UNLOCK
The National Association of Reformed Offenders

Recommendations to the Independent Review of Policy on Retaining and Disclosing Records held on the Police National Computer (PNC)

UNLOCKing Employment

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UNLOCK is an independent charity and membership organisation, set up to achieve equality for people with previous convictions. We believe in a society in which reformed offenders are able to fulfil their positive potential through equal opportunities, rights and responsibilities.

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Background

This submission is made following a roundtable discussion with the Head of the Review, Sunita Mason, and other third sector agencies held at the Home Office on 4 February 2010. The event took place as a result of representations made by UNLOCK to the Home Secretary, Alan Johnson, requesting that the views of those affected be consulted as part of the Review process. This document looks to draw on the views that independent UNLOCK members have submitted and make practical recommendations.

Supplementary documents

- UNLOCK Briefing Paper for the Second Reading of the Rehabilitation of Offenders (Amendment) Bill 2009
- UNLOCK Member submissions to the Independent Review

UNLOCK's Response

In consideration of the Review's Terms of Reference, UNLOCK is pleased to provide responses to the following questions:

I. **Should records be subject to deletion and if so what criteria should be applied to that process?**
UNLOCK supports the argument put forward by the Information Commissioner's Office (ICO) in the "5 Constables" case, and is hopeful that the ICO's application for leave to appeal to the Supreme Court will be successful.

II. **Should a process be put in place to limit access to police records and if so what criteria should be applied to that process?**
UNLOCK believes that there is a clear case for the removal, but not necessarily deletion, of information regarding old/minor/irrelevant conviction information from the PNC for disclosure purposes. A sophisticated, fair, comprehensible and transparent process should be put in place for this to take place (see recommendations below).

III. **What information regarding deletion/limitation of access to records should be provided to the subjects of records by the police and at what stages?**
The Home Office should publish clear information and guidance covering retention and disclosure of information on the Police National Computer. Multiple versions of this may be necessary, targeting various different groups including:

- Statutory agencies working in the CJS (eg Police, CPS and the Judiciary)
- Agencies in the CJS (third sector/voluntary organisations, private organisations)
- Individuals prior to receiving a disposal
- Individuals with information held on the PNC

Agencies and individuals at whom each of the publications is aimed should be involved in its drafting. This is particularly important in the case of individuals whose records are held.

IV. **How any suggested arrangements might be applied and monitored including, where possible, an indication of any additional cost.**
See below.

Recommendations

Although UNLOCK does not agree with the Court of Appeal decision in the "5 Constables" case, and supports the decision of the ICO to apply to the Supreme Court to seek leave to appeal, it recognises that the remit of this review is in light of the Court of Appeal decision, and therefore makes recommendations on the basis that Police have the right, despite data protection principles, to retain old and minor convictions information on the PNC.

Nevertheless, UNLOCK feels that notwithstanding the Court of Appeal decision there is a need for the Government to consider the wider implications of the "5 Constables" case. We have therefore made a number of recommendations, many of which were raised during the roundtable discussion. These recommendations are based on submissions UNLOCK received from its members (people with past convictions) in response to a piece that was included in the charity's monthly e-newsletter.

The recommendations are as follows:

1. **In the short-term, reinstate the 'step down' process.**

   Until the Supreme Court has reached a decision on granting the ICO leave to appeal, and if so granted, then until such time as the appeal is heard, the 'step down' procedure should be re-instated. Although this procedure was by no means perfect, it did at least have the potential to allow for non-disclosure of certain convictions as part of a CRB check. Removal of the 'step down' procedure has left many people whose convictions had already been stepped down in a position where those convictions are now automatically disclosed.

2. **Establish a clear difference between the PNC and a database used for disclosure purposes.**

   The PNC was originally designed to be used for 'policing purposes'. It is now also used for disclosure and vetting purposes for which it was not designed. One of the principle reasons why the original 'step down' process was introduced was to mitigate against the fact that the PNC held old/minor information which may well be disclosed. However, the outcome of the "5 Constables" case has left the whole PNC visible for disclosure purposes. A method to distinguish between PNC data for 'policing purposes' and data for disclosure is therefore needed to ensure that old/minor/irrelevant information is not disclosed. For example, disclosure information could separated from the PNC to form a separate database, or only partial access to the PNC could be allowed for disclosure purposes, so that only information that was 'relevant' would form part of a standard or enhanced CRB check. This would enable a full PNC record to be maintained for 'policing purposes', whilst ensuring a fair and proportionate system is in operation for disclosure and vetting purposes.

3. **For disclosure purposes, operate a process which automatically 'weeds' old/minor conviction information after certain periods of time.**

   Working from the position that all conviction information is held in the PNC, develop a more sophisticated process of 'weeding' information to result in only 'non-weeded' information being visible for disclosure purposes. Although the "5 Constables" case established that the retention of old/minor conviction information was not unlawful under the Data Protection Act, there is no legal obligation to maintain such a comprehensive record of that information.

