



HALSBURY'S LAW EXCHANGE

The employment vetting system: have we got it right yet?

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1. This policy paper was written by Timothy Pitt-Payne QC for the legal think tank, Halsbury's Law Exchange.

Executive Summary

Getting the employment vetting system right is a challenge for both lawyers and politicians. Extremely difficult policy considerations are laden with legal complexities. Serious human consequences can arise from inadequacies and inequalities in the system.

The task is further complicated by an outmoded legal framework open to abuse by unscrupulous employers. This prevents a fair balance from being struck between the key policy concerns of individual fairness, rehabilitation and protection of the vulnerable.

The Rehabilitation of Offenders Act 1974 (the 1974 Act), on which the current legal structure is largely based, seeks to protect ex-offenders from having to disclose information about “spent convictions”. In this modern information age, however, unprincipled employers need only to employ “enforced subject access” or turn to the internet to search for details of past convictions.

Moreover, the Criminal Records Bureau (CRB) system is a massive exception to the 1974 Act, often allowing access to “soft intelligence” - information about allegations that have not led to a conviction and may not even have been tested in court. An individual can find themselves in a most invidious position whereby they have no means of clearing their name once an allegation has been made. There is little in terms of effective remedies.

The Government’s Protection of Freedoms Bill makes some useful changes; but it misses the opportunity for a more radical overhaul.

This policy paper proposes an alternative legal solution to the rehabilitation of offenders: to focus not on preventing employers from finding out about spent convictions, but on preventing them from being taken into account. Employers are already well aware that they cannot take account of matters such as race, sex or sexual orientation when making employment decisions. It is a short step to provide, in addition, that they cannot take account of spent convictions.

In relation to soft intelligence, the paper argues this should be assessed by an independent expert body rather than leaving the task to individual employers.

These proposals would be a major step towards striking the elusive fair balance.

Contents

A. INTRODUCTION

- Hypothetical cases (para 1)
- Application to volunteers (para 2)
- Blacklists (paras 3-5)

B. POLICY FACTORS RELATING TO EMPLOYMENT VETTING

- Primary policy considerations (para 6)
- Information privacy (paras 7-8)
- Criminal justice (para 9-10)
- Rehabilitation (para 11)
- Protecting the vulnerable (para 12)
- Public opinion (para 13)

C. LEGAL APPROACHES TO EMPLOYMENT VETTING

- Current framework (paras 14-15)

D. THE REHABILITATION OF OFFENDERS ACT 1974

- Spent convictions (paras 16-19)
- Unscrupulous or “enforced subject” access (paras 20-21)
- Other information routes: Internet (para 22)
- Remedy for breach (para 23)
- Exceptions (para 24)

E. THE CRB SYSTEM: MANDATORY PROVISION OF INFORMATION TO EMPLOYERS

- Contradictory aims (para 25)
- Levels of disclosure (para 26)
- “Regulated work” and barring lists (paras 27-28)
- “Soft intelligence” (para 29-30)
- “Stepping down” or deletion from PNC: case law (paras 31-36)
- Problems with soft intelligence disclosure (para 37)
- Judicial review of non-conviction information (para 38-42)

F. INFORMATION SHARING

- Information sharing by public bodies (paras 43-44)
- “Pressing need”: case law (paras 45-49)

G. BARRING AND MONITORING: PROVISION OF VETTING INFORMATION TO AN INDEPENDENT EXPERT BODY

- Statutory barring lists pre-SVGA (paras 50-51)
- Right of appeal (para 52)
- Independent Safeguarding Authority (para 53)
- Barring lists post-SVGA (para 54)
- List maintenance (para 55)
- Duties on “regulated activity providers” (paras 56-57)
- Scope of monitoring scheme (para 58)
- ISA/CRB overlap (para 59-60)

H. THE PROTECTION OF FREEDOMS BILL AND OTHER PROPOSALS FOR REFORM

- The Protection of Freedoms Bill (paras 61-63)
- Proposed changes to ISA/CRB (paras 64-65)
- “Regulated activity”: definition and scope (paras 66-67)
- Barring lists (paras 68-72)
- Opportunity to challenge (para 73)
- Test for the inclusion of non-conviction information (para 74)
- Continuous updating of certificates (para 76)

Convictions for consensual gay sex (paras 77-79)
“Disregarding”/”deletion” (paras 80-81)
Overall effect of changes (paras 82-83)
Other reform proposals (paras 84-86)

I. HAVE WE GOT THE SYSTEM RIGHT?

Complex reforms (paras 87-88)
Rehabilitation of Offenders Act: fit for the 21st century? (paras 89-90)
A better approach: discrimination law model (paras 91-96)
Disclosure of criminal convictions: too much information? (paras 97-100)
Are we too soft on “soft intelligence”? (paras 101-104)
The barring regime (paras 105-107)

J. BEYOND THE PROTECTION OF FREEDOMS BILL?

The route to fair balance (para 108)

The employment vetting system: have we got it right yet?¹

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A. INTRODUCTION

Hypothetical cases

1. How much should an employer be able to find out about a prospective employee before deciding whether to make a job offer? Consider the following hypothetical cases:
 - (i) Jane is 55 years old. **Forty years ago she was convicted of a minor shoplifting offence and received a small fine.** She has not re-offended. She is now applying for a job where she will be responsible for handing money. Should the prospective employer be entitled to know about her past conviction? If the employer happens to find out about it, should they be able to rely on it as a basis for refusing to employ Jane?
 - (ii) John is in his mid-30s. **Five years ago a family member raised concerns with local social services that John was sexually abusing his 7-year-old stepdaughter.** Social services and the police investigated, but they both decided to take no action. John is now applying for a job as a youth worker. Should his prospective employer be told about the allegations?

Application to volunteers

2. Questions about employment vetting can raise extremely difficult policy considerations. The difficulties become especially acute in cases relating to the safety of children, or of vulnerable adults. There is continuing debate about how best to protect these groups from physical, sexual or financial abuse at the hands of those seeking to work with them. Although for the sake of simplicity this paper refers to “employment” vetting, many of the most difficult issues relate to those who are seeking to work as volunteers. Voluntary work is generally regarded as socially beneficial, and deserving of encouragement - particularly at a time when rhetoric about the “Big Society” seeks to emphasise that not all social needs should be met by the State. There is an obvious concern that an over-zealous or intrusive approach to vetting could deter potential volunteers.

¹ I am grateful to those who attended the Fourth Northumbria Information Rights Conference (6 June 2011), and to participants in the “Without Prejudice” podcast for 1 July 2011 (Mike Semple Piggot, Amanda Bancroft and Carl Gardner), for their comments on some of the ideas in this paper.

Blacklists

3. Historically, employers - including those seeking to recruit volunteers - have used a wide range of techniques to obtain information about prospective employees. One of the most obvious ones is seeking references, especially from previous employers. More controversially, at various times informal private blacklists have been used in order to identify individuals who are perceived to be troublemakers, eg because of their trade union activities. The Economic League, set up in 1919 to fight Bolshevism, maintained a blacklist of “subversives” until it was wound up in 1994: apparently it kept files on more than 22,000 individuals, some of them prominent in public life (including Gordon Brown MP).² More recently the Information Commissioner’s Office (ICO) took enforcement action under the Data Protection Act 1998 (DPA) against the Consulting Association, which was operating a blacklist of over 3,000 individuals working in the construction industry. The ICO seized the Association’s database, served an enforcement notice to prevent its continued operation, and prosecuted the firm’s owner under the DPA.³
4. As the Consulting Association case illustrates, in some situations the law relating to employment vetting prevents employers from obtaining or using specific information. In other situations, though, employers have a right to obtain information, or even a positive duty not to employ particular individuals.
5. Before describing the legal regimes that lead to these divergent outcomes, this paper summarises the competing policy factors that shape this area of the law.

