



The Collateral Consequences of Criminal Records

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Why Does This Matter?

Whether due to formal legal restrictions, or social stigma and associated forms of discrimination, the 'mark of a criminal record' (Pager, 2003¹) has significant consequences for people with convictions (e.g., Henley, 2018 a², b³; Miller, 2021⁴). The many and varied impacts and effects of criminal records has been referred to as an invisible and pervasive punishment, and a collateral consequence of contact with the justice system (Travis, 2002⁵). These enduring consequences affect a significant proportion of the population across the U.K. A report by McGuinness et al., (2013⁶) estimated that 'at least one third of the adult male population and nearly one in ten of the adult female population [of Scotland] is likely to have

¹ Pager, D (2003) The Mark of a Criminal Record *American Journal of Sociology* 108(5): 937-975

² Henley, A.J. (2018a) 'Mind the gap: sentencing, rehabilitation and civic purgatory', *Probation Journal*, 63 (3): 285–301.

³ Henley, A.J. (2018b) 'Civil and social death: criminal background and the loss of the self', in S. Read; S. Santatzoglou and A. Wrigley (eds.), *Loss, Dying and Bereavement in the Criminal Justice System*, pp. 76-84. London: Routledge.

⁴ Miller, R.J (2021) *Halfway Home: Race, Punishment and the Afterlife of Mass Incarceration*. Little, Brown and Company.

⁵ Travis, J., (2002) *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, Ed. Mauer, M., and Chesney-Lind, M., (eds) The New Press <https://www.urban.org/sites/default/files/publication/59901/1000557-Invisible-Punishment-An-Instrument-of-Social-Exclusion.PDF> accessed 20/12/17

⁶ McGuinness, P., McNeill, F. and Armstrong, S. (2013), 'The Use And Impact Of The Rehabilitation Of Offenders Act (1974): Final Report', SCCJR 02/2013, University of Glasgow. <http://www.sccjr.ac.uk/publications/the-use-and-impact-of-the-rehabilitation-of-offenders-act-1974final-report/>

a criminal record'. Similarly, Freedom of Information requests have revealed that there are over 11.8 million people with a criminal record, equating to one in 6 people⁷.

The *Rehabilitation of Offenders Act 1974*, the primary legislation surrounding the disclosure of criminal records, has been subject to a series of reforms, both in Scotland and in England and Wales. In Scotland, these reforms have been enacted via the *Management of Offenders (Scotland) Act (2019)* and the *Disclosure (Scotland) Act 2020*. These legislative frameworks prescribe what information is allowed to be disclosed to, or withheld from, employers/potential employers, for example, to help them make an informed decision about whether to employ someone. The general purpose is to provide, in principle, for a system of protection to individuals with previous convictions not to have to disclose these in certain circumstances, whilst also safeguarding children and vulnerable adults. After the specified rehabilitation period has passed, the original conviction is considered spent. The length of that period depends on the sentence imposed, which is deemed to reflect the severity of the offence. However these protections do not apply to everyone with a conviction. For example, they do not currently apply to anyone receiving a custodial sentence exceeding 48 months, whose conviction never becomes spent and which means it should be self-disclosed for life, and will always be included in even a basic disclosure certificate⁸.

The stigma of a criminal record and associated vetting and disclosure practices are among the many obstacles to people with convictions accessing and sustaining employment. The evidence suggests, for example, that the mere presence of information of a prior criminal offence can put employers off (Weaver, 2018⁹). Employers can disregard a candidate on the strength of having a prior conviction, regardless of what that conviction is, when it occurred, and what it means, rather than weighing up the information against the nature of the employment they are appointing for. Survey research has demonstrated that as many as 56% of public sector employers and 81% in the private sector had 'anxieties' about employing someone with a criminal record (Fletcher, 2001¹⁰). However, the mark of a criminal record goes beyond barriers to employment and manifests in the 'the deprivation, restriction or outright denial of access to 'employment, financial services, accommodation, international mobility (e.g. travel and immigration), educational opportunities, state compensation for criminal victimisation, and participation in civil society' (Henley 2018). Rather than protecting the public, evidence indicates that anticipated stigma and the repeated encountering of



