# Non-conviction disclosure as part of an Enhanced Criminal Record Certificate: assessing the legal framework from a fundamental human rights perspective

## Joe Purshouse*

This article critically appraises the law governing non-conviction information disclosure as part of an Enhanced Criminal Record Certificate (ECRC) from a fundamental human rights perspective. The dissemination of personal information linking an individual to a criminal investigation or prosecution can have particularly stigmatising effects.[1] However, as part of an enhanced criminal record check, which is usually undergone when an individual seeks to work in close contact with children or adults requiring care or supervision, the police can provide any non-conviction[2] information they hold about the individual to the Disclosure and Barring Service (DBS), wherever such information is deemed *relevant* and *ought to be disclosed.*[3]

The enhanced check produces an ECRC, which is sent by the DBS to the prospective employer. Enhanced checks are a characteristic example of the "pre-emptive turn" in criminal justice, utilising advances in information technology to cut off lines of access to children and vulnerable adults from those who might wish to do them harm. The focus is on managing risks to such groups to obviate the need for more traditional responses to criminal wrongdoing, such as reactively collecting evidence of criminality with a view to prosecuting specific individuals.[4]

This article sets out the convoluted legal framework regulating non-conviction ECRC disclosure, which has developed through a series piecemeal amendments and reforms from

* I would like to thank Paul Roberts, John Jackson, David Mead, Rob Heywood, Ian Edwards, and Jamie Grace for their comments on an earlier draft. I am also very grateful to the anonymous reviewer and Maurice Sunkin. All errors remain my own.

[1] J. Grace, "Clare's Law, or the National Domestic Violence Disclosure Scheme: the contested legalities of criminality information sharing" (2015) 79 J.C.L. 36 at p.40.

[2] For the purposes of this article "non-conviction" information refers to any personal information that may be disclosed by the police on an Enhanced Criminal Record Certificate, which does not directly pertain to any criminal convictions or cautions the applicant might have. Though a police caution is not technically a "conviction", it requires an admission of guilt. Cautions are governed by a separate regime than that covering other non-conviction criminal record disclosure. Non-conviction information varies considerably in terms of what it reveals about the individual. Some non-conviction information is untested, relating to an allegation or arrest that resulted in no further police action against the individual. Other non-conviction information is verifiably true. For example, the police might store information signifying that a job applicant cohabits with a person convicted of child sex offences. This is non-conviction information as it relates to the job applicant, even though it details the convictions of a known associate.

[3] Police Act 1997 s.113B, as amended.

[4] The impact of the "pre-emptive turn" in the (admittedly, separate) context of policing football fans' rights has been documented in this journal. See: M. James and G. Pearson, "Public order and the rebalancing of football fans' rights: legal problems with pre-emptive policing strategies and banning orders" [2015] P.L. 458 at p.458.

successive governments since the mid-1990s. The disclosure of such non-conviction information as part of an ECRC has been challenged on numerous occasions on the grounds that such disclosure violates the right to respect for private life under art.8 of the European Convention on Human Rights (ECHR) and, occasionally, on the basis that it violates the right to be presumed innocent under art.6 ECHR. However, there has been little academic scrutiny paid to the legal framework regulating such disclosure, or the reasoning of decision makers who face the unenviable task of balancing legitimate human rights considerations against crime prevention and public safety interests in this context. Drawing on philosophical and criminal procedure scholarship, I argue that these decision makers have not adequately grasped the extent to which overly cautious disclosure can have a detrimental impact, not only on the individual job applicant, but also on society.

The analysis is structured in five parts. The first two parts set out the legal framework regulating non-conviction ECRC disclosure in all its complexity, providing a narrative history of the successive legal challenges and desultory reforms to the ECRC disclosure framework. The next two parts form the bulk of the analysis. Here, the law is critiqued from a fundamental human rights perspective. In particular, this analysis suggests that non-conviction disclosure is, in wider circumstances than are currently acknowledged, an affront to the presumption of innocence under art.6(2) ECHR. Moreover, even where disclosure is not an affront to the presumption of innocence, the current approach of domestic lawmakers fails to recognise the full extent of the impact that non-conviction disclosure has on the privacy rights of job applicants, and the broader social benefits that might flow from *not* disclosing non-conviction information. Finally, a proposal for law reform, which would address the failings of the current system, is suggested.