B. POLICY FACTORS RELATING TO EMPLOYMENT VETTING

6. There are four primary policy considerations to be addressed.

Information privacy

7. First, there are concerns about information privacy: that is, the right for individuals to control the use and dissemination of information about themselves, especially where such information is sensitive or damaging. Historically, English law has resisted the creation of a free-standing cause of action based on interference with privacy.⁴ The notion of privacy has met with suspicion, no doubt because of its potential wide range and uncertain scope. But there is now an increased level of privacy protection in English law, partly because of data protection legislation,⁵ and partly as a result of the Human Rights Act 1998, and the greater prominence now given to the right to respect

² See the article “Left blacklist man joins euro fight” in the *Guardian*, 9 September 2000.

³ See the press releases dated 6 March 2009 and 16 July 2009, available on the ICO’s website: <http://www.ico.gov.uk/>

⁴ See eg *Kaye v Robertson* [1991] FSR 62; *Wainwright v Home Office* [2003] UKHL 53.

⁵ See the Data Protection Act 1984 and the Data Protection Act 1998. The latter gives effect to the Data Protection Directive: 95/46/EC.

for private life under Art 8 of the European Convention on Human Rights. Judges of high standing have recognised that information privacy is an important aspect of the Art 8 right,⁶ and have indicated that under its influence the law of confidence has now developed so as to create a new tort of the misuse of private information.⁷

8. In the current debate about reforming the EU's Data Protection Directive there is much discussion of a "right to be forgotten"⁸: that is, the right of individuals to ensure that information that is created about them at one point in time is not retained indefinitely without good reason. Information about criminal convictions, or alleged criminal conduct, is treated as sensitive personal data under the current European data protection regime⁹: and the preconditions for processing such data are strict. This suggests that there should be very careful examination, and close scrutiny, of the conditions in which such information is made available to third parties, such as prospective employers.

Criminal justice

9. Secondly, there are considerations about the nature of criminal justice: different assumptions about this will lead to different views about the proper use of information for vetting purposes. On one view, the purpose of the criminal justice system is to establish guilt and administer punishment. Various consequences could be taken to flow from this starting-point. One is that an individual should be taken to be innocent until their guilt is established (either by a plea of guilty or after a contested trial); absent a conviction, individuals should not be disadvantaged by the dissemination of information about allegations made against them. Secondly, once any criminal punishment has been imposed and completed the individual should leave the criminal justice system and return to society on the same footing as any other citizen.
10. This approach to the criminal justice system is increasingly being challenged by an alternative view, based on risk management: the system identifies individuals who are at risk of harming others, and seeks to find ways of controlling that risk.¹⁰ On that approach, allegations that have not been made good to the requisite standard of proof at a criminal trial, or that have not led to a trial at all, may still be material in assessing

⁶ See *R v Chief Constable of South Yorkshire Police ex parte LS and Marper* [2004] UKHL 39, §§67-79 (Baroness Hale).

⁷ See *Campbell v MGN Limited* [2004] UKHL 22, at §14 (Lord Nicholls).

⁸ See eg the European Commission's communication of 4 November 2010, COM 2010 (609), at §2.1.3.

⁹ See Directive 95/46/EC Art 8.5; Data Protection Act 1998, s 2. The latter defines "sensitive personal data" as including information as to the commission or alleged commission of any offence: DPA s 2(g).

¹⁰ For examples of this approach, see the Multi-Agency Public Protection Arrangements (MAPPA) established under the Criminal Justice and Court Services Act 2000 and the Criminal Justice Act 2003; and the provisions relating to Sexual Offences Prevention Orders (SOPOs) under ss 104-113 of the Sexual Offences Act 2003.

risk. Further, even after any criminal punishment has been completed, the fact of a historic conviction may require an individual to be treated differently from others.

Rehabilitation

11. Thirdly, there is a concern about the rehabilitation of criminal offenders. Ex-offenders - particularly those who have served time in prison - may find it difficult or impossible to obtain work. This is arguably unfair, as amounting to an additional punishment, imposed by society generally, in addition to the sentence of the court. It can also be counter-productive: unemployable ex-offenders may be driven to re-offend on the basis that crime is the only economic activity available to them, or perhaps also that it is the only way in which they can establish meaningful connections with other people.¹¹

Protecting the vulnerable

12. Fourthly, there are concerns about protecting the vulnerable. Much of the public debate here has focused on child protection. The Soham murders, and the resulting Bichard inquiry,¹² have played a central part in this debate. There have also been a number of high-profile enquiries into allegations of child abuse in institutional settings.¹³ At the same time, there is now increasing concern about the vulnerability of certain adult groups, eg elderly or disabled individuals in residential care.¹⁴

Public opinion

13. In a democratic society those who make policy are inevitably responsive to public opinion, particularly as reflected in the media: but in this area public opinion is an inconstant guide. At times, the public view may appear to be that no level of risk whatever is tolerable, especially in relation to children: this suggests that there should be very wide information-sharing where there is any possible child protection issue, and also (more generally) that child protection work should be vigorous and interventionist. At other times, public debate is dominated by criticisms of an overbearing State, bent on Orwellian information-gathering, and adopting a disruptive and intrusive approach to family life: this suggests that the focus should be on protecting individual privacy, and that information sharing should be closely restricted. Policy-makers can find themselves swaying backwards and forwards as they seek to accommodate these shifting preferences.

¹¹ There is a considerable amount of discussion of these issues on the website of the National Association of Reformed Offenders: <http://www.unlock.org.uk/main.aspx>

¹² See the Bichard Inquiry Report, HC653, published on 22 June 2004

¹³ See eg the Waterhouse Inquiry into abuse in children's homes in North Wales: <http://news.bbc.co.uk/1/hi/wales/465589.stm>

¹⁴ A recent Panorama investigation into a private hospital for people with learning disabilities attracted widespread attention. See the Care Quality Commission's statement of 31 May 2011, available at http://www.cqc.org.uk/newsandevents/newsstories.cfm?FaArea1=customwidgets.content_view_1&cid=37388

C. LEGAL APPROACHES TO EMPLOYMENT VETTING

Current legal framework

14. The current legal framework is based on four main elements.
 - (i) The Rehabilitation of Offenders Act 1974. This limits the circumstances in which prospective employers can obtain access to information about what are termed “spent convictions”.
 - (ii) The Police Act 1997, Pt 5. This establishes a system of standard and enhanced disclosures, administered through the Criminal Records Bureau (CRB).
 - (iii) Various statutory and common law rules about information sharing: these are of general application, but have important implications for employment vetting.
 - (iv) The Safeguarding Vulnerable Groups Act 2006. This sets up the Independent Safeguarding Authority (ISA). As enacted, the Act envisaged a wide-ranging system of employee monitoring to be conducted by the ISA. It now appears that this will not be brought into effect, although the ISA is to retain certain more limited functions, including the maintenance of two statutory barring lists.
15. I discuss, in turn, the operation of each of these four aspects. I then describe the proposed changes currently under consideration, particularly as a result of the Protection of Freedoms Bill. Finally, I assess whether the proposed changes will lead to an adequate and satisfactory regime.

