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Unlock
for people with convictions

12th April 2017

Mr Robert Neill MP
Chair
Justice Select Committee
House of Commons
London
SW1A 0AA

Dear Mr Neill,

Re: Follow up to oral evidence

It was a pleasure to give oral evidence to the Justice Select Committee on the 15th March 2017 as part of its inquiry into the disclosure of youth criminal records. In addition to the written evidence we have already submitted, I thought it would be helpful to provide further details on areas that were touched on at the oral hearing but where there was limited opportunity to discuss these in detail.

Motoring offences under the Rehabilitation of Offenders Act 1974 (ROA)

When the ROA was reformed in 2014, most 'rehabilitation periods' were significantly shortened. The government's intention was for these reforms to apply to motoring offences too. A last-minute lobby by the insurance industry led the Ministry of Justice to introduce a 'savings provision' to maintain the current periods for motoring offences (5 years). This was only designed to be a temporary measure but it has now been in place for over 3 years. It means that minor motoring offences (such as speeding) have a longer disclosure period than an 8-month prison sentence. This is illogical and unsustainable. It has a disproportionate impact on young people, given the increased likelihood of motoring offences in this age group. Whilst the need for this information to be available to the motoring industry is clear, the way the legislation works means that these rules apply across the board, including to employment and educational opportunities. Despite efforts by Unlock and others to work with the Department for Transport on a solution, the Ministry of Justice needs to play more of an active role in working to find an appropriate legislation solution to the problem.

The impact on university applications

A criminal record acquired as a young person can cause significant detriment to educational opportunities. The University and Colleges Admissions Service (UCAS) requires all applicants to make a declaration on the initial application relating to unspent offences for a wide-range of offences. If applying for a course leading to certain professions or occupations exempt from the

ROA, applicants have to tick a further box if they have a conviction or caution that would not be filtered.

It would be regarded as good practice to not take a declaration like this into account until after the applicant's academic ability had been considered. Unfortunately, this is not always the case, and there is a lack consistency as to why the information is needed at this initial stage. Anecdotally, we know that it puts people off from applying. For example, in one case an individual said:

> *"Why do they need to know this before I've accepted any conditional offer. Asking for information right at the beginning suggests they're going to be using it. It's put me off applying to any course through UCAS. I'm going to look at where I can apply directly instead."*

Although no quantitative research has been carried out in the UK, we regularly hear from people who find that old and minor criminal records cause problems when applying to university, particularly in accessing courses like social work and healthcare. One individual said:

> *"I applied for a place on a Human Resource and Management course at a local university. …I met all the academic requirements… I filled in the form, ticked the box to say I had unspent criminal convictions and made a full disclosure as requested. It did not take long for me to receive a forty-five word email refusing me entry. I appealed but I was refused entry again. At this point, it would have been easy to walk away… However, I decided it was worth one last effort… [Six months after my original application a] letter came through the letter box overturning the original decision to keep me out and offering me a place on the course… We all deserve a second chance, whatever we have done, but be prepared to fight for it – it certainly won't be handed to you on a plate."*[i]

In the US, research ("Boxed Out[ii]") found that "there is no empirical evidence to indicate that criminal history screening makes college campuses any safer". It also found that almost two-thirds of applicants who disclosed a felony conviction to the State University of New York (SUNY) were denied access to higher education. This has led to SUNY removing the box from their initial application form and the Department of Education in the US has emphasised the importance of going "beyond the box" in college applications — because unnecessarily broad questions about criminal history can often deter and discourage qualified students from pursuing a college degree.[iii]

Housing - Local authorities' approach to spent convictions

In 2016, a successful challenge was brought against Hammersmith and Fulham Council after they were found to have acted unlawfully when they refused to add a 19-year-old to the housing register because of a spent conviction acquired as a child. Despite this case, some housing providers continue to ask misleading questions, not making it clear that applicants only need disclose unspent convictions. Croydon Council, for instance, says that it may make an exception to its ban on those with convictions accessing the housing register, "if you can clearly demonstrate …you are now unlikely to repeat such behaviour. This could include …having

maintained a clear record of behaviour for at least 3 years since the offences occurred".[iv] This gives the impression that a three-year-old conviction should be declared, even if it is long spent.

