Reform of the Rehabilitation of Offenders Act:

Key considerations and recommendations

November 2020

Introduction

Criminal record disclosure is one of the fundamental barriers that prevent people with criminal records securing employment, often unnecessarily. We generally welcome reforms that reduce the length of time a person must disclose and endorse the position that people receiving custodial sentences of more than four years should be included in the right to withhold information about their convictions after a certain period of time.

However, for the system to be fair and proportionate, disclosure periods must be consistent with the severity of the sentence/disposal. We are concerned that reforming disclosure periods for community and custodial sentences in isolation from the other (more common) disposals will create disproportionality: in some cases, people convicted of less serious offences will be obliged to disclose them for longer than those with more serious convictions. This cannot happen.

The following examples illustrate our concerns:

- Approx. 50% of all criminal convictions each year are for motoring offences, which attract an endorsement. An adult convicted of drink driving, resulting in a fine and a ban, would be required to disclose for 5 years from the date of conviction. Under the proposals, this is the same disclosure period as an adult conviction resulting in a 1-year custodial sentence.

- Approx. 77% of convictions result in a fine[1], which (for an adult) carries a 1- year rehabilitation period under the current law. This is the same as a conviction resulting in a 1-year community order under these proposals.

- A juvenile conviction resulting in a 10-month referral order will be disclosable for same time as a 4-month custodial sentence in a YOI.

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1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825364/criminal-justice-statistics-quarterly-march-2019.pdf

As the government continues to engage with stakeholders in relation to these reforms, we urge them to carefully consider our following recommendations.

Recommendations

1. **All sentences (excluding life licences) should have a rehabilitation period**

The average length of custodial sentences continues to increase. We welcome the proposal that convictions resulting in custodial sentences of more than four years should be included in the ROA, but we do not agree that there should be exceptions for people convicted of violence, sexual or terrorism offences. It is not supported by any empirical evidence of recidivism rates by this group of offenders; they are among those least likely to reoffend, yet are also those that are most likely to experience the greatest difficulties in securing employment.

In addition, the government states that they are keen to simplify the ROA. Adding exceptions or exclusions creates complexity. Consider the following case studies.

Case Study 1

Adam has been in and out of trouble for the last 7 years. This is his most recent conviction:

Conviction	Date of Conviction	Court:
1	13 AUGUST 2018	LUTON CROWN COURT
	Offence:	
	1 POSSESSION W/INTENT TO SUPPLY CLASS A DRUGS ON 12 DECEMBER 2017	IMPRISONMENT 5 YEARS FORFEITURE/CONFISCATION ORDER
	2 USING THREATENING/ABUSIVE LANGUAGE ON 12 DECEMBER 2017	NO SEPARATE PENALTY
	3 ASSAULT OCCASIONING GRIEVOUS BODILY HARM ON 02 JANUARY 2018	IMPRISONMENT 2 YEARS TO RUN CONCURRENTLY

In this example, Adam is convicted of multiple offences within the same proceedings, including a drugs offence that results in the 5-year custodial sentence and a violent offence resulting in a 2-year custodial sentence, to run concurrently. When there are multiple offences dealt with in the same proceedings, the disclosure period is determined by whichever sentence has the longest period. In this example, would Adam's conviction remain unspent indefinitely even though the violent offence did not result in a 4-year+ sentence? What if the 2-year sentence were to run consecutively, rather than concurrently?

Case Study 2

Scott has been convicted of a terrorist offence, receiving a 4-year custodial sentence. Part-way through his sentence, he tries to escape and is convicted of trying to evade lawful custody. He gets a further 4 months added to his sentence.

In this example, the terrorism offence would have been capable of becoming spent under the proposals, but is this now not the case because of the subsequent conviction (which is not sexual, violent, or terrorism-related)?

2. **Remove ancillary orders from the definition of sentence under ROA (i.e. so that they do not influence the length of the rehabilitation period)**

The ROA defines a sentence as including 'any order made by a court in dealing with a person in connection with any offence'. This means that orders normally considered ancillary (e.g. restraining orders, compensation orders, forfeiture orders) are dealt with as sentences in their own right.

The inclusion of relevant orders under the ROA has led to the unintended consequence of minor disposals such as conditional discharge orders, and compensation orders being subject to significantly longer periods of disclosure than some custodial or community sentences.

We understand that the MOJ do not hold data of the volume or length of relevant orders. It is critical that government and others can assess the impact of laws and policy.

Most people have no idea about the impact of ancillary orders on rehabilitation periods. This issue has been a lot more prominent (as evidenced by enquiries to our helpline) since the ROA changes under LASPO were implemented in 2014. Prior to this, the length of rehabilitation periods for fines, community orders etc. were mostly as long as – if not longer than – the length of the ancillary order. Consider the following case study.

Case Study 3

In 2012, Mohammed was convicted of common assault against his partner, receiving a 1-year community order and an indefinite restraining order. Two years later, his former partner dies in unrelated circumstances.

In 2020, Mohammed applied to be a Contract Tracer for one of the Public Health England contractors. The contract stipulated that they must not employ anybody with unspent convictions. Mohammed applied for the job and, believing his conviction to be spent, did not declare it, and was offered the role. Upon receipt of his basic DBS certificate, he found that the conviction was still disclosed, so he raised a dispute with the DBS which was not upheld.

