

The use and impact of the Rehabilitation of Offenders Act (1974): Final Report

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Contents

Summary	4
Key Messages for Policymakers.....	1
1. Background and Methods	2
2. Prevalence of Criminal Convictions in Scotland.....	4
3. Trends in Criminal Records Checks	8
4. Problems with the Rehabilitation of Offenders Act.....	11
Scottish Amendments affecting ROA coverage and practice.....	13
5. Employment and Desistance	15
6. Employer Perspectives	19
Employer Awareness of the Act	19
Employers' Attitudes to Ex-offenders	20
Real Risks of Employing Ex-offenders?	24
Education and Criminal Records Checks	26
The Importance of Personal Encounters in Overcoming Ex-offender Bias	28
7. Ex-Offender Perspectives	31
8. Possible Approaches to Reform.....	33
Amending Spent Periods.....	33
Certificates of Rehabilitation.....	35
Judicial Imposition of Occupational Disqualification.....	36
Appendices	38
Appendix A. Disclosure arrangements in other countries	38
Appendix B. Ex-offender testimonials.....	44
Bibliography.....	51

List of Tables and Figures

Figure 1 Proportion of adult male population with a known criminal conviction (post-1989).....	5
Figure 2 Proportion of adult female population with a known criminal conviction (post-1989).....	6
Figure 3 Total number of convictions 1971-2011, broken down by crime type.....	6
Table 1 Total Applications to Disclosure Scotland, 2006-07 to 2011-12	8
Table 2 Applications to Disclosure Scotland by Type and Year 20008-09 to 2012-13	9
Table 3 Knowledge of the ROA among Recruitment Staff.....	19

Summary

1. This research arises from a current Government review of the Rehabilitation of Offenders Act (1974). It considers how recent changes to it may affect offender rehabilitation and employment opportunities, and how employers and ex-offenders perceive and are affected by the law.

2. Criminal convictions are an issue for a considerable portion of the Scottish population. Scottish Government analysts have analysed data from the Scottish Offenders Index to produce actual and estimated numbers of persons within the Scottish population having a criminal conviction. This analysis showed that over 38% of men and 9% of women born in 1973 are known to have at least one criminal conviction. Extrapolating to the population as a whole, *at least one-third of the adult male population and nearly one in ten of the adult female population is likely to have a criminal record.*

3. Criminal records checks are now a regular experience for many people. Currently over one million applications for basic disclosure of criminal convictions are processed every year by Disclosure Scotland. Recent changes have included the creation of a heightened checking scheme for people working with vulnerable groups.

4. Research and review have increasingly raised questions about the ability of the Act to support the smooth integration of people with historical criminal convictions. Rehabilitation periods set out in law have been criticised as too long in light of research on the declining risks of recidivism over time as well as research

on the stigmatising effect of waiting for a criminal record to expire.

Amendments to the Act have increased the range of professions and situations that are exempted from the Act.

5. Employment is one of the most strongly correlated predictors of reduced reoffending. Not only does it help establish financial stability, but also roots a range of positive social relationships and bases of identity.

However, amendments to the ROA which increasingly exempt professions in health and social welfare sectors may be exacerbating barriers to employment for ex-offenders in a labour market where such professions are expanding relative to industrial and manufacturing jobs.

6. Surveys of employers regularly show a lack of knowledge about the ROA and a bias against recruitment of ex-offenders, although there are important exceptions to this particularly where an employer has had prior experience of interviewing or hiring ex-offenders. Most employers who have taken the time to interview or have employed ex-offenders reported positive experiences and a willingness to further recruit from this group.

7. Ex-offenders report experiences of feeling discouraged, stigmatised and being wrongly questioned about their backgrounds when attempting to gain access to employment and education. These perspectives show how legislative frameworks and employer attitudes which affect recruitment of ex-offenders have an effect not only on the employment rates of people trying to reintegrate into society but also on their

long-term psychological and general well-being.

8. This report sets out three possible approaches to reform, graduating in the degree to which they would alter existing practices and presumptions.

The most minimal modification of the Act's rehabilitation periods would reduce the passive waiting time. Providing a certificate of rehabilitation would create a

more active mode of acknowledging restoration of a person's status as a welcomed member of society. Judicial imposition of occupational disqualification shift focus onto the specific exclusion from certain jobs where a case by case analysis determines this is appropriate.

Key Messages for Policymakers

Disclosure creep. Research and the ex-offender stories in this report show that disclosure of offences is being requested above and beyond what may be required in law. Moreover, the law itself has been amended to allow disclosure in more situations.

There appears to be a growing presumption of inquiring about an applicant's history rather than presumption against it. The widening spread, or creep, of non-compulsory disclosure and legally allowed disclosure of a wide range of information beyond unspent criminal convictions can have a chilling effect on the career and educational progression of significant numbers of people.

Sentence creep. The increasing average length of sentences in Scotland and the UK as a whole increases the number of those who are permanently marked by a criminal conviction, regardless of their demonstrated ability to desist from offending. In other words, people convicted of offences today are being prevented from ever clearing their criminal history unlike people who committed the same offences twenty years ago.

Public protection and employment of ex-offenders are not trade-offs. The metaphor of 'balancing' public protection against an offender's privacy and interest in employment is regularly invoked in political reviews of the ROA and related legislation.

This assumes that employment of ex-offenders invariably involves some sacrifice of public protection to be balanced against the gain in employment.

However, research regularly shows that that employment is a protective factor against re-offending. This suggests that public protection is increased not traded off when barriers to employment of ex-offenders are removed. As a recent review put it: 'nothing beats crime like a payslip' (GCEAG, 2012: 1).

Better linkage of risk to job. A diversity of offending patterns and risks are managed through the broad brush stroke of the ROA, which excludes whole professions and does not distinguish much between offences. Exemptions of professions like social care involving vulnerable adults marks those with criminal justice histories as permanently dangerous.

However, many offenders have completed sentences of community service, working directly with or for vulnerable populations. The management of the ROA in recent times reflects an approach to risk which allows a reactionary aversion to risk to overtake professional understanding and research evidence about working with offenders.

Putting a face on exclusion. There are positive messages from the research. Personal encounters can change behaviour: employers become more willing to hire those with whom they mingle. Employers who have hired ex-offenders are enthusiastic about hiring them in the future.

However, there is also a need to recognise the long-term psychological damage and counterproductive effect of criminal records disclosure policies on individuals trying to put their lives back together.

1. Background and Methods

1. This report arises from a Scottish Government Justice Analytical Services request to the Scottish Centre for Crime and Justice Research [SCCJR] to produce a user-friendly, policy-focused report that will use the available evidence to assess the extent to which the Rehabilitation of Offenders Act (1974) has balanced the risks to employers with the rehabilitation of offenders.
2. The focus of the report is on the extent to which the Rehabilitation of Offenders Act (1974) and subsequent related amendments might support or inhibit desistance.
3. The Rehabilitation of Offenders Act (ROA) as originally enacted in 1974 was intended to help in the legal rehabilitation of offenders who had not been reconvicted of any serious offence for periods of years and criminalises the unauthorized disclosure of their previous convictions. Padfield surmises the 1974 Act, explaining when a conviction becomes ‘spent’ or remains permanently ‘unspent’:

‘[A] person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction’. The periods were (and remain) fixed: the conviction of someone sentenced to more than 30 months imprisonment is never spent, but if the sentence was between 6 months and up to 30 months, the period is 10 years, less than six months 7 years, and those sentenced to community orders or fines have a ‘spent’ conviction after 5 years. For those under 18, the rehabilitation period is halved’ (Padfield, 2011: 41).

4. This report mainly takes the form of a non-systematic (narrative) literature review of salient sources identified by the co-authors Paul McGuinness and Fergus McNeill. In addition to the use of sources already known to the authors (particularly from recent and relevant special issues of two journals), a series of

pertinent Boolean search terms were identified and entered into a collection of databases and online journals so as to broaden the scope of the report and ensure its contemporary relevance. These include JSTOR; LexisNexis; Web of Knowledge; Web of Science; as well as using Google Scholar to access other subscription-only services and materials.

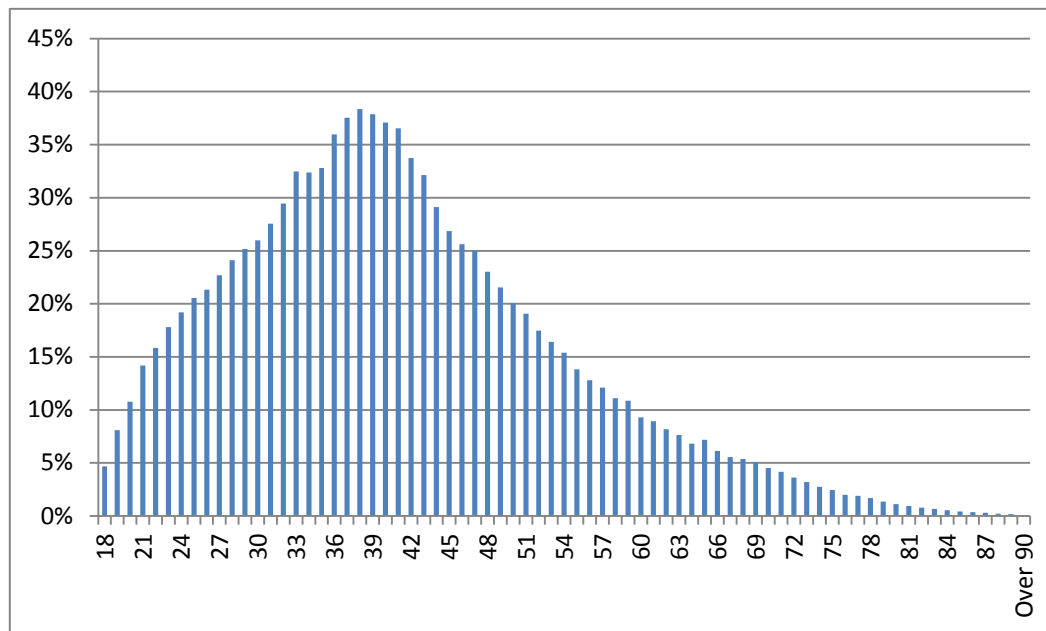
5. In addition to this literature review, SCCJR was provided data on two issues: the prevalence of criminal convictions among the Scottish population, and details about disclosure activity from Disclosure Scotland, which both provide some perspective on the context and impact of the ROA.

