

# **We Know What you did Last Summer, and 30 Years ago: Criminal Records Disclosure and State Regulatory Discretion**

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## **Introduction**

Aleksandr Solzenitzin is famously attributed with the saying ‘Everyone is guilty of something or has something to hide. One just has to look hard enough to find it’.<sup>2</sup> Most people manage to keep their guilty secrets precisely that, secret. Youthful indiscretions and adult ‘moments of madness’ are normally buried in the past and remain there, never to see the light of day again. Such events are viewed as forming part of an individual’s private life, and so entitled to the respect enshrined in the European Convention of Human Rights.<sup>3</sup> Even where proceedings against an individual take place in a public forum, such as a conviction in a criminal court, ‘As the conviction recedes into the past, it becomes part of the individual’s private life’.<sup>4</sup>

For a large, and apparently growing,<sup>5</sup> number of citizens of England and Wales, however, this is not the case, and their mistakes of the past are still coming back to haunt them many years after the event. In an attempt to protect the public from those with criminal histories who may do the public some harm, whilst preserving respect for civil liberties, the UK government created the present system of criminal records disclosure.<sup>6</sup> The system has been criticised for failing to achieve the appropriate balance, leaving the Government open to claims of violations of human rights.<sup>7</sup> In this paper, I examine the difficulties caused by the current system of criminal records disclosure for those with old or relatively trivial criminal pasts for whom the system is an ever present barrier to their rehabilitation and reintegration into society.

Some recently available statistics can be used to illustrate the themes of this research. The Disclosure and Barring Service (DBS), the body tasked with administering the criminal records disclosure system in England and Wales,<sup>8</sup> has produced a dataset of criminal records certificate disclosures for the year between April 2015 and March

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<sup>2</sup> Aleksandr Solzhenitsyn, *Cancer Ward* (Nicholas Bethell and David Berg trs, Farrar, Straus and Giroux, New York 1968) 192.

<sup>3</sup> European Convention on Human Rights 1950, Art 8(1).

<sup>4</sup> *R(on the application of T) v Chief Constable of Greater Manchester Police* [2013] EWCA Civ 25 [33] (Lord Dyson MR).

<sup>5</sup> Chris Baldwin, ‘Necessary Intrusion or Criminalising the Innocent? An Exploration of Modern Criminal Vetting’ (2012) 76 *Journal of Criminal Law* 163.

<sup>6</sup> Sunita Mason, ‘A Common Sense Approach: A Review of the Criminal Records Regime in England and Wales: Report on Phase 1’ (Home Office, February 2011) 12.

<sup>7</sup> Elena Larrauri Pijoan, ‘Criminal Record Disclosure and the Right to Privacy’ [2014] 10 *CrimLR* 723.

<sup>8</sup> This government agency was initially known as the Criminal Records Bureau (CRB) when created in 2002, but has administered the disclosure system in its present form since December 2012 under the provisions of the Protection of Freedoms Act 2012 (Disclosure and Barring Scheme Transfer of Functions) Order 2012, SI 2012/3006.

2016.<sup>9</sup> This information reveals that during the course of the year, 4.214 million DBS certificates were issued, of which only 301,893 were ordinary disclosure and 3.912 million were enhanced disclosure requests. The differences between 'ordinary' and 'enhanced' disclosure are discussed in more detail in the next section of this paper, but it should be noted that the process of 'enhanced' disclosure represents a significantly more intrusive examination of the applicant's previous history than 'ordinary' disclosure. The total number of certificates issued appears to be generally stable and consistent compared with the previous three to four years, but there appears to be a disproportionate increase in the number of enhanced certificates applied for than in preceding years.<sup>10</sup>

Of the total number of certificates, both ordinary and enhanced, some 252,419 disclosed convictions or cautions or some other information recorded against applicants on the Police National Intelligence Computer. This represents approximately 6% of all certificates issued. It is not possible to discern from these statistics how many of the disclosed convictions and cautions would have been regarded as 'spent', and therefore exempt from disclosure, had the applicant been seeking a different job or position. The same statistics also record that there were 1.14 Million 'PLX Hits' during the year. This is the 'Police Local Cross Referencing System', which locates all data known to the police about an individual applicant, not just criminal convictions or cautions. From this number of 'hits', it is interesting to note that only 9,692 certificates issued disclosed 'non-conviction' information. This would suggest that, although the number of applicants adversely affected by criminal records disclosure is relatively low in percentage terms when compared with the number of certificates issued, there are still potentially tens of thousands of people each year having their right to respect for private life unlawfully violated by the state.

After this introductory section, I will consider the legal framework in which disclosure is made. I will then look at how that framework is to be applied to decisions to disclose information as interpreted by the courts. The analysis divides into two main issues – whether the information should be disclosed at all, and what the recipient of the disclosure does with that information. I consider the findings of the study on both of these issues in the fourth and fifth sections respectively of this paper. Finally, I draw some conclusions from the analysis and suggest some resolution of the difficult question of where to draw the balance between protection of the public and rehabilitation and reintegration.

I have adopted a mainly qualitative research method for this study, as this enables a more in depth analysis of the views and attitudes which underlie the actions of those involved in the disclosure system. The research was mainly desk based, analysing data from existing literature and previous research, court decisions in relevant case law, publicly available documents and records from the police, the DBS, and state and professional regulators. The gathered information was subjected to a thematic analysis along the lines of the issues identified from the preliminary review of the legislation, case law and existing literature. This enabled some conclusions to be drawn and recommendations for reform to be made.

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<sup>9</sup> DBS, 'Datasets: Police Disclosure Performance: April 2015 to March 2016' (24<sup>th</sup> April 2016) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/519805/Dataset\\_1\\_disclosure\\_content\\_and\\_performance\\_March16.ods](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/519805/Dataset_1_disclosure_content_and_performance_March16.ods) .

<sup>10</sup> According to figures from the DBS itself and from those cited by Mason (n 5) and Baldwin (n 4).

## Legal Framework

The current legal framework can be found in the combined provisions of the Rehabilitation of Offenders Act 1974 (ROA) and the Police Act 1997. The ROA provides for persons with convictions for criminal offences not to be questioned about those offences,<sup>11</sup> and not to be under any obligation to disclose the fact of conviction,<sup>12</sup> once those convictions have become ‘spent’ under the Act.<sup>13</sup> Similar provisions are made in respect of individuals whose offence was disposed of by way of a caution.<sup>14</sup> The ROA also provides that individuals who do not disclose spent convictions in answer to such a question should not be prejudiced in law by reason of their non-disclosure,<sup>15</sup> nor is the fact of or failure to disclose a spent conviction legitimate grounds for dismissing or excluding an individual from any ‘office, profession, occupation or employment’.<sup>16</sup>

So far, so good one might think from a rehabilitative point of view for those with historical convictions or cautions recorded against them. However, the provisions of the ROA are subject to a large number of exclusions and modifications, which are determined by the Secretary of State.<sup>17</sup> The exemptions to the ROA provisions are set out in statutory instrument<sup>18</sup> and are based on the nature of the occupation applied for rather than on the nature of the offence or its disposal. The statutory instrument has been amended to add further occupations to the excepted list on no fewer than eighteen occasions since inception, the most recent incarnation coming into force on 10<sup>th</sup> March 2015<sup>19</sup>. The initial set of exempt occupations included those that had contact with children, however obliquely, but has now expanded to a plethora of other employments.<sup>20</sup> The exemptions list was described as ‘exceedingly long’<sup>21</sup> as long ago as 2009, and has become much longer since, now extending to occupations as diverse as traffic wardens, actuaries, football stewards, doctor's receptionists, and all jobs which may involve the humane killing of animals.<sup>22</sup> Applicants for positions which fall within this long list of exceptions may be questioned about their criminal records and are obliged to disclose all convictions and cautions, even those which are spent, regardless of relevance to the position applied for.