*The Development of the Law*

The DBS carries out criminal record checks for specific positions, employment, offices, and licences included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and the Police Act 1997. The three main levels of criminal record check are as follows:

- *Basic Check* – this check is normally used for employment positions not exempted from the Rehabilitation of Offenders Act 1974 and contains information regarding unspent convictions.

- *Standard Criminal Record Certificate (SCRC)* – the SCRC reveals information about an individual's "spent" and "unspent" criminal convictions, and cautions, unless these have been "filtered" under new filtering rules.[5]
- *Enhanced Criminal Records Certificate (ECRC)* – the ECRC contains all the information eligible for disclosure on a SCRC, and can additionally list other non-conviction information provided by the police. This level of check is used for certain positions prescribed in s.113B of the Police Act 1997, as amended.

Thus, it is only where an individual is the subject of an ECRC that the DBS may disseminate information on police records that did not result in a finding or admission of guilt.[6] Many of the positions that require a job applicant to undergo an enhanced check involve working in contact with children or vulnerable adults. Although the enhanced check was introduced specifically to safeguard children and vulnerable adults, the list of occupations which require an enhanced check has expanded considerably in recent years, currently including veterinary practitioners, traffic wardens, and general practitioner's receptionists.[7] Larrauri has also observed that, in practice, it is difficult for employers navigate the DBS website, and to decipher whether or not a particular position requires a standard or enhanced check.[8] Added to this, there is no sanction for employers who seek the wrong level of criminal record check. As other commentators have suggested,[9] these factors indicate that employers are overusing the more detailed enhanced check, which is far more popular than the standard check.[10]

As originally enacted, s.115(7) of the Police Act 1997 provided that chief police officers should disclose as part of an ECRC any information on their records which *might* be relevant for the position in question, and "ought to be included" in the certificate. In *X*, the Court of Appeal

[5] In May 2013, the Government introduced new filtering rules which remove certain convictions and cautions from DBS checks automatically. Eligible offences are normally minor and can be filtered after an amount of time up to 11 years depending on the age of the offender at the time of the offence, and the type of disposal received (i.e. caution or conviction). For further information see: Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200).

[6] This analysis is not focused on the regulation of specialist forms of criminal record check, such as those that might be carried out as part of national security vetting for certain government positions.

[7] See Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2015, SI 2015/317; and E. Larrauri, "Are Police Records Criminal Records?" (2014) 22 Eur. J. Crime Crim. L. & Crim. Just. 377 at p.379.

[8] E. Larrauri, "Criminal Record Disclosure and the Right to Privacy" [2014] Crim. L.R. 723 at p.726.

[9] See Larrauri, "Criminal Record Disclosure and the Right to Privacy" [2014] Crim. L.R. 723; A. Noble, "We Know What you did Last Summer, and 30 Years ago" (2016) 1 I.R.P & P. 1 at p.12.

[10] Since the early 2000s, the demand for enhanced checks has been consistently higher than for standard checks. In 2017, the number of enhanced checks administered by the DBS outnumbered standard checks by 11 to 1. See *DBS dataset 3: number and type of registered and umbrella body applications* (London: OGL, 2018).

held that this test for non-conviction disclosure, which afforded chief constables notably wide and subjective discretion to disclose non-conviction information, was in accordance with the law and not contrary to the Human Rights Act 1998 Sch.1, Pt 1.[11] This judgment set a low threshold for non-conviction disclosure as part of an ECRC. Subsequent cases confirmed this approach.[12]

Shortly before the Court of Appeal's judgment in *X*, the murder of two schoolchildren, Holly Wells and Jessica Chapman (commonly known as the Soham murders), brought the issue of vetting and enhanced criminal records disclosure into mainstream political discourse. On December 17, 2003, Ian Huntley, who had previously been investigated by the police in relation to eight separate sexual offences from 1995 to 1999, was convicted of the murders. This caused "widespread public disquiet" when it came to light that Huntley's previous dealings with the police were not disclosed as part of the vetting process carried out by Cambridgeshire Constabulary at the time of Huntley's appointment as a caretaker at the primary school attended by his victims.[13] Then Home Secretary, David Blunkett set up the Bichard Inquiry, which would assess the effectiveness of intelligence-based record keeping, vetting practices, and information sharing between different agencies.[14] In response to a recommendation in the Bichard Inquiry's report, the Serious Organised Crime and Police Act 2005 s.163, which inserted s.113B into the Police Act 1997, replaced the s.115 scheme. The new section extended the range of police forces and other organisations who can provide ECRCs to include the British Transport Police and HM Revenue and Customs. The confluence of the low threshold test for disclosure set in *X*, and the extension of the provision of ECRCs led to high rates of non-conviction ECRC disclosure. In 2007, of the 215,640 ECRCs issued 17,560 contained non-conviction information, and in 2008, 21,045 of 274,877 ECRCs contained non-conviction information.[15]

