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Criminal record checks: is the volume of disclosures proportionate?

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Foreword

The disclosure of information about previous criminal convictions has long been considered an important safeguard for employers and various organisations seeking individuals to serve in positions of trust. But there is a growing recognition that the current system of disclosure is not fit for purpose.

A parliamentary Bill, introduced by the former Chief Inspector of Prisons, Lord Ramsbotham, would shorten the period of time that those with criminal records are required to declare them to employers and those recruiting to voluntary positions. A report from The Law Commission earlier this year raised concerns about the accuracy of the criminal records system and concluded:

Given the vast array and magnitude of the problems identified by our provisional assessment of the disclosure system as a whole, there is a compelling case to be made in favour of a wider review.

More recently, David Lammy called for shorter disclosure periods in the case of some individuals with convictions in his review of ethnic disparities in the criminal justice system.

As this briefing makes clear, there are also strong grounds for concluding that a large number of disclosure requests by employers are unnecessary. Out of a total of 4.2 million requests for disclosure of criminal records made in 2015, only six per cent produced criminal record information.

In the popular imagination, criminal records checks are probably most important when it comes to recruiting adults to work in positions of trust with children or other potentially vulnerable people. But as the briefing points out, hardly any requests in 2015 – 707, or 0.018 per cent – resulted in disclosures related to sexual offences. For those with a criminal record, the anxiety that they will never be able to move on from past mistakes can be an ever present one. Here again, the figures in this briefing give rise to concern. The great majority of disclosures – some three quarters – related to convictions that were more than ten years old.

In practice, routine criminal records checking probably does little to reduce risk or protect potentially vulnerable people. It has long been known, for instance, that most abusers do not have criminal records. But routine checking can act as a significant bar to those with criminal records applying for jobs.

This briefing points to the need to limit the disclosure of criminal records to recent and relevant convictions, and to reducing the time period that those with a criminal record are required to declare it.

Richard Garside
Director

Background

Obtaining a job after receiving a criminal caution or conviction becomes complicated when applicants are subjected to a system of criminal record disclosure before their appointment can be confirmed. There has been a longstanding question mark against the scope of criminal record disclosure in the UK. The system stands accused of allowing a very great deal of disproportionate disclosure, having been the subject of adverse judgements in the courts, one as recently as May of this year.[1] A Law Commission report in 2017 stated that:

> ***The law regulating the circumstances in which an individual is obliged to reveal his or her criminal record must strike a careful balance between providing that individual with an opportunity for rehabilitation (for his or her past offending to be 'forgotten') and ensuring that there is adequate protection in place to guard against the risk that the individual might reoffend and that, as a result, harm may be caused. The question of how this balance is to be struck is one which dominates the system of criminal records disclosure.***

This briefing has been written at a time when further scrutiny of the system is on the way, as a Private Member's Bill to reform the law has been introduced.[2]

Though the *Rehabilitation of Offenders Act 1974* allows for offences to be 'spent' after a certain lapse of time, the system requires full disclosure of criminal records for applications relating to certain activities and occupations. The **Disclosure and Barring Service (DBS)** administers the provision of certificates containing criminal records. Organisations can register with DBS if they submit a large number of applications or can use an umbrella body to submit applications on their behalf. The **Enhanced Checks** are for activity directly in contact with vulnerable groups including children; **Standard Checks** are for licensed occupations or positions of trust (Lipscomb and Beard, 2015).

In 2013 'filtering' of convictions was introduced, so that, for example, old cautions and old convictions not resulting in a custodial sentence would not appear on a certificate obtained from the Disclosure and Barring Service. All convictions were, however, to be disclosed if someone had more than one.[3] This change was followed in 2014 by reforms to the *Rehabilitation of Offenders Act 1974*; the data reported in this briefing relate to the period after the adjustments were made. However, recent adjustments have failed to assuage concerns. In 2017, The Law Commission report identified serious definitional and administrative problems in the frameworks for filtering criminal records. The implications of the Commission's criticisms of current DBS systems will be considered later: the following sections focus on what the data tells us about the size and scope of the current system, given these officially accepted deficiencies.

This research, though limited by the use of a single FOI request, seeks to provide information about the relative quantities of criminal records disclosed over a recent annual period in order to shed light on the questions of scope and possible disproportionality.

The data reported here was obtained in a FOI response re-issued with corrected information in March 2017.

Aims and objectives

The aim of the research was to assess the scope and quantity of recorded information actually identified through applications for Enhanced and Standard Checks.

A key objective was to measure how often DBS checks found criminal records that could be construed as significant to a recruitment decision, in particular, to establish what proportions of Enhanced and Standard Check certificates identified a relevant or recent offence.