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<sup>11</sup> Rehabilitation of Offenders Act 1974, s 4(2).

<sup>12</sup> *ibid*, s 4(3).

<sup>13</sup> *ibid*, s 5. A conviction will become ‘spent’ after a variable period of time following conviction, depending on the sentence imposed.

<sup>14</sup> *ibid*, s 8A and Sch 2. Conditional cautions are spent as soon as the conditions are complied with; other cautions are spent as soon as they are issued.

<sup>15</sup> *ibid*, s 4(2)(b).

<sup>16</sup> *ibid*, s 4(3)(b).

<sup>17</sup> *ibid*, s 4(4).

<sup>18</sup> Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, SI 1975/1023.

<sup>19</sup> Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2015, SI 2015/317. The eighteen amendments all applied to England and Wales, there have been alternative amendments which applied to Scotland only.

<sup>20</sup> AR Mears, ‘Rehabilitation of Offenders – Does the 1974 Act Help Them?’ (2008) 55(2) Probation Journal 161.

<sup>21</sup> *Chief Constable of Humberside v Information Commissioner* [2009] EWCA 1079; [2010] 1WLR 1136 [112] (Hughes LJ).

<sup>22</sup> Disclosure and Barring Service, ‘A Guide to Eligibility for DBS Checks’ (19<sup>th</sup> March 2015 update).

The Police Act 1997 makes provision for two types of disclosure of criminal records - 'ordinary' criminal records certificates and enhanced criminal records certificates.<sup>23</sup> For current purposes, the essential framework of the disclosure system covering both types of certificate centres on statutory powers granted to the DBS.<sup>24</sup> A crucially important similarity between the two types of disclosure is that, where the statutory criteria are satisfied, the DBS has a mandatory duty to supply the certificate containing the applicant's criminal record details (or certify that there are no such details).<sup>25</sup> The criteria, although complex in their wording, are not unduly onerous. The essential requirements are that the applicant for a criminal records certificate is aged over sixteen, pays the prescribed fee,<sup>26</sup> has the application counter-signed by a 'registered person'<sup>27</sup> to attest that the certificate is required for the 'purposes of an exempted question',<sup>28</sup> and, in the case of an enhanced certificate only, that the exempted question is being asked for 'a prescribed purpose'.<sup>29</sup> Exempted question in this context means a question about previous convictions or cautions which is exempt from the non-disclosure provisions of the ROA by order of the Secretary of State.<sup>30</sup> The notion of 'prescribed purpose' in these provisions is worthy of closer scrutiny.

A 'prescribed purpose' is defined as one which is prescribed by Regulation 5A of the Police Act 1997 (Criminal Records) Regulations 2002.<sup>31</sup> This Regulation provides a list of 'purposes', which are directed towards assessing the applicant's 'suitability' to hold certain positions or authorisations.<sup>32</sup> The various purposes listed in the Regulations overlap, but are not co-extensive with, the list of occupations exempted from the ROA under the 1975 Order. Indeed, the prescribed purposes are, for the most part, not occupation specific, but are categorised by general activities linked to a common theme. Two important prescribed purposes are those relating to suitability for positions working with children,<sup>33</sup> and working with adults.<sup>34</sup> In both cases, 'working with' is very broadly and loosely defined to include any form of contact with children or vulnerable adults in any way, regardless of circumstances or remoteness of possibility. Working with a particular group for these purposes also encompasses provision of health or social care services, even to adults who are not necessarily

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<sup>23</sup> Police Act 1997, s 113A and s 113B.

<sup>24</sup> This government agency was initially known as the Criminal Records Bureau (CRB) when created in 2002, but has administered the disclosure system in its present form since December 2012 under the provisions of the Protection of Freedoms Act 2012 (Disclosure and Barring Scheme Transfer of Functions) Order 2012, SI 2012/3006.

<sup>25</sup> Police Act 1997, s 113A(1) and (3); s 113B(1) and (3).

<sup>26</sup> *ibid*, s 113A(1) and 113B(1).

<sup>27</sup> Defined as a person registered with the DBS as being likely to ask exempted questions – Police Act 1997, s 120. This covers employers and regulators in all the occupations excepted from the ROA provisions.

<sup>28</sup> Police Act 1997, s 113A(2) and s 113B(2).

<sup>29</sup> *ibid*, s 113B(2).

<sup>30</sup> *ibid*, s 113A(6).

<sup>31</sup> SI 2002/233 – Promulgated under powers contained in Police Act 1997, s 125(2) and inserted into the 2002 Regulations by Police Act 1997 (Criminal Records)(Amendment) Regulations 2006, SI 2006/748.

<sup>32</sup> *ibid*, Reg 5A (a)-(o) as amended by later statutory instruments. The main purposes are the applicant's suitability to: work with children; work with adults; to hold a Gambling Act 2005 licence; hold a National Lottery Act 1993 licence; act as an immigration adviser; hold a Misuse of Drugs Act 1971 licence; hold a Firearms Act 1968 licence; be employed in national security; and hold a taxi driver licence.

<sup>33</sup> *ibid*, Reg 5C.

<sup>34</sup> *ibid*, Reg 5B.

vulnerable, including transportation of such adults, and covers those whose function is to manage or supervise the work of employees providing such services.<sup>35</sup> The point is that relating disclosure of spent convictions and other criminal records material to a 'prescribed purpose' opens up the field of persons who may be subject to disclosure, even where their connection to that purpose may be tangential.

Where the criteria are met, the DBS is under a mandatory duty to provide a certificate disclosing every 'relevant matter', by which is meant all unspent convictions and cautions, all spent convictions for which a custodial sentence was imposed, spent convictions for more than one offence, and spent convictions and cautions for any one of the long list of offences which appear in section 113A(6D) of the Act.<sup>36</sup> The list of offences for which conviction or caution will always be disclosed irrespective of when committed runs to some 14 sub-paragraphs, some of which contain more than one offence, and others of which include offences which are identified by list or schedule in other legislation, such as the Safeguarding of Vulnerable Groups Act 2006.<sup>37</sup> In addition to disclosure of convictions and cautions, in the case of an 'enhanced' certificate, the DBS are obliged to disclose further information which does not relate to convictions or cautions.<sup>38</sup> In relation to disclosure of this additional information, there is some element of discretion, but it is not that of the DBS. The information to be disclosed is that which the chief officer of police 'reasonably believes to be relevant' for the prescribed purpose and which in the officer's opinion 'ought to be included in the certificate'.<sup>39</sup> The information disclosed under this section is the so called 'soft intelligence',<sup>40</sup> that is police records of unsubstantiated or false allegations, arrests and interviews with no charges being brought, charges dropped or charges upon which the applicant was acquitted. It is disclosure of this type of information which has proved to be the most controversial and has spawned the most judicial and academic comment.<sup>41</sup> It should be emphasised that disclosure of this information is mandatory in the hands of the DBS once the chief officer of police has exercised discretion in favour of disclosure.