D. THE REHABILITATION OF OFFENDERS ACT 1974

Spent convictions

16. The purpose of the Rehabilitation of Offenders Act 1974 (ROOA) is clear from its title: the Act seeks to promote rehabilitation by reducing the disadvantages suffered by those with past criminal convictions, including when seeking employment. It does so by defining the concept of a “spent conviction”, and by protecting ex-offenders from having to disclose information about these in response to questions asked by (amongst others) prospective employers.
17. Whether a conviction is spent will depend on the severity of the sentence, the time elapsed since conviction, the individual’s age at time of conviction, and whether the individual has subsequently re-offended: see generally ROOA s 5. If the sentence is one of life imprisonment, or imprisonment for over 30 months, then the conviction can never become spent.¹⁵
18. Once a conviction has become spent then that individual is entitled not to disclose it even in response to a direct question about their former convictions: in other words, a

¹⁵ See ROOA s 5(1).

question about former convictions can properly be treated as referring only to *unspent* convictions.¹⁶ Under ROOA a spent conviction, or failure to disclose such a conviction, is stated to be not a proper ground for dismissing or excluding a person from any employment, or from prejudicing a person in any employment.¹⁷

19. ROOA remains in force, and indeed much of the subsequent legislation builds on the distinction between spent and unspent convictions. But its practical significance has been steadily reduced. There are four main points to make here.

Unscrupulous or “enforced subject” access

20. One is that there is still an indirect route whereby unscrupulous employers can seek to obtain information about past criminal convictions. An extensive (though not absolutely comprehensive) record of criminal convictions is maintained on the Police National Computer (PNC). Individuals have the right of subject access under s 7 of the Data Protection Act 1998 (DPA), and they can use this to obtain access to a PNC printout of their own complete conviction history. This will not distinguish between spent and unspent convictions. Some employers may require individuals to exercise their own right of subject access in order to obtain disclosure of their complete conviction history in this way, and to provide the resulting information to the employer.
21. There is an obvious legal solution at hand: there is a provision in the DPA which criminalises “enforced subject access” of this kind (see s 56). But the provision has never been brought into force. It is understood that the intention was to bring the provision into force once basic criminal record certificates were available under the Police Act 1997 (see below): but these certificates are not yet available.

Other information routes: Internet

22. A second problem with ROOA is that it assumes that the prospective employer will be seeking information directly from the employee - the main technique the Act adopts is to entitle the employee to give what would otherwise be a false answer, since the employee is entitled to treat any questions about past convictions as relating to unspent convictions only. However, in modern conditions there are many other routes by which such information may be made available. After all, a criminal conviction is usually part of a public process, taking place after a trial held in public, and often reported in the press (even quite minor criminal matters will receive local press coverage); and the amount of press material that is made available online is steadily increasing. A conviction may also be the subject of Internet discussion, eg on social networking sites, even if the individual concerned is an ordinary member of the public. All of this increases the risk that information about spent convictions will be available online, and the problem will only become more acute as an increasing amount of the world’s information becomes digital and searchable, and as search technology improves.

¹⁶ ROOA s 4(2).

¹⁷ ROOA s 4(3).

Remedy for breach

23. A third problem is that the remedy for breach of the ROOA is unclear. The Act states that a spent conviction or a failure to disclose such a conviction is not a proper ground for excluding a candidate from any employment. But what does this actually mean in terms of remedies? Arguably where a public authority refused employment on this basis then its decision could be quashed by way of judicial review. But what about a private sector employer? Would there be a claim for damages for breach of statutory duty? What would be the measure of damages? Despite the fact that the legislation has been in force for almost 40 years there appears to be no case-law addressing these questions. This itself calls into question the effectiveness of the legislation: it suggests that in practice little use of the legislation has been made in order to challenge refusals to employ.

Exceptions

24. A fourth and final point is that the exceptions to ROOA are ever-increasing. A 1975 Order made under s 4(4) of the Act allows employers to ask certain candidates about their spent convictions, by way of exception to ROOA: see SI 1975/1023. The Order has been repeatedly amended: in particular, there is an exception in respect of those carrying out regulated work with children or vulnerable adults, as defined in the Safeguarding Vulnerable Groups Act 2006 (see para 27).

E. THE CRB SYSTEM: MANDATORY PROVISION OF INFORMATION TO EMPLOYERS

Contradictory aims

25. The system for disclosing information via the Criminal Records Bureau (CRB) is in one sense diametrically opposite to the ROOA: it provides a positive right for employers to find out about the criminal convictions of prospective employees, including their spent convictions. Yet at the same time the CRB system builds on the ROOA: it deploys the distinction between spent and unspent convictions, and cross-refers to the Exemptions Order.

Levels of disclosure

26. The legal basis for the CRB system is in the Police Act 1997, Pt 5. The legislation provides for three levels of disclosure in relation to the disclosure of information about convictions. The summary below uses the names by which these three levels are usually known in practice, rather than the slightly different terminology in the Act itself.
- The first level - “basic disclosure” - covers all prospective employees, but only provides for the disclosure of unspent convictions. As indicated above, the provisions for basic disclosure have never been brought into force. Basic disclosure certificates are available, however, from the Scottish equivalent of the CRB (Disclosure Scotland).
 - The second level - standard disclosure - is available in respect of employees who fall within the Exemptions Order, ie it is available in cases where an employer is entitled to ask questions about spent convictions. Under standard disclosure, a prospective employer is entitled to disclosure of all conviction information as held on the PNC, whether the convictions are spent or unspent.

- Finally, the third level is enhanced disclosure. This provides for the disclosure of all of the information that would be included in a standard disclosure certificate, together with what is sometimes referred to as “soft intelligence”: that is, information about allegations that have not led to a criminal conviction. Sometimes this will be information about acquittals, but on occasion there will be information about allegations that have not even been tested at trial. The decision as to whether this information should be disclosed is left to the Chief Constable holding the information, who is required to consider whether the information might be relevant for the purpose of the certificate and whether it ought to be disclosed.

“Regulated work” and barring lists

27. Enhanced disclosure is now available for those carrying out “regulated work” with children or vulnerable adults (whether paid or unpaid), as defined in the Safeguarding Vulnerable Groups Act 2006. Put shortly, the main determinant of whether work is “regulated” is the frequency or intensity of any contact with the relevant group.
28. An enhanced disclosure certificate will inform the prospective employer whether an individual is included on a list barring them from regulated work either with children or with vulnerable adults. The barring lists are now maintained by the Independent Safeguarding Authority (ISA) established under the Safeguarding Vulnerable Groups Act 2006: the ISA, and the 2006 Act, are discussed in more detail in the next section of this paper.

“Soft intelligence”

29. In essence, therefore, a CRB certificate will contain two sorts of information. First, it will provide the employer with information that can assist in reaching a decision as to whether or not to offer employment: ie information about past convictions, together with “soft intelligence”. It will be for the employer to assess this information and decide whether to refuse employment. Secondly, the certificate will inform the employer as to whether it is unlawful to offer employment of a particular kind to this individual, by reason of their inclusion on a barring list. My comments in the rest of this section relate mainly to the first kind of information.
30. The CRB system as currently constituted raises a number of difficult issues. One concerns the scope of disclosure relating to criminal convictions, whether by way of standard or enhanced disclosure. Because the disclosure system is directly linked to the PNC, there is no scope for the CRB to exercise any discretion to withhold convictions from a standard CRB certificate. The result is that a standard or enhanced certificate will include *all* conviction information that is held on the PNC about the individual, regardless of the age or seriousness of the conviction, and irrespective of its relevance to the particular work that the individual is seeking.