2. Prevalence of Criminal Convictions in Scotland

1. Estimates of the overall prevalence of criminal convictions can put into perspective the extent to which a criminal history affects a larger or smaller segment of the population.
2. Justice Analytical Services used the Scottish Offenders Index (SOI) to estimate the proportion of the Scottish population with a criminal conviction. A similar exercise was conducted by the Home Office for the population in England and Wales (Prime et al., 2001).
3. The SOI is limited by time period and types of convictions included:

“While virtually all convictions since 1989, for crimes listed in section 12.3.1, are covered by the SOI, other types of conviction are not. These include convictions for motor vehicle and most minor statutory and common law offences, convictions in courts outwith Scotland, convictions prior to 1989, and any relevant convictions not recorded by SPSA by the end of August 2011.” (Scottish Government, 2012, 44)
4. Figure 2 shows a remarkable prevalence of criminal convictions in Scotland: over 30% of men aged between 33 to 43 had at least one *known* criminal conviction between 1989 and 2011, peaking at over 38% for those born in 1973. This excludes experience in the Children’s Hearing System, convictions before 1989 and convictions for motoring and other minor offences; all of these, if included would tend to increase the prevalence of convictions.

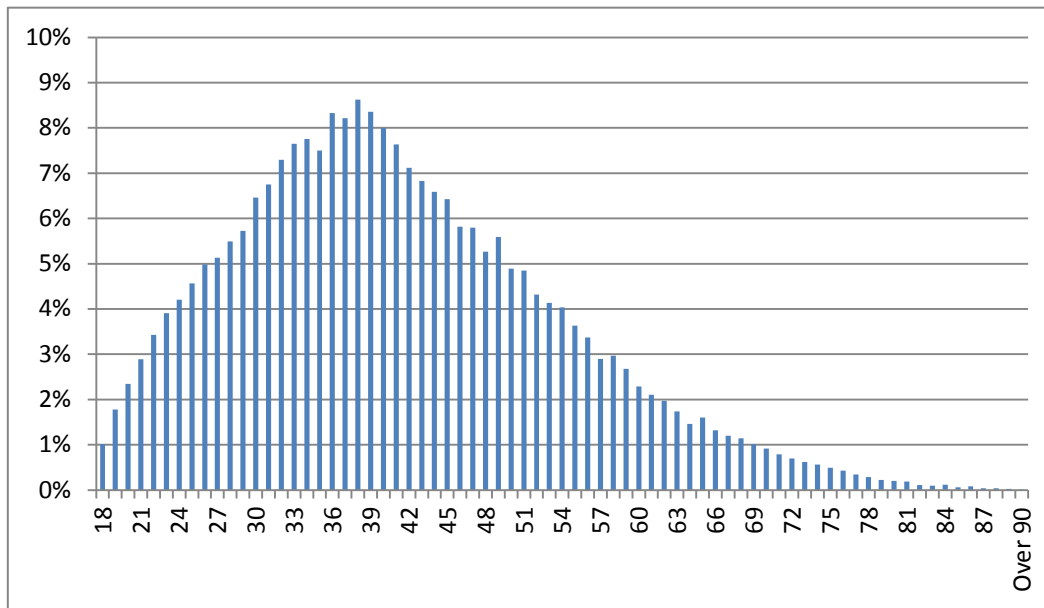
Figure 1 Proportion of adult male population with a known criminal conviction (post-1989)



Source: Scottish Government, Justice Analytical Services

5. As the data in the SOI only goes back to 1989, the figures appear to drop off quite quickly for those born prior to 1973. However, courts data from earlier periods shows that there were actually many more court convictions in earlier periods – particularly during the 1970s, when there were much larger numbers of court convictions for relatively low-level offences such as breach of the peace and drunkenness. Based on a conservative estimate of the conviction rate for older cohorts, Scottish Government analysts have projected that **at least one-third of the adult male population is likely to have a criminal record.**
6. Figure 3 confirms the conventional finding that women have less involvement in the criminal justice system than men. Known criminal convictions peak at around 9% for those born in 1973. Extrapolating this to the population as a whole, this suggests that **nearly one in ten of the adult female population is likely to have a criminal record.**

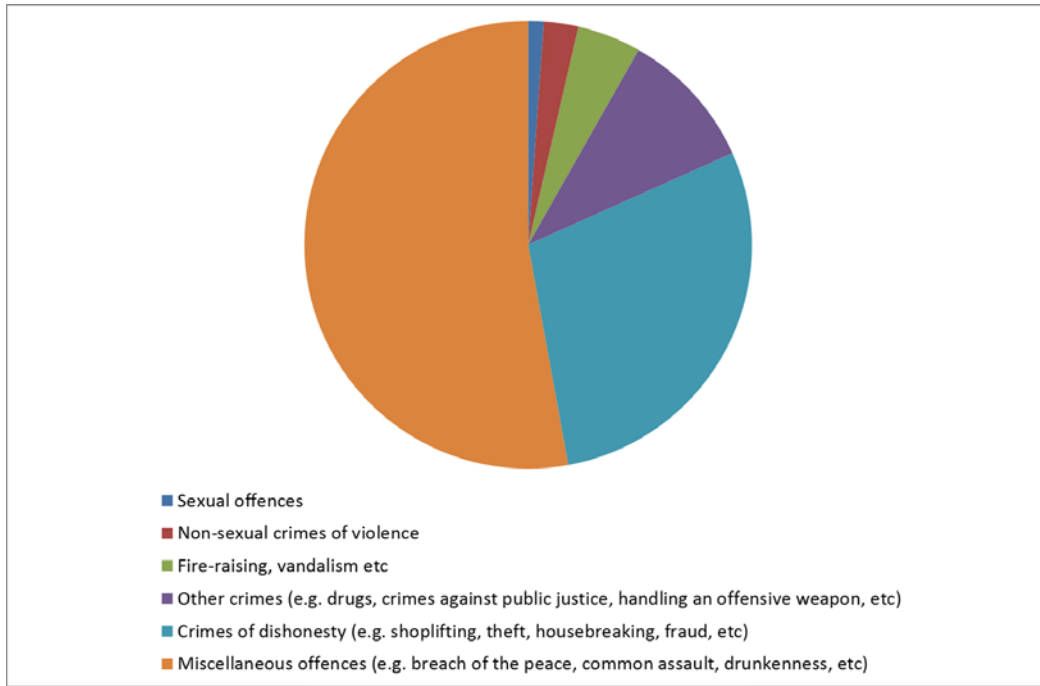
Figure 2 Proportion of adult female population with a known criminal conviction (post-1989)



Source: Scottish Government, Justice Analytical Services

7. These levels of prevalence compare with the study of convictions in the population of England and Wales showing one-third of 48 year old men had a criminal conviction (Prime et al., 2001). That study also found that the majority of people would go on to have only one conviction – about half of men and three-quarters of women (Id.).
8. These data show that accessing employment with a criminal conviction is not an issue for a very small and hardcore minority, but something which affects a significant proportion of people throughout Scottish society. Even for women, nearly one in ten of those at the prime career ages are having to deal with a criminal history when applying for a job.
9. Figure 4 shows the distribution of offences among criminal convictions in Scotland over 40 years. Most convictions involve offences, which in general tend to be less serious than crimes. This data make clear that criminal records are an issue not only for people with the most experience of criminal justice (e.g. ex-prisoners).

Figure 3 Total number of convictions 1971-2011, broken down by crime type



Source: Criminal proceedings data, Scottish Government

3. Trends in Criminal Records Checks

1. Disclosure Scotland is the body responsible for processing applications seeking disclosure of an individual's criminal history. It provided to the Scottish Government figures regarding the total number of disclosure applications per annum (Table 1), as well as the other figures used in this subsection. Disclosure Scotland handles applications typically made in the context of an employment application or offer. This data can provide a sense of the workload involved in processing criminal history records as well as show the numbers of people with relevant criminal information identified through this system.
2. There are currently four levels of application. *Basic* applications are the most numerous and least expansive form of application, containing only information about unspent convictions under the ROA. *Standard* applications contain information about spent and unspent convictions, as well as cautions (a disposition available in England and Wales). *Enhanced* applications contain all conviction information, spent and unspent, and any other non conviction information considered to be relevant by the police or other Government bodies. The *PVG (Protection of Vulnerable Groups) Scheme* came into effect early in 2011, and includes the same information as in the Enhanced application process, which it is gradually replacing as it now is the application used for assessing the background information of people in regulated work with children or vulnerable adults.

Table 1 Total Applications to Disclosure Scotland, 2006-07 to 2011-12

Year	Total Applications Received
2011-12	1,056,122
2010-11	1,039,820
2009-10	946,728
2008-09	881,635
2007-08	782,764
2006-07	599,107

Source: Disclosure Scotland (2012)

3. England and Wales do not have a process for performing basic application records checks and so these are carried out on request by Disclosure Scotland. Hence Table 2 shows data for multiple jurisdictions: Basic applications including England, Wales and Scotland; all other application types (Standard, Enhanced, PVG) including only Scottish applications). Conversation with Disclosure Scotland staff suggest that application requests originating in England and Wales account for up to 80% of the Basic application workload.

4. In 2011-12, 26,064, or 3%, of Basic applications were issued with certificates containing unspent convictions.

Table 2 Applications to Disclosure Scotland by Type and Year, 2008-09 to 2011-12

2011-12

Application Type	Applications Received
Basic*	828,661
Standard / Enhanced**	22,008
PVG**	205,453
Total	1,056,122

2010-11

Application Type	Applications Received
Basic*	738,340
Standard / Enhanced**	295,742
PVG **, +	5,738
Total	1,039,820

⁺ PVG came into force on 28/02/11

2009-10

Application Type	Applications Received
Basic*	582,952
Standard / Enhanced**	363,776
Total	946,728

2008-09

Application Type	Applications Received
Basic*	501,279
Standard / Enhanced**	380,356
Total	881,635

* Figure includes applications from England, Wales and Scotland.

