

# Ministry of Justice consultation on Open Justice – Unlock response, September 2023

## Introduction

Unlock is a national independent advocacy charity that supports, speaks up and campaigns for people facing stigma, prejudice and discrimination because of their criminal record. Our mission is to advocate for people with criminal records to be able to move on positively in their lives. We: support people with criminal records to navigate their way through challenging times, research and raise awareness of the systemic issues that people are facing, and campaign for changes to legislation, policies and practices of government, employers and others.

Our website provides vital information and guidance for people with criminal records, and we also have a helpline run by dedicated staff and volunteers, which deals with specific queries. People can [contact the helpline](#) in various ways, including via email, WhatsApp or our free phone line.

This document sets out Unlock's response to the Ministry of Justice [consultation on Open Justice](#), launched in May 2023. What follows is our response to the questions in the consultation that are pertinent to our work at Unlock (we did not respond to all questions in the consultation).

## Questions

### Open Justice

1. Please explain what you think the principle of open justice means.

Key to open justice is transparency. This includes not only the public and media having open access to court proceedings but there also being transparency in the way the system works. This means how the system works should be clear and understandable. This is a vital part of open access to proceedings, as without it being possible to understand the process being observed, the positive impact of public and/or media access is limited. Such transparency allows for healthy and effective scrutiny of the system, which strengthens the legitimacy of the criminal justice system. Transparency is required throughout the criminal justice system for the principle of open justice to be realised.

A legitimate criminal justice system relies on people knowing what the law is, how it is imposed and how it may impact them. Unlock supports individuals with criminal records, who are often

having to navigate challenges and barriers many years after they have been convicted of an offence or received a caution, with the impact of that offence staying with them for far longer than they may have anticipated. Besides the immediate punishment resulting from a conviction, this long-term impact makes up a crucial part of what an individual may, or may not, be able to foresee at the point of committing the offence. The principle of open justice, if effectively realised, would ensure any individual better understands the criminal record system so they can foresee the long-term impacts of committing an offence beyond just the immediate sentence.

3. What is your view on how open and transparent the justice system currently is?

At Unlock, we run a helpline that provides advice to over 9,000 people a year, as well as providing extensive support to individuals and organisations via our website. Many of these calls are from individuals who require support in understanding their criminal record and the implications it has, or from people dealing with situations that show employers do not fully understand the criminal records system. We also provide advice and support to employers directly to ensure that they are using the criminal records system appropriately.

It is clear to us, through the nature of the work we carry out, that the criminal record system is not clearly understood. This contributes to the fact that it is difficult for people to navigate. Without the public (and organisations) having a good understanding of the criminal record system, this vital part of the justice system lacks transparency. This lack of public understanding in relation to criminal records undermines open justice more broadly; a more open and transparent system would support better understanding. We have provided further comment on this in relation to public legal education later in the consultation.

5. Are there specific policy matters within open justice that we should prioritise engaging the public on?

Better public legal education is required, both regarding the criminal justice system as a whole and in relation to criminal records. This should be supported by the provision of clear and easily understood information that is accessible to all. The impact a criminal record has on an individual can last for many years, creating barriers preventing access to employment, finance, housing and travel. As such, better public legal education would strengthen the principle of open justice as it would support a more complete understanding of the justice system and specifically the long-term impact of a criminal record.

This improved public legal education needs to take three forms in order to be effective. Firstly, there should be better focus on ensuring that the whole system, including that of criminal records, is better understood so individuals can better understand and follow cases. This would also support more effective scrutiny and contribute to the legitimacy of the criminal justice system. Secondly, and more specifically, public legal education should enable people to have a clearer understanding of the long-term impact of a criminal record through better communication of the criminal records system. Finally, the information necessary to support improved public legal education should be easily accessible and clearly formulated. At present, to effectively understand the criminal records system, for example, an individual would be

required to digest multiple pieces of legislation and their many complex and related amendments that have been made over time.

Under the foreseeability principle, someone cannot be retrospectively punished for something that wasn't a crime at the time it occurred, or subject to a punishment more punitive than that understood at the time of the offence. To support this, it is important that the public understand the likely punishments linked to certain offences. We believe that a criminal record can end up being an additional punishment, even though not part of a sentence and, as such, understanding of the criminal records system is crucial to the foreseeability principle.

