UNLOCK
The National Association of Reformed Offenders

UNLOCKing Employment

Briefing Paper for the Second Reading of the Rehabilitation of Offenders (Amendment) Bill 2009

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Statement of Purpose

This document is the result of an initial consultation with UNLOCK members as a result of the introduction the Rehabilitation of Offenders (Amendment) Bill by Lord Dholakia. It sets out to reflect the constructive critique of the Bill offered by UNLOCK members. It is intended to inform the second reading of the Bill and given the short window of time between the first and second readings, it is not intended as a final statement on the issue of reforming the Rehabilitation of Offenders Act 1974.

Background

In 1972, the Gardiner Committee's Report '*Living it Down'* proposed a law which would, "restore the offender to a position in society no less favourable than that of one who has not offended." It was recognised that continually forcing individuals to disclose their offence was counter-productive, as they were unable to secure employment or insurance. This led to the enactment of the Rehabilitation of Offenders Act (ROA) in 1974. The following year an Exceptions Order was introduced to limit the ROA to ensure the protection of the public, with particular concern for children and vulnerable adults. Over time, sentences 'inflated', more exceptions were added and more effective rehabilitative programmes were developed.

In 1999 the *Better Regulation Taskforce* recommended the Government review the rehabilitation periods. The Government said this was not enough and Jack Straw ordered a more fundamental review in 2001. The ensuing report *Breaking the Circle* (BTC), published in 2002, found the ROA to be "not achieving the right balance between resettlement and protection" and to be "confusing" for offenders and employers alike. In 2003 the Government responded, rejecting only one of the fifteen recommendations. One recommendation was rejected, one deferred and the other was accepted with amendments. The amended recommendation related to changing the rehabilitation periods enshrined in the Act. Though the Government has committed to reform, no action has been taken.

In November 2009, Lord Dholakia introduced the Rehabilitation of Offenders (Amendment) Bill. The Bill seeks to introduce the rehabilitation periods which the Government proposed in response to BTC.

Sentence	**Current Periods of Disclosure**	**Periods proposed by *Breaking the Circle***	**Periods proposed by amendment**
Fine	5 years	1 year	1 year
Community sentence	5 years	Sentence + 1 year	Sentence + 1 year
Custody < 6 months	7 years	Sentence + 2 years	Sentence + 2 years
Custody 6 – 30 months	10 years	Sentence + 2 years	Sentence + 2 years
Custody > 30 months	Forever	Sentence + 2 years	Sentence + 2 years
Custody of 4 years +	Forever	Sentence + 2 years	Sentence + 4 years

Response to Key Amendments in the Bill

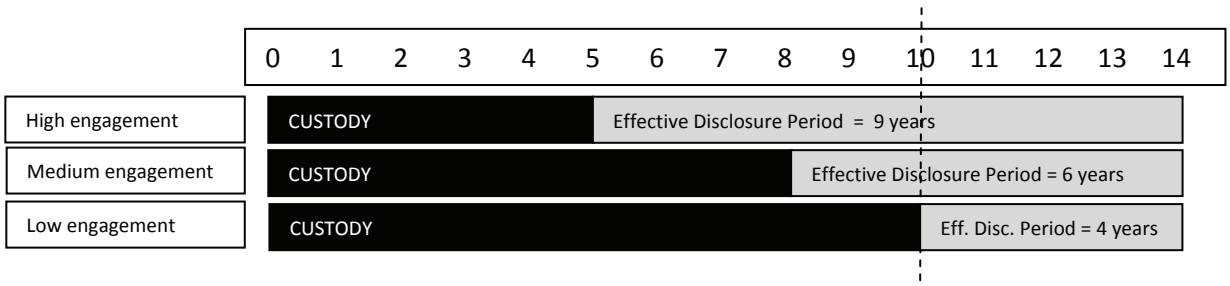
Changes to rehabilitation (disclosure) periods – Agree in part

UNLOCK members feel that the existing periods are disproportionate, partly as a result of sentence inflation over thirty-five years, and constitute additional punishment. Long rehabilitation periods do not inspire confidence in employers or the public as they suggest the Government lacks faith in the effectiveness of its own initiatives to reduce re-offending. UNLOCK members are **supportive of the periods proposed in the amendment**, despite the longer periods assigned to those sentenced to custodial sentences of 4 years or more when compared to those proposed in BTC. They feel that the change would immediately make a significant and **positive difference to the lives of many reformed offenders**, given that it would be retrospective.

However, the revised periods **will only benefit those seeking an increasingly narrow range of employment**, as an increasing number of opportunities are exempt from the Act. As such, even with revised periods, reformed offenders will remain locked out of higher status, higher paid jobs and professions, limiting their opportunity to reach their potential and contribute fully to the economy and their communities. **An increasing number of jobs continue to be exempt from the protections of the ROA**, requiring the disclosure of even the most minor offences. For example, jobs in financial services sector, health and social care, and voluntary community roles such as school governor.

