POLICY NOTE

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSIONS AND EXCEPTIONS)(SCOTLAND) ORDER 2012

SSI 2012/draft

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.

Alternatives to prosecution

6. 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 so that persons with an AtP would receive protection under the Act. AtPs are options that fall short of prosecution which are available to Scottish police and Scottish prosecutors to deal with criminal conduct. The result of this change was to close a loophole that existed in terms of how AtPs were treated under the 1974 Act. Prior to this change, there was no specific provision within the 1974 Act relating to AtPs.

7. When making the aforementioned amendments to the 1974 Act, we decided not to amend the 2003 Order to include AtPs. This meant that whereas we had provided general protection to those who had received an AtP under the 1974 Act, those types of proceedings and types of employment which are subject to the exceptions and exclusions under the 2003 Order were not permitted access to information on spent AtPs. Although we considered this policy to be appropriate at the time of commencing section 109 of the 2010 Act, we have re-examined it due to requests to do so from Her Majesty's Revenue & Customs and the Financial Services Authority. After a careful further examination, we have concluded that it would be appropriate to bring spent AtPs into line with spent convictions under the terms of the 2003 Order, although with an important distinction which is explained below.

8. Section 8B of the 1974 Act, as inserted by the 2010 Act, introduces the concept of AtPs into the 1974 Act. AtPs broadly fall into 2 categories. '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 conduct is generally deemed to be very 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. As such, Parliament agreed it was appropriate that these types of AtPs should be spent at the point they are given under the 1974 Act (i.e. immediately).

9. 'Category 2' AtPs are the remaining AtPs listed in section 8B of the 1974 Act. Category 2 AtPs are fiscal fines, fiscal compensation orders, fiscal work orders and fiscal activity/treatment orders. These types of AtPs are generally given because the criminal conduct is deemed more serious than the conduct that would warrant a 'Category 1' AtP, although still considered relatively minor in nature, (hence no court proceedings are necessary). All Category 2 AtPs require a person to either accept or to have deemed to have accepted them before they take effect (deemed to accept is defined by someone not actively rejecting them). Parliament agreed that, for the purposes of the 1974 Act, it was appropriate that this category of AtP become spent 3

months after they are given. In general terms, Category 2 type AtPs relate to more serious criminal conduct than the conduct covered by Category 1 type AtPs.

10. Following careful consideration, we have decided to include category 2 AtPs within this Order, but not category 1 AtPs. The effect of this approach is that spent category 2 AtPs will be required to be disclosed in line with the requirements of this Order (i.e. for particular types of proceedings, for particular employment purposes etc.) while spent category 1 AtPs will not be required to be disclosed. The reason why we have excluded category 1 AtPs is that we do not think it is appropriate for automatic disclosure under the terms of this Order for AtPs that are given for very low level criminal behaviour. We also consider that where a person has no means to reject the imposition of the AtP, which is the case for police warnings and fixed penalty notices given under section 129 of the Antisocial Behaviour (Scotland) Act 2004, it would not be appropriate for such AtPs to be automatically disclosable as a result of this Order.

11. However, it should be noted that, separate to the operation of the 1974 Act and any Orders made under the 1974 Act, category 1 AtPs may still be disclosed if a person applies for employment covered by the Order and an enhanced disclosure check is required. The relevant Chief Constable can disclose such information in line with their discretionary powers to disclose information under Part V of the Police Act 1997.

Financial Services Authority

12. 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.

13. 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 e-money 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.

14. 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.

Legal services

15. 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 or AtPs 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.

16. 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.

17. We are using this Order to permit the approved regulators to consider spent convictions and also specific spent AtPs, 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

18. 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.

19. 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.

20. 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.

21. 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

22. 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

23. 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.

Definition of actuary

24. 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

25. 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

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

Impact assessments

27. 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

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

Scottish Government
Law Reform Division
6 September 2012