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# Rehabilitation & Desistance vs Disclosure

Criminal Records: Learning from Europe

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Winston Churchill Fellow, 2014

**Published: April 2015**

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# Acknowledgements

First, I will be forever grateful to the Winston Churchill Memorial Trust for giving me such a fantastic opportunity, and placing their faith and confidence in my proposal to award me a 2014 Fellowship. In particular, I would like to thank Jamie Balfour, Julia Weston, Hannah Shaw, Harj Garcha and Letty Thomas, who provided support before, through and since my travels.

Second, I would like to thank the trustees and staff at Unlock. Their support and encouragement enabled me to do something that I have never had to do before – namely, be away from the office for more than two weeks at a time!

Third, and most importantly, I am immensely grateful to everyone that I met on my travels (including all those listed in the appendix). I was genuinely amazed at the amount of time and expertise people were willing to give, which shows how significant they regard not only the issue I was researching, but also the respect they have to the Winston Churchill Memorial Trust.

## Introduction

### Background

In recent years, the criminal records disclosure system in the UK<sup>1</sup> has been subject to intense scrutiny. A series of piecemeal reforms in response to high-profile events has resulted in a confusing and complicated process which, in many ways, undermines rehabilitation policies and places additional and unnecessary obstacles in the way of people with convictions.

Other countries have developed their systems in different ways, responding to different priorities, and the aim of this Fellowship was to try and learn from these different approaches. In my role as a Director of Unlock, one of my aims is to influence policy and practice in England & Wales, in order to achieve a fairer and more inclusive society towards people with convictions, and my hope is that this Fellowship goes some way towards learning from other countries.

### What is the Winston Churchill Memorial Trust?

The Winston Churchill Memorial Trust ([www.wcmt.org.uk](http://www.wcmt.org.uk)) is UK's national memorial to Sir Winston, and each year the Trust awards Travelling Fellowship grants to UK citizens in a range of fields to enable Churchill Fellows to carry out research projects overseas. These projects are designed to exchange ideas and best practice, and build greater understanding between peoples and different cultures, in order that professions and communities in the UK can benefit from these shared experiences.

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<sup>1</sup> For the purpose of simplicity, I use 'UK' in this report. To be technical, and on matters where jurisdiction is important, I'm referring to England and Wales, as systems in Scotland and Northern Ireland are slightly different

## The driving force behind this research

“The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of civilisation of any country – a constant heart searching by all charged with the duty of punishment, a desire and eagerness to **rehabilitate** in the world of industry all **those who have paid their dues** in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an **unfaltering faith that there is a treasure, if only you can find it, in the heart of every person** – these are the symbols which in the treatment of crime and criminals mark and measure the stored up strength of a nation and are the sign and proof of living virtue in it.” [My emphasis]

Winston Churchill, Home Secretary, House of Commons, 20th July, 1910

## Overall objectives of the Fellowship

The objectives of the Fellowship were three-fold:

1. To increase understanding of forward-thinking policies, practices and attitudes that exist in other countries, which achieves both public safety and meaningful rehabilitation
2. To identify practical measures that the UK's policy and practice could learn from other countries and improve the system of using criminal records
3. To raise awareness of these practical measures, working with Government and other stakeholders to take these forward

## The visiting countries

The countries that I visited as part of the Fellowship were France, Spain and Sweden. Each of the countries were identified because they demonstrate, in different ways, policies and practices that are progressive and forward-thinking. I travelled between September and November 2014.

## Aims for each country

My aim was to better understand the policy/processes that govern the use of criminal records in recruitment, but also, and more importantly, my aim was to get beneath the policy and understand the reality of how criminal records are used (or not), and how this helps or hinders people with convictions. To achieve this, I met with the following:

1. Government departments responsible for policies governing the use of criminal records
2. Agencies that are responsible for the criminal record disclosure processes
3. Agencies that work with people with convictions, to understand at a practical level the impact the system has, what works well, and what could be improved.

## Structure of this report

In the time that I have spent since returning from my travels, I have been tackling the challenge of how to bring everything together into one coherent report.

One of the difficulties in this research was that I visited three different countries, which ended up being very different experiences, simply because of the people that I managed to meet and the perspectives that I received. The result has been that, rather than try to report on every single aspect of my research, I have sought to pick out those elements which, I believe, will work well when looked at in the round. In particular, throughout the report, I have tried to compare my findings with the approach taken in the UK.

For my part, I have avoided the temptation to report on some of the finer details of criminal record disclosure practices of each country. For those interested in more details, I can recommend some useful articles by Elena Larrauri (Spain), Martine Herzog-Evans (France) and Christel Backman (Sweden) – more details are in the 'References' section.

In setting out on my travels, I was particularly interested in looking at two core aspects to criminal records in each of the countries that I visited;

The first was the way that criminal records are recorded/held, and how they are accessed (primarily for use in employment). For example, how common is it for employers to ask for details about criminal records, and what types of official checks (if any) do they do?

The second aspect was the way that criminal records are 'expunged'<sup>2</sup>, and by this I mean the point when convictions are removed from official disclosures which are provided to employers. For example, in what ways do they 'wipe the slate clean' for people once they have rehabilitated/desisted from crime, and what does this mean in practice?

For each of these aspects, I briefly look at some important elements to each country, and then seek to bring these together in an analysis, highlighting some key recommendations for the UK.

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<sup>2</sup> Different phrases are used to refer to concepts like 'expungement', such as convictions becoming 'spent' (UK), 'cancelled' (Spain), 'weeded' (Sweden) and 'cleared' (France).

# Recording & Access

## France

The 'Casier Judiciaire National' (French National Criminal Records Office, CJN) is the central body in France responsible for criminal records. I was fortunate to be able to arrange a meeting with the CJN, which is based in Nantes. This gave me an opportunity to gain a good insight into the way the CJN operates. Their activities are, broadly speaking, to:

1. Keep records and manage convictions handed down by court
2. Deliver information in the form of statement or extracts.

In terms of their first core activity, they have operated a centralised system since 1982, although they still have a principally paper-based process for uploading new convictions. The CJN record details passed to them from the courts. In France, the 'types' of offences are broken down into three categories:

1. 'Crimes' – There are around 4,000 of these a year, and include offences such as homicide, armed robbery, rape and serious drug trafficking
2. 'Délits' – There are about 600,000 of these a year, and include offences such as theft, robbery, assault, sexual assault, drug taking and arson
3. 'Contraventions' – This includes 'minor offences' such as parking tickets and the UK equivalent of common assault.

In terms of the second core activity of the CJN, they produce three different criminal record 'certificates', or extracts, of an individual's criminal record. These are often referred to as 'bulletins'.

Bulletin No.1's (referred to here as 'B1's') represent about 28% of all formal disclosures. In 2013, there were just under 3 million of these. These contain all convictions and decisions on record. Access to it is highly restricted; it is only issued to judges, courts and prisons. In new court cases, the B1 record is brought to the knowledge of those involved.