In addition, UNLOCK members are concerned that the **BTC data on reoffending rates relates to the period following *release*, not the end of the sentence.** Evidence indicates that it is the period of time spent in the community without recourse to criminality that is the indicator of change. A system **which adds disclosure periods onto sentences, rather than time in custody, provides a disincentive** for good behaviour and high levels of engagement with rehabilitation whilst in prison. It also fails to encourage reform on release, as recalls have no impact on the disclosure period.

Example: Offender serving a 10 year custodial sentence under the ROA Amendment Bill



As the diagram illustrates, the person who uses their time in custody effectively must live in the community whilst disclosing their convictions for *nine years*, while someone who does not tackle the reasons behind their offending behaviour must only do so for four years.

UNLOCK therefore suggests **linking the disclosure period to the point of return to the community**. This model would be evidence-based and provide an incentive to engage with reducing re-offending initiatives, thereby **increasing the effectiveness and safety** of prison staff. Recalls to prison would result in the disclosure period being 'reset', strengthening the incentive to desist from crime. This model would provide a better fit with the National Offender Management's target to reduce the re-offending rate within a fixed period following release and the data collection that supports it.

A court may order a person cannot be rehabilitated if necessary for public protection - Disagree

UNLOCK members feel that this clause is **unnecessary, unworkable, counter-productive and potentially dangerous.** Members respect the general objectivity and fairness of the judiciary. However, they feel this clause would place judges in the impossible situation of assessing future risk to the public, based on current risk. This entirely **ignores the potential of the rehabilitative process** undertaken by the individual over their sentence. Unless the judiciary were involved throughout a sentence, they would not have adequate information, nor would they have it at an appropriate time. Even then **it would not be possible to conduct a risk assessment independent of a particular context,** such as the type of employment sought. The level of risk a person poses differs dependent upon the circumstances of interaction.

This clause is unnecessary as proportionate public protection will be achieved through the severity and nature of the sentence in combination with the decision-making processes of organisations such as the Prison Service, Parole Board, Probation, and Independent Safeguarding Authority. The extension of a disclosure period would leave the individual excluded from the protections of the Act in all circumstances. It is more **proportionate to maintain fixed disclosure periods but allow for the disclosure of spent convictions in specific relevant circumstances.**

Furthermore, removing the opportunity to become rehabilitated fundamentally **undermines the work of prison officers and others engaged in rehabilitation,** as it would remove the possibility of them ever achieving their goal. It would give the individual 'nothing to lose' or indeed to gain **by removing the logical basis** for engaging in the process of rehabilitation.

UNLOCK asserts that **all people with convictions should have the opportunity to be considered rehabilitated.** This does not equate to the naïve assertion that all people should have the right to work in all environments irrespective of their previous offences but rather to a 'fair' system in which previous offences are only a bar in those specific circumstances which present a genuine risk.

UNLOCK members also feel that **this is a 'get out' clause that would erode the Act** over time due to continual political and media pressure to disapply the periods in a broader set of cases. This would render the changes to the disclosure periods ineffective.

Other Considerations

UNLOCK members support the Bill as the first step on the road to reform but highlight the need for it to be seen in a broader context. Although shorter periods are welcomed they would be ineffective for many people for several reasons.

1. Growth of *Legal* Criminal Records Bureau (CRB) Checks

There has been **significant growth in the legal use of Standard and Enhanced CRB checks**, which provide details of both spent and unspent convictions. This is as a result of legislative change, most notably the ROA Exceptions Order 1975 and the Safeguarding Vulnerable Groups Act 2006. These checks numbered 3.9 million in 08/09. However, individuals required to register with the new Independent Safeguarding Authority are estimated at 11.3 million, all of whom will become eligible for Enhanced checks. Evidence from UNLOCK members suggests whole businesses are undergoing rolling programmes of CRB checks with little recourse to the relevance of such checks to specific job roles. Therefore **a continually decreasing number of people are benefitting from the ROA.**

Recommendation:

- Full review of existing exceptions and the decision-making process. Exceptions to be granted on the basis of an individual job, not the whole employer, industry or profession. Exceptions to be applied to relevant convictions based on evidence of particular risk of harm to the public to ensure full information is available where the nature of an activity or post applied for calls for a high level of vetting in order to maintain the proper protection of the public.

2. Growth of *Illegal* Criminal Records Bureau (CRB) Checks

The Police Act 1997 enshrined in legislation a system of Basic, Standard and Enhanced CRB checks. Basic checks were to deliver on the promise of the ROA by providing information only on un-rehabilitated or 'unspent' convictions. However, **employers in England & Wales have never been provided with a service to obtain basic criminal records disclosures**. This means that many employers are forced to choose between conducting no checks and resorting to illegal checks at the Standard or Enhanced level. These checks circumvent the protections of the ROA, irrespective of the length of disclosure periods and are intended for use in a strictly limited set of roles and professions. Unsurprisingly, UNLOCK **members indicate the use illegal CRB checks is widespread**, resulting in employers being informed of spent convictions, preventing them for securing employment as a result. **The CRB is not an enforcement body and appears powerless to stop these illegal checks**. Voluntary codes of conduct have proved ineffectual. CRB 'registered bodies' (often the employer) *are* criminally liable but there has only been one prosecution under section 123 of Police Act 1997.

