



Community Justice Scotland

Ceartas Coimhearsnachd Alba

**Punishment in Instalments: Understanding
and Navigating the Disclosure of
Convictions Process**

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Contents

1. Introduction

2. Purpose of Report

3. Case Study

3.1 Background

3.2 Rehabilitation

4. Search for information on disclosure of convictions and removal of spent convictions

4.1 Disclosure Scotland – first contact

4.2 The Scottish Legal Aid Board

4.3 Disclosure Scotland – second contact

4.4 Legal Advice

4.5 Disclosure Scotland – third contact

5. Basic Disclosure Check

6. Analysis

7. Recommendations

8. Appendix A

8.1 Good Practice



1. Introduction

I started work at Community Justice Scotland¹ (CJS) in May 2018 as a Modern Apprentice. As part of my job I have supported the Policy Team on CJS's engagement with the Management of Offenders Bill (MoO Bill), the Age of Criminal Responsibility Bill (ACR Bill) and the Disclosure Scotland Protection of Vulnerable Groups Disclosure consultation (PVG review). I participated in conferences, consultation events and reference groups on these Bills and the PVG review. Each of these will have an impact on the Disclosure reforms proposed by the Scottish Government (SG), which are intended to help people with convictions who have already made new starts to move on with their lives.

Disclosure Scotland makes information available to employers about the criminal convictions of people who apply for work. Many people turn their lives around and put past criminal incidents behind them but still have to declare their convictions to any prospective employers. For some convictions, legislation in Scotland gives a convicted person the right to make an application to a sheriff for the removal of their conviction from their Disclosure certificate. The sheriff can order the removal of the conviction information so that it no longer appears in future disclosures if they consider it no longer relevant. They can also refuse the application if they think the record of conviction should stand. On the face of it, this right of application to amend criminal records is a positive development, but as this paper will show, the process of doing so is not as simple as the legislation and the official guidance online makes it appear. The paper will explore;

- The circumstances under which people are required to disclose previous convictions to employers.
- The complicated and expensive procedures and processes for getting convictions removed by a sheriff.
- The feelings, stresses and anxieties that an individual applicant may experience while navigating these procedures, especially if they are not being supported to do so.

¹ <https://communityjustice.scot/>

This report includes a case study with a timeline of events demonstrating the barriers encountered by individuals in the process of applying to have their convictions removed from their disclosure record.

This report identifies recommendations and good practice to improve the processes. This proposes a shift to a person-centred approach in line with the outcomes for the National Strategy for Community Justice² as set out within the National Outcomes Performance and Indicators Framework for Scotland.

The Rehabilitation of Offenders Act 1974³ (the 1974 Act) enabled some criminal convictions to be ignored after a rehabilitation period, a 'spent conviction'. The 1974 Act inadvertently created processes on disclosure of convictions and these have evolved over forty years. The Protection of Vulnerable Groups (Scotland) Act 2007⁴ covers the disclosure of criminal record information in Scotland. This research and case study have identified that the processes for disclosure do not offer support or protection to individuals who wish to effectively disclose their convictions in an application for employment or education. The impact of this is that individuals struggle to reintegrate into society at the end of the disclosure period.

