

# Discussion paper on the Rehabilitation of Offenders Act 1974



## RESPONDENT INFORMATION FORM

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### 1. Name/Organisation

#### Organisation Name

Unlock – for people with convictions

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### 3. Permissions - I am responding as...

Individual

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Please tick as appropriate

**(a)** Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

**Please tick as appropriate**

Yes  No

**(c)** The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

**(b)** Where confidentiality is not requested, we will make your responses available to the public on the following basis

**Please tick ONE of the following boxes**

Are you content for your **response** to be made available?

**Please tick as appropriate**

**Yes**    **No**

Yes, make my response, name and address all available

**or**

Yes, make my response available, but not my name and address

**or**

Yes, make my response and name available, but not my address

**(d)** We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

**Please tick as appropriate**

**Yes**

**No**

## DISCUSSION PAPER QUESTIONS

### Questions – Discussion paper on the Rehabilitation of Offenders Act 1974

**Q1.** Is there a continuing need for legislation that enables people to be rehabilitated<sup>1</sup> such that they do not have to disclose certain previous criminal convictions after fixed timescales? (*chapter 3, page 34*)

Yes  No

Unlock has previously submitted a detailed response to the Ministry of Justice when they consulted on possible reforms in 2011. A copy of this submission has been attached to this response. And is referred in this submission.

**Q2.** Is the 1974 Act still fit for purpose in protecting the public and supporting rehabilitation? (*chapter 3, page 34*)

Yes  No

**Q3.** If your answer to Q2 is “no”, does the 1974 Act require minimal updating or a major overhaul? (*chapter 3, page 34*)

Minimal Updating  Major Overhaul

The Act continues to accept that a significant proportion of people receiving a conviction resulting in a prison sentence of more than 30 months can never be legally rehabilitated. There must be an opportunity for an individual to legally rehabilitate themselves, regardless of their sentence. A tribunal process of some type would achieve this aim for the more serious types of sentences.

It also fails to deal with the changes in the way that information is now readily available – the ‘Google effect’ – and relies on a ‘licence to lie’. The ROA should be amended to reflect the notion of equality for all so that it is an offence to ask about criminal convictions beyond a limited form specific to unspent convictions. Without the force of the law to prevent employers and insurers from asking questions to which they are not entitled to know the answer they have and will continue to discriminate with impunity. Such a change would enable people with convictions to answer questions honestly, rather than being licensed to lie.

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<sup>1</sup> See paragraph 3.12 of discussion paper for an explanation of the definition “rehabilitated person”.

**Q4.** Do the 1974 Act and subsequent public protection legislation strike the right balance in protecting public safety? (*chapter 3, page 34*)

Yes  No – (Too little emphasis on public safety)

No – (Too much emphasis on public safety)

All changes since 1974 have been geared towards degrading the influence and impact of the 1974 Act. Too much emphasis has been placed on the 'process' of criminal record disclosures and checks, rather than looking at whatever information is disclosed and understanding what if any relevance this has. In that sense, there has been too little emphasis on public safety, as there has been little genuine discussion about public safety and what that actually means in terms of criminal convictions.

**Q5.** Do the 1974 Act and subsequent public protection legislation strike the right balance in enabling offenders to be rehabilitated and move on from their offending behaviour? (*chapter 3, page 34*)

Yes  No – (Too little emphasis on rehabilitation)

No – (Too much emphasis on rehabilitation)

The growing number of exceptions from and exemptions to the Act mean that people with old convictions are consigned to an increasingly narrow range of employment and educational opportunities. The Exceptions Order should be overhauled to establish precisely what types of occupations should be included in it. Consideration should also be given as to whether exceptions could be included based on the relevancy of the offence to the role/occupation, e.g. financial convictions for FCA approved-positions.

**Q6.** Are the responsibilities on offenders, employers and others under the 1974 Act sufficiently clear? (*chapter 3, page 35*)

Yes  No

The ROA is confusing for all stakeholders – individuals themselves, practitioners, employers and insurers.