Bulletin No.2's (referred to here as 'B2's') represent about 47% of all formal disclosures. In 2013, there were just over 5 million of these. These contain most of the convictions on the B1, although they don't include suspended sentences, juvenile records or 'contraventions'. They don't disclose anything that has been 'excluded' by the Court (see next section for an explanation of this). B2's are principally used by 'administrations' and for roles such as solicitors, teachers and social workers. In terms of how they are obtained, B2's can be requested online, and only by the employer. An individual cannot obtain their own B2. Where there is no record to disclose, this answer can be provided online.

Bulletin No.3's (referred to here as 'B3's') represent about 25% of all formal disclosures. In 2013, there were over 2.6 million of these. These can only be done by the person concerned, but may be used by employers that request the individual to provide a copy of their criminal record to them. B3's are very limited in what they include – essentially, they only provide details of prison sentences of more than 2 years which have not been suspended. This means that information is rarely disclosed.

Individuals can only obtain their B3 record. There is no charge for these criminal record extracts, and there are three different ways to obtain it:

1. Applying directly online
2. In person at the CJN, based in Nantes (West France)
3. Using a pre-printed application form

There is no general prohibition to the production of a B3, and it is unclear how prevalent it is for employers to ask for an individual to provide a copy of their B3. However, in meetings I had with the French Data Protection Authority, CNIL ('Commission nationale de l'informatique et des libertés'), their view was that the majority of employers do not ask for these, and generally the approach of employers would be to only do checks where there were specific regulations that required them to. However, the perception of CNIL was that they are seeing a higher tendency towards collection. Ultimately, there is no law that prevents an employer from requesting a B3, which means that essentially, whenever asked, an individual would have to provide one.

Interestingly, where employers look to use criminal records, it seems quite common for people to be asked (especially by potential private sector employers) to present an 'empty' criminal record. It seems that some of this stems from stronger regulation in certain sectors where anything on a criminal record actually *prevents* access to the job, and the requirement to provide a copy of their record is mitigated by the processes of expungement that can apply (see later).

Refreshingly, with two different types of checks potentially available to employers, I was particularly interested to see whether the French system suffered from a similar problem to what we have in the UK – the problem of ineligible checks; this is where an employer carries out a level of check which is higher than that to which they are entitled. This was a question that I put to CNIL, and their response was quite interesting. In many ways, the question seemed somewhat of a surprise to them; in their civil law procedure, they have clear, well-defined roles, which in their view, were not open to interpretation. The approach to 'eligibility' seems to be one which ensures that there is clarity around the level of check carried out.

A particular focus for CNIL was, given their role in relation to data protection and privacy, to look at investigating what types of information employers are asking for, and ensuring that information is pertinent and proportionate to the job. In their view, there is a growing number of employers asking for details of criminal records, and there are a number of examples where employers simply follow the practices of others in terms of asking about criminal records, even though they had not given much consideration to why they were collecting it and what they were doing with it. In terms of the 'collection' of criminal records, unlike the UK, employers in France that do request details of criminal records tend not to do this at application stage or even at interview stage – essentially, not any point during the 'filtering' process. If they do ask, they only ask this when they 'can foresee hiring an individual'. In the view of CNIL, this avoids the collection of data that has no use after the recruitment process, given that criminal records are regarded as sensitive personal data.

## Spain

The 'Registro Central de Penados' (National Conviction Register, NCR) is managed by the Ministry of Justice, based in Madrid, and is judicial in its nature. It is private and not open to the public. Aside from judges, prosecutors and policing agencies, only the individual may request a copy of their conviction record. Although court cases are held in public, once recorded, names in court records are anonymised, reflecting an important principle of confidentiality which has informed their approach to criminal records.

In Spain, there is a key difference between 'police' records and 'conviction' records. Police records are sometimes also relevant (for example, a 'clean' police record is a precondition of working for the police). One confusing aspect of the system in the UK is the conflation of the terms 'police' and 'conviction' records, in that 'records' are held by the police, and this often includes more than just conviction records. Although it's quite rare for 'police' records to be disclosed in the UK (for example, on an enhanced check) there is a poor understanding of what constitutes a 'criminal record' – indeed, the term 'criminal record' doesn't have a fixed definition. Unlike in the UK, the Spanish NCR only holds convictions (and only once they are final, i.e. non appealable). It does not record cautions, reprimands, warnings, barrings, etc.

In terms of personal access, individuals obtain their own 'criminal record certificate' (CRC) from the NCR for €3.70 (approximately £2.68). This is so that they can apply for jobs, and for other aspects of life where there are regulations which involve the use of criminal records, such as applications for firearms permits, residence permits, and running some businesses (such as a security company).

However, for some positions, e.g. entry to the police, the 'employer' is authorised in law to obtain criminal record details directly from the NCR, making checking quite easy. It also seems quite common for 'clean records' to be a pre-requisite to working in a particular position – such as in the 'administration' (i.e. public sector jobs such as judges, teachers and doctors), the police or the army. Nevertheless, for the majority of employers that require checks, the 'employer' requires the individual to request their own CRC. There's no law that prohibits Spanish employers from requiring job applicants to submit a copy of their CRC.

Nevertheless, this may give the impression that 'checking' is quite prevalent. Indeed, the sense that I got was quite the opposite. While it's probably too much to say that checking is 'rare', it's certainly not routine, and indeed in many sectors, it's very unlikely. Many positions (such as teachers) only ask the applicant to state that they have never been sentenced to a professional disqualification. Otherwise, there's no general law allowing or requiring criminal record checks. Some specific circumstances (e.g. becoming a lawyer, or having a taxi licence) have regulations that require the presentation of a CRC, but there are no reliable figures on the number of jobs that require CRC.

CRC's are also issued when requested through a 'competent body', as part of processes where it's required. In these cases, it is sent directly to that body. Reasons include:

1. For the cancellation of criminal records (see later)
2. For residence permits
3. For entry into the military
4. For entry into policing, including security guards



*Number of CRC's in 2010, broken down by the type of request*

Type of request	Numbers	Percentage
Requests from individuals	176,332	11.7%
Requests from government agencies:	1,335,834	88.3%
<i>Police job</i>	139,487	9.2%
<i>Army role</i>	44,056	2.9%
<i>Firearms permit</i>	66,792	4.4%
<i>Nationality</i>	119,250	7.9%
<i>Residence/work permit</i>	966,249	63.9%
Total	1,512,166	

As this shows, the vast majority of checking relates to residency and work permits. Generally, employers don't ask. Similar to the situation in France, employers tend to only ask where there is a regulation requiring it. For certain roles, such as prison/police officers, firemen and central bank officials, specific laws bar people with convictions if they have convictions on their record. In other positions, such as civil servants and professors, people with convictions are only prevented from the role if the court specifically imposed a 'professional disqualification' ('inhabilitación') as part of the sentence. In these situations, the employer would simply ask the job applicant to sign a statement stating that they have never been sentenced to a professional disqualification. This is where 'occupational disqualifications' seem to be well used by the courts, not necessarily in terms of numbers, but in terms of ensuring that, where the 'risk' extends beyond the sentence, it's a matter for the criminal law, i.e. a task for the state, limiting the 'delegation' of the power to punish down to the level of individual employers and others. The logical result of this is that there is more confidence in the system of 'cancelling' (see later) as employers are clear about who they cannot legally employ.

