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YEARS
1966-2016

**Nacro's written evidence to Justice
Select Committee inquiry into the
disclosure of youth criminal records**

11 November 2016

About Nacro

1. As an established charity with 50 years of experience, Nacro is a champion of social justice which continues to put crime prevention and reduction at its core. We use our knowledge and experience to help the most vulnerable in the community to move on in their lives and to reach their full potential and aspirations. We do this by addressing social exclusion, inequality of opportunity and deprivation. Throughout England and Wales we deliver interventions which are consistently high quality, evidence-based and outcome-focused so that we can maximise our impact in communities.
2. Our services include supported housing to vulnerable people; vocational training programmes; substance misuse services; offender management services; Resettlement Advice Service for offenders, families and employers. We also use our knowledge of what works to help inform policy and shape practice.

Executive Summary

3. Nacro believes there is a need for a fundamental set of principles, based in evidence, to underpin a revised statutory framework.
4. Disclosure of a criminal record gained as a young person can significantly impact on a person's opportunities. Disclosure must therefore have a clearly defined and legitimate purpose and only be employed when necessary and proportionate.
5. We believe there should be a distinct approach for young adults aged 18-25.
6. We recognise the need for an effective criminal record disclosure regime which helps employers safeguard children and vulnerable adults.
7. We believe further research is needed to understand the link between minor convictions and cautions and protecting the public.
8. Nacro supports the principles behind the filtering regime which made some positive changes. However, it is currently difficult to understand for individuals and organisations.
9. Nacro believes unlawful Disclosure and Barring Service (DBS) checks are a significant problem which can seriously impact on young people's futures.
10. We cautiously welcomed the modest reforms to the Rehabilitation of Offenders Act (ROA) in 2014 but believe these could go much further, for example by implementing Lord Dholakia's recommendations in Nacro's Change the Record campaign.¹
11. We recommend:
 - Re-run a thorough review of the ROA - Breaking the Circle - part two.²
 - Research to look at any potential indirect discrimination implications in the body of evidence around offending and disadvantaged groups
 - Thorough review of the range of offences on the DBS non-filtered list
 - Distinct qualifying period for filtering for young adult offenders
 - Review rules on filtering for multiple convictions and short sentences
 - Review roles, activities and purposes where excepted questions can be asked
 - Eradicate unlawful checks
 - Work with key stakeholders to develop good practice advice, support and guidance and training for organisations and practitioners on handling and managing disclosures

Introduction

12. Nacro responds to this inquiry from our extensive specialist work and expertise on the legislation that governs criminal record disclosure. In the 1990s, Nacro established the national Resettlement Advice

¹ Nacro (2010) Change the Record: Nacro's campaign report London: Nacro

² Home Office (2002) *Breaking the Circle: A report of the review of the Rehabilitation of Offenders Act* London: Home Office

Service (RAS) to provide advice and guidance to prisoners, offenders on license and ex-offenders who faced barriers to effective resettlement in various aspects of their lives. In response to the introduction of the Criminal Records Bureau checks in 2002, RAS adapted to respond to the increase in inquiries from people impacted by the growing number of criminal record checks carried out. RAS has years of experience providing advice, support and training to individuals and practitioners. Our dedicated Employer Advice Service provides practical guidance, expert support and training to employers and other organisations on navigating complex disclosure legislation and managing risk in relation to criminal records and allegations. RAS legal officers are leading experts in this field and provide individuals with advice on rights and responsibilities relating to disclosure; and also legal advocacy for those subject to unlawful criminal record checks or unfair/wrongful dismissal cases.