## Single Justice Procedure (SJP)

25. What do you think the government could do to enhance transparency of the Single Justice Procedure (SJP)?

As the single justice procedure (SJP) is carried out in a closed environment, where even the defendant is unable to attend, it is of limited transparency. This cannot really be addressed without changing the process. However, there are things that could be done to negate the fact it is not a transparent process.

- The scope of SJP should be made clear. The SJP is limited to non-imprisonable offences, the majority of which will be non-recordable, but there is currently a lack of clarity regarding what recordable offences can be dealt with under SJP. We have engaged previously with His Majesty's Courts and Tribunals Service (HMCTS) to try and determine whether recordable offences can be dealt with under SJP and have been told that it would be factually incorrect to say that all SJP offences are non-recordable. HMCTS should provide a clear list of non-imprisonable offences that are recordable, and therefore could be dealt with via SJP and result in a conviction appearing on someone's criminal record. At present, the criminal records implications of processing under SJP are unclear and, as such, lacking in transparency.
- Better information about whether a case dealt with via SJP can lead to someone having a criminal record should be provided to those being invited to plead guilty and accept their case going through the SJP. It should be clearly stated on the information notice initially sent to someone whether the charge involves a recordable offence and, accordingly, the criminal record implications of accepting a conviction this way. This would be partially addressed by clearer information about offences that can be dealt with under SJP, as noted above, but full transparency would require this information to also be communicated directly and clearly to individuals directly as needed.
- Allow greater scrutiny of how the SJP is working. This would include flagging how many cases being dealt with involved recordable offences, and therefore resulted in something being added to someone's criminal record.

In our view, the transparency of the single justice procedure could be enhanced both in terms of offences that fall under it and through the way in which it is administered. A review of the process may be necessary to ensure such transparency.

## Public legal education

58. Do you think the public has sufficient understanding of our justice system, including key issues such as contempt of court? Please explain the reasons for your answer.

No. Further comment provided below in answer to question 60.

60. What do you think are the main knowledge gaps in the public's understanding of the justice system?

Based on the volume of calls our helpline receives, and the range of employers we support, it is clear that the criminal records system represents a significant knowledge gap in the public's understanding of the justice system. We regularly support callers who are having difficulty understanding their criminal record and the implications it carries with it. This is symptomatic of an insufficient understanding of the criminal justice system as a whole but the criminal record system is particularly legally complex and difficult to understand. Similarly, we provide support to employers whose practice around criminal records is often poor. While this is sometimes the result of failure to follow guidance or an over-zealous use of the system, it can also be the result of the guidance that is available being insufficiently clear or accessible.

Firstly, public legal education around criminal records could be improved. In answer to question 5, we have provided further comment on this issue.

Secondly, the criminal records system itself could be made clearer and easier to understand. In order to understand spending periods and the criminal records disclosure system, there are two primary pieces of legislation to consider: the Rehabilitation of Offenders (ROA) Act 1974, the Police Act 1997 and multiple amendments via other primary legislation (such as the Police, Crime, Sentencing and Courts (PCSC) Act 2022). Furthermore, the use of statutory instruments to make amendments (and often, then, amendments of amendments) further complicates the picture. This is a complex scene to navigate, further complicated by the fact legislation as it is available online does not always represent the most up to date legal position given amendments are often not reflected. In short, this is not something that an average person can reasonably be expected to understand. The legal basis of the criminal records system urgently needs to be made clearer. Such an improvement would allow for more effective public legal education related to criminal records.

These issues have a significant impact on individuals as employers often don't understand what they are entitled to know or ask. This can lead to people providing more information than an employer has a right to request or collect, leading to someone being discriminated against unfairly. This also puts employers at risk of breaching data protection laws. In addition, criminal records disclosure is sometimes used by employers as a form of honesty test. This is both poor practice and itself flawed given the previously noted challenge in understanding the criminal records disclosure system. We therefore believe it would be beneficial for there to be a more robust framework for employers to work within in relation to criminal records. This would allow employers to feel more confident that they were engaging appropriately with the criminal records system, while also giving individuals reassurance that there is effective accountability to safeguard their right. Addressing this gap in public understanding would have wider positive

impacts if it allowed more people with criminal records to have access to as wide a range of employment opportunities as possible.