** Figure includes applications only from within Scotland

5. While the number of Basic applications has increased over the years, the combined total number of all other application types (Standard, Enhanced and PVG) has declined. In 2009-10, non-Basic applications comprised 38% of all applications, but this had declined to 22% of all applications in 2011-12.
6. In 2011-12, 14,039 applications to Disclosure Scotland to join the PVG Scheme were issued with certificates that contained conviction information. This was equal to 7% of the total applications to join the PVG Scheme completed in 2011-12. Since PVG has gone live, a total of 811 individuals, or 0.2% of all PVG applications to date have been listed as barred with working with vulnerable groups – 644 with children, 45 with vulnerable adults and 122 with both groups. Disclosure Scotland has capacity to process record updates for PVG applicants so the total number of applications may include record updates rather than applications from people new to the scheme.
7. Overall, the numbers of certificates containing unspent convictions (for Basic applications) and all conviction and other disclosable information for the other schemes accounts for between 3% and 7% of all applications made. It is interesting that Basic applications are growing consistently while all other applications, taken together, have been declining. The reasons for this are not clear.

4. Problems with the Rehabilitation of Offenders Act

1. The ROA does not aim actively to create employment and rehabilitation opportunities for ex-offenders; rather it puts in place a system that can clear the record of ex-offenders seeking these opportunities. ‘The Act has nothing to do with correctional programs or training, but instead it specifies when and how a person’s criminal record becomes expunged or concealed (basically, after multiple years of good behavior). The “rehabilitation” on offer is the removal of the “leper’s bell” of the criminal conviction, not some expert treatment’ (Maruna, 2012: 73-74). This clarification contextualises what we might reasonably expect of reform.
2. Yet, as we have reported above, rehabilitation periods under the ROA, for most convictions, remains long: the vast majority of adult convictions take at least five years to become spent. For example, a 25 year old man fined for drunken behaviour, a case that the offence data above suggest is not unusual., would have a disclosable criminal record for five years. Indeed, the amendments of the ROA, set alongside gradual sentence inflation, have produced an effective escalation in the rehabilitation periods. Convictions receiving a prison sentence of 2½ years or more are never spent. As Rolfe (2001) suggests, this differs from practice in most other European countries (see also Appendix A, summarising policy in a number of countries) where

‘...with the exception of Ireland (and Germany for life sentences) all criminal offences become ‘spent’ after specified time periods... [Furthermore if] information on a criminal record is not sought by the employer, there is no legal need to disclose unspent convictions nor should the individual be penalised if these are later discovered. However, as with other fraudulent acts to gain a job, if a job applicant lies to hide unspent convictions; they may be legally dismissed if these convictions come to light’ (Rolfe, 2001: 21).

3. In Fletcher et al.'s (2012) recent report for the Department for Work and Pensions, three key areas of the ROA were highlighted as in need of reform in England and Wales:
 - i. The Act is confusing to offenders, with only 2% of prisoners in one study understanding the Act's provisions about when one is required to disclose unspent convictions;
 - ii. Sentence inflation (the rising average lengths of sentences) has meant rehabilitation periods are too long or out of reach for increasing numbers of offenders; and,
 - iii. An increasing number of jobs have become exempted under the Act, over the past 35 years. (p. 51)
4. The Green Paper '*Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*' (2010) reflects growing calls for review of the ROA. It recommends that:
 - i. All offenders who receive a determinate sentence should be covered by the Act;
 - ii. The length of rehabilitation periods should be reduced;
 - iii. A clearer classification of rehabilitation periods should be produced; and
 - iv. The language of the legislation should be simplified.
5. Discussion of the ROA must also include consideration of the impact of corollary legislation such as the Police Act 1997. In England and Wales, upon prosecution, police copies of offenders' criminal antecedents are shared amongst other criminal justice services (and similar arrangements apply in Scotland). Five copies are produced for magistrates' court hearings and are distributed by the Crown Prosecution Service. Upon conviction, this information is logged on to the court computer system and is thereafter immediately available to the police and other criminal justice agencies (Padfield, 2011: 38).

6. Criminal records may also be accessed by those responsible for vetting applicants for appointment to a huge variety of jobs and appointments, not simply those related to national security. Security clearance is required when trading in alcohol, driving a bus or taxi, working in a casino or betting office, and in particular, when working with children or vulnerable adults. Prior to the development of disclosure schemes, employers were barred from checking whether prospective employees had a criminal record, excepting those working with children or where concerns of national security arose. The introduction of basic disclosures (for occupations not covered by higher level disclosures) has changed this presumption drastically:

‘[Disclosure checks] will show all convictions that are not spent under the ROA. Any employer can ask a job applicant for a copy of their basic disclosure’ (Fletcher, 2001: 874). The Criminal Records Bureau creation in 1998 was to deal with the explosion of application to check people’s criminal records (or absence of criminal record).

7. The ability of a person to prevent access to his or her information appeared to be supported by the enactment of the Data Protection Act 1998. However, case law shapes how such protections are interpreted and balanced. Padfield (2011) notes that the right to private life provided in the European Convention on Human Rights 1950 art. 8 is not treated as absolute but requires to be balanced on a case by case basis against other interests. Thus we see that although the ROA appeared to protect an offender from disclosure, the reality of English law today presents a very complex picture. Many offenders continue to be forced to disclose their convictions before they can obtain a job. Currently, there is no way that a criminal record can be deleted from the Police National Computer database, a position confirmed by the decision in *Chief Constable of Humberside v Information Commissioner* [2009] EWCA Civ 1079. ‘The Court of Appeal made it clear that the law permits the police to keep all convictions on the PNC forever’. (Padfield, 2011: 45).

Scottish Amendments affecting ROA coverage and practice

8. In addition to corollary acts and the influence of case law, several Scotland specific amendments have been made to the ROA. These amendments, as well as changes in other relevant legislation, have led to some distinctive aspects of operation of

the ROA in Scotland. In addition, though, Scottish amendments as in England and Wales have expanded the number of professions and situations where offenders are denied the benefit of the ROA's coverage and the variety and extent of legislative amendments and consolidations likely compounds the problem of confusion about the Act's coverage and provision among employers, ex-offenders and the general public.

9. A major consolidation of the Rehabilitation of Offenders Act 1974 (Exclusion & Exceptions) Order took place in February 2013. This consolidated all of the changes that have been made since Rehabilitation of Offenders Act 1974 (Exclusion and Exceptions) (Scotland) Order 2003. The Government will be publishing a wider discussion paper about the disclosure and rehabilitation system in Scotland later in 2013, which will detail the nature and implications of this consolidation and other changes.
10. Section 109 of the Criminal Justice & Licensing (Scotland) Act 2010, which commenced in November 2011, provides protection for individuals who have been given an alternative to prosecution (AtP). This is a significant change and is a very different approach than the one that has been taken in England & Wales.
11. There has also been a change to the children's hearings under the Children's Hearings (Scotland) Act 2011. The intent is for children's hearings to be treated as AtPs and only serious violent and sexual offences disclosed automatically. Although this is the intention, there is an issue around the disclosure of spent AtPs in reserved areas. As such a Transitory order will be in place until such time as the powers to allow this to happen are transferred from the UK Government to the Scottish Parliament. Under this transitional order, acceptance or establishment of an offence ground of referral to the children's hearing will be treated as a conviction. Once section 187 of the 2011 Act comes into force the transitional arrangements will come to an end and section 3 of the 1974 Act will be repealed.
12. Recent amendments have increased the range of professions which are exempted from the ROA and the situations in which it is allowable to ask about spent

convictions (e.g. in applying for a taxi licence, to become a foster carer, and in proceedings before an NHS tribunal).

13. Aside from the legislative changes in Scotland affecting handling of Children's Hearings procedures and alternatives to prosecution, the common thread in these amendments is the introduction of presumptions *against* an ex-offender's right to legal rehabilitation which suggest a distrust (or at least the limits of trust) of ex-offenders; and even the presumption that they might take advantage of people in a vulnerable or dependent position.
14. Piecemeal amendments generally make it more difficult to keep abreast of the implications of the Act and may be a contributory factor in the lack of knowledge employers and ex-offenders demonstrate in surveys of their understanding.

5. Employment and Desistance

1. A recent Ministry of Justice (2013) study provides the latest evidence of an established correlation of employment with reduced offending. In a rigorous design using Propensity Score Matching, the MoJ study found that employment has a statistically significant impact on offending.

'For custodial sentences of less than one year, offenders with a P45 employment spell had a proven re-offending rate 9.4 percentage points lower than the matched comparison group. For custodial sentences of one year or more, offenders entering P45 employment after release had a proven re-offending rate 5.6 percentage points lower than the matched comparison group' (Ministry of Justice, March 2013, 24).

2. Research on Norway provides additional robust evidence on the connection between employment and reduced rates of offending. Skardhamar and Telle (2009, 2012) examined all 7,476 prisoners released during the year 2003, following their progress through the end of 2006. The total rate of observed recidivism (re-convicted and sentenced) was 54%, which masks the striking difference in reoffending rates between those who did find a job (33%) and those who did not (78%) upon completion of a sentence (Id.). Moreover, those who found a job and

were married with children had the lowest rates of recidivism; those with higher levels of education also had lower levels of recidivism (Id.).

