 of the 2013 Order

27. Article 3 of the 2013 Order states that section 4(1) of the Act is excluded in relation to the proceedings specified in Schedule 1 to the Order and, to a limited extent, the proceedings with respect to decisions specified in Part 1 of Schedule 2.

28. What this means is that a person may be asked about any or all spent convictions, and that information can be taken into account, in any of the following proceedings (for example):

- proceedings under the Firearms Act 1968, (paragraph 3 of Schedule 1),
- 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, (paragraph 13 of Schedule 1),
- proceedings before the parole board, (paragraph 17 of Schedule 1),
- any decision by the FCA, PRA or the Bank of England to refuse an application under Part 4A permission under the Financial Services and Markets Act 2000, (paragraph 1(a) of Schedule 2),
- any decision by the FCA or PRA to dismiss, exclude or fail to promote a person from being a key worker of the Financial Services Authority, (paragraph 1(l) of Schedule 2),

Example 2

> *An individual is convicted of an offence and fined £500. Some 6 years later they want to take up clay pigeon shooting as a hobby. As such, they apply for a firearms certificate.*
>
> *Although the conviction is spent, the 2013 Order makes it a requirement for this conviction to be disclosed in any proceedings in connection with the individual's application for a firearms certificate if the individual is asked.*

Article 4 of the 2013 Order

29. Article 4 of the 2013 Order states that section 4(2)(a) and (b) of the Act is excluded in relation to questions put in the circumstances set out in Schedule 3.

30. The circumstances in Schedule 3 include the assessment of a person's suitability for a profession, office, employment or occupation set out in Schedule 4, or to hold a licence, certificate or permit set out in paragraph 3(3) of Schedule 3. Provision is made in Schedule 3 for other special circumstances that arise in the context of child minding, adoption and fostering, national security, financial services and the National Lottery Commission.

31. This means that where questions are asked of a person in the circumstances set out in Schedule 3, the person must disclose any spent convictions they may have.

Article 5 of the 2013 Order

32. Article 5 of the 2013 Order states that the professions, offices, employments and occupations set out in Schedule 4 are excepted from the protections in section 4(3)(b) of the Act. It also states that action taken to safeguard national security and decisions taken by persons specified in Part 1 of Schedule 2 to do anything specified in that Part are also excepted from those protections.

33. The effect of this 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 or for prejudicing them in any way in any occupation or employment specified in the 2013 Order.

Example 3

> *An individual is convicted and is given a Community Payback Order. This is spent after 5 years. Some 6 years after the conviction, 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 should self-disclose as they are 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 disclosure on the individual to find out whether they have any spent convictions. If the employer does not seek a standard 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 someone already employed should remain in their job.*

Summary of the effect of the amendment Order - amendments to 2013 Order

34. The current exclusions and exceptions under the 2013 Order mean that all spent convictions, (no matter how minor, how long ago they were committed, the age of the person when the offence was committed or how relevant they are to the particular proceedings or employment), have to be disclosed if asked. As outlined above, this amendment Order makes changes to the rules governing self-disclosure, principally to ensure that only offences which are sufficiently serious, recent or relevant are required to be disclosed by the individual.

35. This new approach links closely to amendments being made by the 2015 Order in relation to the disclosure scheme operated by Disclosure Scotland. That scheme involves the issue of information to employers or other registered persons which either gives details of a person's previous criminal activity, or states that a person does not have any previous criminal activity, (the scheme is referred to here as “state disclosure”). The changes being

made by the amendment Order are intended to ensure that in circumstances where state disclosure is available, an individual is required to disclose no more personally than has been deemed necessary and proportionate for the purposes of state disclosure.

36. The new system of self-disclosure requires to take into account, in particular, the fact that the new system of state disclosure will, in respect of certain convictions, allow for a right to apply to have information removed from a state disclosure. In cases where such an application may be available it will only be when the higher level disclosure is 'sent' that an individual will be required to self-disclose convictions in relation to which such an application may competently be made. An important element of this scheme is that the failure to self-disclose before the higher level disclosure is sent, may not be used to prejudice the individual, though the spent conviction which is ultimately disclosed may be. This is explained in further detail below.

37. Therefore, it is important to note that the individual will not be prejudiced for not disclosing their spent convictions(s) until such time as the higher level disclosure is "sent" by Disclosure Scotland. That means when they apply for a job covered by the amendment Order, they will not have to self-disclose at the point of application as the protections under section 4 of the 1974 Act will only be removed at the point the higher level disclosure is "sent", (i.e. at the point when disclosure by the state takes place).

