

Filtering of criminal records from DBS checks

Unlock briefing

Unlock is an independent award-winning charity that provides a voice and support for people with convictions who are facing stigma and obstacles because of their criminal record. Every year we hear from thousands of people who are being held back in life because of their criminal record due to the negative impact of laws, rules and practices. We have a track-record of constructive engagement with government, the Disclosure and Barring Service (DBS) and employers in working towards a fairer and more inclusive approach.

Summary of issue: Standard and enhanced checks issued by the DBS reveal old, minor and irrelevant criminal records. The current system of disclosure was ruled unlawful by the High Court in 2016. The DBS filtering rules are blunt and disproportionate. People are losing out on jobs and roles they're qualified for. As things stand, a criminal record dogs people for decades, and often for life, no matter how old or minor. This is despite knowing that, in particular, people make mistakes when they're young. Young people should be allowed to fail. The current system is unnecessary and damaging. A fairer, more proportionate and flexible system should be developed that protects the public without unduly harming people's opportunity to get on in life. This would be one with expanded automatic filtering rules and a discretionary filtering process with a review mechanism.

Why it matters

A criminal record can be crippling for employment – Employers are risk-averse, and often assume that if something is flagged on a disclosure, they cannot hire the applicant. Yet it's a sad irony that a criminal record only becomes a problem when someone decides to get on in life; a criminal record check is not required to sell drugs or join a gang, but it is to get a job or go to university.

It dogs people for decades – The current system affects people with a criminal record for longer and more profoundly than elsewhere in Europe. The current criminal record disclosure system acts as a significant barrier to them doing so and can have profound effects well into adulthood, and often indefinitely.

Large numbers of people are affected - In 2015/16, there were 358,810 standard or enhanced checks which had a match with police record. 67% of those matches resulted in a caution or conviction being disclosed. The DBS filtering rules only removed information from 33%. Some 241,203 checks revealed convictions or cautions.

The problem

1. The intention of the DBS filtering system was to prevent the disclosure of old and minor offences on standard and enhanced criminal record checks. However, in practice the system is **ineffective** because it is **limited by inflexible rules** and only came about due to **legal challenges**. Since the filtering scheme was introduced in 2013, it's helped many people with old and minor criminal records to be free of the stigma and discrimination that so many face when they have something on their criminal record.
However, the current system doesn't go far enough: it is blunt, restrictive and disproportionate.
2. The cases brought before the Court of Appeal in February 2017 illustrate the problem:
 - a. One case (A) involved a 51-yr old, who when he was 17 was convicted of theft of a coat from a market stall. He was fined £30. Ten months later, 23 days after turning 18, he was convicted of stealing a motor cycle and of driving without insurance. He was fined £50 and to 24 hours attendance at an attendance centre. **As he has three offences on record, none of them are filtered by the DBS.** He's concerned that his family might learn of the convictions and that his work as a finance director and project manager might require due diligence checks or might engage the Financial Services Authority aspects of the scheme for disclosure of convictions on a standard DBS check.
 - b. Another case (P) involved a 47-yr old woman who, 17 years ago (when suffering from schizophrenia) committed two offences of shoplifting. The first offence involved stealing a sandwich; she was cautioned. The second offence involved stealing a book (priced 99p); she was prosecuted and bailed to appear before a Magistrates court. She was homeless at the time and due to her health, failed to appear at court, so received two convictions - the second theft offence and an offence under the Bail Act 1976. Mrs P has sought voluntary positions in schools and would like to work as a teaching assistant. Although she's had some success in obtaining voluntary roles, she's so far failed to secure paid employment. **As she has two convictions on record, neither is filtered by the DBS.** She believes that having to disclose her convictions goes against her in getting employment, and carry with them a requirement to explain her past mental health history, to which she attributes her offending behaviour, to her significant embarrassment.
3. Many people have **more than one offence on record**. For example, someone stealing a car will have committed at least two offences; theft and driving without insurance. The 'single conviction' rule has no rational relationship to the purposes of rehabilitation.