[11] *R. (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068; [2005] 1 W.L.R. 65; [2005] 1 All E.R. 610.
[12] See *R. (B) v Secretary of State for the Home Department* [2006] EWHC 579 (Admin); [2008] Po. L.R. 11 at [55]; *R. (Pinnington) v Chief Constable of Thames Valley Police* [2008] EWHC 1870 (Admin); [2008] Po. L.R. 141; C. Baldwin, "Necessary Intrusion or Criminalising the Innocent? An exploration of modern criminal vetting" (2012) 76 J.C.L. 140 at p.151.
[13] House of Commons, *The Bichard Inquiry Report* (The Stationery Office, 2004), HC Paper No.653.
[14] House of Commons, *The Bichard Inquiry Report*, p.1.
[15] *R. (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 A.C. 410; [2009] 3 W.L.R. 1056; [2010] 1 All E.R. 113 at [42].

In October 2009, the Supreme Court in *L* dismissed a challenge to the enhanced criminal records disclosure scheme.[16] As in *X*, the case concerned the disclosure of non-conviction information as part of an ECRC. Although the appeal was dismissed, the Supreme Court took the opportunity to clarify the law governing ECRCs. The claimant (referred to as "L"), underwent criminal records checking as part of her employment by an agency, which provided staff for schools. The ECRC, which was disclosed to the agency, showed non-conviction information detailing the claimant's son's listing on a child protection register due to the claimant's alleged lack of ability to care for him, and the claimant's refusal to cooperate with social services.

The Supreme Court held that art.8(1) was engaged through the disclosure, as an adverse ECRC will often represent a "killer blow" to the applicant's employment opportunities in numerous fields.[17] Turning attention to art.8(2), Lord Hope determined that the decision in *X* put the rights of vulnerable groups above the privacy interests of job applicants. According to Lord Hope, the interpretation of s.115(7) in *X*, that any information a chief police officer believes "might be relevant" for the ECRC should be disclosed *unless there is good reason not to* disclose it affords unduly wide discretion to chief police officers. However, for Lord Hope, in view of the relevance and accuracy of the non-conviction information in the immediate case, the disclosure struck a fair balance.

*The Amended Enhanced Disclosure Framework*

Following *L*, the Government undertook a review of criminal record information disclosure, which was conducted by the Independent Advisor for Criminality Information Management, Sunita Mason DJ.[18] Mason DJ concluded that, whilst non-conviction ECRC disclosure was necessary in some circumstances, the disclosure framework afforded the police too much discretion, which led to inconsistent and unfair outcomes. The report suggested that only reliable non-conviction information, which indicates a reasonable risk on behalf of the applicant of causing harm to children or vulnerable groups, should be disclosed.[19] Mason DJ

[16] *L* [2009] UKSC 3; [2010] 1 A.C. 410; [2009] 3 W.L.R. 1056; [2010] 1 All E.R. 113.
[17] *L* [2009] UKSC 3; [2010] 1 A.C. 410 (p. 438).
[18] The Government's review culminated in the following two reports: S. Mason DJ, *A Common Sense Approach: A review of the criminal records regime in England and Wales – Report on Phase 1* (The Stationery Office, 2011), p.33; S. Mason DJ, *A Common Sense Approach: A review of the criminal records regime in England and Wales – Report on Phase 2* (The Stationery Office, 2011).
[19] Thus, making the test of relevance an objective one. Mason DJ, *A Common Sense Approach: A review of the criminal records regime in England and Wales – Report on Phase 1*, pp.32-33.

made numerous recommendations to make the non-conviction disclosure regime simpler and fairer, including: amending the test used by chief officers to make disclosure decisions from "might be relevant" to "reasonably believes to be relevant"; and developing a statutory code of practice for police to use when deciding what information should be disclosed.[20] Although the reports made some useful suggestions for curbing the excesses of overzealous non-conviction disclosure decision makers, it will be shown that Mason DJ's recommendations did not go far enough to address the fundamental deficiencies in the legal framework, which were identified in the review.

