
EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes amendments to the Police Act 1997 (“the 1997 Act”) and the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) to remove any potential incompatibility, arising from the disclosure of criminal convictions and cautions under the 1997 Act and the 2007 Act, with the European Convention on Human Rights (“the Convention”).

In the case of *R (on the application of T and another) v Secretary of State for the Home Department and another* [2014] UKSC 35 (judgment of 18th June 2014), the United Kingdom Supreme Court made a declaration of incompatibility under section 4 of the Human Rights Act 1998 that the provisions in sections 113A and 113B of the 1997 Act (as they applied in England and Wales) were incompatible with article 8 of the Convention because the requirements in relation to blanket disclosure of all spent convictions were not in accordance with the law. Similar provisions in sections 113A and 113B of the 1997 Act (as it applies in Scotland) may be incompatible with article 8. In addition, in section 49(1)(a) of the 2007 Act the definition of “vetting information” relies on section 113A(3)(a) of the 1997 Act and may also be incompatible with article 8.

Article 3 amends the 1997 Act. Section 113A of the 1997 Act is amended by article 3(2). Article 3(2)(c) amends the definition of “relevant matter” in section 113A(6) of the 1997 Act. “Conviction” means a conviction (including a spent conviction) within the meaning of the Rehabilitation of Offenders Act 1974. Paragraph (a) of the definition of “relevant matter” is amended so that it means a conviction but not a protected conviction and paragraph (b) is amended so that it includes all cautions which are not yet spent by virtue of schedule 3 of the Rehabilitation of Offenders Act 1974. Protected conviction is defined by reference to a new section 126ZA inserted into the 1997 Act by article 3(7) of the Order. Protected conviction is defined by reference to the lists of offences inserted into the 1997 Act as new schedules 8A (list of offences which must always be disclosed) and 8B (offences which are to be disclosed subject to rules). Both schedules are inserted by article 3(8) of the Order. A protected conviction is a conviction which is not listed in either schedule 8A or 8B, or is listed in schedule 8B but the conviction was given less than 15 years ago, or in the case of persons under 18 less than 7 years and 6 months, or the sentence received was either admonition or absolute discharge. Protected convictions and spent cautions will not be included in criminal record certificates or enhanced criminal record certificates. Section 49(1)(a) of the 2007 Act relies on the definition of “relevant matter” in section 113A(6) of the 1997 Act and therefore protected convictions and spent cautions will also not be within the definition of “vetting information” for the purposes of the 2007 Act.

Article 3(3)(b)(ii) of the Order amends section 113A(4) to strengthen the test which the chief officer of a police force must apply when the Scottish Ministers request Other Relevant Information (“ORI”). The chief officer must reasonably believe that information is relevant for the purpose for which an enhanced criminal record certificate is required and that the information ought to be disclosed. Article 3(3)(c) repeals section 113B(5) which allowed the police to include ORI in an enhanced disclosure without providing it in the applicant’s copy of the certificate.

Article 3(4) inserts new sections 116ZA and 116ZB into the 1997 Act. The purpose of the new section 116ZA is to specify when a copy of a criminal record certificate or an enhanced criminal record certificate must be sent to the person who signed the statement which accompanied the application for it. Previous requirements to send it to this person at the same time as to the applicant are repealed (articles 3(2)(b) and 3(3)(e)). Where a certificate does not include information about a spent conviction listed in new schedule 8B which is not a protected conviction it continues to

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be sent at the same time to the applicant and the person who signed the statement accompanying the application. Where a certificate does include information about a spent conviction listed in new schedule 8B which is not a protected conviction, a copy of it is issued to the person who signed the statement if, within a period of 10 working days, the applicant either tells Disclosure Scotland to issue the copy or does not indicate to Disclosure Scotland that they intend to make an application to the sheriff under the new section 116ZB(2) for an order for a new certificate from which that information is removed. If the applicant tells Disclosure Scotland that they intend to make an application to the sheriff under the new section 116ZB(2), but does not make the application, Disclosure Scotland must not send a copy of the certificate to the person who signed the statement accompanying the application and the process ends.

The new section 116ZB sets out the procedure for an application to the sheriff to remove information from the certificate. When the application is determined, the sheriff must make an order requiring the issue of a new certificate as at the date of the order (new section 116ZB(9) and (10)). Where the sheriff is satisfied that the information is not relevant for the purpose for which a certificate was required, the sheriff must order that the information is excluded from the new certificate (new section 116ZB(9)(b)). Where the application is refused, the applicant cannot make a further application to the sheriff for removal of the same information which is included in the new certificate (new section 116ZB(10)(b)). Where a sheriff has ordered information to be excluded from a certificate, then the information must not be included in any subsequent criminal record certificate or enhanced criminal record certificate if it is required for the same purpose for which the original certificate was required – new sections 113A(3A) and 113B(3A) as inserted by article 3(2)(a) and 3(3)(a) respectively.

Article 3(5)(a) inserts a new section 117(4) into the 1997 Act in consequence of the change made to section 113B(4) in relation to ORI in order to reflect fully the test which the chief officer of a police force must apply. Article 3(5)(b) inserts a new subsection (5) in section 117 to ensure that, where a certificate includes information about a spent conviction listed in new schedule 8B which is not a protected conviction, an individual cannot make an application under section 117 if the individual could make an application to the sheriff under the new section 116ZB(2) for a new certificate with the information removed.

