

Submission

Call for views - Management of Offenders (Scotland) Bill

Unlock welcomes the opportunity to provide a submission to the Scottish Government in response to the call for views on the Management of Offenders (Scotland) Bill. The focus of our response is on Part 2 of the Bill - Disclosure of convictions.

Unlock is an independent award-winning national charity that provides a voice and support for people with convictions who are facing stigma and obstacles because of their criminal record, often long after they have served their sentence. Our focus is predominantly on people in England and Wales.

Consultation questions – Disclosure of convictions

4. Overall, do you support Part 2 of the Bill? The Scottish Government's view is that it will provide a more appropriate balance between the public's right to protection and a former offender's right to "move on" with their life, by, overall, reducing the legal need for disclosure. Do you agree?

Part 2 of the Bill represents a positive step in the right direction. The Bill contains similar elements to those that were contained in the changes implemented in England and Wales in 2014, and in some ways they go slightly further. This is to be welcomed. We also support the views expressed by Recruit with Conviction in relation to the amendments for those from the forensic mental health estate.

The change in terminology, although technical in nature, recognises a fundamental way in which the Act has been used by employers and others. The concept of a 'rehabilitation period' (and other phrases) have led to a misunderstanding and mis-application of the Act. The changes in this regard are positive, although the risk is that they are seen as purely technical. The opportunity, at implementation stage, is to ensure that work is done to change the historical approach and to embed this new terminology in policies and practices so that, for example, an employer doesn't think that a persons' conviction has to become spent before they can employ them because they are labouring under the assumption that the person is not yet regarded as rehabilitated.

However, we do have concerns about the use of language in the Bill, and in particular the use of the term "offender". We support the views expressed by the Criminal Justice Voluntary Sector Forum (CJVSF) that the use of the term "offender" in the title of the Bill is wholly inappropriate given the stated intentions in the supporting documents for the reductions to disclosure periods included in Part 2 of the Bill. This is particularly disappointing given the positive steps taken by all parties when developing the Community Justice (Scotland) Act 2016 and the National Strategy for Community Justice, when a conscious decision was made to move away from the term "offender" towards "individuals" or "people with convictions". As a charity that uses language which identified people as people first, such as "people with convictions", we support the recommendation of the CJVSF that there should be a review of both the title of the Bill and the language used throughout.

Furthermore, as can be seen in our response to question 6 below, we believe that there is a lot more that needs to be done through law and policy to support the ability of people with convictions to move on with their lives.

5. Do you agree with the Scottish Government that other reforms in Part 2 will make the law on disclosure of convictions more intelligible, clear and coherent?

The change in terminology, particularly replacing “rehabilitation” with “disclosure”, is welcomed, and is in line with similar proposals put forward by Lord Ramsbotham in his Private Members Bill in the House of Lords in early 2018. The change to the ‘excluded sentence’ rule is also a positive step, and brings the operation of the Act more in line with the intention of the legislation.

However, the Committee describes Part 2 of the Bill that it “substantially amends the Rehabilitation of Offenders Act 1974”. It may be clearer to describe the changes as “substantially amending the time it takes for criminal records to become spent.” The Bill does not significantly alter the structure or operation of the Act.

The terminology of “protected person” is positive in concept, as it suggests the law has a beneficial effect by shielding an individual, however the specific choice of words risks some confusion with the phrases “protected caution” and “protected conviction” which are used to refer to cautions and convictions that are filtered from standard and enhanced checks in England and Wales.

However, the Bill itself is unlikely to make the law more intelligible, clear and coherent. This was the aim of the 2014 reforms in England and Wales, yet the lessons from that (explained below) show the need to ensure that a comprehensive plan is in place to ensure that individuals, employers and those helping people find employment know about, and understand, the changes. This should include easily accessible and understandable guidance, practical resources, online tools, awareness raising and training.