The Government implemented the above recommendations in Protection of Freedoms Act 2012 s.82, which amended the s.113B framework. The Home Office published the Statutory Disclosure Guidance for providing information as part of an enhanced disclosure. This guidance, currently in its second edition, details the following principles among others to be applied in determining whether or not information should be included as part of an ECRC:

- Information must only be provided if the chief officer holds a reasonable belief that it is relevant for the prescribed purpose.
- Information should only be provided if, in the chief officer's opinion, it ought to be included in the certificate (having regard to the proportionality requirement in art.8 ECHR).
- Information for inclusion should be provided in a meaningful and consistent manner, with reasons for disclosure clearly set out.[21]

A relevant chief police officer must have regard to the statutory guidance under s.113B(4) of the Police Act 1997, as amended by the Protection of Freedoms Act 2012. The Protection of Freedoms Act 2012 also inserts s.119 into the Police Act 1997, which establishes a procedure by which a job applicant may apply in writing to the Independent Monitor to have a decision to disclose reviewed. However, recent legal challenges to the non-conviction disclosure framework indicate that it is still producing unjust and inconsistent outcomes.

First issue: inconsistency

[20] Mason DJ, *A Common Sense Approach: A review of the criminal records regime in England and Wales – Report on Phase 1*, p.34.
[21] See Home Office, *Statutory Disclosure Guidance*.

The statutory guidance stipulates that a chief police officer must have regard to the relevance, seriousness, currency, and credibility of the non-conviction information at issue, before making a decision to disclose. *L v Chief Constable of Kent Police* drew attention to a potential issue with this approach.[22] In this case, Kent Police disclosed information about historic sex abuse allegations made against the applicant (L). These allegations were part of a failed prosecution launched against the applicant. Andrews J noted a disparity between the proportionality analyses of Kent Police and Hertfordshire Police when L had previously been in contact with the latter regarding an ECRC certificate. Hertfordshire Police determined that the same information regarding the allegations should not be disclosed. Whilst the allegations related to a serious sexual assault, they were historic, had no corroborating evidence, and stood in isolation as the applicant had not come into contact with police either before or since they were made.[23] Based on this information, it would appear that Hertfordshire Police struck the correct balance. The difference between the approaches to the balancing exercise is striking.

The statutory guidance seems to invite such inconsistency by giving the decision maker no direction as to the priority that should be afforded to each of the factors (relevance, seriousness, currency, and credibility), or as to how each might be weighted against the countervailing objectives of disclosure, when making a decision to disclose. It is perhaps for this reason that decisions to disclose under the amended framework have been challenged on a surprising number of occasions.[24] There have also been inconsistencies among judges where decisions to disclose non-conviction information have been judicially reviewed. Some judges have taken the view that where non-conviction information is untested or unreliable this should serve as a barrier to disclosure, even where the information pertains to allegations of violent or sexual offences. Others have taken a precautionary view of non-conviction information, notwithstanding that it is unsubstantiated, or comes from an unreliable source. This leads us to the second issue: that the disclosure framework continues to produce disproportionately precautionary disclosure decisions.

Second issue: precautionary disclosure

[22] *R. (L) v Chief Constable of Kent Police* [2014] EWHC 463 (Admin).
[23] *L* [2014] EWHC 463 (Admin) at [17].
[24] The total number of applications to the Independent Monitor rose from 310 in 2014 to 383 in 2015. S. Pountain, *Independent Monitor: Annual Report 2015* (2017), p.3.