It is possible that the low numbers of checks by employers stems from a misplaced belief by employers in Spain that it's illegal to ask job applicants to submit a CRC. This might be supported by a well-known court judgement which found that an individuals' right of privacy was infringed by a government agency which received criminal record information from the NCR without legal authorisation.<sup>3</sup>

## Sweden

In Sweden, the national criminal records registry is managed by the Records Division of the Swedish National Police Board (NPB), who are responsible for access to 'belastningsregistret' (criminal records). Police records and court records are kept separately under different names – 'belastningsregistret' (court records) and 'misstankeregistret' (police records on suspects). This hasn't always been the case, but since the 1990's, in responding to data protection requirements (such as Recommendation R (87) 15 Regulating the Use of Personal Data in the Police Sector, 1987), this separation has existed.

<sup>3</sup> Constitutional Court judgment (STC July 22 1999, n° 144)

The 'principle of public access' to official documents has been enshrined in Swedish law since 1766. The principle means *"that the general public and the mass media newspapers, radio and television are to be guaranteed an unimpeded view of activities pursued by the government and local authorities"*<sup>4</sup>. Although this 250 year old policy clearly includes "official documents", it rules out direct access through the NPB. Societally, criminal records have historically been considered sensitive information; news media rarely publish the names of suspects or offenders even after the sentence has been passed in court. Indeed, up until 1989, there wasn't even a right for individuals to review their own criminal record data, to protect them from being forced by employers to reveal their criminal record.

However, there has been a notable increase in the number of checks over the last 10 years or so. In 2001, there were 153,240 checks; in 2010 this had more than doubled to 345,551 (Backman, 2012a). It became mandatory in 2001 to check the criminal records of those seeking work as childcare workers, preschool teachers and primary school teachers. In recent years, further categories of employers have been obliged by law to require jobseekers to provide an extract of their criminal record covering verdicts for certain offences. The types of offences disclosed vary depending on the occupation, and as a result, there are a number of different forms that can be downloaded from the national police website;<sup>5</sup>

- Preschool workers, teachers, those in childcare and when doing work experience as part of teaching training
- Working with children with disabilities
- Working with children
- Working in a residential home
- Insurance intermediary
- For overseas purposes (e.g. live or work abroad, adopting children abroad)
- Individual access through 'subject access' (known in Sweden as a 'Section 9' request)

Individual access through 'subject access' contains all the information held on the person's record, whereas the others limit the scope of the information to offences regarded as 'relevant'. Although finding out exactly what was defined as 'relevant' was quite difficult, in interviews that I held as part of my research, it was clear that the 'relevancy' test worked quite well.

Example – "I applied for a job in a school a couple of years ago. I know that my drugs conviction is still on my record, but it wasn't disclosed to the school, I think because it's not deemed relevant to the job that I was applying for."

An interesting development has been the extension of the obligation to conduct criminal record checks to state funded activities that are mandatory by their nature (e.g. teachers, doctors, social services) where the state has a special responsibility. Others, such as the Swedish Scouts Association, have tried to get the right to conduct criminal record checks, but they represent non-public sector activities that are not mandatory to attend. The logic, so it goes, is that doing checks for these roles would amount to an invasive 'control society'. However, since December 2013, as a result of implementing a European Union Directive (2011/92EU, Dec 13 2011), those who work with children, paid or voluntary, can be asked to hand in their criminal record,

<sup>4</sup> <http://www.government.se/sb/d/16574>

<sup>5</sup> <https://polis.se/Skane/Service/Blanketter/Blanketter-belastningsregistret/>

disclosing the same crimes as for those working in preschools and schools. It's up to each organisation to choose whether or not they want to ask for criminal records (in comparison to schools where it's mandatory to check).

Simultaneously, there has been a significant increase in the number of employers with no direct access to criminal records who force applicants to use their right under 'subject access' as a means of obtaining a copy of their record (a process known in the UK as 'enforced subject access'). In 1995, there were approximately 10,000 'forced' checks of this type in Sweden, and in 2011 this increased significantly, to more than 177,000 (Backman, 2012a). To battle against this, the 'individual access' results come in two sections – the first section (i.e. the front page) gives information about the national criminal records registry, and explaining the nature of this type of request, i.e. stating that it shouldn't be used for employment purposes. The results then appear on further pages. The authorities had clearly anticipated potential abuses of this system, as they also don't number the pages, allowing an individual to provide just the front page. However, some employer practice has since adapted to this by requiring individuals to provide the response in an unopened envelope, to ensure that nothing could be removed.

The 'Datainspektionen' (Swedish Data Protection Authority) has previously, in 2009, supported recommendations that would prevent such abuses of the system. In 2009, a report proposed the introduction of special provisions governing the use of criminal records. In short, they were looking to prohibit checks in general where these are deemed to have a palpable effect on personal privacy. In 2014, this was looked at again by a committee<sup>6</sup>, chaired by Michael Koch, former Chairman and Director of the Labor Court.

The starting point of the committee was that there would be a general prohibition for employers to request conviction records from job seekers. A particular reason they gave for this was statistics that show the disproportionate recording of certain 'groups' in society. For example, it is more than twice as common for men to have a record than women. Figures also show that the NPB delivered the most number of checks to people who are between 19 and 27 years old. As a result, proposals to restrict access to criminal records would most likely benefit young men with criminal records when looking to get better opportunity when entering the labour market after serving a sentence in prison.

I was fortunate enough to be able to arrange a meeting with the Chairman of the Committee, which gave me a great opportunity to understand the context of the review. I was particularly struck at how important they felt it was to protect access to criminal records. However, there may be ways to circumvent the proposed law. For example, as the enquiry noted, there have been websites developed which focus on publishing information regarding convictions on the internet (see below). Furthermore, and quite fundamentally in my view, the recommendations would only cover access to the official criminal record and preventing employers from asking individuals to provide a copy of it; this didn't extend to meaning that employers couldn't ask the individual to self-disclose the details of their criminal record, for example on an application form or some form of declaration. This may not be a significant issue in Sweden, in that employers so inclined tend to simply choose to ask for a copy of the individual's criminal record, and if access to this were curtailed, employers may not require any self-disclosure or declaration.

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<sup>6</sup> <http://www.regeringen.se/sb/d/108/a/243101>

However, a (troubling) revolution in the way that criminal records are accessed has taken place in Sweden the last 18 months or so as a result of a website called 'Lexbase'.

"I felt so bad that I could not go to work. I'm in the database. I have done everything to return to normal life and hold a job for two years. If someone is looking at me, I will lose my job. You must do something about this. My neighbours can see my house on a map with a red dot. I am totally stressed out, I feel so damn bad that I can kill myself".<sup>1</sup>

The quote above perhaps epitomises the impact of Lexbase, which was launched in early 2014.<sup>7</sup> Essentially, Lexbase is a way to obtain details of criminal records online. As a private enterprise, its ultimate goal is to make money. "*We made 1.8 million kronor in the first couple of days*", the owner is reported to have stated.<sup>8</sup> On their website, they say "*Lexbase enables you to search a person or a company to see if they have previously been subject to legal review.*"

So what is the 'service' that they offer? It's fairly simple – visitors to their website, [www.lexbase.se](http://www.lexbase.se), simply search using a number of options, including by name, and by address. This shows an initial set of 'names' which have records against them, and that's when you come up with a firewall where you have to pay to get more details. However, the costs are hardly prohibitive for most people – the costs are 59k (about £4.73) to read a summary, or 79k (about £6.33) to download the full extract, which often involves copies of court records – but does signal a shift towards the marketisation of criminal records.