That is not to say that the DBS has no discretion whatsoever when it comes to exercising its powers under the Police Act, but any such discretion is confined to which type of certificate is issued - ordinary or enhanced. The DBS may treat an application for an ordinary certificate as an application for an enhanced certificate, and *vice versa*, so long as the statutory criteria for that level of disclosure are met.<sup>42</sup>

There are three significant differences between ordinary and enhanced criminal records certificates. The first is that for standard disclosure the position which the applicant is seeking needs to be one which is an exception to the general rule against

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<sup>35</sup> *ibid*, Reg 5B.

<sup>36</sup> Police Act 1997, s 113A(3) and 113B(3). This is in keeping with the pre-Police Act 1997 position that exceptions to non-disclosure provisions extended to those in administrative roles as well as those with direct contact with vulnerable groups – *Wood v Coverage Care Ltd* [1996] IRLR 264.

<sup>37</sup> *ibid*, s 113A(6D).

<sup>38</sup> *ibid*, s 113B(3).

<sup>39</sup> *ibid*, s 113B(4).

<sup>40</sup> In the literature and case law, this class of information is variously referred to as 'non-conviction information', 'soft disclosure', or 'criminality information' as well as 'soft intelligence'. The phrase 'soft intelligence' is used throughout this paper to denote all information of this type.

<sup>41</sup> Baldwin (n 5).

<sup>42</sup> Police Act 1997, s 113A(5) and 113B(7).

asking an ‘exempted question’.<sup>43</sup> There is no requirement to consider the purpose for which that question is being asked. Enhanced disclosure, however, is only available if the applicant’s proposed activity is covered both by the exceptions under the ROA Exceptions Order and falls within a prescribed purpose.<sup>44</sup> The second difference is that standard certificates only disclose convictions and cautions, whereas enhanced certificates additionally disclose, at the discretion of the chief of police, the ‘soft intelligence’ held by the police about an individual applicant. The third difference is the fee payable by the applicant to the DBS for the different levels of certificate.<sup>45</sup> This fee differential provides the DBS with a financial incentive to issue enhanced certificates, even where such a level of disclosure may be entirely unnecessary.

The criminal records disclosure system in England and Wales operates within a complex framework of two main statutes supplemented by a bewildering array of amending statutory instruments and official guidelines. Essentially the regime makes disclosure of convictions and cautions mandatory if a former offender is seeking a particular job or position. Further non-conviction information must also be disclosed, if the police believe it ought to be disclosed, where the ex-offender is seeking a particular job where his or her suitability to perform that job has to be assessed because of the nature of the position. The numbers of positions and persons affected by these disclosure rules is growing. Because of the complexity of the legislative scheme, the next section will consider how the regime is applied in practice and in particular its impact on the rights of the individuals affected.

### **Where is the law now?**

In November 2012, the European Court of Human Rights ruled, in the case of *MM v United Kingdom*, that the criminal record disclosure system in England and Wales, at it stood at the time, violated the rights of citizens to respect for their private lives under Article 8 of the European Convention on Human Rights, and such a violation could not be justified as a necessary or proportionate means of achieving the legitimate aim of protecting the public. The system was criticised for drawing no distinction based on the nature of the offence, the way in which the case was disposed of, the time elapsed since commission of the offence, or the relevance of the information to the position for which disclosure was sought.<sup>46</sup> The disclosure regime came under scrutiny again before the domestic courts less than three months later, when the Court of Appeal delivered its judgment in *R(on the application of T) v Chief Constable of Greater Manchester Police*.<sup>47</sup> This now well known case involved two individuals, both of whom had received cautions for theft many years prior to their applications for enhanced criminal records certificates. The Court of Appeal held that the disclosure of criminal records engaged Article 8 because such records, after a period of time, became part of an individual’s private life. The claimants’ Article 8 rights were violated because the system of disclosure ‘failed to strike a fair balance

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<sup>43</sup> DBS (n 22)-The position sought by the applicant would have to be an exception under the 1975 Order to allow the prospective employer to ask the exempted question ‘do you have any criminal convictions or cautions?’.

<sup>44</sup> DBS (n 22) - That is a purpose provided for by the Police Act 1997 (Criminal Records) Regulations 2002, Reg 5A.

<sup>45</sup> DBS (n 22) At the time of writing the relevant fees are £26 for an ordinary certificate and £44 for enhanced.

<sup>46</sup> *MM v United Kingdom* (24029/07, ECtHR, 13<sup>th</sup> November 2012).

<sup>47</sup> [2013] EWCA Civ 25; [2013]1WLR 2515.

between their rights and the interests of the community'.<sup>48</sup> The Court of Appeal issued a declaration that the provisions of the Police Act 1997 and the ROA were incompatible with Article 8.<sup>49</sup> This decision was upheld on the Police Act point by the Supreme Court in the subsequent appeal.<sup>50</sup> The Supreme Court agreed with the Court of Appeal that the criminal record certificate provisions were incompatible with Article 8 and the interference with an individual's private life which they represented was not in accordance with the law<sup>51</sup> or necessary in a democratic society.

In between the Court of Appeal and Supreme Court decisions, the UK Government, no doubt seeing the way in which the wind was blowing, amended the criminal records disclosure system by introducing the concept of the 'protected conviction and caution'.<sup>52</sup> The Supreme Court declined to comment on the changes and based its decision exclusively on the pre-amendment regime. The new 'filtering rules' provided for certain convictions and cautions not to be disclosed on certificates if more than eleven years had elapsed since conviction (six years in the case of cautions), it was the applicant's only conviction, it did not result in a custodial sentence, and the offence did not appear on a DBS compiled list of offences relevant to safeguarding.<sup>53</sup> Commentators, however, felt that the amendments amounted to no more than 'tweaking' the original system,<sup>54</sup> and the post-amendment regime would be no more respectful of human rights than the earlier one.<sup>55</sup> Given the minor nature of changes, and the fact that this leaves those with recent but otherwise spent convictions, two minor convictions, or a conviction disposed of by a short period of imprisonment, vulnerable to disclosure, these comments would appear to be well founded.

The courts have given a mixed reception to the amendments with regard to their compatibility with Convention Rights. In *W v Secretary of State for Justice*,<sup>56</sup> the High Court held that disclosure of W's conviction for occasioning actual bodily harm at the age of 16, for which he received a two year conditional discharge, was, under the amended disclosure regime, prescribed by law and a proportionate means of addressing a legitimate aim in a democratic society. W was 47 years of age and of otherwise exemplary character when he had applied for an enhanced certificate with a view to becoming a teacher of English as a second language. A similar conclusion was reached in *R(on the application of SD) v Chief Constable of North Yorkshire*,<sup>57</sup> a case which did not involve a criminal conviction but a finding by a disciplinary panel

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<sup>48</sup> *ibid*, [50] (Lord Dyson MR).

<sup>49</sup> Human Rights Act 1998, s 4.

<sup>50</sup> *R(on the application of T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49 – The Supreme Court allowed the appeal against a declaration of incompatibility in respect of the ROA and its Exception Order.

