HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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The retention and disclosure of criminal records

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An individual who is convicted of a recordable offence will have a "nominal record" of that conviction placed on the Police National Computer. Nominal records will also be created for individuals who are cautioned, reprimanded, warned or arrested for such offences. An individual's nominal record is retained until his 100th birthday.

The Police National Database is used to record details of "soft" police intelligence, for example details of criminal investigations that did not lead to a conviction. This intelligence will generally be retained for a minimum of six years, longer if it relates to allegations of a serious offence or if the individual concerned is considered to pose an ongoing risk.

Criminal records checks

When a person applies for a so-called "excepted position", he or she may be required to provide details of his criminal record by way of a standard or enhanced criminal records check from the Disclosure and Barring Service (formerly the Criminal Records Bureau). Excepted positions cover, for example, work with children or vulnerable adults or roles in certain licensed occupations or positions of trust (e.g. police officers, solicitors).

The information in this briefing about disclosure relates to England and Wales. For information about Scotland see Disclosure Scotland and for information regarding Northern Ireland see AccessNI.

The disclosure of non-conviction information and old and minor convictions

There has been some debate over two particular issues relating to criminal records checks: the disclosure of non-conviction information and the disclosure of old and minor convictions.

The Government legislated, via the *Protection of Freedoms Act 2012,* to introduce a number of new safeguards relating to the disclosure of non-conviction information, such as a new independent disputes process.

Legislation introducing a new filtering mechanism to restrict the disclosure of old and minor convictions came into force on 29 May 2013. This followed a Court of Appeal ruling in January 2013 that the mandatory and blanket disclosure of convictions as part of a criminal records check was incompatible with Article 8 of the European Convention on Human Rights (right to respect for private life).

A judgment of the Supreme Court in January 2019 said that two specific aspects of the filtering mechanism, concerning multiple convictions and the disclosure of warnings and reprimands received by children, were disproportionate and therefore incompatible with Article 8.

There have been calls for wider reform of criminal records disclosure, including from the Law Commission, the Justice Committee, Charlie Taylor in his review of youth justice and David Lammy in his review into the treatment of and outcomes for BAME individuals in the criminal justice system.

1. Retention and deletion

Criminal records information is held on two main systems. The first is the Police National Computer, which records details of convictions, cautions, reprimands, warnings and arrests. The second is the Police National Database, which records "soft" local police intelligence for example details of investigations that did not lead to any further action.

1.1 Nominal records on the Police National Computer

An individual who is convicted of a recordable offence will have a "nominal record" of that conviction placed on the Police National Computer (PNC). Nominal records will also be created for individuals who are cautioned, reprimanded, warned or arrested for such offences. An individual's nominal record is retained until his 100th birthday.

Record deletion process

Chief constables "own" the data that their force has entered on to the PNC. They can exercise their discretion, in exceptional circumstances, to delete non-court disposals (e.g. cautions) which are owned by them and held on the PNC as well as any non-conviction outcome.

The National Police Chiefs' Council (NPCC)[1] has issued guidance on the Record Deletion Process.[2] This guidance applies to the deletion of DNA profiles, DNA samples, fingerprints and PNC records.[3] Its purpose is to ensure that a consistent approach is taken by relevant Chief Officers when exercising their discretion in dealing with applications for the deletion of records from national police systems.

Annex B says that there is no set criterion for the deletion of records and that it is for Chief Officers to exercise professional judgement based on the information available. Annex B gives examples of circumstances in which deletion should be considered by a Chief Officer. These include:

- No Crime. Where it is established that a recordable crime has not been committed. For example, a sudden death where an individual is arrested at the scene and subsequently charged, but after post mortem it is determined that the deceased person died of natural causes and not as a result of homicide.
- Malicious/False Allegation. Where the case against an individual has been withdrawn at any stage, and there is corroborative evidence that the case was based on a malicious or false allegation.

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1 The NPCC was formed on 1 April 2015 and replaced the Association of Chief Police Officers

2 NPCC, Deletion of Records from National Policing Systems, Version 2.0, 2018

3 The guidance has replaced the 'Exceptional Case Procedure' as defined in the 'ACPO Retention Guidelines for Nominal Records on the Police National Computer'. The Retention Guidelines came into force in March 2006 as part of the Government's response to the Bichard Inquiry into the circumstances surrounding the Soham murders.