Information on the performance of the system in detecting possibly fraudulent applications was also sought.

Findings

Police and criminal records

According to a recent FOI request, there were 3,921,969 Enhanced Checks and 303,410 Standard Checks in 2015 (DBS FOI 1392).

1 www.unlock.org.uk/filtering-may-2017
2 www.unlock.org.uk/criminal-records-bill-receives-first-reading-house-lords
3 www.gov.uk/government/publications/dbs-filtering-guidance/dbs-filtering-guide#what-pnc-information-will-be-filtered-from-inclusion-on-a-dbs-certificate

Table 1. DBS disclosures, PNC matched applications, and criminal records (convictions and cautions), 2015

Level Check	Total disclosures issued	No of applications resulting in a PNC match	No of criminal records (convictions and cautions) printed on certificates	No of convictions printed on certificates
Enhanced	3,921,969	210,577	926,585	859,451
Standard	303,410	34,216	171,192	160,660
Total	**4,225,379**	**244,793**	**1,097,777**	**1,020,111**

Information was requested about the numbers of criminal records, and, in particular, convictions, that were made known; in addition, information about matches on the Police National Computer (PNC) was obtained.

The PNC records arrests and other criminal justice information, as well as non-criminal information such as driving details, records of absconding, etc.[4] Local police intelligence is included in an Enhanced Check. *The Protection of Freedoms Act 2012* laid out a Quality Assurance Framework guiding police disclosure of intelligence, including an Independent Monitor in case of dispute (Lipscomb and Beard, 2015). However only six per cent of the total applications 'resulted in a PNC match' implying that no less than 94 per cent showed no trace on the PNC and therefore no criminal records.

Despite the fact that only six per cent of applications produced criminal record information, it is striking that over a million criminal records (overwhelmingly, convictions) were disclosed in 2015.

Examining the totals, the data show that the ratio of criminal records to the disclosures was about 1: 4, and was much lower for Standard than for Enhanced Checks (14:25 compared with 6:25). In other words, compared with Enhanced Checks, Standard Check applications appeared twice as likely to produce criminal records. However, this does not tell us how many individuals had criminal records because one applicant may have had more than one offence listed. Also one individual may have made more than one application in the year.

What we need to know is how relevant and recent the criminal records were- topics explored in the next sections.

Sexual offence records and Enhanced Checks

In order to focus the inquiry into relevance of offences, the research sought to measure the number of sexual offence records disclosed by Enhanced Checks. Sexual abuse is, of course, not the sole threat to the vulnerable but it has achieved signal significance. The particular offences are listed in a Guide which was the responsibility of the Association of Chief Police Officers (ACPO). The proportions of Enhanced Checks containing any record of an offence were requested for two sets of sexual offences listed in Offence Groups contained in the ACPO Guide, namely, Offence Group A 2.1 – 2.17; Offence Group B 2.2.3 -2.15 (ACPO, 2006).

For Offence Group A (295 listed offences), 270 certificates contained records of such a sexual offence; for Offence Group B (106 listed offences), 437 contained records of such a sexual offence.

Combining the figures for each Offence Group, in all, 0.018 per cent (707/3,921,969) of disclosures contained a sexual offence.

In cases where sexual offences were revealed, information on the specific posts sought was requested. The data searched by the DBS on our behalf was in a free text field and therefore the results are not clear-cut.

As the large number of 'Other' posts shows, it was therefore unclear which posts were being applied for.

4 **'Computerised Information on the PNC**.
The PNC holds details of people who are, or were, of interest to UK law enforcement agencies because they:
- have convictions for criminal offences
- are subject to the legal process, for example waiting to appear at court
- are wanted
- have certain court orders made against them
- are missing or have been found
- have absconded (escaped) from specified institutions
- are disqualified from driving by a court
- have a driver record held at the Driver and Vehicle Licensing Agency (DVLA)
- hold a firearm certificate'

(Home Office, 2014)

Table 2. Posts applied for, by sexual offences revealed

Post Applied For	Count of offences
Teacher	12
Child minder	0
Doctor	2
Nurse	10
Social Worker	0
Carer	35
Other	648
Total	**707**

Dishonesty offences disclosed by Standard Checks

The proportions of Standard Checks containing any record of offences of dishonesty were requested for several sets of offences listed in Offence Groups contained in the ACPO Guide (Offence Group B 4.1 -4.18; 5.3 -5.13; Offence Group C 4.2 -4.17; 5.5 -5.9, ACPO, 2006)

For Offence Group B (373 listed offences), 1,509 certificates contained records of such an offence of dishonesty; for Offence Group C (1287 listed offences), 2,951 contained records of such an offence.

