UNLOCK response to Ministry of Justice Green Paper: Breaking the Cycle: Effective Punishment, Rehabilitation & Sentencing of Offenders

Submitted by

UNLOCK, the National Association of Reformed Offenders

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About UNLOCK

UNLOCK, the National Association of Reformed Offenders is an independent charity and membership organisation, aiming to achieve equality for people with criminal conviction previous convictions.

We believe in a society in which reformed offenders are able to fulfil their positive potential through equal opportunities, rights and responsibilities.

UNLOCK's Mission Statement:

Driven by the needs of reformed offenders, UNLOCK works to reduce crime by helping them overcome the social exclusion and discrimination that prevents them from successfully reintegrating into society.

UNLOCK empowers reformed offenders to break down barriers to reintegration by offering practical advice, support, information, knowledge and skills. It also acts as their voice to influence discriminatory policies, behaviours and attitudes.

To contact UNLOCK:

Head Office: 35a High Street, Snodland, Kent, ME6 5AG
Telephone: 01634 247350
Email: enquiries@unlock.org.uk
Website: www.unlock.org.uk

Registered Charity Number: 1079046
Company Number: 3791535

Introduction

1. UNLOCK is pleased to have the opportunity to respond to this consultation. UNLOCK broadly supports the measures proposed across the green paper along with the notion that other Government departments should work in symbiosis to bring about their own reform to support these proposals.

2. *'Breaking the Cycle'* heralds a welcome shift away from a criminal justice system that is reactive to, and often led by, headline grabbing retribution, towards a more reasoned approach focused on achieving improved long term outcomes for offenders and society as a whole. In particular we fully support reform which regards rehabilitation as a key component of an effective system.

3. UNLOCK's work focuses primarily on how reformed offenders may re-build their lives so that they play an active and positive role in their communities. Recognising that employment reduces the likelihood of re-offending, and that imprisonment fails to prepare leavers either with skills or to be 'work-ready', we fully support the ambition that prisons should be places of industry for those who are able to work. We do however question how this ambition might be achieved with current levels of prison overcrowding, minimal staff levels, reduced budgets and inflexible prison regimes, not to mention the actual physical limitations of prisons.

4. One of UNLOCK's objectives is the reduction of discrimination facing reformed offenders through a combination of employer best practice and reformed legislation that supports their inclusion. No matter how well prepared individuals are for work or how good their skills might be, without the opportunity of suitable work they remain marginalised and more likely to re-offend. We are therefore especially pleased to see that the Rehabilitation of Offenders Act will be reformed. It is this particular issue on which we focus our response.

Response to the consultation question Q17

What changes to the Rehabilitation of Offenders Act 1974 would best deliver the balance of rehabilitation and public protection?

5. The Rt Hon Lord Gardiner acknowledged the UK's position back in 1972 as one that lagged behind other European countries in the way we treated "rehabilitated people" at that time. In his report entitled *Living it Down*, he noted that *"a state of affairs in which a million people are forced to live in fear because of an ancient skeleton in their cupboards plainly requires reform".* Reform took place in the shape of the Rehabilitation of Offenders act 1974 (ROA). We now have in excess of 8 million people with criminal convictions.

6. Whilst the ROA has remained unchanged for some thirty-seven years, the social and political landscape has transformed beyond recognition. Society has recognised the need to be inclusive of all people, bringing in more and more legislation to prevent discrimination based on particular characteristics of minority groups. The Equality Act 2010 now harmonises all previous discrimination law, and strengthens the law to support progress on equality. It aims to protect all people from discrimination, harassment and victimisation and lists the 'protected characteristics' of those to whom it extends including age, gender, disability, race, and religion and so on; this being an all-encompassing list. It does not extend to what comprises one third of men by the age of fifty-three – those with criminal convictions. Lord Gardiner had envisaged that reformed offenders should also take an equal place in society once their sentence and disclosure period had ended and that was the intention behind the ROA.

7. Whilst worthy in aim and a milestone in legislation, the law reform he brought about unfortunately failed to achieve what it set out to do. Thus in 1999 the then Home Secretary Jack Straw heeded the advice of the Better Regulation Task Force and recommended a Government review of the ROA not only to reconsider its rehabilitation periods but also to recognise that *"the changing emphasis in the criminal justice system on effective rehabilitation and resettlement indicated that it was time for a more fundamental review"*.

8. UNLOCK, led by reformed offenders, was to play a significant part in this review by sitting as a Member of the Review Advisory Team which delivered its report, *Breaking the Circle* (BtC) in 2002[1]. This was followed by a consultation with relevant parties and the publication of a summary of their views and the government's response some nine

[1] Home Office, *Breaking the Circle – A Report of the Review of the Rehabilitation of Offenders Act* (London: Home Office, 2002)

months later. Almost all of the recommendations contained in the report were accepted. UNLOCK has lobbied and argued for those recommendations to be implemented through legislative change for some eight years; none of them have.

9. Arguably, many of the recommendations made at the time still stand although in the intervening years enacted legislation in the form of an expanding Rehabilitation of Offenders (Exceptions) Order 1975 and Safeguarding Vulnerable Groups Act 2006 amongst others, has rendered even those recommendations as falling short of forming a revised ROA that would achieve its original aims, let alone come close to achieving equality status such as the 2010 Act delivers.

Licensed to Lie

10. *Living it Down* was based firmly on the premise that reformed offenders should be enabled lie; to say no when asked if they have criminal convictions providing those convictions have become spent. Not unsurprisingly, members of UNLOCK frequently state that they do not feel comfortable beginning an employer/ employee relationship with a lie. Such a relationship should be built on trust and honesty and is undermined from the very beginning. It is a perverse situation whereby a person wishing to 'go straight' is forced to be dishonest.