4. **Minor offences are being routinely disclosed.** An FOI response revealed that relatively minor under-18 convictions are routinely and widely disclosed. Between 2013 and 2015 under-18 shoplifting was disclosed 34,000 times and there were over 2,795 disclosures of under-18 convictions for theft of a cycle. Such disclosure of minor offences (that do not appear on the list of exempt offences) was relatively common; shoplifting, common assault and possession of various forms of cannabis were some of the most commonly disclosed under-18 convictions. This suggests that the “two offences” rule is having a significant impact on children.

5. The **list of offences is an inappropriate barometer for relevance.** Offences themselves are not a good indicator of the seriousness of nature of a person’s offending behaviour. One of the court cases involved a 13-year-old who was given two reprimands for sexual offences against a male under 13. The facts were that the incident involved mutual masturbation graduating to ‘bum sex’. Robbery (an offence than cannot be filtered) could be used as the offence where a 12-year-old pushes over a classmate and takes their mobile phone. Offence categories fail to take into account specific circumstances. For example, the production and distribution of sexual images of a child could relate to a 16-year-old sending a classmate a naked picture of themselves. When it comes to cautions, people may accept a caution for a relatively serious offence when, if they were charged, that offence would likely be downgraded or they might be acquitted. Offences of ABH and prostitution should not be on the list.

6. The Law Commission’s review of the filtering system was very narrow and did not extend to reviewing the list of offences to make sure it’s the right list.
 - a. On page 4 of the final report by the Law Commission, it states: *“The project is a very narrow one with a short time frame. Our terms of reference expressly limit our review to changes that can be achieved using only secondary legislation.”*

 - b. As the report states on page 13: *“We do not make recommendations about whether any particular offences should be added or removed from the list of non-filterable offences. Specifically, we have not produced a draft statutory instrument containing a revised list of non-filterable offences for implementation. We have concerns that merely introducing new statutory instruments to give effect to either the itemised list that we have produced, or a revised list compiled within the narrow confines of the present project, would be unlikely to produce the best solution to wider problems with the disclosure regime as a whole.”*

7. There is **no discretion** – The filtering system is made up of ‘bright-line’ rules:
 - a. Age, seriousness and relevance are not considered where someone has more than one conviction.
 - b. Disclosure is automatic – there is no provision to make prior representations if something does not fit within the automatic rules.
 - c. There is no assessment at any stage as to the relevance of the conviction/caution to the employment sought, or to the extent the individual may be perceived as continuing to pose a risk.

8. There is **no opportunity for review** – The Independent Monitor is available to review the decision by a Chief Policy Officer to disclose “relevant information” such as arrests and allegations. This function does not currently extend to reviewing the automatic disclosure of old/minor convictions and cautions.

What we can do about it

We urge the government to take immediate steps to reform the system and make sure that old, minor or irrelevant convictions and cautions are not disclosed on criminal record checks. This would include extending the automatic filtering rules so that they cover **multiple offences/convictions** and that more **offence categories** could be filtered. A **discretionary filtering process with a review mechanism** could apply to convictions and cautions not eligible for automatic filtering because of the nature of the offence or the sentence received.

The government has an opportunity to undertake proactive work to establish a much more proportionate framework. An appropriate statutory framework in our view would be one that is:

1. **Transparent and fair:** Clear to all parties, including individuals and employers. Individuals are able to understand what may be disclosed on a certificate
2. **Proportionate:** Old, minor or irrelevant information is removed from the disclosure where it does not relate to the purpose of the check being undertaken
3. **Flexible:** For enhanced checks, the police can disclose relevant information if necessary (even if filtered). Wide range of factors that need to be considered when assessing proportionately. Any automated process of filtering is subject to an individual consideration. Does not require a decision about every disclosure or each time a fresh disclosure is sought.

In relation to the current filtering system, the government should:

1. **Remove the 'one offence/conviction' rule**
2. **Reduce the list of offences not eligible for filtering**
3. **Remove the restriction on prison sentences so they are eligible for filtering**
4. **Introduce a discretionary filtering system with a review mechanism for offences not eligible for automatic filtering**
5. **Establish a more nuanced system for the disclosure of cautions**
6. **Create a distinct system for the disclosure of criminal records acquired in childhood**
 - a. This was recommended by Charlie Taylor in his review of youth justice in 2016.
 - b. We believe there is a need for a distinct system of disclosure for records acquired in childhood. We are not aware of any evidence to support the current system. In fact, there is significant evidence to suggest that the current disclosure framework for childhood convictions works *against* rehabilitation. Whilst it is important to ensure that employers and the public are protected, the current system allows for disclosure of significantly more information than would be required to

achieve this. International comparisons indicate that far less punitive systems are possible, with no compromises on public or employer protection. The current system involves disproportionate, lengthy and wide disclosure which is unnecessary and actively unhelpful to children in building positive lives in adulthood.