⁷Ref: Home Office Freedom of Information Request response 60086 (22nd September 2020) - you can find this here:

https://www.whatdotheyknow.com/request/687665/response/1642897/attach/3/60086%20Dominic%20Headley%20Response.pdf?cookie_passthrough=1

⁸ More information on rehabilitation periods can be found at <https://www.gov.scot/publications/disclosure-periods-previous-convictions-alternatives-prosecution-scotland-under-rehabilitation-offenders-act-1974/>

⁹ Weaver, B., (2018) *Time for Policy Redemption: A Review of the Evidence on the Disclosure of Criminal Records*. SCCJR https://www.sccjr.ac.uk/wp-content/uploads/2019/01/Weaver_SCCJR_2018_Time_for_policy_redemption_a_review_of_the_evidence.pdf

¹⁰ Fletcher, D.R., (2001) Ex-offenders, the Labour Market and the New Public Administration. *Public Administration*, 79 (4): 871–891

obstacles can exacerbate existing marginalities, inhibit social participation, and thus can increase risk of reoffending and destabilise desistance (Weaver, 2018¹¹).

On 25th February, 2021, the Criminal and Social Justice Research Cluster, and the Howard League Scotland Student-led branch at the University of Strathclyde, invited Gerry Keogh, Founder of Unlock Employment; Keith Rosser, Non-Executive Director of Disclosure Scotland, and Chair of Release Scotland; and Dr. Andrew Henley, Asst. Professor at the University of Nottingham, to share their expertise and experiences. In what follows, we summarise the main tenets of their presentations. You can, however, **download the webinar of this event [here](#)**.

1. A Synopsis of Gerry Keogh's Presentation

Gerry Keogh is founder of [Unlock Employment](#), a Community Interest Company, based in Govan, Glasgow. Drawing on his personal and professional experiences, Gerry recognises that the consequences of a criminal record affect differently situated people in diverse ways. Through Unlock Employment, Gerry actively supports people into employment, and in so doing, in his interactions with people with convictions and encounters with employers, actively seeks to dismantle the self- and social stigma associated with a criminal record.

Gerry Keogh's presentation focused on the **impact of having to disclose convictions to employers**. Gerry generously shared his firsthand experiences of criminal records and how a conviction shaped his life. Within two and a half years of leaving prison, Gerry was working in the employability field, supporting people distanced from the labour market back in to work. He expressed the privilege he felt in being in a position to help those with a criminal conviction to access employment, but also acknowledged the shocked he experienced, when he discovered that the people he was working with did not understand how and when they needed to declare their convictions to employers – and when they didn't. He learnt that there was a general assumption, among people with convictions, that once a person had a conviction, they had to declare the conviction for the rest life. Gerry discovered that many of the people he was coming into contact with did not know what their rights were. Indeed, one of the biggest barriers people faced when trying to gain employment, he found, was a lack of understanding as to when a person had to disclose their conviction, and when they didn't, because people were still 'ticking the box'¹² when their conviction had actually been spent.



The next step to redressing this imbalance, Gerry identified, is to have a public education campaign that can increase awareness as to when and whether those with convictions need to disclose – and we need to particularly target that at both people with convictions, and potential employers. This misunderstanding, noted by Gerry, is especially prevalent in areas of multiple deprivation and too often sabotages any hope of employment or the kinds of future that employment unlocks. To help people move on following a conviction, and after sentencing, there must, he argued, be a positive reinforcement of what life can be after a person's time in prison is over and how they can move on, and there needs to be

¹¹ Op.cit 8

¹² The 'box' refers to the check box on applications forms that asks applicants to declare if they have a criminal records.

the provision of accurate information of what a criminal record means. He concluded by stating that **change will come from changing the mindset associated with criminal records**, among people with convictions and employers and how, despite a conviction, someone can both start and sustain employment and live a socially integrated and fulfilling life after prison – ‘because employment changes lives’.

