UNLOCK
The National Association of Reformed Offenders

The Rehabilitation of Offenders Act 1974

Consultation Response to the Ministry of Justice – Claims Management Regulation

March 2009

March 2009

www.unlock.org.uk

Response to the Informal Consultation on a proposal to seek an amendment to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975

Organisational information

UNLOCK, the National Association of Reformed Offenders is a charity set up in 1999 to achieve equality for reformed offenders in the United Kingdom. It was established by, and is driven by, the needs of reformed offenders, empowering them to break down the barriers to successful reintegration and reducing re-offending. It is an independent membership organisation which represents the views of reformed offenders as a key stakeholder in the Criminal Justice System.

UNLOCK and the Review of the Rehabilitation of Offenders Act 1974 (ROA)

UNLOCK was a member of the advisory group to the Rehabilitation of Offenders Act Review which published its report, *Breaking the Circle*[1] (BtC), in July 2002 as a consultation document.

In its response to the consultation findings,[2] the government accepted the majority of the report's recommendations. Relevant here is the government's acceptance of the recommendation related to 'maintaining protection'. In the 2002 review, it was stated that:

> *"Certain types of posts, professions and licensing bodies should continue to be excepted from the disclosure scheme. Employers must receive details of all previous convictions so that the public can be protected* ***where there is an issue of national security or where the employee would hold a position of particular trust****."*

The government responded:

> *"The Government accepts the review's recommendation, and will seek to ensure that the current exceptions are preserved;* ***future applications for exception judged against strict criteria****; and the range of exceptions significantly clarified as part of the proposed reforms to the legislation."*

[1] Home Office, *Breaking the Circle – A Report of the Review of the Rehabilitation of Offenders Act* (London: Home Office, 2002)

[2] ROA Review Implementation Team, *Breaking the Circle. A Summary of the Views of Consultees and the Government Response to the Report of the Review Of The Rehabilitation Of Offenders Act 1974* (London, Home office, 2003), http://www.nio.gov.uk/breaking_the_circle_-_government_response_to_the_report_of_the_review_of_the_rehabilitation_of_offenders_act_1974.pdf

UNLOCK regrets to note that, despite the urgent need for reform, the government has failed to implement any of the accepted recommendations whilst at the same time continuing to expand the list of exceptions beyond the accepted criteria highlighted above.

The ROA is both ineffective and confusing, and the addition of yet another unjustifiable exception would simply make it more so.

Against this background, UNLOCK welcomes the opportunity to respond to this Consultation.

Consultation questions:

- **Do you agree that the Claims Management Regulator should be able to request the disclosure of all criminal convictions (including spent ones) from Individual Controllers (and Persons of Significant Influence) of Firms that apply to him for authorisation?**

No. UNLOCK believes that the ROA is quite clear in its purpose. It is submitted that, whilst abiding by the ROA, the regulator will to be able to exercise its duty effectively and diligently.

- **Do you agree that the Claims Management Regulator should be able to take into account any criminal convictions (including spent ones) that Individual Controllers (and Persons of Significant Influence) may have when considering applications for authorisation?**

No. The regulator is, under current law, only entitled to be informed of unspent convictions. This should remain the case. Exceptions to the ROA should be confined only to those where it is absolutely necessary in the context of the situation. UNLOCK believes that, in order for the regulator to perform their duties effectively, they are able to do so whilst abiding by the 1974 legislation.

UNLOCK has reached this position primarily for two reasons.

1. **The purpose of the ROA is that it allows spent convictions not to be disclosed, because, once they become spent, they are irrelevant. The Act therefore enables the regulator to be in possession of those convictions which are relevant, and therefore enabling the regulator to perform its duties effectively and diligently.**

2. **The regulator has so far failed to incontrovertibly show that they warrant being exempted from the ROA, and therefore justified in being made aware of spent convictions.**

These reasons are further explained:

1. **The purpose of the ROA is that it allows spent convictions not to be disclosed because, once they become spent, they are irrelevant. The Act therefore enables the regulator to be in possession of those convictions which are relevant, and therefore enabling the regulator to perform its duties effectively and diligently**

- It is stated in the consultation that *"the aim of the ROA is to increase the employment prospects of ex-offenders and, in turn, reduce their propensity to re-offend."* This simply is not the case.