3. The literatures around desistance and resettlement allow us to posit several reasons for such frequently observed correlations between successful engagement in the labour market and desistance from crime. Farrall (2002: 146-50) notes that, in terms of its impact on an individual's life, paid employment has the potential to achieve the following: a reduction in 'unstructured' time and an increase in 'structured' time; the establishment of a daily routine which is focused away from offending; an income, which enables 'home-leaving' and the establishment of 'significant' relationships (Willis, 1984); a 'legitimate' identity; an increase in self-esteem; positive use of an individual's energies; financial security; daily interaction with non-offenders; for men in particular (see Wallace, 1986, 1987), a reduction in the time spent in single-sex, peer-aged groups; the means by which an individual may meet their future partner; and ambition and goals, such as promotion at work.
4. In a recent extensive review of the English-language literature, McEvoy (2007) arrived at similar conclusions about the relationships between crime, desistance, employment and resettlement. In this review, he observed that work programmes in prison have been prioritised and are viewed in the UK as Key Performance Indicators and part of the allocated hours of 'purposeful activity' which prisoners may expect. However, despite that prioritisation, even very good work programmes delivered in prison may not result in prisoners finding and maintaining employment if they are not linked to, and supported by, good resettlement provision. McEvoy (2007) concluded that given the wide range of other social and personal problems that offenders face, standalone employment interventions are unlikely to succeed. Properly integrated programmes are required which address personal development, accommodation and substance misuse needs as well as training and employment issues.
5. McEvoy (2007) also draws on the desistance literature in highlighting the centrality of employment in developing the social capital that helps offenders desist from criminal behaviour, recommending therefore that such interventions should, where possible, also be accompanied by a focus on the importance of the family as a

second key factor in supporting desistance. Social capital originates in ‘relations between individuals, in families and in aggregations of individuals in neighbourhoods, churches, schools and so on. These relations facilitate social action by generating a knowledge and sense of obligation, expectations, trustworthiness, information channels norms and sanctions’ (Hagan and McCarthy, 1997: 229). Accessing employment typically requires social capital but, once secured, it also generates it. McEvoy draws comparisons with other desistance supporting relationships:

“The ways in which people are “connected” to their families, communities or indeed employers and co-workers can thus be seen as a resource in seeking to reduce offending or indeed reoffending behaviour...Good family relationships share many of the features of employment including an increase in ‘structured’ time and a decrease in ‘unstructured’ time, the construction of legitimate identities and increased self-esteem, contentment and emotional support and ‘something to lose’ – all of which are associated with desistance from criminality’ (McEvoy, 2008: 44).

6. In general, it seems that access to meaningful employment, particularly alongside supportive social relationships, can provide a powerful stake in conformity, cementing a person’s commitment to the desistance process. Since labour market participation is itself a key marker of social integration and a source for the development of a more ‘pro-social identity’, it makes sense to regard meaningful and rewarding work as *both* a key facilitator of the desistance process and as an important potential measure of arrival at the outcome of social integration.
7. Of course, the impact of the ROA and of disclosure systems must be contextualised within an appreciation of the structural conditions in the labour market itself. Solomon et al. report that ‘the typical job for which a prisoner is prepared is a low-skill, blue collar, or manufacturing job’ (Solomon et al., 2004: 6). Yet the impact of globalization, technological advances, and the availability of migrant labour has reduced these opportunities. While the UK labour market has shifted toward jobs in the service sector – child and social care, customer service – precisely the sorts of jobs for which individuals with criminal histories are less

likely to be hired or where (enhanced) disclosure issues arise. More optimistically (but notably writing before the current recession), Solomon et al. argue that, with the retirement of the baby boom generation, it is likely that the labour market will change again, that unemployment rates will fall, and that employers will need to develop new sources of labour, potentially including ex-offenders (Solomon et al., 2004).

8. Some analysts have suggested that there is a Catch-22 in play such that the limited employment opportunities potentially open to ex-offenders tend to possess less recidivism-reducing characteristics than ones they are debarred from due to their criminal history. At least one study concludes that employment's effect on desistance or recidivism varies according to the job: 'only jobs that are high quality in terms of pay or viable careers have been shown to reduce recidivism' (McKean and Ransford, 2004:19).

6. Employer Perspectives

Employer Awareness of the Act

9. The ROA's impact is also affected by a lack of knowledge, both on the part of employers and ex-offenders seeking gainful employment. A study by Metcalfe et al. (2001) showed: Only 23% of recruitment is conducted by recruiters with much idea at all about the Act. Perhaps as little as 13% of recruitment involves recruiters with a reasonable knowledge of the Act and confident in its use.
10. A similar survey of 204 employers from the North-West of England, (Haselwood-Pocsick, 2008: 22), collected the following data displayed in Table 2.

Table 3 Knowledge of the ROA among Recruitment Staff

Knowledge of the Provisions of the Rehabilitation of Offenders Act 1974 Among Recruitment Staff at the Surveyed Employers (n = 204)

	Aware (%)	Not aware (%)	Does not know (%)
All employers	50	36	14
Employers who request criminal records info from job applicants	62	27	11
Employers who <i>do not</i> request criminal records info from job applicants	23	56	21
Employers with experience of employing ex-offenders	69	25	6
Employers with <i>no</i> experience of employing ex-offenders	35	44	21

11. These findings confirm that knowledge on the topic of spent convictions was patchy among employers: only half asserted that their recruitment staffs were made aware of the provisions of the Act. It must be stressed, however, that we cannot assume that the employers who regularly requested information on criminal records would be aware of the relevant legislation: more than a quarter of employers requesting criminal records information reported they were not aware of the specific provisions of the Act. Similarly, recruitment staff in a quarter of employers that had experience of employing ex-offenders were unaware of the provisions.

Employers' Attitudes to Ex-offenders

12. That knowledge of the ROA amongst employers is patchy creates difficulties in assessing the Act's impact. The task is further complicated by the methodological difficulties of relying on self-reports not just of knowledge and attitudes but also of employers' *practices*. Pager and Quillian's (2005) research on the U.S. points out that employer responses to surveys tend to under report the extent to which ex-offenders are discriminated against:

‘On the basis of several methods for assessing the attitude–behavior relationship, all comparisons tell a similar story: it is difficult to get an accurate picture of actual hiring outcomes based on responses to the employer survey used in this study. Employers generally express a greater likelihood of hiring applicants with criminal records, and a far greater likelihood in the case of black applicants, than we see in actuality. Furthermore, employers who indicate greater willingness to hire an ex-offender in response to a survey question seem to be only slightly more likely actually to offer an interview to such an applicant. Both in terms of making aggregate- and individual-level predictions, our evidence points to weak correspondence between survey results and actual hiring outcomes’ (Pager, and Quillian, 2005: 369-70).

13. In the UK, Fletcher's (2002) study of the recruitment practices of 26 companies known to provide work in occupations traditionally sought by offenders (retail, hotel and leisure and transport and distribution) found that two-thirds of employers had a policy on recruiting people with criminal records, which in the main presumed *against* the applicant. ‘One in 20 were explicit in saying they did not hire ex-offenders: “My managing director would not touch offenders with a barge pole”, commented the general manager of a bed manufacturer. A further 38% restricted their recruitment to certain posts’ (Fletcher, 2002: 501).
14. Such attitudes and practices of discrimination have been confirmed elsewhere. Working Links' (2010) UK research found that although only 10% of employers said they would not consider employing ex-offenders, only 18% said they have actually employed someone they know to have convictions.

‘Our research also found that three quarters of employers would use a conviction to either reject an applicant outright, or to choose between two equally qualified applicants where one has no conviction.’ (Working Links, 2010: 12)

15. Fletcher’s (2001) review of previous research that has explored how employers respond to job applications from offenders in England and Wales has highlighted several key messages:

- Most employers seek criminal record information from job applicants. Most private sector employers lack the appropriate policy frameworks for dealing with the issues raised by the recruitment of offenders in a responsible way. Equal opportunities policies are, for example, not seen as being directly relevant and few have policies that specifically mention offenders.
- The type of offence is a key consideration, with violent and sexual crimes often being viewed as being most serious.
- Many recruitment exercises are staffed by line managers who are unfamiliar with the legislative framework and have not received appropriate information or training. In such circumstances anxiety on the part of the recruiter that offenders cannot be trusted can be a significant factor hampering their recruitment.
- Very few *knowingly* recruit offenders (Fletcher, 2008: 289-290).

16. Atkin and Armstrong’s survey of employers in the U.S. distinguishes offences and the impact this has upon employer attitudes with unsurprising results. The vast majority (80%) expressed some degree of ‘unwillingness to hire an ex-offender who was convicted of a violent offense, with the exception of domestic violence, where only 51% indicated an unwillingness to hire’; levels of unwillingness to hire were lowest for those convicted of drug possession and use offences and driving under the influence of drugs or alcohol offences (Atkin and Armstrong, 2013, 81-82). This research echoes other U.S. studies showing generally a greater willingness to hire those convicted of less serious offences (misdemeanours) than more

serious (felonies) ones even though many felony convictions were for non-violent offences (Fahey, Roberts and Engel, 2006).

17. Employer behaviour towards offenders in the recruitment process is diverse, complex and often contradictory. Despite this, Fletcher et al. (2001) suggests that it is possible to discern five key determinants of their responses: legislation, corporate culture, key individuals, prevailing stereotypes and prejudice, and labour market conditions. A lack of knowledge may be expected in smaller businesses with limited resources, but as Fletcher et al. point out, 'the low importance attached to the issue, the decentralised nature of much recruitment activity and difficulties maintaining effective communication meant that it also characterised many recruitment exercises undertaken by large national or multinational employers' (Fletcher et al., 2001: 39). This shared ignorance of the ROA (and perhaps more broadly of the issues around rehabilitation) amongst both small and large businesses impedes development of common values and coordinated approaches between the public and private sectors, especially with regards to social responsibility. With particular regards to the private sector:

'[M]ost companies are primarily concerned with their bottom-line performance. They want recruits able to contribute to the key business goals of productivity and profitability. Many have particular concerns about the honesty and job-readiness of offenders. In contrast, a few believe that commercial success and social responsibility are inextricably linked' (Fletcher et al, 2001: 39).

18. The risk of reoffending is one that weighs heavily upon employers' recruitment decisions, despite the difficulty in analysing its prevalence. Yet the fear prevails:

'Pauly and Kay (1996) found that 84 per cent of over 200 company managers thought that there was a high risk of recidivism when recruiting ex-offenders. Many employers are also acutely aware of the negative publicity that might be generated. Some are concerned about the attitude of other employees toward an ex-offender in their workforce' (Fletcher, 2001: 875).

