



Ministry
of Justice

Government Response to the Justice Committee's First Report of Session 2017–19: Disclosure of Youth Criminal Records

January 2018

Cm 9559



Ministry
of Justice

Government Response to the Justice Committee's First Report of Session 2017–19: Disclosure of Youth Criminal Records

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

January 2018



© Crown copyright 2018

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at <https://www.gov.uk/government/publications>

Any enquiries regarding this publication should be sent to us at correspondence-YJPU@justice.gov.uk.

ISBN 978-1-5286-0179-5

CCS0118708642 01/18

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

Contents

Introduction	2
Terminology	2
Context	3
The current system	3
Spent convictions under the Rehabilitation of Offenders Act 1974	3
Filtering rules for criminal records certificates	4
Recent trends	5
Criminalisation of young people	5
Disclosure of records	6
The Committee's Recommendations	7
Proposals for legislative change to the disclosure system	7
Disclosure rules for standard and enhanced criminal records certificates	7
Police intelligence	8
Introducing discretion or a review process	9
Rehabilitation Periods under the Rehabilitation of Offenders Act 1974	9
Guidance for individuals	10
Other areas of concern	12
The impact on employment	12
Employers	13
Education	13
Housing	14
Insurance	15
Travel	16
Sexual offending	16
Discriminatory impact of the disclosure regime	18
Young adults	18
The UN Convention on the Rights of the Child and the Beijing Rules	19
Machinery of Government	19
Annex A	20
Annex B	21

Introduction

1. The Government welcomes the House of Commons Justice Committee's 2017 report on the disclosure of youth criminal records. We are grateful for the time given and expertise shared by the Committee in producing and publishing the Report.
2. The Crime and Disorder Act (1998) states that the principal aim of the youth justice system is to prevent offending by children and young persons under 18 years old. As stated in our written evidence to the Committee, this Government recognises that our primary objective in youth justice is to stop young people being drawn into crime and consequently blighting their life chances, and to prevent the harm caused to victims and communities by crime. The young people who end up in the youth justice system often face multiple disadvantages early on in life. We are committed to supporting children who find themselves in this position, to prevent their entry into the youth justice system.
3. For those children and young people who offend, the Government is firmly committed to ensuring they are given the opportunity to learn from their mistakes and move ahead positively with their lives. We recognise that under 18s should be treated differently to adults who offend, and are committed to responding proportionately to children and young people who are in the youth justice system.
4. However, where an offence has been committed, we have a responsibility to ensure the public are adequately protected. We give careful consideration to maintaining a policy on youth criminal records which balances protecting the public and supporting rehabilitation.
5. Given the breadth of the recommendations, we consider it is appropriate to group the recommendations to provide a more coherent response. This means that we have answered some recommendations out of order. All recommendations are listed in the response, and none have been omitted.

Terminology

6. Where we refer to 'children', 'young people' or 'youths', we are referring to people between the age of 10 and 17 at the date of conviction or caution. In England and Wales, the age of criminal responsibility is 10.
7. The criminal justice system in England and Wales does not operate distinct processes for 'young adults' (although there can be particular custody arrangements for 18–21s under England and Wales statute). Those who are 18 years and over are dealt with by the adult criminal justice system rather than the youth justice system.
8. The Committee's report refers to people who offend when they are under 18 years of age, however it is important to note that in any individual case, the applicable rehabilitation period (as set out in the Rehabilitation of Offenders Act 1974) will depend on the offender's age at the date of conviction or caution.

Context

The current system

9. The disclosure regime is designed to protect the public, in particular children and vulnerable adults, while supporting ex-offenders to move past their offending. The Committee's report is reflective of a long-running debate on how the disclosure regime should balance the objectives of securing public safety while promoting offender rehabilitation and respecting an individual's right to privacy.

Spent convictions under the Rehabilitation of Offenders Act 1974

10. The Rehabilitation of Offenders Act 1974 (the ROA) provides that after a specified period, which varies according to the disposal administered or sentence passed, convictions and cautions become "spent". When a caution or conviction has become spent, the offender is treated as rehabilitated in respect of that offence and is not obliged to disclose it for most purposes. Further, that person will not be subjected to any liability or otherwise prejudiced in law if s/he fails to disclose a spent conviction or caution – for example if an employer becomes aware of a spent conviction or caution (or the fact a person has chosen not to disclose that conviction or caution), this is not a proper ground for dismissing that person, or excluding him/her from employment.
11. The rehabilitation period that applies to a conviction will depend on the seriousness of the offence (as ascertained by the sentence that was handed down) and the age of the offender at the time they received a conviction or caution. Rehabilitation periods are substantially shorter where the individual was convicted or cautioned while under the age of 18.
12. The provisions of the ROA apply in respect of all convictions and cautions except for those where the offender received a custodial sentence of longer than four years, or an indeterminate sentence. The ROA applies to applications for employment as well as other areas, for example insurance and housing, such that, subject to exceptions, where a rehabilitated person is asked about their previous convictions and offences, that question will be treated as not relating to any spent cautions and convictions.
13. The ROA also provides the Secretary of State with the power, by Order, to exclude or modify certain protections set out in the Act such that spent cautions and convictions are nonetheless disclosable. These exceptions are set out in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (the Exceptions Order). The Exceptions Order includes several excepted professions, offices, employment, work and occupations, as well as excepted licences, certificates and permits, and proceedings. These roles and activities include, for example, ones concerned with working with children or other people in vulnerable circumstances, or where sensitive information is handled and there is a risk to the public of an abuse of trust. Where people apply for work listed on the Exceptions Order, the Disclosure and Barring Service (DBS) may issue a certificate of their records.