I managed to arrange a meeting with Lexbase. The two 'directors' of the company met with me in their basement office in a serviced office block in Stockholm. They took me through how it works. Although the precise details are not clear, ultimately Lexbase has arrangements in place to make sure that it receives the details of all cases that are taken through the courts. Collection is daily, and it's been building up its data for a number of years. The result is a rapidly growing database of criminal records, as well other 'interesting' sets of data, such as the conduct of doctors. They don't follow the same 'thinning' rules that are in place for formal criminal record systems. In defence of their system, their view was that "Lexbase didn't create a system of employers asking about criminal records". Although that's true, it's also fair to say that the access levels created by Lexbase take the collateral consequences to having a criminal record to wholly different level. What felt most uncomfortable was the seeming inability to do anything about Lexbase. In my meetings with the Data Protection Authority, it was clear that they felt powerless; restricted and unable to act, as a result of the way that their current laws were written. Latest practical developments include courts deciding to no longer give our verdicts as PDF files, providing only paper copies who come to the court. Although this will not stop Lexbase, it may make their work a lot harder.

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<sup>7</sup> Albeit then taken down temporarily before being re-launched

<sup>8</sup> <http://www.thelocal.se/20140707/lexbase-to-expose-doctors-mistakes-sweden>

## Recording & Access – Analysis

### Access by individuals

France and Spain both appear to offer better 'access' to an individual to their criminal record than in the UK. In Spain, the access point was cheap. In France, it was free. In the UK, we have a similar 'access' process through the Data Protection Act; an individual can apply for a copy of the records that the Police hold, and this costs £10. However, it's not possible for an individual to obtain their own Disclosure & Barring Service (DBS) check in advance of applying for jobs that need them. This seems at odds with rules around privacy and data protection, as it's hard to give genuine consent when you are not entirely sure what you are consenting to be disclosed.

**Recommendation – Individuals should be able to obtain a copy of what they might have to reveal to a future employer. In particular, this would mean being able to get a copy of your own DBS, at a notional cost in line with data protection rights.**

Sweden in particular has experienced a problem of 'enforced subject access', which has also been a problem in the UK historically. In March 2015, this practice became a criminal offence in the UK. The principle of ensuring that criminal record details are provided directly to the individual is fundamental, and in the UK there is emerging practice of employers adopting 'workarounds' (such as getting 'agreements' for disclosures to be sent 'care of' the applicants work address). Such practices undoubtedly breach the spirit of the law, and work needs to be done to ensure this type of practice is stamped out.

**Recommendation – Government should ensure that criminal record details are provided directly to the individual, and not to third parties such as employers.**

### The value of asking/checking

There remains no conclusive evidence that shows that asking for criminal record details, or checking an official record, effectively reduces the risk of offending, despite the significant amount of trust placed in this strategy. The logic is that past criminality is a predictor of future criminality. However, the relationship between employment and potential future criminality remains unclear. Indeed, the clearest evidence relates to how legitimate employment is critical to the desistance process.

The findings from countries overseas shows that there are different levels of 'commitment' to the value of criminal record checks. However, across the board, it's perhaps fair to summarise that the more 'professional' jobs are those more likely to be regulated by criminal record checks, which begins to raise the question as to whether criminal record checks have a disproportionate impact on certain groups of people, and certain types of offences.

**Recommendation – Research should be done into the effectiveness of criminal record checks and what value they provide to employers that use them.**

Ultimately, there's two approaches to the value of criminal record checks. The first approach is adopted by those employers that do criminal record checks, which is 'risk-based'. This approach assumes that people re-offend, and from an employers' perspective, the role of crime prevention, through their use of criminal records, is more important than potentially punishing the person again. The second approach is potentially adopted (albeit not always knowingly or intentionally) by those employers who rely on a 'trust-based' approach. With this approach, there is a general acceptance that criminal record checks are ineffective in identifying future risk, and that skilled recruiters through interviews, and effective safeguarding measures, are more effective.

It appears that the latter approach is one that is more prevalent in the countries that I researched, whereas the UK has shifted significantly towards a risk-based approach, reflective of the neoliberal trend towards 'responsibilisation' of individuals (in this case, employers) for decision-making processes, including about how best to minimise 'risk'.

I also encountered little evidence of concern about employer liability for 'negligent hiring'. In the UK, many employers conduct criminal record checks "to be on the safe side". Indeed, to some extent this culture might derive from the approach of the state in pushing down responsibility to individual employers. In the countries I visited, there seemed to be a greater "freedom to hire", which results from more state intervention and therefore clearer lines of accountability – for example, in Spain, if a person should be legally prevented from adopting a particular role, this would be the role of the courts to impose this.

It's clear that in (continental) Europe, the requirement for a person to undergo a criminal record check would not normally be done unless there was a specific law requiring it, or a clear business need. This seems to stem from the confidential character that criminal records have historically taken within the laws of each country, and the approach of legislation in explicitly justifying the use of criminal records on a case-by-case basis.

However, although these are only cursory warnings, the sense I got in my research is that this approach is on shaky foundations, and that the presumption against the use of criminal records is being increasingly tested (as can be seen in Sweden). The need to regulate access to criminal records is fairly obvious – the role of the law is to balance the potential risks posed with the legitimate interest of protecting the individual from discrimination. Ultimately, if there is no statute limit, then there is a danger of excluding all people with convictions by allowing all employers and others to use criminal records as evidence of current 'bad character'.

## The increase in checking

Of course, just because the checking criminal records is not prohibited, does not mean that it is standard practice. That's what's different to the UK. In the countries I visited, the approach tends to be one of general prohibition from access to criminal records, unless there is a specific law authorising it. This is something that has clearly gone awry in Sweden, and they are now responding in a way which would suggest that 'general prohibition' was the position they have always wanted to be in, just that practices had developed quicker than the laws to regulate them did. In all three countries, there was a feeling that employers only did checks when the law specifically required them to do so. In the UK, criminal record legislation is written in such a way

that legally entitles any employer to require a basic criminal record disclosure (so long as they satisfy data protection requirements).

Recommendation – There should be a general prohibition against criminal record checks for recruitment. Exceptions would be granted on a case-by-case basis, where it was deemed (a) lawful and (b) necessary.

Lawfulness would relate to the 'level' of check. Necessity would relate to (a) what information the employer was seeking and what information they regard as 'relevant', and (b) what policies/processes they have in place to ensure they don't use criminal records as a part of the recruitment process, until they can foresee hiring an individual.

Recommendation – Employers should only carry out a criminal record check where there is specific law which requires them to do so.

An interesting phrase that I picked up was the use of "criminal history" to refer to what is often regarded in the UK as someone's "criminal record". Similar to the well-placed criticisms of the labels "offender" and "ex-offender", I would argue that "criminal record", as well as "criminal background" (and "criminal record **certificate**"), send the wrong messages for what is essentially details of what has happened in the past. "Record" (as does "certificate") gives some perverse sense of achievement, and "background" too readily attaches relevance. "History", on the other hand, perhaps more closely attaches to what the details genuinely are – i.e. historical.