- Proven Alibi. Where there is corroborative evidence that the individual has a proven alibi and as a result s/he is eliminated from the enquiry after being arrested.
- Suspect status not clear at the time of arrest. Where an individual is arrested at the outset of an enquiry, the distinction between the offender, victim and witness is not clear, and the individual is subsequently eliminated as a suspect (but may be a witness or victim).[4]

Individuals can apply for the removal of a record from the PNC using a form available on the NPCC website. The form must be completed and sent (with proof of identity and any documentation to support the application) to the National Records Deletion Unit. The application will then be sent on to the relevant Chief Officer for a decision.

Note that individuals with a court conviction cannot apply to have their records deleted under the records deletion process. Neither can an individual apply where an investigation into them, or court proceedings against them, remain ongoing.

1.2 Intelligence on the Police National Database

Operating alongside the PNC is the Police National Database (PND). While the police use the PNC to record convictions, cautions, reprimands, warnings and arrests, they use the PND to record "soft" local intelligence such as details of allegations or police investigations that did not lead to arrest or charge.[5]

The review, retention and disposal of police information, including that on the PND, is governed by the Accredited Professional Practice (APP) – Information Management issued by the College of Policing, which states:

> The primary purpose of review, retention and disposal procedures is to protect the public and help manage the risks posed by known offenders and other potentially dangerous people.
>
> The review of police information is central to risk-based decision making and public protection. Records must be regularly reviewed to ensure that they remain necessary for a policing purpose, and are adequate and up to date.[6]

Police information is divided into four groups based on an assessment of the risk posed by the person to whom the intelligence relates. Scheduled reviews take place at intervals specified for each group.

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4 Annex B

5 Until May 2010 local intelligence was held by individual police forces on their own systems. On the recommendation of the Bichard Inquiry into the circumstances surrounding the Soham murders, the PND was introduced to act as a central repository for this intelligence in order to enable better sharing of information between police forces.

6 College of Policing, APP: *Management of police information*

Group 1 intelligence is information relating to any of the following:

- offenders who have ever been managed under multi agency public protection arrangements (MAPPA);[7]
- individuals who have been convicted, acquitted, charged, arrested, questioned or implicated in relation to murder or a "serious offence" as defined in the *Criminal Justice Act 2003*;[8] and
- potentially dangerous people.

Intelligence within this category should be retained until the individual it relates to is deemed to have reached 100 years of age. It should be reviewed every ten years to ensure it is adequate and up to date.

Group 2 is information relating to other sexual, violent or serious offences not covered by Group 1. Once the individual to whom the intelligence relates has completed a ten-year "clear period" the police will review the intelligence and assess whether the individual continues to pose a risk of harm.[9] If he does not, the intelligence should be disposed of. If he does, then the intelligence should be retained for a further ten-year clear period. The same review exercise should then take place on the expiry of this and every other subsequent ten-year clear period.

Group 3 intelligence is information relating to individuals who are convicted, acquitted, charged, arrested, questioned or implicated for offending behaviour that does not fall within Groups 1 or 2. Such intelligence will be retained for an initial six-year clear period. The police may then either delete the record or, if they wish to retain it, carry out a review and risk assessment every five years.

Group 4 intelligence is information relating to undetected crime. Information relating to an undetected Group 1 offence should be retained for 100 years from the date it was reported to police. Information relating to other undetected offences should be retained for a minimum of six years.

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7 See the Ministry of Justice website, Multi agency public protection arrangements for an overview of MAPPA. Offenders managed under MAPPA will have been convicted of (or cautioned for) sexual or violent offences.

8 A "serious offence" is an offence listed in Schedule 15 to the 2003 Act that is punishable either with life imprisonment or with a determinate sentence of ten years or more. Examples include wounding with intent to cause grievous bodily harm, robbery, arson, possessing a firearm with intent to endanger life or cause fear of violence, rape, and sexual assault.

9 For these purposes, a "clear period" is the length of time since a person last came to the attention of the police as an offender or suspected offender for behaviour that can be considered a relevant risk factor. Further behaviour brought to the attention of the police and that indicates a relevant risk of harm will reset an individual's clear period, as will a request for information made by other law enforcement agencies and requests for a criminal records check.

2. Disclosure and Barring Service checks

2.1 "Spent" convictions and "excepted positions"

Under the *Rehabilitation of Offenders Act 1974*, convictions,[10] cautions, reprimands and warnings become "spent" after a certain period of time.[11] Once a record becomes spent it does not usually need to be declared to employers or voluntary organisations.