2. Purpose of this report

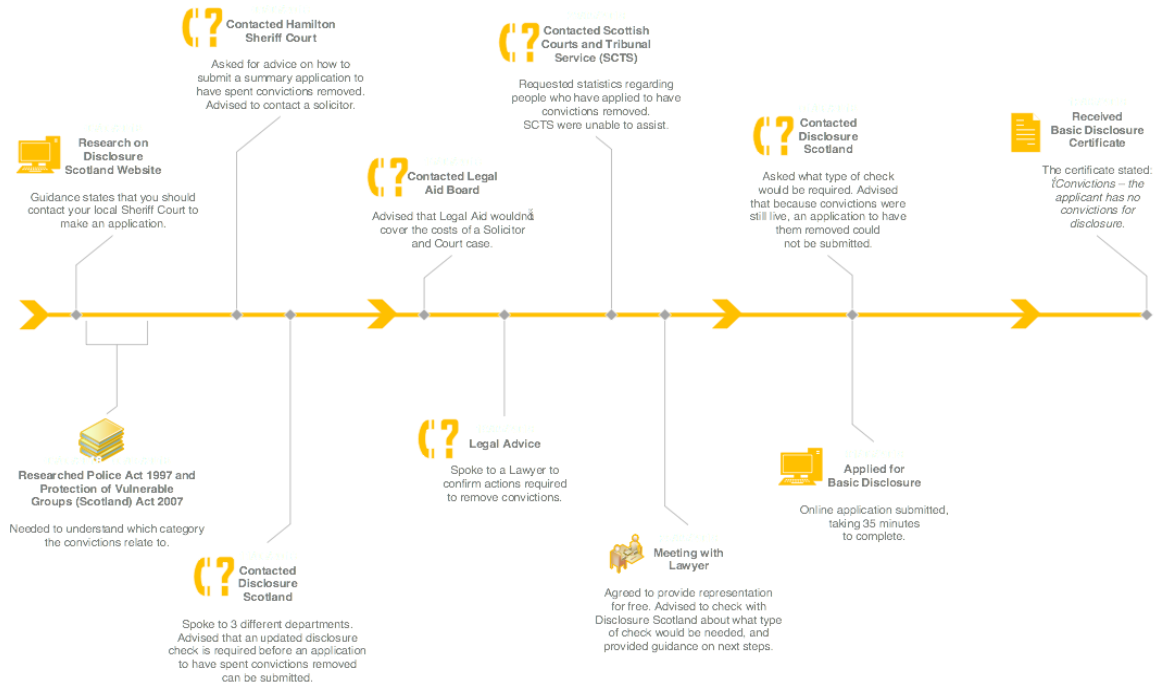
The purpose of this paper is to examine the process of removing convictions and it seeks to help people with convictions navigate their way through the system. The report makes recommendations for change and hopefully will provide help to people with convictions so that they can better understand the disclosure system and how their convictions are disclosed. This is based on a case study using the real example of a person with lived experience. It documents first-hand experience in seeking to get spent convictions removed from their Disclosure Scotland record.

² <https://www.gov.scot/Publications/2016/11/5600>

³ <http://www.legislation.gov.uk/ukpga/1974/53>

⁴ <http://www.legislation.gov.uk/asp/2007/14/contents>

Disclosure Application Timeline
May – June 2018



3. Case Study

3.1 Background

S is 32 years old. In 2004, aged 18, they were convicted of racially aggravated assault under The Criminal Law (Consolidation) (Scotland) Act 1995 section 50A (1) (B) & (5) Assault-Racial-Bottle. S got into a fight in an Indian restaurant after a football game and when S was being restrained by the owners of the restaurant S shouted a racial comment which they are now deeply ashamed of. The assault was S retaliating to an assault on them by someone from the other supporting football team. In anger S swung a bottle that hit someone. 'I wish I could go back to that night so many times and I would have done so many things differently, I am not that person, I was so angry.'

S was homeless from age 14 and had undiagnosed trauma as a result of significant Adverse Childhood Experiences (ACEs). At the time of the arrest and conviction S was still experiencing the negative effects from their traumatic childhood. As a result, they were unable to engage fully with support services. This chaotic period led to them breaching probation conditions. In their view, the punishment was harsher due to the breach. They believe the conviction, which still shows up on their disclosure record because it is a racially aggravated offence, has an impact on their applications to employers. Each disclosure means S has to relive a period S is 'deeply ashamed of.'

S was then convicted in 2013 under the Misuse of Drugs Act. They were caught in possession of a small amount of cannabis and one ecstasy tablet. S admits their life was still in tremendous chaos at that time, and that that conviction led them on a path of change and getting to the root causes of why they were so troubled.