2. A Synopsis of Keith Rosser’s Presentation

Keith Rosser is both Non-Executive Director of Disclosure Scotland, and Chair of Release Scotland. Release Scotland is a network of Scottish employers, which was started by a group of employers who recognised that employment can help people with convictions move on in life. Release Scotland includes members of the private, public and third sectors and actively supports the Ban the Box campaign, established by Business in the Community. Keith is a **Group Director at Reed**, the world's largest family-owned recruitment business who helped over 8000 people with convictions into work in 2019. As an active campaigner, Keith has unique insights into the issues and concerns of employers around the recruitment of people with convictions, and is a strong advocate for the contributions that people with convictions can make to businesses.

Keith Rosser discussed **employer perspectives (the business voice) on recruiting people with conviction**, simultaneously identifying the ways that employment can help people with convictions turn their lives around, as well as providing prospective employers ‘with a wider talent pool’ to recruit from. **‘This is not just about business doing good its good for business’**. He emphasised that negative stereotyping is still prevalent, revealing survey results that showed that those who have never recruited people with convictions were three times more likely to believe that people with (any – even minor) convictions were less trustworthy, highlighting how much negative stereotyping prevails. To combat these issues, Keith discussed that Release Scotland encourages those with convictions to be upfront and open, to focus on their transferable skills and to never approach interviews in a negative light as mindset trumps everything when it comes to gaining employment. However, the stereotypes living in the minds of employers must be changed to effectively remove barriers to for those with convictions.



Keith identified a significant attitudinal challenge in the minds of employers, who are preoccupied with ‘clean’ CVs, and which inevitably places those with convictions at an automatic disadvantage. People with convictions, he suggests should be open and honest; focus on transferable skills; focus less on what they aren’t doing or haven’t done and what they were or are doing; and ensure you know what/not to declare and when. However, Keith recognizes that COVID-19 has initiated a shift towards further digitised recruitment processes, there is a risk that this could bring in a new biased filtering system with a tick-box question about criminal records and rejects those who do not have ‘normalised’ CVs or career record, and which eliminates those who are digitally excluded.

3. A Synopsis of Andrew Henley’s Presentation

Dr. Andrew Henley is Asst. Professor at the University of Nottingham, and is one of the U.K's leading academic experts into the collateral consequences of criminal records. Andrew's doctoral thesis comprised a critical history of the legal rehabilitation of people with criminal records in England and

Wales. In addition to his academic work, Andrew served as a trustee and later Chair on the board of the charity Unlock which provides information, advice and advocacy for people with convictions who are seeking to move forwards positively with their lives.

Dr. Andrew Henley discussed his research, titled *“From ‘Civic Purgatory’ to Citizenship: Alternative Approaches to Criminal Records”*. He emphasized the lack of research on the impact of criminal records in the U.K. compared to other countries, and other aspects of the justice system, or ‘carceral continuum’. Dr. Henley highlighted the concept of “civic purgatory”, noting the significant time gap between a person’s ‘legal rehabilitation’ and the time at which they are no longer recognized as an ‘offender’ in society, as measured by their involvement in the justice system.



A significant contribution that Dr. Henley’s research has made to our understanding of the collateral consequences of criminal records, is how the “pains of imprisonment” often last longer than the prison sentence. There are also pains associated with having a criminal record, which he conceptualises as **“pains of criminalisation”**. Some of these pains, as we noted above, include, but are not limited to, **restriction of employment, restriction of international mobility, denial of civic participation, and denial of victimisation**. These restrictions are part of an active social process that discriminates against individuals with criminal records, and an increasing pattern of criminal record ‘checking’ across Europe.