This type of practice is clearly inconsistent with the disclosure rules set out in the ROA, and is further underpinned by housing allocation policies that appear to routinely take into account spent convictions. Most application forms for social housing ask about criminal convictions and, since 2011, local authorities have had the right to apply "blanket bans". Several local authorities apply significant restrictions on people with criminal records accessing social housing. For instance, Croydon Council states that: if you "have been involved in relevant criminal behaviour you will be disqualified from going on the housing register… Relevant criminal behaviour includes conviction of an arrestable offence in, but not restricted to, the locality of the dwelling."[v]

No comprehensive research of the approach by local authorities has been carried out. However the Standing Committee for Youth Justice has examined 30 of the 33 London boroughs' housing allocation policies and found that 13 of them contained restrictions on people with criminal records accessing social housing (this does not include specific restrictions on accessing priority lists, or restrictions placed on people who had committed anti-social behaviour or housing related fraud).

Insurance companies misleading customers and taking into account spent convictions

The committee has received written evidence from the Financial Ombudsman Service, and the case of Ms J was one where CIS General Insurance Limited wrongly took into consideration a spent conviction).

In research we carried out in 2016, we found that, for household insurance, 31 insurance companies asked questions (or had assumptions) which were misleading. None of them referred to the Rehabilitation of Offenders Act 1974 or the need to only disclose a conviction if it is 'unspent'. Similar experiences are reported for motor insurance.

Furthermore, as part of this research we tested the insurers' response to a 'mistaken' disclose of a spent conviction. In these situations, insurers should disregard the conviction and not take it into account. Despite being told this explicitly by the 'mystery shopper', two insurers (Direct Line and Churchill) quoted higher premiums when informed of a spent conviction, and six insurers (Co-op, Aviva, Shelia's Wheels, Very, Littlewoods, esure) even refused to quote. This goes against the Association of British Insurers (ABI) good practice guide to insurers.

Case for wider review of the ROA and criminal record disclosure legislation

Recent significant changes to sentencing, technology and employer practices, alongside increasing evidence of abuse and ineffectiveness (as detailed above), means there is a need for a fundamental and independent review of the aims and effectiveness of the Rehabilitation of Offenders Act 1974 and criminal record checking processes. With policy responsibility for criminal record disclosure legislation straddling the Home Office and the Ministry of Justice, an independent cross-departmental review of the current system should be undertaken with the

aim of minimising the unnecessary and disproportionate impact of criminal records on law-abiding people with convictions from moving on positively in their lives.

List of offences that can be filtered

In her oral evidence, Ms Newton talked about the review that the Home Office had commissioned the Law Commission to undertake. It was suggested that this was with the aim of reviewing the list of offences and to make sure it's the right list. It is important to note that, as detailed on page 4 of the final report by the Law Commission, it states:

> *"The project is a very narrow one with a short time frame. Our terms of reference expressly limit our review to changes that can be achieved using only secondary legislation."*

We believe it is a mischaracterisation to suggest to the Committee that this review sought to review the list in the way you set out. Both Unlock and SCYJ were involved in the consultation process, and it was clear that the scope did not extend to reviewing this. As the report states on page 13:

> *"We do not make recommendations about whether any particular offences should be added or removed from the list of non-filterable offences. Specifically, we have not produced a draft statutory instrument containing a revised list of non-filterable offences for implementation. We have concerns that merely introducing new statutory instruments to give effect to either the itemised list that we have produced, or a revised list compiled within the narrow confines of the present project, would be unlikely to produce the best solution to wider problems with the disclosure regime as a whole."*