S believes their case would not be handled the same way today. *'I feel that if I was given the opportunity to explain the background to my case before potential employers received details of my disclosure, then I don't think I would have faced as many setbacks and rejections as I previously did in the last 13 years.'*



3.2 Rehabilitation

S believes that they have done everything they can do to rehabilitate themselves. However,... *'like hundreds of thousands of people living in Scotland, my past is still being held against me. It is like I am still being punished and the shame that is attached to that part of my life haunts me. My most recent Enhanced Disclosure clearly states that I am not barred from working with any type of group whether adults or children. That means that I pose no risk to the people that I would work with. However my conviction still shows up in the vetting information. Employers don't see the breakdown of the offence.'*

Referring to the convictions disclosure certificate their potential employer received, S related how they had applied for employment in January 2018 and had a negative experience.

"They only see what is there in black and white and you don't get any opportunity to defend yourself or prove that you are rehabilitated and therefore you are invisibly punished for a crime you committed over a decade ago."

Employers do not receive supporting information with a disclosure certificate, or what the conviction or rehabilitation period mean.

"This experience was devastating to me, I just want to work and provide for my child. Why do I have to keep living this shame and being treated like I am a risk to society. I am not a risk, I made mistakes but I have the right to move on with my life."

Evidence from Dr. Beth Weaver's Time for Policy Redemption study⁵ shows that adolescence and early adulthood is the peak period for offending. It also shows that most young people who offend stop offending in adulthood, with other research demonstrating that social, environmental and developmental issues, for example, ACEs play a large part in the behaviour of young people that leads them on the path of offending and getting convictions.

⁵ http://www.sccjr.ac.uk/wp-content/uploads/2018/03/Weaver_Time-For-Policy-Redemption1.pdf

4. Case study: seeking information on disclosure of convictions and removal of spent conviction

A spent conviction is a criminal conviction which, under the 1974 Act, can be treated as 'spent, ignored or forgotten' after a certain length of time. Though a conviction is spent, the person has to apply to have that conviction removed from their disclosure record.

S understood that their conviction for racially aggravated assault, when aged 18, would become spent after the rehabilitation period of 15 years. S started looking on the Disclosure Scotland (DS) website⁶ for further information on how to apply to have their conviction removed from the vetting information on their disclosure record. This process took a considerable amount of time and 'was not an easy task'. S researched the Acts to try to find out which category their convictions came under, to support S in the next step.

The DS's website states that in order to remove a spent conviction an individual should make a Summary Application to a Sheriff Court⁷. As a result, S spoke to the Clerk at their local Sheriff Court. They told S that they had never heard of this and it's not something that they have come across or something that the Sheriff Court would take on. S was told that because they didn't receive their conviction at that court they should contact the court at which they were convicted.

"I was told that my conviction will never be removed as it's the law and these rules are in place to protect people."

The Clerk advised S to contact a solicitor as they did not know about any new legislation and that they could not make any further comments until the new legislation reached the court.

"I feel hopeless, why am I getting treated like I am a danger to people? Physically and emotionally, this is draining. When is my rehabilitation going to matter? I feel like I am still being punished in slow instalments and will never be fully accepted back into society as long as I have this hanging over my head."

⁶ Formerly www.disclosurescotland.gov.uk now replaced by <https://www.mygov.scot/working-jobs/finding-a-job/disclosure/>

⁷ <https://www.mygov.scot/convictions-higher-disclosures/>

4.1 Disclosure Scotland:

S went back to DS for clarification. S was passed between different DS departments until they spoke to someone in PVG enquires who gave S further information. Their advice, which contradicted the Sheriff Clerk's statement, outlined a process, which would take time and money to pursue. S was advised by the DS of an example that they knew about;

The DS staff member told S about an individual who had gone through the process to apply to have their convictions removed. The individual was quoted £2800 legal costs from a solicitor and went ahead assuming if they paid the money it would be worth it in the long run. The individual's legal costs ended up being over £3000 and at the end of the process, the Sheriff rejected her application and did not remove the convictions. There is no appeal against that decision. The individual had to get a part-time job to pay legal fees and could not progress in her planned career.