However, if a person applies for a so-called "excepted position", then the prospective employer is entitled to ask for details of both spent **and** unspent convictions, cautions, reprimands and warnings by way of a criminal records check conducted by the Disclosure and Barring Service (DBS).[12] Excepted positions cover, for example, work with children or vulnerable adults or roles in certain licensed occupations or positions of trust such as police officers or solicitors. The DBS has published eligibility guidance employers can use to decide whether a role is eligible for a DBS check and which type.

2.2 Types of check

Four types of check are issued by the DBS: basic, standard, enhanced, and enhanced with barred list. A basic check only shows unspent convictions, cautions, reprimands and warnings. A standard check contains details of all spent and unspent convictions, cautions, reprimands and final warnings (as held on the PNC) except those which, under the filtering rules, should no longer be disclosed. An enhanced check includes the same information as a standard check together with local police intelligence. An enhanced with barred list check includes the same information as an enhanced check together with details of whether the individual concerned is on the lists maintained by the DBS of those barred from working with children and/or vulnerable adults.[13]

Standard and enhanced check therefore provide details of convictions, cautions, warnings or reprimands held on the PNC. From 29 May 2013 some PNC information relating to old and minor convictions and cautions is "filtered out" under the "filtering rules" and no longer appear on DBS certificates. For further details see section 4.4 of this briefing.

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10 Other than convictions resulting in a prison sentence of more than four years, which are excluded from the scope of the 1974 Act and can therefore never become spent

11 For further information see Library Briefing *The Rehabilitation of Offenders Act 1974*, CBP1841

12 The DBS was formed on 1 December 2012 by the merger of the Criminal Records Bureau, which previously had responsibility for issuing criminal records checks, and the Independent Safeguarding Authority: see DBS website, What we do

13 Gov.uk, DBS checks: guidance for employers

The two types of enhanced check also provide details of relevant and proportionate non-conviction information, for example details of arrests recorded on the PNC or police intelligence recorded on the PND. Disclosure of such information is not automatic but is done on a case-by-case basis following the exercise of police discretion. Under section 113B(4) of the *Police Act 1997*, the test the police use when deciding whether to disclose non-conviction information is whether the chief officer "reasonably believes it to be relevant" for the purpose of the check and whether in his or her opinion it ought to be included.

3. The disclosure of non-conviction information

3.1 Background

The disclosure of non-conviction information has proved controversial in some cases, and there have been a number of judicial review challenges to the inclusion of non-conviction information on enhanced checks.

Until October 2009, the leading case on the disclosure of police information in connection with an enhanced check was *R (on the application of X) v Chief Constable of the West Midlands Police and another* [2005] 1 All ER 610, in which the Court of Appeal held that the policy of the relevant legislation, in order to serve the pressing social need to protect children and vulnerable adults, was that the information should be disclosed to the Criminal Records Bureau by the police even if it only "might" be true.

However, in October 2009 the Supreme Court ruled that equal weight should be given to the human rights of the person applying for the enhanced disclosure as to the need to protect children and vulnerable adults: following *R (X) v Chief Constable of the West Midlands Police* the balance had tipped too far against the applicant.[14] The Supreme Court held that all enhanced disclosures are likely to engage Article 8 of the European Convention on Human Rights (right to respect for private life), as the information has been collected and stored in police records and disclosure of relevant information is likely to diminish the applicant's employment prospects. The police should consider two questions when deciding whether to disclose non-conviction information: first, whether the information is reliable and relevant; and second, in light of the public interest and the likely impact on the applicant, whether it is proportionate to disclose the information. Factors to be considered in assessing proportionality include:

- the gravity of the information;
- its reliability and relevance;
- the applicant's opportunity to rebut the information;
- the period that has elapsed since the relevant events; and
- the adverse effect of the disclosure.

If the chief constable is not satisfied that the applicant has had a fair opportunity to answer any allegations in the information concerned, or if the information is historical or vague or he has doubts as to its potential relevance, the applicant should be given the chance to make representations as to why it should not be included.

[14] R (L) v Commissioner of Police of the Metropolis [2009] UKSC 3. The Supreme Court has also published a press summary of the decision, which provides an overview of the key issues set out in the judgment.