4. **Operate a Criminal Records Tribunal to enable 'relevant' information to become 'irrelevant' for the purposes of disclosure.**

   A process should exist whereby individuals with criminal conviction information held on the PNC can apply to a Criminal Records Tribunal, operated by the Judiciary, to prove that the disclosure of a conviction is no longer necessary or proportionate, despite their conviction not yet being automatically 'weeded' as recommended above.

5. **Information that is 'non-weeded' should be further subject to a stricter definition of 'relevancy' under the Police Act 1997.**

   Currently, for the purposes of a standard and enhanced CRB check, any cautions or convictions held on the PNC are automatically disclosed. This can often result in 'irrelevant' information being disclosed. Irrelevance for these purposes is both old/minor conviction information (which would be dealt with through the above) as well as information that is completely unrelated to the job role sought; for example a driving conviction for an office-job. A more sophisticated process needs to be in place which assesses 'relevancy' not only on whether it is held on the PNC (or a 'non-weeded' system as proposed), but also whether it is actually 'relevant' for the purposes of a CRB check. Such a system could be achieved by amended the distinction of 'any relevant matter' under the Police Act 1997 which obliges the CRB to disclose 'relevant' information for the purposes of a disclosure check.

6. **Issue guidance on the retention/disclosure process.**

   Clear guidance needs to be issued by the Home Office regarding the Police National Computer, covering both retention and disclosure issues. Multiple versions of this may be necessary, targeting various different groups, including statutory agencies working in the CJS (the Police, the CPS, the Judiciary), other agencies in the CJS (third sector/voluntary organisations, private organisations) and individuals themselves (both those in advance of receiving a certain disposal but also for those who currently have information held on them on the PNC)

7. **Implement section 56 of the Data Protection Act 1998.**

   Currently, section 56 has not yet been implemented. It is understood that until basic disclosures are provided by the CRB, this section will not be introduced. Implementing section 56 of the Data Protection Act 1998 would prevent employers and others who are *outside* of the Exceptions Order from circumventing the protection of the Rehabilitation of Offenders Act 1974 (ROA) by requiring individuals to undertake an enforced subject access request.

8. **Bring Penalty Notices for Disorder (PNDs) within the remit of disclosure legislation.**

   Currently, PND's are not covered by the ROA. There may well be a logical reason for this, given that if they were, they would therefore also be exempt from it through the Exceptions Order 1975 and as a result, disclosed as a matter of routine for standard and enhanced CRB checks. as opposed to now, where they are *possibly* disclosed as part of other 'soft intelligence'. However, an anomaly exists whereby if directly asked an individual is obliged to disclose a PND for the purposes of employment (or other service) and is not afforded the protection of the ROA. Clearly, this is not the intention of Parliament. Although integration into the ROA may not be the most appropriate mechanism, some form of legislation is necessary to close this rather strange obligation to *forever* disclose a PND.

9. **Recommend a wider holistic review of the disclosure of criminal conviction information held on the PNC.**

   Despite the narrow Terms of Reference of this review, it is absolutely necessary to recognise the wider remit in which a review of this nature sits. There is a need to look holistically at the way that criminal conviction information is disclosed, including addressing areas such as:

   a. Reforming the Rehabilitation of Offenders Act 1974, implementing the reforms that the Government accepted back in 2003 in response to the 2002 Home Office *Breaking the Circle* review.
   b. Undertake a full review of the Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975 in line with the recommendation made by Lord Justice Hughes in the "5 Constables" case for the need to review the accretions that there have been to this.
   c. Looking at ways to prevent CRB checks which are not legal under the Police Act 1997.
   d. Replace Enhanced disclosures with Standard disclosures where a position is subject to an ISA-check, in line with the briefing paper that Liberty has published on this subject.

10. **Actively encourage and facilitate the involvement of those who have direct personal experiences in future consultations/reviews/recommendations.**

    UNLOCK has a membership of over 4,700 reformed offenders. These are individuals who have personal experience of the current policy on retention and disclosure and are best placed to not only identify issues that are present in the current system, but also make recommendations as to how these issues can be overcome practically. Although UNLOCK as an organisation attempts to try and represent our members views, this should in no way replace direct consultation with those individuals. For example, as this review has progressed UNLOCK has consistently sought the views of its members, the results of which have largely steered the work that has been undertaken. This is evidenced in part in the five submissions by UNLOCK members that are attached to this document.

    As an independent organisation, UNLOCK would be willing to facilitate this relationship and would be happy to discuss this in greater detail.

Recommended system

This diagram shows UNLOCK's recommended system to determine whether a criminal conviction is disclosed for the purpose of a standard or enhanced CRB check.