4.2 Help with legal expenses-The Scottish Legal Aid Board Scotland (SLAB)

S contacted SLAB for advice and assistance and, as it was not a criminal legal matter and also not a new case, was passed on to civil advice and assistance. S was told that in order to get financial help to apply to have convictions removed, an individual must show that their case is reasonable and justified. In addition S must be financially eligible (i.e. be in receipt of benefits or on a low income, etc.).

S was told that a solicitor can apply to the Board for some funding to assist S with advice and could write letters on their behalf, but could not proceed with a case without a person paying legal/courts costs, and that the Board wouldn't cover this. S asked the advisor if they knew of any previous applicants who had applied for this type of legal aid to have their convictions removed. The advisor told S they had not heard of any previous cases or persons applying for assistance for removal of convictions.

4.3 Conversation with Senior Representative of Disclosure Scotland

Following SLAB's advice, S spoke to a senior representative of DS and was told that Legal Aid does cover such costs. S stated that they had spoken to the SLAB and reported what they had said, but the representative of DS dismissed S's understanding and said they would look into it, as that was not correct. They told S that they would get back to her on this matter.

S did not receive any subsequent clarification from them and has still not heard back from them.

"I felt like I was being Patronized and as if I just made up what the Legal Aid Board told me. They completely brushed me off. Again!"

4.4 Legal Advice

S spoke to a solicitor who advised S of the process to apply for removing convictions. The solicitor told S they had dealt with a previous case which cost in total £800. The person did not get the convictions removed. The solicitor stated that they had driving convictions and that the process is more straightforward than the one for S's type of conviction.

S would be unable to fund the legal fees themselves. The solicitor agreed to support S to make an application without charge as part of the case study research. The solicitor advised S to check with DS what type of Disclosure check would be needed as they believed DS had not provided the right information for S's particular convictions.

"I felt relieved that someone finally understood how hard this was for me and how frustrating this journey has been, I don't feel alone anymore and I feel like I have some hope."

4.5 Disclosure Scotland

S contacted DS and asked for advice on what type of check S had to apply for so that S could make a Summary Application to a court to have convictions removed. It was then that S was told that their convictions

were not spent but were still live and S would not be able to apply to have them removed.

S explained to DS that they were spent convictions as set out in the relevant Acts, but DS advised that in fact the first conviction would be disclosed until 2020 and it would then 'automatically' fall off and not appear on a new disclosure check. S was also told that they had been re-convicted of the first offence (which at this stage was over 10 years old) as they breached the original order, and that S could not apply to have the conviction removed. S was then told that the second conviction that they had was on the 'always' list and that it would not be spent until 2028 and then it would become 'protected'⁸. DS then stated that the convictions would show up on all checks that S applied for.

S informed the DS customer service advisor that they had previously been told by DS that the convictions were spent and would not show up on a basic check, However the oldest conviction would still show in the enhanced check on the vetting information. S asked the DS representative where they got their information from. They stated to S 'they had it in front of them which explains the rules lists'.

"After the phone call I was really upset, I was in tears, I felt another barrier had been put in place and I felt sick at the thought of having to wait another few years before I can do anything to have the convictions removed. I am now confused again as I can't get an answer, I thought this was going to be a simple process from looking at DS instructions on their website but I have been going around in circles for weeks. The call wasn't supportive, I was given more incorrect information."

S stated that they felt like they were being judged on their convictions and that they were made to feel like they did not know what they were talking about. The customer service person had their information and disregarded what S was trying to tell them.

"DS weren't willing to explore my case to see if anything was missing or incorrect, in my opinion I felt like I was getting read a script. I feel like I am back to square one. I am disappointed and confused at why I am being

⁸ http://recruitwithconviction.org.uk/protected_convictions_in_scotland/ - Protected convictions are minor historical convictions that will not be disclosed on a range of Disclosure Scotland certificates, including PVG, Enhanced Disclosures and Standard Disclosures.

treated like this, I feel worthless! I thought I finally found a way to move on from that part of my life but still I am being judged.”