11. Lord Gardiner noted that other countries suggested that "*employers, insurers and so on should be restrained from asking questions about criminal convictions, except perhaps in a limited form like "have you any convictions which have not been wiped out by operation of law?""*.

12. Although Lord Gardiner elected not to take this approach at the time, times have changed. In 1972 employers were free to ask any questions they like; questions which are nowadays unlawful because they are discriminatory. The notion of equality law was in its infancy with the Equal Pay Act just coming into force in 1970 and then the Sex Discrimination Act in 1975.

13. People are no longer free to discriminate and employers are restricted in what they can and cannot ask a prospective employee. The law now protects anyone who is faced with discrimination and prosecutes the perpetrator. Employers breaching equality law face employment tribunals risking expensive litigation and reputational damage.

14. The ROA must 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 such as Lord Gardiner described. 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 reformed offenders to answer questions honestly, rather than being licensed to lie.

What is the ROA?

15. Allowing employers to ask any questions they like is grossly unfair on those applicants who do not have a knowledge or understanding of the ROA. As BtC indicated, the ROA is extremely confusing and most former offenders (not to mention criminal justice professionals) do not understand it. Our recent research report *Time is Money: financial responsibility after prison*[2], found that only 2% of serving prisoners interviewed could demonstrate an accurate understanding of what the Act meant for them.

16. When applying for a job which is not an exception to the ROA, a person need only declare an unspent conviction, and only then if asked. Given that employers may ask questions about convictions in any manner they wish, it is common for them to ask general questions such as "do you have any criminal convictions?" Since most people who have convictions do not understand the law regarding disclosure, there are two obvious scenarios.

    - People seeking to be as honest as possible unnecessarily provide information which is detrimental to their application. If they do not know they are legally bound to declare only unspent convictions they may unwittingly declare spent ones.
    - Alternatively, they may believe their convictions are spent (when in fact they are not so) and so not declare them.

17. In the first scenario, an employer has knowledge to which they are not entitled. An employer might only disregard a spent conviction if they are fully aware of the ROA. Even then, in reality the inclination to take it into account when making their decision to appoint may be overwhelming. Although doing so is unlawful under the ROA, we have yet to discover an incident of successful action against an employer throughout the thirty-six years the law has existed. Taking an action against an employer is impossible under current equality law because it does not extend to discrimination on the basis of a reformed person's past. This is despite the fact that the majority of employers (who have not previously and knowingly employed reformed offenders) would refuse to appoint anyone with a conviction. The ROA effectively has no 'teeth' and is not a useable means of redress for those whom it should support. Employers can and do act with impunity in their discrimination of potentially excellent employees and in the process deny access to work for a significant proportion of the population.

[2] Bath, C. and Edgar, K. (2010) *Time is Money: financial responsibility after prison,* London: Prison Reform Trust and UNLOCK, the National Association of Reformed Offenders

18. In the second scenario, a person who does not declare an unspent conviction if asked, however innocently, can be dismissed at any point in the future on those grounds even if the conviction has subsequently become spent. That person may continue in their employment in the belief that their job is secure when in fact it is not.

19. Employers also have a poor level of knowledge of the ROA, perhaps because under the current system, the consequences for contravening it are minimal. There is little impetus for employers to gain any better knowledge or understanding of the ROA than reformed offenders themselves because there are no effective sanctions set out against misuse or misapplication of the law. This means that they may inadvertently ask questions, elicit information, and discriminate illegally, without even considering the ROA.

20. Of course, there are employers who act properly in this regard; some will apply good employment policies backed up by good practices. UNLOCK suggests that by shifting the presumption on which the ROA is premised, all employers would be obliged to develop better HR policies leading to more equal opportunities for reformed offenders.

21. In its response to BtC the Government agreed that a voluntary Code of Practice be developed for employers to govern the use of disclosures in the recruitment process. This was despite there being support for it being a statutory code amongst many respondents to the consultation. UNLOCK argues that a voluntary code would be ineffective; it would not carry weight and it would remain the case for many employers that anything short of it being an offence to misapply the ROA leaving reformed offenders without the protection of the law as they have been thus far. It is already the case that the Criminal Records Bureau processes illegal applications despite them being subject to a code of practice. It would be naive to believe that employers would be swayed by a voluntary code when selecting their staff.

22. The ROA also has implications within basic financial services, which are critical to successful engagement in the economy and wider society. In contrast to the employment scenario, when buying insurance a person must declare a conviction *even if not asked a question* by the insurer, as it is considered a 'material fact'. This is true not only for convictions held by the policyholder, but by others covered by the policy, including partners and children. The result is typically a refusal to insure or an unrealistically inflated premium. However, the ROA means that once a conviction is spent, an insurer must not use it in its decision making process. In the case of insurance policyholders, non-disclosure of an unspent conviction, again however innocent, will render an insurance policy legally voidable and any claim does not have to be honoured. As with employers, insurers often have a poor level of knowledge of the ROA and in reality may take into account convictions which are spent. The lack of effective sanctions for breaches of the law inevitably means that they are endemic.

Recommendation 1:

a) The ROA should shift its premise from a 'licence to lie' for reformed offenders to making it an offence to ask an applicant or employee about spent criminal convictions unless authorised (in accordance with excepted professions and occupations) thereby reflecting the philosophy of modern equality law.
b) It must be made an offence under the ROA for an employer or insurer to take into account spent convictions when making disadvantageous employment or insurance decisions however that knowledge may be made known to them.
c) Both a and b must be rigorously enforced in the same manner as similar discriminatory offences are enforced under the Equality Act 2010.