Recommendation – Phrases such as "criminal record", "criminal record certificate" and "criminal background" should be replaced with "criminal history".

## The process of asking/checking

An interesting finding was the clear separation between 'conviction' records and 'police' records. In the UK, although technically some may argue that this separation exists, in reality the police have responsibility for managing both police and conviction records. The 'blurring' of the lines between 'intelligence' and convictions seems more readily apparent in the UK through the use of 'intelligence' on enhanced checks – this wasn't something that came up as much of a problem during my research.

Recommendation – 'Police' records and 'Conviction' records should be held separately. Conviction records may come from Police records, but they would be held separately, solely for disclosure purposes.

A further observation, from France and Spain in particular, was the role of court imposed 'disqualifications' from certain areas of work, and legislation which legally prevents people from undertaking certain work – i.e. if a record of an occupational disqualification exists on a person's record, they are legally prohibited from taking on any work proscribed by the court. While at first, this may seem a strict approach, it should be seen in the context of a much more expansive

approach to 'cancelling' criminal records (see later section). This is in stark contrast to the current approach of managing criminal records in the UK, where effectively *all* convictions are available for disclosure, and the ultimate decision is left to the employer. I believe there is some value in looking more closely at the role of the Government and the criminal law. The closest example in a UK context is that of the 'barring' system for working with children and vulnerable groups. However, in the UK, the problem exists that even when a person is not barred, their criminal record is still provided to the potential employer. An alternative approach, which was evident in my research, was that of 'occupational disqualifications', imposed by a court, which may restrict specific individuals from specific areas of work, but that otherwise that individual is able to apply for work in other sectors without the stigma of their criminal record.

Recommendation – The Government should explore the use of 'occupational disqualifications' more broadly as a means of regulating who can work in certain roles, allowing for more restricted access to criminal records in other roles and more expansive 'cancelling' systems.

Example – An individual is convicted of financial-related theft. Under this recommendation, it may be appropriate for the individual to be disqualified from financial services positions, but their criminal record would not be disclosed when applying for work with children.

There was general consensus across all three countries that, if an employer were to be asking for details of criminal records, they did so at the point that they 'could foresee hiring' the individual. It was very rare for employers to ask for criminal records at application stage. Indeed, there seemed to be a strong resistance to even asking at interview. This view seems to stem from a much deeper protection of privacy, recognising more clearly that the criminal record of a job applicant only becomes relevant, if at all, once that individual has been selected for the role.

This finding poses some interesting questions for the UK context. Historically, employers have increasingly asked for details on application forms, which led an increasing 'tick-box' mentality when making recruitment decisions. The recognition of this as a problem resulted in the launch of the 'Ban the Box' campaign in early 2013, which seeks to encourage employers to remove such 'tick boxes' and move the issue of convictions further down the recruitment process. However, this has not gone as far as to suggest when the most appropriate stage might be.

Recommendation – Research should be carried out which looks at the effects of asking for criminal record details at different stages of the recruitment process.

Recommendation – Employers should only consider asking for details of criminal record when they 'can foresee hiring' an individual, and only then in relation to convictions for offences which have clear relevance to the job role.



# Protection, Deletion & Expungement

## France

France proved to be the most interesting of countries in relation to 'protecting' against the ongoing effects of criminal records by 'removing' records through a couple of interesting measures that the French system has in place. These will be briefly looked at in turn.

### 'Data management' (an automatic measure)

The French system has automatic expungement measures which require no action on the part of the individual. These are best described as 'data management' measures. Essentially, they derive from need to have measures which respond to handling excessive amounts of data.

For example, the 'Hundred Years Rule' (which involves the deleting files relating to those who reach 100 years of age, but recently in December 2014 increased to be the '120 years rule') and the 'Forty Years Rule' (which clears files which have not been deleted via other techniques, and where there is a clear 40-year period of no reconviction) are both in operation. These measures can hardly be seen as purposeful for overcoming issues caused by criminal records – it's likely to come too late for many people. But it does remove records entirely, across all of the bulletins. This contrasts with the current state of 'retention' in the UK, which holds on to all recorded convictions until an individual reaches 100 years of age.

### 'Legal rehabilitation' (an automatic measure)

'Legal rehabilitation' in France was created in 1994, when the new Penal Code came into force. In simple terms, it's a measure which recognises desistance from crime. It's clear from my research that it's regarded as the most prominent of measures in France – it's automatic, doesn't require any legal action, yet takes effect fairly quickly. It benefits all individuals except those who committed 'crimes'. In terms of the time periods that apply:

- Fine – 3 years
- Prison (up to 1 year) – 5 years (from end of sentence)
- Prison (up to 10 years) – 10 years (from end of sentence)
- Multiple prison sentences (total not exceeding 5 years) – 10 years (from end of sentence)

In terms of what's required, it simply requires the passing of a certain amount of time without further convictions, so in that sense it can be seen as working in a similar way to the Rehabilitation of Offenders Act (ROA) in the UK. Once 'legally rehabilitated', in practice this means that it is no longer disclosed on a B2 or B3. This is quite a significant measure given that, in comparative terms, a B2 could be compared with a standard or enhanced DBS check in England & Wales. The result is that this measure could be seen as one that 'recognises' desistance, once an individual has shown that they are now living a law-abiding life by having not receive further convictions.

## Clearing of B2 and B3 (a measure involving merit)

A person who applies to the 'Juge de l'application des peines' (JAP, which is the person in charge of the implementation of sentences), for release of some kind, can, at the same time, obtain clearance of their B2 and B3 (French Penal Procedure Code, FPPC, art, 712-22). Other people can apply to a 'sentencing court in charge of "délits"

With this measure, legal action is needed, so ultimately a court decision is required. The measure is discretionary, and based on merit. It's designed to help people desist, not reward desistance. There's no required delay after the sentence, and an individual can ask directly the court that sentences him not to register the sanction in a B2 and B3. The aim of this measure is purely utilitarian – the idea is to help people find employment.

Given that many areas of work legally require a clear criminal record, this is something that the courts consider when looking at requests – i.e. if the person is looking to work in an area which requires a criminal record check, the role of the court becomes more important. Reasons for rejection under these processes tend to include professions which require high moral standards, and for offences which are too serious, or where there are too many. Since 2005, this hasn't applied to sexual offences. It seems that this is rarely used, potentially due to a lack of awareness, but where it is applied for, it is often granted.

## Judicial rehabilitation (a measure involving merit)

The existence of 'judicial rehabilitation' was the most significant finding in my research of the French system. In effect, it could be regarded as a 'rehabilitation ritual' which recognises full desistance. In many ways, it seems to be the type of system which, in Shadd Maruna's words, recognises "*achievement not only in the eyes of the public, but also to the ex-offenders themselves in order to constitute the "authenticity test" that desisting ex-offenders so badly want*" (Maruna, 2001: 163).