5. S applied for Basic Disclosure check

S went ahead and applied for a Basic Disclosure Check. S made an online application⁹. S stated that it took them ‘ages’ as they ask for lots of information. S had to update their address and answer questions, S stated the questions were simple but the document uploading took a long time.

S received the Disclosure Certificate a week later and was shocked to find that there were no convictions on it at all. The only thing on it was a paragraph about the 1974 Act.

S was relieved that the convictions weren’t on it, but angry that they had been given the wrong information and at the way that they had been treated, which had been stressful and traumatic.

6. Analysis

The case study highlights an example of where the individual was not supported by the processes involved in identifying disclosure of convictions. S’s experience clearly shows that the disclosure systems do not allow people to easily navigate the disclosure process. It is very hard for individuals to remove spent convictions, an important process that they may need to do in order to successfully apply for employment or education and to continue their reintegration process.

The statutory agencies did not offer clear guidance or advice on the process involved. S was never given a satisfactory response to their questions or requests. The information given was unsupportive, often contradictory, and did not explain the entire process needed to reach a satisfactory conclusion. The process has significant and prohibitive costs attached and these are not highlighted on any of the statutory agencies’ websites. How can a person without employment access the funds to pay for the support needed to effectively disclose convictions? The front-facing customer service individuals seemed unable to support people with

⁹ <https://www.mygov.scot/basic-disclosure/apply-for-basic-disclosure/?via=http://www.disclosurescotland.co.uk/basicdisclosureonline/>

their specific queries, and they are simply told to seek legal advice. The query is then unresolved.

Disclosure has a significant impact on a large number of people. Since the start of 2007¹⁰ DS has barred and listed¹¹ 5,295 individuals, over 100 of these were people under the age of 18 and over 600 were between 18-24 at the time of the barring.

When DS was asked for an example of a conviction that would result in a young person being barred from working in a regulated area, they said that a person could have stolen cash out of a care home.

In this example, the young person would have this status indefinitely and there would be no further consideration of their progress through to adulthood. The same individual could be now aged 40 and still have this conviction on their disclosure record until they ask for removal. As indicated in this report, this would be a complex and costly process to navigate.

It is appropriate that for some offences there is a necessary rehabilitation period, in order both to protect the public and to give an opportunity to the person to move on from their offending. The evidence shows that most young people do stop offending if they have access to opportunities to do so¹². The current process does not allow individuals to remove spent convictions easily in order to gain access to such opportunities and to move on with their lives.

Given the potential benefits in having spent convictions removed, one would expect most eligible individuals to pursue this. In terms of uptake for the removal of spent convictions, DS stated that to date (summer 2018) 346 applicants gave notice of an intention to start the process of applying to a sheriff to have their convictions removed. Of the 346,

- 27 proceeded with applications,

¹⁰ <http://www.legislation.gov.uk/asp/2007/14/contents>

¹¹ "If Disclosure Scotland decides that someone's unsuitable to do regulated work with vulnerable groups, they'll bar them from working with children and/or protected adults, and inform their current employers. They'll also remove them from the PVG Scheme and tell any other employers listed on their record that they have been barred. ", <https://www.mygov.scot/pvg-scheme/?via=https://www.disclosurescotland.co.uk/faq/index.htm>

¹² http://www.sccjr.ac.uk/wp-content/uploads/2018/03/Weaver_Time-For-Policy-Redemption1.pdf

- In three cases the Sheriff ordered for the convictions to remain as they were still relevant,
- In only one case an individual had their convictions removed from their disclosure record.
- 23 have yet to be decided by the Sheriff, but there is no indication of these cases going ahead.
- In 24 cases the person did not proceed with an application and therefore Disclosure Scotland did not issue a certificate to the person who countersigned the application.

Where there is no indication that a case will proceed, DS closes their case down without any follow up action.

Scottish Courts and Tribunal Service (SCTS) was unable to provide information about applications for the removal of spent convictions.

