The complexity of the Rehabilitation of Offenders Act, 1974

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. We work in England and Wales. A core mission for Unlock is to provide advice and help for people in respect of their criminal record and any consequential barriers. Our website provides vital information and guidance, and we have a helpline provided by dedicated staff and volunteers, which deals with specific queries. People can contact the helpline via email, WhatsApp or our free phone line. The lived experiences we hear through our helpline provide a major foundation for our policy and advocacy work.

The Rehabilitation of Offenders Act (ROA) was passed in 1974. It grew out of the work of the Joint Working Party on Previous Convictions (chaired by Lord Gardiner, "the Gardiner Committee"), whose report was entitled "Living It Down: The Problem of Old Convictions".[1] The legislation passed through parliament between the two general elections of 1974 and took effect in 1975.

To mark the ROA's fiftieth anniversary, this briefing examines the way in which the legislation has evolved over time and how the rights and obligations it established stand up in the modern world. Legislative changes to the ROA have created an ever-more complex set of rights and responsibilities. These, combined with societal changes, mean that the time is right for review and reform of the ROA and the criminal records regime it created.

Background

The ROA established the right for someone's past criminal convictions to be forgotten by setting out limits as to when they need to disclose them. Under the ROA, most disposals have a 'rehabilitation period', during which the caution or conviction is considered 'unspent' (some convictions will never become spent, so the person concerned is unable to ever be legally considered rehabilitated). A rehabilitation period only begins as a sentence concludes, though cautions, and some convictions, do become immediately spent upon completion: once the rehabilitation period ends, the offences become spent. Before something becomes spent, someone would have to disclose it when asked – including during recruitment processes, applying for higher education or to get insurance. However, once something becomes spent, it is only disclosable in specific circumstances, set out in the Exceptions Order (see below). This principle is fundamental in supporting people to move on with their lives.

[1] https://files.justice.org.uk/wp-content/uploads/2015/01/06171928/LivingItDown.pdf

A year after the ROA was passed, the ROA Exceptions Order followed. This set out certain regulated roles for which exceptions would be made. These exceptions permit employers to access more criminal record data, for specific roles and situations. Spent cautions and convictions, and sometimes other non-conviction information, can be shared. Under this framework, employers can conduct elevated DBS checks (Standard, Enhanced or Enhanced with barring). See below and on our website for more information on DBS checks.

The Exceptions Order has been subject to periodic changes. Over time more roles have been added. These are typically roles involving work with vulnerable groups, or work involving certain levels of professional responsibility. Changes to the way information is disclosed for these roles have also occurred. One of the biggest, introduced in May 2013, was to allow some cautions and convictions to become protected after a period of time. This mechanism, known as 'filtering', allows many spent convictions to be removed ("filtered") from elevated checks. These rules were further changed following a 2019 Supreme Court judgement. Details of the current situation can be found on our website.

Besides the Exceptions Order, the ROA also interacts with the Police Act (1997). This established the modern system of criminal records checks, administered by the Disclosure and Barring Service (DBS)[2]. The ROA determines what parts of your criminal record you legally must disclose and when; the Police Act determines what information about your criminal record will be included in a criminal record check. There are various levels of criminal records checks; the lowest being Basic, which reveals all unspent cautions and convictions. These can be asked for by any organisation, in any circumstance. The elevated levels are Standard, Enhanced and Enhanced with Barring. All elevated checks include unspent (and unfiltered) cautions and convictions, while Enhanced checks also include police information. Elevated checks can only be carried out in relation to roles covered by the Exceptions Order.

In addition, data protection legislation interacts with the ROA, as criminal records data is specifically referenced as a distinct category of sensitive information. As such, employers and others who collect and hold this data need to be able to justify doing so and ensure that they handle it appropriately. While this is not an explicit part of the criminal records regime, it is another layer of consideration and complexity for employers.

Issues

To mark the 50th anniversary of the ROA (passed in 1974, it took effect in 1975), Unlock is calling for a fundamental review of the legislative framework governing criminal records disclosure. The overly complex nature of the legislation is a key reason why reform is needed. This complexity has arisen partly due to various amendments to both primary and secondary ROA legislation over the last 50 years. These amendments have created idiosyncrasies, contradictions and challenges for both individuals and organisations to navigate legal rights and requirements.

One particular issue with the ROA is the complex legislative landscape in which it exists. Not only has it been amended numerous times, but its application involves interactions with other pieces

[2] This was previously know as the Criminal Records Bureau (CRB), so occasionally references to CRB checks remain in use in some places.

of legislation such as data protection legislation and the Police Act 1997. Since 1975, the ROA itself has been amended 53 times, predominantly in the last 30 years. Additionally, the Exceptions Order and the Police Act – the related pieces of legislation noted above, with the latter having its own secondary legislation attached – have themselves been amended 23 and 50 times respectively.[3] These amendments have not always been made with consideration of the impact they may have on the ROA or how they may interact.

Although they often create and embed complexities, many of the changes that have been made over time have been positive. For example, following a 2019 Supreme Court judgment, the rules on what can become protected were changed to allow more things to be filtered off elevated dc checks. More recently, the Police, Crime, Sentencing and Courts Act 2022 (PCSC), implemented in October 2023, reduced spending periods and allowed some prison sentences of over four years to become spent for the first time. These changes represent progress in reducing the amount of information people have to disclose in certain circumstances, better supporting the principle of rehabilitation.