6. Do you have any further views on law and policy around disclosure of convictions?

As with previous changes made in England and Wales, the amendments have focused solely on the system of basic disclosure. This represents a missed opportunity to fundamentally review the aims and objectives of the criminal record disclosure regime and to look at the system in the round.

The changes may make the law more intelligible, clear and coherent, and they do reduce the legal need for disclosure, but do they better help people with convictions to move on with their lives? The changes will invariably help people with convictions to move on with their lives, however the Bill fails to recognise and respond to key problems that people face in relation to the disclosure of their convictions. Some of these issues may require primary legislation, however they are highlighted here to ensure that it is clear that the Bill should not be seen as the end of changes in this area::

Determining ‘when’ convictions become spent

1. **The further conviction rule** – Although the Bill amends the operation of the ‘excluded sentence’ rule, it maintains the approach to further convictions (whereby certain further convictions can ‘drag on’ currently unspent convictions and neither of them becomes spent until the longest of them does). In our view this is at odds with the policy intention behind the Act and the Bill.

2. **Ancillary orders** – It is disappointing that the Bill will maintain the current position.
3. **The blanket exclusion for sentences of over 48 months** - Unlock believes the Act should apply to all people who have served their sentence. Over 7,000 every year receive a conviction of over 4 years in prison which cannot become spent. Convictions that can never be spent are an invisible punishment that will forever shadow the individual, preventing full rehabilitation and meaningful employment even after completing their sentence. People should have the opportunity to have the positive things they have done since leaving prison recognised in law by allowing them to be 'legally rehabilitated'.
4. **Young adults** – Unlock is aware of concerns raised by CJVSF with regards to inconsistency in disclosure procedures when individuals reach the age of 18, given the Youth Justice system continues to deal with individuals up until the age of 21. Unlock supports the notion that there needs to be a more nuanced approach for young adults, and the Justice Committee's recent inquiry into the Disclosure of Youth Criminal Records is the most comprehensive assessment of that issue to date.

What it means once a conviction becomes spent

1. **The legislation is abused** - There is insufficient focus on or recourse against employers who breach the law. Unlock is aware of spent convictions being asked about and taken into account by employers without adequate legal remedy available. Employers request standard and enhanced checks for roles not eligible for them with little fear of sanction. People with convictions and cautions are not adequately informed of the implications of the sentence given to them at court and this should be remedied. Neither are they given clear information about their rights with regards to employers asking for information on their offending history. Information continues to be available online after convictions are spent, which is a real and increasing problem. Unlock is aware of employers finding out about spent convictions via internet searches and discriminating on this basis.
2. **Responsibilities of employers** – The Bill maintains the 'right to lie' principle (or referred to as a "legal shield" in the policy memorandum for the Bill). There is nothing to stop prospective employers asking people about spent convictions. Rather, the onus is on the prospective employee to decide whether to lie. We would like to see it made an offence to ask about spent convictions unless authorised to do so. It should be possible for individuals to take action against an employer or insurer who takes into account spent convictions when making an employment or insurance decision.
3. **Employers doing illegal standard and enhanced checks** - It is an offence to 'knowingly' carry out a standard or enhanced check when the role is not eligible for one. However, no employer has ever been prosecuted for doing so. In England and Wales, the Disclosure and Barring Service (DBS) does not see itself as an enforcement body and appears ineffective at stopping these illegal checks. We understand that Disclosure Scotland take a similar view. Effective systems should be established for identifying and stopping ineligible checks and action taken against employers that do not take reasonable steps to ensure checks applied for are eligible.
4. **People are not aware of their rights** - All people convicted of a criminal offence should be made aware of the Act and offered information and guidance on the long term impact of having a conviction. The information given is poor at present. The Scottish Government, through Disclosure Scotland, should publish and maintain accurate guidance on their process, specifically targeted at people with convictions (with a focus on the positions that are eligible for standard and enhanced checks, and how individuals can address issues such as employers undertaking illegal checks).
5. **Spent convictions are available online** - After convictions become spent, information is still often readily available online, and search engines/news organisations should operate a presumption that this information is removed once convictions become spent.