In the summer 2018, DS conducted a consultation exercise on a review of the PVG scheme and disclosure. The consultation failed to capture or address many of the issues of misinformation and lack of support experienced by S and highlighted in this report.

As part of the consultation, DS contacted via email the 346 people who intended to pursue the removal of spent convictions, in order to understand their experience of the process. 51 people responded¹³. The main reasons people did not proceed with an application were:

- Cost - the court and legal representation was too expensive
- There is no legal help available
- Length of time the process took
- Not enough help or guidance

These barriers are easily identifiable in the example evidenced by S's experience.

¹³ https://consult.gov.scot/disclosure-scotland/protection-of-vulnerable/user_uploads/sct0418415086-1_vulnerable_final.pdf page 58

The current system has evolved over forty years and was not designed to be supportive of individuals, employers or education providers in understanding disclosure. Given the number of people in Scotland living with spent convictions, the numbers applying to have spent convictions removed are shockingly low, but understandably so given the processes required. The processes put barriers in place for individuals with convictions, families, employers or education providers to understand the purpose of disclosure or how to deal with its implications.

S was told by a senior representative of DS that their's was a 'unique' case, whose experience did not reflect that of the majority of people going through these processes or seeking employment, and that it was simply 'unfortunate' that they had had this experience. The representative suggested that employer discretion was the main reason behind whether or not a conviction would have inhibited them gaining employment or accessing education. S feels that this is not the case as they know many people who have convictions and has spoken with individuals who are also 'stuck', as they do not have the money to go through the process of having convictions removed. In addition people do not bother to apply for jobs due to the disclosure process and fear of rejection. Any fee is likely to be discriminatory between affluent people who can afford the costs and for people who cannot. Why should a person who has paid their debt to society have to pay again in the form of excessive fees in order to remove convictions?

S also feels that if the age for convictions was to be raised, then this would benefit young people who would be more able to move on with their lives after the rehabilitation period. S was 17 at the time of their offence but 18 by the time they were convicted, which DS and employers don't take into consideration as all they see is the offence and conviction on the vetting information.

7. Recommendations

In the short term, there are practical changes that could take place to make the current disclosure system and process for the removal of spent convictions more accessible to and easier to navigate for people with convictions:

- More effective frontline staff training for Disclosure Scotland customer services so that the individual seeking assistance is dealt with in a compassionate manner and not left feeling the way that S did.

- Accessible information and clear guidance across statutory agencies' websites regarding the processes and costs for individuals, employers and education providers.
- Take into account that some individuals with convictions come from very complex backgrounds and have commensurate needs. The process must be accessible, taking into account needs associated with literacy and using technology.
- Many people with convictions have suffered severe trauma, and the process of disclosure and removal of spent convictions can re-traumatise. Services must be in place to support this.
- The experience of S highlights that the disclosure process does not help reintegration into employment and the numbers of cases which don't proceed with the removal of their convictions could indicate that people give up due to a barrier of lack of money.
- Remove any fee for removal of conviction process and where fees are absolutely necessary the provision of financial aid.

In the longer term, significant change is required in order to ensure the disclosure system is fit for purpose for people with convictions and employers. This should take into account every level of disclosure, from Basic up to Enhanced and PVG.

- Legal change to reduce rehabilitation time from 15 years to 11 years for over 25 year olds, and to 5 years if between 18 and 25 years old. This will ensure protection but also ensure young people have a chance to turn their lives around and not experience the difficulties as highlighted in this case study.
- An independent review of disclosure, giving consideration to the principles and purposes underlying disclosure and removal of convictions with due consideration of the Human Rights Act, proportionality, and evidence about desistance from offending.
- Creation of an independent review system that deals with cases on an individual basis.
- Creation of an independent review system completely detached from Disclosure Scotland so that an individual applying for the

removal of spent convictions is dealt with in an appropriate and person-centred way.

