

# **REHABILITATION OF OFFENDERS ACT 1974: EXCEPTIONS ORDER (SCOTLAND)**

## **A CONSULTATION PAPER**

**Making it work together**



**SCOTTISH EXECUTIVE**

## Ministerial Foreword

The Scottish Executive is committed to a safer Scotland and protecting the public, in particular the most vulnerable members of society.

The Rehabilitation of Offenders Act 1974 (ROA) allows people, who have been convicted of an offence to "wipe the slate clean" after a specified rehabilitation period. For the purposes of employment previous (spent) convictions do not have to be declared, although there are some exceptions to this.



The ROA Exceptions Order sets out the range of posts involving a particular level of trust whereby the legal protection offered by the ROA to ex-offenders is not available. These posts include work with children, work with vulnerable adults, and employment involving the administration of justice, national security and financial services. In respect of these posts, an employer is entitled to know about all previous convictions, both spent and unspent.

We are proposing to update the Exceptions Order to ensure the order is consistent with changes to legislation in Scotland, such as the introduction of the Regulation of Care (Scotland) Act, and recent additions to the Exceptions Order in England and Wales. Updating the Order also gives us the opportunity to include any other occupations and offices of employment that we consider necessary.

We have outlined professions, occupations, offices of employment in the attached consultation that we think should be included in the new Exceptions Order. I hope as many of you as possible will let us know your thoughts on our proposed changes to list of exceptions to the Rehabilitation of Offenders Act. Consultation is important on this issue to help ensure we strike the right balance between supporting the rehabilitation of offenders and protecting the public.

A handwritten signature in black ink that reads "Jim Wallace". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Jim Wallace  
Deputy First Minister and Minister for Justice  
December 2002

# **REHABILITATION OF OFFENDERS ACT - EXCEPTIONS ORDER (SCOTLAND) CONSULTATION PAPER**

## **INTRODUCTION**

1. There are a number of exceptions to the Rehabilitation of Offenders Act to protect the public and, in particular, the most vulnerable members of our communities. This paper invites views on proposed changes to the Rehabilitation of Offenders Act 1974 Exceptions Order in Scotland.

## **BACKGROUND**

### **Rehabilitation of Offenders**

2. The Rehabilitation of Offenders Act 1974 (ROA) aims to make life easier for many people who have been convicted of a criminal offence, served their sentence and have since lived on the right side of the law. The Act provides that anyone who has been convicted of a criminal offence and sentenced to less than two and a half years in prison can be regarded as "rehabilitated" after a specified period with no further convictions. The rehabilitation period, which varies from six months to ten years, is set according to sentence. After the specified period the original conviction is considered to be "spent".

3. In most circumstances, once a conviction is spent the convicted person does not have to reveal it or admit its existence. This means that if an ex-offender whose convictions are all spent is asked on an application form, or at an interview, whether he or she has a criminal record he or she is entitled to say "no". It is against the law for an employer to refuse to employ a person because he or she has a spent conviction.

4. An effective rehabilitation scheme should protect individuals from the requirement to disclose previous convictions whenever it is safe to do so, opening up appropriate employment opportunities to those with previous convictions to help reduce the chances of re-offending.

5. However, there are some categories of employment involving a particular level of trust to which the ROA does not apply and for the purposes of which convictions never become spent. The posts in these categories include work with children, work with vulnerable adults, and employment involving the administration of justice, national security and financial services. The various types of posts/professions which come within these categories are specified in an Exceptions Order. The current list of exceptions (that apply currently in Scotland) are shown in Annex A.

6. The Home Office recently consulted on the recommendations made following a review of the ROA for England and Wales. The review recommended a number of changes to introduce greater clarity and fairness to the legislation, but did not recommend any changes to the scope of the Exceptions Order. The Scottish Executive will consider reform of the ROA in Scotland in due course, but any changes to the legislation in Scotland are likely to be broadly consistent with what is proposed in England and Wales and we agree that reform of the ROA should not impact significantly on the scope of the Exceptions Order.