13. Over the years, Nacro has worked tirelessly to campaign for effective change to the legislative regime which governs disclosure and the use of criminal records. In the 1970s, Nacro was one of three organisations exclusively working on this issue at the time where no law existed to support the successful reintegration into society of reformed offenders who had stayed on the right side of the law. Nacro successfully established a Committee, chaired by the Rt. Hon Lord Gardiner, to discuss the introduction of such a law and what form it should take. As a result of the Committee's 1972 report *Living it Down: The Problem with Old Convictions*,³ the Rehabilitation of Offenders Act 1974 was introduced.
14. Whilst the ROA was radical at the time, it has failed to keep up with society's changing needs and scientific advances in our understanding of neurological development as well as failing to chime with our growing knowledge of what constitutes effective resettlement. Nacro has continued to advocate, through our Change the Record campaign and working with the government and other stakeholders, for the reform of the ROA for both adults and young people. The changes to the ROA, implemented in 2014, were greatly welcomed; however despite these changes, the ROA did not go far enough to assist people with criminal records to draw a line under their past. In some instances, it has contributed to some of the barriers and collateral consequences that still prevent people with criminal records (and those who have been subject to allegations) from moving forward with their lives in a positive and constructive way. We believe that, whilst criminal record checks are often a necessary tool for employers in certain roles to prevent potential harm to children and vulnerable people, we also believe that a better system which adopts a more measured and considered approach can be developed which achieves a more equitable balance between the right to a private life and safeguarding concerns.
15. Whilst Nacro wholeheartedly welcomes this inquiry into the disclosure of youth criminal records, we hope that the Committee considers this issue in the context of the wider criminal justice system. Criminal records are interconnected with and interdependent upon government policy and legislation, police practice, judicial discretion, prison experience, the work of the National Probation Service and Community Rehabilitation Companies as well as employer recruitment attitudes and practice. Therefore, a whole systems approach is required to meaningfully result in real change. Nacro hopes that this is considered through the Committee's wider work into the criminal justice system and offender rehabilitation and resettlement.
16. Due to the broad topics that are covered within the inquiry's questions, we have been unable to explore all of the deeper intricacies associated with this issue. We appreciate that this is a short inquiry; however, we are more than happy to meet with the Committee to expand or clarify our response. If you have questions on any aspect of our initial response, please contact Rachel Annison, Policy Officer: rachel.annison@nacro.org.uk, 020 7902 5437.

³ Gardiner Rt. Hon. Lord, JUSTICE, National Association for Care & Resettlement Of Offenders, Howard League for Penal Reform (1972) *Living it down: the problem of old convictions* London: Justice

1. The appropriateness and effectiveness of the statutory framework

17. Nacro believes there is a need for a fundamental set of principles, based in evidence, to underpin a revised statutory framework. The current framework for adults and young people is complex and is the result of multiple pieces of legislation. In practice, it has created difficulty for the most experienced practitioners to navigate this system, let alone a child or young person trying to understand what they are required to disclose or what they are not.
18. Some of the key pieces of legislation which govern the current disclosure regime in England and Wales include:
- Rehabilitation of Offenders Act 1974
 - The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013
 - Police Act 1997
 - Safeguarding Vulnerable Groups Act 2006
 - Protection of Freedoms 2012
 - Legal Aid, Sentencing and Punishment of Offenders Act 2012
19. Some of these laws create collateral consequences which continue to impact on an offender after their sentence has expired. Collateral consequences are restrictions imposed by the operation of the law on offenders as the result of an arrest, conviction or imprisonment. Unlike the punishment imposed upon conviction, these additional restrictions are civil consequences, outside the realm of the criminal process, and are considered indirect consequences of having a criminal record.⁴ These consequences are far reaching, and include limiting a young offender's ability to secure certain types of employment, applying for educational or training courses, housing when they turn 18, future eligibility to adopt and foster, as well as applying for certain types of insurance and loans.
20. Generally speaking, having to disclose a criminal record can negatively impact a young person's life in terms of them accessing employment, education, training and accommodation. What we have found, through enquiries that have been made via our national helpline, is that the negative effect of disclosing a criminal record is generally felt at the point where a) an individual attains the age of 16 and is required by an employer, education or housing provider to disclose a previous caution or conviction or b) they are aged 16/17 at the time that they are convicted and they are subsequently asked to disclose criminal information.
21. Owing to the limits that criminal record disclosure place on present and future opportunities for some young people, it is crucial that disclosure has a clearly defined and legitimate purpose, is only employed when it is necessary and is proportionate to what it seeks to achieve. However, the use of criminal record disclosure and the requirements for applicants to disclose their criminal record has been adopted for purposes other than employment. Arguably this has extended the reach of the ROA beyond what was originally intended and to who it applies. In addition, these changes have not been adequately coordinated which has resulted in contradictions between different pieces of legislation. These issues are explored throughout our written evidence.
22. Our experience indicates that a criminal record can be used as a basis to discriminate against ex-offenders in a range of sectors where a criminal record declaration is requested. Our work indicates that there is a great deal of reticence amongst employers to employ ex-offenders. For example, research indicates that three quarters of employers admitted that they would use a conviction either to reject an applicant outright, or to choose between two equally qualified applicants where one has