3.2 The Home Office Review and the Protection of Freedoms Act 2012

In 2009, the then Home Secretary Alan Johnson asked Sunita Mason, the newly-appointed Independent Adviser for Criminality Information Management, to review the retention of criminal record information with a view to formulating a "clear, principled approach". The outcome of the review was published on 18 March 2010.[15] One of her recommendations was that the Government review the disclosure of non-conviction information to see whether a more "balanced" approach could be taken.[16]

Following the 2010 general election, the Government said that it would "review the criminal records and vetting and barring regime and scale it back to common sense levels".[17] The review was again conducted by Sunita Mason. Ms Mason's report on phase 1 of her review was published on 11 February 2011.[18] She covered a range of issues, the key ones being the filtering of old or minor conviction information (discussed further in section 4.1 of this note) and the disclosure of non-conviction information.

Ms Mason made a number of recommendations aimed at a more restricted approach to disclosing non-conviction information as part of an enhanced criminal records check.

The first was that the statutory test for the police to use when deciding whether to disclose non-conviction information should be made more strict. At the time of Ms Mason's review, section 113B(4) of the *Police Act 1997* required the police only to form the opinion that the information "might" be relevant before it should be disclosed.[19] She suggested that this be replaced with a requirement for the police to "reasonably believe" that the information is relevant.[20]

She also recommended the introduction of a new statutory code of practice for the police to follow when deciding whether to disclose non-conviction information, in order to generate "consistency and proportionality across police forces".[21] She suggested that the code should include a requirement to justify the following:

- the decision to include non-conviction information on an enhanced certificate;
- the risk that might be posed;
- the source of the information (if relevant); and
- the potential impact of disclosure on the individual the check related to.

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15 Home Office, A Balanced Approach – Independent Review by Sunita Mason, March 2010 (DEP 2010-0745)
16 Ibid, p9 and pp25-26
17 Cabinet Office, The Coalition: our programme for government, May 2010, p20
18 Sunita Mason, A Common Sense Approach – Report on Phase 1, February 2011
19 *Police Act 1997*, s113B(4)
20 Sunita Mason, A Common Sense Approach – Report on Phase 1, February 2011, p33
21 Ibid, p34

Another recommendation was for the Government to develop an "open and transparent representations process for individuals to challenge inaccurate or inappropriate disclosures". She said that representations should be overseen by an independent expert, rather than by the police force that took the initial decision to disclose.[22]

The Government implemented Ms Mason's recommendations relating to a new test for disclosure, a new statutory code and a new independent disputes process in section 82 of the *Protection of Freedoms Act 2012*.[23]

The Statutory Disclosure Guidance,[24] issued by the Home Office, sets out the principles chief officers should apply In deciding what, if any, information should be provided for inclusion in an enhanced check.

Details of the disputes process are provided on the Gov.uk page, Report a problem about a criminal record check or barring decision.

3.3 Police guidance

A Quality Assurance Framework (QAF) issued jointly by the DBS and the Association of Chief Police Officers (ACPO)[25] sets out detailed guidance for the police to follow when deciding whether to disclose intelligence as part of an enhanced criminal records check.[26]

An overview of the structure and function of the QAF is set out in Quality Assurance Framework: An applicant's introduction to the decision-making process for Enhanced Criminal Record Checks (Standards and Compliance Unit, March 2014). The QAF sets out the following general approach:

> The role of police is to identify information that might be relevant to an employer's assessment of applicant suitability and to determine whether it ought to be disclosed (having considered the potential impact upon the private lives of those concerned, if considering disclosure as Approved Information)
>
> You are required to consider the gravity of the material involved, the reliability of the information on which it is based, the period that has elapsed since the relevant events occurred and the relevance of the material to the application in question.
>
> Whatever information you determine to be relevant, you should also consider whether you need to offer Representations in order to satisfy yourself that your conclusions are not based on inaccurate/incomplete information or on a false premise or a state of affairs which is out of date – information that should no longer be considered a factor in your deliberations or that should be viewed in a different light.