Filtering rules for criminal records certificates

14. Prior to 2013, all convictions, cautions, reprimands and warnings, spent or otherwise, which were recorded on central records (i.e. the Police National Computer, PNC) had to be disclosed on a standard or enhanced criminal record certificate. In response to a Court of Appeal judgment,¹ in May 2013 the government amended the Exceptions Order and the Police Act 1997 to provide that certain old and minor convictions, cautions, reprimands and warnings are protected from disclosure and no longer automatically subject to routine disclosure in standard and enhanced disclosure certificates, in other words they are 'filtered' out from certificates.²
15. In that case, the Court of Appeal held that the Police Act 1997 and the Exceptions Order were incompatible with Article 8 of the European Convention on Human Rights in that they provided for the disclosure to employers of, and allowed employers to ask about and take into account, all spent convictions and cautions on a blanket basis. The Court held that was disproportionate.
16. The filtering system recognises that the balance between public protection and rehabilitation is best achieved by setting limits on the time for which certain old and minor spent convictions and cautions are disclosable. These convictions and cautions will be filtered more quickly in the case of offenders who were convicted or cautioned below the age of 18, and in that way the system acknowledges the special importance of supporting those who get into trouble when they are young to put the past behind them. However, it also recognises the principle that there are certain offences which are sufficiently serious that they should always be disclosable where the Exceptions Order applies. There are also some occupations and areas of employment where the filtering rules do not apply because of the nature of the responsibilities involved.
17. The filtering provisions provide for spent cautions and convictions not to be disclosed to employers where a certain period has elapsed:
 - Where the person was under 18 years at the date of the conviction, that conviction may be filtered after 5.5 years (compared with 11 years where the person was aged 18 or over at the date of conviction);
 - Where the person was under 18 years at the date of accepting a caution, that caution may be filtered after 2 years (compared with 6 years for cautions received where the person was aged 18 or over at the date of caution).
18. However, a conviction cannot be filtered from a standard or enhanced certificate where:
 - The person has been convicted of any other offence at any time;
 - The person was sentenced to custody in respect of the conviction; or

¹ *R (T) v Chief Constable of Greater Manchester and Others* [2013] EWCA Civ 25

² The amendments are set out in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (S.I. 2013/1198) and the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (S.I. 2013/1200)

- The offence of which the person was convicted was a listed offence, as set out in article 2A(5) of the Exceptions Order (listed offences include e.g. sexual or serious violent offences and offences relating to safeguarding vulnerable people).
19. Further, a caution cannot be filtered where the caution was for a listed offence (as set out in article 2A(5) of the Exceptions Order).
 20. In situations where spent convictions and cautions are disclosable, there are a range of operational safeguards around the disclosure scheme to ensure people with convictions and cautions are treated fairly. Organisations registered with the DBS (Registered Bodies – RBs) are required to comply with the DBS code of practice. This requires RBs to: set out a written policy on the suitability of ex-offenders that is available on request to potential applicants; ensure that all applicants for relevant positions or employment are notified in advance of the requirement for disclosure; notify all potential applicants of the potential effect of a criminal record history on the recruitment and selection process and any recruitment decision; and discuss the content of the disclosure with the applicant before withdrawing any offer of employment.
 21. The conditions for disclosing youth criminal records set out above are strict, in order to prevent impacting the futures of children and young people who have committed an offence disproportionately.
 22. The disclosure system has been the subject of several reports, as well as comment from stakeholders and the public. Some share the Committee's position and argue for changes to reduce the impact of criminal records on ex-offenders' life chances.³ However, other reports, whose focus is on the protection of children and vulnerable adults, have led to calls to strengthen safeguarding arrangements and broaden disclosure.⁴

Recent trends

Criminalisation of young people

23. Over recent years, significant efforts have been made to reduce the number of children and young people who offend. Between the peak of youth offending in 2007 and 2016, cautions and convictions given to under-18s decreased by 82% and the number of under-18s proceeded against fell by 72%.⁵ The under-18 custodial population fell by 70% between 2006/07 and 2016/17, and as of November 2017 912 young people were in custody.⁶

³ These include: the review by David Lammy MP *The treatment of, and outcomes for, Black, Asian and Minority Ethnic (BAME) individuals in the Criminal Justice System*; Charlie Taylor's *Review of the youth justice system in England and Wales*

⁴ Baroness Tanni Grey-Thompson's report *Duty of Care in Sport*; NSPCC *Trust to Lead* campaign; and the Law Commission review *Taxi and Private Hire Services*

⁵ <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2016>

⁶ <https://www.gov.uk/government/statistics/youth-custody-data>

Disclosure of records

24. All employers can ask about unspent convictions and cautions, either by asking an applicant to obtain a basic criminal record certificate, or asking the applicant to disclose any unspent convictions or cautions. It is not possible to quantify how many employers take into account unspent convictions and cautions. The number of DBS checks applied for, and certificates supplied, does not therefore tell the whole story of criminal records disclosure. However, the figures on standard and enhanced DBS checks issued show that a significant proportion of youth criminal records are not disclosed.
25. Of the 4,259,847 applications received by the DBS for a standard or enhanced criminal record check between 1 November 2016 and 31 October 2017, just 1.4% (59,902) matched against a PNC record including a conviction received under-18 and 1.8% (77,225) matched against a record including a caution received under-18. 2.9% of applications (122,646) matched against a PNC record including a conviction and/or caution received under the age of 18. See Annex A for more data.
26. The filtering arrangements provide significant protection from disclosure for those with youth criminal records. The data shows that around 50% (60,985 of 122,646) of disclosure certificates did not disclose any under-18 criminal record information. In over 75% (67,244 of 77,225) of cases where the individual had one or more cautions under the age of 18, the filtering rules had the result that the disclosure certificate did not disclose details of any under-18 caution. In 12% (7,198 of 59,902) of cases where the individual had a conviction under the age of 18, the filtering rules had the result that the disclosure certificate did not disclose details of any under-18 conviction.⁷