Upon speaking to Nacro, it was clear that he had no idea that the indefinite restraining order was still active even though the subject was now deceased and he had no idea that the restraining order had any impact on the disclosure period of his conviction. He had lost his job by the time he was able to get the restraining order ended at court, despite our intervention with the employer.

Case Study 4

In 2016, Brandon was convicted of his third drink driving offence. He was given a fine and a ban 'until further test'. Due to medical reasons, Brandon is now unable to drive. He is physically unable to re-take his driving test, so his convictions remain unspent for the rest of his life.

He has lost a job and had three offers withdrawn because of his criminal record.

By removing ancillary orders from the definition of a sentence and removing the savings provision that created a 5 year disclosure period for all motoring convictions neither disqualifications nor endorsements would determine the length of the time that this information must be disclosed to employers as they do at present.. Endorsements and disqualifications are ancillary to the actual sentence that is imposed as a result of a conviction and therefore it is unequitable for an order that does not form part of the operative sentence to be determinative as to how long the information must be disclosed to employers.

The removal of ancillary orders and endorsements from the definition of a sentence under the ROA would result in the disclosure period being determined by the actual sentence (usually a fine). This should not disadvantage the employer, because the endorsement/disqualification will be visible on an applicant or employee's driving record for a period determined by law. The ROA could be disapplied for driving-related roles and the motor insurance industry, to allow those that fall within this category of employer or insurer to continue to take into account (for a period of time) details of ancillary orders for motoring offences and endorsements. This specific exception should address any concerns that may be raised by the insurance industry.
For all other intents and purposes, the information would no longer be disclosable once the rehabilitation period for the operative part of the sentence has ended, unless an ROA exception applies.

3. Develop a statutory code of practice that organisations requesting criminal record information must adhere to

The system of disclosure and any reforms to disclosure requirements will only be effective if employers understand it and adopt fair recruitment practices in respect of people with criminal records.

While the number of people with criminal records continues to rise, so does the availability of this information to employers and other organisations. The number of DBS checks has risen from 1.4 million in 2002/3 to 5.8 million in 2018/19 and, increasingly, employers tend to search for any online information about applicants or existing employees.

Although campaigns such as Ban the Box and changes to data protection have prompted many organisations to review their policies and procedures towards the recruitment of people with criminal records, research over the last 18 years or so has consistently found that a large proportion of employers have concerns and/or negative attitudes towards knowingly recruiting people with criminal records. Most recently, for example, research conducted by Onward (2019) found that of the 1200 businesses surveyed, almost half (49%) said they would not consider knowingly employing an ex-offender.

The DBS have their statutory code of practice that organisations processing DBS certificates must adhere to, but we would like to see something similar that all organisations requesting and processing criminal record information must follow. This would include practical advice about:

- Enhancing the reputation of the organisations as an inclusive recruiter
- A policy statement about the recruitment of people with criminal records
- Best practice about when and how to request criminal record information during the recruitment process
- How to use the information in an objective way to inform the recruitment decision
- Training required for recruiters

- Data protection considerations

Breaking the Circle (2002) recommended a voluntary Code of Practice and this was widely accepted.

4. Implement legislative sanctions for abuse of the ROA

Enquiries to our Criminal Record Support Service tell us that there is still a big proportion of employers (including recruitment agencies and commissioning bodies) breach the ROA. This is usually by one of following ways:

1. They request a self-declaration of more information than they are entitled to (e.g. by asking for details of any past convictions, rather than unspent only, or anything that would not be filtered on a DBS check, which is only appropriate for ROA-exempt roles). The individual ends up over-disclosing and the information is used against them.

2. They request a higher level of check than is lawful for the role and take information into account that they are not entitled to (this includes commissioners or contractors requiring higher levels of check than are eligible as part of the contractual requirements)

3. They find out about a spent caution/conviction/record by other means – often online – and use it withdraw job opportunities

The ROA aims to offer protection from discrimination for people with past records who have not reoffended. If the applicant/employee has been subject to an unlawful DBS check (point 2 above) and it can be proven that information about a spent conviction was used to prejudice them, they may be able to pursue a claim for compensation.

More often than not, the employer does not go as far as undertaking the DBS check because they find out about the spent criminal record beforehand, either by self-declaration (point 1) or by searching out information online (point 3). In these cases, it's very difficult to take any action against the employer because, despite there being prohibitions within the ROA in terms of the use of spent criminal data in the absence of an exception, there are no sanctions or form of redress available under the ROA where these prohibited steps have been breached.

5. Change the terminology: clearly define the purpose of the Act and change references of 'rehabilitation periods' to 'disclosure periods'

'Rehabilitation period' is not the best way to describe the period during which a conviction is disclosable. It reinforces the view that, while their record is unspent, the individual is not rehabilitated and is, therefore, risky. We still find that employers, recruitment agencies and commissioning bodies/organisations stipulate that they will not consider people with unspent convictions; we believe that changing the terminology could have some impact on the perception of people with unspent convictions.