

Rehabilitation & Desistance vs Disclosure

Criminal Records: Learning from Europe (Summary)

This paper provides a summary of the conclusions and recommendations made in a report written by Christopher Stacey, Director (Services) at Unlock, who was made a Winston Churchill Fellow in 2014. The full report, and more information, can be found online at www.unlock.org.uk/wcmt.

Background

In recent years, the criminal records disclosure system in the UK¹ has been subject to intense scrutiny. A series of piecemeal reforms in response to high-profile events has resulted in a confusing and complicated process which, in many ways, undermines rehabilitation policies and places additional and unnecessary obstacles in the way of people with convictions.

Other countries have developed their systems in different ways, responding to different priorities, and the aim of this Fellowship was to try and learn from these different approaches. In my role as a Director of Unlock, one of my aims is to influence policy and practice in England & Wales, in order to achieve a fairer and more inclusive society towards people with convictions, and my hope is that this Fellowship goes some way towards learning from other countries.

The countries that I visited as part of the Fellowship were France, Spain and Sweden. Each of the countries were identified because they demonstrate, in different ways, policies and practices that are progressive and forward-thinking. I travelled between September and November 2014.

Conclusions

Tensions

The title chosen for this research report reflects an ongoing tension that exists not only in the UK, or indeed just in Europe. On the one hand, whether it's phrased as 'rehabilitation', 'desistance' or simply 'living a normal, law-abiding life', it's essentially looking at people who are no longer committing crime. On the other hand, whether it's phrased 'disclosure', 'criminal record checks' or 'safeguarding', it's essentially looking at informing others about what people

¹ For the purpose of simplicity, I use 'UK' in this report. To be technical, and on matters where jurisdiction is important, I'm referring to England and Wales, as systems in Scotland and Northern Ireland are slightly different

have done in the past. At its most simple form, this is what has been explored in this research. How have other countries gone about balancing the two?

Looking at it from the perspective of Government and employers, the tensions that this research has highlighted can be set out as follows

From a Government perspective

“Who has desisted/rehabilitated” [Individual rights and the ability for people to change]

vs

“What to disclose and to who” [Risk/public protection]

From an employer perspective

“If/when/need to ask/check”

vs

“Value of checking”

Ultimately, although it may be an overly simplified perception of the three countries I visited, there were two key values which seem evident:

- They have faith and confidence that people rehabilitate, and so there's little need for them to have to disclose their record. This results in more progressive 'expungement' policies which allow people with convictions to be protected from the potential prejudice and stigma that they might otherwise face.
- The majority of employers do not see the value in requiring the disclosure of criminal records. In some cases, they recognise the genuine shortfalls of criminal record checks, and so use other measures instead.

Linking the collateral consequences of criminal records with desistance and other social harms

Recognition of 'reform' is incredibly important – the concept of 'redemption', restoration and de-labelling. Much of what has been looked at in this report is to what extent other countries 'label' people once they have served their sentence and living a law-abiding life, and what forms of 'de-labelling' they have in place.

The problems faced by people with convictions, as a result of their criminal record, are often referred to as the 'collateral consequences'. This is, in itself, an interesting phrase, as it suggests that the problems or effects of a criminal record are somehow 'natural' or 'expected'.

However, to date, little work has been done to examine the extent to which collateral consequences associated with a criminal record have an impact on the desistance efforts of people coming through the criminal justice system. Arguably, the issues associated with a criminal record are not directly linked to the 'risk of re-offending', but yet the measures that the countries visited as part of this research demonstrate a clear recognition of desistance through 'legal' rehabilitation of one form or another. To strengthen the value of these types of measures, and to further the prospect of the UK going further in its 'legal rehabilitation' efforts, work needs to be done to examine the collateral consequences associated with a criminal record, and what

the benefits are in having measures that seek to 'de-label' and remove the stigma associated with a criminal records. There may be some benefits in a desistance/re-offending context, but one should expect to see wider benefits, in the reduction of other social harms, such as long-term unemployment.

Minimising the collateral consequences of criminal records

In the UK, there are clear 'collateral consequences' attached to a criminal record. These are less evident in the countries that I visited. An important legality principle would suggest that these types of 'additional punishments', if felt justified, should be established in law and imposed by courts at the point of conviction, or in the future in exceptional cases. The current 'extra-judicial' punishment, beyond what is carried out by the state, could be seen as a form of 'soft vigilantism' carried out by the public. Overall, the UK has much to learn from overseas. There are a number of facets to the countries that I visited which point to gaps in the existing regime that the UK has. There are also some shared tensions. Nevertheless, this research has identified the need for the UK system to generally become more sophisticated in developing strategies and mechanisms by which the collateral consequences of criminal records are mitigated. More work is needed to establish the evidence base underpinning the value of such approaches that operate overseas – it's my hope that this research will help to add weight behind the importance of this work.

Summary of recommendations

Below is a list of the recommendations made in the report. They have been themed into those involved in making them possible, and ordered to provide a more cohesive set of recommendations.

Government (and disclosure agencies)

The use of criminal records

1. 'Police' records and 'Conviction' records should be held separately. Conviction records may come from Police records, but they would be held separately, solely for disclosure purposes.
2. The Government should explore the use of 'occupational disqualifications' more broadly as a means of regulating who can work in certain roles, allowing for more restricted access to criminal records in other roles and more expansive 'cancelling' systems.

Disclosures on criminal record checks

3. The UK should establish an 'ultimate' form of rehabilitation which applies for all types of disclosures.
4. The UK should introduce measures which enable any person with convictions to be ultimately regarded as legally 'rehabilitated'.
5. Research should be undertaken to understand the effectiveness of the system of 'judicial rehabilitation' in France.

6. The UK should learn from how France, Spain and Sweden have been able to have a stronger commitment to 'rehabilitation' laws when applied to jobs that work in sensitive roles.
7. Research should be undertaken into whether measures that deal with criminal records have any positive impact on rehabilitation/desistance.
8. More research needs to be done into the effectiveness of systems which 'forgive', comparing them to systems that 'forget', and how the two can work together in a cohesive criminal record disclosure system.
9. Research should be carried out to understand what impact 'forgiving' and 'forgetting' measures have in mitigating the collateral consequences of criminal records.

The process of issuing criminal record checks for employment

10. Research should be done into the effectiveness of criminal record checks and what value they provide to employers that use them.
11. There should be a general prohibition against criminal record checks for recruitment. Exceptions would be granted on a case-by-case basis, where it was deemed (a) lawful and (b) necessary.
12. Government should ensure that criminal record details are provided directly to the individual, and not to third parties such as employers.
13. Individuals should be able to obtain a copy of what they might have to reveal to a future employer. In particular, this would mean being able to get a copy of your own DBS, at a notional cost in line with data protection rights.

Employers

14. Employers should only carry out a criminal record check where there is specific law which requires them to do so.
15. Research should be carried out which looks at the effects of asking for criminal record details at different stages of the recruitment process.
16. Employers should only consider asking for details of criminal record when they 'can foresee hiring' an individual, and only then in relation to convictions for offences which have clear relevance to the job role.
17. Employers should shift the phrasing of their questions towards asking for details of what would be disclosed on the relevant level of check that the job is eligible for.

General recommendation

18. Phrases such as "criminal record", "criminal record certificate" and "criminal background" should be replaced with "criminal history".

The full report can be downloaded from the Unlock website – www.unlock.org.uk/wcmt

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