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22 Ibid, pp41-2

23 *The Protection of Freedoms Act 2012 (Commencement No. 3) Order 2012, SI 2012/2234*
Further background is set out in the Explanatory Notes to section 82, section 8.2 of Library Research Paper 11/20 and section 4.7 of Library Research Paper 11/54.
Section 82 came into force on 10 September 2012

24 Second edition, August 2015

25 Now replaced by the National Police Chiefs' Council (NPCC)

26 DBS/ACPO, Quality Assurance Framework (Version 9)

> These considerations should help you arrive at a conclusion of whether or not a reasonable employer, when considering the employment of an applicant, would find the information material to that decision.[27]

The QAF also sets out the circumstances in which the police should offer the individual who has applied for the check the opportunity to make representations about the disclosure of non-conviction information. It suggests the presence of any of the following factors should require the police to consider whether representations might be appropriate:

- If it is unclear whether the position [*employment] for which the applicant is applying really does require the disclosure of such information [*our addition]
- Where the information may indicate a state of affairs that is out of date or no longer true
- If the applicant has never had a fair opportunity to answer the allegation
- If the applicant appears unaware of the information being considered for disclosure
- If the facts are not clear and are in dispute.[28]

Circumstances where representations may not be needed include where the information relates to an impending prosecution or provides background to a conviction on the PNC.[29]

If the police decide that it is appropriate to offer the applicant the opportunity to make representations, they will contact him directly to inform him of this. Any representations made by the applicant are then added to the information held by the police and become a factor in their decision-making: "They may decide not to disclose some, or all, of the information as a result, or re-word the disclosure text itself to make it, for instance, more balanced, accurate and fair".[30]

If, having followed the procedure in the QAF, the police decide to disclose any non-conviction information as part of an enhanced check, it is open to the applicant to challenge this decision by way of an application to an Independent Monitor (as legislated for in section 82 of the *Protection of Freedoms Act 2012*):

> ... the Protection of Freedoms Act 2012 made provision for a new independent process known as 'Review', with oversight by an appointed Independent Monitor for Disclosure, giving applicant's further opportunity to challenge a disclosure. QAF will support this independent review as the Independent Monitor will assess whether or not police applied QAF correctly when processing an application. Where necessary, the Independent Monitor may also

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27 DBS/ACPO, Quality Assurance Framework, MP7a and MP7b v9 disclosure rationale and method: General Guidance, March 2014, p6
28 DBS/ACPO, QAF GD4: Representations Guidance, June 2013, p1
29 Ibid
30 Standards and Compliance Unit, Quality Assurance Framework: An applicant's introduction to the decision-making process for Enhanced Criminal Record Checks, March 2014, p10

> advise of changes that should be made to QAF to keep it as effective as possible, thus ensuring that QAF continues to meet the requirements of legislation and case law.
>
> If you are in receipt of a disclosure that you know to be inaccurate or believe should not have been made – either at all or in part – please do not panic or worry: remember that there are mechanisms in place to put things right.[31]

The form for raising a dispute, and associated guidance, is available via the DBS on Gov.uk: see DBS certificate disputes and fingerprint consent forms.

[31] Ibid, p13

4. The disclosure of old and/or minor conviction information

4.1 The Home Office Review

As part of her review of criminal records, the Independent Adviser for Criminality Information Management, Sunita Mason, also considered the issue of disclosing old and minor conviction information as part of standard and enhanced criminal records checks.

She did not recommend any change in the rules permitting an individual's PNC record to be retained until his 100th birthday. She did, however, recommend the introduction of a new "filtering mechanism" to prevent old and/or minor convictions from appearing on a criminal records check.[32]

In her phase 1 report, Ms Mason said that in many cases the disclosure of minor information placed "an unnecessary burden on the lives of individuals", particularly where the conviction was old and the individual concerned posed no significant public protection risk to children or vulnerable adults. However, she said that wider public protection needs meant that certain types of conviction should **always** be disclosed, for example if they related to offences in the following categories:

- assault and violence against the person;
- affray, riot and violent disorder;
- aggravated criminal damage;
- arson;
- drink and drug driving;
- drug offences;
- robbery; and
- sexual offences.