<sup>51</sup> The basis of this finding was on identical grounds to those which formed the decision of the ECtHR in *MM v UK*. Lord Wilson dissented from the view of the other Supreme Court Justices on this point, but agreed with the remainder of the judgments.

<sup>52</sup> Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013, SI 2013/1198.

<sup>53</sup> *ibid*. The DBS, 'List of Offences That Will Never be Filtered From a DBS Certificate' (DBS, 2<sup>nd</sup> December 2013) runs to 31 pages, contains in excess of 1,000 separate offences, and contains such heinous common problem crimes as 'violating the female heir to the Crown', 'throwing missiles at a train', and 'soliciting for the purposes of prostitution'.

<sup>54</sup> Adam Jackson, 'Supreme Court' (2014) 78(6) *Journal of Criminal Law* 463, 465.

<sup>55</sup> Pijoan (n 7) 731.

<sup>56</sup> [2015] EWHC 1952; ACD 139.

<sup>57</sup> [2015] EWHC 2085; QBD 16<sup>th</sup> July 2015.

that a teacher had made inappropriate remarks of a sexual nature to an adult student. The High Court held that the interference with the teacher's privacy was justified as it came within the scope of Article 8(2).

However, in *P v Secretary of State for Justice*,<sup>58</sup> the claimants had been convicted of minor dishonesty offences, and in one case absconding whilst on bail, when aged in their late teens. The claimants were concerned that a criminal records certificate disclosing these offences may jeopardise their positions as a teaching assistant and a finance director respectively. The High Court in this case took the view that the amended disclosure system still infringed the claimants' Article 8 rights and that infringement was not according to law.<sup>59</sup> Shortly after this decision, another High Court judge ruled, in *G v Chief Const of Surrey Police*,<sup>60</sup> that disclosure of reprimands (the juvenile equivalent of cautions) received for sexual activity with young boys when the applicant was himself still a minor was an unjustified violation of the applicant's Article 8 rights.

The current position of the amended disclosure scheme is, therefore, somewhat unclear. This lack of clarity is exacerbated by the fact that most, if not all, of these recent decisions are likely to be considered by the appellate courts.<sup>61</sup> However, the general view seems to be that even the amended disclosure scheme still amounts to an unlawful and unjustifiable interference with Article 8 rights.<sup>62</sup> In the light of the uncertainty surrounding the legal position, the next section looks at the issue of whether the criminal record information should be disclosed at all.

### **Should the Information be Disclosed?**

There are two distinct aspects to this question. The first is whether there can be any justification for the disclosure of criminal records information where the data is old or irrelevant to the position for which the applicant has applied. The analysis of this aspect of the question will focus on the disclosure of spent convictions and cautions, but will also draw upon some of the available literature, case law and data in respect of disclosure of soft intelligence where this illustrates the point being made. The second aspect is whether the correct level of disclosure is being sought in all cases and whether more use should be made of the standard records certificates.

The sentencing framework in England and Wales is underpinned by a combination of what are traditionally seen as utilitarian and limited retributive theories of punishment.<sup>63</sup> Indeed, the main sentencing statute provides that two of the purposes of sentencing, amongst others, are the reform and rehabilitation of the offender<sup>64</sup> and the

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<sup>58</sup> [2016] EWHC 89; [2016] 1WLR 2009.

<sup>59</sup> *ibid*. In view of this finding, it was not strictly necessary for the court to consider the proportionality point but the court held that, had it been necessary to do so, it would have found the interference a disproportionate means of achieving a legitimate aim.

<sup>60</sup> [2016] EWHC 295; [2016] 4WLR 94.

<sup>61</sup> Permission to appeal was granted in *SD* in November 2015. Applications for permission to appeal have been listed for hearing in *W* and in *G* in February 2017.

<sup>62</sup> RA Easton, 'Forgiven and Forgotten?: Disclosure of Criminal Records' (2016) 160(11) Sol Journal 25.

<sup>63</sup> J Halliday, 'Review of the Sentencing Framework for England and Wales' (Home Office, London 2001).

<sup>64</sup> Criminal Justice Act 2003, s 142(c).

protection of the public.<sup>65</sup> Ashworth describes this as ‘pick and mix’ sentencing<sup>66</sup> in that it is not possible to achieve all those purposes simultaneously and it is necessary to favour one over the others. This highlights the potential tension between the rights of offenders and public protection that the criminal records disclosure system is seeking to relieve. Given the underlying ethos of the criminal justice system, the question might be posed whether it is appropriate to continue to penalise offenders by disclosing convictions and cautions in the belief that this is justified as it prevents harm to the vulnerable. This tends to veer towards a more retributive form of punishment, suggesting that the offender deserves continued punishment because it serves a wider benefit to the public to do so, without any incentive for the offender not to re-offend.<sup>67</sup>

It is clear beyond doubt that the purpose and policy underpinning and embodied in the ROA was a rehabilitative and reformatory one.<sup>68</sup> The aim of the Act was to permit those with criminal records to reintegrate themselves back into useful members of society.<sup>69</sup> In the original form of the 1975 Order, the number of exceptions to the non-disclosure provisions of the Act was quite small. It was only over the intervening years that more and more occupations have been added. It was around the time of the passing of the ROA that it has been said that rehabilitative theories of sentencing were on the wane, only to undergo something of a revival in the past twenty-five years or so.<sup>70</sup> It is contended that the most influential approach towards rehabilitation of offenders over the last twenty years is one of risk management.<sup>71</sup> Although this approach has had its critics over the years, mostly on the grounds of lack of empirical support and a tendency to focus on offence based dispositions rather than the broader social and cultural context,<sup>72</sup> more nuanced versions of the risk management approach based on the importance of community in helping offenders desist are now very much to the fore.<sup>73</sup> Rehabilitative theories of punishment have been reinvented as a move towards risk management and re-branding in terms of resettlement and desistance.<sup>74</sup>

By contrast, the disclosure regime created by the Police Act 1997 seems to embody a much more retributive approach to punishment. It creates a scheme whereby the majority of offenders seeking certain positions are permanently stigmatised by the actual or potential sharing of criminal information about them with those who have the power to refuse entry to that position.<sup>75</sup> The Government’s own review of the regime claims to start from the principle that it is the criminal justice system which

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<sup>65</sup> *ibid*, s 142(d).

<sup>66</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (CUP, Cambridge 2010) 77.

<sup>67</sup> M Cavadino and J Dignan, *The Penal System: An Introduction* (2<sup>nd</sup> edn, Sage, London 1997) 39.

<sup>68</sup> Robert Banks, *Banks on Sentence* (11<sup>th</sup> edn, Robert Banks, Etchingham, East Sussex 2016) 90.3.

<sup>69</sup> Nicola Lacey, *State Punishment* (Routledge & Kegan Paul, London 1988).

<sup>70</sup> Ashworth (n 66) 86.

<sup>71</sup> DA Andrews and J Bonta, *The Psychology of Criminal Conduct* (5<sup>th</sup> edn, Matthew Bender & Co, New Providence, NJ 2010).

<sup>72</sup> RE Mann, ‘Managing Resistance and Rebellion Relapse Prevention Intervention’ in DR Laws, SM Hudson and T Ward (eds), *Re-making Relapse Prevention With Sex Offenders: A Sourcebook* (Sage, Thousand Oaks, CA 2000).