19. A human resource manager in a train operating company, part of Fletcher's 2002 cohort, justified this position by saying: 'It is definitely not an equal opportunities issue. It is a societal issue'. This was often justified by making a distinction between 'deserving' and 'undeserving' groups. Offenders were felt to be undeserving because offending was deemed to be a choice rather than an innate characteristic (Fletcher, 2002: 500-501).
20. However, there is anecdotal evidence that employers are confronting some of the ignorance and lack of action around recruitment of ex-offenders. In 2012 the Glasgow Employers Advisory Group on Ex-offenders (GCAEG) was set up in consultation with the city's Chamber of Commerce 'to articulate the key issues and challenges from the perspective of employers, in recruiting ex-offenders and to produce a set of recommendations to improve ex-offenders' chances of securing stable employment (from *Not Your Typical Crime Fighters!* Report, p. 1; GCEAG, 2012).
21. The public sector may be doing a better job than the private sector in not discriminating against ex-offenders. Fletcher (2002) found that the public sector, whilst more likely to make use of the Police Act to request basic disclosures, perhaps due to jobs associated with vulnerable groups, used this information more responsibly. Public sector employers were much more likely to request this data at the job-offer stage and to have recruited an offender in the last 12 months.
22. Finally, a major survey by The Chartered Institute of Personnel and Development's (CIPD) 2007 report, *Employing Ex-offenders to Capture Talent*, provides much more positive conclusions on UK employers' policies, views and experiences in connection with employing ex-offenders. Some of the comments made by CIPD members who took part in focus groups are included, together with example case studies. The keys findings relating to employers' practices and experiences of recruiting ex-offenders were as follows:
 - Around half (53%) of organisations report experience of employing ex-offenders, with the voluntary sector (75%) having the greatest involvement, followed by the public sector (71%), with the private sector lagging behind at 34%.

- As many as one in ten organisations with experience of employing ex-offenders say they tend to actively seek ex-offenders to employ. The main reasons employers are proactive in recruiting ex-offenders include: to boost their recruitment pool; and to support organisational policy.
- Only one in seven organisations ask job applicants if they have a criminal record.
- One-fifth of organisations say that their experience of employing ex-offenders was 'better than expected', with this being more commonly reported in the private sector. Only around 5% of employers (23 of 474 respondents) reported negative experiences when employing an ex-offender.
- Of those organisations that had a 'better than expected' experience, they said that ex-offenders were more motivated to succeed than they expected and praised their attitudes and performance. Among the 134 organisations that reported positive experiences with ex-offenders, the reasons given are that they settle into work well with colleagues (86%) and perform well (82%) (CIPD, 2007, 4).

23. The more positive results of the CIPD research may be a function of its survey group including a higher proportion of employers who had worked with ex-offenders than the other research cited in this report. This fact may also add support to the finding, discussed below, that having experiences of hiring ex-offenders overcomes to some extent the initial bias against them.

Real Risks of Employing Ex-offenders?

24. As mentioned, some of the unwillingness of employers to recruit ex-offenders may have to do with concerns about their risk of reoffending. This subsection considers some of the research on these risks.
25. There is a developing evidence base (though principally based on research in the US) about the shelf-life of criminal convictions. This literature has explored the time periods within which the predictive validity of prior convictions wanes. Bushway and Apel (2009) report that:

[R]esearch has shown definitively that individuals who have not offended for a very long time—between 7 and 10 years—have a very small probability of offending in the next year. In fact, *they often seem to have the same level of risk as individuals without a criminal history*. This line of research has thus established that it is possible to distinguish risk levels among individuals with criminal histories, although in this case it takes at least 7 years of waiting before the desisters reveal themselves’ (Bushway and Apel, 2012: 29-30; emphasis added).

26. The little evidence that exists on reoffending in the *workplace*, suggests it is comparatively rare. In a recent conference paper reviewing findings from a 1970s study, Soothill (2012) reports that eight percent of all reconvictions by ex-offenders involved workplace offences.
27. More generally, quantifying the actual risk to employers of hiring ex-offenders in terms of committing crime is an exceptionally difficult undertaking. Exploring the interactions between employment related opportunities to offend and constraints upon offending and the differing motivations and propensities of individual ex-offenders to reoffend (or not) is obviously problematic.
28. Harris and Keller provide a précis of the inconclusive research in this area, warning policy makers that they ‘should consider that risks averted by exclusion of offenders in the workplace might translate into increased risks of crimes to the public at large’ (Harris and Keller, 2005: 19).
29. Moreover, research on the risks of hiring ex-offenders should take into account the risks created by *not* hiring offenders, or by having a regulatory context which creates barriers to employment for ex-offenders:

‘Research on workplace violence indicates that workers actually face higher risks of assault from strangers, clients, intimate partners, or other family members than from co-workers (Duhart, 2001; National Center for the Analysis of Violent Crime, 2004; Tjaden & Thoennes, 2001). It is not surprising that higher risk occupations include protective and mental health services and retail sales positions (Lord, 1998; National Institute for

Occupational Safety and Health, 1996). Persons with criminal backgrounds are believed to make substantial contributions to levels of crime in vocations serving vulnerable populations (see, e.g., Crooks Caring for Seniors, 1998). Yet, other than for a few small-scale accounts of employee crimes in health care settings (see, e.g., Pillemer & Bachman, 1991; Pillemer & Moore, 1989), there is *no research* that demonstrates that an organization, co-worker, or client is any more likely to be victimized by exposure to an employee with a criminal history than to one without. This is partly due to the lack of emphasis by researchers on the measurement of criminal histories of employee subjects and partly due to methodological problems where criminal histories are taken into account.’ (Harris and Keller, 2005: 17-18, emphasis added).

30. The Chartered Institute of Personnel and Development’s recent survey provides some solace, painting a cautiously positive, “rosy picture with regard to employment prospects for ex-offenders, contrary to what might be expected” (CIPD, 2007, 4), so long as policy supports these initial findings. In something of a volte face from the CIPD’s 2005 Labour Market Outlook survey which found employers expressing little interest in ex-offenders as a potential labour market source, 2007’s survey shows an eroding employer reticence in employing ex-offenders so long as they are supported in policy. This includes:

“accessible and appropriate guidance on risk assessment and legal duties, and networking opportunities with other employers to share experiences and learn from each other... [T]his willingness to get more involved is justified by the experiences reported by employers themselves. These show that employing ex-offenders is no less viable than employing people without offending backgrounds – no more difficult and no less satisfactory – while reoffending at work, as reported by employers themselves, is rare” (CIPD, 2007, 4)

Education and Criminal Records Checks

31. While this chapter focuses on the employer perspective, it is worthwhile to mention the parallel issue of ex-offender access to education, as education is both

an important shaper of employment opportunities as well as a predictor, in a similar way to employment, of reduced reoffending (e.g. Skardahamar and Telle, 2012).

32. There has yet to be comprehensive research on the attitudes and practices of UK based universities and further education institutions towards ex-offenders, but recent American research flags up issues which are relevant to the UK. The American Association of Collegiate Registrars and Admissions Officers in collaboration with Center for Community Alternatives (2010) conducted a survey made available to all of its members that explored the use of criminal history screening in college admissions procedures. Key findings include:

- A majority (66%) of the responding colleges collect criminal justice information, although not all of them consider it in their admissions process.
- Most educational institutions that collect and use criminal justice information have adopted additional steps in their admissions decision process, the most common of which is consulting with academic deans and campus security personnel. Special requirements such as submitting a letter of explanation or a letter from a corrections official and completing probation or parole are common.
- Less than half of the institutions that collect and use criminal justice information have written policies in place, and only 40 percent train staff on how to interpret such information.
- A broad array of convictions are viewed as negative factors in the context of admissions decision-making, including drug and alcohol convictions, misdemeanour convictions, and youthful offender adjudications.

33. In sum, most higher and further education institutions surveyed collected criminal history information, and this information generally is used in ways which increase the scrutiny of ex-offender applicants. However, the researchers conclude that this response is not justified by available evidence:

“There is no evidence that screening for criminal histories increases campus safety, nor is there any evidence suggesting that students with criminal records commit crimes on campus in any way or rate that differs from students without criminal records” (CCA, 2010 , 32).

The Importance of Personal Encounters in Overcoming Ex-offender Bias

34. In the UK, the Recruitment and Employment Confederation express what should be important to employers. ‘What is the applicant's attitude to the offences? When interviewing the applicant, depending on if they are prepared to discuss their past, consider the following: ‘The degree of remorse, or otherwise, expressed by the applicant’ and ‘Their motivation and desire to change’ (<http://www.rec.uk.com/home>).

35. However, answering these questions requires that the ex-offender reach the stage of an interview:

‘Employers who feel sympathetic toward ex-offenders are likely to express such sympathies in conversations with ex-offender applicants. But above and beyond employers' predispositions, we observe some evidence that the interaction itself can work to clarify and shape the employers' interpretation of the criminal record. For employers who have ambivalent feelings about hiring ex-offenders, or who have anxieties about particular kinds of ex-offenders, interaction with the candidate allows the employer to interrogate these concerns directly.’ (Pager and Western, 2009: 204)

36. Interestingly, Pager, Western and Sugie (2009) discovered that employment prospects improve for applicants who have a chance to interact with the hiring manager, especially where applicants manage to elicit sympathetic responses in the course of those interactions. Those interactions seem to offset or mediate concerns about theft, violence, and drug use, as well as reliability and performance. Whilst, ‘personal contact with an applicant cannot reveal all of these issues... [it] can help to provide some signals as to the disposition of the applicant and can help

the employer develop a “gut feeling” about whether this individual is likely to diverge from the stereotype of the ex-con’ (Pager, Western and Sugie, 2009: 209).

37. Padfield (2011) suggests the importance of personal contact:

“Ex-offenders have a largely negative reputation amongst the employers who had no known experience of working with them, in stark contrast to the positive impressions of those employers who are open to recruiting ex-offenders.” (Padfield, 2011: 41).

38. Pager and colleagues conclude that,

‘while a criminal record does have a significant negative impact on the employment prospects of job seekers, some employers are willing to look beyond the conviction, or to downplay its significance in the context of other information they acquire during the interview. In these cases, a kind of empathy seems to develop between employer and job seeker, with goodwill often translating into a substantial improvement in employment prospects.’ (Pager and et al., 2009: 8-13)

39. Alison Itani, HR Director for Wiltan, a manufacturing company, shares her experiences:

“Many of the offenders completing their sentence and ex-offenders we employ are loyal and have a lot of drive. They are motivated and will take every opportunity that is offered to them to change their lives. Giving someone a second chance at this point in their life will be paid back ten-fold in hard work and reliability. This process also brings diversity into the workplace and enables other employees to see the values by which their employers and the company they work for live by. This can be a very positive experience for all involved” (CIPD, 2007, 11).