⁴ Goulette N, Reitler A, Frank J, Flesher W and Travis L 'Criminal Justice Practitioners' Perceptions of Collateral Consequences of Criminal Conviction on Offenders' *Criminal Justice Review* [2014], Vol. 39(3) 290-304

no conviction.⁵ This can have a significant effect on the ability of ex-offenders to move on in their lives.

23. We therefore believe that there needs to be a set of fundamental principles to underpin the framework and a clear understanding of the purpose and impact of rehabilitation periods. Currently, the purpose of the ROA is to “rehabilitate offenders who have not been reconvicted of any serious offences”; however, it does not provide a definition of rehabilitation, nor is there an explanation on how it will rehabilitate nor does it detail the steps required to achieve rehabilitation within those periods, to ensure the factors which contributed to the individual’s offending have been addressed.
24. We believe that the current classifications do not reflect current knowledge on desistance, or moving on from crime and feel both outdated and arbitrary. As with adults, we are unaware of any evidence upon which rehabilitation periods for young people under the age of 18 are based. Given the impact these can have on future education and employment prospects, we believe it is very important to build up the evidence base and gain a better understanding.
25. As a Transition to Adulthood member, we believe that research on the distinct neurological development of young adults warrants a distinct approach within the criminal record disclosure regime.
26. Due to its complex and piecemeal nature, many people with criminal records find the regime confusing. Whilst the 2014 changes attempted to make the framework fairer and hoped it would make the regime more straightforward, the average person finds it incredibly difficult to understand and apply the provisions to their situation. For children and young people, this can be even more difficult without expert guidance and support. Without clear guidance in a user-friendly format, there is a risk that young people with a criminal record may under-disclose or over-disclose. If a prospective employer discovers discrepancies between a disclosure statement and a returned check, this can be seen as dishonest and can result in the applicant not being selected. Similarly, if a person over-discloses this can also discourage employing that particular candidate.
27. Whilst parts of the statutory regime make provision to penalise the unauthorised disclosure of convictions, our experience of supporting people with criminal records indicates this has not stopped some employers from carrying out unlawful checks i.e. where the conviction or caution is spent and protected by the ROA. Nacro believes that sanctions for unlawful checks as well as discrimination protection should be re-examined with a view to strengthening existing provision.

2. Balance between protection of employers and the public and rehabilitation

28. Nacro recognises that there needs to be an effective criminal disclosure regime that helps employers safeguard children and vulnerable adults. This regime should be robust enough to stop people who might pose a risk to children and vulnerable adults from applying for jobs where they may have contact with them. DBS checks are a necessary tool to aid the formal risk assessment process which needs to be in place for all individuals who aim to work in regulated activity with children or vulnerable adults. It is, however, also important to recognise that, as NSPCC research shows, many high-risk individuals do not have criminal convictions.⁶
29. At present it is unclear as to whether the current rehabilitation periods for young people strike an appropriate balance between their right to reintegrate back into society and the protection of the public. We believe that more robust evidence is needed in order for us to understand the link between minor convictions and cautions, and protecting the public. Nonetheless, there has tended

⁵ Working Links (2010) *Prejudged: Tagged for life* London: Working Links

⁶ Erooga M (2009) *Towards safer organisations: Adults who pose a risk to children in the workplace and implications for recruitment and selection* London: NSPCC

to be an over-reliance on criminal record disclosures when assessing risk and not enough focus on promoting rehabilitation of young offenders. In deciding what roles and types of employment should not be protected by the ROA, there should be a transparent decision making process as well as a clear and principled relevancy test for those decisions.

30. The current disclosure regime can even extend beyond people with criminal records to affect people who they live with. For instance, the 'disqualification by association' element of the Childcare Disqualification Regulations 2009 prevents people working in early years provision if a member of their household has been cautioned or convicted for a relevant offence. These provisions should be re-examined.