A review of the case law after the Supreme Court ruling in *L* indicates a propensity among some judges and chief constables to be overly risk averse when making or reviewing decisions to disclose. In *C,* the High Court granted the claimant's application for the quashing of a chief constable's decision to disclose historic allegations of child sex abuse on his ECRC.[25] Langstaff J observed, in an opinion subsequently affirmed in the Court of Appeal,[26] that the reliability of an allegation is significant in the balancing exercise: "Weaker allegations must carry less weight in the balancing process than ones with stronger reasons to believe them."[27] However, Langstaff J did not go so far as to suggest that such allegations should not be disclosed, and subsequently, in *A,* the Court of Appeal held that the reliability of an allegation is not a threshold test for non-conviction disclosure. Rather, factors such as the reliability of the information, the gravity of the offence in question, and the relevance of the offence to the position applied for are all merely factors that feature in the proportionality analysis.[28]

This approach does not seem to go far enough to protect the human rights of those subject to the criminal process. Given that such disclosure interferes with art.8(1), in effectively permitting the disclosure of unreliable or irrelevant non-conviction information, and leaving the decision maker to attribute weight to the competing factors as he or she sees fit, the non-conviction disclosure system as it currently operates may create unfair outcomes.

In *B,*[29] a prominent example of overly risk averse disclosure, the claimant challenged a non-conviction disclosure. He was alleged to have stabbed a man in the chest and attempted to stab the same man's teenage child with a samurai sword, after consuming alcohol. B's alleged victims had no injuries at the time of making the allegation and the Crown Prosecution Service (CPS) dropped the case. During a search of B's house as part of this investigation, the police found a number of weapons that he lawfully owned, although some ammunition which was found was not stored correctly.

Munby LJ gave the leading judgment in the High Court, ruling that there had been no violation of art.8. His Lordship stated that the police had not erred in disclosing details of the allegations

[25] *R. (C) v Chief Constable of Greater Manchester Police* [2010] EWHC (Admin).
[26] *R. (C) v Chief Constable of Greater Manchester Police* [2011] EWCA Civ 175; [2011] 2 F.L.R. 383; [2011] Fam. Law 581; [2011] P.T.S.R. D41.
[27] *C* [2010] EWHC (Admin) at [13].
[28] *A* [2013] EWCA Civ 1706 at [66].
[29] *R. (B) v Chief Constable of Derbyshire* [2011] EWHC 2362 (Admin); [2012] A.C.D. 42.

made against the applicant, or the subsequent police investigation. Munby LJ viewed the nature of B's prospective employment, working as a consultant at a mental health trust, to be of central significance. Taking the above into account, Munby LJ concluded that

> "one can perhaps test the matter in this way. Suppose that none of this information had been included in the Certificate, and suppose that the claimant had then appeared for work under the influence of alcohol and brandishing a sword or a gun in front of one of his patients. Would not both the patient and the Trust have been justifiably angered – to use no stronger word – if they had then discovered what the police had been aware of but had chosen not to reveal? The answer is obvious."[30]

To take the worst case scenario of what could foreseeably happen *if* the allegations were true and not disclosed and then work backwards is an arbitrary way of approaching a proportionality assessment of this kind. The rhetorical question posited by Munby LJ could equally be reversed: if the allegations against B were not true, and suppose as a result of the disclosure the applicant was blocked off from his chosen career and stigmatised in his local community, would not the applicant have been justifiably angered? Granted, the information about B's incorrect storage of firearms in his possession was true. However, this fact alone does not seem to have a direct bearing on the applicant's suitability for working with children or vulnerable groups. The remaining allegations in the ECRC were untested. Furthermore, the evidence which brought into question the credibility of the allegations was not mentioned as part of the disclosure. In this case, the proportionality analysis of Munby LJ completely fails to account for the degree of certainty with which we know that the competing human rights of the applicant and the interests of the vulnerable groups are in peril.

Fortunately, in other recent challenges, a more exacting proportionality analysis has been conducted by the courts.[31] For example, in *P*, the High Court allowed the claimant's complaint that the disclosure on his ECRC of allegations, which suggested that he made sexual and other inappropriate comments to service users at a residential drug treatment centre where he worked, violated his rights under art.8. Foskett J gave due weight to the lack of reliability concerning the allegations, noting that the supposed use of inappropriate language by the claimant to the

[30] *B* [2011] EWHC 2362 (Admin); [2012] A.C.D. 42 at [84]-[85] (emphasis in original).
[31] *RK v Chief Constable of South Yorkshire Police* [2013] EWHC 1555 (Admin); [2013] A.C.D. 121; *R. (P) v Chief Constable of Thames Valley Police* [2014] EWHC 1436 (Admin); (2014) 17 C.C.L. Rep. 250; *R. (BW) v Chief Constable of Cambridgeshire Police* [2015] EWHC 4095 (Admin).

service user was not corroborated by any of the three other service users who were present at the time of its alleged use.[32] Similarly, in *RK*, Coulson J quashed a decision of a chief constable to disclose non-conviction information, noting a series of failures to adequately account for the unreliability of the allegations made against the applicant and biases in the presentation of the information on the ECRC.[33] Whilst it is encouraging that, in these examples, the judiciary has corrected the excessive disclosures of the police, the fact that there are numerous examples of such unjust disclosures occurring post-*L* speaks to a need for clearer guidance for disclosure officers.