## Disclosure Scotland

7. The Rehabilitation of Offenders Act Exceptions Order plays an important role in determining the level of disclosure certificate available to employers under Part V of the Police Act 1997. Part V provides for the issue of certificates, known as Disclosures. There are 3 levels of Disclosure:

**Basic**, which will show only unspent convictions. It is available to anyone for any purpose.

**Standard**, which will show any spent or unspent convictions and any cautions (from England, Wales or Northern Ireland. We do not have cautions in Scotland).

**Enhanced**, which will show any unspent convictions and any cautions plus any non-conviction information supplied by a Chief Constable. This would be information held as "intelligence" by the police which in the Chief Constable's opinion might be relevant to the position in question.

*The Standard and Enhanced Disclosures are available only to those being considered for positions which are excepted under the Rehabilitation of Offenders Act 1974.*

8. Progress on this issue has been linked to the transfer of powers to Scottish Ministers to make clear it is within devolved competence to update all aspects of the Exceptions Order in Scotland. This transfer of powers is expected to be complete in February 2003.

## PROPOSED CHANGES TO THE EXCEPTIONS ORDER

9. Generally, the Exceptions Order should only be extended where there is a clear need to provide additional protection beyond the disclosure of unspent convictions under the ROA. However, there are a number of parts of the Exceptions Order in Scotland which need updated to provide greater protection to the public, in particular vulnerable groups. We intend to introduce changes at the earliest legislative opportunity.

10. We propose to update the Exceptions Order to:
- extend exceptions recently introduced in England and Wales to Scotland
  - update terminology and definitions to reflect Scottish legislation, including provisions in the Regulation of Care (Scotland) Act 2001 and the prospective Protection of Children (Scotland) Act 2003. These amendments provide greater protection to vulnerable people.
  - ensure other occupations involving a particular level of trust are added.
  - address gaps in the current schedule, for example social workers who work solely with offenders are not currently covered and persons concerned with the operation of the children's hearing system. Also there is an ambiguity over whether students on placements as part of their studies falls under the Exceptions Order.

11. The occupations added to the Exceptions Order for England and Wales since devolution are:-

### **Professions**

Chartered psychologist  
Actuary  
Registered Foreign lawyer  
Legal Executive

### **Offices, employments and work**

Any work which is –

- (a) in a regulated position (a term that is defined in Part II of the Criminal Justice and Court Services Act 2000 to include a wide range of positions that involve contact with children. The equivalent Scottish term will be "child care position", defined in the Protection of Children (Scotland) Bill; or
- (b) in a further education institution where the normal duties of that work involve regular contact with persons aged under 18.

Any employment in the Royal Society for the Prevention of Cruelty to Animals where the person employed or working, as part of his duties, may carry out the killing of animals

Any office or employment in the Serious Fraud Office

Any office or employment in the National Crime Squad or the National Criminal Intelligence Service

Any office or employment in Her Majesty's Customs and Excise

Any employment which is concerned with the monitoring for the purposes of child protection, of communications by means of the Internet

### **Regulated occupations**

Taxi and Private Hire drivers

- Taxi and private hire drivers may find themselves in regular unsupervised contact with children and vulnerable adults. This is particularly true of those undertaking school or hospital contract work.

12. The recent statutory instruments<sup>1</sup> in England and Wales also extended the scope of the Exceptions Order in the financial services industry, clarified the scope of the Order in relation to adoption and updated definitions of care services to reflect the Care Standards Act 2000. The Executive proposes to extend these new exceptions to Scotland, amending as appropriate the terminology. For example, the legislation in Scotland will refer to the SSPCA rather than the RSPCA. Definitions of care and adoption services will be based on Scottish legislation.

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<sup>1</sup> Statutory Instruments 2001/1192, 2001/3816 and 2002/441 which are available from The Stationery Office ([www.hmsso.gov.uk](http://www.hmsso.gov.uk)).