“Stepping down” or deletion from PNC: case law

31. The only way of mitigating the effect of these provisions is if there is some process for removing minor or old convictions from the PNC itself. At one point it appeared that the Data Protection Act 1998 might provide a basis for imposing such a mechanism, but this possibility was dispelled by the decision of the Court of Appeal in *Chief Constable of Humberside v Information Commissioner* [2009] EWCA Civ 1079.

32. The background to the *Humberside* case was that the police had adopted an approach whereby convictions would be deleted from the PNC only in very exceptional circumstances, regardless of how old or how minor the conviction might be. This approach was set out in guidelines issued in 2006.¹⁸ However, in certain circumstances convictions would be “stepped down” from the PNC (ie not made available to non-police users of the PNC). Under the guidelines, where conviction information was stepped down from the PNC it would be treated in the same way as police intelligence (ie non-conviction information): so it would potentially be included in an enhanced (but not a standard) disclosure, subject to a relevance test.¹⁹
33. In five cases (involving old and/or minor criminal convictions) the ICO served enforcement notices on Chief Constables, as the data controllers for their own force, requiring the deletion of the convictions from the PNC: the material was to be “stepped out” (deleted altogether), not merely “stepped down”. The basis of the enforcement action was that the retention of this information contravened the third and fifth data protection principles: the information was excessive by reference to the purposes for which it was held, and/or had been kept for longer than necessary. The Chief Constables appealed unsuccessfully to the Information Tribunal, but on further appeal to the Court of Appeal they succeeded in having the enforcement notices set aside.²⁰
34. The Court of Appeal considered that the purposes for which the information was held included the provision, where necessary, of a record of criminal convictions to the courts (for sentencing purposes, or in contexts where evidence about the previous convictions of a defendant or a witness was admissible). It was important that any such record should be as full as possible.²¹ Moreover, the police themselves considered that the information was potentially of value for operational policing purposes, and the ICO ought not to second-guess that judgment unless it was irrational.²² For both reasons, the Information Commissioner was not entitled to hold that the retention of these convictions on the PNC breached the Data Protection Act 1998.
35. The Court of Appeal judgment explained that on a proper understanding of the legislation, stepped down convictions would need to be included in standard or enhanced CRB certificates.²³ Following this case the police suspended the step-down approach in relation to the provision of conviction information to the CRB. Instead they adopted an

¹⁸ The Retention Guidelines for Nominal Records on the PNC: <http://www.acpo.police.uk/documents/PoliceCertificates/SubjectAccess/Retention%20of%20Records06.pdf>

¹⁹ See s 1.3 of the Retention Guidelines.

²⁰ *Chief Constable of Humberside Police and others v Information Commissioner and another* [2009] EWCA Civ 1079.

²¹ See judgment eg at §§34-35.

²² See judgment eg at §§39-44.

²³ See at §3 of the judgment.

approach whereby any conviction information retained on the PNC would be provided to the CRB for inclusion in a standard or enhanced CRB disclosure.²⁴

36. The current position, therefore, is that the PNC continues to hold records of substantial numbers of old and/or minor convictions, and that no filter is applied before including this information in a standard or enhanced CRB disclosure.

Problems with soft intelligence disclosure

37. There is a separate set of problems about the disclosure of “soft intelligence” (non-conviction information) via enhanced CRB disclosures.
 - Most fundamentally, there is a major incursion on the presumption of innocence if allegations that have not led to a conviction (or in many cases even to a trial) are nevertheless disclosed to a prospective employer from police records.
 - In practical terms, from the point of view of the prospective employer the difficulty is that there will often be no good way of evaluating or assessing the material. The employer is in no position to assess the credibility of any allegation, or to form its own view as to what would have happened if the allegation had been tested at trial. Inevitably, the temptation will be simply to reject any candidate who has adverse information on their CRB check.
 - From the individual’s point of view, they can find themselves in a most invidious position, whereby they have no means of clearing their name once an allegation has been made, recorded in police records, and included in a CRB check. Although there is a procedure for complaints to the CRB, it is intended to deal with cases of factual error (eg where the information included relates to a different person) rather than to challenge the police decision to include the information on the form.

Judicial review of non-conviction information

38. There have been various attempts by way of judicial review to challenge police decision-making about whether particular items of non-conviction information should be included in CRB certificates. These have met with mixed success.
39. In *X v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068 the Court of Appeal emphasised the wide scope of the police discretion. The question was whether, in the relevant chief officer’s opinion, the information might be relevant and ought to be included.²⁵ The Court considered that the exercise of this discretion could be

²⁴ Information about the change of policy was provided by the Metropolitan Police Service in response to a request under the Freedom of Information Act 2000, and is available here: <http://www.unlock.org.uk/userfiles/file/employment/ACPO%20Guidance%20FOI%20to%20MPS%20Dec%202009.pdf>

²⁵ See Police Act 1997 s 115(7), as it stood at the time of the *West Midlands* case.

challenged only in very limited circumstances.²⁶

40. However, the Supreme Court took a rather different approach in the important case of *L v Metropolitan Police Commissioner* [2009] UKSC 3. The case emphasises that a decision to disclose non-conviction information is likely to engage the individual's right to respect for private life under Art 8.²⁷ In determining whether any interference is justified, the importance of protecting that right should be balanced against any relevant social need (eg considerations of child protection), but with no prior assumption that either privacy rights or child protection must take precedence in all cases.²⁸ In cases of doubt, the applicant should have the opportunity to make representations as to whether the information should be disclosed.²⁹ The approach taken in the *West Midlands* case gave insufficient weight to the need to protect the applicant's right to respect for private life.³⁰
41. The *L* case has to some extent improved the position of individuals about whom CRB disclosures are made. It certainly increases the prospect of a successful judicial review challenge: but the outcome of such a claim will always be uncertain, and the adverse costs risks if the claim fails may be very considerable indeed. It is worth bearing in mind that in *L* itself the Supreme Court considered that, on the facts of the particular case, the disclosure at issue had been lawful.
42. The fundamental problem remains that under the existing system an individual can have their working lives blighted by the fact that allegations (eg of sexual abuse) have been made against them, even if they have successfully defended themselves at a criminal trial, or indeed even if there has never been a trial at all. The difficulty faced by such individuals is this: how should I go about trying to clear my name and get the allegations excluded from any future disclosure to prospective employers? At present there is no obvious answer to this.

F. INFORMATION SHARING

Information sharing by public bodies

43. Information sharing by public authorities is a complex and difficult area. The question, broadly speaking, is this: in what circumstances can a public authority that has obtained

²⁶ See at §41 of the judgment, discussing the circumstances in which disclosure would be disproportionate and hence in breach of Art 8 of the Convention.

²⁷ See judgment at §§ 22-29, 68-73.

²⁸ See judgment at §§45, 81-82.

²⁹ See judgment at §§46, 63, 82.

³⁰ See judgment at §§44, 63, 83-85.

personal information lawfully share that information with other bodies, or make it public? In particular, can it do so if the sharing or disclosure is for purposes different from those for which the information was originally obtained? Discussion of information sharing usually involves consideration of: the DPA; the law as to breach of confidence; relevant common law principles; and Art 8 of the Convention.

