POLICY NOTE

THE REHABILITATION OF OFFENDERS ACT 1974 (EXCLUSIONS AND EXCEPTIONS) (SCOTLAND) AMENDMENT ORDER 2019

SSI 2019/396

1. The above instrument was made in exercise of the powers conferred by sections 4(4) and 10(1) of the Rehabilitation of Offenders Act 1974 ("the 1974 Act"). The instrument is subject to affirmative procedure. For the purposes of this note, the instrument will be called "the 2019 Amendment Order".

This instrument amends the Rehabilitation of Offenders Act (Exclusions and Exceptions) (Scotland) Order 2013 (SSI 2013/50) ("the 2013 Order") to reduce the level of protection an individual has against being asked about, requiring to self-disclose or being prejudiced by a spent conviction for the offence of wilful neglect under section 26 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 ("the 2016 Act").

Policy objectives

2. The broad purpose of the 2019 Amendment Order is to amend the 2013 Order to restrict the circumstances in which a person with a spent conviction for the offence of wilful neglect will benefit from legal protection against self-disclosing and answering questions about it (e.g. when applying for employment or in judicial proceedings).

3. The offence of wilful neglect applies to care workers who ill-treat or wilfully neglect another individual in their care. The 2016 Act provides penalties which are proportionate to the severity of the offence and the breach of trust which it entails.

4. Section 29 of the 2016 Act inserted the wilful neglect offence into the list in schedule 8A of the Police Act 1997 ("the 1997 Act"), meaning that a spent conviction for the offence must be disclosed by Disclosure Scotland in a higher level state disclosure unless a sheriff orders otherwise. Higher level disclosures encompass standard and enhanced disclosures under the 1997 Act and PVG scheme records under the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act".)

5. The 2019 Amendment Order will thus achieve consistency between the system of state disclosure under the 1997 and 2007 Acts and the system of self-disclosure under the 1974 Act.

General background

6. 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 section 5 of the 1974 Act.

7. Once a conviction is spent, an individual becomes a "rehabilitated 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.

8. Section 4 of the 1974 Act sets out the effect of becoming a rehabilitated 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. However, there are certain exceptions and exclusions to this general approach when the interests of public safety are paramount.

9. The 1974 Act provides the Scottish Ministers with power to make by order exceptions and exclusions to the protections under section 4 of the 1974 Act. The Scottish Ministers made the 2013 Order in exercise of this power.

The 2013 Order

10. The effect of the 2013 Order can be described as follows:

Article 3

11. Article 3 of the 2013 Order states that the application of section 4(1) of the 1974 Act is entirely excluded in relation to a number of the types of proceedings specified in schedule 1 of the 2013 Order. What this means is that a person may be asked about any or all of their spent convictions, and that information can be taken into account, in those proceedings.

12. For certain other forms of proceedings specified in article 3 (including some of those listed in schedule 1 and Part 1 of schedule 2), the application of section 4(1) is excluded only in relation to convictions which are not "protected convictions" (see paragraph 21 below). That means that a person may be asked in those proceedings about any spent convictions which are not protected convictions, but not about protected convictions.

Article 4

13. Article 4 of the 2013 Order states that the application of section 4(2)(a) and (b) of the 1974 Act is excluded in relation to questions put in the circumstances set out in its schedule 3.

14. Section 4(2)(a) and (b) of the 1974 Act provide protection for a rehabilitated person so they are neither required to disclose their spent conviction(s) in judicial proceedings, nor subjected to any liability or prejudice for failure to do so. 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 – for example, in the context of child minding, adoption and fostering, national security, financial services and the Gambling Commission.

15. The protections in section 4(2)(a) and (b) of the 1974 Act generally continue to apply in respect of spent convictions which are "protected convictions" (see paragraph 21), even in the circumstances to which schedule 3 of the 2013 Order applies. In general, the protections also continue to apply in respect of a conviction which falls within article 4(2A) of the 2013 Order if the conviction is not included in a higher level disclosure sent in connection with the purpose for which a question is put.

16. Article 4(3) has the effect that certain questions are not covered by these special rules. In particular, the protection afforded by section 4(2)(a) and (b) of the 1974 Act does not apply in relation to questions put to assess the suitability of a person to hold firearm licences and shotgun certificates, air weapon licenses, explosives certificates and licenses granted under section 4A of the Poisons Act 1972. Further, the protection does not apply in relation to questions put by certain persons or bodies in order to assess, for the purpose of safeguarding national security, the suitability of a person of a person for any office or employment. Finally, no protection is afforded in relation to any question put to assess the suitability of a person to hold the occupation of firearms dealer or any occupation requiring the person to have a certificate certifying them to be fit to acquire or acquire and keep explosives.

