



The retention and disclosure of criminal records

Standard Note: SN/HA/6441

Last updated: 9 May 2013

Author: Sally Lipscombe and Jacqueline Beard

Section: Home Affairs

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 and can be disclosed as part of a criminal records check.

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.

When a person applies for a so-called “excepted position”, then he 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).

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 has recently 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.

The Court of Appeal ruled 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). The Government is seeking leave to appeal this decision. The Government has also proposed legislation to introduce a new filtering mechanism to restrict the disclosure of old and minor convictions. This legislation requires the approval of Parliament before it can come into force.

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as being up to date; the law or policies may have changed since it was last updated; and it should not be relied upon as legal or professional advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required.

This information is provided subject to [our general terms and conditions](#) which are available online or may be provided on request in hard copy. Authors are available to discuss the content of this briefing with Members and their staff, but not with the general public.

Contents

1	Retention and deletion	2
1.1	Nominal records on the Police National Computer	2
1.2	Intelligence on the Police National Database	3
2	Disclosure	5
2.1	The Disclosure and Barring Service: standard and enhanced checks	5
2.2	The disclosure of non-conviction information	6
	The Home Office Review and the Protection of Freedoms Act 2012	7
	Police guidance	8
2.3	The disclosure of old and/or minor conviction information	10
	The Home Office Review	10
	Court of Appeal ruling	12
	Proposed changes to legislation	13

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 and can be disclosed as part of a criminal records check.

The review, retention and disposal of nominal records on the PNC is governed by Retention Guidelines prepared by the Association of Chief Police Officers (ACPO).¹ 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. They replaced the *ACPO General Rules for Criminal Record Weeding on Police Systems*. Under the old ACPO General Rules the general approach was that records would be completely deleted from the PNC after a specified period of time, and thereafter would not show up on a criminal records check. However, the Retention Guidelines introduced a new approach, under which police records on the PNC were “stepped down” after a certain period rather than deleted altogether:

The Retention Guidelines are based on a format of restricting access to PNC data, rather than the deletion of that data. The restriction of access is achieved by setting

¹ ACPO, *Retention Guidelines for Nominal Records on the Police National Computer*, March 2006

strict time periods after which the relevant event histories will 'step down' and only be open to inspection by the police. Following the 'step down' other users of PNC will be unaware of the existence of such records, save for those occasions where the individual is the subject of an Enhanced Check under the Criminal Records Bureau vetting process. In those cases the data should be dealt with as intelligence and only disclosed, where the relevance test has been applied, on the authority of the Chief Officer.²

The time period after which an individual's event history "stepped down" under the Retention Guidelines varied depending on, for example, the nature of the offence(s) that led to the event history, the age of the individual at the time the record was created and the sentence (if any) imposed.

However, the step down procedure was suspended in October 2009 following the Court of Appeal's decision in the so-called *Five Constables* case, in which it ruled that the retention of an individual's record until his 100th birthday did not infringe data protection principles.³ **All** records on the PNC (including those that had already been stepped down, or those that were due to be stepped down) are now therefore retained until the individual's 100th birthday and can be disclosed as part of a criminal records check.

Chief constables "own" the data that their force has entered onto the PNC and, as such, are responsible for deciding whether or not to delete it. An individual may write to their chief constable (or the data protection officer for their police force) to request the removal of information from the PNC. The Retention Guidelines include guidance, known as the "exceptional case procedure", for chief constables to use when considering such requests:

Exceptional cases will by definition be rare. They might include cases where the original arrest or sampling was found to be unlawful. Additionally, where it is established beyond doubt that no offence existed, that might, having regard to all the circumstances, be viewed as an exceptional circumstance.

For example where a dead body is found in a multi-occupancy dwelling and the cause of death is not immediately obvious. All the occupants are arrested on suspicion of murder pending the outcome of a post mortem. All arrested persons are detained at the local police station and samples taken. It later transpires that the deceased person died of natural causes. No offence therefore exists, and all persons are released from custody.⁴

The examples of exceptional cases set out in the current guidance are **extremely** limited, and do not cover situations where (for example) a person wishes to have his record removed because it is appearing on his criminal records check and causing difficulties in finding employment.

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

² Ibid, para 1.2

³ [Chief Constable of Humberside Police & Ors v The Information Commissioner & Anor \[2009\] EWCA Civ 1079](#)

⁴ ACPO, [Retention Guidelines for Nominal Records on the Police National Computer](#), March 2006, Appendix 2, pp11-12

PND to record “soft” local intelligence: for example details of allegations or police investigations that did not lead to arrest or charge.⁵

The review, retention and disposal of material held on the PND is governed by the [Guidance on the Management of Police Information](#).⁶ The legal framework is set out in section 7 and Appendix 4 of the guidance. This framework applies to information held on any police systems other than the PNC.