- c. We support the '[Growing up, moving on](#)' campaign led by the Standing Committee for Youth Justice, of which we are a member. This includes the provision for childhood records to be physically deleted after a period of non-offending. In the immediate term, an expanded filtering system and discretion introduced to the under-18 criminal records system, specifically:
- i. All under-18 cautions should be filtered automatically after two years, at most (meaning they do not appear on Standard or Enhanced criminal records checks);
 - ii. Convictions that did not result in a prison sentence should be filtered automatically, at the most, four years after the person's last conviction. Any number of convictions that did not result in a custodial sentence should be filterable.
 - iii. Where filtering is not automatic, a review mechanism should be introduced to consider offences for filtering. The police could perform the review function, with people having the possibility of appeal;

7. Enable a way for applicants to apply for their own DBS before applying for positions

The way forward - Discretionary filtering

Why?

Any system that is wholly dependent on automatic rules, without discretion or review, is going to be inflexible and disproportionate, with people on the margins unfairly affected.

In September 2015, the Scottish Government introduced a filtering system for old/minor convictions. Although this system is not ideal, critically they have introduced a 'review process' by way of an 'application to a sheriff' that allows those with a spent conviction for an offence on the "rules list" to apply to a sheriff to have this information removed from their disclosure certificate if they think it is not relevant to the role for which they have asked for the disclosure.

In March 2016, the Department for Justice in Northern Ireland introduced a criminal records filtering review scheme which includes an opportunity for independent review. Despite this system having its limitations, it nevertheless provides a strong basis for how a similar review process could to be introduced in England & Wales. The Independent Reviewer is also the Independent Monitor in England and Wales.

The examples of Scotland and Northern Ireland are not referenced here to suggest they should be replicated in England and Wales. However, they do demonstrate the ability to establish a system that is partly based on automatic rules and partly based on a discretionary process.

How?

1. The filtering system should, principally, be an automatic process that gives clarity and certainty. We have made recommendations in our written evidence as to how the automatic filtering rules should be amended (including removing the 'one conviction only' rule and creating a distinct set of rules for offences committed by those under 18). However, any automatic rules, without review, are going to be rigid with people on the margins unfairly affected, which is why a discretionary process to establish a more nuanced approach needs to be built into the system.
2. The National Police Chiefs Council (NPCC) support the idea of chief officers being given responsibility to apply similar tests of relevance and proportionality as they currently do with non-conviction information. Building on the existing quality assurance framework for enhanced checks, the police could assess individual DBS applications and apply a discretionary filtering process, determining whether unfiltered convictions/cautions are relevant to the role (and so disclosed) or not relevant (and so not disclosed).
3. The discretionary filtering process would need to be subject to independent review. This could be carried out by the Independent Monitor, receiving appeals from applicants that believe information is no longer relevant and so shouldn't be disclosed – decisions could be made to allow future disclosures, or just the current disclosure.

The Home Office would need to undertake an assessment of the costs of introducing a discretionary filtering process, which it has yet to do. The current DBS system is self-financing by employers. In addition to the fixed fee charged by the DBS (£26 for standard, £44 for enhanced), employers pay an additional cost if they use the services of an umbrella body. Umbrella bodies charge varying prices, often between £10 and £25. For example, Personnel Checks charge £68.49 for enhanced checks, which is £24.49 more than the flat DBS cost. A small rise in the fixed cost of DBS checks (e.g. 50p per check) could cover the additional resources of an expanded role for the Independent Monitor. As of the end of the financial year 2017, the DBS was sitting on approximately £70m cash balance.