40. Jusna Illah, Policy Co-ordinator for Intertrade Services Group, a not-for-profit company:

“We’ll definitely continue with work placements for ex-offenders and we would consider employing ex-offenders as part of our diversity strategy. It’s business need as well as a social need. If someone is capable and willing and wants a chance at employment, then we will look at the pros and cons and judge each person on their own merits” (CIPD, 2007, 11).

7. Ex-Offender Perspectives

41. Testimonials from ex-offenders are drawn from research literature as well as stories submitted to SCCJR directly in response to this research. Key themes of the experience of attempting to access employment and education are summarised here. Complete testimonials have been provided in Appendix B. An important overall theme is that legislative and employer attitude barriers to recruiting ex-offenders have an effect not only on the employment rates of people trying to reintegrate into society but also on the psychological and general well-being of these individuals. This can produce independent and deep negative effects relating to self-esteem and willingness to engage in desistance.

- *A job interview experienced as a chance to gawk at a real, live criminal*: ‘I got invited to some interviews, just cos they wanted to see what an armed robber, or someone who’d done 20 years looked like. I could see within minutes that I wasn’t here to get the job’
- *Rejection experienced as loss of hope, feeling permanently excluded*: ‘I just kinda felt self-defeatist, innit, I felt kinda like well OK, see I told you so, what’s the point in trying to change or trying to do anything, because society is not going to accept me.’ And, ‘To actually make the application was a big step for me and having heard nothing back feels like a kick in the teeth that I will just have to get accustomed to.’
- *A sense of ongoing anxiety and insecurity*: under threat of prosecution, but not convicted, ‘I imagined that the police would burst into the classroom and lift me directly from my seat such was the emotional turmoil that I was going through at the time.’
- *The Disclosure Scotland process experienced as lengthy and stress inducing*: ‘It took from March until December 2011 for Disclosure Scotland to sort out my application for PVG membership. All my reports/records from criminal justice social work/court/psychiatric needed to be sought and reviewed, causing me considerable distress at having my past raked up again.’

- *Loss of control and involvement in explaining one's past and defining one's future:* through 'knowing that people unknown to me were making decisions about my future based on reports rather than speaking directly to me.'
- *A feeling that criminal justice actors sometimes overstep their roles and obstruct desistance:* 'Basically I was at college and something happened and my social worker was phoning to find out what happened and, 'Aye he's got previous convictions and that.' And tellin the head of faculty; that's not fucking right. That's heavy gross misconduct.'
- *Having a job offer revoked despite a conviction being spent:* 'I was refused on the grounds of the organisation had deep concerns that if the media found out that a charity was employing an ex-offender it could have a negative effect on them.'

8. Possible Approaches to Reform

1. Maruna (2012) reminds us of the dictionary definition of the lost word ‘habilitation’, from which we derive rehabilitation: ‘1. to make fit or capable (as for functioning in society) 2. to clothe or ‘to qualify oneself.’” He continues that the ROA goes to this second meaning of the term rather than the first. The discussion here focuses on approaches to reform which might enhance this role, that is maximise the ability of legislation to create conditions which support by smoothing the way towards the reintegration of ex-offenders into jobs and education. It builds on the research presented above, on the problems with current arrangements under the ROA and the responses of employers and ex-offenders to it.
2. On the basis of the evidence reviewed above, and particularly in light of the emerging evidence about the role of work (particularly of certain types) in supporting desistance from crime, the UK and Scottish Governments have recognised the need to reform the ROA and to re-examine disclosure schemes.
3. We identify here among a range of possibilities three potential approaches to reform which graduate in terms of the extent to which they would alter existing practice: (a) retaining the current system but with alterations to rules about disclosure and to ‘spent periods’; (b) the introduction of ‘certificates of rehabilitation’; (c) and the replacement of the current system with one based on judicially imposed occupational disqualification.

Amending Spent Periods

4. There appears to be growing consensus that the waiting periods for convictions to become spent are too long. A lengthy period of waiting for a record to expire means a person is prevented from having a clear criminal record for an amount of time beyond which it is likely they are at risk of reoffending (see Bushway and Apel, 2009, cited above who note that after seven years a person’s risk of reoffending falls to the level of one who has never offended). Furthermore, the conviction hanging over one’s head for so long may be experienced as a negative labelling process that offsets or counteracts other signs that a person is ready to change their behaviour. Maruna (2012) argues that this kind of passive waiting for

time to pass neglects the insights of labelling theories that have found people live up or down to our expectations of them.

5. Within the UK, as early as 1999 the Better Regulation Task Force recommended that the Government review the rehabilitation periods in the ROA. These recommendations were taken on board in the form of a review, called *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act (2002)*, which was more fundamental than simply placing a greater emphasis on rehabilitation and resettlement:

‘The key objective for [such] a new disclosure scheme is to reduce re-offending by developing the best mechanism to enable people with previous convictions to access employment opportunities whilst maintaining the protection of the public. The key focus of this review has been to remove the barrier to employment that a criminal record presents by devising disclosure periods that are specifically related to the likely risk presented to the employer. It is not intended that the review should affect the use of previous convictions by the police or the courts for crime prevention, evidential or sentencing purposes’ (Home Office, 2002: 10).

6. Echoing Maruna’s (2012) arguments, respondents have commented on how current rehabilitation periods have a demoralising impact on ex-offenders trying to ‘go straight’.

‘The PRT [Prison Reform Trust] likened it to serving a ‘double sentence’... the PRT suggested a simple ‘2 year rule’ whereby convictions become ‘spent’ 2 years from the date of conviction for a community sentence, and 2 years from the date of release for a custodial sentence (of less than 4 years). The Criminal Bar Association agreed that rehabilitation periods should be automatic in the case of lesser crimes (e.g. up to 12 months custody) but proposed that, for longer sentences (up to 4 years custody), the rehabilitation periods should be set by the sentencer. NAYJ (National Association for Youth Justice) supported this more flexible approach as it would help offenders to understand how ‘rehabilitation’ applied to their particular circumstances.’ (UNLOCK, 2002: 60)

7. The *Breaking the Circle* review (Home Office, 2002) is now over a decade old so included in this report's appendix is an update on a selection of the international jurisdictions collated in Annex D of the 2002 review with an up-to-date detailing of what types of criminal convictions are disclosed in each country and their particular procedures with regards to the removal of conviction data.

Certificates of Rehabilitation

8. A second approach, favoured by Maruna (2011), would involve the development of the use of 'certificates of rehabilitation'. Such certificates would be issued by state or judicial authorities in light of evidence that a person has made significant progress away from offending. Maruna argues that our approach to rehabilitation should focus on active, not the passive form of redemption on which the current ROA works. Rehabilitation policies should encourage, support and facilitate good behaviour. Moreover, he argues that rehabilitation should not just be done, but be 'seen to be done,' through tangible measures such as a certificate (see also Maruna, 2012). Such rituals send important signals to the individual and wider society. He argues that:

'it may be better to forgive than forget past crimes. That is, rather than burying past crimes as if they never happened, states should instead acknowledge and formally recognise that people can change, that good people can do bad things, and that all individuals should be able to move on from past convictions' (Maruna, 2011: 97).

9. While Maruna argues that such a system (unlike any system of permitted non-disclosure of the past) has the merits of honesty, integrity and active support for change, it could also be argued that issuing such certificates would also assist employers with the potential reputational risks that might ensue if an ex-offender that they employed did re-offend. Certificates of rehabilitation would effectively represent the sharing of this risk with the issuing authorities, without absolving employers of their duties of care and due diligence.

Judicial Imposition of Occupational Disqualification

10. The third approach would go much further than the two previous possibilities. In the continental tradition, rehabilitation has tended to be seen as the right of those who have served their punishment, and not as the conditional reward only of those who have made sufficient progress in treatment or through formal rehabilitative interventions. Under such an approach, the right to rehabilitation arises not from evidence that the offender has somehow changed (so as to reduce risks) but rather from recognition of the state's duty to delimit punishment – to ensure that punishment ends the moment the sentence of the court has been completed.
11. Drawing on this kind of tradition – and noting the stronger traditions of respect for personal privacy in such jurisdictions (on which see also Herzog-Evans, 2011) – Larrauri (2012) writing in Spain has recently suggested a radically different approach. Her proposal is that occupational disqualification could be part of the sentence imposed by the court (in much the same way that the court can disqualify from driving). This approach shifts the presumption burden from a situation where a person's criminal conviction is treated as evidence (validly or not) as a continuing risk of offending to a presumption that a criminal conviction matters only in specific instances where a clear risk arises and can be evidenced.
12. In our assessment, Larrauri's approach has considerable merit, though it would serve to complicate the sentencer's responsibilities and tasks. One possible practical way of moderating the practical impact in the Scottish context, would be to leave occupational disqualification as an option for judges imposing community sentences or short custodial sentences, and to require the Parole Board (as a quasi-judicial body) to make determinations about disqualification in release decisions about longer sentence prisoners. The merit of this approach perhaps is that it would allow good conduct and progress in prison to mitigate disqualification, or to reduce disqualification periods. The early or eventual termination of disqualification periods by the Parole Board could also potentially fulfil at least some of the functions of certificates of rehabilitation and of the redemption rituals proposed by Maruna (2011, 2012).

13. These approaches to reform are not the only possible ways of proceeding, nor does the evidence – or could any evidence – dictate an obvious path of change. Rather this concluding discussion has aimed to organise some of these possibilities around different, increasingly radical, levels of action.

Appendices

Appendix A. Disclosure arrangements in other countries

This appendix excerpts criminal records disclosure policies in selected countries as surveyed in a commissioned study by KPMG (2009) available at; <http://www.cpni.gov.uk/advice/Personnel-security1/Overseas-criminal-record-checks/>.

