Justice Committee

Management of Offenders (Scotland) Bill

Written submission from Nacro

About Nacro

We are a national social justice charity with more than 50 years’ experience of changing lives, building stronger communities and reducing crime. We house, we educate, we support, we advise, and we speak out for and with disadvantaged young people and adults. We are passionate about changing lives. We never give up.

Introduction

1. We welcome the Scottish Government’s commitment to generally reducing the length of time that people with past convictions are legally obliged to disclose them. We have consistently argued that more needs to be done to remove the barriers that people with criminal face when trying to move forward with their lives in positive and constructive ways, such as securing employment or undertaking education courses or training. For many years, we have been a staunch advocate for a more equal balance between rehabilitation and protection.

2. We also welcome the move away from the term ‘rehabilitation’ to ‘disclosure’, although note that it seems a little contradictory to fall under a piece of legislation that is called the ‘Management of Offenders’ Bill.

3. Nacro runs the Resettlement Advice Service, through which we offer support and advice regarding access to employment, housing and education to people with criminal records and professionals working with them. We provide training to employers and organisations about assessing and managing risk in relation to criminal records.

4. We have concentrated our response to this consultation on part 2 - the disclosure of convictions.

Response to Consultation Questions 4, 5 and 6

(4) Overall, do you support Part 2 of the Bill? The Scottish Government’s view is that it will provide a more appropriate balance between the public’s right to protection and a former offender’s right to “move on” with their life, by, overall, reducing the legal need for disclosure. Do you agree?

Criminal record disclosure is one of the main barriers that people with criminal records face when trying to secure employment. Our experience indicates that this is largely due to employer perceptions and misunderstandings, often based on false assumptions around perceived risk to an organisation’s security and harm prevention, as well as a belief that people with criminal records lack personal attributes such as honesty and reliability. In contrast, research which surveyed
employers’ attitudes indicated that employers who have knowingly employed people with criminal records have reported a positive experience characterised by hard work if not harder, than those with no criminal record\(^1\).

We cautiously welcome these proposals which will bring the Scottish legislation more closely in line with the amendments that were implemented in England and Wales in 2014. However, despite these changes, we believe that the law does not go far enough to assist people with criminal records to draw a line under their past. At a time when employers report experiencing chronic skills shortages, we encourage Government to do everything possible to strike a balance between removing the barriers that people with criminal records face in accessing employment with the need to safeguard those at risk of harm.

Nacro were a founding member of the Ban the Box campaign in the UK, which calls on employers to assess applicants on their skills and abilities first before requesting criminal record declarations. The principles of this campaign come from the American campaign of the same name; the key difference being that in America, many states and cities have made it illegal for employers to ask for criminal record declarations during the initial stages of recruitment. They did so on the basis that there is an overrepresentation of black and minority ethnics (BAME) with criminal records and that by discriminating against ex-offenders, employers were discriminating predominantly against BAME communities.

We fully support legislative changes that would make it unlawful on the grounds of indirect discrimination for employers to request criminal record information at the initial stage of recruitment and recommend that this is considered under the existing proposals. This follows the recommendation in the recent Support for Ex-Offenders’ Inquiry that ‘the Government should consider making banning the box a statutory requirement for all employers’. This is one way in which the proposed Bill could go further in meeting its stated aims.

Given the impact that disclosure can have on future education and employment prospects, we believe that it is crucial that disclosure periods have a clearly defined and legitimate purpose, and are only employed when necessary and when it is proportionate to what the law seeks to achieve. We support the reduction in the rehabilitation periods proposed by the Bill and believe that it is important to build up an evidence base to gain a better understanding of the link between convictions and protecting the public.

(5) Do you agree with the Scottish Government that other reforms in Part 2 will make the law on disclosure of convictions more intelligible, clear and coherent?

In some respects, we agree that the Bill makes the law on disclosure more coherent, but it is important to acknowledge that it is still quite complicated and difficult to understand for the average lay person. We strongly recommend that any changes are accompanied by comprehensive guidance aimed at different audiences.

\(^1\) Working Links (2010) Prejudged: Tagged for Life
Having said that, there are some anomalies with the proposed amendments that are virtually identical to the changes that came into force in England and Wales in 2014 and it is worth us highlighting some of the problems this has caused.

1. **Section 19: Disclosure periods for particular sentences**

Section 19 (2D) and (2E) makes the provision for any order imposed on a person in respect of a conviction that disqualifies, disables, prohibits, restricts or is otherwise intended to regulate their behaviour to be disclosable for the length of the order, or two years from the date of conviction.

A similar provision was made in England and Wales under the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. Such orders are referred to in the legislation as ‘relevant orders’. For the first time, ancillary orders such as restraining orders, forfeiture orders, and sexual harm prevention orders impacted on the disclosure period of convictions. This has caused a host of problems for people subject to those orders, as many (including offender managers and advisers) are completely unaware of this provision, leading to significant under-disclosure and accompanying problems.