13. The Regulation of Care (Scotland) Act 2001 replaces the previous regulatory system of local authority and health board inspection teams with a new, independent regulator, the Scottish Commission for the Regulation of Care (the Care Commission). All the services defined in sections 2 and 8 of the Act will ultimately be required to register with the Care Commission, including local authority services. Subordinate legislation made under the Act requires that providers, managers and other staff working in care services are fit persons. One of the fitness criteria for providers and managers relates to criminal convictions. In addition, providers are only to employ persons fit to be employed in the provision of the care service. The national care standards against which the Care Commission inspect services state that criminal record checks should be obtained for all staff.

14. The Regulation of Care (Scotland) Act 2001 also establishes the Scottish Social Services Council with the duty to establish and maintain a register of social workers and of other social service workers.

15. The Exceptions Order needs to cater for the changes effected by the Regulation of Care (Scotland) Act in relation to registration, inspection and enforcement, both with regard to care services and to the social service workforce. The Order will also be updated to ensure it is consistent with the prospective Protection of Children (Scotland) Act 2003.

**Question 1: Do you agree that the recent additions to the Exceptions Order for England and Wales should be extended to Scotland (taking account of the new Scottish legislation)? If not, please explain why.**

16. We propose to make clear that those **training** in the field of care and health services will be included in the Exceptions Order. At present the Order only covers those working in those fields and as a result have access to vulnerable people. There is currently a lack of clarity over whether students on placements are covered by the Exceptions Order. We also intend to make clear that practitioners within the National Health Service who are contractors as distinct from employees are included.

**Question 2: Do you agree that ‘training’ should be made explicit in the definition of work in care and health services, to clarify the position of students on placements?**

17. There are references in the current Exceptions Order that apply to professions and occupations that relate to England and Wales and legislation which does not extend to Scotland. We will be updating various aspects of drafting to ensure the exceptions order accurately reflects the position in Scotland and removes references to professions and legislation which do not apply here. For example, there is no need to refer to a barrister in the Exceptions Order for Scotland.

18. Part V of the Police Act 1997 (see paragraph 7 for background) is being amended through the Criminal Justice (Scotland) Bill to bring more categories of person within the scope of the Enhanced Disclosure arrangements, such as those involved in the children’s hearing system. We propose that those categories that are not already exceptions under the

Exceptions Order should be made so. This will ensure that Part V of the Police Act 1997 (as amended) and the Exceptions Order are consistent.

### **Additional proposals for inclusion in the Exceptions Order**

19. We propose to include the following occupations in the Exceptions Order. These are currently being considered by the Home Office for England and Wales.

#### Counsellors and Psychotherapists

The British Association for Counselling and Psychotherapy (BACP) would like to have access to spent convictions when considering applications for membership. Counsellors and Psychotherapists by the nature of their work see both the vulnerable and young persons and they can be seen in the premises of the counsellor without anyone else being present. There is also a danger that convicted sexual offenders could apply for membership and BACP would not be in a position to check their convictions.

#### Social Workers

While most social work is already covered by the definitions of work with children and vulnerable adults we propose to specifically add social workers to the list of occupations, as there is an ambiguity over whether those social workers who work primarily with offenders is covered by the Order.

#### Those applying for Passenger Carrying Vehicle (PCV) licences

The DVLA is looking for an exception which would enable them to require a standard disclosure to accompany applications for Passenger Carrying Vehicles.

**Question 3: Do you agree that these categories should be added to the Exceptions Order?**

**Question 4: Do you have any other comments or suggestions on the scope of the Exceptions Order and what should be included?**

20. Exceptions to the Rehabilitation of Offenders Act should only be added where there is a clear need to provide additional protection beyond the disclosure of unspent convictions under the ROA.

## **RESPONSES**

21. We welcome responses from anyone who has an interest in the issues or questions raised by this paper by 24 January 2003.

Please send your response to:

ROA Exceptions Order Consultation  
Criminal Justice Division  
1W Rear  
St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DN

Or e-mail to: [ROAexceptions@scotland.gsi.gov.uk](mailto:ROAexceptions@scotland.gsi.gov.uk)

In accordance with normal practice in Scottish Executive consultations, all responses received will be made available to the public, unless confidentiality is specifically requested.