For Offence Group B this amounted to 0.50 per cent of disclosures and for Offence Group C 0.97 per cent of disclosures; thus Standard Checks identified at least one offence in over one per cent of disclosures.

In the case of the dishonesty offences, information on specific posts sought was requested. Because the data searched for were in a free text field, the results are not enlightening, with many cases unspecified.

Implications for public protection

While conventionally such information is described as a 'disclosure', we do not know if any

Table 3. Posts applied for, by offences of dishonesty, 2015

Post Applied For	Count of offences
Credit Controller	1
Book Keepers, Payroll Managers and Wage Clerks	0
Bank and Post Office Clerks	0
Finance Officers	1
Administrators	34
Accountants	1
Others	4,423
Total	**4,460**

of these subjects had made any part of their histories known to an employer *before* the check. The results could then be viewed as confirmatory. If on the other hand we assumed that no one had previously informed the employer, the results may have discovered information that had a protective effect. If this was the case, then, at the very most, it could be suggested that in the year in question the system may have by its discovery function helped to protect an unknown number of vulnerable people from 707 persons with relevant sexual offence records and produced information about relevant offences of dishonesty in the case of 4,460 positions of trust. If more information about the results of these disclosures was available, we might be better able to assess whether employers were aware of any of these facts before the check and understand how employers reacted to the offence information. The Law Commission points out that the current system makes it difficult for job applicants to know exactly what a criminal record check will include.

The current system purports to suggest that disclosure assists employer decision-making by providing clear information but its likely effect on rates of job application and recruitment must also be considered. The impact of the system in deterring applications in the first place is hard to assess: the most obvious deterrent lies in the request for a check to take place. It is reasonable to assume that the system should be designed to provide information for a fair decision to be made. It would be unjust to conclude simply that the very low rates of relevant offence information emerging are a sign of success, because people with relevant records are deterred from working in sensitive occupations. From a more positive perspective, the policy objective must be how to incentivise appropriately managed applications that openly and fairly address any risks. In particular, research has found that work is of key importance to people with sexual offence convictions (Farmer et al., 2015). If applicants for sensitive posts were enabled by law to present proper evidence of rehabilitation, there would be encouragement to make the process more fair and transparent. Such developments would be boosted by increased statutory support for probation and other services able to help provide objective evidence and advice.

In themselves the rates of disclosure do not tell us very much about one important consideration in assessing risk: the recency of the offence recorded. In the next section, more evidence will shed light on this question.

Table 4. Enhanced and Standard Checks, by age of convictions revealed, 2015

Enhanced		
Post Applied For	Convictions revealed	%
Up to 2 years old	36,294	4
Between 2 to 5 years old	65,628	8
Between 5 to 10 years old	136,977	16
Over 10 years old	620,552	72
All	**859,451**	**100**
Standard		
Post Applied For	Convictions revealed	%
Up to 2 years old	4,875	3
Between 2 to 5 years old	10,170	6
Between 5 to 10 years old	23,685	15
Over ten years old	121,930	76
All	**160,660**	**100**

Ages of convictions revealed at time of application

According to a classification by specific periods of years, the ages of the convictions made known by Enhanced and Standard Checks in 2015 was requested. (See Table 4 on previous page).

There is a consistent pattern in which a great majority of convictions were more than ten years old. Moreover, these old convictions were very large in number: almost three quarters of a million convictions over ten years old – 742,482 – were disclosed in one year. The scale and effect of reporting convictions obtained such a long period ago is therefore very clear: a great many old convictions, of whatever relevance, are disclosed to employers who are given the responsibility of interpreting the significance of such a vast number.

In pondering this question of relevance, it is also interesting to compare the total convictions disclosed with the total of relevant offences as classified in this research. The ratio of the total of relevant offences (5,167) to the total number of convictions (1,020,111) is 1:197, implying that many offences whose relevance is unclear or indirect are disclosed.

Robustness and effectiveness of the Police National Computer matching

Applicant details are entered into the system which then searches for PNC matches. The effectiveness of the system depends on its capacity to achieve accurate matching with PNC cases. If by manipulating details it can be 'deceived' to miss actual matches then its effectiveness will be compromised. Information was therefore sought about suspect or false identities, which has been entered on the application and then uncovered by the process of making a check in that year.

> ***Out of the 144 Enhanced cases [i.e. where doubts were raised], 119 resulted in the applicant/Registered Body being issued with a further warning letter and the application was allowed to continue, 8 applications were withdrawn and 17 resulted in no further action being taken...***
>
> ***Out of the 7 Standard applications [i.e. where doubts were raised], all resulted in the applicant/Registered Body being issued with a warning letter and the applications were allowed to continue through the system.***
> (FOI reference 1408 re-issued 15.03.17)

It is not entirely clear from these responses whether some fault rests with the person concerned (the applicant) or the Body that processed the application on behalf of an employer.