<sup>73</sup> S Casey, A Day, J Vess and T Ward, *Foundations of Offender Rehabilitation* (Routledge, London 2013).

<sup>74</sup> Gwen Robinson, ‘Late Modern Rehabilitation: The Evolution of Penal Strategy’ (2008) 8 *Punishment and Society* 429.

<sup>75</sup> Jamie Grace, ‘Old Convictions Never Die, They Just Fade Away: The Permanency of Convictions and Cautions for Criminal Offences in the UK’ (2014) 78(2) *Journal of Criminal Law* 122.

provides suitable punishment for offences and, having served their punishment, offenders have the right to re-enter society and have a normal life.<sup>76</sup> However, this position does not sit easily with the provisions of the Police Act. There has been a recognition that cultural barriers may exist to respecting the rights of offenders when it comes to protection of the public.<sup>77</sup> It is widely recognised that a significant factor in rehabilitating offenders is the ability to find and retain a job, and the permanent ‘branding’ of offenders is a major obstacle to their rehabilitation and reintegration.<sup>78</sup> In addition, there is a growing body of research which suggests that after a certain period of non-offending, criminal records are of little predictive value as to future offending.<sup>79</sup>

It is against this background that I consider the question of whether spent convictions, cautions and non-conviction data should be disclosed at all. In the case of convictions and cautions, an easy answer is that disclosure is mandatory under the Act, and so convictions and cautions must be disclosed in order to protect the public. This still does not answer the question, however, of why convictions and cautions are disclosed where they are very old, or have no relevance to the position applied for, or are so old as to be of no probative value in assessing the risk posed to the public by the applicant. Although not the main focus of this paper, it is instructive to examine how the police exercise their discretion to disclose soft intelligence. This sheds some light on whether it would be more appropriate for disclosure of all criminal records information to be discretionary rather than mandatory based on a test of relevance and the risk to the public posed by the applicant.

When chief police officers are asked to consider disclosure of soft intelligence information, they are required to perform a ‘two-stage’ test – is the information relevant to the purpose for which disclosure is sought? If so, ‘ought’ the information be disclosed.<sup>80</sup> In practice, the police make the decision to disclose by following the combined guidance of the ‘Statutory Disclosure Guidance’<sup>81</sup> and the ‘Quality Assurance Framework’. The guidance contains some assistance in interpreting the question of what is relevant and when ‘ought’ the information be disclosed, amongst the principles of disclosure. Relevant is said to be given its ordinary meaning of pertinent to, connected with or bearing upon the subject in question. The decision about whether the information ought to be disclosed is said to include consideration of the impact of disclosure on the applicant’s job and private life, but no further guidance than that is offered.

In evaluating how closely the chief officers follow these guidelines on the question of relevance, the starting point could be the facts of the leading case itself.<sup>82</sup> Although

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<sup>76</sup> Mason (n 6) 12.

<sup>77</sup> Grace (n 75) 135.

<sup>78</sup> DS Murphy, B Fuleihan, SC Richards and RS Jones, ‘The Electronic “Scarlet Letter”: Criminal Backgrounding and a Perpetual Spoiled Identity’ (2011) 50 *Journal of Offender Rehabilitation* 101.

<sup>79</sup> K Soothill and F Brian, ‘When do Ex-offenders Become Like Non-offenders?’ (2009) 48(4) *The Howard Journal* 373; SD Bushway, P Nieuwebeerta and A Bickland, ‘The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?’ (2011) 49(1) *Criminology* 27.

<sup>80</sup> *R (on the application of W) v Chief Constable of Warwickshire* [2012] EWHC 406; [2012] InfoTLR 371.

<sup>81</sup> Home Office, ‘Statutory Disclosure Guidance’ (Home Office, July 2012).

<sup>82</sup> *R (T)* (n 47).

this was a case involving cautions, and so disclosure was mandatory, had disclosure been discretionary, the question might be asked what the relevance was of theft of bicycles and false fingernails to positions in teaching and the care industry. In the post *R(T)* era, a number of other examples may be given of disclosures which appear to have little relevance to the position applied for. What risk, for example, would be run by employing a care worker with historical offences of failing to wear a seatbelt and failing to ensure her children did so at a residential home for the elderly?<sup>83</sup> Another example is the case of an applicant for a job in the healthcare industry with thirty-three years old convictions for drink driving and taking without the owner's consent.<sup>84</sup> It may be unfair to pose such questions hypothetically, given that they involve convictions and so are disclosable regardless of relevance. There are, however, other examples which illustrate the point with regard to the disclosure of soft intelligence too. For example, an applicant for a taxi driver's licence was turned down when his certificate revealed that he was awaiting trial on charges of 'fly-tipping'.<sup>85</sup> The same committee also refused a licence to an applicant whose otherwise clear certificate disclosed an arrest on suspicion of abduction of fourteen year old girl, fourteen years earlier, in the context of a family dispute, where the subsequent charge was dropped before trial.<sup>86</sup>

What the officers making the decision whether to disclose, and the Statutory Guidance itself, seem to overlook is the requirement of the Act that the relevance has to be to the 'prescribed purpose'. In other words there has to be some connection between the information disclosed and the applicant's suitability for the position, rather than just some vague or remote connection between the offence and the occupation. What the police appear to be asking themselves is whether there is some connection between the information being considered for disclosure and working, in the broadest possible sense, with children, vulnerable adults, holding a firearms licence and so on, without any regard to the likelihood of that connection ever existing in reality. The police officers responsible for disclosure do not appear to appreciate this subtle but crucial difference between linking an offence to a job and linking an offence to an applicant's suitability for that job.

Even where it is possible to see a relevant connection between the offence and the applicant's suitability for the position, there is still the second part of the test to overcome – whether the information ought to be disclosed. In this area too there are many examples where the decision to disclose is questionable. For example, whilst there is an obvious relevance to an applicant for a taxi driver's licence previous convictions for motoring and unlawful plying for hire offences, was it really necessary to disclose these when they occurred more than eight years previously?<sup>87</sup> In a case involving convictions for public order offences which were committed between twenty-one and fifteen years before an application for a taxi driver's licence was made, making a case for relevance is a stretch; an argument as to why this ought to

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<sup>83</sup> *Re Gallagher's Application for Judicial Review* [2015] NIQB 63.

<sup>84</sup> Unlock, 'Convictions and Employment Law' (January 2016) <[hub.unlock.org.uk/knowledgebase/convictions-employment-law-2](http://hub.unlock.org.uk/knowledgebase/convictions-employment-law-2)> accessed 5<sup>th</sup> April 2016.

<sup>85</sup> Newcastle City Council, 'Regulatory Appeals Sub-committee Minutes: 15/02557/TXDPH' (7<sup>th</sup> December 2015).

<sup>86</sup> *ibid*, '15/02071/TXDPH'.