6. **Eligibility for standard and enhanced checks** - A wide number of employers can access standard and enhanced checks. This should be reviewed in full. Exceptions should be granted on the basis of an individual job role, not the whole employer, industry or profession. Criteria for assessing eligibility must be set down by government. Where an exception can be proved necessary, only relevant spent convictions should be requiring of disclosure.

Addressing barriers that people with unspent convictions face

Alongside reducing the disclosure periods, much more needs to be done to minimise the barriers that people with unspent convictions face. The Bill does nothing to address these issues. Given that those following a conviction will still have to wait a period of time before their conviction becomes spent, the law and policy around the disclosure of their convictions should be looked at in terms of what can be done to help them. In particular, we would encourage work to be done to look at banning employers from asking about previous criminal convictions until after the successful candidate has been selected. Known as 'Ban the Box', so far this has been a business-led voluntary initiative.

In 2017, the UK civil service endorsed the Ban the Box campaign and removed the criminal record disclosure section from initial job applications for the majority of civil service roles. Ban the Box does not oblige employers to hire people with criminal records, but it increases the chance that they will consider them. When applicants are able to progress to later stages in the recruitment process and meet employers, they have the opportunity to show their potential. Removing this tick-box from the application process gives people with convictions the chance to get further into the application stage before disclosing their criminal record. Since 2013, over 80 companies have joined this movement, but there's much more to be done. In a recent survey of over 60 national companies, 75% were found to have general questions about criminal records on the application form. Employers no longer ask other discriminatory questions during recruitment and selection. We encourage the Scottish Government to likewise commit to 'Ban the Box' for all public bodies. We also believe the government should follow the lead taken in the US by introducing 'fair chance hiring' practices, including a statutory requirement for all employers to delay the questions about criminal records until the pre-employment stage.

A further way of addressing the barriers that people with unspent convictions face is to pilot tax incentives to encourage employers to recruit people leaving prison and people on probation. Many businesses are fearful of hiring people with a criminal record. 75% of companies admit to discriminating and not offering an applicant a job on the basis of them declaring a criminal record. This is often because of long-standing beliefs about their reliability and the risks they think they pose to a company's public image. This comes at a cost to society; around a third of people claiming job seekers allowance have a criminal record.

The Scottish Government should recognise and champion those employers that are already employing people with convictions. Yet there are many more companies that need to be encouraged to change their recruitment practices to take on people with criminal convictions, and they need to be given the support to do so. So we would like to see the Scottish Government pilot the use of financial incentives for those employers who actively employ people leaving prison and those on probation.

Learning the lessons from England and Wales

Unlock were heavily involved in the work that led up to the implementation of changes in England and Wales in 2014. Alongside some of the issues that remain the legislation (outlined above), we thought it might be helpful to share what we consider to be some of the lessons from that work:

1. **Implementation timescales** – Given the significant (positive) impact the changes will have on individuals' lives, it is important to be clear about the timescales involved in implementing the changes. Many people may be putting their lives on hold until the changes come into force. Significant time periods or delays should be avoided.
2. **Awareness and understanding amongst individuals** – Much of the benefit from the Bill will be felt once individuals are aware of the positive impact it will have on them. If individuals are not aware, they may still discount themselves from jobs thinking that they have an unspent conviction when in fact it is now spent.
3. **Awareness and understanding amongst employers** – Changes to the Act will present a real opportunity to engage with employers in a way that can often be difficult to do. There needs to be capacity available to work proactively with employers to understand the changes and implement any amendments to their policies, practices and guidance. At the same time, there is an opportunity to work on some of the issues that may have materialised as a result of terminology (see response to question 4 above).

More information

Contact	Christopher Stacey Co-director, Unlock 07557 676433 christopher.stacey@unlock.org.uk
Address	Maidstone Community Support Centre, 39-48 Marsham Street, Maidstone, Kent, ME14 1HH
Web	www.unlock.org.uk @unlockcharity
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