What is particularly striking is its scope – it can apply to all types of sentences, including prison sentences and all types of offences, even those classed as 'crimes' in the French system. People who have more than one conviction don't apply for the rehabilitation of a single, or a percentage, of their convictions – they must apply for the rehabilitation of all. Judicial rehabilitation concerns their entire life. The conditions for judicial rehabilitation are very strict. Not only must they have totally stopped committing crime; they must have effectively become a 'near perfect citizen'.

So how does it work? An individual can put themselves forward after a certain amount of time, depending on the sentence.

- Contravention - 1 year
- Délit - 3 years (6 years if re-offended)
- Crime - 5 years (10 years if re-offended)

They apply to the district prosecutor, who seeks the opinion of the post-sentencing judge. The district prosecutor obtains various official documents, and sends these, with his opinion, to the prosecutor general, who submits the case to the court which is competent for judicial rehabilitation; it's part of the Court of Appeal. This means that there is a high level of experience and competence dealing with these cases, recognising the seriousness of the matter, and the

seriousness of the statement, if judicial rehabilitation is indeed granted. The court must give its ruling within two months, with the applicant and/or his advocate being summoned. The court holds an adversarial debate, where the individual can either choose to present his case alone, or be assisted by a solicitor. Individuals are usually helped by a solicitor, although not always, but the court doesn't rely solely on the application by the individual. The police investigate the evidence that is presented; there is also a discrete investigation in the community. Interestingly, the hearing and the decision are held *in camera* (a legal term meaning 'in private'). This is mainly because of the serious repercussions the individual might face if their criminal record is made public.

The person must have paid all damages and fines, ensuring that rehabilitation does not prejudice third parties, and must acknowledge their conviction and sentence; essentially, taking full responsibility for their actions. The Court also considers the nature of the offence and whether it was a one-off. However, one principle that came from a number of sources was that judicial rehabilitation shouldn't be denied to an individual solely on the basis of their past criminal activity – in essence, nobody is beyond the pale, simply because of what they had done in the past. What is arguably more important is what has happened since the end of their sentence – to quote Article 787 of the FPPC, they have to have “behaved irreproachably”. This is very much a discretionary analysis by the Court. Stable employment is a key factor (which could be problematic, given the perhaps difficulties with a criminal record) although actively looking for a job and training to better chances of employment are also helpful characteristics.

In terms of the outcomes of an application, the court can reject; decide it's premature; or grant judicial rehabilitation. If the court rejects the request, the person can reapply after 2 years. If granted, the record disappears, as if it legally never existed. However, since 2007 this has only meant from B2's and B3's, unless the court specifically decides that the B1 is wiped too. In practice, courts are still granting it to B1's, as it's a natural consequence of the decision that they have just made – they either consider the case worthy of full judicial rehabilitation, or not at all. A further 'outcome' of the process is a 'rehabilitation certificate' – *“The rehabilitation person may have an exemplified copy of the rehabilitation judgement and copy of the criminal records delivered to him free of charge”* (Art 798, FPPC).

The concept of the Court playing a role in this way makes sense. After all, only courts have the ability to deliver the lifelong stigma that is attached to a criminal conviction, and so it's perhaps right that only courts have the ability to remove that label. This process acts to restore the person's reputation as ultimately good. Academic research of this process suggests that *“the criminological and emotional effects of judicial rehabilitation may be just as powerful as its legal consequences”* (Herzog-Evans, 2011). Judges and lawyers report that individuals often *“have a trembling voice and cry when the ruling is voiced”* with an effect that *“resembles citizenship ceremonies”* (Herzog-Evans, 2010).

It follows that it can be arguably seen as a 'reward' which is 'earned', rather than a 'right' or a 'privilege'. Certainly, it's very much a recognition of desistance, rather than a system to aide that process, and the number of individuals benefitting from this process is very small (see below), showing how it's a very high bar to meet the stringent process involved.

*Number of individuals benefitting from these measures*

Year	Judicial rehabilitation	Legal rehabilitation / Clearing from B1, 2 or 3 <sup>9</sup>
2012	24	4857
2013	23	5025
2014 (up to 01/11/14)	20	4156

Interestingly, the consequences of judicial rehabilitation on further reoffending has never been studied. However, the feelings of those who have been granted judicial rehabilitation have been looked at (Danet and al., 2008), which found that they see the process as being both a recognition of their efforts, and a form of contract.

## Spain

### Cancelación de antecedentes penales

The 'cancellation of criminal records' is detailed in Article 136 of the Criminal Procedure. Records are 'cancelled' or 'sealed' but not erased – judges will still be aware of the record, but they'll be disregarded as an aggravating factor when dealing with future convictions. Once all convictions are cancelled, the individual will be in possession of a clean criminal record certificate (CRC). Importantly, all convictions can be erased at some point, which is an important observation.

However, there seemed to be a lot of confusion about how the cancellation process worked, and unfortunately I was unable to meet with the Ministry of Justice to clarify. However, although it's not clear why this is the case, it seems that the majority of people don't realise that 'cancelling' is not an automatic process, and that an individual has to proactively cancel. Most won't be aware that their criminal record has, or could, be cancelled.

Cancellation is considered a right, and the requirements are:

1. A period of time (6 months, 3 years or 5 years – see below)
2. No further crime in interim
3. Civil compensation paid

The sentences and their respective rehabilitation periods are:

- Minor offences (up to six months sentence) - Six months
- Up to five years of prison - Three years
- More than five years of prison - Five years

Similar to the UK, the period starts from the end of the full sentence, regardless of how long is served, although there is often time after sentencing before the sentence is implemented.

For example, a sentence of 3 years in prison in October 2014 is likely to be implemented by 2016, and so will finish by 2019. The conviction could be cancelled three years later, in 2022.

<sup>9</sup> These figures include both 'clearing' and 'legal rehabilitation'.

Convictions can be cancelled in two ways. The first is through the individual making an application to the Ministry of Justice, or the NCR does it itself. The cancellation of criminal records will not be executed automatically by the passage of the relevant time period; it is necessary to start new proceedings. These proceedings would be initiated either ex-officio by the Register once it is considered that the necessary requirements have been fulfilled or at the request of the interested party whose data are recorded.

In legal terms, it seems to be an effective process. Once the rehabilitation period has passed, the record is expunged, and a certificate would show that the individual has no criminal record. This is particularly helpful in Spain because many employers that do ask about criminal records ask for a 'clean record', rather than asking 'have you ever been convicted'. The record is then only available to judges and courts.

Practically, however, it's unclear how effective 'cancellation' is, as there's a lack of both quantitative and qualitative evidence. Unofficially, in 2012 there were nearly 34,000 cancellations, which appears to represent an increase over previous years. There are no official statistics about how many applications are made, so it's not possible to know how many are cancelled by application, or automatically. The number that have applied themselves would go some way towards showing how much of a burden they find having a criminal record (or not). Likewise, a study involving interviews with those who have had their record 'cancelled' would go some way towards understanding the effectiveness of this measure.

## Sweden

In general, criminal record information is kept for 5 years if the sentence was a fine, and 10 years for other sentences. If the person has multiple convictions, it is the date of the last conviction that decides when the record is expunged. Up until 2010, the records for young people (under 18) were kept for the same period, but this has been changed by an amendment to the Criminal Records Act so that they are generally only kept for three or five years, depending on the sentence. Although prison sentences are excluded from this amendment, it's highly unusual for people under 21 to be sent to prison in Sweden.