The broader criminal records regime and the sealing of records

This briefing is focused on the DBS filtering regime. It's important to recognise how that regime is just one element of the broader criminal records regime which, in our view, needs fundamental reform. That would include an overhaul of the Rehabilitation of Offenders Act 1974, including changes to the length of time after which convictions can become spent (for example, enabling sentences of over 4 years in prison to become spent).

It is also important to recognise the importance of more fundamental 'sealing' processes. Quasi-judicial processes – like in France – give individuals the right to "judicial rehabilitation". Sealing processes of this type have recently been advocated for by David Lammy MP in his 2017 review of disproportionately in the criminal justice system, and processes like this could interact with amendments to the filtering regime, especially if there were to be a discretionary review mechanism as to necessity for continued disclosure on criminal record checks.

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Case studies

The case studies below have been provided to Unlock by individuals and appeared on our online magazine [theRecord](#). Names and personal details have been changed to protect the identities of those involved.

Case study 1 - Marcus

In 1995 Marcus was convicted of 6 offences although he appeared in court only once. The six offences were committed between 1992 and 1994 when Marcus was aged between 14 and 16. He was arrested and charged when he was 17 years old but by the time he appeared at the magistrate's court for sentencing he was 18.

In 2013, with the help of a solicitor, Marcus applied to the courts for 'leave to appeal out of time'. Unfortunately, this was refused. He took his case to the Criminal Cases Review Commission but again, was unsuccessful.

In the same year, after applying for an enhanced Disclosure and Barring Service (DBS) check, Marcus was told by the DBS that they would not be including him on either the children or adults barred list as they didn't believe that it was appropriate to do so. However, as Marcus says:

"Not being on the barred list means nothing because the convictions will show up regardless of the list. Some companies implement a risk assessment for you to pass, so even if the DBS themselves say you're not on their barred list, the company can override this with a risk assessment and you don't get the job."

Although on the face of it, Marcus' case may seem complicated, the background to the offences is important and the circumstances surrounding the case are paramount. However, these don't show on a DBS certificate so don't offer an employer a true reflection of the context of the offences.

Marcus was convicted of taking indecent photographs and an indecent assault on a female. He is the first to admit that the offences look terrible but explains that they were committed when he was very young and influenced by a man 50 years older than him who was already a convicted paedophile and who'd served a prison sentence for a sexual offence. This man groomed Marcus at a vulnerable time in his life, sexually abused him and manipulated Marcus into believing that he cared for him, loved him and understood him.

At the time, Marcus was a lonely child, bullied, outcast and struggling terribly with his gender identity (which at that time was a completely taboo subject). He was struggling with mental health problems and isolation. So when he was shown some attention he was drawn to the older man. Over time this man convinced Marcus to film children on the beach for him suggesting that if he didn't he would no longer offer Marcus his support and friendship.

Marcus received a community order following conviction and the older man a long prison sentence. However, Marcus believes that his punishment has been greater as he continues to be punished 22 years after the event, whereas the older man was retired and the conviction had no impact on his employment opportunities.

Marcus believes that the convictions and subsequent DBS checks have had an extremely damaging effect on him. It has influenced the direction of his life in a negative way, has prevented him from pursuing an interesting career, both in paid work and voluntary work. It has lost him jobs after successful interviews, prevented him from joining a mental health charity and has been a constant source of punishment, humiliation and the biggest hurdle in his struggle with mental health problems. It has prevented him from going on holidays which required a visa and stopped him from engaging in any job or action that required disclosure. It continues to punish him and has left him financially poor and vulnerable.

Marcus said:

“No matter how hard you work, how much time and energy you give to make amends, how may people believe in you enough to give you a character reference, how much good you do to try to compensate for any wrongdoing, this time-bomb continues to blow up in your face. It depletes you of any sense of control over your life, drags you down and places you in a negative place mentally.

“No good can come of a system that does not allow forgiveness through good deeds and what do you do if you can never work off a conviction? Where do you go?”

Case study 2 - Wesley

At the onset of puberty Wesley had a lot of mixed feelings about his sexuality. Although he can remember attending sex education classes, he says there was very little information about being gay and this made him feel 'lost and alone'.

For a while, he explored his sexuality with a friend of his brother who was five years younger than him. However, a few years later and long after the abuse had stopped, he confessed both his sexuality and the abuse that had taken place to a church minister. The church minister subsequently informed the police.