3. Filtering and new rehabilitation periods

a) Filtering

31. Prior to the changes to disclosure which introduced the DBS filtering regime, RAS routinely received calls from young people who faced significant barriers when accessing education and employment opportunities that were exempt from the ROA: they were subject to a DBS check and full disclosure of all cautions and convictions regardless of how old or minor the offence.
32. We supported the legal challenge which led to the introduction of the filtering regime. The case of T was the principal focus of this judgment.⁷ T faced barriers when applying to work for a local football club, and enrolling on a sports studies course at university due to receiving warnings at the age of 11 for theft of two bicycles, both of which entailed contact with children.
33. The government appealed the judgment made in favour of the claimant in the Court of Appeal, but the Supreme Court ultimately dismissed parts of the government's appeal, as the Court deemed the Police Act 1997 was incompatible with the right to a private life as it was not in accordance with the law and "was not necessary in a democratic society to attain the aim of protecting the safety of children."⁸ In passing judgement, Lord Reed stated, "I cannot ... see any rational connection between minor dishonesty as a child and the question whether, as an adult, the person might pose a threat to the safety of children with whom he came into contact."⁹
34. In May 2013, the Home Office introduced the filtering regime which allowed for certain old and minor offences to be filtered. The filtering rules allow for a young person to not disclose a conviction after 5.5 years if it was the person's only conviction, did not result in a custodial sentence and the offence does not appear on the DBS non-filtered list. Youth cautions are eligible for filtering after 2 years if the caution was not issued for an offence on the DBS non-filtered list. Filtered cautions and convictions are not disclosed on standard or enhanced DBS certificates and it is unlawful for an employer to take into account a filtered caution or conviction.
35. Nacro supports the principles behind the filtering regime. Some of the changes it introduced were positive and our helpline observed a decrease in the number of enquires from young people who had received cautions and convictions for old and minor offences being prevented from accessing education or employment opportunities that required DBS checks.
36. However, the filtering regime is extremely complex and arbitrary. It simply does not go far enough to achieve the necessary balance between public protection and allowing ex-offenders to move on from their past mistakes.

⁷ R (on the application of T and another) (Respondents) v Secretary of State for the Home Department and another (Appellants) Trinity Term [2014] UKSC 35 On appeal from: [2013] EWCA Civ 25

⁸ *Ibid*, paragraph 143

⁹ *Ibid*, paragraph 142

37. The regime is extremely difficult to understand for both individuals and organisations. For example, there are clear differences between the public facing list of offences that are ineligible for filtering, and the operational list used by the DBS. It is also extremely difficult for an individual to access the required information they need to work out whether or not their offences would qualify for filtering.
38. RAS continues to receive enquiries from young people who have accepted a caution for a broad spectrum of offences such as actual bodily harm or affray. On occasion, the young person has been incorrectly advised that the caution will not affect their future education or employment prospects.
39. RAS often advocates for people who have received a caution or minor conviction in their youth that has continued to have an impact upon them long into adulthood. It is important to note that many of these enquiries come from people who may have acquired their criminal record between the ages 18-25. In our experience, those working hard to turn their lives around may find their efforts frustrated by having to disclose their criminal record. Even if their criminal record is deemed spent under the ROA, they may still be compelled to disclose their past mistakes, as some organisations still continue to carry out unlawful DBS checks on roles and positions that are not eligible. They can do this as they face no clear sanctions for breaking the law.
40. Nacro believes unlawful DBS checks are a significant problem. At a time when many employers complain of chronic skills shortages, we encourage the government to do everything possible to remove the barriers that young people face moving forward. This includes reviewing and scaling back the criminal record regime; it was estimated that four million DBS checks are carried out each year.¹⁰
41. Nacro recognises that it is important to have in place a disclosure regime that strikes the balance between public protection whilst enabling young people who are not a risk, equal access to education, training, housing and employment opportunities. We do not believe that the current filtering regime achieves this balance and welcomed the judgment in R (on the application of P and A)¹¹ in the High Court in January 2016 that found the current system is arbitrary.