Duty to inform

23. In BtC, one of the recommendations made was that the requirement to disclose a conviction should be explained as part of the delivery of the sentence. This was rejected by the Government. It did however accept another recommendation that clear guidance should be made available through the statutory agencies and other organisations involved with the rehabilitation and resettlement of offenders.

24. When consulted on BtC in 2002, sentencers opposed the notion of explaining the impact of the ROA on people they convict at the time of sentencing. However, UNLOCK argues that there is a proven case for ensuring that this information is given to people by the court at the time they are sentenced as well as making at available at later stages by other statutory agencies (depending on the type of sentence given).

25. Many people receive court disposals which do not bring them into prolonged (or indeed any) contact with criminal justice agencies such as the Prison and Probation Services. Therefore it cannot be supposed by sentencers that such agencies will inform them of their rights and duties regarding disclosure and the ROA. Further, it is relevant for families of convicted people to know what duties will be placed upon a household where a member has a criminal conviction. For example, insurance companies regard a member of a household having a conviction as a 'material fact' even though they may not be party to the insurance contract and will usually either avoid a current home insurance policy or refuse cover. The impact is serious and profound. The sooner they are made aware, the better their opportunity to mitigate against potential future loss.

26. Those who are sentenced to imprisonment should also be informed of the real impact of their sentence from the start. Many go through their prison sentence intent on a course of positive action and making plans for their release only to discover the reality of what having a conviction means in terms of future disclosure requirements. It would be better

that they plan according to what the laws will require of them rather than what they anticipate is the case.

27. Criminal justice agencies have also been shown to have a poor level of knowledge of the ROA. UNLOCK members have experienced prison officers, probation officers, legal advisors, and third sector workers with no, or inaccurate, knowledge of the ROA.

28. It has been UNLOCK's experience that neither prison nor probation officers know the law or give accurate information to prisoners and those released. In fact we are aware of of cases where probation officers have advised people to lie to their insurance company when asked about their criminal conviction. Not only is this reckless and unprofessional, it also rendered the unhappy recipient of that advice liable for committing a fraudulent act and possible prosecution.

29. It is UNLOCK's experience that there is a lack of knowledge about the ROA not just on the part of offenders, employers, insurers and statutory agencies who deliver criminal justice services, but also by the public in general. The full impact of receiving a conviction remains hidden only to be realised at the point where people are trying to leave their crime behind. It would be better to have a more transparent system where all parties know their rights and duties regardless of their status.

Recommendation 2:

In keeping with our 2010 report, *Time is Money: financial responsibility after prison*[3], we recommend that:

a) All people convicted of a criminal offence should be made aware of the ROA and offered information and guidance on the long term impact of having a conviction.
b) Sentencers should inform those they convict about the ROA in general and the impact of their sentence in particular with regard to disclosure.
c) Statutory provision should be made to ensure that people with convictions are able to access information regarding disclosure at any point during or after their sentence.
d) 'Rehabilitation period' should be renamed 'disclosure period' as it is more easily understood and factually accurate.

Reduced disclosure periods

30. One of the key findings of the BtC Report, and one of the reasons for reviewing the Act in the first place, was an acknowledged need to reduce disclosure periods. Frustrated by

[3] Bath, C. and Edgar, K. (2010) *Time is Money: financial responsibility after prison,* London: Prison Reform Trust and UNLOCK, the National Association of Reformed Offenders

lack of any action on that particular issue, Lord Dholakia proceeded to take his Rehabilitation of Offenders (Amendment) Bill through the House of Lords. Thwarted at his first attempt by a General Election in 2009, he began again in 2010.

31. The Bill received its Second Reading in January 2011 and was well received by Lord McNally, Minister of State for Justice, who gave the following warranty, *"I would like the noble Lord, Lord Dholakia, to leave his Bill in abeyance because we are working urgently on the issue and will be introducing legislation. The Front Bench opposite knows how restricted I am in making commitments, but we are undertaking that work with urgency. I also promise my noble friend that he will be fully involvement in our discussions so that when we bring forward proposals they will very much reflect the content and the spirit of the legislation that he has put before the House today"*[4].

32. UNLOCK is encouraged both by Lord McNally's statement and by assurances given in meetings between Lord McNally, Lord Dholakia and UNLOCK on this reform.

33. A comparison between current disclosure periods, BtC proposed periods and disclosure periods proposed by Lord Dholakia in his Bill (being the same as those accepted by the Government in its BtC response) can be seen below:

Sentence	**Current Periods of Disclosure**	**Periods proposed by *Breaking the Circle***	**Periods proposed by amendment**
Fine	5 years	1 year	1 year
Community sentence	5 years	Sentence + 1 year	Sentence + 1 year
Custody < 6 months	7 years	Sentence + 2 years	Sentence + 2 years
6 – 30 months	10 years	Sentence + 2 years	Sentence + 2 years
30 months – 4 years	Forever	Sentence + 2 years	Sentence + 2 years
4 years +	Forever	Sentence + 2 years	Sentence + 4 years

34. After consulting with its Members on the Bill as it was first published in 2009, UNLOCK responded with a Briefing Paper[5] which, though largely supporting the Bill's proposed reform, differed in some aspects.