Wesley co-operated fully with the police investigation and when the case went to court, he was convicted of several counts of indecent assault and received a 12-month community order.

Sometime later whilst working for a company running events for youths, Wesley was asked to apply for a personal licence. Not knowing what would appear on his criminal record certificate, he explained to his employers about his conviction and the circumstances surrounding it. His employers agreed that they would make no decision about his future until they'd seen the certificate. However, once they'd had sight of it, Wesley was forced to resign as his employers believed that he posed a risk to their clients.

As part of his pre-sentencing report, Wesley had been assessed by a well-respected child protection charity who had stated that:

"He would not appear to be a risk to any vulnerable group in any ordinary social or work setting."

Despite sharing the report with his employers it did nothing to allay their fears.

The actions of his employers were a devastating blow to Wesley. He'd had his career path mapped out and now had to face the fact that if he wanted to continue to pursue this type of work, he'd have to face the fear of future criminal record checks. Wesley decided to change direction as he didn't feel that he could face what had happened when he was 13 constantly coming back to haunt him.

Wesley said:

"I was a gay teenager in a world with little support. I did do something wrong but I was honest, open and worked hard to do everything asked of me by the judiciary"

service. I am now very nervous about the ordeal of dealing with a disclosure for seemingly disconnected events. I am really worried about getting a visa for travel (although I haven't tried) and I have avoided promotions when a DBS check might be required.

"As a law-abiding adult I'm baffled that something I did at age 13 would create complications so far into my adult life."

Case study 3 - Helen

Aged 14 Helen was arrested and received a caution. It was around this time she started binge drinking which began a downwards spiral. Smoking 'weed' and drinking heavily at the weekends was pretty much the norm amongst the gang that she hung around with and by the time she was 19 a deep depression had overtaken her. She sought help from her GP and received a prescription for anti-depressants, which initially helped. She then began getting as 'high as a kite', she became overconfident and argumentative and her weekend drink binges got completely out of control. The depression came and went: 6 months of highs followed by a dark depressive period.

Her first conviction was for drink driving and taking without consent – she 'borrowed' her parents' car. Another drunken incident resulted in a criminal damage conviction when a friend wouldn't answer the door to Helen. But then came the conviction with the greatest impact: assault on a police constable. She was on a night out, drunk again and angry. She admits that she was being a nuisance. Somebody called the police. When they arrived she resisted arrest and assaulted the police officer by spitting on his arm. Helen doesn't try to excuse her behaviour but, she can help to explain it by the fact that she was diagnosed with bipolar disorder the previous year. She was under the care of a mental health team at the time of her arrest.

Helen said:

"I'm repentant and ashamed about my past and although my criminal record isn't extensive, it's affected my self-esteem and mental health, thus impeding my whole life. So, why does my record bother me so much? It's the conviction for assault that causes me the most problems especially if I'm applying for jobs which require an enhanced Disclosure and Barring Service check. The word 'assault' is so ambiguous

and it would be a huge benefit if the DBS could provide more details on my certificate so that employers had a better understanding of what I did. There's various levels of 'assault' and when I explain to an employer that I spat on a PC (not something I'm proud of) I'm not sure that they always believe what I'm telling them, as assault means something very different to them. I'm sure that there are instances where this level of detail would work against some people but perhaps the DBS could make this an 'optional extra' on certificates.

"My past has not been great but, finally, I've decided that I'm not going to allow the rest of my life to be dictated by mistakes made almost a decade ago. I'm a mum now and I'm in full time employment but I know that I want to go back into working with young people.

"Let's hope and pray that the work that's being done around changing the filtering process pays off and can start to benefit people like me who have more than one conviction. Fair do's, if you commit an offence you need to be punished but do we really need to be punished for life?"

Case study 4 - Teresa

In 2008, after enduring more than a year of emotional abuse from her partner, the police came knocking at Teresa's door. She had never had any dealings with the police before and she had no idea why they were there. They informed her that her partner had accused her of assault; she had pushed him out of the bedroom door the night before.

The police asked Teresa whether she was suffering from any mental health issues and she admitted that she'd recently had a number of suicide attempts that required hospitalisation. She doesn't remember much after that apart from tears and complete detachment, but ultimately she was cautioned for ABH.