<sup>87</sup> Bath and North East Somerset Council, 'Licensing Sub-committee Minutes: Item 33' (4<sup>th</sup> August 2015).

have been disclosed is difficult to see. A similar example may be seen in relation to a soft intelligence disclosure case, where an applicant acquitted of a charge of rape of a seventeen year old female had this fact disclosed on his certificate in relation to an application for a teaching position.<sup>88</sup>

It appears from the case law and regulatory data examples that when deciding whether soft intelligence ought to be disclosed, chief officers are still basing their decisions on the now defunct test of whether the allegation ‘might be true’, notwithstanding the absence of further action, the withdrawal of charges or the acquittal of the accused.<sup>89</sup> It is highly unsatisfactory to let police re-try the case of an acquitted defendant and decide that he did commit the offence after all. Of course the police will generally believe the allegations to be true, especially where an accused has been charged or tried. It is unsafe and unsatisfactory where individual rights are in issue to enable the police to re-assess the evidence in their own minds and decide that the allegations are true after all. This leads to the conclusion that the chief police officers are not the appropriate people to exercise the discretion necessary in such cases.

The other aspect of this question of whether information ought to be disclosed is whether the right levels of disclosure are being sought in all cases. Even as long ago as 2003, the Government itself pointed out that the number of Enhanced Disclosures outnumbered Standard Disclosures by ten to one.<sup>90</sup> Pijoan points out that, in practice, the enhanced certificate is the one that most employers apply for, probably because it is not simple to weed out the positions for which a standard certificate is required.<sup>91</sup> This is true, but a simpler explanation might be that it is all too easy to bring a position within the ambit of s 113B by some link, no matter how tenuous, to a prescribed purpose and a prospective employer will want to know the ‘full story’ about who they propose to take on as employee. There is no sanction provided for seeking the wrong level of disclosure. Any ‘registered’ person can seek enhanced disclosure as long as they certify that the ‘exempted’ question is likely to be asked for a ‘prescribed purpose’ under s 113B, and they pay the higher fee. Mason recommended that there be periodical reviews of the ‘registered bodies’ to ensure that they were adhering to their obligations with regard to the correct level of checks, with persistent offenders facing de-registration.<sup>92</sup> This recommendation was not taken up, but a revised Code of Practice from the DBS firmly places the burden on the counter-signing officer of the registered body to satisfy himself or herself that the person against whom disclosure is sought is eligible for that level of check under the Act.<sup>93</sup>

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<sup>88</sup> *R(on the application of AR) v Chief Constable of Greater Manchester Police* [2013] EWHC 1319; QBD 5<sup>th</sup> September 2013.

<sup>89</sup> *R(on the application of X) v Chief Constable of West Midlands Police* [2004] EWCA Civ 1018; [2005] 1WLR 65. This test was held to be incorrect by the House of Lords in *R(on the application of L) v Commissioner of Police for the Metropolis* [2009] UKSC 3; [2010] 1AC 410 which introduced a test of proportionality into this question.

<sup>90</sup> Home Office, ‘Breaking the Circle: Rehabilitation of Offenders Act Review’ (Home Office, April 2003).

<sup>91</sup> Pijoan (n 7) 726.

<sup>92</sup> Mason (n 6) 44.

<sup>93</sup> Home Office, ‘Revised Code of Practice for Disclosure and Barring Service Registered Persons’ (November 2015).

Although I have adopted a largely qualitative approach to this study, the recent statistics to which I referred in the introductory section,<sup>94</sup> formed part of the analysis of the issue of whether proper use is being made of the disclosure system. The DBS statistics indicate that, in the year April 2015 to March 2016, for every application for an ordinary criminal records certificate there were almost thirteen applications for enhanced certificates.<sup>95</sup> This shows a marked increase in the proportion of enhanced certificates being sought since the time of the Home Office's own review of the working of the ROA some twelve years earlier.<sup>96</sup> Such an increase would tend to suggest that more applicants, at the request of prospective employers, are bringing the job that they hope to do within the ambit of a 'prescribed purpose' under the 2002 Regulations.<sup>97</sup> On the basis of the number of 'PLX Hits',<sup>98</sup> it would appear that around 2.8 million applications could have been dealt with by an ordinary certificate, as there was nothing to disclose by way of convictions, cautions or soft intelligence. This overzealous and unnecessary use of the enhanced disclosure procedure, however, appears to be continuing unabated by the DBS.

In terms of the number of applications overall, the figures appear to have remained relatively stable and consistent over a number of years.<sup>99</sup> Intuitively this seems to be unexpected, given that during this period the Court of Appeal and Supreme Court delivered their judgments in *R(T)*<sup>100</sup> and Parliament introduced an amended disclosure system. However, there does not appear to be any '*R(T)* effect' in terms of a reduction in the number of certificates being sought, although, on further reflection, this is probably no surprise given the very minor nature of the amendment which followed that decision.

The conclusion to be drawn from this section is that, whilst mandatory disclosure of unspent convictions is unobjectionable, disclosure of spent convictions and cautions should not be mandatory but be discretionary. However, that discretion should not be that of the police. The DBS should be able to exercise this discretion on behalf of the applicant, possibly in consultation with the applicant themselves before disclosure is made to the prospective employer or regulator.<sup>101</sup> A procedural requirement of consultation before disclosure has been championed by Munby LJ in two cases. In *R(H) v A City Council*<sup>102</sup>, the local authority had disclosed H's conviction for indecent assault upon a child to charitable organisations and public bodies with which H was involved. The Court of Appeal held that the principles which applied to the statutory disclosure scheme outlined in *R(L)*<sup>103</sup> also applied in this non-statutory context, and the Council failed to engage with the crucial point that H did not work with children. The local authority's blanket policy of disclosure was, therefore, substantively unlawful both at common law and as a violation of H's Article 8 rights. The Court of Appeal also introduced the notion that both the common law and Article

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<sup>94</sup> See note 9 and the discussion which follows it in the main text.

<sup>95</sup> DBS (n 9).

<sup>96</sup> Home Office (n 90).

<sup>97</sup> See note 31 above.

<sup>98</sup> See the paragraph which follows note 10 above.

<sup>99</sup> See note 10 above.

<sup>100</sup> *R(T)* (n 4 and n 50).

<sup>101</sup> Jamie Grace, 'Privacy, Stigma and Public Protection: A Socio-legal Analysis of Criminality Information Practices in the UK' (2013) 41 *International Journal of Law, Crime and Justice* 303, 321.

<sup>102</sup> [2011] EWCA Civ 403.

<sup>103</sup> *R(L) v Commissioner of Police for the Metropolis* [2009] UKSC 3; [2010] 1AC 410.

8 demanded procedural fairness, which, in this case, required that ‘the local authority must consult with [the claimants] and given them a proper opportunity to make their objections to what was proposed, *after* the local authority has decided what disclosure to make, and to whom, and *before* it does so.’<sup>104</sup> The failure to consult in this case was described as an ‘egregious’ procedural shortcoming ‘which vitiated the entire process.’<sup>105</sup>

A requirement of consultation in order to satisfy the demands of procedural fairness was highlighted in *R(B) v Chief Constable of Derbyshire*,<sup>106</sup> where Munby LJ again made it clear that, in his view, ‘compliance with the procedural requirements of Article 8 requires that the claimant be given adequate opportunity to make representations *before* any ECRC was issued. He ought to have been sent a draft of the Certificate ... He was not; so there was, in my judgment, a breach of Article 8.’<sup>107</sup> However, the claimant’s attempt in this case to extend ‘consultation’ to wide-ranging disclosure of all the information upon which the Chief Constable had based his decision was decisively rejected by the Court. The significance of consultation was taken a stage further in *Re JR59’s Application for Judicial Review*,<sup>108</sup> where the Court ruled that it was a disproportionate interference with the applicant’s Article 8 rights if, having made representations which failed to dissuade the chief constable from the decision to disclose, the applicant was not given the opportunity to withdraw his application for a certificate *before* the disclosure was made to the prospective employer.