[4] http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110121-0002.htm
[5] http://www.unlock.org.uk/userfiles/file/disclosure/UNLOCK%20Briefing%20Paper%20-%20Rehabilitation%20of%20Offenders%20(Amendment)%20Bill1.pdf

Changes to length of rehabilitation (disclosure) periods

35. UNLOCK members felt that the existing periods are disproportionate, partly as a result of sentence inflation over thirty-five years, and constitute additional punishment. Long rehabilitation periods do not inspire confidence in employers or the public as they suggest the Government lacks faith in the effectiveness of its own initiatives to reduce re-offending. UNLOCK members were generally supportive of the periods proposed in the amendment, despite the longer periods assigned to those sentenced to custodial sentences of 4 years or more when compared to those proposed in BTC. They felt that the change would immediately make a significant and positive difference to the lives of many reformed offenders, given that it would be retrospective.

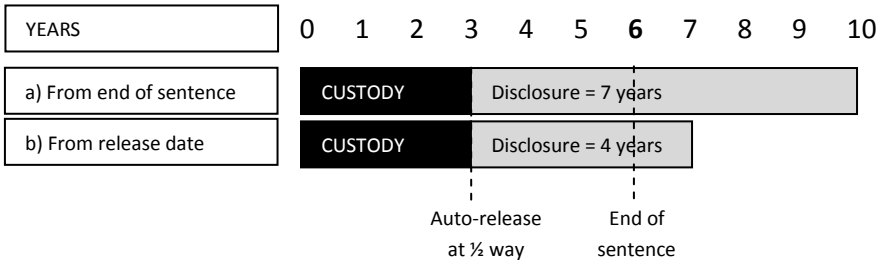
36. However, they felt that the revised periods would only benefit those seeking an increasingly narrow range of employment, as an increasing number of opportunities are exempt from the Act. As such, even with revised periods, reformed offenders would remain locked out of higher status, higher paid jobs and professions, limiting their opportunity to reach their potential and contribute fully to the economy and their communities. An increasing number of jobs continue to be exempt from the protections of the ROA, requiring the disclosure of even the most minor offences. For example, jobs in financial services sector, health and social care, and voluntary community roles such as school governor.

'Effective' rehabilitation (disclosure) periods

37. In addition, UNLOCK members were concerned that the BtC data on reoffending rates for former prisoners (on which the proposed periods were based) relates to the period following release, not the end of the sentence. Hence, evidence indicates that it is the period of time spent in the community without recourse to criminality that is the indicator of change. The following points were raised: -

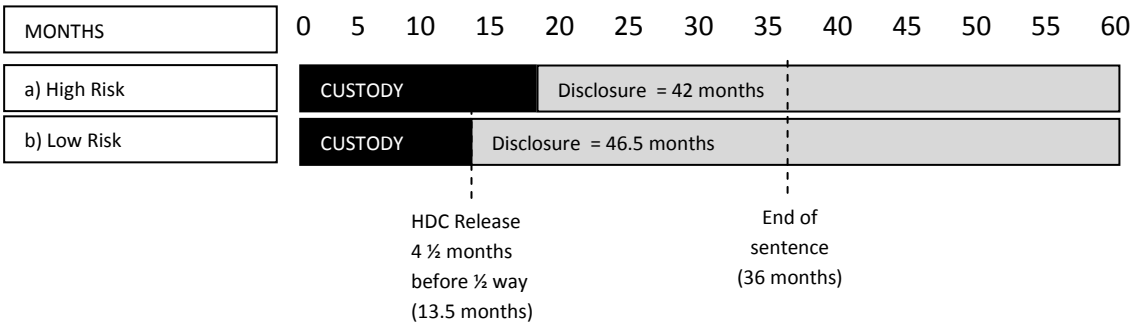
    i. The rules in the Amendment Bill would fail to meet the stated aims as the 'effective' disclosure periods would actually be much longer and more complicated. If the disclosure period started at the point of release from custody, the positive effects on employment and reducing re-offending would be maximised, while the public acceptance test would still rest on the headline periods.

Example: Person serving a 6 year custodial sentence (4 year disclosure) with effective disclosure periods under a) the ROA Amendment Bill and b) UNLOCK proposal

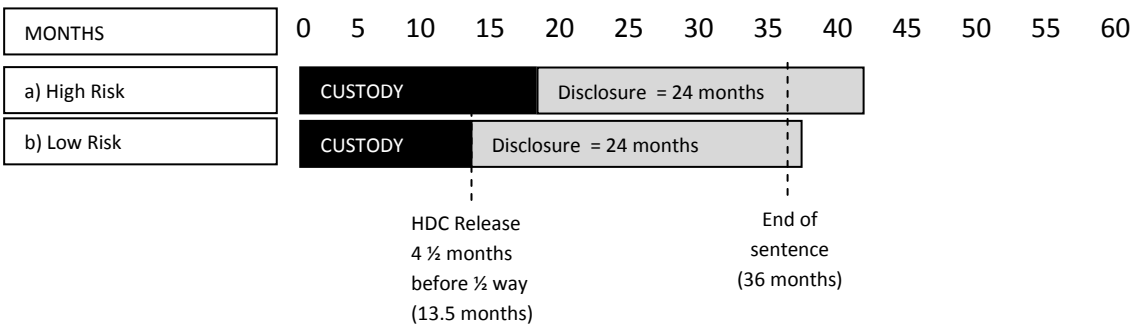


ii. In addition, the approach taken in the Amendment would penalise people who are at a low risk of re-offending, and therefore qualify for release through Home Detention Curfew, as they would suffer a longer disclosure period. This would provide a disincentive to rehabilitation and good behaviour whilst in prison. If the disclosure period started at the point of release from custody, it would remove the disadvantage applied to low risk offenders. Starting the period from end of sentence would also fail to exploit an opportunity to discourage re-offending on release, as if the disclosure period started from the point of release, recalls could result in 'resetting the clock' on the disclosure period.

