

Submission

Scottish Government consultation on criminal records and the Remedial Order 2018

Introduction

Unlock welcomes the opportunity to provide a short written submission to the Scottish Government's consultation on the proposed draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018.

Unlock is an independent award-winning national charity that provides a voice and support for people with convictions who are facing stigma and obstacles because of their criminal record, often long after they have served their sentence. Although our focus is primarily on the system as it applies in England & Wales, we feel we have a helpful contribution to make to this consultation given our involvement in the ongoing developments to the system in England and Wales.

Our response

Unlock very much welcomes the Scottish Government's efforts to create a fairer and more proportionate criminal records disclosure system by putting forward this remedial order, despite this policy only being implemented as a result of a court decision.

It is clear from the case of *P v Scottish Ministers [2017] CSOH 33* that the current "Always Disclose List" meant that the system was inflexible and couldn't take into account individual situations. This is in line with previous submissions that we have made. We therefore welcome an approach that seeks to create a more flexible process in which individual circumstances can be taken into account.

The 2018 Proposed Draft Order sets out the proposed amendments to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007. The effect of these amendments means that an individual with a conviction on the "Always Disclose List" will in certain circumstances have the right to apply to a Sheriff in order to seek removal of that conviction before their disclosure is sent to a third party such as an employer.

They will have this right where the conviction is on the "Always Disclose List" and that:

- a) where the person was aged under 18 at the date of conviction, 7 years and 6 months have passed since the date of the conviction; or
- b) where the person was aged 18 or over at the date of conviction, 15 years have passed since the date of the conviction.

We note that the consultation regards this policy proposal as being one that should provide an ECHR compliant system.

As a result, our response to this proposal addresses four key areas:

1. It needs to be more than just an 'ECHR compliant' system

It is noticeable that this policy has been developed in response to a court decision. It is clear that these efforts to alter the system have been made to simply make the system ECHR compliant. This represents a missed opportunity to genuinely change the approach to disclosing old, minor and irrelevant convictions on disclosures.

Given the urgency associated in responding to the court decision, we recommend that the Scottish Government commit to introducing interim arrangements in response to the court decision, whilst also committing to undertake a broader review of its approach, with a view to making the system more than just 'ECHR compliant', but rather with the aim of achieving a system that genuinely makes sure that people are not unnecessarily anchored to their past as a result of the disclosure of old, minor or irrelevant records. The current policy proposal is simply a sticking plaster and not the end solution.

2. The rationale for the time periods

In our submission to the consultation held on the original remedial order in 2015, we said that the time periods (15 years and 7.5 years), were unnecessarily long and disproportionate. It remains unclear what these periods are based on and what the justification is for these. There appears to be no evidential basis for these time periods, and furthermore the time periods were important when they related to 'automatic removal' from disclosure (as proposed in 2015). Given that the 2018 remedial order is based on a system where a sheriff needs to be satisfied that the conviction is not relevant to the purpose for which the disclosure is being sought (before a conviction would be removed from a disclosed) the length of time that has passed is a factor that the sheriff can consider, and so having this type of 'buffer period' before an individual can apply to a sheriff is an unnecessary obstacle.

3. The rationale for the list of offences

In our submission to the consultation held on the original remedial order in 2015, we said that: *"It remains our view that, although a list of offences can be helpful as an indicator of whether or when a conviction could become protected, it can act as a blunt instrument and should not be used as an ultimate test of whether an offence should become (or not be) protected. Individuals with offences that appear on the 'Offences that will always be disclosed on Higher Level Disclosures' should have recourse to the review process (see below) where they believe the offence is no longer relevant to the purposes for which they are applying for a disclosure."*

We therefore see it as a positive step forward that people with offences on the "Always Disclose List" will have an opportunity to apply to a sheriff to have it removed. However, it appears that there has been no consideration about whether the current "Always Disclose List" is set at the right level. In England & Wales, our experience of a similar "List of offences that will never be filtered" creates an inflexible regime which, coupled with long 'buffer periods' before an individual can apply, results in an ineffective system.

4. The effectiveness of a sheriff-based system

In our submission to the consultation held on the original remedial order in 2015, we welcomed a review process. However, we raised concerns that there was no user-friendly guidance on the process, and we believed that access to, and the operation of, this review process was critical to striking the appropriate balance in individual cases.

It is important to ensure that the sheriff-based system is an effective way of doing this, ensuring the sheriffs make decisions on a case by case basis and that their decisions are transparent and robust.

There appears to have been no detailed analysis or breakdown of the current cases that have been dealt with through the current sheriff-based system, and this is an important step to take. We recommend that the Scottish Government undertake an evaluation of the current sheriff-based system and publish its findings; these could then inform the broader review that we have recommended above. This would look at the number of cases that were eligible to apply to a sheriff, the number that applied, the types of cases that were decided on, the types that were successful and the types that were not.

More information

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