On the basis of the findings of this study, the police are generally reluctant to change their decision to disclose soft intelligence once that decision has been taken, even after consultation with the applicant. It is difficult to discern from the data available the number of disclosures where consultation took place, what that consultation consisted of, and whether this made any difference to the decision to disclose. It is worthy of note that in *R(T)* itself, one of the applicants received an ‘amended certificate’, which still disclosed the caution but included some additional information, following representations by the applicant’s solicitor.<sup>109</sup> Other evidence of the impact of a duty to consult is largely anecdotal and would have to be the subject of a more in depth study.

The suggestion that some element of discretion should be introduced into the disclosure of convictions and cautions was not accepted by the Court in *W v Secretary of State for Justice*<sup>110</sup> as being neither practical nor sufficiently certain. However, this is not necessarily the case. The DBS already has discretionary powers to ensure the correct level of disclosure is being applied for, even though, on the evidence of this study, it does not use those powers. Even if there are concerns about certainty and practicability of such a suggestion, it cannot be any more unreliable and uncertain than the rather arbitrary system of police discretion which currently exists. The question of disclosure of all forms of criminal records, whether conviction or soft

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<sup>104</sup> *R(H) v A City Council* (n 102) [69] (Munby LJ) – emphasis in the original.

<sup>105</sup> *ibid.*, [62] (Munby LJ).

<sup>106</sup> [2011] EWHC 2362 (Admin).

<sup>107</sup> *ibid.*, [70].

<sup>108</sup> [2012] NIQB 66.

<sup>109</sup> *R(T)* (n 4) [19].

<sup>110</sup> [2015] EWHC 1952.

intelligence, should be based on an assessment of the risk presented by an individual to vulnerable members of the public to whom that information may suggest the applicant may be a threat. The DBS are in a more independent and objective position to exercise such discretion than the police under the current system.

### **Use of Disclosed Information**

In the penultimate section of this paper, I consider the other side of the disclosure regime – the organisation that receives the disclosed information from the DBS. What do these organisations, which are usually employers or state appointed regulators, do with the criminal records information which they receive? Technically, of course, it is the applicant for a particular position who seeks the criminal records certificate, but such a request is normally made at the insistence of the individual or body having the power to decide whether the applicant is appointed to the position they seek. This body or individual is the ‘registered body’ required to countersign the application, and which normally receives a copy of the certificate sent to the applicant.

The involvement of this registered body has been used as a means by which chief police officers seek to absolve themselves of responsibility for the consequences of their decisions to disclose soft intelligence. The police may argue that they are simply providing the information. What the prospective employer or regulator does with that information is beyond the control of the police and the DBS. Indeed, in some of the cases challenging officer’s decisions to disclose, one of the arguments against the allegation of a violation of Article 8 rights was that disclosure did not prevent the applicant from obtaining a job, only that particular position for which they had applied. This argument was accorded significant weight in the lower courts in some cases,<sup>111</sup> but the courts now generally accept that an applicant’s rights to privacy extends to his choice of occupation and disclosure amounts to ‘something close to a killer blow to the hopes of a person who aspires to any post’.<sup>112</sup>

It is only to be expected that a potential employer or regulator for particular occupations will want to know the ‘full story’ so far as the previous criminal history of a prospective employee or licence holder is concerned.<sup>113</sup> Recent research by Appleton found that 37% of withdrawn job offers were based on non-conviction information,<sup>114</sup> although there is no report of how many were withdrawn after disclosure of conviction records or cautions. Some employers will take the view that as the police have taken the trouble to mention it on the certificate, it must be important and so the employer must act on it too, with no thought as to whether the information is relevant to the position or ought to have been disclosed. Older research by Fletcher *et al*, suggests that 56% of public sector employers have ‘anxieties’ over employing anyone with any form of criminal record, largely as a result of stereotyped attitudes of ‘once an offender always an offender’ or anger about certain types of offence rather than concerns about the risk of re-offending.<sup>115</sup> This is still reflected in

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<sup>111</sup> *R(AR)* (n 88) although the point was not determinative of the matters in issue in this case.

<sup>112</sup> *R(L)* (n 103) [75] (Lord Neuberger).

<sup>113</sup> Daniel Marshall and Terry Thomas, ‘The Disclosure of Police Held ‘Non-conviction Information to Employers’ (2015) 17(4) *International Journal of Political Science* 237.

<sup>114</sup> J Appleton, ‘Checking Up’ (Civitas, London 2014).

<sup>115</sup> DR Fletcher, A Taylor, S Hughes and J Breeze, *Recruiting and Employing Offenders* (Joseph Rowntree Foundation, York 2001).

the fact that many employers will only offer a position to an applicant with a 'clean' DBS certificate. In *R(Pinnington) v Chief Constable of Thames Valley*<sup>116</sup> Richards J said that he was 'troubled by the employer's insistence on a completely clean certificate'.<sup>117</sup>

Employers and regulators are, however, performing and different function and exercising different powers than those responsible for the disclosure of criminal records. Private sector employers are, of course, free to make what they will of the disclosed information and, so long as they do not discriminate on the grounds of any of the 'protected characteristics' contained in the Equality Act 2010,<sup>118</sup> they may appoint or refuse to appoint the applicant to the post as they see fit. Those in the public sector, however, are in a different position, and this includes the vast majority of state or professional regulators. The difference is that these employers or regulators are 'public bodies' and so are obliged to exercise their powers lawfully within the bounds of the powers granted to them by Parliament, and are susceptible to judicial review of the exercise of their powers.

Local authorities and other public employers and regulators unequivocally state that they exercise their regulatory powers for the 'protection of the public'. Promoting the 'public interest' is seen by some commentators as the whole reason for economic regulation of any business or commercial activity.<sup>119</sup> Although the concept of what is meant by 'the public interest' is difficult to define,<sup>120</sup> there is no doubt that the notion of protecting the public or acting in the public interest heavily influences the shaping of regulation generally.<sup>121</sup> Local authority and other public regulators often appear in their rhetoric to attempt to tread an uncertain line between a retributive view of punishment with the protection of the public taking precedence, whilst still respecting the human rights of those individuals seeking positions over which those regulators have control.

It must be emphasised, however, that, although regulators are exercising statutory powers, those powers are often couched in wide discretionary terms. This means that the registered bodies who seek criminal records certificates have much more flexibility over how they treat and use the information they receive about an individual. In most cases, the regulator has to determine whether the disclosed information impacts on the applicant's 'suitability' or 'fitness' to be appointed to the post applied for. There are some limits to the exercise of this discretion. Public regulators must exercise their discretion for the purposes for which it was granted,<sup>122</sup> must exercise their discretion rationally,<sup>123</sup> and, where Convention Rights are in issue, must act proportionally and in a way which gives effect to those rights.<sup>124</sup> In practice,

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<sup>116</sup> [2008] EWHC 1870; [2008] PoLR 141.

<sup>117</sup> *ibid.*, [59].

<sup>118</sup> Equality Act 2010, s 4 – Having a criminal record is not one of the protected characteristics.

<sup>119</sup> RA Posner, 'Theories of Economic Regulation' (1974) 5 *Bell Journal of Economics and Management* 335, 336.