An independent agency responsible for the removal of conviction process would ensure that a person-centred approach is adopted which is cost effective for an individual and the taxpayer. This would ensure clarity within the disclosure process and that an individual, employer or education provider can correctly and effectively reintegrate individuals into employment and education providers. An example of good practice using independent decision-making in disclosure can be found in Northern Ireland, with the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO). For further detail on this example, please see Annex A.

As stated previously, two people can have the same conviction but circumstances and intent could be different. This information could be vital in enabling a proportionate and appropriate decision to be made to proceed with employment or placement. A full background of the offence and circumstances could be provided to the independent reviewer that would allow them to look at the individuals rehabilitation rather than the offence, and to make an informed decision.

The current system in Scotland does not adequately take into account a person's right to move on from their past, regardless of their progress. Rather than continuing to revise a dysfunctional system, it would be appropriate to reconsider the purpose and principles behind disclosure, and using the best practice available internationally and the body of evidence available about desistance from offending, design something new, trauma-informed, and fit for purpose.

8. Appendix A

8.1 Good practice

As part of this research I have also identified good practice in dealing with people with convictions.

Recruit With Conviction (RWC)¹⁴ : promotes safe, suitable and sustainable employment for people with convictions. They achieve this by working with employers to develop good practice in the recruitment and retention of people with convictions and by providing training especially tailored for key workers who provide support to people with convictions.

According to RWC potentially half of all unemployed people have previous criminal convictions including minor driving offences. Therefore employment barriers and solutions relating to criminal convictions must be part of a core skill set for all professionals who work in employability services not just advisers working in prisons.

By the end of the course participants are able to use the ‘Apply With Conviction’ approach to support people with a criminal record to employment.

The program builds on an evidence base of what works and the requirement to adapt advice based on the aspirations, attitude and aptitude of each individual as well as their unique offending background.

The program does not promise illusionary silver bullets – supporting people with criminal convictions to sustainable employment is hard work, needing imagination and integrity.

However by using the ‘Apply With Conviction’ approach for people with criminal records, participants will maximize the opportunity available to them to compete for jobs and minimize the likelihood of bad advice and unintended negative consequences.

Northern Ireland

I recently visited Belfast and met with some organisations. One was the Northern Ireland Association for the Care and Resettlement of Offenders¹⁵

¹⁴ <http://recruitwithconviction.org.uk/>

¹⁵ <https://www.niacro.co.uk/>

NIARCO is an organisation that works to reduce crime and its impact on people and communities. It has over 20 services that support children, young people, adults and families.

I spoke to NIARCO about the support a person can get regarding the Northern Ireland disclosure system. It has a Disclosure Hub where people can access advice and training regarding their criminal record disclosure. A person can be assisted in writing a disclosure statement along with their job application so that if they do have convictions to disclose the person gets an opportunity to speak about what happened and what they have done since the offence to turn their lives around.

NIARCO also offers advice and training to potential employers and institutions such as colleges and universities. They have a helpline for employers to call and it also offers two and a half days training on how to interview people that disclose convictions. NIARCO has a real insight into this and I feel that we could learn a lot from them. They encourage employers to take a common-sense approach to a person with convictions by starting with how the conviction affects the role.

The advice line is open to anyone and they offer advice on:

- Types of convictions
- Whether a conviction is spent
- How to disclose
- Preparing disclosure statements
- Who to mark the statement to
- Encouraging employers to see the person
- Working with ACCESS NI, Northern Ireland's version of Disclosure Scotland

A time for Policy Redemption – Dr. Beth Weaver 2018¹⁶

Dr. Beth Weaver of Strathclyde University's report 'Time For Policy Redemption' has excellent recommendations regarding disclosure and explains the relationship between offending and youth, and desistance from committing offences. The study reinforces that employment is a key protective factor in desistance and that public protection is increased when barriers to employment are removed. The research also shows that anticipated stigma and the repeated encountering of obstacles in obtaining employment can increase risk of reoffending and undermine desistance.

¹⁶ http://www.sccjr.ac.uk/wp-content/uploads/2018/03/Weaver_Time-For-Policy-Redemption1.pdf



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