Inevitably however, piecemeal changes have entrenched the idiosyncrasies and contradictions inherent in such a complex regime. For example, the fact that certain court orders impact on spending periods can mean that less serious offences remain unspent for much longer periods. Another example is where a contradiction was introduced between the ROA and the Police Act, leading to some cautions and convictions being eligible for filtering (so removed from elevated DBS checks) despite being unspent (therefore visible on basic DBS checks). We responded to the government's solution to this problem here. The fact that such an anomaly emerged demonstrates the excessive complexity of the regime.

To compound the confusion, these changes are rarely effectively communicated or made easy for people to understand. Online access to up-to-date versions of legislation is the responsibility of the National Archives. Yet amendments are not always quickly reflected in the accessible legislation. Perhaps inevitably, then, complications and confusions arise. Expecting people to navigate and interpret multiple pieces of legislation to understand what changes have been made and how it impacts them is unrealistic and undermines transparency. Even where the legislation is up to date on the website, it is still unrealistic to expect anyone without legal knowledge or expertise to read and understand complex legislation. This makes it challenging both for people with criminal records to understand their rights and for organisations to understand their responsibilities so they can be confident they are acting lawfully. Just one example of this is where people have to navigate legislation to try and understand what is or isn't a recordable offence, and therefore part of their criminal record.[4] A complex system is made harder to navigate by this shortfall in accessibility and lack of transparency.

The complexity of the legislation and the difficulty of interpreting it is reflected in the contacts our helpline receives. Across the last twelve months, we received 10,054 contacts (over 800 a

[3] All amendments can be found by searching for the relevant acts on https://www.legislation.gov.uk/.
[4] For more details, see this piece on our website concerning the challenge of understanding what makes up a criminal record: https://unlock.org.uk/what-is-on-my-criminal-record/.

month).[5] Many of these focus on confusion about what needs to be disclosed or about what actually would appear on a DBS check. Around a third of these contacts specifically included questions about the ROA or seeking direct disclosure advice.[6] Indeed, it is likely safe to assume that the other two-thirds would have direct implications relating to the ROA too, though were perhaps recorded separately if they were about a specific topic (e.g. travel, housing, employment). The number of questions we are asked about these pieces of legislation demonstrates the complexity of the system and the lack of clear information available.

The lack of clarity around the ROA can lead to both under- and over-disclosure of criminal records. This can be hugely problematic. When people don't know what information they are legally entitled to withhold they can often end up over-disclosing. By over-disclosing, a person gives an employers access to information about their criminal record that employers neither have a right to nor should be using to make decisions. This obviously undermines the fundamental principle of the ROA to allow people to move on. People can then end up excluded on the basis of spent convictions, for example, with that information having been originally shared in good faith. Similarly, people can sometimes under-disclose, withholding information they ought to have shared. This can mean organisations don't get the information they need to carry out risk assessments and make the most appropriate decisions. There is also a risk that organisations will use someone's disclosure as an honesty check, excluding them due to dishonesty when a DBS check reveals more information. Honest mistakes can deepen stigma and lead to exclusion and the purpose of criminal records checks can be undermined. Clarity in the system would help everyone.

Finally, it is worth noting that the world we live in today has changed radically since the ROA was passed in 1974. Firstly, there has been a widening of criminal justice interactions, with an ever-increasing list of criminal offences. Ever more people have a criminal record; in 2024, the figure stands at over 12.5 million. Given the trend of escalating, punitive sentences, increasing numbers of these people have to disclose details of that record for longer (as more substantial sentences carry longer rehabilitation periods). Secondly, the rise of the internet has had a huge impact on someone's right to be forgotten. Online reports of convictions often mean that criminal records information about an individual remains visible online indefinitely. A societal drift towards an assumption of a "right to know" has contributed to employers conducting online searches about potential employees. In doing so, they may gather spent criminal records information they have no right to hold. As such, the right to be forgotten, as established in law by the ROA, is undermined. Legislation fit for the modern world is needed.

Conclusion: the way forward

Change is needed. The legislative framework governing the criminal records regime is overly complex and therefore ineffective. This framework requires simplification. Doing so would benefit people with criminal records as well as employers and others who collect and interpret criminal records data. Simplified legislation would enhance understanding of the criminal records regime for all, increasing the likelihood of fairness.

[5] For the year running 1/10/23 - 30/09/24.
[6] This is based on contacts recorded under "disclosure advice" or "ROA".

The first step towards a simplified framework would be a wholesale review of the criminal records regime. This could investigate the ways in which it is, or is not, achieving what it is intended to. The ROA itself grew out of a committee examining the issue of people being unable to move on from their criminal records. A similar committee could do valuable work now to assess where change is needed.

Further information

Please visit our website to find out more about our work. Last year we published a briefing on the over-arching arguments for reform of the criminal records regime.

If you'd like to know more about any of the issues discussed in this briefing, or any of our work more widely, please email policy@unlock.org.uk.

Registered charity no. 1079046