She also said that old and minor conviction information should not be ignored if it represented a pattern of criminal behaviour rather than a one-off offence.[33]

Ms Mason subsequently set up a panel of experts to look more closely at a new mechanism to filter old and minor convictions. Panel members included representatives from the Information Commissioner's Office, ACPO, the Criminal Records Bureau, the NSPCC, Unlock and Liberty. In a report published in December 2011, Ms Mason set out the following general principles as agreed by the panel:

- Filtering should include convictions, cautions, warnings and reprimands, aligned to the conviction type;
- There should be a consultation process before a particular conviction type can be subject to filtering;

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32 Home Office, A Balanced Approach – Independent Review by Sunita Mason, March 2010 (DEP 2010-0745), p8 and pp19-24

33 Sunita Mason, A Common Sense Approach – Report on Phase 1, February 2011, pp27-29

- Extra consideration should be given to convictions, cautions, warnings and reprimands defined as minor received by individuals before their 18th birthday;
- There should be a defined period of time after which minor convictions, cautions, warnings and reprimands (as defined) are not disclosed. This would cover the old element of the proposal;
- The rules should ensure that no conviction is filtered if it is not "spent" under the provisions of the Rehabilitation of Offenders Act;
- Particular care should be taken before considering any sexual, drug related or violent offence type for filtering;
- Where any conviction, caution, warning or reprimand recorded against an individual falls outside of the minor definition then **ALL** convictions should be disclosed even if they would otherwise be considered as minor;
- The filtering rules should be both simple and understandable to individuals who are users and/or customers of the disclosure service.[34]

She commented that there had been a lack of evidence-based research for the panel to consider, and that there should therefore "initially be a cautious approach to implementation of any proposal for filtering". She suggested the following basic structure:

- A threshold pertaining to the number of convictions, cautions, warnings and reprimands defined as minor should be applied. In the first instance, this should be set at 1 (one). This would allow individuals to be given "a second chance" where a conviction is defined as minor and it meets the time definition for filtering.
- There would need to be an exception to this principle where several minor disposals related to the same set of events. This should not preclude them being filtered out in appropriate circumstances.
- For individuals (over 18 at the point of conviction) a period of 3 years should have elapsed before the conviction is filtered out.
- For individuals (under 18 at the point of conviction) there should be an elapsed period of 6 months before a single minor conviction, caution, warning or reprimand is filtered out.[35]

Alternative approaches could involve linking the filtering date to the penalty administered (a similar approach to the way in which convictions become spent under the *Rehabilitation of Offenders Act 1974*), or requiring the courts or the police to take filtering decisions on a case-by-case basis.

In its response to Ms Mason's report on the panel review, the Government said it was "continuing to keep the relevant legislation under review", commenting that this was "a complex area raising

34 Sunita Mason, Filtering of Old and Minor Offending from Criminal Records Bureau Disclosures, December 2011, p2
35 Ibid, pp2-3

difficult issues of principle and process and there is no consensus between all the interested parties on how these should be resolved to deliver a workable scheme".[36]

4.2 Court of Appeal ruling- January 2013

The issue was given a degree of urgency in January 2013 after the Court of Appeal ruled that mandatory and blanket disclosure as part of a standard or enhanced criminal records check was incompatible with Article 8 of the European Convention on Human Rights (right to respect for private life).[37] The main case considered by the Court involved an individual referred to as T, who had received two police warnings relating to two stolen bicycles when he was 11 years old. He was otherwise of good character, and had believed that his warnings were spent. However, they had appeared on an enhanced criminal records check carried out when he was aged 17 after he applied to work at a local football club, and on a further enhanced criminal records check issued when he was aged 19 after he enrolled on a sports studies course at university.

The Court acknowledged that the disclosure of conviction information furthered both the general aim of protecting employers and, in particular, children and vulnerable adults in their care, and the particular aim of enabling an employer to assess whether an individual was suitable for a particular kind of work. However, it considered that "the statutory regime requiring the disclosure of *all* convictions and cautions relating to recordable offences is disproportionate to that legitimate aim".[38] It went on:

> The fundamental objection to the scheme is that it does not seek to control the disclosure of information by reference to whether it is relevant to the purpose of enabling employers to assess the suitability of an individual for a particular kind of work. Relevance must depend on a number of factors including the seriousness of the offence; the age of the offender at the time of the offence; the sentence imposed or other manner of disposal; the time that has elapsed since the offence was committed; whether the individual has subsequently re-offended; and the nature of the work that the individual wishes to do. These same factors also come into the picture when the balance is to be struck (as it must be) between the relevance of the information and the severity of any impact of the individual's article 8(1) right.[39]

The Court did not prescribe any solution to the incompatibility between the current disclosure scheme and Article 8, instead stating that it would be "for Parliament to devise a proportionate scheme".[40]