  The legislative definition of the Act is that it is *"an act to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years, to penalise the unauthorised disclosure of their previous convictions, to amend the law of defamation, and for purposes connected therewith."*

  The Act is premised on the fact that, after a pre-determined length of time, and a particular conviction has become "spent", that particular conviction is no longer relevant. This means, in essence, that their now spent conviction bears no relevance towards their propensity to re-offend, and so no longer needs to be disclosed.

  This is a very important point. It seems to be the case that, in the consultation, a spent conviction is still considered to be material to the regulator. This fundamentally contradicts the spirit of the ROA, and therefore, to allow the regulator to be exempt from the act, their argument must be supported by incontrovertible evidence to enable an exemption to the legislation to be granted.

- The ROA is the only form of legislation that is some way protects people with previous convictions. As the discrimination of people with criminal convictions is not included in anti-discrimination legislation, the protections afforded to people with relatively minor, and distant, criminal convictions are only provided for within the ROA. To circumvent this piece of legislation would unjustifiably enable access to irrelevant convictions.

- The function of the ROA is that it objectively determines the length by which a conviction must be disclosed, based on the length of sentence imposed. The consultation proposes to purport that this is not sufficient for the purposes of the regulator; however no conclusive reasons have been given to support this. Instead, the consultation seems to believe that as the FSA is currently exempt from the legislation, this is a justification to enable them to be also. This reasoning is fundamentally flawed. The idea that the manner in which exemptions can be granted can be based of precedent is quite simply mistaken.

- It must also be remembered that, for those convictions that involve a sentence of imprisonment over 30 months, the conviction will never become spent. For a sentence of between 6 months and 30 months, the conviction will need to be disclosed for the next ten years. UNLOCK believe that these disclosure periods provide far greater periods of disclosure than should ever be required. This is supported by a Home Office review,

Breaking the Circle,[3] in which recommendations were made, and accepted by the Government, to reform the current disclosure periods in the ROA substantially, reducing them to 1 year following a community sentence, and 2 years following a prison sentence. Whilst it is not being suggested here that the regulator should use these periods instead of the current periods, it is evidence nevertheless that it is certainly not reasonable to require convictions beyond the current disclosure periods to be revealed.

- To enable the regulator to receive official confirmation of an individual's unspent convictions, they are able to request an individual to undertake a "basic disclosure", via the Disclosure Scotland service (http://www.disclosurescotland.co.uk/) or the Access NI service (http://www.accessni.gov.uk/). At present, the CRB do not currently provide this service, however they are due to do so in the near future. There are already a number of employers who use the Disclosure Scotland and Access NI service to enable them to supplement and confirm the disclosure made by the applicant.

2. The regulator has so far failed to incontrovertibly show that they warrant being exempted from the ROA, and therefore justified in being made aware of spent convictions.

- The consultation paper states that *"the Claims Management Regulator is responsible for regulating claims management services - essentially this means regulating the activities of claims management companies when making claims for compensation in certain sectors. The legislative framework is provided –in the Compensation Act 2006, which received Royal Assent in July 2006 and regulation commenced in April 2007."*

  It is questionable, if the regulator believes that being exempt from the ROA is so fundamental in enabling it to carry out its legislative duties, why it has taken nearly two years for the regulator to apply to become exempt from the Act. It is essential, to enable closer examination of whether exemption is reasonable and justified, if the regulator could provide instances where not being in possession of spent convictions has been detrimental to their ability to carry out their duties effectively and diligently. To enable the regulator to fully justify their need to be exempt from the ROA, such examples should be clearly brought forward, with the regulator detailing how they would have dealt with the situation more effectively if they were in possession of details of spent convictions.