38. It should also be noted that any applicant whose record contains multiple spent convictions will have each conviction considered separately and the rules will be applied to each conviction as though it is the only conviction on the record.

Detailed description of the amendment Order

Article 2 - definitions

39. Article 2 sets out new defined terms to be inserted into the 2013 Order.

40. Article 2 also inserts new article 2A into the 2013 Order which introduces the concept of a 'protected conviction'. 'Protected convictions' are convictions for any offence <u>not listed</u> in either of the new Schedules A1 and B1 and any offence listed in Schedule B1 which is filtered out because;

- the sentence imposed was admonition or absolute discharge, or the discharge of the referral of a child's case to a children's hearing, or
- the person was under 18 years of age at the time the offence was committed and at least 7 years 6 months have passed since the date of that conviction, or
- the person was over 18 years of age at the time the offence was committed and at least 15 years have passed since the date of that conviction.

41. The policy underpinning the introduction of the concept of a 'protected conviction' into the 2013 Order is to ensure that minor offences and those committed a number of years ago do not have to be self-disclosed when spent because they have become 'protected convictions'.

42. It is only spent convictions for offences which are included in Schedule A1 that always have to be self-disclosed without limit of time because of the serious nature of these offences.

43. Offences that fall under Schedule B1 are deemed less serious, which is why this amendment Order will allow such offences to become protected by virtue of the disposal given or the passage of time since conviction. The starting point however is that such convictions will be subject to state disclosure (and therefore self-disclosure under this amendment Order) if none of the conditions mentioned above in respect of those convictions is met.

44. Automatic state disclosure of Schedule B1 convictions is to be subject to a right of appeal. Accordingly, it is only where Schedule B1 convictions are in fact disclosed by Disclosure Scotland that the protections under the 1974 Act are disapplied in respect of those convictions. This is set out in more detail below.

Article 3 - Amendment to Article 3 of the 2013 Order

45. Article 3 is amended to allow for a more restricted form of mandatory self-disclosure in respect of certain proceedings. That is, those proceedings set out in paragraphs 1, 2, 6, 8, 9, 13, 15, 16, 18, 20, 25 and 28 of Schedule 1 to the 2013 Order and in paragraph (b) of article 3 itself, (i.e. certain proceedings relating to financial services under Part 1 of Schedule 2). The amendment ensures that in respect of those proceedings, section 4(1) of the Act is not excluded in relation to any spent conviction which is a 'protected conviction'. In other words, the section 4(1) protection applies to 'protected convictions' so far as these proceedings are concerned, meaning that only convictions which are not protected require to be disclosed. Details of the proceedings in Schedule 1 and Part 1 of Schedule 2 mentioned above are set out in Annex A to this note.

46. The disapplication of the exclusion in relation to proceedings is not expressly connected to the issue of a higher level disclosure because higher level disclosures cannot be obtained in connection with proceedings. This can be contrasted with the position in respect of other circumstances where self-disclosure may be necessary, as set out below.

47. Theoretically this may mean a person may be required to disclose in these proceedings more than they would have had disclosed in a higher level disclosure in connection with the same issue, (e.g. application for entry to a profession). However, it is considered this is likely to have a minimal prejudicial effect overall given the modification of the exception in relation to section 4(3)(b) made by article 5 of this instrument, (as described further below). This exception limits the non-protected Schedule B1 convictions which can be used to exclude a person from any office, profession, occupation or employment to those convictions appearing in a higher level disclosure obtained for that purpose.

48. That means, while in proceedings for entry to a profession a person may, for example, be required to disclose a Schedule B1 offence which resulted in a court fine 12 years prior, they can only be excluded from entry to the profession on the basis of the court fine if the fine also appears in a higher level disclosure. They could not be prejudiced in the proceedings if a court, during an appeal process for a particular job in a profession, deemed it appropriate not to include the court fine in the higher level disclosure.

Example 4

An individual is convicted of an offence included in the list in Schedule B1 when they were 17 and is given a community order. The rehabilitation period for such a sentence is 2½ years from the date of conviction or a period beginning with the date of conviction and ending when the order ceases to have effect, whichever is the longer.