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36 Letter from the Home Office and the Ministry of Justice to Sunita Mason, *Filtering of old and minor offending from Criminal Records Bureau disclosures*, 27 July 2012

37 *R on the application of T, JB and AW v Chief Constable of Greater Manchester, Secretary of State for the Home Department and Secretary of State for Justice* [2013] EWCA Civ 25

38 Ibid, at para 37

39 Ibid, at para 38

40 Ibid, at para 69

The Court directed that its decision should not take effect until the Supreme Court had determined the Government's application for permission to appeal.[41]

4.3 Supreme Court ruling- June 2014

In May 2013 the Supreme Court granted the Government permission to appeal the Court of Appeal's decision. The hearing took place on 9 and 10 December 2013 and judgment was given on 18 June 2014. The Supreme Court dismissed the appeal against the declarations of incompatibility.[42]

The Supreme Court confirmed that the cautions imposed on T and on the other individuals represented aspects of their private lives, respect for which is guaranteed by Article 8. It found the requirement that a person disclose his previous convictions and cautions to a potential employer to constitute an interference with this right. The Court stated:

> [I]n order for the interference to be "in accordance with the law", there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined.

The disclosure scheme, prior to amendments made in May 2013 to eliminate any incompatibility, was incompatible with Article 8:

> …because of the cumulative effect of the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the absence of any mechanism for independent review of a decision to disclose data…

41 Ibid, at para 84

42 *R (On the application of T and another) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35

4.4 The filtering rules

On 26 March 2013 the Government laid orders before Parliament to change the law so that certain spent disposals (e.g. old and minor convictions and cautions) will no longer be disclosed on a DBS certificate.[43]

The filtering rules for criminal record check certificates, which took effect from 29 May 2013, are as follows:

> **For those 18 or over at the time of the offence:**
>
> An adult conviction will be removed from a DBS certificate if:
>
> - 11 years have elapsed since the date of conviction; and
> - it is the person's only offence, and
> - it did not result in a custodial sentence
>
> Even then, it will only be removed if it does not appear on the list of offences which will never be removed from a certificate. If a person has more than one offence, then details of all their convictions will always be included.
>
> An adult caution will be removed after 6 years have elapsed since the date of the caution – and if it does not appear on the list of offences relevant to safeguarding.
>
> **For those under 18 at the time of the offence:**
>
> The same rules apply as for adult convictions, except that the elapsed time period is 5.5 years
>
> The same rules apply as for adult cautions, except that the elapsed time period is 2 years.[44]

The list of specified offences, that will always be subject to disclosure, includes sexual and violent offences and other offences relevant to safeguarding.[45] Further information about the filtering rules can be found in the DBS filtering guide.

Certain aspects of the filtering system have been criticised as operating too bluntly and inflexibly.[46] The rule that only a single conviction can be filtered, provided it did not result in a custodial sentence, means that multiple convictions for lesser offences, no matter how long ago they occurred, cannot be filtered. Cautions and convictions for offences specified in the list mentioned above also cannot be filtered, regardless of the circumstances. The rules do not allow for discretion and there is no right of appeal.

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43 *The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013* and *The Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013.* These Orders were laid before the hearing of the appeal to the Supreme Court in the case of T took place

44 Disclosure and Barring Service, Filtering rules for criminal record check certificates, 17 December 2013

45 Disclosure and Barring Service, List of offences that will never be filtered from a criminal record check

46 See, for example, the work of the charity Unlock, Policy issues: filtering

4.5 Supreme Court ruling – January 2019

In January 2019 the Supreme Court gave judgment on a group of cases each concerning individuals who had been convicted or received cautions or reprimands in respect of relatively minor offending: R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants).[47] Disclosure of the individuals' criminal records to potential employers had made, or might in the future make, it more difficult for them to obtain employment. The individuals challenged the disclosure schemes[48] as being incompatible with Article 8 of the European Convention on Human Rights, protecting the right to respect for private and family life.

The cases had been heard by first the High Court and then the Court of Appeal before reaching the Supreme Court on appeal by the Government. The courts considered whether the disclosure schemes interfered with the individuals' Article 8 rights, and if they did so, whether this interference was in accordance with the law (the legality test) and necessary in a democratic society (the proportionality test).

The High Court and Court of Appeal had found that the schemes for disclosure were incompatible with Article 8 for failing the legality test because of the breadth of the categories in the legislation and were disproportionate for failing to sufficiently distinguish between convictions and cautions of varying degrees of relevance.