Example: Person serving a 36 month custodial sentence (2 year disclosure), identified as a) high risk and b) low risk, with effective disclosure periods under the Amendment Bill

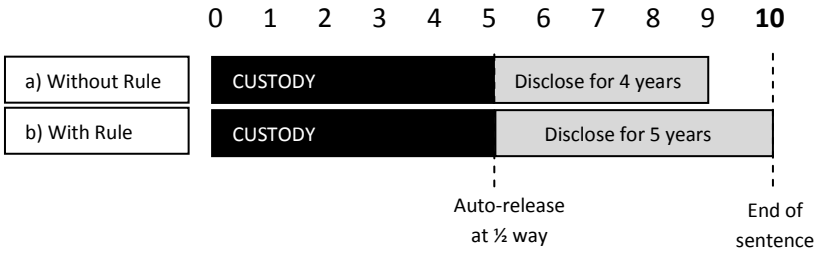


Example: Person serving a 36 month custodial sentence (2 year disclosure), identified as a) high risk and b) low risk, with effective disclosure periods under UNLOCK proposal



iii. On longer sentences, starting disclosure periods from release could allow convictions to become spent before the end of the sentence. Irrespective of the evidence, it is recognised that that this would probably be politically unacceptable. However, to compensate, a rule could be imposed that the disclosure period could not be shorter than the sentence. The rule might be "the conviction will be spent after a period of four years from the point of release, or at the end of the sentence, whichever is the later". This would present individuals with the opportunity of being 'rehabilitated' by the end of their sentence if they had genuinely reformed.

Example: Person serving a 10 year custodial sentence (4 year disclosure), under the UNLOCK proposal, a) without the additional rule and b) with the additional rule



38. A model which links the disclosure period to the point of return to the community provides a good balance between rehabilitation and public protection because it is evidence-based. It should secure support from criminal justice agency staff because it provides an incentive to engage with reducing re-offending initiatives, thereby providing an additional tool for staff and increasing their effectiveness. The model would provide a better fit with the National Offender Management's target to reduce the re-offending rate within a fixed period following release and the data collection that supports it.

Recommendation 3:

a) Disclosure periods should be reduced to those proposed by Rehabilitation of Offenders (Amendment) Bill [HL]

b) The period of disclosure should begin on release from custody and end following the stated periods or at the end of the sentence period whichever is later.

Overhaul the REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) ORDER 1975

Need for reform

39. UNLOCK advocates that the 1975 Order should be reviewed along with the ROA. Given the impact that this Order has on the remit of the ROA, it might even be incorporated in a larger piece of legislation which brings together all criminal conviction disclosure issues. It is worth considering what Lord Gardiner stated to the House at the time the Order was being considered for approval:

    "I would remind your Lordships of the broad principle of the Act, which is that a former offender who remains free of further convictions should at the end of a qualifying period become a "rehabilitated person ", and his conviction a "spent" conviction. But we all accepted when the Act was before your Lordships' House that there would be some situations in which information about spent convictions ought to remain available and usable. In particular, noble Lords expressed concern during our debates about the need to safeguard national security, and to protect the interests of particularly vulnerable members of society, such as children, the sick or handicapped and old people. We have taken account of this concern in the draft Order. The Order steers a reasonable middle course between the twin dangers of drawing the exceptions from the Act so widely that its aim would be nullified, and restricting them so narrowly that the risk of undesirable consequences would be too high."

40. UNLOCK regrets to note that since 1975 the list of exceptions has expanded to the extent that the aim of the ROA is now nullified for too many people and seemingly more than L Gardiner envisaged or sought.

41. Returning once again to the recommendations made in the BtC report, the Government accepted the proposal related to 'maintaining protection'. It was stated that:

    "Certain types of posts, professions and licensing bodies should continue to be excepted from the disclosure scheme. Employers must receive details of all previous convictions so that the public can be protected where there is an issue of national security or where the employee would hold a position of particular trust."

    The Government responded:

    "The Government accepts the review's recommendation, and will seek to ensure that the current exceptions are preserved; future applications for exception judged against strict

criteria; and the range of exceptions significantly clarified as part of the proposed reforms to the legislation."[6]

42. As previously noted, whilst none of the review's recommendations were implemented, there was in 2003 an acceptance by Government that strict criteria should be applied when considering exceptions to the ROA. To this day UNLOCK has been unable to discover what criteria or process is set down for use by the Ministry of Justice when considering applications, nor is it clear how they are critically assessed to discover the purpose to be served by excepting certain roles/professions from the ROA.

Too many exceptions to list

43. If a person with a criminal conviction wants to establish whether they need to disclose a conviction in order to apply for a job, they should be able to do so easily. Having earlier advocated that this information should be made available at the time of sentencing and at various other staging points through the criminal justice system, the current position is that most people contact a third sector body, such as UNLOCK, who will provide information about disclosure periods in accordance with the ROA. Although complicated to calculate at times, the answer will rely on the application of set rules. Discovering whether a particular job itself is excepted from the ROA is another matter.

44. Clearly there are some professions which are obvious exceptions, for example, teacher, nurse or carer of elderly people. There is however no comprehensive list of jobs or professions to which a person may be referred. Furthermore, there is no standard test applied to a particular position or role to ascertain whether it justifies an exception. This results in it being difficult for the Government to protect against an ever-increasing exceptions list. It is also impossible to know what proportion of employment opportunities are protected by the ROA provisions. Furthermore, the availability of basic disclosures is often overlooked as a potential recruitment tool, in providing official records of unspent convictions. Each time a job is approved as an exception, a further Order is made or an amendment to an existing Order with no consolidated list being available. They relate in particular to matters of national security, the care of those who are considered to be vulnerable and to the administration of justice.

