

Filtering of Old and Minor Offending from Criminal Records Bureau Disclosures

Background

There are three levels of criminal records check available currently under the Police Act 1997. These are:

- Basic check: Contains details of any ‘unspent convictions’ held on an individual. These checks are undertaken for employment purposes and are available through Disclosure Scotland.
- Standard check: Contains details of any convictions, cautions, reprimands or warnings recorded, whether or not they are ‘spent’ under the terms of the Rehabilitation of Offenders Act. These checks are undertaken for safeguarding purposes and are available through the Criminal Records Bureau (CRB).
- Enhanced check: Contains the same information as a standard check, together with any information from the ISA’s children and adults barred lists, and any information held locally by police forces that is considered relevant to the position applied for and which the police consider ought to be included in the certificate. These checks are undertaken for safeguarding purposes and are available through the CRB.

In both my reviews “*A Balanced Approach*” and “*A Common Sense Approach*” I recommended that Government implements an appropriate form of filtering in the CRB process that removes convictions, cautions, warnings and reprimands that are undeniably **minor** and cannot be classed as anything other than **old** (where the word “conviction” is used in the rest of this paper, the reader is asked to assume this refers to cautions, warnings and reprimands as well).

Overarching Principles

To assist in defining a process that allows Government to implement a filtering process, I chair an Independent Advisory Panel for the Disclosure of Criminal Records (IAPDCR). This Panel includes members from ICO, ACPO, NACRO, NPIA, NSPCC, CRB, Liberty, UNLOCK and the Lucy Faithful Foundation, as

well as individuals who offer their own personal expertise. The Group's terms of reference are set out at Annex A. The IAPDCR unanimously supported the notion that old and minor convictions should be filtered out and has agreed the following principles:

- 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;
- 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.

Although a number of potential solutions have been discussed by the IAPDCR members, there has been a lack of evidence-based research available to them for consideration. Consequently, I consider that there should initially be a cautious approach to implementation of any proposal for filtering and that there may be an opportunity to consider an evidence-based approach in the future. It is, therefore suggested that the following criteria should also apply:

- 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.

Definition of Minor Convictions, Cautions, Warnings and Reprimands

I was keen to point out in my report “*A Common Sense Approach*” that there are a number of important opinions and views around what constitutes a serious offence and, therefore what is minor. The IAPDCR recognised that there were offence types such as theft (which includes shoplifting), possession of drugs and fraud (including travel and benefit fraud) where, at the bottom end of the spectrum, the offence is likely to be regarded by many as minor but where others would say that the employer should be entitled to know about the offence. The Group felt that any definition of minor should be set by Government and subject to a full consultation process. However, the following small number of convictions types are provided as working examples of what might constitute a minor offence (subject, of course to further debate and consultation):

- Drunk and disorderly
- Offence against property
- Failure to report an accident

There will always be exceptional cases where a conviction filtered out using the standard rules is, nevertheless relevant for inclusion in a disclosure because of the particular circumstances of the post being applied for. For that reason, it would be important to retain the capacity for the police to add such convictions back into disclosures as part of local police information.

Business Rules (to be applied)

The above approach would allow the CRB to design a filtering process based around the following business rules.

1. Is the conviction defined as minor? If not then disclose
2. Does the individual have a single minor conviction? If not then disclose
3. Was the single minor conviction received before the person was 18? If yes then the conviction will not be disclosed if it is spent and more than six months old.

4. Was the single minor conviction received after the person was 18? If yes then conviction can be filtered out if it is spent and it is more than 3 years old.

Examples

	Scenario	Outcome	Rule
1	Individual 23, has a single conviction for Drink Driving received when they were 17	Disclose	Conviction not defined as minor
2	Individual 36, has a single conviction for drunk and disorderly received when they were 28	Filter out	Single Conviction is defined as minor and conviction was received over 3 year threshold.
3	Individual 19, has three convictions for drunk & disorderly when they were 17	Disclose	Individual has more than 1 conviction
4	Individual 19, has a single conviction for an offence against property when they were 17	Filter out	Single conviction defined as minor and because it was received over the 6 month threshold applying to under 18 year olds
5	Individual 56, has a shoplifting conviction dating back to when they were 17	Disclose	Conviction is not defined as minor.
6	Individual 27, has three convictions for breach of the peace dating back 10 years with none received in the last five years	Disclose	More than 1 conviction albeit all minor

Alternative Approaches

Such an approach may not go far enough on its own however. To illustrate, shoplifting is often quoted as a minor offence, particular when it involves a single conviction received a long time ago. On the PNC shoplifting is recorded within a wider category of theft and realistically the CRB may not be able to easily separate shoplifting from other categories of theft. Therefore, if it was decided to classify shoplifting as a minor conviction type we would need to apply that principle to the whole category of theft offences if the process were

to be fully automated. One possible way around this could be to introduce another category for offences such as theft where there is a wide range of convictions that could fall within it.