⁷ Figures provided by DBS, December 2017

The Committee's Recommendations

Proposals for legislative change to the disclosure system

Conclusion: *We note that the observations of the Information Commissioner's Office regarding the compatibility of the current disclosure scheme with Article 8 of the European Convention chime with the conclusions of the Court of Appeal's important decision in May 2017, the latest in a line of recent judgments regarding the compatibility of the regime with human rights standards. We regret the Government's decision to appeal against this recent judgment rather than tackling the urgent need for reform without further delay. (Paragraph 57)*

27. As the Committee is aware, the Government is defending the current disclosure regime in *P and Others v SSHD and SSJ*. The Government believes the current disclosure arrangements, including rehabilitation periods and the filtering system, to be proportionate and strike the right balance between protecting the public and individuals' right to privacy.
28. The Court of Appeal granted the Secretaries of State permission to appeal, and a hearing before the Supreme Court is expected in June 2018. Also, the Supreme Court has granted the Department for Justice of Northern Ireland permission to appeal a judgment of the Court of Appeal in Northern Ireland which found the disclosure regime in Northern Ireland to breach article 8 (*Gallagher's Application* [2016] NICA 42). In reaching its conclusion the Court of Appeal in Northern Ireland relied on case law in England and Wales, which the Court of Appeal in *P and Others* has since found goes too far ([2017] EWCA Civ 321, paragraph 42). As a result, there is now inconsistency between the approach adopted to essentially identical provisions in the case law in England and Wales and in Northern Ireland. In seeking permission to appeal, the Secretaries of State noted that it is clearly in the public interest for the issue to be authoritatively resolved in both jurisdictions.
29. The Committee makes a number of recommendations and conclusions relating to the legislation which governs the filtering of convictions and cautions from criminal records certificates. The Government notes these recommendations and the Committee's concerns. However, against the backdrop of the litigation described above, the Government believes that it is appropriate to consider these recommendations in conjunction with an authoritative judgment of the Supreme Court on the requirements of Article 8 in this context.

Disclosure rules for standard and enhanced criminal records certificates

30. The Committee makes a number of recommendations and conclusions relating to disclosure rules. We have addressed these together, below.

Conclusion: *The filtering system is rules-based, but we do not accept that these rules are open or transparent or that a rules-based system offers sufficient flexibility. Our predecessor's inquiry received overwhelming evidence of the harsh impact of the system on those who offend in childhood, arising in particular from the five and a half year qualification period before filtering is permitted, the multiple conviction rule and the serious offences rule. We conclude that too many childhood offences are unfiltered, undermining rehabilitation*

and denying children the “second chance” to which the Justice Minister is committed. We further conclude that the filtering system is wholly inappropriate for records of childhood offending and should be radically revised as a matter of urgency. (Paragraph 48)

Recommendation 10: *We commend the Law Commission’s detailed and authoritative report on non-filterable offences, and endorse its conclusions on the complexity and inaccessibility of the filtering system and its recommendation for a wider review of the whole disclosure system. (Paragraph 53)*

Recommendation 19: *‘We recommend an urgent review of the filtering regime, with regard in particular to mitigating its well-evidenced adverse impact on individuals with youth criminal records.’ (Paragraph 93)*

Recommendation 20: *We further recommend that, after application of the rules for automatic filtering, chief police officers be given additional discretion to decide whether to disclose non-filterable offences in any particular situation, based on the relevance of the offence to the activity and whether disclosure would be proportionate to protecting the public interest, taking into account the age of the offence, the age of the individual concerned at the time of the event, and their intervening conduct. For criminal records acquired during childhood, there should be a rebuttable presumption against disclosure. (Paragraph 94)*

31. We will consider these recommendations following the conclusion of the litigation.

Police intelligence

Recommendation 12: *To support consistency, we recommend a rebuttable presumption against disclosure of police intelligence relating to under-18s, including of information relating to a reprimand or caution that would otherwise be filtered from a DBS certificate. (Paragraph 60)*

32. The Government does not agree with the principle of a presumption against disclosure of intelligence information relating to under 18s. The disclosure of such information is subject to a restrictive legislative test and subject to a robust disputes process. The most recently published DBS dataset indicates that intelligence information met the test for disclosure on less than 10,000 certificates (0.22% of all applications issued) in the year 2016–17.⁸

33. Non-conviction information is retained on local police systems for the purposes of operational policing. This might include information such as details of arrests or allegations made against an individual. Where the DBS receive an application for an enhanced criminal record check, this is referred to relevant police forces to consider such local information for disclosure. The Protection of Freedoms Act 2012 tightened the test for disclosure such that the DBS will ask a chief officer to disclose any information that he reasonably believes to be relevant for the purpose for which the certificate is sought, and ought to be disclosed. The Government has issued statutory guidance to support chief officers in making appropriate, proportionate and consistent

⁸ <https://www.gov.uk/government/statistics/dbs-dataset-1-disclosure-progress-information-disclosed-and-update-service-subscriptions>

disclosure decisions.⁹ The guidance is clear that the age of the applicant at the time of the incident or offence is a factor that should be considered.