44. During the last Parliament the subject of information sharing became intensely controversial. The Coroners and Justice Bill was introduced into the House of Commons in January 2009: it included a proposed amendment to the DPA (cl 152 of the Bill) intended to facilitate information sharing. There was extensive criticism of the proposal, and in March 2009 the clause was withdrawn from the Bill.

“Pressing need” case law

45. For present purposes it is not necessary to explore all of the ramifications of the law about information sharing. It is sufficient to refer to a line of judicial review cases, which establish that public authorities can only share damaging information about individuals where there is a “pressing need” to do so. These cases gave practical effect in English law to the requirements of Art 8 of the Convention, even before the Human Rights Act came into force. Two decided cases illustrate how this area of the law works in practice.
46. In *R v A Local Authority in the West Midlands ex parte LM* [2000] 1 FLR 612, there were allegations that an individual had sexually abused his daughter and another child. A local authority and a police authority disclosed the allegations to a county council with whom the individual had contracted to provide school transport. The allegations had been made 10 years previously and were unproved. The Court held that the disclosure was unlawful: there was no “pressing need” to disclose.
47. In *R (on the application of C) v A Borough Council* [2002] EWHC 2007 (Admin), C was formerly a teacher at a school operated by the Council. Allegations were made that he had abused the child of his partner. The Council told another local authority (where C had applied for a job) about the allegations. The Court held that the Council had failed to carry out a proper balancing exercise before deciding to disclose, and that the disclosure was unlawful.
48. The cases require that public authorities making disclosures of this kind need to consider carefully the circumstances of the individual case, including: the cogency of the information supporting the allegation; the strength of any legitimate interest of the third party in receiving the information; and the degree of risk if disclosure is not made. It may also be necessary for the public authority to give the individual concerned an opportunity to make representations, before deciding whether it should make any disclosure.³¹
49. These cases do not compel public authorities to disclose information of this kind

³¹ Compare *H & L v A City Council* [2011] EWCA Civ 403.

to prospective employers: but they accept that such disclosures may be lawful, if made after proper consideration and for sufficient reason. So this is a route whereby prospective employers may receive additional information, on an *ad hoc* basis, over and above anything included in a CRB disclosure.

G. BARRING AND MONITORING: PROVISION OF VETTING INFORMATION TO AN INDEPENDENT EXPERT BODY

Statutory barring lists pre-SVGA

50. The system of CRB disclosures, and the rules about disclosure by public authorities on the basis of a “pressing social need”, involve the provision of information to prospective employers, leaving the employers with the task of evaluating its significance and deciding whether or not to employ the individual in question. A different and in some respects more intrusive approach involves the use of statutory barring lists, prohibiting employers from engaging particular individuals to carry out specified work. This takes the employment decision out of the hands of the individual employer: instead the decision is taken by the expert body that is responsible for operating the barring list. The advantage of this approach is that the expert body may well be better placed than the employer - by reasons of its experience and expertise - to evaluate information about individuals, especially non-conviction information. The disadvantage is that a decision to bar someone entirely from a particular area of work is clearly more far-reaching than merely a decision to turn down their application for a specific position. Hence, where barring lists are used, the procedural rights of those included on the lists become particularly important.
51. Prior to the enactment of the Safeguarding Vulnerable Groups Act 2006 (“SVGA”) there were three statutory banning lists, prohibiting individuals from working in specified employment, and also prohibiting employers from engaging them to do so.
- There was a list maintained under s 142 of the Education Act 2002, covering education-related work. For (obscure) historical reasons it was often known as “list 99”.
 - There was a separate list under s 1(1) of the Protection of Children Act 1999, covering those considered unsuitable to work with children.
 - Finally there was a list relating to work with vulnerable adults, under Pt 7 of the Care Standards Act 2000.

Right of appeal

52. Individuals placed on any of these lists had a statutory right of appeal, formerly to the Care Standards Tribunal and subsequently to the Health, Education and Social Care Chamber of the First-tier Tribunal.³² It was possible for an individual to be provisionally

³² Jurisdiction was transferred under the Tribunals, Court and Enforcement Act 2007.

placed on a list before there had been any opportunity for a hearing, and in a case relating to the vulnerable adults list the House of Lords held that this was in breach of Art 6 of the Convention: *R (ota Wright and others) v Secretary of State for Health and another* [2009] UKHL 3.

Independent Safeguarding Authority

53. The SVGA created a new independent expert body, the Independent Safeguarding Authority (ISA).³³ The scheme envisaged by the Act was two-fold: first, that the ISA would be responsible for maintaining barring lists relating to work with vulnerable groups; and secondly, that all of those engaging in specified work with those groups would be required to register for monitoring with the ISA.

Barring lists post-SVGA

54. The 2006 Act creates two barring lists (replacing the three lists mentioned above), one relating to work with children and the other to work with vulnerable adults. A person included on either list is barred from “regulated activity” relating to the relevant group.³⁴ Regulated activity, in general terms, means any activity of a specified nature (eg teaching) or in a specified place (eg a school or care home), involving contact with children or vulnerable adults as the case may be, if the activity is either “frequent” or “intensive”. Initially it was envisaged that an activity would be frequent if carried out once a month or more, and intensive if taking place on three or more days in a 30 day period. In March 2010, following a review by Sir Roger Singleton,³⁵ new definitions were adopted: “frequent” was to mean once a week or more, and “intensive” was to mean four or more days in one month, or overnight.³⁶

List maintenance

55. The ISA maintains both barring lists. In some situations, inclusion in a list is automatic; in some, inclusion is automatic, but subject to a right to make representations as to why the individual should be removed; and in others, it is for the ISA to decide whether to include the individual, after giving them an opportunity to make representations.³⁷ There is a right of appeal to the Upper Tribunal against an ISA decision to include a

³² Jurisdiction was transferred under the Tribunals, Court and Enforcement Act 2007.

³³ There is a very useful and helpful summary of the 2006 Act and the work of the ISA in House of Commons Research Paper 11/20, 23 February 2011, at s 8.1.

³⁴ There are also provisions in the SVGA about “controlled activity”: but the relevant provisions have not been brought into force, and the Protection of Freedoms Bill proposes to repeal them. Hence I do not discuss these provisions here.

³⁵ His report *Drawing the Line* was published on 15 December 2010: see <https://www.education.gov.uk/publications/eOrderingDownload/DCSF-01122-2009.pdf>

³⁶ The change to the definition of “intensive” was set out in the Safeguarding Vulnerable Groups Act 2006 (Regulated Activity) (Devolution and Miscellaneous Provisions) Order 2010, SI 2010/1154. The change to the definition of “frequent” was set out in statutory guidance published by the ISA.

³⁷ See Sch 3 to the SVGA.

person in a barring list, or not to remove him from such a list. However, the appeal may only be brought on the grounds that the ISA erred in law, or in any finding of fact on which its decision was based; and the decision whether or not it was appropriate for an individual to be included in a barred list is expressly stated not to be a question of law or fact.³⁸

Duties on “regulated activity providers”

56. The SVGA imposes various duties on “regulated activity providers” - broadly speaking, those who engage employees or volunteers to work with children or vulnerable adults - to provide information to the ISA. There is a duty to provide information to the ISA in certain circumstances, eg where an individual is dismissed on the basis that they may harm a child or vulnerable adult.³⁹ There is also a duty to answer requests for information from the ISA, where the ISA is considering whether to include a person in a barring list, or remove them from a list.⁴⁰
57. The Act also includes provisions whereby those intending to engage in regulated activity must register for monitoring with the ISA, with the employer obliged to check that individuals are registered before engaging them.⁴¹ So the Act envisages that there are to be two sorts of list: a list of those prohibited from engaging in regulated activity; and a list of those permitted to do so. However - unlike the provisions in relation to the two barring lists - the provisions as to monitoring have not been brought into force.