Dr. Henley’s research also explores what an alternative approach to criminal records might look like (see also Weaver, 2018¹³). The benefit of using criminal records as a public protection tool is limited, as the vast majority of individuals who acquire a criminal conviction do so only once. As an alternative approach, he outlines the “four Rs”: **retraction, recency, relevance, and redeemability**. Retraction refers to the withdrawal of criminal records related information into the private sphere to prevent unnecessary discrimination; recency advocates for an evidence-informed assessment of the predictive validity of a criminal record in relation to future offending; relevance pertains to the relationships between the nature or circumstances of a conviction, and the purpose of the enquiry; redeemability recognizes that no individual should be permanently excluded from the possibility of legal rehabilitation.

What Does This Mean?

This briefing paper has summarized the multiple forms of discrimination and restriction experienced by people with a criminal record. As Henley (2018¹⁴) observes, these ‘pains of criminalisation’ are widespread; research suggests one third of the adult male population and nearly one in ten of the adult female population [of Scotland] have a criminal record (McGuinness et al., 2013¹⁵). Despite a series of legislative reforms, and awareness raising activity by key agencies such as Recruit With Conviction or Release Scotland, further action is required. Below we set out some possible directions for future action in this area, building on our learning from our speakers.

¹³ Op.cit 8

¹⁴ Op. cit 2&3

¹⁵ Op.cit 6

A criminal record need not be the end of a person's working life: People with convictions can, and do, have much to offer employers, businesses and communities. Providing appropriate support and adopting a “strengths based” approach can help people to recognise their skills and overcome the stigma and labels placed upon them, offering hope for a more positive future.

Good for business, not “business doing good”: recruiting people with convictions can increase the talent pool available to employers, and help them to meet future challenges. A person’s “mindset” can be more important in recruitment than their skillset (which can be taught). Recruiting people with convictions opens up to employers an additional pool of committed and motivated future employees.

The importance of public education: While providing opportunities to people with convictions offers significant benefits to employers, communities and people with convictions, the enduring stigma and misconceptions surrounding criminalised people persist and must be urgently tackled. Specifically, there is a need for wider public education about the limited predictive power of criminal records, and a need for greater public understanding that whilst many people have a criminal record, the vast majority of these people only have one or two convictions. There is also an urgent need for education and support to help people with convictions to understand what needs to be disclosed, to who and for how long. Misconceptions around this can serve as a barrier to work and diminish hope of a better future. Criminal justice agencies should be encouraged to reflect on who is responsible for providing this information in an accessible way.

Future challenges: ongoing efforts to address barriers to employment will be crucial due to macro changes in the labour market. For those who are already marginalized, the impact of the Covid 19 pandemic may be substantial. Further, the increased use of AI and digitised recruitment may inadvertently build in further barriers for people without an “ideal” CV or employment history. This also creates challenges for the criminal justice system, as the ongoing “pains of criminalisation” which persist after a person has completed their sentence can foster a perception that the justice system is unfair or “not on the side” of people who have made significant efforts to change their lives.

Alternative futures: Arguably, there is scope for further systemic, legislative reform, both in terms of what can be disclosed, and in the provision of guidance as to how employers should approach that information to ensuring that decision-making is based on individualised assessments of criminal records that consider factors such as the nature of the crime; the time elapsed since it was committed; the disposal of the case; and the nature of the job and therefore relevance of the data to the employment (Weaver, 2018). We can, then, be guided by the principles of retraction, relevance, recency and redeemability, advanced by Henley (2019¹⁶). By limiting access to criminal records as far as possible, making sure convictions can only be disclosed when they are relevant, being guided by evidence as to when convictions lose their predictive power, and offering a route to full legal redeemability we can ensure the protection of all citizens and limit the punitive effects of criminalization, which, of course are not limited to discrimination in the labour market, and which often persist far beyond when a sentence has been served in full.

¹⁶ Henley, A.J. (2019) ‘Alternative approaches to criminal records: how can we achieve justice as fairness?’, in P. Carlen and L. Ayres França (eds.), *Justice Alternatives*, pp.321-339. London: Routledge.