After 8 years, with no other convictions, that individual applies to join any of the professions mentioned in part 1 of Schedule 4, (e.g. social worker, accountant, nurse or midwife). As a result, proceedings are commenced in respect of that individual's admission to any of these professions.

As the conviction was as a result of a Schedule B1 offence and the person was under 18 years of age at the time of the conviction and at least 7 years 6 months have passed since the date of that conviction, it is a 'protected conviction'.

Therefore, the individual's previous conviction is not admissible in those proceedings and if asked about it they can refuse to answer. Further, the non-disclosure of the spent conviction cannot be used as grounds for preventing that individual becoming a member of any of these professions.

Example 5

If they applied after 7 years rather than 8 years the conviction would not yet be a 'protected conviction' and as such, it would have to be self-disclosed in those proceedings, if asked.

However, if this process was as part of an application for employment as a social worker in a local authority, a higher level disclosure would be available under the Protection of Vulnerable Groups (Scotland) Act 2007, (PVG).

As the conviction is not yet protected, there will be a presumption to include the spent conviction in the PVG disclosure. However, that individual will now have 10 days to intimate to Scottish Ministers an intention to appeal such a disclosure to the court. The court may decide the disclosure is appropriate or may decide that such a disclosure is not appropriate.

If it is not appropriate, the higher level disclosure will not include the spent conviction even although it is not yet protected. If the spent conviction is not included in the higher level disclosure as a result of the court's decision, that individual will not be prejudiced in the proceedings and as a result they cannot be barred from the profession for the self-disclosure of the spent conviction.

49. Article 3 is also amended to re-apply the section 4(1) protection in respect of 'protected convictions' only for the purposes of financial services related proceedings set out in Part 1 of Schedule 2. This amendment will work in exactly the same way as the other proceedings where restricted disclosure is appropriate as mentioned in paragraph 45 above.

Article 4 – Amendment to Article 4 of the 2013 Order

50. Article 4 of the 2013 Order is amended to disapply the exclusion of section 4(2) in relation to all 'protected convictions', (new paragraph (2)(a)). This in effect reapplies the section 4(2) protection in respect of those convictions, subject to some exceptions set out in the new paragraph (3) of article 4 of the 2013 Order.

51. The new paragraph (2)(b) of article 4 disapplies the current exclusion in respect of non-protected Schedule B1 convictions which are not included in a higher level disclosure. This is to deal with the fact that the section 4(2) protections have to continue to apply in respect of non-protected Schedule B1 convictions which are not contained in a higher level disclosure following appeal to the Sheriff Court. It will also cover cases where a disclosure is not obtained at all and any period for which a person is employed pending a higher level disclosure being sent. The corollary of this is that the exclusion will apply if the Schedule B1 conviction is included in a higher level disclosure when it is sent by Disclosure Scotland after any application to the sheriff has been determined (or where no such application is made).

52. That of course means that when asked about previous convictions in relevant circumstances, (e.g. an application form), a person may treat the question as not relating to any Schedule B1 conviction (whether a protected conviction or not). As such, they do not have to disclose any such conviction and cannot be prejudiced or subjected to any liability by reason of that failure to disclose that conviction until the higher level disclosure is sent and contains the spent conviction. <u>It is only at the point when a higher level disclosure which contains information on a non-protected Schedule B1 conviction is sent to a registered person, (that is, the person who countersigned the disclosure application), that the individual will be liable to self-disclose.</u>

53. The purpose of new paragraph (3) of article 4 of the 2013 Order is to ensure the amendments to the 2013 Order do not apply to firearm licence applications, explosive certificates and where questions about spent convictions are asked in the interest of national security. In such circumstances <u>all</u> spent convictions will continue to be required to be self-disclosed if asked. This ensures the current requirement to self-disclose in such circumstances is not changed by amending the 2013 Order.

54. The purpose of paragraph (4) is to deal with the situation where a non-protected Schedule B1 conviction is disclosed in a higher level disclosure. This paragraph ensures that the disapplication of the exclusion continues in relation to the prior failure to disclose so that this failure cannot be prejudice by that failure. The individual may, however, be prejudiced by the fact of the conviction itself since the exclusion will apply by virtue of new paragraph (2).

<u>Example 6</u>

> *An individual is convicted of an offence under Schedule B1 and the sentence imposed was admonition. After 6 years, with no other convictions, that individual applies for a job as a traffic warden and is asked in the application form whether they have any previous convictions. Note that the conviction becomes spent after 5 years.*
>
> *As the sentence imposed was admonition it is a 'protected conviction'. 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.