34. It is already the case that an applicant who believes that information provided for disclosure is not relevant, or ought to not be included on a certificate may challenge its disclosure before an employer sees the disclosure. The challenge process includes an application to an Independent Monitor who will review the case and is able to make the final decision on which information should be included on the certificate. The Independent Monitor publishes an annual report including a breakdown of his decisions.¹⁰

Introducing discretion or a review process

Recommendation 18: *We recognise the potential advantages of allowing applications to a court or to the Parole Board to have criminal records “sealed”, but we anticipate that this would impose unsustainable pressures on the decision-making body because of the number of individuals likely to apply. We therefore conclude that a filtering system, albeit with substantial revisions, should be retained to allow automatic filtering of many criminal records. (Paragraph 92)*

Recommendation 21: *Given the successful introduction of review processes for disclosure of criminal records in Scotland and Northern Ireland, we find it surprising that no system of review exists in England and Wales and we conclude that one should be introduced. We recommend that the Independent Monitor be given an enhanced role in conducting reviews prior to disclosure and, building on our earlier recommendation at paragraph 95, that individuals be given the right to apply to the Monitor for review of a police decision to disclose non-filterable offences, including records of offences acquired in childhood. (Paragraph 99)*

35. On 19 December 2017, the Government responded to David Lammy MP's review into the treatment of, and outcomes for, Black, Asian, and Minority Ethnic individuals in the Criminal Justice System, in which he called for a discretionary process for criminal records to be sealed. We confirmed in our response that we would consider the recommendation following the conclusion of the ongoing litigation, along with recommendations on criminal records made in Charlie Taylor's Review of the Youth Justice System and the views expressed by stakeholders. We will include these two recommendations from the Committee as part of this consideration.

Rehabilitation Periods under the Rehabilitation of Offenders Act 1974

Conclusion 7: *The Government did not provide the rationale behind the current rehabilitation periods, and some witnesses suggested that none exists. The evidence we have considered also leads us to conclude that the 2014 revisions did not go far enough, and we are particularly concerned that, for some DTOs and YROs, the rehabilitation periods have in fact increased to a level that appears disproportionate. (Paragraph 43)*

36. The Government does not agree that there is no rationale for the current rehabilitation periods. The Coalition Government considered the available evidence and concluded

⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452321/6_1155_HO_LW_Stat_Dis_Guide-v3.pdf

¹⁰ <https://www.gov.uk/government/publications/annual-report-of-the-independent-monitor-2015>

that the rehabilitation periods were too long and that they failed to recognise that offenders are most at risk of re-offending shortly after they are discharged from custody. It introduced reforms to the ROA in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPO Act) to achieve a more proportionate balance between improving the employment prospects of reformed offenders who have put their criminal lives behind them, while maintaining public protection.¹¹

37. As Annex B demonstrates, most rehabilitation periods were significantly reduced in length.
38. Rehabilitation periods for community orders and custodial sentences were revised to commence when an offender's sentence ends, rather than from the date that the offender was convicted. As the Committee notes, this had the effect that some juvenile offenders sentenced to Youth Rehabilitation Orders (YROs) and Detention and Training Orders (DTOs) may be subject to longer rehabilitation periods than prior to the reforms. This is a more consistent and risk-based approach, and requires the individual to demonstrate that they have not been convicted of any further offences for a period of living in the community whilst not constrained by prison or supervision.

Recommendation 17: *'We strongly endorse the proposals for reducing rehabilitation periods for childhood offences contained in Lord Ramsbotham's Criminal Records Bill of Session 2017–19, which we believe reflect a broad consensus for the need for reform in this area. We commend the Bill to Parliament.'* (Paragraph 86)

39. The Committee has suggested that the rehabilitation periods set out in the Rehabilitation of Offenders Act 1974, which are not subject to challenge in *P and Others*, should be reconsidered. The Government considers that it is important to consider the Committee's recommendations regarding different aspects of the disclosure system in the round, and will therefore consider this recommendation alongside the others.

Guidance for individuals

Conclusion: *We find it a matter of regret that the laudable principles of the youth justice system, to prevent offending by children and young people and to have regard to their welfare, are undermined by the system for disclosure of youth criminal records, which instead works to prevent children from moving on from their past and creates a barrier to rehabilitation.* (Paragraph 14)

40. The Government agrees that we should ensure children and young people understand their rights with regard to disclosure of criminal records and we accept that guidance for them could be improved. We appreciate that young people in particular, may not understand, or may not be exercising, their full rights in respect of disclosing their conviction information.
41. We are hoping to work with stakeholders to implement practical ways of helping children and adults who have offended. The Ministry of Justice is currently exploring ways to engage with stakeholders to refresh guidance and online content available to ensure that it is clear, consistent and easily accessible. This will make it easier for

¹¹ <https://www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/laspo-rehab-of-offenders-act-ia.pdf>

people to understand their rights and responsibilities in respect of disclosure, including clear signposting between relevant websites where appropriate.

42. We have also identified the need to work with relevant charities and other third party organisations to ensure they offer consistent, up to date information to relevant audiences through their online and offline channels. We are planning to set up a content stakeholder panel in order to facilitate this.