The list of exceptions that apply currently in Scotland are:

**PRESENT POSITION (LIST OCCUPATIONS) OF EXCEPTIONS**

**Professions**

1. Medical Practitioner
2. Advocate, solicitor
3. Chartered Accountant, certified accountant
4. Dentist, dental hygienist, dental auxiliary
5. Veterinary Surgeon
6. Nurse, midwife
7. Ophthalmic optician, dispensing optician
8. Pharmaceutical chemist
9. Registered teacher
10. Any profession to which the Professions Supplementary to Medicine Act 1960 (a) applies and which is undertaken following registration under that Act.
11. Registered Osteopath
12. Registered Chiropractor

**Offices and employments**

1. Judicial Appointments
2. The Director of Public Prosecutions and any employment in his office.
3. Procurators Fiscal and District Court Prosecutors and any employment in the office of a Procurator Fiscal or District Court Prosecutor or in Crown Office.
4. Justices' Clerks and their assistants.
5. Clerks (including depute and assistant clerks) and officers of the High Court of Justiciary, the Court of Session and the district court, sheriff clerks (including sheriff clerks depute) and their clerks and assistants.
6. Constables, persons appointed as police cadets to undergo training with a view to becoming constables and persons employed for the purposes of, or to assist the constables of, a police force established under any enactment; naval, military and air force police.
7. Any employment which is concerned with the administration of, or is otherwise normally carried out wholly or partly within the precincts of, a prison, remand centre, detention centre, Borstal institution or young offenders institution, and members of boards of visitors appointed under section 6 of the Prison Act 1952 (b) or of visiting committees under section 7 of the Prisons (Scotland) Act 1952(c)
8. Traffic wardens appointed under section 81 of the Road Traffic Regulation Act 1967(a) or section 9 of the Police (Scotland) Act 1967(b).
9. Probation officers appointed under schedule 3 to the Powers of Criminal Courts Act 1973 (c)
10. Any employment by a local authority in connection with the provision of social services or by any other body in connection with the provision by it or similar services, being employment which is of such a kind as to enable the holder to have access to any of the following classes of person in the course of his normal duties, namely-
  - (a) persons over the age of 65

- (b) persons suffering from serious illness or mental disorder of any description
  - (c) persons addicted to alcohol or drugs
  - (d) persons who are blind, deaf or dumb
  - (e) other persons who are substantially and permanently handicapped by illness, injury or congenital deformity
11. Any employment which is concerned with the provision of health services and which is of such a kind as to enable the holder to have access to persons in receipt of such services in the course of his normal duties.
  12. Any office or employment concerned with the provision to persons aged under 18 of accommodation, care, leisure and recreational facilities, schooling, social services, supervision or training, being an office or employment of such kind as to enable the holder to have access in the course of his normal duties to such persons, and any other office or employment the normal duties of which are carried out wholly or partly on the premises where such provision takes place.

### **Regulated Occupations**

1. Firearms dealer
2. Any occupation in respect of which an application to the Gaming Board for Great Britain for a licence, certificate or registration is required by or under any enactment.
3. Director, controller or manager of an insurer.
4. Any occupation which is concerned with-
  - (a) the management of a place in respect of which the approval of the Secretary of State is required by section 1 of the Abortion Act 1967 (e); or
  - (b) in England and Wales, carrying on a nursing home in respect of which registration is required by section 187 of the Public Health Act 1936(f) or section 14 of the Mental Health Act 1959 (a)
  - (c) in Scotland, carrying on a nursing home in respect of which registration is required under section 1 of the Nursing Homes Registration (Scotland) Act 1938(b) or a private hospital in respect of which registration is required under section 15 of the Mental Health (Scotland) Act 1960(c).
5. Any occupation which is concerned with carrying on an establishment in respect of which registration is required by section 37 of the National Assistance Act 1948(d) or section 61 of the Social Work (Scotland) Act 1960(e).
6. Any occupation in respect of which the holder, as occupier of premises on which explosives are kept, is required by any Order in Council made under section 43 of the Explosives Act 1875(f) to obtain from the police or a court of summary jurisdiction a certificate as to his fitness to keep the explosives.