Relatively few cases of concern about applications were flagged up. By the same token, an applicant can request that an inaccurate certificate be corrected but it should be noted that there is no mechanism for resolving a dispute between the applicant and DBS (Law Commission, 2017).

Conclusions

The Law Commission, reporting on the effect of filtering rules in 2015, identified a similar total of certificates to the total recorded in this FOI request.

> ***When the filtering rules were applied, the number of certificates issued containing relevant matters was 244,000.***
> (Law Commission, 2017)

Here, 'relevant matters' are those that should be disclosed under the present law. However, in a very detailed examination, the Commission has found that in practice the current system of filtering is unclear and not properly manageable. For example, the use of PNC offence codes is not readily compatible with the filtering rules as they now stand:

> ***The present reliance by DBS on the ACPO PNC codes is not only inefficient, it also poses a potential risk of inadequate or inappropriate disclosures being made.***
> (ibid)

The Law Commission's criticisms of the reliability of the system cast a serious shadow over the legality and accuracy of the data discussed in this briefing. However, even though the system has been officially brought into severe doubt, the consequences for applicants remain as significant as ever.

The findings from the FOI request indicate that the reporting of topically relevant offences especially for Enhanced Checks was at an extremely low rate. If all whose records cite relevant offences were excluded from the positions applied for, then at first sight the maximum rate of protection would be 0.12 per cent (5167/4,225,379) of all disclosures. However this takes no account of applicants who can point to evidence of rehabilitation since the relevant offence. The Law Commission points to the possibility that a convicted person could present evidence of rehabilitation in order to have records removed. By insisting on reporting offences and yet not confirming evidence of rehabilitation such as courses undertaken while under supervision or probation reports, the system facilitates and encourages prejudiced responses.

The research supports claims that the reporting of many, predominantly old, offences to employers carries substantial risks of injustice. Such information imposes a responsibility on them to discern a meaning in these offences which is likely to be beyond their competence. For example The Law Commission points out that offences which cover a broad range of behaviour are particularly hard to interpret. A substantial lapse of time since an offence was recorded only adds to the uncertainty (Unlock, 2016).

Old criminal records typically imply risks to the public that have diminished over time. The exception would be in cases where there is reason to suppose that individuals have effectively sustained patterns of highly harmful behaviour, while escaping further convictions. In such exceptional cases police intelligence may be considered to have a part to play. The question here is whether the risk to the public of employing someone with patterns of harmful behaviour below the criminal justice threshold of evidence is sufficient to outweigh the risk of injustice to an applicant with a 'clean' recent record. However unless the police declare what their current judgement is in every such case, it is not clear what the employer is to make of intelligence information, apart from the obvious fact that an individual has been under investigation. It is vital that the applicants are able to make effective use of opportunities to challenge allegations that are unproven.

It should be borne in mind that investment in criminal record checks prevents very few of the abuses that take place, because most abusers do not have criminal records (Kaufman and Erooga, 2016). It would be better if the system was able to provide clear and regular information about the posts sought by applicants with relevant offences so that potential risks could be clearly identified.

Crucially, the system in England and Wales is characterised by a lifetime concept of criminal justice recording, according to which any expungement is impossible; only non-disclosure is allowed (Grace, 2014). Apart from particular questions about the appropriateness of keeping certain records, etc., the implicit premise of lifetime record-keeping is clear: that no-one is ever rehabilitated. If it was revised, the label of criminality could be temporary, removing the lifetime stigma, and so an incentive to rehabilitation would be created.

A briefing such as this cannot, on its own, provide a ready-made route to reform but its evidence can support efforts to hold public authorities to account for the consequences of the systems over which they preside. The Law Commission's review considers a range of wider reforms, indicating that only thorough-going changes will be satisfactory. The sheer breadth of its critical findings suggests that much more should have been done, much earlier, to increase the transparency of DBS's work. Consistency, however, will not be enough: more fundamental change is called for. The evidence of the present study again draws into question the scope and proportionality of the current system, and provides grounds for the introduction of changes which would firmly limit disclosure to relevant and recent convictions, assist applicants to evidence their rehabilitation, and set unambiguous terms for the retention of records. Above all, exclusion from employment because of convictions should be seen in future as abnormal and exceptional rather than normal and acceptable. This is the larger social battleground on which more fundamental changes can be sought, bringing people with convictions 'in from the cold'.

About the author

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