**Q7.** Are there any aspects of the 1974 Act, you would prioritise for reform? (*chapter 3, page 35*)

Yes  No

**Q7a.** If answered 'Yes', what are they? (*chapter 3, page 35*)

- Shortening the length of the rehabilitation periods.
- Extending the provisions of the Act to all sentences.
- Overhauling the Exceptions Order

**Q8.** Are all, some or none of the definitions in the 1974 Act clear and understandable? (*chapter 3, page 41*)

All  Some  None

**Q8b.** If you answered 'some' or 'none', what changes could be made to make the definitions clearer? (*chapter 3, page 41*)

The ROA is a confusing piece of legislation. It is also a unique one, in that it licences a lie. Whether the definitions in the Act itself are clear and understandable is not relevant – individuals rarely seek legislative sources. However, the practical impact of the legislation is important – and that is what needs to be clearer. For example, the fact that employers can legally ask for all convictions, when they're only entitled to know about unspent convictions, makes many people uneasy, as it requires them to lie (albeit legally)

**Q9.** Do you agree it is necessary to include these definitions within the 1974 Act? (*chapter 3, page 41*)

Yes  No

**Q9a.** If not, why not? (*chapter 3, page 41*)

**Q10.** Is it clear what a 'rehabilitated person' means under the 1974 Act after undertaking previous criminal activity? (*chapter 3, page 45*)

Yes  No

The use of this language is a strange one. Evidence surrounding desistance shows that people do not become rehabilitated at a specific point, certainly not after a period of time set out by legislation. That's not to say that the concept of a person with that status isn't important (i.e. becoming a person with a conviction that is now spent). However, to many, an individual can become practically rehabilitated much before this point, and hence it can be confusing.

**Q10a.** If not, what changes could be made to make the meaning of a 'rehabilitated person' clearer? (*chapter 3, page 45*)

A simple statement at the outset of the Act such as '*For the purposes of this Act, and in the circumstances outlined herein, a rehabilitated person shall be treated as though they had never had never committed the offence(s) in question and their sentence(s) shall be regarded as spent*'. The caveats to this should then follow. At the moment, the definition and the caveats are too intertwined.

**Q11.** Is the difference between a conviction and an AtP<sup>2</sup> clear? (*chapter 3, page 45*)

Yes  No

Comments

**Q11a.** If not, what changes could be made to make this clearer? (*chapter 3, page 45*)

**Q12.** Do you think some criminal offences or crimes should never be rehabilitated under the 1974 Act, (i.e. a person would always have to disclose it)? (*chapter 4, page 64*)

Yes  No  Depends on the offence or crime

Everyone sentenced should have the opportunity to become rehabilitated. This may not always be a fixed period of time. See the attached response Unlock made in 2011 which sets out in more detail the concept of a Criminal Records Tribunal (page 19).

**Q13.** If answered, 'Yes' or 'Depends on the crime or offence', what offences or crimes do you think should never be rehabilitated? (*chapter 4, page 64*)

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<sup>2</sup> Section 109 of the Criminal Justice & Licensing (Scotland) Act 2010, (commenced in November 2011) introduced AtPs into the 1974 Act <http://www.legislation.gov.uk/asp/2010/13/section/109>

Homicide  Other violent offences  Sexual offences

Housebreaking/theft  Fraud/bribery/corruption

Criminal damage  Drugs offences

Public order offences  Driving offences

Other (please specify below)

**Q14.** Is a sentence of 30 months the appropriate point at which an offender will never become rehabilitated under the 1974 Act? (*chapter 4, page 64*)

Yes  No

**Q14a.** If you answered 'no', should it be shorter or longer? (*chapter 4, page 64*)

Shorter  Longer

**15.** What do you think the appropriate rehabilitation period should be for the following disposals set out in the table below? (e.g. spent immediately or 1, 2, 3 months etc or 1, 2, 3 years etc.) (*chapter 4, page 65*)

See attached response for Unlock's view on rehabilitation periods.

**Q15a.** If you have stated in Q15 above that some of the above custodial (prison) sentences should be spent immediately, please explain why. (*chapter 4, page 66*)

**Q15b.** If you have stated in Q15 above that individuals under the age of 18, receiving a custodial sentence, should have shorter rehabilitation periods than those aged 18 and above for equivalent criminal activity, please explain why. (*chapter 4, page 66*)

Several reasons suggest that it is appropriate to lessen the burden of a previous convictions for younger people:

- As the law still, in many respects, regards under 18s as children, the ROA should seek to lessen the adverse consequences of criminal convictions upon them. This would recognise their ongoing psychological and emotional development when compared to adults.
- The period should not be so long as to appear insurmountable.
- There are potentially negative consequences regarding access to educational opportunities (e.g. applications for college or university courses) which would disproportionately affect under 18s.

With regards to the sentencing of adults with developmental or learning difficulties, it would be appropriate to allow sentencers the power to apply these shorter rehabilitation periods.

