Response

by the Faculty of Advocates

to the call for written evidence

on the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018.

The Faculty has prepared this written response to the call by the Delegated Powers and Law Reform Committee of the Scottish Parliament for evidence on the Order. We have framed our response by adopting the questions posed by the Committee, which are reproduced below. The Faculty does not take a position on the issues of policy which arise in relation to this legislation. Its comments are limited to the legal issues which arise, primarily in relation to Article 8 of the European Convention on Human Rights, with which the previous scheme, as it operated in Scotland, was found by the Outer House of the Court of Session not to comply in the case of *P. v Scottish Ministers,* 2017 SLT 271.

In light of the Committee's interest in the Proposed Draft Order the Committee would be keen to obtain the Faculty's views on whether the proposed changes would address the issues of ECHR incompatibility identified by the court in the case of P v the Scottish Ministers and would be capable of being operated compatibly with ECHR rights.

The proposed changes partially address the issues of ECHR compatibility. However, the opportunity to seek an independent review of disclosure of serious offences on the basis of time elapsed since the date of conviction will not necessarily guarantee that the disclosure system is in accordance with the law and proportionate in every case. It is possible that there may be further compatibility challenges before the courts. We note that the Law Commission for England and Wales has stated that there is a "compelling case" for a wider review of the disclosure system as a whole (Law Commission, Criminal Records Disclosure, http://www.lawcom.gov.uk/project/criminal-records-disclosure/, accessed 22 October 2017).

(i) In accordance with the law

The importance of the length of time since conviction was highlighted in *P v Scottish Ministers* (para. 47). Under the proposed changes, individuals may challenge the proportionality of the disclosure of serious offences in terms of Schedule 8A of the Police Act 1997 before a Sheriff on the grounds of the time elapsed since conviction (15 years after the date of conviction or 7.5 years after the date of the conviction depending on the individual being aged 18 or under 18 at that time). The proposed changes thus provide some further safeguards to enable the proportionality of any disclosure to be properly evaluated.

It should be noted, however, that the list of serious offences under Schedule 8A remains unchanged. In *P v Scottish Ministers,* the approach of disclosing any conviction from the list was said to be "sweeping and indiscriminate", with the offence of lewd and libidinous practices ranging from relatively minor sexual misconduct to serious sexual abuse of young children (para. 47). Furthermore, the proposed changes do not take into account the level of disposal or the particular circumstances of the offence or the individual.

Useful guidance is set down in the recent English case of *R (on the application of P) v the Secretary of State for the Home Department* ([2017] 2 Cr. App. R. 12, para. 39-42) regarding factors to enable the proportionality of any disclosure to be properly evaluated. Here the court states that there is no one particular safeguard that converts what is an otherwise arbitrary scheme into one that is in accordance with the law. Factors such as the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the absence of any mechanism for independent review of a decision to disclose data are not individually necessary or sufficient. The legality of the disclosure regime will depend on the cumulative effect of the available discriminators in drawing appropriate distinctions and ensuring that there is a coherent and relevant link between the disclosure and the public interest to be safeguarded, as well as the availability of a mechanism for an independent review. An independent review is not an absolute condition; however, the less the discrimination in relation to the other features, such as the nature of the offence, disposal and lapse of time, the greater the need for some filter to ensure that the critical link to the public interest is not lost.

(ii) Proportionality

Proportionality should focus on the particular circumstances of the individual case and not on the system as a whole (*P v Scottish Ministers*, para. 61). The cumulative effect of such factors in the individual case will determine whether the disclosure scheme is proportionate or otherwise. Given that the proposed changes do not consider such factors as the nature of the disposal and the relevance of the disclosure to

the employment, there may be still be cases where the scheme is deemed to go further than necessary or does not strike a fair balance between the rights of the individual and the community.

Whether the period of time which must pass before the disclosure of Schedule 8A spent conviction information may be appealed to the sheriff (15 years from the date of conviction, or 7.5 years if the individual was under 18 on the date of conviction) is proportionate?

Bright line rules, such as the mandatory disclosure of serious offences, are not in themselves arbitrary provided that they are "sufficiently calibrated" to ensure that the proportionality of the interference is adequately examined (*R (on the application of P),* para. 43). While the period of time elapsed since conviction is included in the proposed changes, the disposal in the case and the relevance of the data to the employment are not taken into account. When deciding whether the disclosure scheme is in accordance with the law, the cumulative effect of the available safeguards together with the independent review would have to be compared against the consequences for the individual (*R (on the application of P),* para. 45). There may be "hard cases" where the period of time which must pass before the disclosure of Schedule 8A spent conviction information may be appealed is not proportionate.

The lack of any provision allowing the disposal of the conviction to be taken into account in determining whether an appeal to the sheriff against disclosure of a Schedule 8A conviction is appropriate.

We consider that the absence of such a provision is problematic. As mentioned above, no one particular safeguard will work in every case. The level of disposal, however, has consistently been cited as one of the factors that may ensure that the proportionality of the disclosure is adequately examined (*P v Scottish Ministers*, para. 47, *R (on the application of T) v Chief Constable of Greater Manchester Police* [2015] A.C. 49, para 119, *Re Gallagher's Application for Judicial Review*, [2016] NICA para. 70 and *R (on the application of P),* para. 39-42). As such, we consider that such a provision would be beneficial.

Whether there are any concerns about the sheriff appeal procedure as it currently applies to the disclosure of schedule 8B convictions?

We refer to the comments made in our previous written response to the 2015 remedial order. Firstly, the procedure of making an application to a sheriff might not prevent infringement of article 8 rights. A potential employer or training organisation may find out about a conviction because the employer or organisation is required to give evidence or because they become aware of an unusual delay in the processing of the original disclosure request. Secondly, practical issues may impact on the operation of the procedure e.g. is the applicant's name being published on the list of court business, how long does

it take for an application to be determined, in what circumstances is legal aid available and, if it is, how long does it take for an application for legal aid to be determined? Finally, it is important that there is consistency in decision making as one sheriff's decision is not binding on another sheriff.

The transitional provision set out in the Proposed Draft Order dealing with the transition from the existing regime to the proposed new regime.

The transitional provisions provide that any applications for criminal record certificates and enhanced criminal record certificates, applications for new certificates under section 117 of the 1997 Act, disclosure requests and requests for correction of scheme records 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. We consider that transitional provision is appropriate as it will benefit applicants who are already in the system prior to the Order coming into force while ensuring that the disclosure system continues to function meantime.

24 October 2017