Other areas of concern

The impact on employment

Recommendation 2: *'While recognising that exceptions may need to be made for exempted roles, we agree with the recommendation of the 2015 Parliament Work and Pensions Committee that Ban the Box, which applies to all criminal records, should be extended to all public sector vacancies, and that the Government consider making it a mandatory requirement for all employers.'* (Paragraph 23)

43. The Government is committed to supporting ex-offenders into meaningful work, where it is appropriate to do so. People who have a job on their release from custody are 6-9 percentage points less likely to reoffend.¹²
44. Ban the Box, an initiative by Business in the Community (BITC), gives people with a criminal conviction the chance to demonstrate relevant skills and experience ahead of formally disclosing any conviction(s). Offenders can therefore be tested on their merits before the employer is informed of their previous offending. Business in the Community (BITC) reports that 87 employers, covering more than 720,000 roles, have committed to creating fair employment opportunities for ex-offenders.¹³
45. Following the former Prime Minister's commitment in February 2016, the Ban the Box campaign was formally launched across the Civil Service on the 17 October 2016 by the Cabinet Office. 380,000 roles (97% of Civil Service roles) were identified as suitable for removal of the 'box' that asks about criminal convictions during the initial stages of the recruitment process.¹⁴ Departments will be required to report on exceptions periodically, to the Cabinet Office.
46. The Ministry of Justice (MoJ) will continue to explore options for promoting Ban the Box across both the public and private sectors, primarily by ensuring we lead by example. We will be publishing an Employment and Education Plan in early 2018 which will promote Ban the Box. In addition, and in collaboration with the Cabinet Office, we will launch a proactive campaign to increase the number of ex-offenders working in the Civil Service, 'Going Forward into Employment'. The Plan will continue to drive innovative employment programmes like the Prisoner Apprenticeship Pathway, where prisoners will receive high quality, employer-led training and work experience in custody that leads to a guaranteed apprenticeship on release. We will also launch the New Futures Network (NFN), that will support empowered governors to broker relationships between prisons and employers more effectively. Initiatives like these, coupled with work to promote Ban the Box, will all help ensure offenders have the best chance of securing employment immediately on release.

¹² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217412/impact-employment-reoffending.pdf

¹³ <https://www.bitc.org.uk/programmes/ban-box/who-has-banned-box-0>

¹⁴ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-03/111417>

47. It should be noted that the majority of jobs are not eligible for a standard or enhanced criminal record check.¹⁵ Employers recruiting for jobs which are not eligible for these types of check may instead ask for a basic criminal record check, which includes only unspent cautions and convictions. Unspent convictions and cautions – or any failure to disclose them when asked – can be taken into account by any employer. The filtering regime applies in the limited circumstances in which an individual's spent convictions or cautions may be disclosable. We consider that this achieves the right balance between protecting the public and allowing individuals to move on from their past.

48. In his 2017 Review into the treatment and outcomes of BAME individuals in the criminal justice system, David Lammy MP recommended that the MoJ should commission and publish a study indicating the costs of unemployment among ex-offenders. In early 2018, we will publish an employment and education plan which will look at the current picture and the barriers to employment, and will make the case to the public about unemployment among ex-offenders.

Employers

49. We note the Committee's concern that some employers may fail to make an objective and balanced assessment on applicants with unspent convictions. We believe that employers are best placed to consider whether a person's convictions and cautions (either before they have become spent, or, in the case of activities listed in the Exceptions Order, when they are spent) make them unsuitable for a particular job. We welcome the Committee's recommendation that employers should comply with the DBS Code of Practice,¹⁶ take each case on its own merits, and do not withdraw employment offers solely on the basis of a spent caution or conviction. Balanced recruitment decisions should have regard to such factors as:

- The person's age at the time of the offence;
- How long ago the offence took place;
- Whether it was an isolated offence or part of a pattern of offending;
- The nature of the offence;
- Its relevance to the application or post in question; and
- What else is known about the person's conduct before or since the offence.

Education

Recommendation 3: *'We recommend that educational providers do not automatically use information about spent criminal records to deny access to courses, including vocational courses in health and social care. We urge providers to do everything they can to support students with childhood criminal records in their chosen field of study—for example, by giving them all possible assistance to secure work placements related to their courses.'* (Paragraph 28)

¹⁵ Eligibility for standard or enhanced checks are controlled via the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, which lists occupations and activities which involve special risks and sensitivities, such as working closely with children or vulnerable adults

¹⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/474742/Code_of_Practice_for_Disclosure_and_Barring_Service_Nov_15.pdf

50. The Government agrees with the Committee that, where the Exceptions Order applies such that an individual's spent convictions or cautions are disclosable in the context of their education, this should not be used as an automatic bar to enrolment on educational programmes.
51. Higher Education Institutions are autonomous, independent organisations and, as such, admissions are a matter for each individual institution. They are best placed to decide which applicants would be the most suited for their organisations and the courses they offer. Similarly, further education providers, including colleges, are independent organisations who are able to set their own entry criteria for qualifications, in line with those published by the qualification owner. However, we expect providers to take account of the Committee's recommendation as part of a transparent admissions process.
52. The Welsh Government also agrees with the recommendation that providers should do everything possible to support those with childhood criminal records to access learning in their chosen choice of study and to support the young person progress from learning into employment.

Housing

Recommendation 4: *'We recommend that, in relation to England, Department for Communities and Local Government guidance for housing authorities be amended as a matter of urgency to reflect the High Court's 2016 decision on spent offences in YA v London Borough of Hammersmith and Fulham, and to clarify best practice in relation to unspent offences. We also draw the attention of the National Assembly for Wales to this issue.'* (Paragraph 32)

53. The Government understands the profound impact that housing has in terms of providing stability to all citizens, strongly acknowledging that it is a vital component in terms of moving forward.
54. In 2012, we issued statutory guidance regarding social housing allocations for local authorities in England. Within this guidance, we made clear that, when framing and applying their qualification criteria, local authorities must adhere to their duties as required under the equalities legislation, as well as the requirement in the relevant allocation legislation to give overall priority for an allocation to people in the reasonable preference categories.¹⁷
55. As a further demonstration of the Government's commitment to the development and improvement of housing provision, the Secretary of State for Communities and Local Government announced his intention to issue a Green Paper on social housing in England; a wide-ranging, top-to-bottom review of the issues facing the sector. This will build on the programme of engagement which the Housing Minister is undertaking with tenants and other key stakeholders. However, while the review is underway and until it is concluded, we do not consider it appropriate to outline a specific commitment in relation to the guidance we provide local authorities on social housing allocations.