Recommendations:

- Strengthen CRB screening process to prevent illegal checks
- Prosecute employers where they undertake illegal checks
- Where Standard or Enhanced CRB checks are required it should be clearly indicated in adverts and a rationale as to why they are necessary provided at application stage

3. Developments in Equality Legislation

In 1972, the Gardiner Report highlighted that, "some reformers in other countries have suggested employers, insurers and so on should be restrained from asking questions about criminal convictions, except perhaps in a limited form like "have you any convictions which have not been wiped out by operation of law?" However, it went on to say that, "In a country like ours, that cannot be right." Rather, it asserted that individuals should have the freedom to answer a question about convictions as if their spent convictions had never occurred.

Many UNLOCK members feel uncomfortable about the current basis of the ROA, whereby employers have the freedom to ask about all convictions but the individual has the freedom to 'lie' in relation to spent convictions. They feel uncomfortable beginning a relationship with an employer in a manner which, irrespective of the employer's lack of awareness, feels dishonest to them. They would **prefer to empowered to be truthful than to be licensed to lie.**

Nearly 40 years have passed since Gardiner and attitudes towards the balance of rights between institution and individual have changed. For example, the Association of British Insurers now accepts that insurers should not ask about spent convictions. A recent draft bill on non-disclosure in insurance from the Law Commission would require insurers to ask appropriate questions rather than relying on the customer to know what must be disclosed. **Employers no longer ask other discriminatory questions during recruitment and selection** (such as those related to marital status, plans for pregnancy, age, or sexuality) as it is a criminal offence for them to discriminate on these bases.

Even where employers refrain from illegal CRB checks and only ask appropriate questions, **developments in media and technology allow for the circumvention of the protection of the ROA.** The internet, including online newspapers and a new breed of websites dedicated to the reporting of convictions, allows for information on a person's criminal record to be freely available forever. Circumventing the CRB process can be as easy as 'Googling' a person's name.

Recommendations:

- Responsibility for ensuring compliance with the ROA to be moved to employers, by preventing inappropriate questions about 'any convictions', but making reference to 'unspent convictions under the ROA'. This would mean applicants could answer the question truthfully rather than simply being legally allowed to be untruthful.
- Reformed offenders must have recourse to equality legislation where there is evidence of discrimination on the basis of a rehabilitated conviction. This is particularly essential where information on convictions is easily available in the public domain.
- Consideration should be given to how reporting of convictions on the internet could be subject to an expiry date, potentially via a Code of Practice amongst reputable outlets. In December 2009, the Office for Criminal Justice Reform published *Publicising Sentencing Outcomes* which stated that, "It may be contrary to the Rehabilitation of Offenders Act to publish information about spent convictions."

4. The ROA is Poorly Understood

As BTC indicated, the **ROA is extremely confusing** and many offenders do not understand it. This means that people are unsure of what they are required to disclose and often inadvertently disclose convictions which are spent. These may be used unofficially by the employer to disadvantage the applicant.

Employers and insurers also have a poor level of knowledge of the ROA, perhaps because under the current system, the consequences for contravening it are minimal. This means that **employers may inadvertently ask questions, elicit information, and discriminate illegally**, without even considering the ROA.

Criminal justice agencies have also been shown to have a poor level of knowledge of the ROA. UNLOCK members have experienced prison officers, probation officers, legal advisors, and third sector workers with no, or inaccurate, knowledge of the ROA.

Recommendations:

- As per BTC, sentencers to be required to explain the disclosure requirements as part of the delivery of the sentence by virtue of clear written guidance in order to raise awareness
- Statutory provision should be made to ensure that people with convictions are able to access information regarding disclosure at any point during or after their sentence
- Rehabilitation periods should be renamed 'disclosure periods' as it is more factually accurate.
- The ROA must been seen to have 'teeth' via a strengthened CRB process and the inclusion of reformed offenders in equality legislation.

5. Indeterminate Sentences

On 31st March 2008, **10,911 prisoners were either Lifers or on IPPs** (indeterminate sentences for public protection). Some UNLOCK members suggested that Lifers should come under the four year disclosure period as they always have to demonstrate to the Parole Board that they do not pose a risk in order to be released and can be recalled immediately if there is any indication a risk developing. If such a model were to be adopted, careful regard would have to given to ensuring this did not disadvantage long-term determinate sentenced prisoners. Released IPP prisoners may apply to the Parole Board for their license to be cancelled after 10 years. This process could also assign 'rehabilitated' status to the conviction.

Recommendations:

- Consideration should be given to how Criminal Records Tribunals, administered by members of the judiciary, could offer people without fixed disclosure periods the opportunity to achieve rehabilitated status through a process of evidence submission.