b) Rehabilitation of Offenders Act reforms

42. The ROA 1974 primarily exists to allow people with convictions to be reintegrated back into society by having the right to legally ignore their conviction(s) after a period of time. The Act allows convictions, cautions, reprimands and final warnings in respect of a certain offence to be considered spent after a specified period of time known as the rehabilitation period which is decided by the sentence or disposal received.
43. Once spent, the person is considered to be rehabilitated and the Act treats the person as if they had never committed an offence. As a result, the conviction or caution in question does not need to be disclosed by the person when applying for most jobs, educational courses, insurance, housing applications or other purposes, unless the role applied for is exempt from the Act.
44. Nacro cautiously welcomed the modest reforms to the ROA that came into force in 2014, and we continue to push for further reform as we believe that they should go much further. We recommend that the government implements the proposals recommended by Nacro President, Lord Dholakia, in

¹⁰ Disclosure and Barring Service (2013) *Everything you always wanted to know about form completion... but were afraid to ask!* London: Home Office [online] available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260701/e-guide_v1.1_PDF.pdf

¹¹ R (on the application of P and A) v Secretary of State for Justice, Secretary of State for the Home Department and Chief Constable of Thames Valley Police [2016] EWHC 89 (Admin)

our Change the Record campaign that allows for a rehabilitation period for custodial sentences over four years which are currently never spent.

45. ROA amendments have also led to unintended consequences. For example, less serious disposals such as endorsements for motoring offences, conditional discharge orders, and compensation orders; as well as relevant orders (i.e. restraining orders) are subject to significantly longer periods of disclosure than custodial or community sentences.

Example scenarios

46. A young person receives a three year conditional discharge order. Their sentence may become spent after three years from the date of the order being imposed by a court regardless of whether they were an adult or young person at the time of sentence.
47. A young person receives a six-month Detention and Training Order. Their sentence may become spent after two years: the rehabilitation period is the total length of the order (six-months) plus the buffer period of 18 months.
48. A young person receives a fine, three penalty points and an endorsement for a driving offence. Current guidance from the Ministry of Justice advises the rehabilitation period is three years due to the penalty points.
49. Clearly the current treatment of driving offences has created a perverse situation in which young people receiving an endorsement could have a longer period of disclosure than a non-custodial sentence and short custodial sentence. This is clearly not what the changes to the ROA were meant to achieve. We believe that it is vitally important to ensure that any required periods of disclosure should be in line with the seriousness of the sentence or disposal imposed on the young person.
50. We also urge the government to address some of the existing transparency issues. A young person may find it difficult to work out what they need to disclose when applying for roles which are covered by the Exceptions Order 1975 but may require a basic criminal check: some military offences and non-recordable offences (e.g. Fixed Penalty Notices) are treated as a sentence under the ROA but not disclosed on criminal record checks. We have raised concerns with the government in relation to the data protection implications this issue presents.

Recommendations

51. Nacro believes that wholesale reform of the criminal record regime is needed in order to achieve meaningful change so that it is adequate, accurate and transparent for individuals and organisations as well as striking the correct balance between public protection and giving young people who have made mistakes in their past, a fair opportunity to move on with their lives.
52. Nacro hopes the Committee will take into account the following recommendations:
- Re-run a thorough review of the ROA - *Breaking the Circle* - part two. This would enable full consultation with a wide range of interested stakeholders.
 - Research to look at any potential indirect implications in the body of evidence around offending and disadvantaged groups.
 - A thorough review of the range of offences on the DBS non-filtered list as well as their justification and criteria for inclusion.
 - Consideration for introducing a distinct qualifying period in order that certain offences become eligible for filtering for young adult offenders. This qualifying period would be distinct from those for children and over 25s.

- Review of the rules that determine filtering of multiple convictions including short sentences.
- Reducing the roles, activities and purposes where 'excepted questions' can be asked.
- Commitment to clean up the criminal record regime so that unlawful checks are eradicated and ensure that sufficient legal sanctions are put in place against organisations that carry out unlawful checks or take into account spent convictions when making a suitability decision.
- Working with key stakeholders to develop good practice, advice, support, guidance, and training for organisations, individuals and practitioners on handling and managing disclosures.