The guidance requires that intelligence should only be held on the PND where it is:

- “necessary”, requiring the intelligence to hold some value for the police service in their effort to fulfil a policing purpose (for example bringing offenders to justice, preserving order and preventing the commission of offences);⁷
- “adequate”, requiring the record to be as complete as possible, and requiring the police to make reasonable effort to collect enough information to allow them to identify every person, object, location and event as unique;
- “accurate and up to date”, which speaks for itself; and
- “not excessive”, which requires the amount and type of information held in relation to a person to be proportionate to the threat that they pose to others and the community.

Intelligence held on the PND will be classified as group 1, 2, 3 or 4 based on an assessment of the risk posed by the person to whom the intelligence relates. This classification determines how long the intelligence will be retained for.

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

- offenders who have ever been managed under multi agency public protection arrangements (MAPPA);⁸
- 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*;⁹ and
- potentially dangerous people.

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 National Policing Improvement Agency, 2nd edition, 2010

⁷ See section 7.4 of the Guidance for examples of some of the issues the police should consider when deciding whether it is “necessary” to retain intelligence on the PND for policing purposes. Paragraph 2.2.2 of the *Code of Practice on the Management of Police Information* (July 2005) issued by the Home Secretary sets out the full list of policing purposes that can be used to justify the retention of police information.

⁸ See the Ministry of Justice website, [Multi agency public protection arrangements](#) [accessed 9 May 2013] for an overview of MAPPA. Offenders managed under MAPPA will have been convicted of (or cautioned for) sexual or violent offences.

⁹ 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.

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 intelligence 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.¹⁰ 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.

2 Disclosure

2.1 The Disclosure and Barring Service: standard and enhanced checks

Under the *Rehabilitation of Offenders Act 1974*, convictions,¹¹ cautions, reprimands and warnings become “spent” after a certain period of time. 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 (e.g. police officers, solicitors). The DBS has published a full list of excepted positions in respect of which a criminal records check can be sought: please see [DBS checks: eligibility guidance](#), December 2012.

¹⁰ 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. See paragraph 7.6.5 of the Guidance for further details on clear periods, including the rules as to the date on which a clear period will start to run in any given case.

¹¹ Other than convictions resulting in a prison sentence of more than two and a half years, which are excluded from the scope of the 1974 Act and can therefore never become spent

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](#) [accessed 9 May 2013]

Three levels of check are issued by the DBS: standard, enhanced, and enhanced with barred list.¹³ A standard check contains details of all spent and unspent convictions, cautions, reprimands and final warnings (as held on the PNC). 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.¹⁴

All three types of check therefore provide details of any convictions, cautions, warnings or reprimands held on the PNC, whether spent or unspent and regardless of how old the information is or how minor the offence involved was.

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.

2.2 The disclosure of non-conviction information

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.¹⁵ 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:

¹³ There is a third level of check, basic, which only shows unspent convictions, cautions, reprimands and warnings. However, this is currently only available via Disclosure Scotland and not via the DBS: see Disclosure Scotland website, [What is a disclosure?](#) [accessed 9 May 2013]

¹⁴ Gov.uk/DBS website, [Disclosure and Barring Service: criminal records checks, referrals and complaints](#) [accessed 9 May 2013]

¹⁵ *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.

- 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.

The Home Office Review and the Protection of Freedoms Act 2012

In 2009, the then Home Secretary Alan Johnson asked Sunita Mason, a 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 2010.¹⁶ 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.¹⁷

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”.¹⁸ The review was again conducted by Sunita Mason. Ms Mason’s report into phase 1 of her review was published on 11 February 2011.¹⁹ She covered a range of issues, the key ones being the filtering of old or minor conviction information (discussed further in section 2.3 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, s113B(4) of the *Police Act 1997* only required the police to form the opinion that the information “might” be relevant before it should be disclosed.²⁰ She suggested that this be replaced with a requirement for the police to “reasonably believe” that the information is relevant.²¹

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”.²² She suggested that the code should include a requirement to justify the following:

- the decision to include non-conviction information on an enhanced certificate;

¹⁶ Home Office, *A Balanced Approach – Independent Review by Sunita Mason*, March 2010 (DEP 2010-0745)

¹⁷ Ibid, p9 and pp25-26

¹⁸ Cabinet Office, *The Coalition: our programme for government*, May 2010, p20

¹⁹ Sunita Mason, *A Common Sense Approach – Report on Phase 1*, February 2011

²⁰ *Police Act 1997*, s113B(4)

²¹ Sunita Mason, *A Common Sense Approach – Report on Phase 1*, February 2011, p33

²² Ibid, p34

- 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.

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.²³

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](#). 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

For the new statutory code, see Home Office, [Statutory Disclosure Guidance](#), July 2012.