Scope of monitoring scheme

58. The scope of the monitoring scheme, as originally envisaged, would have been very wide indeed: initial estimates were that up to about 11 million individuals would be required to register for monitoring with the ISA once the scheme was fully in force.⁴² The Government subsequently estimated the adoption of Sir Roger Singleton’s recommendations would reduce this figure to about 9 million.⁴³ The intention was to bring in the requirement to register for monitoring into force in stages, with the whole of the existing workforce being covered by 2015. However, it now appears likely that the provisions about monitoring will be repealed, without ever having been brought into force: see the next section of this paper.

ISA/CRB overlap

59. The ISA and the CRB currently operate alongside one another. Employers may be entitled to standard or enhanced CRB checks, as explained above; and they may also be entitled

³⁸ The provisions about the right of appeal are in SVGA s 4.

³⁹ SVGA s 35.

⁴⁰ SVGA s 37.

⁴¹ See SVGA ss 8, 10 and 11.

⁴² HC Deb 27 October 2009 c310W.

⁴³ HC Deb 14 December 2009 cc50-53WS.

to check whether individuals are included in a relevant ISA barring list. The ISA and the CRB have different functions: the ISA makes barring decisions; while the CRB provides information that employers can use in deciding whether to engage an individual. There is however some overlap, in that enhanced CRB disclosures are used as a means of informing employers whether individuals are included on one of the ISA's barring lists.

60. There is an institutional and organisational question as to whether it is appropriate to have two separate bodies working in this area. There is a more fundamental question: is it necessary to have both an elaborate set of provisions about barring lists, and a set of procedures for providing information directly to employers? The current reform proposals, discussed in the next section of this paper, address both these issues.

H. THE PROTECTION OF FREEDOMS BILL AND OTHER PROPOSALS FOR REFORM

The Protection of Freedoms Bill⁴⁴

61. This Bill was promised in the Coalition Agreement (the foundational document of the present Government). It covers a wide range of subjects, including employment vetting.
62. The Bill gives effect to two recent reviews of employment vetting (both published on 11 February 2011, the same day as the Bill itself), one relating to the remodelling of the ISA scheme, and the other relating to the criminal records regime. The first is a joint review by the Department for Education, the Department of Health and the Home Office.⁴⁵ The second is a review of the criminal records regime in England and Wales, by Sunita Mason, who is Independent Advisor for Criminality Information Management.⁴⁶
63. At the time of writing, the Bill has completed its Committee Stage in the House of Commons. The discussion below relates to the Bill in its current form.

Proposed changes to ISA/CRB

64. At a late stage in the Committee process, the Government introduced an amendment that would merge the ISA and CRB to create a new body, the Disclosure and Barring Service (DBS). This would be established as a non-departmental public body rather than an executive agency, so as to ensure independence from Ministers. The relevant provisions are in Pt 5 Chapter 3 of the Bill (together with Sch 8). These changes relate to organisational arrangements. They do not affect the point of substance, as to whether it is necessary to have both the barring arrangements and the regime for CRB disclosure, operating side-by-side.

⁴⁴ There are two excellent House of Commons research papers relating to the Bill. Paper 11/20 is a briefing on the Bill prepared for the Second Reading debate in the House of Commons. Research Paper 11/54 is a report on the House of Commons Committee Stage of the Bill. I have found both of these extremely helpful in preparing this part of the paper.

⁴⁵ See <http://www.homeoffice.gov.uk/publications/crime/vbs-report?view=Binary>

⁴⁶ See <http://library.npia.police.uk/docs/homeoffice/balanced-approach-criminal-record-information.pdf>

65. In relation to the **ISA scheme**, see Chapter 1 of Pt 5. The central change made by the Bill is the complete abolition of the requirement to register for monitoring with the ISA: see cl 68, repealing ss 24-27 of the 2006 Act. The concept of controlled activity is also abolished: cl 67. As explained above, the ISA will be left with the function of maintaining the two barring lists established by the 2006 Act. This removes one of the most controversial aspects of the scheme established by the SVGA.

“Regulated activity”: definition and scope

66. The definition of “regulated activity relating to children” is to be modified in various ways: see cl 63. The list of activities that constitute regulated activity will be narrowed. For instance, the provision of legal advice to a child is specifically excluded, as is paid work involving occasional or temporary contact with children; so it appears that building contractors who occasionally carry out work on school premises will now fall outside the definition. Voluntary work, under the day-to-day supervision of another person who is engaging in regulated activity related to children, is also excluded. At Committee stage, Government amendments somewhat widened the scope of regulated activity: first aid volunteers and social security appointees will now come within the definition, as will the teaching, training, instruction and supervision of 16 and 17 year olds.

67. The scope of “regulated activity relating to vulnerable adults” is also to be revised: see cls 64 and 65. A vulnerable adult will be redefined to mean someone in respect of whom a regulated activity was being provided: and the definition of “regulated activity” for this purpose is also revised. However, in the course of the Committee stage the Minister (Lynne Featherstone) emphasised that those who were taken out of the scope of regulated activity under the Bill would still be eligible for an enhanced criminal records check.⁴⁷ It appears therefore that the amendments to narrow the scope of regulated activity are intended to change the existing regime in relation to barring, but not in respect of CRB disclosures.

Barring lists

68. Clause 66 limits the barring provisions so that they apply only where an individual has engaged in regulated activity in the past or where there is reason to believe that they might do so in the future. Someone who has never worked with children or vulnerable adults, or indicated that they intend to do so, will not be placed on either barring list, even if convicted of an offence that would otherwise lead to an automatic barring. There was extensive debate about this in Committee, but the provision stands.

69. Clause 71 introduces two ways whereby a regulated activity provider can find out whether a specified individual is on a barring list. One option is to apply to the ISA to find out whether a specific individual is barred. A second is to register with the ISA so as to be automatically informed if a specified person becomes barred. In both cases, the regulated activity provider would require the consent of the individual in question.

⁴⁷ PBC Deb 10 May 2011 c561.

70. Clause 72 requires a regulated activity provider to check whether a person is barred before allowing them to engage in regulated activity. The clause sets out various means (eg checking an enhanced CRB certificate) whereby the duty can be satisfied.
71. The net effect of these changes is that: (i) fewer people will be placed on the barring lists; and (ii) there is a reduction in the range of work from which those placed on the barring lists are excluded. As pointed out above, though, it appears that there will not be an equivalent reduction in the range of individuals for whom CRB disclosures can be obtained.
72. In relation to **CRB checks** (and apart from the points made above), see generally Pt 5, Chapter 2 of the Bill.

Opportunity to challenge

73. The effect of cl 78 is that a certificate will be issued to the applicant only, not to the applicant and the proposed employer simultaneously. The rationale is that this will give the applicant an opportunity to challenge the contents of the certificate before the employer sees it, in particular (see below) by requesting a review of the inclusion of non-conviction information in an enhanced CRB certificate. The right to challenge would be significantly undermined if it could only be exercised after the employer had seen the certificate. The potential disadvantage is that where there is a challenge there may be a delay before the employer sees the certificate, and this could potentially mean that any job opportunity was lost: but this may simply be an inevitable consequence of introducing a right to challenge.