**Q15c.** If you have stated in Q15 above that individuals receiving a custodial sentence of over thirty months should be able to be rehabilitated under the 1974 Act, please specify the length of the custodial sentence and your reasons why you think this would be appropriate. (*chapter 4, page 66*)

See view on a Criminal Records Tribunal (attached)

**Q15d.** If you have stated in Q15 above that some of the above non-custodial sentences should be spent immediately, please explain why. (*chapter 4, page 66*)

**Q15e.** If you have stated in Q15 above that individuals under the age of 18, receiving a non-custodial sentence, should have shorter rehabilitation periods than those aged 18 and above for equivalent criminal activity, please explain why. (*chapter 4, page 66*)

**Q16.** What changes are needed to be made to section 5 of the 1974 Act to make the rehabilitation periods easier to understand? (*chapter 4, page 66*)

There are many variations, but in an attempt to simplify this, there may be a risk of increasing some so that they are grouped with others. This should be resisted.

**Q17.** Is it clear and understandable what happens to the rehabilitation period when more than one sentence is imposed in respect of a conviction? (*chapter 4, page 66*)

Yes  No

This is often not appreciated by individuals.

**Q17a.** If not, what changes could be made to make this clearer? (*chapter 4, page 67*)

A statement should be made in court.

**Q18.** Is it clear and understandable what happens to the rehabilitation period when an individual is convicted of a further offence before a rehabilitation period ends? (*chapter 4, page 67*)

Yes  No

**Q18a.** If not, what changes could be made to make this clearer? (*chapter 4, page 67*)

It would be simpler to regard each conviction in isolation so that previously spent convictions do not become 'reactivated'.

**Q19.** Do you think the rehabilitation period for the first offence should be extended if the offender commits a further offence? (*chapter 4, page 67*)

Yes  No

No, both should become 'spent' in the course of time prescribed based on the sentence for each specific offence.

**Q20.** Is it clear and understandable how rehabilitation periods are set where an individual initially receives an AtP for criminal activity, but then is convicted for the criminal activity after either a) failing to adhere to the terms of the AtP or b) refusing the AtP? (*chapter 4, page 67*)

Yes  No

**Q20a.** If not, what changes could be made to make this clearer? (*chapter 4, page 67*)

**Q21.** Are the protections given to spent convictions/AtPs clear and understandable? (*chapter 5, page 73*)

Yes  No

**Q21a.** If not, what would make this clearer? (*chapter 5, page 73*)

An explanation of this at the point of conviction by the court.

Better guidance accompanying the legislation which outlines to employers, insurers and other interested parties exactly what they are entitled (and not *required*) to ask for and what the sanctions are for failing to comply.

Better support to individuals receiving a convictions so that they understand where they stand.

**Q22.** Should employers be prevented from using spent convictions/AtPs against an employee? (*chapter 5, page 6*)

Yes  No

**Q22a.** If you answered 'no', why not? (*chapter 5, page 73*)

**Q23.** Do you think it should be a criminal offence if an employer does not comply with the principle of not using spent conviction/AtP information against an employee? (*chapter 5, page 74*)

Yes  No

**Q23a.** If you answered 'Yes', what sanctions would you like to see imposed and why? (*chapter 5, page 74*)

Ultimately, criminal. But individuals should also have the opportunity to seek civil recourse through an accessible mechanism.

**Q24.** Do you agree that spent convictions/AtPs should not be disclosed in proceedings before a judicial authority? (*chapter 5, page 74*)

Yes  No

**Q24a.** If you answered 'no' please explain why. (*chapter 5, page 74*)

**Q25.** Do you agree that spent convictions/AtPs should be disclosed in proceedings before a judicial authority? (*chapter 5, page 74*)

Yes  No

**Q26.** Do you agree with the policy approach that limits the protections<sup>3</sup> under section 4<sup>4</sup> of the 1974 Act? (*chapter 6, page 85*)

Yes  No

Placing any individual outside the scope of the Act permanently sends out the message that they are inherently 'unreformable' or 'irreclaimable' and acts as a disincentive to any attempt at reform on their part.

**Q27.** Is it clear and understandable how the limitations under the 1974 Act affect the disclosure of previous convictions? (*chapter 6, page 85*)

Yes  No

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<sup>3</sup> See chapter 5 for further information on the protections under section 4 of the 1974 Act and chapter 6 for information on where these protections don't apply.

<sup>4</sup> <http://www.legislation.gov.uk/ukpga/1974/53/section/4>

**Q27a.** If you answered 'no', what changes would you like to see to make it clearer? (*chapter 6, page 85*)

It needs to be better communicated (either through legislation or separate guidance)

**Q28.** Do you think these limitations are necessary? (*chapter 6, page 86*)

Yes  No

Please explain why.