¹⁷ Allocation of accommodation: Guidance for local housing authorities in England' Local Government and Communities https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5918/2171391.pdf

56. The Welsh Government is currently updating the Code of Guidance for allocations and homelessness in Wales, which they expect to complete by Summer 2018. This will reflect the High Court's decision.

Insurance

Recommendation 5: *'We recommend that the Financial Conduct Authority consider undertaking a thematic review of this issue within the insurance sector. We further recommend that guidance from the Association of British Insurers be strengthened to leave insurers in no doubt that they must not expressly or implicitly request customers to disclose spent offences, and that unspent offences should be taken into account only if they have relevance to the type of cover. We further recommend that the ABI take steps actively to promote the guidance among its members.'* (Paragraph 37)

57. The Government is clear that insurers must demonstrate fair and appropriate behaviour regarding the issue of spent convictions. While the ROA does not prevent insurers from asking about spent convictions, it provides that where a question is asked which seeks information about a person's previous convictions, it shall be treated as not relating to spent convictions and the person is entitled not to disclose any spent convictions without prejudice. We have commenced exploration of these issues with the ABI, who have published practice guidance for insurers on this subject.
58. Furthermore, we welcome the Committee's recommendation on insurers and regulatory authorities to create a more transparent and guidance-rich process when declaring youth criminal records in the insurance sector, which complies with the law. In the Financial Conduct Authority's Business Plan 2017/18, a commitment was made to look at firms' pricing practices.¹⁸ The FCA is currently undertaking investigative work, looking at firms' pricing approaches and rating factors for household insurance. Following this work, it will consider whether, and what, further steps need to be taken in this market.
59. As part of the FCA's discovery work, it will seek to consider whether insurance providers are not acting fairly, e.g. by not making clear to consumers that they do not need to disclose unspent criminal convictions, thereby potentially causing harm to consumers. The FCA intends to review firms' sales processes and websites to determine whether they are expressly or implicitly requesting customers to disclose spent offences when completing a quote for household insurance.
60. If the FCA sees instances where insurers are requesting data inappropriately in delivering a quote to a customer, it will seek to take appropriate action to remedy the issue.

¹⁸ Financial Conduct Authority Business Plan 2017/18, Chapter 7
<https://www.fca.org.uk/publication/business-plans/business-plan-2017-18.pdf>

Travel

Recommendation 6: *'We have no remit to comment on the visa practices of other jurisdictions, but we conclude that these can also have a disproportionately negative impact on would-be travellers with criminal records acquired in childhood. We recommend that the Foreign and Commonwealth Office raise these concerns in discussion with relevant governments.'* (Paragraph 40)

61. The Government understands entirely the frustrations encountered by would-be travellers with criminal records acquired in childhood. However, as the report acknowledges, we are unable to determine the visa applications procedures and practices of other jurisdictions.
62. We would advise any individual who is concerned that a previous conviction or other judicial matter may affect their travel plans to consult the embassy of the country they are travelling to for further guidance and clarification prior to making any travel arrangements.

Sexual offending

Conclusion: *'We do not think that the difficult problem of sexual offending by children is assisted by giving them a record of a non-filterable sexual offence. We note the inconsistency between the current police response to "sexting" by children, designed to prevent them from entering the criminal justice system, and the previous policy of taking formal action. While we commend this change in policing approach, we are concerned about the implications for children whose "sexting" offences pre-date the policy change, acquiring non-filterable criminal records as a result.'* (Paragraph 51)

63. Indecent or nude images produced by young people under the age of 18, either of themselves or others under 18 (this comes under the broader act of messaging explicit text and/or images, known as "sexting"), should not be dismissed as a trivial matter. The Government is working to prevent young people from becoming involved in this type of behaviour, and helping them to understand the potentially harmful consequences of these actions.
64. Cases of "sexting" where a young person has consented to a photo being taken, or has taken and shared the photo themselves, can be damaging to both the victim and the perpetrator. It can be difficult for young people to understand the implications of these activities, or to consider that once an image has been shared they have no control over its distribution. The Government's Disrespect No Body campaign, targeted at 12–18 year olds, aims to challenge attitudes and behaviours amongst young people regarding abuse in relationships. It includes information and advice about "sexting", including that pressuring someone into sending naked pictures is a form of abuse and not normal or acceptable.¹⁹ A number of charities and organisations also provide advice, information and support to young people, parents and professionals on "sexting" and abuse, including the NSPCC, ChildLine and National Crime Agency's Child Exploitation and Online Protection Command.
65. In January 2016, the Home Office launched outcome code 21, which allows the police to record that a crime has happened but that they have decided not to take any formal

¹⁹ <https://www.disrespectnobody.co.uk/sexting/consequences/>

or informal action. Outcome 21 serves as a flag to police in the future should the individual be subject to an enhanced disclosure check.