<sup>120</sup> M Feintuck, *The Public Interest in Regulation* (OUP, Oxford 2004) 3.

<sup>121</sup> T Prosser, *Law and the Regulators* (Clarendon Press, Oxford 1997) 15.

<sup>122</sup> *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997.

<sup>123</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1KB 223.

<sup>124</sup> Human Rights Act 1998, s 6; *R(on the application of Daly) v Secretary of State for Home Department* [2001] UKHL 26; [2001] 2AC 532.

local authority and other regulators structure the exercise of their discretion in accordance with published policies.

Of the 337 local councils in England and Wales responsible for various regulatory matters for which criminal records certificates are available, all of them had some form of ‘Conviction Policy’.<sup>125</sup> These policies are designed to guide the exercise of local authority regulators’ discretion in cases where DBS checks reveal convictions and cautions, spent or otherwise in the case of excepted occupations under the 1975 Order. The point should be made that no council has a policy in relation to how to deal with disclosed soft intelligence, so the effect of such information on a local authority regulator is even more fluid than in the case of convictions and cautions. However, councils do have policies to deal with cases where criminal records certificates reveal convictions and cautions. There are, however, two problems revealed by these policies. First, they are all, to some degree or other, based on now very old Government Circulars from 1992.<sup>126</sup> Second, in the absence of more specific guidance from central government, every council has created its own policy and every policy is different.

Approx two-thirds of Councils from which it was possible to obtain information have updated their conviction policies since inception of the DBS. This update was not necessarily because of the inception, but some amendments reflect the fact that the DBS and not the CRB now issue certificates. There are very few councils that make any substantial amendments to take account of the human rights concerns expressed by the Court in *R(T)*.<sup>127</sup> None of them make specific reference to the *T* case or the subsequent amendments to the disclosure regime. This should be no real surprise as local authority regulators are notoriously reluctant to change and apply new policies, even when they have one.<sup>128</sup>

The local authority ‘Conviction Policies’ generally impose a blanket ban on the grant of a licence or issue of a permission for most serious offences, such as murder, manslaughter, rape, or terrorism. This reflects the fact that some offences rule out consideration for most positions where there is likely to be face to face contact with the public.<sup>129</sup> For other cases, regulators usually apply different sliding scales, which vary as a combination of the nature of the offence and the time which has elapsed since completion of the sentence, rather than date of offence or conviction. The more serious the offence, the longer needs to have elapsed since completion of the sentence before the applicant will be considered eligible for a position. The ‘clean’ period which needs to elapse before consideration is given to an applicant can vary between two and twelve years depending on offence and council.

Because all councils employ different policies and different criteria when determining whether applicants should be permitted entry to certain positions, this can lead to different outcomes being experienced in similar cases in different locations. Although

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<sup>125</sup> It was not possible to obtain information from the other 38 councils in England and Wales at the time the research was conducted due to technical difficulties in gaining access to their websites.

<sup>126</sup> Home Office Circular 2/92 and Department for Transport Circular 13/92.

<sup>127</sup> *R(T)* (n 50).

<sup>128</sup> S Cammiss and C Manchester, “‘Careering out of Control’: Decision-making in Contested Cases Under the Licensing Act 2003’ (2012) 31(1) Civil Justice Quarterly 89.

<sup>129</sup> J Abrahams, ‘What Can’t you do With a Criminal Record? (2013) Prospect 22<sup>nd</sup> May.

all councils claim that they will consider factors such as the nature of the offence, when the offence was committed, the date of conviction, the age of applicant at time of offence, and any other relevant factors, the weight given to such factors appear to vary from council to council, leading to inconsistency. For example, an applicant for a taxi licence with a history of a solitary suspended sentence twenty-one years ago for possession of cannabis and amphetamines was refused a licence,<sup>130</sup> whereas, at a different council an applicant with a five year old conviction for solicitation was granted a licence.<sup>131</sup> At another council, an applicant with a conviction for affray when involved in a fight between groups of teenagers thirteen years earlier was also refused a licence.<sup>132</sup>

Although the examples considered here are not identical situations, they do reflect the differing approaches and inconsistency that can and does arise when local authority regulators are left to design and implement their own policies in the absence of statutory or other guidance. The findings of this study suggest that it is the nature of the offence that is the prominent consideration and not some of the other factors which councils claim to take into account. It was particularly noticeable how many outcomes depended on the length of time that applicant was 'conviction free' rather than how long ago the offence was committed or the applicant's age at the time of the offence. There appeared to be a complete absence of human rights considerations, such as the individual's right to respect for his or her privacy or requirement to support a family.

## **Conclusion**

The law in this important area is still not in a settled state, and it is unclear what the present position is in view of conflicting authorities and potential for change as a result of appeals to the higher courts. However, the predominant view is that the amended disclosure regime still represents an unjustifiable infringement of Article 8 ECHR rights. The amendment was token and ineffective and only likely to affect the position of a very small number of people, namely those with only one very minor conviction. It brought no relief to the much larger group of offenders who have lived conviction free for many years but are still finding it difficult to reintegrate themselves fully back into society.

The DBS should play a much more active role in the disclosure process, rather than simply act as a conduit for information, which it is bound to disclose regardless of its view of the relevance or purpose of disclosure. The disclosure of spent convictions and cautions should be discretionary on same basis as 'soft intelligence' currently is, but not at the discretion of Police, whose exercise of their present powers is seen as unreliable and arbitrary, but by the DBS itself. Safeguards can be built into the system to address concerns about legal certainty. But the starting point should be, as was suggested by Liberty, acting as Intervener in *R(T)*, that the point at which a conviction or caution becomes spent is the point at which it recedes into the past and

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<sup>130</sup> Lancaster City Council, 'Licensing Regulatory Committee Meeting Minutes: Item 33' (15<sup>th</sup> October 2015).

<sup>131</sup> Bristol City Council, 'Public Safety and Protection Committee Minutes' (14<sup>th</sup> July 2015).

<sup>132</sup> Manchester City Council, 'Licensing and Appeals Sub-committee hearing Minutes:LACHP/15/142' (30<sup>th</sup> June 2015).

becomes part of one's private life.<sup>133</sup> From that starting point, the structure of discretion of both the 'discloser' and the 'recipient' of the criminal record information must be based on the assessment of the risk posed by the applicant to any potential vulnerable person with whom they are likely to interact, not the nature of their offence alone.

The fact that local authority regulators have their own conviction policies demonstrates that it is possible to have a 'job specific' set of standards or guidelines to control or structure the exercise of discretion. Statutory or non-statutory guidelines to structure and control discretion on the basis of risk should counter any objections that having to make disclosure decisions on a case by case basis makes the law unworkable or uncertain. The difficulty councils in practice experience with their own policies is as a result of inconsistency of approach and implementation rather than an inherent fault in the policy.

As was said by Fenton, in an entirely different context, 'It may be...we are still a long way from the necessary and explicit acknowledgment that the human rights of the offender are as essential a consideration as risk assessment and public protection'.<sup>134</sup> The decisive factor in both respecting an individual's rights and protecting the public should be the relevance of criminal records information to that individual's suitability to fulfil that role based on the risk presented by that individual, not by a tenuous link to the nature of the offence, which may be irrelevant or so old as to fade into the applicant's past.

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