Skip forward 8 years and, having completed a degree in psychology, Teresa applied for her first job. She had a great interview and couldn't believe her luck when she was offered the job. As she needed to have a DBS check and knew that the caution wouldn't be eligible for filtering, she arranged a meeting with the HR manager to discuss her criminal record. Teresa hadn't thought about what had happened for many years: she'd moved on, she'd completed her therapy and done well. But as she started to explain the situation, it all came flooding back to her. She spent the next week in a state of anxiety, having flashbacks and regrets, reliving memories. It was a totally overwhelming experience. Then at the end of the week she got a call from the employer, informing her that they'd decided to revoke the job offer, as they felt that they could not trust her to be alone with vulnerable clients. Thankfully Teresa battled on and she is now working in the NHS but it has not been an easy road.

Teresa said:

"I recently applied to the police to have my caution deleted from the PNC as I don't feel that the ongoing implication of accepting it was properly explained to me at the time. I was a victim of abuse and struggling with a mental health condition. Sadly the police have refused to delete it.

"I'm no longer a victim and I no longer struggle with a mental health condition. But this caution will follow me for life. I might be very capable and good at my job but I'll have to revisit this every time I have a DBS check. When does the past become the past?"

Case study 5 - Dennis

Dennis has two minor convictions. The first was in 2004 when he was 17 years old - for criminal damage to a phone box for which he received a fine and community service. The second was in 2012 when he was 25 years old - for common assault after an altercation one evening with another young man.

Dennis is studying hard for exams that will lead him to be qualified to take up to regulated positions in the finance industry which will require him to undergo standard DBS checks. He is terrified that his past will block his career for which he is working incredibly hard.

Dennis said:

"I regret both instances. I wish I could turn back the hands of time to change the situation but unfortunately I can't. I've done my absolute best to move forward and build a career but truthfully it's not myself holding back my progress but these two minor convictions. When is the law going to change so that I can apply for a job without having the stigma of disclosing a criminal record? These convictions are not relevant to the jobs that I want to do but an employer will obviously choose the candidate without the conviction and justify it by saying that the other candidate was stronger for the role.

"When will this nonsense stop! Even if the law changes for minor convictions, having to wait for over 11 years for it to be filtered is ridiculous. Justice has been done, I've paid the fine and more than suffered for my mistake. I plead that the law does not destroy my future as it has many others who simply want to just get on with life."

Case study 6 - Monica

Monica didn't have a great start in life. She was in care from the age of 2 and she didn't go to a great school, leaving with no qualifications. Fighting was part of her language – she used violence to settle disputes and disagreements. This worked for Monica amongst her peers, but not when she tried to use the same strategy outside in the real world soon after she turned 18; people immediately called the police and Monica ended up with a conviction for 'Threats to kill' under the Offences Against the Person Act 1861, for which she received a conditional discharge.

Later on Monica managed to find employment in the public sector. Her professional body wasn't informed of her conviction and she was not asked about it. The years passed and she became more and more successful. She'd learned to slow down her speech, she was careful not to swear and she learnt not to use her eye gaze to challenge people.

For 30 years Monica worked hard and did extremely well, until the rules changed and people in her sector were required to undergo regular criminal record checks (every three years). Monica handed in my notice. She couldn't run the risk of being found out.

She then set up her own company to enable her to continue working in the sector. As she was self-employed Monica didn't have to be DBS-checked so her past never come to light. However, after about 7 years the rules changed again and when she started to tender for contracts, she would often be told that she would need a criminal record check.

That's when Monica turned to Unlock. We advised Monica that if she wanted to go back into a paid role in the profession she loved, she would have to be honest and open about her past; legally it would then be up to each organisation to decide if they thought a past mistake, 35 years before, was relevant today.

Monica couldn't do it. She was not confident to disclose her conviction so she went into retirement. She said:

"I felt cornered. The decision was made for me, I left the world of work, a move I would never have made on my own. I would have worked until I dropped, work defined me but I'm just not brave enough to put myself in a position where I have to be judged again.

"Although I'm now effectively retired, I did get away with not disclosing my conviction...I'm just paying for it now."