We recommend that, should this provision remain, the Scottish Government publish a comprehensive list of orders covered by the provision and raise awareness among those responsible for making sentencing decisions, those responsible for policing/managing these orders, offender managers/criminal justice social workers, advisers and individuals with criminal records who may be impacted.

2. **Table A: Disclosure periods for motoring offences**

Under s.139 Legal Aid and Punishment of Offenders Act 2012 (LASPO) amendments to rehabilitation periods that are contained in Table A within the Rehabilitation of Offenders Act 1974 (ROA) came into effect in England and Wales. Simultaneously, the government introduced a savings provision that allowed motoring offences to have a rehabilitation period of 5 years from date of conviction (if over 18 when convicted) and 2½ years from date of conviction (if under 18 when convicted). According to Ministry of Justice guidance, this rehabilitation period applies to all motoring offences which attract an endorsement for a road traffic offence listed in Schedule 2 to the Road Traffic Offenders Act 1988, imposed either by the court or by means of a fixed penalty notice (FPN).

Road traffic legislation specifically provides for a FPN in these circumstances to be treated as a conviction and dealt with as such under the ROA. The current position also is that penalty points and driving disqualifications imposed by the court on conviction may become spent when they cease to have effect (penalty points have effect for three years as set out in road traffic legislation).

**Unintended consequences of proposals**

We note that the proposed rehabilitation periods for motoring offences in this Bill align with the current rehabilitation periods for motoring offences committed in England and Wales. As with England and Wales, under the proposed rehabilitation
periods endorsements for motoring offences would have a longer rehabilitation period than all non-custodial sentences and also custodial sentences (including suspended sentences) of less than 30 months. This would create an unequitable system where those convicted of motoring offences are required to disclose their conviction for a longer period than those that have committed an offence serious enough to warrant a period of custody of up to 30 months (and this covers a wide range of, potentially, serious offences).

**Drag on effect**

If a person is convicted of an offence within the rehabilitation period of the first offence, the rehabilitation period of the earlier ‘unspent’ conviction will now be affected and in effect dragged forward so that neither offence will become ‘spent’ – until they both are. This is known as the ‘drag on’ effect.

As a result, the rehabilitation period for the further conviction and the rehabilitation period for all other ‘unspent’ convictions will all end at the same time – when the longest rehabilitation period ends. Until this point, all the convictions will be considered ‘unspent’ and will therefore need to be disclosed. Resultantly, the proposed rehabilitation periods for motoring convictions may have the potential to completely derail the intentions of the reforms of the Act.

The examples below demonstrate how, under the proposed rehabilitation periods, receiving an endorsement could disproportionately affect when a person’s criminal record becomes spent:

**Scenario 1**

Emma receives a 12 month community payback order for shoplifting on 10 March 2017. Her sentence may become ‘spent’ 12 months from the date of the order imposed in a court. However, Emma receives a driving conviction for speeding on 9 March 2018 – just one day before her conviction would have become ‘spent’. She receives a fine, three penalty points and an endorsement. As the endorsement would have a rehabilitation period of five years (she is over 18 when convicted), none of Emma’s convictions will now become ‘spent’ until 9 March 2023.

**Scenario 2**

John receives a 12 month community payback order for common assault on 10 March 2017. His sentence may become ‘spent’ after one year from the date of conviction. John then receives a 12 month custodial sentence for affray on 9 March 2018. The conviction would become ‘spent’ on 9 March 2021.

In relation to the above scenarios, Emma would have to disclose her conviction for two years longer than John, despite John having been convicted of more serious offences. Disclosure would therefore have a far greater impact on Emma than it would John.
Possible Solutions

We would recommend that the Scottish Government consider the following:

- The possibility of creating a system where motoring offences should not have a drag on effect on other convictions.
- The system should ensure that the rehabilitation period for motoring offences is proportionate in relation to other sentences.
- That any other sentence imposed as a result of a motoring offence is appropriate. For example, a person who causes death by dangerous driving should receive a sentence which is disclosed under ROA in line with other sentences for serious offences. This will ensure that those convicted of a serious driving offence have to disclose for an appropriate period of time.

(6) Do you have any further views on law and policy around the disclosure of convictions?

1. Sanctions for breach of the legislation

We know from calls to our Resettlement Advice Service that unlawful criminal record checks continue to be a problem. Whilst the ROA implicitly makes provision to penalise the unauthorised disclosure of convictions by protecting spent convictions, our experience of supporting people with criminal records indicates that this has not stopped some employers from carrying out unlawful checks and taking information they are not entitled to into account when making recruitment and employment decisions.

We recommend that the Bill is more explicit about the penalties that organisations should face for breach of the legislation, given the adverse impact this can have on people’s employment prospects. This should be complemented by work with employers to increase their knowledge and awareness about their responsibilities and addressing some of the preconceptions they may have about employing people with convictions.

2. Treatment of young people

Nacro is a member of the Transition to Adulthood Alliance (T2A) and, as such, we endorse a distinct approach for the treatment of children and young adults under the disclosure regime. We acknowledge current inconsistencies, both in England and Wales and in Scotland, of a youth justice system which deals with young people up to the age of 21, with a disclosure system that treats anybody convicted at age 18 or over as an adult. We recommend that the Scottish Government considers a distinct system of disclosure for all young people prosecuted under the youth justice system.