    The list includes, though this is by no means fully inclusive:

[6] ROA Review Implementation Team, *Breaking the Circle. A Summary of the Views of Consultees and the Government Response to the Report of the Review Of The Rehabilitation Of Offenders Act 1974* (London, Home office, 2003), http://www.nio.gov.uk/breaking_the_circle_-_government_response_to_the_report_of_the_review_of_the_rehabilitation_of_offenders_act_1974.pdf

Accountants, Actuaries, Chartered psychologists, Court officers, justices' clerks and their assistants, Dealers in securities, Dentists, dental hygienists and dental therapists, Directors, controllers or managers of insurance companies, Firearms dealers, Home inspectors, Judicial appointments, Lawyers and legal executives, Managers or trustees under a unit trust scheme, Medical practitioners, Members of boards of prison visitors, Nurses and Midwives, Occupations regulated by the Gaming Board for Great Britain, Officers and employees of: Prisons, remand centres, removal centres, short-term holding facilities, young-offender institutions, Officers and Employees of: the Crown Prosecution Service, the Serious Fraud Office, the Serious Organized Crime Agency, Her Majesty's Customs and Revenue, Optometrists and dispensing opticians, Pharmaceutical chemists and registered pharmacists and pharmacy technicians, Police constables, cadets and police force employees and assistants, Registered chiropractors, Registered osteopaths, Registered, dieticians, paramedics, occupational therapists, physiotherapists, radiographers, speech and language therapists and clinical scientists, The employees of certain children's charities, Traffic Officers, Traffic wardens, Veterinary surgeons,

An applicant for a job should be told specifically that the job is exempt from the ROA and that they will be required to disclose both spent and unspent convictions.
Then there is another list of occupations exempted from the protections under the ROA because of what the work involves. In these cases a person will usually be required to disclose even both spent and unspent convictions. Exempted categories include:

- Employees of the RSPCA whose duties extend to the humane killing of animals
- Any employment or other work normally carried out in bail hostels or probation hostels
- Any office or employment concerned with providing care services to vulnerable adults which would normally enable access to such vulnerable adults
- Any position whose normal duties include work in a school, children's home or children's hospital.
- Certain officials and employees from government and public authorities with access to sensitive or personal information or official databases about children or vulnerable adults
- Any office or employment concerned with providing health services which would normally enable access to recipients of those health services.
- Any occupation concerned with the management of abortion clinics
- Any occupation concerned with the management of registered nursing homes
- Officers and other persons who execute various court orders
- Anyone who as part of their occupation occupies premises where explosives are kept under a police certificate
- Contractors who carry out various kinds of work in tribunal and court buildings.

As well as excluding particular professions and occupations involving certain kinds of work, the Order also enables employers to require disclosure of spent convictions when asked for particular purposes. Examples include any questions asked:

- to assess a person's suitability to work with children.
- to assess a person's suitability to adopt children, or a particular child, or a question about anyone over the age of 18 living with such a person
- for the purpose of safeguarding national security, if you wish to be employed by certain bodies such as the UK Atomic Energy Authority, the Civil Aviation Authority, the Financial Services Authority or as an officer of the Crown.
- by or on behalf the Football Association, Football League or Premier League to assess someone's suitability to work as, or supervise or manage, a steward at football matches.
- by the Financial Services Authority and certain other bodies involved in finance, when asked to assess the suitability of a person to hold a particular status in the financial and monetary sectors.

45. At the time of the Order being passed in 1975, the list of exceptions was considered to be long even by Lord Gardiner's reckoning: *"I had always envisaged that there would be a number of exceptions; but I must say that I had not anticipated that it would be quite as long as it is. I am still not persuaded about the dental hygienist, and I do not know why nobody can be a traffic warden without exposing any convictions they may ever have had, however long ago."* He acquiesced to demands from other parties at the time simply not to delay passage of the Order. We can be sure that he did not foresee, nor arguably would have supported, the ever-expanding list of professions and jobs falling outside the scope of the ROA rendering it increasingly meaningless.

46. Lord Henley stated to the House when the Grand Committee reported that it has considered the [then] latest Order of 2007: *"It might be useful for the Government to introduce some consolidation of all this so that we know exactly where we are in terms of all the exceptions to the Rehabilitation of Offenders Act. It is a very worthy Act in itself but it is beginning to look as though there might be more exceptions than in the original Act"*. Lord Thomas went to say, *"The temptation to add to the list of exceptions goes on and on. Of course, we on these Benches support the essential necessity of protecting children and vulnerable people, but I want to draw to the Committee's attention how making too many exceptions can lead to a continuation of the problems from which people suffer and can result in further imprisonment. A previous regime, which has fortunately now departed from the Home Office, was anxious always to lock more people up, to the point where the jails are bursting and to do that even when the rate of offending was significantly reducing. That regime has gone and I hope that under the new Ministry of Justice we will see a broader approach to those problems and that the*

exceptions to the Rehabilitation of Offenders Act 1974 will be much fewer and far between".

47. Even where a profession or job does warrant disclosure of spent convictions, there is a case for considering whether all spent convictions are relevant.