The KPMG survey collected information on relevant laws and policies but did not evaluate how these were enforced in practice. It is beyond the scope of this report to explore international practice in detail, but an overview of the legal position can help situate the changes under review in Scotland's own law and policy. Similar to Scotland and the UK, where rehabilitation periods (the point at which a conviction may become undisclosable) are provided for, these are often on the magnitude of 5 or 10 years, though some countries allow for much briefer periods in some cases (of 1-3 years). However, unlike Scotland and the UK, most jurisdictions appear not to restrict the offences which are eligible for rehabilitation by sentence length (i.e. disallowing any conviction that resulted in a sentence of 30 months or more from ever being spent). Moreover, a number of jurisdictions completely destroy the criminal record once it is expunged (spent), where the UK retains and in some cases (e.g for non-Basic applications) discloses information about these.

Australia

There is no obligation on Australian police forces to destroy criminal records information at any time. Criminal records information may not be disclosed where the conviction is spent. Most States and Territories have their own spent convictions legislation which limits the disclosure of criminal history information. The exceptions are South Australia and Victoria, which follow Commonwealth legislation. Where a criminal record exists within the jurisdiction of an Australian State or Territory, the spent convictions legislation of that State or Territory will be applied.

Spent convictions legislation varies from jurisdiction to jurisdiction. However, in most cases, the rehabilitation period after which convictions are considered spent is 10 years (5

for juveniles) for less serious offences. More serious offences (e.g. those incurring a prison sentence of at least 30 months) may remain unspent (KPMG, 2009, 18-20).

Belgium

An individual's convictions are permanently removed from the criminal registry once the individual has been granted "rehabilitation". There is no set time frame for rehabilitation in Belgium. After a prison sentence has been served, the individual can apply for rehabilitation. This is accorded at the discretion of the courts and normally takes a minimum of several months (KPMG, 2009, 51-52).

Czech Republic

Technically, criminal convictions remain on record in the database for an indefinite period. However, convictions may be expunged on the basis of a request by the convicted person provided the sentence has been served and statutory conditions have been fulfilled. Copies of Entry from the Penal Register, on the other hand, will show all convictions, whether conditional or unconditional, served or being served, including any that have been expunged (KPMG, 2009, 92-93).

Denmark

In Denmark, judgments will be removed from a criminal record after 2, 5, 10 or 20 years, or at the age of 80 if no recent convictions have been added. The length of time a judgment remains disclosable is prescribed in Danish legislation (Declaration of the Treatment of Individuals' Information in the Central Criminal Register) and depends on the type of criminal records disclosure requested. In respect of a Private Penal Certificate, the relevant information is as follows: Custodial sentences 5 years from date of release; Suspended sentences 3 years from date of decision; Discontinued charges with conditions 2 years from date of decision; Fines 2 years from date of decision; In the case of individuals aged between 15 and 18 years, discontinued charges and fines, where these are first-time offences, will cease to be disclosable after 1 year. (KPMG, 2009, 101).

Estonia

Decisions will be removed from the Punishment Register and archived after a period of 1, 2, 3, 5 or 10 years, or after death (or cessation of activities, in the case of legal entities). The length of time that different categories of conviction remain disclosable is: Custodial sentences (3-20 years) 10 years from date of release; Custodial sentences (up to 3 years) 5 years from date of release; Community service 3 years from date of performance; Probation/conditional release from 3 years from date of period end/release a fine; Fines for criminal offences 3 years from date of decision; Enforced psychiatric treatment/sanctions 2 years from date of termination/ imposed on a minor application; Fines or detentions imposed for 2 years from date of decision misdemeanours in relation to tax offences; Fines/detentions imposed for 1 year from date of decision misdemeanours. Where disclosure is sought for a position that involves working with children, a check will be made of both registered and archived convictions (KPMG, 2009, 109- 110).

France

There are three types of criminal records disclosure issued in France. Only one of these is available to the individual whose record it is. All three types are based on the same data set maintained in the nation's criminal records database. The Bulletin 3 certificate is the only criminal records certificate that an individual can obtain. It is therefore the only form of disclosure accessible (via the individual) to a UK employer. An individual may apply for a Bulletin 3 for any purpose, subject to confirmation of identity. Bulletin 1 is available only to judicial authorities on request; Bulletin 2 is available to specially designated organisations such as public hospitals or organisations where individuals work with vulnerable groups.

In France, judgments will not be published on a Bulletin 3 certificate once the rehabilitation period has passed. Depending upon the conviction, this will be either 3 or 5 years after the sentence was completed. Records of all convictions are still kept but will not appear on the Bulletin 3 certificate. When a Bulletin 2 certificate is requested in relation to a job dealing with minors, crimes committed against children will remain on the certificate. Felonies (serious offences) remain disclosable for 5 years after the sentence

has been completed. Misdemeanours (less serious offences) remain disclosable 3 years after the sentence has been completed. In the case of convictions of minors, these are removed from the Bulletin 3 once the individual has reached maturity and 3 years from the date of the crime have passed.

Germany

Disclosable criminal convictions in Germany mirror almost all of those major categories in the UK. Criminal conviction data on individuals is expunged after certain fixed time periods, according to the type of punishment imposed on the subject. This is governed by paragraph 45 of the Federal Central Criminal Register Act. Once a conviction has been expunged the relevant entry in the Central Criminal Registry will be removed within one year. During this time the conviction will not appear on the criminal record disclosure documents. Expiry periods vary according to the punishment. They are set out in section 46 of the Federal Central Criminal Register Act. They can range from five years for minor offences to 20 years (in cases of severe sexual offences). The only categories for which a historical is not never expunged are: lifetime imprisonment, preventive detention, and accommodation in a psychiatric hospital.

Slovenia

The Penal Code of the Republic of Slovenia governs rehabilitation of individuals. Under this legislation, a conviction of a criminal offence can be regarded as expunged provided that no further criminal offences are committed within the prescribed time period. The same applies for sentences that are lapsed or discharged. Technically, details of expunged convictions remain on record for an indefinite period. A conviction is not expunged until the period of rehabilitation has lapsed. Once expunged, the rehabilitated person is under no obligation to reveal their past history of association to a criminal record. Guidance issued by the legislation states that the length of the rehabilitation period depends on the sentence of the offence (KPMG, 2009 ii, 38- 39).

Spain

Once convictions have expired they can be removed from the Certificate of Convictions only upon the individual's request for cancellation. A cancellation request form known as as the "Modelo de cancelacion de antecedentes penales" is to be completed. Expiry

periods vary according to the type of punishment and range from six months (for minor offences) to five years (for serious offences) provided no further offence has been committed in the meanwhile (KPMG, 2009 ii, 54- 55).

Sweden

In Sweden, most judgments are deleted from the Criminal Records Registry after 3, 5, or 10 years, if no recent convictions have been added. The length of time that a conviction remains on record depends on the type of sentence passed. The maximum duration is 20 years. The relevant details are: Custodial sentences 10 years from date of release; Enforced psychiatric treatment 10 years from date of release; Youth detention 10 years from date of release; Suspended sentences 10 years from date of decision; Discontinued charges (adults) 10 years from date of decision; Fines 5 years from date of decision; Discontinued charges (minors) 3 years from date of decision (KPMG, 2009 ii, 71-71).

Switzerland

Convictions are removed after a specified time period which is dependent on the type of punishment. Expiry periods for convictions to be removed are governed by Section 369 of the Swiss Penal Code. If two-thirds of a sentence has been spent it will no longer appear on the Extract. Different removal policies apply to convictions involving punitive measures or convictions involving a suspended or partially suspended sentence. Convictions are no longer reported on the Criminal Record Extract once subjects have fulfilled the terms of their suspension period. Data that is removed is completely destroyed and not archived.

Expiry periods vary according to the type of punishment as follows: 20 years - for prison sentences of at least five years; 15 years - for prison sentences from one to five years; 10 years - for prison sentences of less than one year or fines (KPMG, 2009 ii, 76-77).

USA

In the United States, criminal records generally remain on record without termination, with certain exceptions. Exceptions can include a record or conviction occurring while an individual is legally minor - generally under the age of 18. Such juvenile police or criminal records will be sealed and are not accessible, other than to authorised law enforcement

agencies. It is possible, but difficult and relatively rare, for an adult to obtain expungement or sealing of police or criminal records, through application to the courts via legal counsel (KPMG, 2009 ii, 105-107).

Appendix B. Ex-offender testimonials

This appendix presents first person testimonials of ex-offenders. Some of these are drawn from other research, and some were provided directly to SCCJR in the course of this research. While these are summarised in the main text, it may be important to have these views laid out in the context of their speakers' overall perspective. SCCJR is deeply grateful to those who shared these difficult experiences with us, as well as to the work of Postive Prison in assisting us.

'Jack': "I think they [people] should get to know people [ex-offenders]... before they you know, make a judgement on, on a label they've been given."

'Pete': "I don't generally tell them [people] ...I want other people to see me first."

(Aresti et al, 2010, 180)

'Jack', 51, is involved in education, working on a widening participation programme and in the media. In his offending years he was a bank robber, been to prison twice and his longest sentence was 20 years for armed robbery. He speaks on his negative interview experiences:

"I got invited to some interviews, just cos they wanted to see what an armed robber, or someone who'd done 20 years looked like. I could see within minutes that I wasn't here to get the job ... you'd go through the interview, and just feel a little bit dejected really, like, you know "(Aresti et al, 2010, 172-173).

On disclosure he comments:

'I'm aware that it's [disclosing] is not a good chatting up line, or getting work line, because I know people are gonna make a judgement ...If they know it too early ...If they've made judgements on me over a period of time, then find it out, it'll just be a shock that their get over with ... you know, quite quickly" (Aresti et al, 2010, 179).

'Pete', a 27-year-old student who during his offending years was a gang member and has been to prison three times, twice for robbery, speaks on his disheartening university admissions experiences and his eventual vindication:

"I just kinda felt self-defeatist, innit, I felt kinda like well OK, see I told you so, what's the point in trying to change or trying to do anything, because society is not going to accept me ...When I finished the foundation I applied for six universities for UCAS, one turned me down, and five of them were crying out for me. People were crying out for me" (Aresti et al, 2010, 180-181).