3. Military Convictions

Nacro and the Defence Select Committee have previously sought an urgent review of the Armed Forces Act 2006, which impacts on the disclosure of military convictions. Reform is needed urgently because the Act currently enables the Service justice system to operate in such a way that inadvertently creates some
serious inequalities and injustices. These issues are set out below (in no particular order).

It is imperative that each of these issues is properly addressed and remedied if the Service justice system – and indeed the entire criminal justice system in civilian life as well – is to operate in the fair, equitable and transparent manner intended by the relevant legislation.

**Issue 1: The inequitable treatment of convictions**

Under the current proposals, those serving in the UK Armed Forces would be required to disclose their military convictions for longer if returning to live or work in Scotland than if returning to England or Wales. For example, the offence of cashiering, discharge with ignominy or dismissal from Her Majesty’s service has a rehabilitation period of 12 months under the ROA, as applied in England and Wales. The disclosure period recommended under these proposals appears to be 10 years in Scotland.

We would respectfully submit that having to disclose a conviction for nine years longer simply by nature of returning from the military to live or work in Scotland is unjust, inequitable and contravenes The Armed Forces Covenant. The Ministry of Defence and their courts have jurisdiction over Scotland, England and Wales, so the consequences of any punishment that is imposed must be consistent across these jurisdictions. We would ask the Scottish Government to urgently consult with the Ministry of Defence and consider reducing the proposed rehabilitation periods for military offences so that they are in line with those that exist in England and Wales.

**Issue 2: Failing to provide service personnel with basic information**

Any service personnel facing military disciplinary proceedings should be made fully aware of the ramifications of proceeding to court martial or to a summary hearing, in particular the legal consequences and practical impact that a military conviction received via either route will have on them in civilian life.

Providing service personnel with this basic information will enable them to make a fully informed decision to elect for trial by court martial (where they would be assured of a fair trial with access to full representation) or by summary hearing (where this is not the case). We have evidence that some service personnel end up receiving a criminal record without having any idea that they have one, and without having received any appropriate legal advice.

Guidance on the full impact on service personnel of receiving a caution or conviction needs to be made clear, transparent and understandable to all those involved in the military disciplinary process, including the defendant, their legal representatives, commanding officers and prosecutors, as well as judges.
Issue 3: Failing to record military convictions properly on the Police National Computer

Nacro has experience of cases where servicemen have had military convictions recorded on the Police National Computer when they should not have been – either because of the date that they were uploaded onto the system (certain offences committed before 2009 should not appear) or because of the nature of the offence or disposal. In addition, we also have evidence that some service personnel who have received either a fine or compensation order at summary hearing have not had their convictions disclosed on criminal record checks because the convictions were not placed on the Police National Computer by the administrative department of the Armed Forces – in some instances this is due to a lack of proper training.

There is currently a distinct lack of transparency in relation to the recording of military convictions. Accordingly, it is difficult to assess exactly how widespread this problem is, although our experience would suggest it is fairly common. To date neither the Ministry of Justice nor the Ministry of Defence have provided figures to enable a comparison between the number of service personnel convicted as a result of military proceedings and the subsequent recording of these convictions on the Police National Computer.

It is imperative that there is a full review of the way in which military convictions are recorded and placed on the Police National Computer and that there is an independent system for the recording of military convictions on the Police National Computer in order to ensure that the process is transparent, fair and consistent.

Issue 4: The Security Industry Association’s handling of convictions

If this Bill is successful and the rehabilitation periods are reduced, there will remain a requirement for unprotected convictions to be disclosed when applying for a licence from the Security Industry Association (SIA). The presence of a military conviction (depending on the date and nature of the disposal) will generate an automatic rejection of an individual’s application.

When service personnel leave the Armed Forces, they often have the necessary skills, training and experience to be a significant asset to the security industry. Yet many are currently being refused a licence as a result of receiving a minor military conviction. Refusal of a licence means that they will struggle to obtain any employment whatsoever in the security, maritime or aviation industries as many employers in this sector insist on completely clean records. The end result is that the security sector is missing out on a huge amount of expertise and relevant experience, and valuable skills are being wasted as a result of an often extremely minor offence.

Nacro believes that minor military (and civilian) convictions should not lead to an automatic rejection of an application for a licence from the SIA. It also believes that medium and serious convictions should be considered on a case-by-case basis by a human being, as opposed to every single military conviction, no matter how minor or major, resulting in an automatic computer generated rejection of a licence which is the current situation. We would therefore recommend a review of how the SIA treats
applications from military personnel who have received minor convictions. This also enforces the need to ensure that the treatment of military convictions is consistent across the UK.

In summary, I am sure that you will agree that it is unconscionable that any of the scenarios outlined above be allowed to continue when they so clearly contravene the spirit of the legislation and the basic principles underpinning any fair and equitable justice system. We would therefore advocate urgent reform and review in all the areas outlined above.

Nacro
20 April 2018