Opportunity for review

It was suggested by Ms Newton that there are two safeguards in relation to the disclosure of old/minor cautions/convictions. The first being the filtering regime. It was put forward that the second safeguard was that individuals, once receiving a certificate with information about convictions or cautions on it, could, if they believed the disclosure to be unfair, go back to the DBS as part of the 'Independent Monitor' system, or complain to the police. It was suggested that these two routes were avenues of redress. In its annual report of 2014 (the latest one available) the functions of the Independent Monitor are described as follows:

> *"The Independent Monitor is appointed by the Secretary of State under section 119B of the Police Act 1997 and has two statutory duties.*
>
> *"Firstly, in accordance with section 119B of the Police Act 1997 (the 1997 Act), the Independent Monitor must review a sample of cases in which police non conviction information is provided on enhanced criminal record certificates under section 113B(4) of the Act. The purpose of the review is to ensure compliance with Home Office Statutory Guidance on disclosure and Article 8 of the European Convention of Human Rights (ECHR).*

"Secondly, when a request for an Enhanced Certificate is made, an individual's details are referred to any police force which may hold information about the individual. This enables the force to check against their records for any information which they reasonably believe to be relevant to the prescribed purpose for which the certificate is sought and then consider if it ought to be disclosed. If an applicant is not satisfied with the information being disclosed they may apply to the Independent Monitor for a review. Under section 117A of the Police Act 1997, the Independent Monitor has a role in reviewing those cases where a person feels that the information disclosed by police within a Disclosure and Barring Service Enhanced Criminal Record Certificate is either not relevant to the workforce they are applying for, or that it ought not to be disclosed."

It is clear the functions of the Independent Monitor do not currently extend to reviewing the disclosure of old/minor convictions. This is an area that could be explored as a way of introducing a discretionary filtering process.

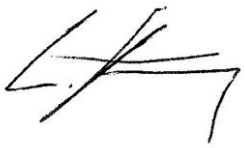
Discretionary filtering – the way forward?

During oral evidence I was asked by Kate Green MP whether I believed there needed to be an opportunity for review. I would like to provide more details about a suggested process that I will refer to as 'discretionary filtering'. This develops the point that was made in our written evidence (point 33.6).

1. The filtering system should, principally, be an automatic process that gives clarity and certainly. We have made recommendations in our written evidence as to how the automatic filtering rules should be amended (including removing the 'one conviction only' rule and creating a distinct set of rules for offences under 18). However, any automatic rules, without review, are going to be rigid with people on the margins unfairly affected, which is why a discretionary process to establish a more nuanced approach needs to be built into the system.
2. The National Police Chiefs Council (NPCC) support the idea of chief officers being given responsibility to apply similar tests of relevance and proportionality as they currently do with non-conviction information. Building on the existing quality assurance framework for enhanced checks, the police could assess individual DBS applications and apply a discretionary filtering process, determining whether unfiltered convictions/cautions are relevant to the role (and so disclosed) or not relevant (and so not disclosed)
3. The discretionary filtering process would need to be subject to independent review. This could be carried out by the Independent Monitor, receiving appeals from applicants that believe information is no longer relevant and so shouldn't be disclosed – decisions could be made to apply to allow future disclosures, or just the current disclosure.

I hope this additional information is helpful. Should you have any questions about this, or any of the other written or oral evidence provided, please don't hesitate to get in touch.

Yours sincerely,



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[i] Unlock, "University study is possible – but you'll have to fight for it". Available at: http://www.the-record.org.uk/unlock-people-with-convictions/university-study-is-possible-but-youll-have-to-fight-for-it/

[ii] Centre for Community Alternatives (2015), *Boxed Out: Criminal History Screening and College Application Attrition.* Available at http://www.communityalternatives.org/fb/boxed-out.html

[iii] Details available at http://harvardlawreview.org/2017/01/the-presidents-role-in-advancing-criminal-justice-reform/ , 5th January 2017, 130 Harv. L. Rev. 811

[iv] London Borough of Croydon, 2016, "Housing Allocations Scheme, Version 7, available at https://www.croydon.gov.uk/sites/default/files/articles/downloads/Allocations%20Policy%20Final%20021116C.pdf

[v] Ibid.