- The consultation paper states that there is *"evidence that the then non regulated claims management companies were:*
  - *Using aggressive marketing techniques*
  - *Misleading advertising*
  - *Misleading consumers about funding options*
  - *Providing poor quality advice*

[3] Home Office, *Breaking the Circle – A Report of the Review of the Rehabilitation of Offenders Act* (London: Home Office, 2002)

- *Opaque and unfair contracts concealing the nature of arrangements between client and claims management business and the costs that have to be paid*
- *Opaque business arrangements between claims companies and solicitors*
- *Insurance fraud"*

It is clear that this statement is intended support the regulators claim for exemption, and to provide examples of where the regulator would be able to perform its duties diligently and effectively if they were able to be request details of spent convictions. However, it is strikingly clear that, from the examples listed above, being exempt from the ROA would not enable the regulator to prevent such problems occurring. The only example above which relates to convictions of any nature is that of insurance fraud. However, if the conviction is within the periods of disclosure set out in the ROA, then this would be need to be disclosed, and could be confirmed by obtaining a basic disclosure certificate. However, if the conviction is outside of those determined disclosure periods, then, under the legislation, they are regarded as irrelevant as the individual concerned is now "rehabilitated".

It follows then that there is no established link between the problems that the regulator has previously had with non-regulated claims management companies and the need to disclose spent convictions. It is asserted that there needs to be evidence brought forward which would show that, if the regulator were in possession of spent convictions, it would result in higher quality, and more effective, regulation. If this link cannot be established, the disclosure of spent convictions would not improve the regulation of claims management companies, and therefore any exemption would be unnecessary

- The consultation states that, in the basis of their proposal, they need to be aware of spent convictions is because Paragraph 10 of the Compensation (Claims Management Services) Regulations 2006 states:

"(2) For the purposes of making a decision regarding the suitability of an applicant, the criteria are the following—

> *(a)* ***that the applicant does not have a history of committing relevant criminal offences (in particular, perjury or an offence involving fraud, theft or false accounting, or in relation to financial services, consumer credit or consumer protection) or breaches of any law or rule of practice regulating the provision of financial, legal or other relevant services;****"*

The Regulator proposes to ask about spent convictions generally, as opposed to specifically those involving those offences above, and presumably use the services of the Criminal Records Bureau (CRB) to support any application. Unfortunately, the CRB process does not, at present, allow for only selective offences to be disclosed.

Furthermore, Paragraph 10 of the Compensation (Claims Management Services) Regulations 2006 requires the regulator to be made aware of relevant convictions. It is apparent that, without any express language detailing otherwise, the intention of this paragraph of the Regulation runs in parallel, and in accordance, with previous legislation, and therefore meaning that it only refers to unspent convictions. If the intention of the

Regulation was to circumvent the ROA provisions, then it would need to be expressly stated. It is therefore clear that this was not its intention.

- The consultation states that the proposed approach towards somebody with a spent conviction will include a judgement, amongst other things, of:

  "whether the appropriate penalty, restitution or other remedial steps required have been carried out;"

  It is submitted that the ROA is able to perform this function effectively, without the need for the regulator to be exempt from it. The 1974 legislation was written so that convictions would be unspent where the penalty had not yet been carried out, and therefore any such convictions would need to be disclosed irrespective of whether the regulator was exempt from the legislation itself.

- It is further stated in the consultation that *"when we consider these types of application, we will also take into account the time that has passed since the criminal conviction(s). Generally the more time that has passed, the less weight we will attach to that criminal conviction. However, we will consider any subsequent misconduct and, for example, whether the offender has taken any steps to provide compensation or restitution to anyone who lost out because of his/her offence(s)."*

  It is the purpose, and the function, of the ROA to take account of the time that has passed since the criminal conviction in question. The case has not yet been made which clearly identifies how and why the current legislation does not effectively provide this function.

  Furthermore, the use of the word "offender" is rather significant. This demonstrates the regulators viewpoint on people with previous convictions and how this relates to the ROA. The purpose of the 1974 Act is that, after the period of disclosure, the person is termed "rehabilitated". Using the word offender could only ever relate to those with unspent convictions, and even this is open to debate. The terms ex-offender, reformed offender or person with a previous conviction are certainly more suitable. The term offender is usually confined to those who are still undergoing the punishment imposed on them for the offence they have committed.

  End.