A majority of the Supreme Court dismissed the Government's appeal (except in the case of one of the individuals, W). The Court said that the disclosure schemes did satisfy the legality test. On the proportionality test it said that categories used in the scheme were proportionate, with two exceptions; the multiple convictions rule and the disclosure of warnings and reprimands for younger offenders.

The multiple convictions rule

The filtering rules mean that where a person has more than one conviction, no filtering takes place and all convictions appear on the person's certificate. The Supreme Court said that this rule does not achieve its purpose of indicating propensity as it applies irrespective of the nature, similarity, number or time intervals of offences and is disproportionate and incompatible with Article 8.

Warnings and reprimands for younger offenders

The Supreme Court also ruled that the disclosure of warnings and reprimands (now replaced with youth cautions) is disproportionate and incompatible with Article 8. The Court said that the purpose of these disposals is instructive and specifically designed to avoid damaging effects later in life through disclosure.

The Government will now have to consider reform of the scheme in light of the Supreme Court's judgment.

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47 For details of the facts of each of the cases see the Supreme Court's press summary

48 The schemes are those under the Rehabilitation of Offenders Act 1974 and Part V of the Police Act 1997

5. Calls for review and reform

There have been a number of calls for a wider review and reform of the system of disclosing criminal records, particularly where a record was acquired when the individual was a child.

In 2016 the Law Commission was asked by the Home Office to review the specific area of law dealing with filtering. The terms of reference expressly limited the review to changes that could be achieved using only secondary legislation. However in its final report in January 2017, the Law Commission said there was a compelling case for a wider review of the disclosure system as a whole.

> Our conclusion is that the present system raises significant concerns in relation to ECHR non-compliance and, what may be considered to be, the overly harsh outcomes stemming from a failure to incorporate either proportionality or relevance into disclosure decisions. An impenetrable legislative framework and questions of legal certainty further compound the situation. This is an area of law in dire need of thorough and expert analysis. A mere technical fix is not sufficient to tackle such interwoven and large scale problems.[49]

The Justice Committee's report into the disclosure of youth criminal records, published in October 2017, endorsed the Law Commission's conclusions on the complexity and inaccessibility of the filtering system and its recommendation for a wider review of the whole disclosure system. The Committee's report said:

> We find it a matter of regret that the laudable principles of the youth justice system, to prevent offending by children and young people and to have regard to their welfare, are undermined by the system for disclosure of youth criminal records, which instead works to prevent children from moving on from their past and creates a barrier to rehabilitation.[50]

The Committee's recommendations included:

- an urgent review of the filtering regime, to consider removing the rule preventing the filtering of multiple convictions;
- introducing lists of non-filterable offences customised for particular areas of employment, together with a threshold test for disclosure that is based on disposal/sentence; and
- reducing qualifying periods for the filtering of childhood convictions and cautions.

It also recommended that the Government consider the feasibility of extending this new approach, possibly with modifications, to the disclosure of offences committed by young adults up to the age of 25.

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49 Law Commission, Criminal Records Disclosure: Non-Filterable Offences, HC 971, 31 January 2017, p127

50 Justice Committee, Disclosure of youth criminal records, HC 416, 27 October 2017, p9

Charlie Taylor in his review of youth justice, published in 2016, proposed the Government develop a distinct approach to how childhood offending is treated by the criminal records system. He said the criminal records system should be more sensitive to the transitory nature of much childhood offending, and to the limited future risk of offending that most crimes committed in childhood actually present. In his view, all childhood offending (with the exception of the most serious offences) should become non-disclosable after a period of time and the circumstances in which police intelligence on childhood conduct can be disclosed should be further restricted.[51]

David Lammy in his independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, published in 2017, said that the current criminal records regime is "making work harder to find for those who need it the most" and that "a more flexible system is required, which is capable of recognising when people have changed and no longer pose a significant risk to others".[52] He recommended a system for sealing criminal records:

> Individuals should be able to have their case heard either by a judge or a body like the Parole Board, which would then decide whether to seal their record. There should be a presumption to look favourably on those who committed crimes either as children or young adults but can demonstrate that they have changed since their conviction.[53]

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51 Ministry of Justice, Review of the Youth Justice System in England and Wales, Charlie Taylor, December 2016, p25

52 The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, September 2017, p66

53 Ibid

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