Test for inclusion of non-conviction information

74. The test for the inclusion of non-conviction information in enhanced CRB certificates is to be amended: see cl 80. The current test is that information is included if in the opinion of the chief officer of police it “might be relevant” and ought to be included. The proposed new test refers to information which the chief officer “reasonably believes to be relevant” and which in the chief officer’s opinion ought to be included.
75. Provision is also made in cl 80 for the applicant to challenge the inclusion of non-conviction information in a CRB certificate. Where this is done, the inclusion is reviewed by a chief officer of police, but the final decision is taken by the independent monitor (appointed under s 119B of the Police Act 1997).

Continuous updating of certificates

76. Clause 81 introduces new s 116A into the Police Act 1997, providing a mechanism whereby certificates can be updated on a continuous basis. The applicant would need to subscribe to the updating arrangements at the time of his application for a certificate and annually thereafter.

Convictions for consensual gay sex

77. The Programme for Government included a pledge that historical convictions for consensual gay sex with over 16s would be treated as spent and would not show up on criminal record checks. The pledge is somewhat confusing. Its language implies that spent convictions do not show up on criminal record checks: but a standard or enhanced CRB check will cover *all* convictions, whether or not they are spent.

78. Consensual sex between men over the age of 21 was decriminalised by s 1 of the Sexual Offences Act 1967. The age of consent was lowered to 18 in 1994,⁴⁸ and then to 16 in 2000.⁴⁹ However, it remains the case that convictions for offences involving consensual gay sex with men under 16 are recorded on the Police National Computer (PNC) and will be shown on standard or enhanced CRB checks.
79. Part 5, Chapter 4 of the Bill contains provisions that will allow a person convicted or cautioned for such an offence to apply to the Secretary of State to have the conviction or caution disregarded. The conviction will be disregarded if the Secretary of State decides that it appears that the other person involved in the conduct consented to it and was aged 16 or over, and that any such conduct would not now be an offence under s 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory).

“Disregarding”/”deletion”

80. A disregarded conviction or caution is to be “deleted” from official records: cl 91. However, deletion bears a special meaning: it involves recording, alongside the details of the conviction or caution concerned, the fact that it is disregarded, and the effect of this. So “deletion” here involves adding information to the existing record rather than taking information out of it. It is unclear why the information cannot simply be deleted in the ordinary, everyday sense of the word.
81. A disregarded conviction or caution is not required to be disclosed under any enactment, rule of law or agreement: so it will not be included in a standard or enhanced CRB disclosure. Otherwise, it is treated similarly to a spent conviction: it is not a proper ground for dismissing or excluding a person from any employment, or from prejudicing a person in any employment.

Overall effect of changes

82. The overall effect of the changes to the CRB regime is to improve the position of applicants, particularly in relation to the inclusion of non-conviction information in CRB disclosures. The test for inclusion is more rigorous; and there is a higher level of procedural protection, with an opportunity to challenge the decision to include the information at a stage before the prospective employer will see the certificate.
83. On the other hand, the most controversial current feature of the disclosure regime remains in place: namely, the disclosure to prospective employers of non-conviction information. I return, in the final section of this paper, to the question of whether this is appropriate and desirable.

Other reform proposals

84. The Protection of Freedoms Bill reflects the two reviews referred to above (relating to the ISA scheme, and the criminal records regime). The latter review, by Sunita Mason,

⁴⁸ By ss 143 and 145 of the Criminal Justice and Public Order Act 1993.

⁴⁹ By s 1 of the Sexual Offences (Amendment) Act 2000.

includes a recommendation for a filtering mechanism so that not all criminal convictions are included in CRB disclosures: see recommendation 5 in the review. According to the Mason Review, a panel of independent experts has been set up to make recommendations about filtering, and will report later this year: this is the Independent Advisory Panel for the Disclosure of Criminal Records (IAPDCR).⁵⁰

85. Separately, in December 2010 the Government published a Green Paper, “Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders”.⁵¹ There is a promise to reform the Rehabilitation of Offenders Act 1974 (see §§107 and 113-118). Specific suggestions include:

- broadening the scope of the Act so that it covers all offenders who receive a determinate sentence;
- reducing the length of rehabilitation periods;
- producing a clearer, simplified classification of rehabilitation periods, with perhaps as few as two or three classes; and
- modernising and simplifying the language of the legislation.

86. A further document was published by Government in June 2011, following consultation.⁵² There is no mention of any proposals regarding the Rehabilitation of Offenders Act 1974.

I. HAVE WE GOT THE SYSTEM RIGHT?

Complex reforms

87. The vetting system is legally complex, and the proposed reforms will do little to reduce its complexity. Standing back from all of the detail, the reformed system will consist of four main elements:

- (i) Prospective employees will be protected from having to disclose spent convictions.
- (ii) However, there will be wide-ranging exceptions, entitling employers to be provided by a Government agency with a comprehensive list of convictions, both spent and unspent, for particular categories of employee.
- (iii) Employers will also be entitled, in a wide range of circumstances, to find out about allegations that have not led to a criminal conviction or have not even been tested at trial.

⁵⁰ The terms of reference for the IAPDCR are at Appendix D to the Mason Report: <http://www.homeoffice.gov.uk/publications/crime/criminal-records-review-phase1/criminal-records-review?view=Binary>

⁵¹ See <http://www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf>

⁵² See <http://sentencing.justice.gov.uk/breaking-the-cycle-response.pdf>

- (iv) There will be statutory barring lists, maintained by a Government agency: individuals on those lists will be prohibited from working with children or with vulnerable adults.

88. Although the proposed reforms are welcome, there remain fundamental problems with each of these four elements.

Rehabilitation of Offenders Act: fit for the 21st century?

89. Although the Act is almost 40 years old, its objective remains valid and important. If a criminal conviction wrecks an individual's employment prospects for life then this is both unfair to the individual and damaging to society as a whole. The risk of further offending, inevitably, will increase as a result. So it is worth preserving the principle that most convictions should become spent, after a set period has passed during which the individual has not reoffended.

90. The fundamental problem is with the way in which the current legislation gives effect to this objective. Its approach is to try and prevent employers from finding out whether individuals have spent convictions. Employers are not entitled to obtain this information from official records, and if they ask for it then prospective employees are not obliged to answer. There are two difficulties with this.

- One is that the legislation operates, in effect, by allowing individuals to tell what would otherwise be regarded as a lie. An employer says: "Do you have any criminal convictions?" The individual says no: but what this may mean is "No, I do not have any unspent convictions, but I do have a spent conviction - however, you are not entitled to know about it and I do not have to tell you about it". Encouraging what would in ordinary circumstances be regarded as dishonesty is an odd way in which to try to rehabilitate a person with a criminal record.
- The second main problem is that, the more information about every one of us becomes publicly available and readily searchable on the Internet, the less valuable the legislation will be. At present, its focus is on trying to stop the employer from finding out about spent convictions: but technological change makes this an increasingly unrealistic objective.