The phrase for removing convictions in Sweden is 'weeding'. The majority of convictions are 'weeded' after ten years. The maximum length for a sentence to be held in the Swedish Criminal Record System is twenty years.

The provisions for the weeding of criminal records are set out the Criminal Records Act 1998. The technicalities surrounding the definitions is beyond the scope of this report to explain, but an overview is provided below.

*Weeding periods that apply*

Sentence	Length of time before 'weeding' applies
Waiver of prosecution, under 18 years of age	<b>Three years</b> after the decision (SFS 2008:47)
Fines specified to a maximum amount Suspended sentence (if under 18 at the time) Probation (if under 18 at the time) Day fines	<b>Five years</b> after the judgement, decision or acceptance
Conversion sentences for fines Sections 18/21, Fine Conversion Act , 1979:189	<b>Ten years</b> after the sentence has been enforced
Suspended sentence sentence Probation Community service	<b>Ten years</b> after the judgement or decision
Imprisonment	<b>Ten years</b> after the sentence has been enforced

An entry remains in the criminal record for as long as the date for weeding of another entry has not occurred, although future fines don't have impact on earlier sentences. The longest time a record would remain on the criminal record is 20 years.

Once weeded, the record would not be disclosed on any type of disclosure provided to employers. However, it's yet to be seen whether Lexbase will undermine this, as Lexbase hasn't yet been around long enough to gather conviction records that would now be officially weeded.

## Protection, Deletion & Expungement – Analysis

### The right to rehabilitate

One consistency across all three countries was how the time that it takes for records to be 'expunged', or for individuals to be regarded as rehabilitated, is much less than in the UK.

Furthermore, the breadth of offences that could be expunged – for example, very serious offences could be expunged in all three countries – shows a level of commitment to rehabilitation that is simply not present in the UK. An important principle results from this – that nobody is 'beyond the pale' and that everyone is capable of being granted the status of being 'rehabilitated'.<sup>10</sup> This contrasts with the fact that anybody sentenced to more than 4 years in prison in the UK can never be regarded as 'rehabilitated' in the eyes of the law. The French

<sup>10</sup> This phrase is somewhat uneasy to some, but hopefully reflects the point nevertheless

system of judicial rehabilitation could provide a model by which more serious offences currently not covered by UK rehabilitation legislation could be dealt with, so that cases could be considered for judicial rehabilitation after a period of time. It may also provide a mechanism by which individuals could be regarded as 'rehabilitated' much earlier, and help to overcome a practical objection that some have to 'automatic' rehabilitation processes, where little faith is placed in them due to their automatic nature.

Recommendation – Research should be undertaken to understand the effectiveness of the system of 'judicial rehabilitation' in France.

Recommendation – The UK should introduce measures which enable any person with convictions to be ultimately regarded as legally 'rehabilitated'.

### A single tier of 'rehabilitation'

In all three countries, their system of 'rehabilitation' was, at least from the outside, simple in that there was one level to it – 'ultimate rehabilitation'. For example, in Spain, either your record was disclosed (if enough time hadn't passed), or it wasn't (if enough time had passed). The UK seems to be unique in that, although there is rehabilitation legislation, there is a significant number of jobs and roles that are exempt – effectively meaning that even those considered 'rehabilitated' still have their convictions disclosed.

Recommendation – The UK should learn from how France, Spain and Sweden have been able to have a stronger commitment to 'rehabilitation' laws when applied to jobs that work in sensitive roles.

Recommendation – The UK should establish an 'ultimate' form of rehabilitation which applies for all types of disclosures.

### The need for steps that help rehabilitation/desistance (not just recognising it)

France, in particular, has rehabilitation policies that appear to actively aide desistance, not just recognise when it happens. It seems, therefore, that there is a role to better understand whether processes such as 'clearing of B2 and B3' in France have any link to helping to reduce re-offending.

Recommendation – Research should be undertaken into whether measures that deal with criminal records have any positive impact on rehabilitation/desistance.

## Forgiving v Forgetting

An interesting way of critiquing the measures found in the three countries are whether they represent some level of 'forgiveness', or whether they simply try to 'forget' what someone has done in the past. This reflects a recent discussion that's taken place in the US<sup>11</sup>, where 'forgiveness' doesn't seek to hide the past of an individual, but rather recognise the way they have changed, for example through 'good conduct' certificates, as opposed to 'forgetting' measures, which seek to remove from the existence of a criminal record.

The measures of Spain and Sweden are best seen as measures which seek to 'forget' what someone has done, and indeed going by the definitions above, France similarly has measures which 'forget', although arguably their system of 'judicial rehabilitation' operates as a form of forgiveness, but nevertheless results in the outcome of 'forgetting' (i.e. the person no longer has to disclose), as opposed to some form of 'good conduct' certificate.

The recent discussion in the US is undoubtedly in response to today's world – one where it looks increasingly difficult to see how society can 'forget' things, not just criminal records. To some, a system of 'forgiving' would afford the opportunity to a wider range of people, including more serious offences. However, perhaps it too readily accepts that measures such as 'certificates of good conduct' would be taken at face value, and there is a lack of research to date which looks at how these types of measures work in practice.

There seems to be room for both. Certainly, for the most serious of offences, 'forgetting' is rarely going to be suitable, whereas 'forgiveness' is something that should be open to all. Looking practically at where the UK is at currently, if you asked someone applying for a job who has a 'spent' conviction, whether they would rather say "yes, I have a criminal record but the court has declared me rehabilitated", or "no", it's clear that the majority would prefer the latter. The power of a 'clean' record should not be underestimated. As a result, it shouldn't be a case of 'either or' - measures of 'forgiveness' should be built onto measures of 'forgetting'.

Recommendation – More research needs to be done into the effectiveness of systems which 'forgive', comparing them to systems that 'forget', and how the two can work together in a cohesive criminal record disclosure system.

## 'Have you been convicted?' or 'What's on your record?'

All three countries had significant measures in place which remove convictions from disclosures provided to employers. This may be the reason behind what seemed to take place in practice, which is that for those employers that do ask for details of criminal records, they rely more so on asking individuals 'what's on your criminal record?', as opposed to 'have you ever been convicted?'.

Such a shift in questions posted by employers in UK, even in isolation of anything else, would represent a huge step forward. Commonly, employers ask confusing and unclear questions,

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<sup>11</sup> <https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting>



often asking individuals to disclose much more than they legally have to, relying on individuals to understand their rights.

For example, many employers in the UK ask “have you got any convictions?”. For most jobs, legally the individual only has to disclose their unspent convictions, and if the employer were to decide to do a criminal record check, they would only be allowed to do a ‘basic’ one, which only discloses unspent convictions. If, instead of asking this question, they asked “have you got anything on your basic disclosure”, the answer would normally be much clearer and simpler to answer, not to mention the approach be much fairer.

Recommendation – Employers should shift the phrasing of their questions towards asking for details of what would be disclosed on the relevant level of check that the job is eligible for.