Third issue: the limited effectiveness of the Independent Monitor

The disparity in *L v Chief Constable of Kent Police*, and in the approaches to disclosure among chief constables and judges more generally, highlights a credible threat that the outcome of future art.8 challenges to the non-conviction regime may rely too heavily on the personality and political preferences of the decision maker; a threat that is scarcely mitigated by the limited oversight of the Independent Monitor.

The Independent Monitor has two statutory duties. Firstly, to review a sample of cases in which non-conviction information is included on an ECRC. The purpose of the review is to ensure compliance with art.8 ECHR and the statutory guidance. Secondly, to review challenges where a person feels that their non-conviction information should not be disclosed on an ECRC.[34] However, the Independent Monitor only reviews a relatively small number of disclosure decisions per-year, and concerns have been expressed that this role is not widely publicised.[35]

In *MS,* the High Court expressed "significant concern" over the way in which the Monitor had undertaken an independent review of a chief constable's decision to disclose historic allegations of indecency occurring 15 years before the applicant sought an ECRC.[36] Blair J observed that the Monitor had misunderstood the police's own review of the disclosed material, and did not undertake the independent review required of him, applying the statutory guidance.[37] Even more recently, in *SD,* the Independent Monitor's decision to uphold the

[32] *P* [2014] EWHC 1436 (Admin) at [25].
[33] *RK* [2013] EWHC 1555 (Admin); [2013] A.C.D. 121 at [38].
[34] S. Pountain, *Independent Monitor: Annual Report 2015*, p.5.
[35] The monitor reviewed a sample of 48 non-conviction ECRC disclosure decisions from a pool of 9626 in 2014, and reviewed 310 challenges from applicants. See S. Pountain, *Independent Monitor: Annual Report 2015*.
[36] *R. (MS) v Independent Monitor* [2016] EWHC 655 (Admin); [2016] 4 W.L.R. 88 at [51].
[37] *MS* [2016] EWHC 655 (Admin); [2016] 4 W.L.R. 88 at [50].

disclosure on a college lecturer's ECRC of allegations that he had made lewd sexual remarks in front of students was overturned by the Court of Appeal.[38] Beatson LJ held that the disclosure omitted relevant exculpatory information in relation to the allegations, and thus was disproportionate.[39] Whilst it would be premature to conclude that the mechanism for independent review has been a total failure on the basis of these challenges, it is proposed that independent oversight in the disclosure process should be more robust, and that, in any event, broader reforms are needed to address the systemic issues in the current system.

Currently, non-conviction information is disclosed on approximately 10,000 ECRCs per annum.[40] Whilst this represents a significant decrease on the rate of non-conviction disclosures prior to the *L* case, in the absence of an empirical evidence base supporting the crime prevention and public safety benefits of disclosure, the amount of presumptive "killer blows" this will deliver to non-convicted job applicants still seems extraordinary. Before considering how the amended non-conviction ECRC disclosure framework might be reformed, it is worth broadening the focus of this analysis to consider the extent to which such disclosure can be justified from a fundamental human rights perspective. It is only from the vantage point of a clear understanding of the impact of non-conviction disclosure – on individual human rights, and the common good insofar as it is impacted by the protection or non-protection of individual human rights – that we can begin to develop a principled and coherent legal framework for its regulation.