Example 7

An individual is convicted of an offence under Schedule A1 when they were 19 and is given a 2 year custodial sentence.

16 years after the individual was convicted, with no other convictions, that individual applies for a job that involves regulated work with children and is asked in the application form whether they have any previous convictions.

Although the conviction is spent, it was a Schedule A1 offence and as such, the individual will always be required to self-disclose this conviction.

Example 8

An individual is convicted of an offence under Schedule B1 when they were 19 and is given a 2 year custodial sentence.

16 years after the individual was convicted, with no other convictions, that individual applies for a job that involves regulated work with children and is asked in the application form whether they have any previous convictions.

As the conviction was as a result of a Schedule B1 offence and the person was over 18 years of age at the time of the conviction and at least 15 years have passed since the date of that conviction, it is a 'protected conviction'.

Therefore, in completing the form, the individual is entitled to leave that section blank or answer no and the conviction information will not be 'issued' by Disclosure Scotland in a PVG disclosure. 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.

Article 5 – Amendment to Article 5 of the 2013 Order

55. Article 5 of the 2013 Order is amended to disapply the exceptions in article 5(a) and (c) of the 2013 Order in relation to 'protected convictions' and Schedule B1 convictions which are not contained in a higher level disclosure. The disapplication does not apply in relation to the exception in article 5(b), (any action taken for the purpose of safeguarding national security).

56. The new paragraph (2)(b) of article 5 disapplies the current article 5(a) and (c) exceptions for non-protected Schedule B1 convictions which are not included in a higher level disclosure. This is to deal with the fact that the section 4(3)(b) protection has to continue to apply in respect of non-protected Schedule B1 convictions which are not contained in a higher level disclosure following an application to the sheriff. It will also cover cases where a disclosure is not obtained at all and any period for which a person is employed pending a higher level disclosure being sent. The corollary of this is that the

exception will apply if the Schedule B1 conviction is included in a higher level disclosure when it is sent by Disclosure Scotland after the determination of the application by the sheriff (or where no application is made).

57. The new paragraph (3) of Article 5 ensures that the exception from the protections in section 4(3) of occupations mentioned in paragraph 1 or paragraph 4 of Part 3 of Schedule 4 continues as at present so that all spent convictions must be disclosed. That is, firearms dealers and persons requiring an explosives certificate.

58. The new paragraph (4) of Article 5 is to prevent a person being prejudiced by their failure to disclose a non-protected Schedule B1 conviction if it appears in a higher level disclosure. This leaves intact the exception so far as it relates to the fact of the conviction itself, rather than the failure to disclose.

Example 9

An individual is convicted of an offence under Schedule B1 when they were 19 and is given a 2 year custodial sentence.

13 years after the individual was convicted, with no other convictions, that individual applies for any office or employment covered by Schedule 4 of the 2013 Order and is asked whether they have any previous convictions.

As the conviction was as a result of a Schedule B1 offence and the person was over 18 years of age at the time of the conviction and it has been less than 15 years since the date of that conviction, it is not a 'protected conviction'.

Therefore, the presumption will be to issue this spent conviction in a higher level disclosure. Disclosure Scotland inform the person of this and their right to appeal this decision. The person chooses to appeal the disclosure of this spent conviction.

Scenario 1

The person applies to the sheriff for removal of the spent conviction . The sheriff's decision is that the spent conviction should not be included in the higher level disclosure. As such, the spent conviction will not be included in the higher level disclosure by Disclosure Scotland.

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.

Scenario 2

The person applies to the sheriff for removal of the spent conviction. The sheriff's decision is that the spent conviction should be included in the higher level disclosure. As such, the spent conviction will be included in the higher level disclosure by Disclosure Scotland.

As a result of the spent conviction being included in the higher level disclosure which is issued by Disclosure Scotland, the protection not to self-disclose is disapplied and the person is required to disclose this fact when asked.

The potential employer will now know about the spent conviction and they can take this into account when deciding on whether to interview them and/or deciding whether to employ them. However, they will not be able to prejudice the person for not disclosing their spent conviction when applying for the position.

Example 10

An individual is convicted of an offence under Schedule B1 when they were 25 years of age and the sentence imposed was a £300 court fine. After 16 years, with no other convictions, that individual applies for a firearm certificate and is asked whether they have any previous convictions.