## Conclusions

### Tensions

The title that chosen for this research report reflects an ongoing tension that exists not only in the UK, or indeed just in Europe. On the one hand, whether it’s phrased as ‘rehabilitation’, ‘desistance’ or simply ‘living a normal, law-abiding life’, it’s essentially looking at people who are no longer committing crime. On the other hand, whether it’s phrased ‘disclosure’, ‘criminal record checks’ or ‘safeguarding’, it’s essentially looking at informing others about what people have done in the past. At its most simple form, this is what has being explored in this research. How have other countries gone about balancing the two?

Looking at it from the perspective of Government and employers, the tensions that this research has highlighted can be set out as follows

#### From a Government perspective

“Who has desisted/rehabilitated” [Individual rights and the ability for people to change]  
vs

“What to disclose and to who” [Risk/public protection]

#### From an employer perspective

“If/when/need to ask/check”

vs

“Value of checking”

Ultimately, although it may be an overly simplified perception of the three countries I visited, there were two key values which seem evident:

- They have faith and confidence that people rehabilitate, and so there’s little need for them to have to disclose their record. This results in more progressive ‘expungement’ policies which allow people with convictions to be protected from the potential prejudice and stigma that they might otherwise face.

- The majority of employers do not see the value in requiring the disclosure of criminal records. In some cases, they recognise the genuine shortfalls of criminal record checks, and so use other measures instead.

## Linking the collateral consequences of criminal records with desistance and other social harms

Recognition of 'reform' is incredibly important – the concept of 'redemption', restoration and de-labelling. Much of what has been looked at in this report is to what extent other countries 'label' people once they have served their sentence and living a law-abiding life, and what forms of 'de-labelling' they have in place.

The problems faced by people with convictions, as a result of their criminal record, are often referred to as the 'collateral consequences'. This is, in itself, an interesting phrase, as it suggests that the problems or effects of a criminal record are somehow 'natural' or 'expected'.

However, to date, little work has been done to examine the extent to which collateral consequences associated with a criminal record have an impact on the desistance efforts of people coming through the criminal justice system. Arguably, the issues associated with a criminal record are not directly linked to the 'risk of re-offending', but yet the measures that the countries visited as part of this research demonstrate a clear recognition of desistance through 'legal' rehabilitation of one form or another. To strengthen the value of these types of measures, and to further the prospect of the UK going further in its 'legal rehabilitation' efforts, work needs to be done to examine the collateral consequences associated with a criminal record, and what the benefits are in having measures that seek to 'de-label' and remove the stigma associated with a criminal records. There may be some benefits in a desistance/re-offending context, but one should expect to see wider benefits, in the reduction of other social harms, such as long-term unemployment.

Recommendation – Research should be carried out to understand what impact 'forgiving' and 'forgetting' measures have in mitigating the collateral consequences of criminal records.

## Minimising the collateral consequences of criminal records

In the UK, there are clear 'collateral consequences' attached to a criminal record. These are less evident in the countries that I visited. An important legality principle would suggest that these types of 'additional punishments', if felt justified, should be established in law and imposed by courts at the point of conviction, or in the future in exceptional cases. The current 'extra-judicial' punishment, beyond what is carried out by the state, could be seen as a form of 'soft vigilantism' carried out by the public. Overall, the UK has much to learn from overseas. There are a number of facets to the countries that I visited which point to gaps in the existing regime that the UK has. There are also some shared tensions. Nevertheless, this research has identified the need for the UK system to generally become more sophisticated in developing strategies and mechanisms by which the collateral consequences of criminal records are mitigated. More work is needed to establish the evidence base underpinning the value of such approaches that operate overseas – it's my hope that this research will help to add weight behind the importance of this work.

# Summary of recommendations

Below is a list of the recommendations made in this report. They have been themed into those involved in making them possible, and ordered to provide a more cohesive set of recommendations.

## Government (and disclosure agencies)

### The use of criminal records

1. 'Police' records and 'Conviction' records should be held separately. Conviction records may come from Police records, but they would be held separately, solely for disclosure purposes.
2. The Government should explore the use of 'occupational disqualifications' more broadly as a means of regulating who can work in certain roles, allowing for more restricted access to criminal records in other roles and more expansive 'cancelling' systems.

### Disclosures on criminal record checks

3. The UK should establish an 'ultimate' form of rehabilitation which applies for all types of disclosures.
4. The UK should introduce measures which enable any person with convictions to be ultimately regarded as legally 'rehabilitated'.
5. Research should be undertaken to understand the effectiveness of the system of 'judicial rehabilitation' in France.
6. The UK should learn from how France, Spain and Sweden have been able to have a stronger commitment to 'rehabilitation' laws when applied to jobs that work in sensitive roles.
7. Research should be undertaken into whether measures that deal with criminal records have any positive impact on rehabilitation/desistance.
8. More research needs to be done into the effectiveness of systems which 'forgive', comparing them to systems that 'forget', and how the two can work together in a cohesive criminal record disclosure system.
9. Research should be carried out to understand what impact 'forgiving' and 'forgetting' measures have in mitigating the collateral consequences of criminal records.

### The process of issuing criminal record checks for employment

10. Research should be done into the effectiveness of criminal record checks and what value they provide to employers that use them.
11. There should be a general prohibition against criminal record checks for recruitment. Exceptions would be granted on a case-by-case basis, where it was deemed (a) lawful and (b) necessary.
12. Government should ensure that criminal record details are provided directly to the individual, and not to third parties such as employers.
13. Individuals should be able to obtain a copy of what they might have to reveal to a future employer. In particular, this would mean being able to get a copy of your own DBS, at a notional cost in line with data protection rights.

## Employers

14. Employers should only carry out a criminal record check where there is specific law which requires them to do so.
15. Research should be carried out which looks at the effects of asking for criminal record details at different stages of the recruitment process.
16. Employers should only consider asking for details of criminal record when they 'can foresee hiring' an individual, and only then in relation to convictions for offences which have clear relevance to the job role.
17. Employers should shift the phrasing of their questions towards asking for details of what would be disclosed on the relevant level of check that the job is eligible for.

## General recommendation

18. Phrases such as "criminal record", "criminal record certificate" and "criminal background" should be replaced with "criminal history".

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# Appendix - List of individual thanks

## Spain

- Elena Larrauri & Marti Rovera Sopena - Universitat Pompeu Fabra
- Santiago Corbera Benedicto – Assessor Laboral
- Noemi Morell & Iris Vega – FICAT
- Elisabeth Abad & Juan José Romero Bazán - CIRE
- Quatre Camins Penitentiary Centre

## Sweden

- Faris Jasim & Sophia Abusagr – Arbetsförmedlingen (Swedish Employment Service)
- Stefan Henriksson – KRIS
- Elisabeth Wallin & Jonas Agnvall – Datainspektionen (Data Protection Authority)
- Michael Koch (Head) & Pernilla Arrland (Secretary) - Review Committee
- Peter Söderlund, Gabriel Jabber & Antonio Bustinza - X-Cons Stockholm
- Christel Backman – University of Gothenburg
- Annalina Jansson – Krami
- Magnus Gröndal & Jonas Häger – Lexbase

## France

- Elise Thevenin-Scott – Casier Judiciaire National (National Criminal Records Office)
- Annie Kensey – French Ministry of Justice
- El Boujemaoui & Cody Olson - CNIL
- Martine Herzog-Evans – University of Reims