66. All reported offences of youth produced sexual imagery must be recorded as a crime in line with Home Office Counting Rules (HOCR). However, the offence of sending an indecent image will only result in a criminal record where the offender is convicted by a court, or cautioned by the police. In all other cases, it is recorded as intelligence on the local police force systems. Each time an enhanced criminal record certificate is applied for, police decide whether to disclose the intelligence, taking into consideration its relevance to the job applied for.
67. Figures published by the National Police Chiefs' Council (NPCC) show that over 6200 incidents of children sharing or possessing sexual images of themselves or others occurred in the year 2016–17. The number of young people charged has dropped from 150 in 2014/15 to 63 in 2016/17, while over the same period the use of outcome 21 rose from 34 to 2079.²⁰
68. Guidance to police forces produced by the College of Policing makes it clear that where "sexting" is reported to police, it is vital to ascertain whether any aggravating features or known vulnerabilities are present and check the welfare of those involved.²¹ Aggravating factors include exploitation, coercion, a profit motive or adult perpetrator; if any of these factors appear to be present, the behaviour should be treated as child sexual abuse and investigated accordingly.
69. The Committee is concerned in particular about inconsistency for young people who received convictions or cautions for sending indecent images, prior to the introduction of outcome 21, who may have their conviction or caution disclosed on a standard criminal record certificate.
70. We do not agree that there is inconsistency here, as the policy represents a change in recording the police response rather than a change in police discretion. The Government has never had a national policy that directed or suggested police take formal action in these cases. Prior to the introduction of outcome 21, police still had discretion to take proportionate and appropriate action in each case, including decisions to take no further action.
71. There is no evidence that young people have been inappropriately charged or cautioned for "sexting" where there are no aggravating factors. People who received convictions or cautions for sending indecent images prior to the introduction of outcome 21 have received them because the court (or police in the case of a caution) considered the circumstances of the offence was serious enough to require that disposal. Therefore, it is appropriate that convictions and cautions for sending indecent images continue to be disclosed within the legal framework. The broader issue of how youth criminal records should be dealt with overlaps with other

²⁰ Figures quoted in an NPCC press release, 7 November 2017.
<https://news.npcc.police.uk/releases/police-responding-proportionately-to-rising-number-of-sexting-incidents>

²¹ College of Policing briefing note *Police action in response to youth produced sexual imagery ('Sexting')*, November 2016. [http://www.college.police.uk/News/College-news/Documents/Police_action_in_response_to_sexting_-_briefing_\(003\).pdf](http://www.college.police.uk/News/College-news/Documents/Police_action_in_response_to_sexting_-_briefing_(003).pdf)

recommendations made by the Committee (recommendations 8, 18, 19, 20, 21). The UN Convention on the Rights of the Child and the Beijing Rules.

Discriminatory impact of the disclosure regime

Conclusion: *'Our conclusion that the criminal records disclosure regime needs to change is supported by evidence of its discriminatory impact on BAME children, children within the care system, girls forced into prostitution and children seeking to become British citizens—an impact that is very likely to follow them into adulthood, to the further detriment of their life chances.'* (Paragraph 65)

72. The Government acknowledges the over-representation of BAME and looked-after children in the youth justice system. As the Prime Minister announced when she took office, it is the Government's priority to fight social injustices.²² The Government therefore takes the possibility of discrimination in the criminal justice system very seriously. The Prime Minister commissioned, and published, the results of the first Race Disparity Audit in October 2017. The Ministry of Justice is taking a number of actions as a result, including: collecting and publishing more and better data on race, improving diversity in the prisons' workforce, and working towards incorporating ethnicity in the measures to gauge prisons' performance.

73. The Government published its response to the recommendations made by David Lammy MP in his review of the criminal justice system, including the disclosure of criminal records, on 19 December 2017. We believe that it is important to look at the different aspects of the disclosure regime in the round, and we will therefore consider these recommendations, along with recommendations on criminal records made by Charlie Taylor, the Justice Committee and others, once the litigation is concluded.

Young adults

Recommendation 15: *We recommend that a new approach for disclosing the criminal records of young adults be the subject of comprehensive research.* (Paragraph 74)

74. We accept that young people continue to mature into their mid-twenties. This is informing practice: age and/or lack of maturity may be taken into account as a mitigating factor by the court when passing sentence, and Probation Service pre-sentence report writers are reminded to take this into account when making recommendations as to the most suitable sentence for the offender.

75. The Government has committed to considering the proposals made by Charlie Taylor and David Lammy MP in their reviews of the youth and criminal justice systems (respectively), in respect of criminal records disclosure, following the conclusion of ongoing litigation. We will fully consider the evidence base for the various recommendations, and what further evidence may be needed.

²² <https://www.gov.uk/government/speeches/statement-from-the-new-prime-minister-theresa-may>

The UN Convention on the Rights of the Child and the Beijing Rules

Conclusion: *We do not share the Minister's confidence that the current system for disclosure of youth criminal records is consistent with the UK's obligations under the UN Convention on the Rights of the Child, General Comment No 10 of the Committee on the Rights of the Child and the Beijing Rules; indeed, we conclude that the current framework may well fall short of these obligations and requires significant reform. (Paragraph 70)*

76. The Government considers that the disclosure regime is compatible with the UN Convention on the Rights of the Child. As described above, the disclosure regime treats convictions and cautions received by those under the age of 18 differently to those incurred by an adult (see paragraph 16). The Government considers that this is proportionate and achieves a balance between public protection and helping young offenders to put their past behind them. Any future changes to the regime will take into account the Convention.

Machinery of Government

Recommendation 16: *'Regardless of whether or not it is a useful principle to base policy-making on criminal records disclosure on achieving a 'balance' between rehabilitation on the one hand, and the interests of employers and the wider public on the other, we believe that the coherence of Government policy would be enhanced by consolidating responsibility into a single department.'* (Paragraph 83)

77. We refute the Committee's conclusion that Government policy on youth criminal records would be enhanced and more coherent if responsibility was placed in a single department.