Linking seriousness to penalties

An alternative approach would be to use criteria linked to the penalty administered. For example, an offence punished via a caution could be filtered more quickly than an offence punished with a fine and a one year sentence could be filtered more quickly than a five year sentence. This approach would be more closely aligned to the approach taken in the Rehabilitation of Offenders Act, which links rehabilitation periods to the penalty rather than the nature of the offence. Under such a system it would be especially important to allow for convictions to be added back via an exceptional cases procedure as there are likely to be cases where offending relevant for inclusion in the disclosure process receives a relatively low penalty.

Courts to decide on disclosability

Courts are well placed at the point of sentencing to make judgements about the seriousness of an offence and its implications for the ongoing threat to public protection posed by the offender. A system could be introduced whereby the court would indicate whether, once an offence became spent under the terms of the Rehabilitation of Offenders Act, it should still be disclosable for CRB purposes. This decision could take place within a framework of rules set by Government which would ensure, for example, that sexual and violent offences always remained disclosable. Any such approach would need to be relatively light-touch and the additional burden on the courts would need to be carefully considered.

There is, however also an issue around non-court disposals. Consideration will need to be given as to whether similar rules would be required in order to consider when it may be appropriate, and not, to disclose such information which could relate to serious offending.

Police to decide on disclosability

As part of the statutory disclosure process, the police are already required to make discretionary decisions around whether to disclose "local police information" such as intelligence in relation to enhanced certificates. In 2009/10, 25,000 pieces of such information were disclosed by the police out of a total of 5.2 million applications for disclosure. The system could be changed so that the same police discretion was applied to the disclosure of all spent convictions, cautions, reprimands and warnings.

Within a framework of rules, judgements about what should be excluded from disclosures on the grounds of age/seriousness would be left to the police. This also provides for a mechanism through which the severity and relevance

of convictions which fall within offence categories such as theft can be considered.

This approach has attractions in terms of tailoring judgements to individual cases, but would have resource implications for police administration as it would require them to look at standard checks as well as enhanced ones and require a relevancy decision to be made in relation to convictions as well as intelligence.

Such an approach would also need to be considered alongside a review or representations process whereby individuals would be able to challenge the decisions to disclose such information.

Whilst there has been considerable consultation with the expert panel on filtering it has not been possible to reach a consensus on every point. I have received final responses from many of the panel members, some of which were in agreement with the report and some of which offered alternative suggestions.

This report, therefore, represents my professional opinion in my role as independent advisor, having reflected and considered all of the views of the panel members.

Sunita Mason

Independent Advisor for Criminality Information Management

December 2011

Annex A

TERMS OF REFERENCE

INDEPENDENT ADVISORY PANEL FOR THE DISCLOSURE OF CRIMINAL RECORDS (IAPDCR)

Purpose

1. The panel has been set up in accordance with the Government Response to Sunita Mason's Independent Review, A Balanced Approach, Safeguarding the public through the fair and proportionate use of accurate criminal record information.
2. The purpose of the panel will be to provide support and expert advice to the Independent Advisor with a view to improving the arrangements for disclosing criminal and allied records, particularly in relation to the filtering of old and minor records.
3. Sunita Mason in her role as the Independent Advisor will advise the Home Secretary and the Justice Secretary on:
 - i. whether filtering arrangements should be applied as part of the process to disclose information relating to convictions, cautions etc ("central records") under the provisions of the Police Act 1997;
 - ii. how such arrangements might be structured to improve the proportionality between civil liberties and the impact on public protection;
 - iii. how such arrangements might operate alongside other existing legislation, especially the Rehabilitation of Offenders Act 1974;
 - iv. whether locally held police intelligence and information should continue to be disclosed and if so, what type and under what circumstances;
 - v. whether a risk-based approach to disclosure could be adopted to provide greater transparency and consistency in decision making; and
 - vi. any further relevant issues which may emerge from the current review of the Criminal Records Regime.

Membership

4. The panel will bring together experts to determine and advise on the most effective response to Sunita Mason's filtering recommendation. The membership of the panel is as follows:

1. Sunita Mason (Chair)	Independent Advisor for Criminality Information Management
2. Jonathan Bamford	Head of Strategic Liaison, Information Commissioner's Office
3. Mervyn Barrett	Head of Resettlement Information, NACRO
4. Jon Brown	Head of Strategy and Development (Sexual Abuse), NSPCC
5. Lucy Butler	Assistant Director, Association of Directors of Adult Social Services
6. Commander Simon Pountain	ACPO Disclosure Portfolio Holder
7. Isabella Sankey	Director of Policy, Liberty
8. Christopher Stacey	Information and Advice Manager, UNLOCK
9. Rodney Warren	Criminal Law Practitioner, Rodney Warren & Co.
10. Professor Richard Young	University of Bristol

Supplementary Attendees (as required by relevant expertise)

Ian Bloom	Senior Policy Advisor, NPIA
Donald Findlater	Director, Lucy Faithfull Foundation
Helen Judge	Director of Criminal Policy, Ministry of Justice
Gary Linton	Head of ACPO Criminal Records Office and UKCA-ECR
Graham Morris	Head of Operational Information Services, ACPO
Ian Readhead	Director of Information, ACPO
Helen Ryan	Head of Policy, Criminal Records Bureau
Mr Justice Ryder	Presiding Judge of the Northern Circuit
John Woodcock	Head of Criminal Records Policy, Home Office