Although the sentence imposed is a 'protected conviction' because at least 15 years have passed since the date of that conviction, the person is still required to self-disclose the fact they have a spent conviction. This is because the new rules do not apply to individuals wishing to obtain firearm certificates.

Criminal Justice Division
7 September 2015

ANNEX A

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) Order 2013 (Amendment) (Scotland) Order 2015

Schedule 1 - Proceedings

The paragraphs below are where the new rules apply and where the self-disclosure of 'protected convictions' is not necessary.

1. Proceedings in respect of a person's admission to, or disciplinary proceedings against a member of, any profession specified in Part 1 of Schedule 4 to this Order.

2. Disciplinary proceedings against a constable.

6. Proceedings in respect of the grant, renewal or variation of a licence under section 25 (restrictions on persons under eighteen going abroad for the purpose of performing for profit) of the Children and Young Persons Act 1933.

8. Proceedings in respect of an application for, or cancellation of the Scottish Ministers' approval of a place under section 1 of the Abortion Act 1967.

9. Proceedings before Social Care and Social Work Improvement Scotland under Part 5 of the 2010 Act.

13. 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.

15. Proceedings in connection with a decision of the Scottish Social Services Council under Part 3 of the 2001 Act.

16. Proceedings in respect of a decision by a local authority to:

a) refuse to enter a person in; or
b) remove a person from,

the register maintained by the authority under section 82(1) of the Antisocial Behaviour etc. (Scotland) Act 2004.

18. Proceedings in respect of the award, suspension or withdrawal of accreditation under any accreditation scheme made by the Scottish Ministers under section 11(1) of the Criminal Justice (Scotland) Act 2003.

20. Proceedings under section 11 of the Private Security Industry Act 2001.

25. Proceedings before the NHS Tribunal under Part II of the National Health Service (Scotland) Act 1978.

28. Proceedings before the Court of Session or the sheriff in order to determine the suitability of a person to become a lay representative.

SCHEDULE 2 - FINANCIAL SERVICES

PART 1

Decisions referred to at Articles 3(b) and 5(c)

1. Any decision by the FCA, the PRA or the Bank of England

(a) to refuse an application for Part 4A permission under the 2000 Act;

(b) to vary or to cancel such permission (or to refuse to vary or cancel such permission) or to impose a requirement under section 55L, 55M or 55O of that Act;

(c) to make, or to refuse to vary or revoke, an order under section 56 (prohibition orders) of that Act;

(d) to refuse an application for approval under section 59 of that Act or to withdraw such approval;

(e) to refuse to make, or to revoke, an order declaring a unit trust scheme to be an authorised unit trust scheme under section 243 of the 2000 Act or to refuse to give its approval under section 251 of the 2000 Act to a proposal to replace the manager or trustee of such a scheme;

(f) to give a direction under section 257 (authorised unit trust schemes) of the 2000 Act, or to vary (or to refuse to vary or revoke) such a direction;

(g) to refuse to make, or to revoke, an authorisation order under regulation 14 of the Open-Ended Investment Companies Regulations 2001 or to refuse to give its approval under regulation 21 of those Regulations to a proposal to replace a director or to appoint an additional director of an open-ended investment company;

(h) to give a direction to an open-ended investment company under regulation 25 of those Regulations or to vary (or refuse to vary or revoke) such a direction;

(i) to refuse to give its approval to a collective investment scheme being recognised under section 270 of the 2000 Act or to direct that such a scheme cease to be recognised by virtue of that section or to refuse to make, or to revoke an order declaring a collective investment scheme to be a recognised scheme under section 272 of that Act;

(j) to refuse to make, or to revoke, a recognition order under section 290 of the 2000 Act, otherwise than by virtue of section 292(2) of that Act, or to give a direction to a UK recognised investment exchange or UK recognised clearing house under section 296 or 296A of the 2000 Act;

(k) to make, or to refuse to vary or to revoke, an order under section 329 of the 2000 Act (orders in respect of members of a designated professional body in relation to the general prohibition);

(l) to dismiss, exclude or fail to promote a person from being a key worker of the FCA or the PRA;

(m) to refuse an application for registration as an authorised electronic money institution or a small electronic money institution under the Electronic Money Regulations 2011;

(n) to vary or cancel such registration (or to refuse to vary or cancel such registration) or to impose a requirement under regulation 7 of the Electronic Money Regulations 2011;

(o) to refuse an application for registration as an authorised payment institution or a small payment institution under the Payment Services Regulations 2009;