48. Again L Gardiner considered relevance at the time of the passage of the Order and stated: "*Perhaps I should pick out one point on paragraph (2), which says in effect that when the Order refers to spent convictions it means all spent convictions, and not just those that might be considered relevant to a particular situation. We considered very carefully whether we should frame exceptions from the Act in terms only of specified convictions. For example, a man applying for a job as a school teacher should be asked to disclose any spent convictions for sexual or violent offences, but not dishonesty. But when we came to draft the Order, we found that to do it in this way would have resulted in an immensely complicated and tangled scheme. Moreover, one cannot often define with any confidence which particular offences might be relevant. So, where there is an exception in the Order allowing questions to be asked about spent convictions, or action to be taken on the basis of such convictions, it relates to the whole of a man's record."*

49. Complication may be an unfortunate but inevitable consequence of creating an effective and equitable scheme. However, to disadvantage a person because of an irrelevant spent conviction does not achieve a fair balance between an employer's need to know and an individual's right to equal opportunities. In an increasingly competitive world, employers (some would say naturally) are more likely than not to hire those with an unblemished past than one with a conviction no matter how old or irrelevant. Technological advances since 1972 should allow such as system to be instigated without unnecessary administrative burdens.

Recommendation 4:

a) The Rehabilitation of Offenders Act (Exceptions) Order 1975 must be overhauled with the MoJ undertaking a full review of current exceptions.
b) Exceptions to be granted on the basis of an individual job role, not the whole employer, industry or profession, giving consideration to the role of basic disclosures and the Independent Safeguarding Authority (or Criminal Records Bureau) in employment vetting. Criteria for assessing Order eligibility must be set down by the MoJ or other department and strictly adhered to.
c) Where an exception can be proved necessary, only relevant spent convictions should be requiring of disclosure.

Criminal Records Tribunal

50. Whilst all criminal record information is currently retained on the Police National Computer for 100 years, convictions may become spent and not subject to disclosure according to the sentence type and length. Even allowing for reform of the ROA to reduce disclosure periods there could still be a considerable time period during which a person may have demonstrated that they have reformed and that disclosure of a criminal record would serve no reasonable purpose. UNLOCK advocates that there should be an opportunity for an individual to apply to a court or other tribunal for their conviction to be made spent ahead of the normal period set down in law.

51. One of the advantages of such a scheme would be to act as an incentive to achieve rehabilitated status so that the stigma of the 'ex-offender' label could be effectively removed as though the conviction had become spent from the mere passing of time. Achieving rehabilitated status could perhaps become a significant 'marker' in the process, a rite of passage, formal recognition of re-integration requiring conscious and deliberate activities consistent with good and active citizenship.

52. There are of course many ways in which such a scheme could be administered and clearly there is scope for a separate examination to explore possibilities. UNLOCK's Vice-President, Judge John Samuels has suggested it could for example, be administered by retired professional judges and indeed has been looking at how this may be possible. Ultimately however, a Criminal Records Tribunal would naturally fall within the scope of a reformed ROA.

Recommendation 5:
A Criminal Records Tribunal should be established where people can apply to have their convictions to become spent ahead of the period set down in the ROA.

Indeterminate Sentences

53. On 31st March 2008, 10,911 prisoners were either Lifers or on IPPs (indeterminate sentences for public protection). In response to our consultation with our Members, some suggested that Lifers should come under the four year disclosure period as they always have to demonstrate to the Parole Board that they do not pose a risk in order to

be released and can be recalled immediately if there is any indication a risk developing. If such a model were to be adopted, careful regard would have to given to ensuring this did not disadvantage long-term determinate sentenced prisoners.

54. Released IPP prisoners may apply to the Parole Board for their license to be cancelled after 10 years. This process could also assign 'rehabilitated' status to the conviction.

Recommendation 6:
Consideration should be given to how Criminal Records Tribunals, administered by members of the judiciary, could offer people without fixed disclosure periods the opportunity to achieve rehabilitated status through a process of evidence submission.

Other Considerations

A filtering process for old/minor convictions

55. In response to Sunita Mason's report in February 2010, *A Balanced Approach*[7], an independent panel was established, chaired by Sunita,[8] to assist in putting recommendations forward to the Home Secretary for filtering old/minor convictions and for them not to be disclosed on standard or enhanced CRB checks. This followed the removal of the step-down procedure that was in place prior to October 2009 which, following the "5 Constables" case,[9] was withdrawn by the Association of Chief Police Officers.

56. UNLOCK is a member of this panel, which is close to making its recommendations. UNLOCK has published its own views in *UNLOCK's Proposed Filtering Approach.* [10]
In short, we believe that a filtering process should be one which:

1. Establishes a clear difference between information held on the PNC and information used for disclosure purposes
2. Is as simple as possible

[7] Mason, S., *A Balanced Approach: Independent Review by Sunita Mason – Safeguarding the public through the fair and proportionate use of accurate criminal record information* (London, Home Office, 2010)
[8] This panel is known as the Independent Advisory Panel on the Disclosure of Criminal Records (IAPDCR)
[9] [2009] EWCA Civ 1079 available at http://www.bailii.org/ew/cases/EWCA/Civ/2009/1079.html
[10] Available to download at http://www.unlock.org.uk/userfiles/file/employment/UNLOCK%27s%20Proposed%20Filtering%20Approach%2011102010.pdf

3. Strikes the right balance between rehabilitation and public protection
4. Automatically 'filters' old/minor conviction information after fixed periods of time
5. Ascertains 'seriousness' by reference to the sentence imposed by the court
6. Only applies to 'clear periods'
7. Covers all job positions and all types of disclosure
8. Ensures that, once filtered, convictions are not disclosed
9. Makes the necessary changes the Police Act 1997 and the Rehabilitation of Offenders Act 1974 to provide legal clarity on what needs to be disclosed
10. Is accompanied by clear information & advice regarding retention and disclosure of information on the Police National Computer

57. A filtering process is intended to recognise a point in time where it is felt it is no longer necessary to disclose for specified purposes.

58. The ROA is intended to give people with convictions an opportunity to leave crime behind and not to be discriminated against except in exceptional circumstances where specifically necessary for the protection of the public.