78. The Home Office and Ministry of Justice worked together to develop a practical scheme combining the expertise of both departments. While the Ministry of Justice leads on the ROA, policy on criminal records disclosure and the leadership and direction of the DBS falls to the Home Office. The existence of this dual responsibility enables the Government to strike the right balance between public protection and rehabilitation during policy development. The departments work well together at both ministerial and official levels.

Annex A

These tables show the total applications for standard or enhanced criminal record checks received by the DBS between November 2016 and October 2017. This is broken down by applications where the individual was matched to a PNC record of either a conviction or caution received under the age of 18. It is further broken down by applications where details of an under 18 conviction or caution was disclosed following the application of the filtering rules. Table 1 presents the data in relation to under 18 convictions and cautions separately while Table 2 shows applications where the individual received a conviction and/or caution. It may be the case that an individual offender has obtained one or more convictions and one or more cautions before the age of 18.²³

Table 1:

Nov 2016–Oct 2017		PNC match to under-18 conviction		under-18 conviction disclosed		PNC match to under-18 caution		under-18 caution disclosed	
Certificate Type	Total applications	Number	% of applications	Number	% of matches to u18 conviction	Number	% of applications	Number	% of matches to u18 caution
Standard	315,865	8,845	2.80	8,011	90.57	8,688	2.75	1,301	14.97
Enhanced	3,943,982	51,057	1.29	44,693	87.54	68,537	1.74	8,680	12.66
All certificates	4,259,847	59,902	1.41	52,704	87.98	77,225	1.81	9,981	12.92

Table 2:

Nov 2016–Oct 2017	Total PNC match to under-18 offending		Total under-18 offending disclosed	
Certificate Type	Number	% of applications	Number	% of matches to u18 offending
Standard	15,435	4.89	9,014	58.40
Enhanced	107,211	2.72	51,647	48.17
All certificates	122,646	2.88	60,661	49.46

²³ Figures provided by DBS, December 2017

Annex B

Table 1: Current rehabilitation periods as set out in section 5 of the ROA

Sentence/disposal	ADULTS (18 and over at the time of conviction or caution)	OFFENDERS UNDER 18 AT THE DATE OF CONVICTION OR CAUTION <i>Time is calculated from the end date of the sentence (including the licence period)</i>
Custodial sentence of over 4 years, an indeterminate sentence, or a public protection sentence	Never spent	Never spent
Custodial sentence of over 30 months (2½ years) and up to and including 48 months (4 years)	7 years	3½ years
Custodial sentence of over 6 months and up to and including 30 months (2½ years)	4 years	2 years
Custodial sentence of 6 months or less	2 years	18 months
Detention and Training Order, over 6 months	N/A	As for custodial sentence
Detention and Training Order, 6 months or less	N/A	As for custodial sentence
Youth rehabilitation order	N/A	6 months beginning with the last day on which the order has effect
Fine	1 year from the date of conviction	6 months from the date of conviction
Conditional discharge	Period of the order	Period of the order
Absolute discharge	Nil (spent immediately)	Nil (spent immediately)
Conditional caution	3 months or when the caution ceases to have effect if earlier	3 months or when the caution ceases to have effect if earlier
Any other caution	Spent immediately	Spent immediately
Compensation order	On the discharge of the order (i.e. when it is paid in full)	On the discharge of the order (i.e. when it is paid in full)
Binding over order	Period of the order	Period of the order
Hospital order under Part III of the Mental Health Act 1983 (with or without a restriction order)	Period of the order	Period of the order
Referral order	N/A	Period of the order

Table 2: Rehabilitation periods prior to 10 March 2014 (when the LASPO amendments came into force)

Sentence/disposal	ADULTS (18 and over at the time of conviction or caution). <i>(rehabilitation period applied from <u>date of conviction or caution</u>)</i>	OFFENDERS UNDER 18 AT THE DATE OF CONVICTION OR CAUTION <i>(rehabilitation period applied from <u>date of conviction or caution</u>)</i>
Custodial sentence of over 30 months (2½ years), indeterminate sentences, and public protection sentences	never spent	never spent
Custodial sentence of over 6 months and up to and including 30 months (2½ years)	10 years	5 years
Custodial sentence of 6 months or less	7 years	3½ years
Detention and Training Order, over 6 months	N/A	5 years if 15 or over at date of conviction; 1 year after order ceases if under the age of 15
Detention and Training Order, 6 months or less	N/A	3½ years if 15 or over at date of conviction; 1 year after order ceases if under the age of 15
Youth rehabilitation order	N/A	The period of the order, or 12 months from the date of conviction (whichever is longer)
Fine	5 years	2.5 years
Conditional discharge	One year from the date of conviction, or the period of the order (whichever is longer)	One year from the date of conviction, or the period of the order (whichever is longer)
Absolute discharge	6 months	6 months
Conditional caution	3 months	3 months
Other caution	Spent immediately	Spent immediately
Binding over order	One year from the date of conviction, or the period of the order (whichever is longer)	One year from the date of conviction, or the period of the order (whichever is longer)
Hospital order under Part III of the Mental Health Act 1983 (with or without a restriction order)	5 years from the date of conviction or a period beginning with the date of conviction and ending 2 years after the order ceases to have effect (whichever is longer)	5 years from the date of conviction or a period beginning with the date of conviction and ending 2 years after the order ceases to have effect (whichever is longer)
Referral order	N/A	Period of the order

CCS0118708642

978-1-5286-0179-5