(p) to vary or cancel such registration (or to refuse to vary or cancel such registration) or to impose a requirement under regulation 7 of the Payment Services Regulations 2009,

(q) in a case requiring any decision referred to in paragraphs (a) to (p), where the FCA, the PRA or the Bank of England has the function of deciding whether to give consent or conditional consent in relation to the decision which is proposed in that case, to give or refuse to give consent or to give conditional consent, or

(r) in a case requiring any decision referred to in paragraphs (a) to (p), where the FCA, the PRA or the Bank of England has the power under the 2000 Act to direct another regulator as to the decision to be taken in that case, to decide whether to give a direction and, if a direction is to be given, what direction to give

by reason of, or partly by reason of, a spent conviction of an individual, or of any circumstances ancillary to such a conviction or of a failure (whether or not by that individual) to disclose such a conviction or any such circumstances.

2. Any decision by the scheme operator within the meaning of section 225 of the 2000 Act of the Financial Ombudsman Service to dismiss, or not to appoint an individual as, an ombudsman (within the meaning of Schedule 17 to the 2000 Act) of the Financial Ombudsman Service by reason of, or partly by reason of, his spent conviction, or of any circumstances ancillary to such a conviction or of a failure (whether or not by that individual) to disclose such a conviction or any such circumstances.

3. Any decision of the FCA—

(a) to refuse an application for listing under Part VI of the 2000 Act or to discontinue or suspend the listing of any securities under section 77 of that Act;

(b) to refuse to grant a person's application for approval as a sponsor under section 88 of the 2000 Act or to cancel such approval;

(c) to dismiss, exclude or fail to promote a person from being a key worker of the FCA in relation to the exercise of its functions under Part 6 of the 2000 Act, or,

d) to refuse to grant a person's application under information provider rules (within the meaning of section 89P of the 2000 Act) for approval as a Primary information provider, to impose limitations or other restrictions on the giving of information to which such an approval relates or to cancel such an approval

by reason of, or partly by reason of, a spent conviction of an individual, or of any circumstances ancillary to such a conviction or of a failure (whether or not by that individual) to disclose such a conviction or any such circumstances.

4. Any decision of anyone who is specified in any of paragraphs 2 to 7 of the second column of the table in Part 2 of this Schedule, other than the FCA or PRA, to dismiss an individual who has, or to exclude or fail to promote an individual who is seeking to obtain, the status specified in the corresponding entry in the first column of that table (but not, where applicable, the status of being an associate of another person), by reason of, or partly by reason of, a spent conviction of that individual or of that individual's associate, or of any circumstances ancillary to such a conviction or of a failure (whether or not by that individual) to disclose such a conviction or any such circumstances.

5. Any decision of anyone who is specified in paragraphs 8(1) or 16(1) of the second column of the table in Part 2 of this Schedule to dismiss an individual who has, or to exclude or fail to promote an individual who is seeking to obtain, the status specified in the corresponding entry in sub-paragraph (2) of the first column of that table (associate), by reason of, or partly by reason of, a spent conviction of that individual, or of any circumstances ancillary to such a conviction or of a failure (whether or not by that individual) to disclose such a conviction or any such circumstances.

6. Any decision of the Council of Lloyd's—

(a) to refuse to admit any person as, or to exclude, an underwriting agent (within the meaning of section 2 of the Lloyd's Act 1982), where that person has, or has applied for, Part 4A permission;

(b) to dismiss any person who is, or to exclude or fail to promote an individual who is seeking to become, an associate of a person who has Part 4A permission and who is admitted to Lloyd's as an underwriting agent (within the meaning of section 2 of the Lloyd's Act 1982); or

(c) to dismiss, or to exclude a person from being, an associate of the Council of Lloyd's,

by reason of, or partly by reason of, a spent conviction of an individual, or of any circumstances ancillary to such a conviction or of a failure (whether or not by that individual) to disclose such a conviction or any such circumstances.

7. Any decision of a UK recognised investment exchange or UK recognised clearing house to refuse to admit any person as, or to exclude, a member by reason of, or partly by reason of, a spent conviction of an individual, or of any circumstances ancillary to such a conviction or of a failure (whether or not by that individual) to disclose such a conviction or any such circumstances.

Definitions

The FCA means the Financial Conduct Authority;
The PRA means the Prudential Regulation Authority

Criminal Justice Division
7 September 2015