59. UNLOCK's view is that any filtering process introduced should work alongside reform of the ROA. For example, filtering should apply to basic, standard and enhanced disclosures. It would not be logical for a conviction to be filtered (and therefore not appear on a standard or enhanced disclosure) but not be spent under the ROA (and therefore appear on a basic disclosure). In this situation, coordinated amendments to the ROA, the Exceptions Order and the Police Act could ensure that filtering convictions had the same legal status as spent convictions, solving the issue.

60. The Protection of Freedoms Bill offers the Government the opportunity to introduce coordinated revisions to the criminal records disclosure regime as a whole. Amendments could be made to the ROA, the Exceptions Order and the Police Act within this Bill.

Recommendation 7:

Reform of the ROA to be taken forward in the Protection of Freedoms Bill, alongside other changes to the criminal records regime, including the introduction of a filtering process.

UNLOCK's Proposed Disclosure Regime

61. The table below is intended to place UNLOCK's recommendations for reform of ROA disclosure periods into the context of the wider criminal records regime, which when viewed as a whole illustrates how our proposed changes to the ROA would deliver the right balance between rehabilitation and public protection.

Purpose		**Positions covered by the ROA**	**Positions exempt from the ROA**	**Positions defined as "regulated activity"**	**Positions defined as "regulated activity"**
Example		Factory worker	Insurance sales person	Primary school teacher	Primary school teacher
Method		Basic CRB check	Standard CRB check	Enhanced CRB check provided to employer	Vetting body barring decision
Sentence	Life Sentence and IPP's	On application	On application	On application	In perpetuity
	Custody - more than 4 years	4 years from release	Disclosed unless filtered	Disclosed unless filtered	In perpetuity
	Custody - more than 6 months, up to 4 years	2 years from release	Disclosed unless filtered	Disclosed unless filtered	In perpetuity
	Custody 6 months or under	2 years from release	Disclosed unless filtered	Disclosed unless filtered	In perpetuity
	Probation	1 year from end of Probation	Disclosed unless filtered	Disclosed unless filtered	In perpetuity
	Fine	1 year	Disclosed unless filtered	Disclosed unless filtered	In perpetuity
	Caution	Nil – not disclosed	Disclosed unless filtered	Disclosed unless filtered	In perpetuity
	Reprimand or final warning	Nil – not disclosed	Disclosed unless filtered	Disclosed unless filtered	In perpetuity
	PND, FPN	Nil – not disclosed	Nil – not disclosed	Nil – not disclosed	In perpetuity

Comparative analysis needed

62. When Lord Gardiner prepared his report, Living it Down, he examined the “rehabilitation laws” in other countries. UNLOCK similarly proposes that the MoJ conduct a comparative analysis of other jurisdictions, in particular European states, to examine how different regimes deal with criminal convictions and their disclosure. For example, France has a sophisticated approach to criminal records, based on the notion of "right to be forgotten" rather than a "right to know" as well as a Criminal Records Tribunal.

Recommendation 8:
The MoJ should conduct a comparative analysis to examine how other countries deal with criminal records.

Summary of UNLOCK’s recommendations in response to Q17

What changes to the Rehabilitation of Offenders Act 1974 would best deliver the balance of rehabilitation and public protection?

Recommendation 1:

a) The ROA should shift its premise from a ‘licence to lie’ for reformed offenders to making it an offence to ask an applicant or employee about spent criminal convictions unless authorised (in accordance with excepted professions and occupations) thereby reflecting the philosophy of modern equality law.
b) It must be made an offence under the ROA for an employer or insurer to take into account spent convictions when making disadvantageous employment or insurance decisions however that knowledge may be made known to them.
c) Both a) and b) must be rigorously enforced in the same manner as similar discriminatory offences are enforced under the Equality Act 2010.

Recommendation 2:

a) All people convicted of a criminal offence should be made aware of the ROA and offered information and guidance on the long term impact of having a conviction.
b) Sentencers should inform those they convict about the ROA in general and the impact of their sentence in particular with regard to disclosure.

c) Statutory provision should be made to ensure that people with convictions are able to access information regarding disclosure at any point during or after their sentence.
d) 'Rehabilitation period' should be renamed 'disclosure period' as it is more easily understood and factually accurate.

Recommendation 3:

a) Disclosure periods should be reduced to those proposed by Rehabilitation of Offenders (Amendment) Bill [HL]
b) The period of disclosure should begin on release from custody and end following the stated periods or at the end of the sentence period whichever is later.

Recommendation 4:

a) The Rehabilitation of Offenders Act (Exceptions) Order 1975 must be overhauled with the MoJ undertaking a full review of current exceptions.
b) Exceptions to be granted on the basis of an individual job role, not the whole employer, industry or profession, giving consideration to the role of basic disclosures and the Independent Safeguarding Authority (or Criminal Records Bureau) in employment vetting. Criteria for assessing Order eligibility must be set down by the MoJ or other department and strictly adhered to.
c) Where an exception can be proved necessary, only relevant spent convictions should be requiring of disclosure.

Recommendation 5:

A Criminal Records Tribunal should be established where people can apply to have their convictions to become spent ahead of the period set down in the ROA.

Recommendation 6:

Consideration should be given to how Criminal Records Tribunals, administered by members of the judiciary, could offer people without fixed disclosure periods the opportunity to achieve rehabilitated status through a process of evidence submission.

Recommendation 7:

Reform of the ROA to be taken forward in the Protection of Freedoms Bill alongside other changes to the criminal records regime, including the introduction of a filtering process.

Recommendation 8:

The MoJ should conduct a comparative analysis to examine how other countries deal with criminal records. End.