The balance of relevant jurisprudence and commentary suggests that there are two primary human rights based objections to non-conviction disclosure. The first is that the disclosure of police information, which has not established that the job applicant has engaged in any criminal wrongdoing, for the purpose of evaluating the applicant's suitability for a particular role, violates the applicant's right to be presumed innocent protected under art.6(2) ECHR.[41] The second distinct yet related objection is that non-conviction disclosure represents an unwarranted violation of the job applicant's right to respect for private life under art.8. It digs up the past interactions that the job applicant has had with the authorities and presents these to

[38] *R. (SD) v Chief Constable of North Yorkshire* [2017] EWCA Civ 1838.
[39] *SD* [2017] EWCA Civ 1838 at [57].
[40] Disclosure and Barring Service, *DBS dataset 1: disclosure progress, information disclosed and update service subscriptions* (London: OGL, 2017).
[41] The argument surfaced in *X*, and again in Mason DJ's review of non-conviction disclosure. See S. Mason DJ, *A Balanced Approach: Safeguarding the public through the fair and proportionate use of accurate criminal record information* (The Stationery Office, 2010), p.26.

his or her potential employer, treating the applicant's preferences as insignificant, and damaging his or her career prospects and reputation.

*When Does Disclosure Violate Article 6(2) ECHR?*

In its narrow sense, the presumption of innocence is a principle in criminal procedure which puts the burden of proof on the prosecution to prove the guilt of the accused. It is thus firmly grounded in a formalised trial setting. This narrowly formulated understanding of the presumption of innocence, which has roots at common law,[42] is plainly irrelevant to the process of disclosing non-conviction information. The enhanced disclosure process is not a criminal trial seeking to determine guilt. However, the presumption can be understood in a broader sense, as a fundamental principle of political morality, carrying robust implications for procedural fairness generally.[43]

Disclosures might be understood as an affront to the broader presumption of innocence, particularly when this principle is understood as a general presumption that the treatment of an individual should be consistent with his or her innocence. From the employer's perspective, the aim of obtaining this non-conviction information is, ultimately, to draw inferences about, or assess the character of, the individual concerned, and to assess the risks he or she might pose to the interests of the employer's company or organisation. Its dissemination in this context seems to treat the individual as someone who is "risky" on the basis of proceedings which ultimately did not find the individual guilty of an offence. Not all non-conviction ECRC disclosure will threaten the presumption of innocence in this way. This point is perhaps best demonstrated in the facts of *L*, where the information concerned was verifiably true, and did not relate to any criminal proceedings against the claimant. However, a closer analysis of the presumption of innocence is needed to comprehend the relationship between the presumption and non-conviction disclosure where non-conviction information, which raises suspicions that the applicant *might* have committed an offence, is disclosed as part of an ECRC.

[42] See *Woolmington v DPP* [1935] A.C. 462; [1935] All E.R. Rep. 1; (1935) 51 T.L.R. 446; (1936) 25 Cr. App. R. 72; (1935) (pp. 481-482).

[43] Understood in this broader sense, the presumption of innocence can be regarded as reinforcing other fundamental human rights, such as the right to liberty, fair trial rights, and the right to respect for private life. See, for example: P. Roberts and A. Zuckerman, *Criminal Evidence*, 2nd edn (Oxford: Oxford University Press, 2010), p.223; L. Campbell, "Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence" (2013) 76 M.L.R. 681 at p.690.

The presumption of innocence is a component of the right to a fair trial contained in art.6 ECHR. In *AR*,[44] Raynor J held that the disclosure of rape allegations made against a taxi driver ("AR") as part of an ECRC did not breach the presumption of innocence under art.6(2) ECHR. The defendant chief constable disclosed the information on the basis that, in his opinion, it was "more likely to be true than false."[45]

AR relied on the ECtHR's decision in *Allen*,[46] in submitting that, in disclosing the acquittal, the authorities treated the individual as if he were guilty. Raynor J dismissed the argument, observing first that the information disclosed did not imply he was guilty, as AR had suggested. Rather it suggested that, notwithstanding the acquittal, AR may have committed the offences in question.[47] Consequently, Raynor J held that the presumption of innocence had not been breached. The Court of Appeal recently affirmed Raynor J's decision. The appellate Court ruled that, as the statements on the ECRC were limited and cast no aspersion on the correctness of the acquittal, there was no violation of art.6(2).[48] This is a fine line. Indeed, the Court of Appeal left open the possibility that non-conviction disclosure as part of an ECRC *could* violate art.6(2) if the language used in the disclosure is such as to undermine the effect of an acquittal. The decision suggests that art.6(2) will only be violated in this context where the police directly question the correctness of a decision to acquit an individual.