They allow the judiciary to differentiate between someone being sentenced for the first time and someone who has multiple previous convictions. However, I would argue that a restriction should apply here that only relevant previous spent convictions should be disclosed – i.e. where someone is being sentenced for a violent offence, a previous public order offence may be relevant, but a spent conviction for shoplifting is probably not.

**Q29.** Do you think that the 2013 Order<sup>5</sup> protects the public? (*chapter 6, page 86*)

Yes  No

An Order in and of itself cannot protect the public. The Order mirrors in many respects the Exceptions Order 1975, and has similar flaws (see attached for more information).

**Q30.** Should certain occupations and professions have access to spent conviction information? (Please tick all that apply) (*chapter 6, page 86*)

Yes  No  Depends on the offence or crime

Depends on the occupation or profession

The way in which occupations become 'exempt' from the ROA needs to be seriously looked at. 'Relevant' offences for a particular role should be established, so that there is a 'close nexus' between the nature of the crime and the type of occupation or profession being applied for.

**Q30a.** If you answered, 'Depends on the offence or crime', what types of offences or crimes do you think should be disclosed to occupations and professions even after they are spent? (*chapter 6, page 86*)

Homicide  Other violent offences  Sexual offences

Housebreaking/theft  Fraud/bribery/corruption

<sup>5</sup> <http://www.legislation.gov.uk/ssi/2013/50/contents/made>

**Criminal damage**  **Drugs offences**  **Public order offences**

**Driving offences**  **Other**

This is too blunt a question to answer.

**Q30b.** If you answered, 'Depends on the occupation or profession', what types of occupations or professions do you think should have access to spent conviction information? (*chapter 6, page 86*)

This is too blunt a question to answer.

**Q31.** After a certain period of time, should spent convictions no longer be disclosed under the 2013 Order? (*chapter 6, page 87*)

**Yes**  **No**

Roles included within the Order should only be entitled to certain spent convictions. Blanket access to all convictions is not a particularly sophisticated or effective way of disclosing conviction information

**Q31a.** If you answered, 'Yes', after what period of time should convictions no longer be disclosed? (*chapter 6, page 87*)

**1 year**  **2 years**  **3 years**  **4 years**  **5 years**

**6 years**  **7 years**  **8 years**  **9 years**  **10 years**

**20 years**  **Other**

Unlock has does a significant amount of work in establishing 'filtering' processes for positions exempt from the ROA.

**Q32.** Should spent convictions be disclosed in the types of proceedings found in schedule 1 of the 2013 Order, (e.g. proceedings before the Parole Board for Scotland, proceedings before the Scottish Criminal Cases Review Commission)? (*chapter 6, page 87*)

**Yes**  **No**

But again, only where there is a 'close nexus' with the case currently under consideration and the spent conviction.

**Q33.** Should certain occupations and professions have access to spent AtP information in the same way as convictions under the 2013 Order? (*chapter 6, page 87*)

**Yes**  **No**

**Q34.** Should spent AtPs be disclosed in the types of proceedings found in schedule 1 of the 2013 Order, (e.g. proceedings before the gambling commission, proceedings held in respect of an application for the grant, renewal, or cancellation of a licence to be a taxi driver or private hire driver)? (*chapter 6, page 87*)

Yes  No

**Q35.** Is it clear and understandable how defamation is covered within the 1974 Act? (*chapter 7, page 89*)

Yes  No

**Q35a.** If not, what changes could be made to make it clearer? (*chapter 7, page 89*)

Clarification is needed as to how online reporting of criminal convictions should be dealt with. A requirement for website owners to remove reference to spent convictions from online news reports would alleviate this problem to some degree.

**Q36.** Is it clear and understandable what and how the section on unauthorised disclosure of spent convictions of the Act works? (*chapter 8, page 91*)

Yes  No

**Q36a.** If not, what changes could be made to make it clearer? (*chapter 8, page 91*)

The practical impact of this section is not particularly clear, nor rarely enforced. The number of prosecutions under this section is testament to that. The ROA can therefore be regarded as 'toothless' as there appear to be no consequences for breaching its protections. Similarly, section 123 in part V of the Police Act 1997 needs to be enforced in relation to 'false declarations' being made to obtain standard or enhanced CRB checks for positions which are not exempted from the ROA. To date, there hasn't been a single prosecution under this section and yet anecdotal evidence suggests that this unlawful practice is routine.

**End of Questionnaire**

18<sup>th</sup> November 2013