Pete describes his fear of being isolated again from society is so immense that it causes him to avoid disclosure:

"It's like before that I wouldn't tell people because when people see me they wouldn't expect I can do those things so I kinda didn't tell people..."

On being asked why he would not disclose his past:

"Just fear, fear of being rejected innit, fear of kind of like of not being accepted, do you know what I mean, not feeling part of and, and kinda like feeling erm, isolated again innit and stuff..."

Despite his university peers reacting positively upon his disclosure, he still avoids disclosing his past to others:

"I tell you what when it came out like, it was weird, people just accepted me, people just like said, if that's where you've come from and that's what you're doing now, that's amazing, but still today, I don't meet people [and disclose] I don't, unless it's through work or I have to tell them, I don't generally tell them..." (Aresti, 2010, 178- 179).

'Jim', released from Low Moss in 2012, was kind enough to proffer his testimony through Positiveprison.org.uk at the request of the SCCJR for the exact purposes of this report. His experiences speak to both sides of the employment relationship:

“In my old job they used to have application forms that requested applicants to state if they had a criminal record. I used to argue with other managers that this was highly questionable in the sense that the manufacture and distribution of confectionery was not a "protected" job as such, and if someone withheld details of their previous convictions or outstanding charges then we would be in no position to do anything about it. I personally felt we were excluding a section of the population who indeed would be the ones who would benefit most from a secure job. It could also be argued that the public backlash from employing an ex-offender would be significant enough for some companies not to consider offering a job to someone with a record.

“For someone like myself who has a good academic background, it is perhaps harder to hide a huge gap in my employment history. I feel that I will be lucky to get any job again. Since release I have actually only applied for one job. The position was something that I was perhaps over qualified for, but have loads of experience in. The overqualification was, in my opinion, enough of a compensation for the time I spent in prison. To actually make the application was a big step for me and having heard nothing back feels like a kick in the teeth that I will just have to get accustomed to.

“In education, some establishments (well at least one that I know of!) are asking for details of any past, present or pending charges. There was a course starting in January at the University of the West of Scotland in programming oracle databases. My technical background is more than sufficient to meet the entry requirements and since this is an industry standard package then it could have added to my employment prospects. Last January I undertook a course in Microsoft Systems administration at the same institution. I told them about my previous anti poll tax breach of the peace as well as my more recent speeding conviction. Both of these were deemed to be not relevant to the course I was intending to pursue. However, I did not tell them that I could be potentially facing a charge of embezzlement - at this point I was unaware that the police had been

brought in to investigate my actions. The course actually only ran for 12 weeks and was finished before I was charged! However, at a number of points I imagined that the police would burst into the classroom and lift me directly from my seat such was the emotional turmoil that I was going through at the time. In terms of the oracle database course I did not submit an application, partly due to personal embarrassment, stigma and even guilt, and partly due to not wanting to get another disappointment by not getting on the course” (on file with SCCJR).

Sharon¹ shares her thirteen year experience having difficulty accessing education, employment and volunteering due to a criminal conviction.

“After completion of my 200 hour CSO (for an April 2004 conviction for embezzlement), I decided along with encouragement from a criminal justice worker to return to education and opted to do an HNC in Social Care with the plan of going to university to do a social work degree. However, in 2006 I was refused admission on the course as my conviction was not spent, and as the course was placement based, the college advised I would not get a disclosure certificate. I therefore opted to do an HND in social science; I was accepted onto the course.

“I decided to go to university, however despite wanting to be a social worker was still encouraged not to apply due to my conviction. Therefore I applied to do BA Criminology, and attended Glasgow Caledonian University, graduating in 2011 with a BA (hons) Criminology, 2:1

“I wanted to work with offenders, but needed to gain some experience, so applied to work voluntary with SACRO as a peer mentor for female offenders. I was accepted with SACRO having full knowledge of my conviction, as I disclosed it on the application form and during interview. However, it took from March until December 2011 for Disclosure Scotland

¹ This is the actual name per the willingness of the contributor to be named. Her full name and contact details are on file with SCCJR and she would be willing to be contact directly for further elaboration of this history.

to sort out my application for PVG membership. All my reports/records from criminal justice social work/court/psychiatric needed to be sought and reviewed, causing me considerable distress at having my past raked up again, and also knowing that people unknown to me were making decisions about my future based on reports rather than speaking directly to me. SACRO refused to allow me to engage with them on a voluntary basis until PVG membership was obtained. This also prevented me from seeking any other employment paid or voluntary until membership had been obtained. This was very frustrating as it meant throughout this time I had to survive on benefits. Once PVG membership was obtained, job search began again and I was able to continue with voluntary work.

“In 2012 I was offered sessional work with a voluntary organisation, Lillias Graham Trust, however when I disclosed my conviction, (even though it was over 5 years and spent), I was refused on the grounds of the organisation had deep concerns that if the media found out that a charity was employing an ex-offender it could have a negative effect on them.

“Since August 2012 I have been working full time in paid employment with SACRO as a restorative justice worker, although my post will be redundant from 31 March 2013, and I am in the process of job hunting again. Whilst I might have PVG membership, I still face prejudice as some employers ask disclosure at the time of applying, rather than after short-listing. This can often lead to my application being over-looked in favour of applicants with no offending history.” [on file with SCCJR]

‘Anna’ discusses a very recent experience:

‘Just had an interview with Barnardos which consisted of individual interview and group interview. I excelled in my interview and was told I "should be proud of myself". I was phoned that afternoon and advised that I was without doubt the preferred candidate. Then I was asked about the break in my employment, despite me providing an honest account of my

offences, what they were, the court they were heard at, and their disposal. I was questioned about this and told that I may need to come in speak in person about the offences, to management and to assure them of my recovery. I was also asked about the nature of the offences. Found it extremely humiliating, knew these questions had to be asked.....Still feel tarred with the same brush, very deflated and de-motivated about what was said to be an excellent interview.’ [on file with SCCJR]

Prior research on the experience of short sentences provided further examples of perceived discrimination and obstruction of progress towards life goals (Armstrong and Weaver, 2010). ‘Tony’ recounts how a difficulty at College led to a criminal justice social worker disclosing his prior convictions:

“Intensive probation was all right because it wasnae social workers, was NCH Action for Children. But CJSW, nah, not at all, don’t like them, would even go so far as to say I fucking despise them, they are nosy nosy nosy bastards. Sorry for swearing but that’s just my feeling, I cannot fucking tolerate em. I fucking hate the deviant bastards they just scurry above your heid and they’ve no got that control to do stuff that man. I’m only on probation, man, they’ve got no need to go over my heid and go to this one and that one. Basically I was at college and something happened and my social worker was phonin’ to find out what happened and, ‘Aye he’s got previous convictions and that.’ And tellin the head of faculty; that’s not fucking right. That’s heavy gross misconduct anyway you wanna fucking slice it... [Interviewer: *did you make a formal complaint about this conduct?*] No I told him straight I cannae work with him. Wasn’t a complaint, a formal complaint, [I] just said to his boss, ‘You better get me another social worker or breach me now?’” (Interview transcript on file with SCCJR)

A further testimonial, more generally but passionately describing the experience of being an offender trying to fit back into society, is included as follows:

“Hello every one

“My name is, well it does not matter what my name is because mostly I’m known as ex con, but to the people that know me I am their Son, Father, Brother, Friend and colleague who was a former offender. Prison can be many things it can be a punishment to some and a training ground for others. For my crime I was judged and found guilty and rightly so. Also not forgetting the pain and heart ache I caused three families, the victim’s family, my friend who lost his life family, my own family and I was sentenced to five and a half years in an English prison for my actions.

“While serving my sentence and paying what I believed was my debt to society my conscious was born, to understand why this rebirth of consciousness is important. I was in prison. A place where weakness is preyed upon and bullying is rife from, Wing governors to the senior officers to the prison officers to the prisoners themselves. The whole prison system is built on the culture of bullying. Was I rehabilitated in prison? My honest answer has to be no. Was I asked, why I offended or my reason for doing so? Again, my answer is no. Did the system fail me? My answer would be the system is set up too fail. As a society, we put prisoners in the same blocks and fence them off together no matter their degree of crime. They are all the same in societies eyes. Therefore, one cure should fit all as does the cells. However, if you took the roof of these blocks you would see individual cells with individual people with individual problems who need individual programmes to help them desist from crime. One cure does not fit all.

“On the day my life changed this was like any other day on the prison landing; there had already been a fight, two cell searches and now the new inmates were coming through from reception. One of these inmates walked on the landing with his shoulders slumped down his head hanging low and worst of all he made no eye contact with, staff or prisoners alike, his whole demeanour spelled victim to me I could see the stronger wolfs circling. Something in me changed as I walked towards the new inmates cell passing by the prison officers, they must have seen what I had seen. Emerging from the cell with a new friend, and most importantly a conscious. Following this, I helped many prisoners whether it was writing letters home for them or just listening I completed my sentence in a more positive way.

“On leaving prison, I had the belief that I had paid back society and had done my time and I had become a better citizen and would go on to be a more productive member of society. Little did I know my struggle was just beginning my other sentence had begun?”

“When a member of society has done wrong we send them to prison for doing wrong, but when that wrongdoer comes back in to society after being deemed fit to do so. We then send them off again to a place between two worlds. Law-abiding society on one side and the criminal world on the other, Where former offenders cannot gain entry, one door is closed because you are an ex con? In addition, the other is wide open but I will not enter because I have a conscience now and do not want to be part of that world.

“I am part of struggle now, this struggle is called Desistance and on being a champion of this cause, I will be subject to discrimination and prejudice on a daily basis. Whether you are looking for employment or at a dinner party, my past will always be the main topic of discussion. Surely I should be encouraged and given hope to desist from crime and not put down by society because I once committed a crime, even though I have done my time and learned my lesson by the grace of God.

“I re-entered society in the summer 2001 and as a citizen I now feel second-class one, Having moved no further forward in society’s eyes. I am still discriminated against, even though I have desisted from crime from that day until this, So I ask when will society desist in its prejudice against me, I am not in a closed prison anymore but in one where hope is a prison whisper?”

“Yours sincerely

“Former Offender”

[received by SCCJR, March 2013]

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