

address Maidstone Community Support Centre, 39-48 Marsham Street, Maidstone, Kent, ME14 1HH
helpline 01634 247350 / advice@unlock.org.uk
office 01622 230705 / admin@unlock.org.uk
web www.unlock.org.uk & @unlock2000



09 November 2015

Anna Bulik
Policy Team, Disclosure Scotland
Pacific Quay
Glasgow
G51 1DZ

Dear Ms Bulik,

Re: The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015

Unlock is an independent award-winning charity dealing with the ongoing effects of criminal convictions by providing trusted information, advice, training and advocacy in England & Wales. Our expertise, knowledge and insight helps us work with government, employers and others to change policies and practices to create a fairer and more inclusive society so that people with convictions can move on in their lives. I was a member of the Independent Advisory Panel on the Disclosure of Criminal Records, which was chaired by Sunita Mason. I have also made a witness statement in a further challenge to the filtering system as it operates in England & Wales.

The approach taken in England & Wales came about through the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013. In April 2013, Unlock wrote to Lord Goodlad, Chairman of the Secondary Legislation Scrutiny Committee, where we set out our views on the Order at that time. Please find enclosed a copy of this letter for your information.

The process set out in this Remedial Order varies significantly from that of England & Wales, and we make the following comments based on our observations of the Remedial Order:

1. **Disclosure time periods** – The periods of time that must have passed for a conviction to become protected in England & Wales (11 years as an adult, 5.5 years for under 18's) are too long to be proportionate in our view. The Remedial Order proposes even longer periods (15 years and 7.5 years), which in our view are unnecessarily long and disproportionate. It is unclear how these periods have been arrived at and what the justification is for these increased lengths. If they are based on the retention periods for the Scottish Criminal History System, this would be a mistake, as it would be confusing a key difference between 'retention' and 'disclosure'. If they are linked to periods it takes for convictions to become 'spent' under the Rehabilitation of Offenders Act, an alternative approach would be to set a particular time period starting from when the conviction becomes spent. It is also important to note that this legislation is currently subject to review by the Scottish Government.

Unlock – for people with convictions

We are an independent award-winning charity, providing trusted information, advice and advocacy services for people with criminal convictions. Our staff and volunteers combine professional training with personal experience to help others overcome the long-term problems that having a conviction can cause. Our expertise, knowledge and insight helps us work with government, employers and others to create a fairer and more inclusive society.

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2. **Number of offences** – In England & Wales, the limit to one ‘conviction’ (or even one ‘offence’) is a significant contributor in ruling many people out of the filtering regime. Our understanding is that this Remedial Order doesn’t have a similar limit, which we welcome.
3. **List of offences** – It is welcomed that a list of offences that *could* become protected has been published on the Disclosure Scotland website. This is something that the UK Government has still not done in relation to the operation of its equivalent filtering regime. However, the inflexible nature of the list of offences that will not become protected is present in this Remedial Order. It remains our view that, although a list of offences can be helpful as an indicator of whether or when a conviction could become protected, it can act as a blunt instrument and should not be used as an ultimate test of whether an offence should become (or not be) protected. Individuals with offences that appear on the ‘[Offences that will always be disclosed on Higher Level Disclosures](#)’ should have recourse to the review process (see below) where they believe the offence is no longer relevant to the purposes for which they are applying for a disclosure.
4. **Review process** – We welcome the review process, taking place through application to a sheriff, that individuals can use if the relevant time period has not yet passed for an offence that could be protected. We believe this process should be widened to include a broader list of offences (see above). It also remains unclear how this application process will work in practice. There is no user-friendly guidance available on the Disclosure Scotland website. The access to, and operation of this review process is, in our view, critical to striking an appropriate balance in individual cases.
5. **Determining relevance** – In England & Wales there is a broad approach taken to ‘determining relevance’. The filtering approach applies across the board, to all types of standard and enhanced checks. This makes creating a proportionate filtering approach difficult and the result was that the rules were diluted to the lowest common denominator – i.e. it must be appropriate for the conviction/caution to have been filtered from all types of DBS check. Although the benefit of this was that it was easy for the DBS to implement, the outcome was a very arbitrary assessment of relevance, taking little account of the specific reasons for the disclosure check and the specific nature of applicants’ criminal record. If the review process in this Remedial Order was widened (see above), this would help to mitigate this issue and better ensure that only relevant spent conviction information is disclosed for the purpose for which it is being applied for.

We would also like to raise a couple of practical considerations which, although may be beyond the remit of this consultation, we believe are important when reflecting on the challenges we’ve identified with the current approach taken by the UK Government:

1. **Employer practice** – Over two years since the filtering process came into force in England & Wales (May 2013), employers continue to ask misleading questions on application forms. This results in many individuals disclosing significantly more information than legally required to. There is an important role for the Disclosure &

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Barring Service and Disclosure Scotland in informing employers of their responsibilities, and taking action where employers continue to act in such a way.

2. **Clarity on what's 'protected'** – It is not currently possible to obtain your own Disclosure & Barring Service disclosure certificate in advance of applying for employment or volunteering opportunities. Given the complexity of the filtering process and the lack of understanding by individuals of their own criminal record, the causes a number of difficulties for individuals when trying to determine what they do and not need to disclose.
3. **The review process interacting with recruitment** - Although it is unclear how the review process operates, it appears to come into effect after an application for a disclosure has taken place. Within the context of a specific recruitment cycle, it appears to create a number of logistical and practical problems for an individual that may be considering an application for review, in particular the length of time that it will take to process. This being the case, it would add weight to the importance of making this process available to an individual before they apply for a disclosure that relates to a particular job vacancy, instead applying in advance of applications in a particular area of employment.

We hope these comments are helpful. We would welcome the opportunity to contribute to any further discussions on this issue.

Yours sincerely,



Christopher Stacey

Co-Director

email christopher.stacey@unlock.org.uk