A better approach: discrimination law model

91. A better approach would be to focus, not on preventing employers from finding out about spent convictions, but on preventing them from taking them into account. Discrimination law provides a helpful model here. Employers are already well aware that they cannot take account of matters such as race, sex or sexual orientation when making employment decisions. It is a short step to provide, in addition, that they cannot take account of spent convictions.

92. It is suggested, therefore, that new legislation should be enacted, replacing the Rehabilitation of Offenders Act 1974, and adopting an approach based on discrimination

law.⁵³ In outline, employers generally (both public and private sector) should be prohibited from discriminating against an individual on the ground that:

- the individual has a spent conviction;
- the individual has refused to answer questions about their spent convictions; or
- the individual has given inaccurate or incomplete answers to questions about their spent convictions.

The provision should cover all forms of discrimination, including in relation to: recruitment; terms and conditions; promotion; access to training; and dismissal. Complaints of discrimination should be dealt with by Employment Tribunals, as is the case for all other forms of employment discrimination.

93. Alongside these provisions, there should be specific prohibitions on seeking information about spent convictions, whether from the prospective employee or third parties.
94. If an employer discriminates on the ground that an individual has a spent conviction, or asks a prohibited question, then the individual should be able to complain to an Employment Tribunal. Assuming that the same approach is adopted as for other forms of employment discrimination, compensation would be available both for financial loss and for injury to feelings. For instance, an individual who was turned down for a job could claim compensation for the period of time it would take him to find equivalent work. In the case where an employer asked a prohibited question, but where there was no evidence of any other form of discrimination, it might be necessary for there to be a minimum level of financial award, in order to provide a sufficient element of deterrence: again, any complaint that the employer had asked a prohibited question should be brought in the Employment Tribunal.
95. This approach would adapt well-understood legal principles and remedies (namely, discrimination law as applied by Employment Tribunals) in order to achieve the objectives of the Rehabilitation of Offenders Act 1974.
96. At the same time, the prohibition on enforced subject access (in s 56 of the DPA) should be brought into force. Employers who sought to force individuals to exercise their own statutory right of access to their own criminal record, in order to circumvent the law about disclosure of spent convictions, would then be committing a criminal offence.

Disclosure of criminal convictions: too much information?

97. Inevitably, there will continue to be situations where employers are entitled to disclosure of spent convictions: especially where individuals are seeking to work with children or vulnerable adults, whether on a paid basis or as volunteers. The difficulty,

⁵³ A similar approach has been advocated by Unlock in their response to “Breaking the Cycle”: see <http://www.unlock.org.uk/userfiles/file/roa/BTC%20Consultation%20-%20UNLOCK%20response%20March%202011.pdf>

as highlighted in the *Chief Constable of Humberside* case, is that there is no effective filter. Either employers are only entitled to know about spent convictions; or they are entitled to know about all convictions, spent or unspent, however old or minor, as recorded on the PNC.

98. A filtering mechanism is required for cases where spent convictions are disclosable: as explained above, this is currently being considered by the IAPDCR. I would suggest a variation on the “step down” mechanism that was adopted prior to the *Humberside* case.
99. Spent convictions held on the PNC should be stepped down, by reference to factors such as: the seriousness of the offence; the length of sentence imposed; and the time elapsed since conviction. Prior to step down the conviction would automatically be included in any standard or enhanced disclosure. After step down, its inclusion would be discretionary. Even when a conviction had been stepped down, it would remain on the PNC for police operational purposes and for use within the criminal justice system (eg in relation to sentencing).
100. After step down, I would suggest that the same approach should be applied to a conviction as is set out in the Protection of Freedoms Bill in relation to non-conviction information. In other words:
 - the information would be considered for inclusion in an enhanced disclosure, but not a standard disclosure;
 - the information would only be included if a chief officer of police reasonably believed that it was relevant and ought to be included; and
 - there would be a right to challenge the decision to include.

Are we too soft on “soft intelligence”?

101. The disclosure of non-conviction information (or “soft intelligence”) is perhaps the most difficult problem to which the vetting system gives rise. There is something repugnant about the disclosure to prospective employers of allegations for which an individual has been tried and acquitted, or that have never been tested in court. On the other hand, especially where there is a pattern of similar allegations against an individual, the overall conclusion may well be that they pose an unacceptable risk if allowed to work with children or vulnerable adults. There is also a pragmatic consideration: as pointed out above, it is extremely difficult for individual employers to form any judgment about the cogency of allegations disclosed to them by way of soft intelligence.
102. Soft intelligence cannot be ignored: the question is, who should consider it? I would suggest that this is pre-eminently a task for an independent expert body, such as the proposed new DBS. The model I have in mind is that, in those cases for which an enhanced check is available, a chief officer of police should consider whether there is relevant non-conviction information that ought to be disclosed. If the answer is yes, then the information should be disclosed to the DBS, rather than to the prospective

employer. It would then be for that body to consider the information and to decide whether the individual should be placed on a barring list.

103. In the suggested approach, prospective employers would continue to receive conviction information, of different kinds.

- Most employers would only obtain information about unspent convictions. The employee would be able to obtain a basic disclosure certificate giving this information, and could show it to the prospective employer.
- Those employers who were entitled to see a standard disclosure certificate would see information about unspent convictions, and also about any spent convictions that had not been “stepped down”.
- Those employers who were entitled to see an enhanced disclosure certificate would see the same information as for a standard disclosure; in addition they might see information about convictions that had been stepped down, though this would be a matter for a discretionary decision by the police.

However, non-conviction information would not go to employers. Instead it would be provided to the DBS, for them to consider whether the individual should be barred.

104. The outcome would be that an individual would not be disadvantaged by the disclosure of non-conviction information, except in those circumstances where the DBS considered that the information was sufficiently serious to justify a decision to bar them from the area of work altogether. Employers would be spared the task of having to assess the information and judge its reliability.

The barring regime

105. In the suggested approach the barring regime operated by the ISA (or in future the DBS) would play a central role. There are two important aspects of that regime that would need attention: the provision of information to the ISA (or any successor body), and rights of appeal.

106. As explained above, under the suggested approach the ISA would receive the information that is currently provided to employer by way of “soft intelligence”. I would also suggest that in all cases where there is a finding of fact in non-criminal proceedings that an individual has deliberately caused harm to a child or vulnerable adult, then that finding should be reported by the court to the ISA, for them to consider whether a barring decision should be made.

107. As far as rights of appeal are concerned, it is essential that there should be proper provision for challenging barring decisions. Their impact on individuals is obviously grave. Except in cases where a particular criminal offence is so severe that barring is automatic, there should be a right of appeal to an independent tribunal. At present the appeal is to the Upper Tribunal, which seems an appropriate level within the judicial system. However, the right of appeal is limited by s 4 of the SVGA 2006, which provides that an appeal lies on a question of law or fact but the decision as to whether an individual ought to be barred is not a question of law or fact. I would suggest that

this provision should be revised. The appellate tribunal should be able to make its own findings of fact, and to substitute its own decision as to whether barring is an appropriate response.

J. BEYOND THE PROTECTION OF FREEDOMS BILL?

The route to fair balance

108. The Protection of Freedoms Bill is welcome, so far as it goes: but there remain fundamental problems with the vetting system. The debate needs to be expanded beyond the issues addressed in the Bill, so that there is proper consideration of the rehabilitation of offenders, and of the way in which information on the PNC is used. We have not yet succeeded in striking a fair balance between rehabilitation, individual fairness, and the protection of the vulnerable. There is more work to be done: it is hoped that this paper will contribute.