Article 5

17. 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 1974 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.

18. The effect of this is to remove the general prohibition in section 4 of the 1974 Act against using the existence of, or the failure to disclose, certain spent convictions as a ground for dismissing or excluding a person or for prejudicing them in any way in any occupation or employment.

19. The protections in section 4(3)(b) however continue to apply to "protected convictions" (see paragraph 21). They also apply to those convictions which fall within article 5(2)(2A) of the 2013 Order which are not included in a higher level disclosure sent in connection with the profession, office, employment, occupation, decision or proposed decision to which the exception from the provisions of section 4(3)(b) of the 1974 Act would otherwise apply.

20. Certain occupations, actions, etc. are not covered by these special exceptions about protected convictions and higher level disclosures (e.g. action taken for the purpose of safeguarding national security or work as a registered firearms dealer), meaning that all spent convictions may be considered when making decisions in those contexts.

Protected convictions

21. The concept of a "protected conviction" is defined in article 2A of the 2013 Order (as inserted by article 2(2) of the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015). This provides that a protected conviction is either a spent conviction which is not a conviction for an offence listed in schedule A1 or B1 of the 2013 Order or a spent conviction for an offence listed in schedule B1 of the 2013 Order, if one or more conditions in article 2A(2) relation to the conviction is satisfied. These relate to the length of time which has elapsed since the date of the conviction and the sentence imposed in respect of it.

Effect of the 2019 Amendment Order

22. The 2019 Amendment Order adds the offence of wilful neglect into the list of statutory offences in schedule A1 of the 2013 Order. This will mean that a spent conviction for this offence cannot meet the definition of "protected conviction" in article 2A of the 2013 Order, reducing the level of protection a person has against being asked about it, having to self-disclose it or being prejudiced by it.

23. In practical terms, when the Order is brought into force, the application of section 4(1) of the 1974 Act will always be excluded in relation to a spent conviction for wilful neglect in respect of any proceedings mentioned in article 3(1) of the 2013 Order. This will achieve the intention that a person with such a conviction will not be protected from being asked about, being required to disclose or being prejudiced by the conviction in those proceedings.

24. The application of section 4(2)(a) and (b) of the 1974 Act will be excluded in relation to a spent conviction for the wilful neglect offence where a question is put in circumstances to which schedule 3 of the 2013 Order applies, subject to the exception outlined at paragraph 16 above. The second exception is as set out in article 4(2)(b) of the 2013 Order, which is that:

    a. at least 7 years and 6 months have passed from the date of the conviction of an under 18 year old or at least 15 years have passed from the conviction of an over 18; and
    b. the conviction is not included on a higher level disclosure sent in connection with the purpose for which the question is put.

25. In respect of the latter criterion, amendments made to the 1997 and 2007 Acts by the Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 mean that individuals with a spent conviction for an offence which features in schedule 8A of the 1997 Act - including wilful neglect - are able to apply to a sheriff to have their spent conviction removed from a higher level disclosure where the relevant timeframe at paragraph 24a. has passed.

26. After the 2019 Amendment Order comes into force, the criteria at paragraph 24a. and b. would also require to be met by a person with a spent conviction for the offence of wilful neglect in order for them to benefit from the exception in article 5(2)(b) of the 2013 Order. Article 5(2)(b) switches on the application of section 4(3)(b) of the 1974 Act in relation to any profession, office, employment or occupation specified in schedule 4 of the 2013 Order, as well as in relation to any decision or proposed decision taken by a person specified in Part 1 of schedule 2 of that Order to do or refuse to do anything specified in that Part.

Consultation

27. A consultation on the creation of an offence of wilful neglect was undertaken during the Bill stage of the 2016 Act. The Scottish Government does not consider that further consultation is required in relation to the 2019 Amendment Order, as the Bill consultation responses were clear that the commission of the offence of wilful neglect as a care worker should be treated very seriously.

Impact Assessments

28. Further Impact Assessments are not necessary, as these were undertaken during the Bill stage of the 2016 Act.

Financial Effects

29. A further Business and Regulatory Impact Assessment (BRIA) is not required, as a BRIA was undertaken during the Bill Stage of the 2016 Act.

Scottish Government
Directorate of Healthcare Planning and Quality Improvement
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