

# **CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 5 - Criminal Justice**

#### ***Section 109 – Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974***

543. This section inserts two new sections (8B and 9B) and a new Schedule 3 into the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). The 1974 Act provides protection to people who are convicted of a criminal offence and receive a prison sentence of 2.5 years or less. After a certain period of time, which varies according to the length of sentence passed, these convictions become “spent” and the offender is considered to be rehabilitated. The amendment will extend the protection under the 1974 Act to include individuals who have been given an alternative to prosecution (ATP) in respect of an offence in Scotland. It also provides protection to individuals who have been given anything corresponding to an ATP in respect of an offence under the law of a country or territory outside Scotland.

The new section 8B(1) of the 1974 Act defines an ATP for the purposes of these provisions. In Scotland a person has been given an ATP in respect of an offence in the following circumstances:

- they have been given a warning by a constable or a procurator fiscal;
- they have accepted or are deemed to have accepted a conditional offer to pay a fixed penalty issued under section 302 of the 1995 Act or a compensation offer issued under section 302A of the 1995 Act, and this includes, by implication, acceptance or deemed acceptance of a combined fixed penalty and compensation offer which can be made under section 302B of the 1995 Act;
- they have had a work order made against them under section 303ZA of the 1995 Act, which offers the individual the opportunity of undertaking unpaid work;
- they have been given a fixed penalty notice under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004; or
- they have accepted an offer from a procurator fiscal to undertake an activity or treatment or to receive services.

544. The definition of an ATP includes any disposal made in a jurisdiction outside Scotland which corresponds with one of the Scottish ATP’s contained within this list.

545. The new section 9B of the 1974 Act is essentially replicating section 9 of the 1974 Act (unauthorised disclosure of spent convictions) but makes provision for the unauthorised disclosure of ATP’s. Section 9 of the 1974 Act provides some protection for the rehabilitated offender and there are criminal sanctions where an individual discloses

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information outwith the course of their duties or improperly obtains information on spent convictions. Under the new section 9B, an individual found guilty of disclosing information which relates to a person being given an ATP which has become spent outwith the course of their official duties will be liable on summary conviction to a fine not exceeding level 4 on the standard scale. Where a person improperly obtains information which concerns a person being given an ATP in terms of subsection (8) they will be liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.

546. The new section 9B(6) of the 1974 Act provides the Scottish Ministers the power to make an Order to except the disclosure of information on ATP's which originates from an official record in particular cases or classes of cases from the offence of unauthorised disclosure. There is a similar power in section 9(5) of the 1974 Act in relation to the unauthorised disclosure of spent convictions. This power will be subject to the affirmative procedure.
547. The new Schedule 3 to the 1974 Act essentially mirrors the provisions in sections 4, 5, 6 and 7 of the 1974 Act with appropriate modifications to apply them to ATP's. Paragraph 1 of the new Schedule 3 defines when an ATP becomes spent. Warnings issued by a procurator fiscal or a constable or a fixed penalty notice issued under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 all become spent at the time they are given. All other ATP's will become spent after 3 months.
548. Sub-paragraphs (5) and (6) of paragraph 1 of the new Schedule 3 to the 1974 Act explain what will happen to the rehabilitation period if an individual is subsequently prosecuted and convicted of the offence for which the ATP was given. If a person is given an ATP (other than a fiscal or police warning ) in respect of an offence and is then prosecuted and convicted of the offence, the rehabilitation period for the ATP will end at the same time as the rehabilitation period for the offence. Further to this, with the exception of fixed penalty notices issued under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004, if the conviction occurs after the end of the 3 month rehabilitation period, the ATP will be treated as not being spent until the rehabilitation period for the offence ends. This can arise, for example, where a person is subsequently prosecuted as they accepted an ATP, but then fail to adhere to its terms.
549. Paragraph 2 of the new Schedule 3 to the 1974 Act provides a definition of "ancillary circumstances" in relation to an ATP. Paragraph 3 sets out what protection is afforded to persons in relation to their spent ATP's and any ancillary circumstances in civil proceedings. Paragraph 4 provides that if a person who has a spent ATP is asked a question seeking specific information other than during court proceedings that may lead to the disclosure of the ATP or any ancillary circumstances, they are not required to answer it. Under paragraph 5, any obligation imposed by a rule of law or provisions in an agreement or arrangement to disclose information does not extend to spent ATP's and ancillary circumstances, and a person cannot be dismissed or excluded from any office, profession, occupation or employment, or be prejudiced in any way as a result of having a spent ATP or for failing to disclose this information.
550. Paragraph 6(a) of the new Schedule 3 to the 1974 Act provides the Scottish Ministers the power to make an Order to exclude or modify the application of the provision in paragraph 4 (2) and (3) that a person is not required to acknowledge the existence of a spent ATP or ancillary circumstances when they are asked for information other than during court proceedings and must not be prejudiced for their failure to provide this information. This will mirror the order making power in section 4(4)(a) of the 1974 Act. Orders made under that provision have specified various offices and types of employment where the employer can ask questions about spent convictions. Paragraph 6(b) of the new Schedule 3 provides the Scottish Ministers the power to provide for exceptions to the provision in paragraph 5 that a person is not required to disclose a spent ATP or ancillary circumstances under a rule or law or agreement. Therefore where excepted in an order, the obligation imposed on a person will extend to requiring

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disclosure of an ATP. This will mirror the order making power in section 4(4)(b) of the 1974 Act.

551. Paragraph 8 of the new Schedule 3 to the 1974 Act provides for limitations on the effect of rehabilitation under the 1974 Act for an ATP in a similar way to section 7 of that Act for convictions, and sets out the circumstances where the protection under certain provisions of the 1974 Act will not apply. For example, previous convictions, spent or otherwise, must be disclosed in criminal proceedings. This paragraph also gives power to the Scottish Ministers, by the application of section 7(4) of the 1974 Act to Schedule 3, to exclude the application of paragraph 3 of that Schedule in relation to any specified proceedings, by order. This power will be subject to the affirmative procedure.