For details of the disputes process, please see the DBS website, [Disclosure and Barring Service: criminal records checks, referrals and complaints](#) [accessed 9 May 2013].

Police guidance

A Quality Assurance Framework (QAF) issued jointly by the DBS and ACPO sets out detailed guidance for the police to follow when deciding whether to disclose intelligence as part of an enhanced criminal records check.²⁵ The most recent version of the QAF (version 8) was published on 10 September 2012 and reflects both the principles set out by the Supreme Court in its October 2009 judgment and the changes made by section 82 of the *Protection of Freedoms Act 2012*.

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, December 2012). 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.

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.

²³ Ibid, pp41-2

²⁴ *The Protection of Freedoms Act 2012 (Commencement No. 3) Order 2012, SI 2012/2234*

²⁵ DBS/ACPO, [Quality Assurance Framework \(Version 8\)](#), 2012

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.²⁶

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 for which the applicant is applying really does require the disclosure of such information
- 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 dispute²⁷

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.²⁸

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".²⁹

If, having followed the procedure in the QAF, the police decide to disclose any non-conviction information as part of an enhanced check, then 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 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..³⁰

²⁶ DBS/ACPO, *Quality Assurance Framework (Version 8): MP7 General Guidance*, 2012, p5

²⁷ DBS/ACPO, *QAF GD4: Representations Guidance*, 2012, p1

²⁸ Ibid

²⁹ Standards and Compliance Unit, *Quality Assurance Framework: An applicant's introduction to the decision-making process for Enhanced Criminal Record Checks*, December 2012, p10

³⁰ Ibid, p13

The form for raising a dispute is available via the DBS website: see [Form AF15: Certificate Disputes & Fingerprint Consent Forms and Guidance](#).

2.3 The disclosure of old and/or minor conviction information

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 current 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.³¹

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.³²

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;

³¹ Home Office, [A Balanced Approach – Independent Review by Sunita Mason](#), March 2010 (DEP 2010-0745), p8 and pp19-24

³² Sunita Mason, [A Common Sense Approach – Report on Phase 1](#), February 2011, pp27-29

- There should be a consultation process before a particular conviction type can be subject to filtering;
- 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.³³

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.³⁴

Alternative approaches could involving 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 difficult issues of principle and process and there is no consensus

³³ Sunita Mason, *Filtering of Old and Minor Offending from Criminal Records Bureau Disclosures*, December 2011, p2

³⁴ Ibid, pp2-3

between all the interested parties on how these should be resolved to deliver a workable scheme".³⁵

Court of Appeal ruling

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).³⁶ 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".³⁷ 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.³⁸

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".³⁹

The Court directed that its decision should not take effect until the Supreme Court has determined the Government's application to appeal.⁴⁰ An answer to a PQ in March 2013 stated that the Government had made the application for permission to appeal the Court of Appeal's decision to the Supreme Court.⁴¹

³⁵ 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

³⁶ [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](#)

³⁷ Ibid, at para 37

³⁸ Ibid, at para 38

³⁹ Ibid, at para 69

⁴⁰ Ibid, at para 84

⁴¹ [HC Deb 13 March 2013 c232W](#)

Proposed changes to legislation

On 26 March 2013 the Government laid orders before Parliament to amend the current legislation so that certain spent disposals (e.g. old and minor convictions and cautions) will no longer be disclosed on a DBS certificate.⁴²

A news story from the DBS website explains the changes being considered:

An adult conviction will be removed from a criminal record certificate if,

(i) 11 years have elapsed since the date of conviction (ii) it is the person's only offence and (iii) it did not result in a custodial sentence.

Even then, it will only be removed if it does not appear on the list of specified offences. 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 specified offences.

For those under 18 at the time of the offence:

- a conviction received as a young person would become eligible for filtering after 5.5 years - unless it is on the list of specified offences, a custodial sentence was received or the individual has more than one conviction
- a caution administered to a young person will not be disclosed if 2 years have elapsed since the date of issue - but only if it does not appear on the list of specified offences⁴³

The list of specified offences would include sexual and violent offences and other offences relevant to safeguarding, which would always be subject to disclosure.⁴⁴

Damien Green, Minister for Policing and Criminal Justice, has stated that these orders are the Government's response to the judgment in the Court of Appeal case, the terms of which it considers to be too broad.⁴⁵ He also confirmed that the changes would have retrospective effect.

Note that this secondary legislation is subject to the affirmative process and Parliament's approval is needed before it can come into force.

⁴² [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](#)

⁴³ Gov.uk, [Filtering of old and minor conviction and cautions](#), 27 March 2013 [accessed 9 May 2013]

⁴⁴ [HC Deb 17 April 2013 c130WH](#)

⁴⁵ [HC Deb 17 April 2013 c132WH](#)