Article 4 amends the 2007 Act. Article 4(2) repeals section 46(3)(b) of the 2007 Act so that the Scottish Ministers are not required to issue a statement of scheme membership if the individual makes a disclosure request under sections 52 or 53 of the 2007 Act at the same time as they apply to join the PVG Scheme.

Article 4(3) amends subsection (1)(c) of the definition of “vetting information” in relation to ORI provided by the police. This is now aligned with the similar provision in section 113B(4) of the 1997 Act. The chief officer must reasonably believe that information is relevant in relation to the type of regulated work in relation to which the scheme member participates in the PVG Scheme and that the information ought to be disclosed.

Article 4(4)(a) inserts a new section 51(5) into the 2007 Act in consequence of the change made to section 49(1)(c) in relation to ORI in order to reflect fully the test which the chief officer of a police force must apply. Article 4(4)(b) inserts a new subsection (7) in section 51 to ensure that, where a scheme record includes information about a spent conviction listed in new schedule 8B to the 1997 Act which is not a protected conviction, an individual cannot request correction of a scheme record under section 51 if the individual could make an application to the sheriff under the new section 52A(2) to have the information removed from the scheme record.

Article 4(5) inserts a new section 52ZA into the 2007 Act. It provides that in the circumstances where a scheme record corrected under section 51 includes information about a spent conviction listed in new schedule 8B to the 1997 Act which is not a protected conviction and which would otherwise need to be disclosed following correction of a scheme record, the request for the disclosure is treated as not having been complied with and as if the request had been made on the date the correction is made.

Article 4(6) substitutes a new section 52 of the 2007 Act on disclosure of scheme records and inserts a new section 52A to provide for an application to the sheriff for removal of certain vetting information. The purpose of the new section 52 is to specify when a scheme record is to be disclosed to the person who countersigned the disclosure request. Where a scheme record does not include information about a spent conviction listed in new schedule 8B to the 1997 Act which is not a protected conviction, it continues to be disclosed at the same time as the copy of it is sent to the scheme member. Where a scheme record includes information about a spent conviction listed in new schedule 8B to the 1997 Act which is not a protected conviction, it is to be disclosed if, within a period of 10 working days, the applicant either tells Disclosure Scotland to disclose it or does not indicate to Disclosure Scotland that they intend to make an application to the sheriff under the new section 52A(2) for removal of the information from the scheme record. If the scheme member tells Disclosure Scotland that they intend to make an application to the sheriff under the new section 52A(2), but does not make the application or the application is abandoned, the disclosure request is treated as having been withdrawn.

The new section 52A of the 2007 sets out the procedure for an application to the sheriff for removal of vetting information from a scheme record. Where the sheriff is satisfied that the information is not relevant for a type of work in relation to which the scheme member participates in the PVG Scheme, the sheriff must order the Scottish Ministers to remove the information from the scheme record (new section 52A(9)). When the appeal is determined the Scottish Ministers must treat the disclosure request as if it had been made on the day after the date of the order (new section 52A(10)) and the disclosure request will be treated again in accordance with section 52. Where the application is refused, the scheme member cannot make a further application to the sheriff for removal of the same information from the scheme record in relation to a disclosure request for the same type of regulated work (new section 52A(3)(c)).

Article 4(7) amends section 53(3) of the 2007 Act to alter the content of a short scheme record. A short scheme record will include a scheme member's statement of scheme membership and state that there is no vetting information on the scheme record. If a scheme member with vetting information included in their scheme record requests disclosure of a short scheme record, it will be treated under the new section 53(1A) as a disclosure request for a scheme record under section 52 of the 2007 Act.

Article 4(8) inserts a new section 57A into the 2007 Act to make provision for the definition of "conviction" and "protected conviction" for the purposes of sections 52 and 52A of the 2007 Act. "Conviction" has the same meaning as in the Rehabilitation of Offenders Act 1974, including a spent conviction. "Protected conviction" has the same meaning as in section 126ZA of the 1997 Act.

Articles 5 to 10 make transitional provision. Any applications for criminal record certificates and enhanced criminal record certificates under sections 113A, 113B, 114 and 116 of the 1997 Act (article 5(1) and (2)), applications for new certificates under section 117 of the 1997 Act (article 6), applications for registration under section 120 of the 1997 Act (article 7), disclosure requests under sections 52 and 53 of the 2007 Act (article 8), requests for correction of scheme records under section 51 of the 2007 Act (article 9(1) and (2)) and nominations of a countersignatory under regulation 4(1) or 4(2) of the Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2010 (article 10) which have been received prior to the coming into force of this Order and are not yet completed are to be treated as having been received after the coming into force of this Order (article 11). This means that the new definition of 'relevant matter' in section 113A(6) of the 1997 Act will apply when all of these applications or requests are completed. Article 5(3) and (4) provides that section 116ZB(2) does not apply to a criminal record certificate or an enhanced criminal record certificate issued prior to the coming into force of this Order so that there can be no application to the sheriff for a new certificate. Article 9(3) provides that, for the purposes of section 51 of the 2007 Act, information is not to be regarded as inaccurate if it is information about a conviction which no longer falls within the definition of "vetting information" by virtue of the coming into force of this Order.

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Article 11 makes a consequential amendment to the Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010 to provide for a fee waiver when a request for a disclosure of a short scheme record is treated as a request for a scheme record by virtue of the new section 53(1A) of the 2007 Act (as inserted by article 4(6)(b) of this Order).

Article 12 revokes the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015.