It is reasonable to suggest that, in merely providing personal information to a third party so that the third party can assess the suitability of an individual for particular forms of employment, a public authority is not treating an individual as though he or she is guilty of an offence, or expressing a belief in the guilt of the individual. After all, it is not the police determining the suitability of the applicant or imposing restrictions on his or her employment prospects.[49] However, in determining whether art.6(2) is violated by the disclosure of non-conviction information, it is important for courts not to rest on the assumption that the police and the DBS

[44] *R. (AR) v Chief Constable of Greater Manchester Police* [2013] EWHC 2721 (Admin).
[45] *AR* [2013] EWHC 2721 (Admin) at [13].
[46] According to the ECtHR one aim of art.6(2) "is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged." See *Allen v United Kingdom*, App no 25424/09 (ECtHR, 12 July 2013) at [94].
[47] *AR* [2013] EWHC 2721 (Admin) at [55].
[48] See *AR* [2016] EWCA Civ 490; [2016] 1 W.L.R. 4125; Times, September 9, 2016 (p. 4149); cf. *R. (Adams) v Secretary of State for Justice* [2011] UKSC 18; [2012] 1 A.C. 48; *R. (Nealon) v Secretary of State for Justice* [2016] EWCA Civ 355; [2017] Q.B. 571; [2016] 3 W.L.R. 329; [2016] 2 Cr. App. R. 11.
[49] See Campbell, "Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence" (2013) 76 M.L.R. 700.

adopt a passive role in creating the information that is disclosed, and in determining which information should be disclosed and how it should be presented. Such an assumption overlooks not only the role of the officers responsible for making such disclosures, but also the potential for such records to be tainted with the biases exhibited by police officers at the point of creation. One needs look no further than the *X* case for an illustration of this problem. The respondent had disclosed the following comments in the claimant's ECRC:

> "It is alleged that on 11 December 2001 [the claimant] indecently exposed himself to a female petrol station attendant. It is further alleged that this was repeated on 7 May 2002. [The claimant] was arrested and interviewed whereby he stated that he did not think that he had committed the offence but that he was suffering from stress and anxiety at the time. [The claimant], … was charged with two counts of indecent exposure, however the alleged victim failed to identify the suspect during a covert identification parade, and the case was subsequently discontinued."[50]

The information presents an unfavourable image of the applicant. As Wall J noted, the information is partial and "carries with it an implication that the claimant was guilty, or at the very least the author of the summary believed him to be guilty."[51] The respondent omitted four occasions in the police interview where the claimant categorically denied that he had committed the acts of indecent exposure in question. Moreover, the ECRC makes no mention of the fact that the complainant stated she was "100% certain" she could identify the perpetrator of the indecent exposure, before failing to identify the claimant in an identity parade. Thus the information has been cherry-picked in such a way that is difficult to reconcile with a general presumption that the treatment of an individual should be consistent with his or her innocence. It is submitted that significant insinuation, bias, or omission in the presentation of information as part of an ECRC, which paints an unbalanced and unfavourable picture of the facts surrounding an applicant's non-conviction disposal, will undermine the effect of such a disposal and consequently violate the applicant's art.6(2) rights.

This could be taken further. Commenting on the presumption of innocence as a normative principle (and not on its limits in English law) Larrauri suggests that the disclosure of *any* untested or unproven information on an ECRC might be considered a breach of the presumption because "(a) although there is no formal accusation, *state agents* like the police

[50] *X* [2004] EWHC 61 (Admin); [2004] 1 W.L.R. 1518 (p. 1521).
[51] *X* [2004] EWHC 61 (Admin); [2004] 1 W.L.R. 1518 (p. 1527).

*endorse that suspicion is relevant* (this is why they disclose it); and (b) *this disclosure attributes stigma* to people who might (later be found to) be innocent."[52] Here, Larrauri succinctly articulates why the disclosure of untested information in the context of a criminal record certificate seems offensive to the ideal that those not convicted should be presumed innocent. It is not necessary to reach a conclusion as to the precise scope of the presumption as a normative principle here.

Turning then to English law, the presumption of innocence under art.6(2) would have to be extended quite considerably for it to protect job applicants from the disclosure of any and all untested or unproven information (assuming "proven" refers to the criminal standard of proof, that is). Such an extended scope is undesirable in this context. This is because, even if an individual has not been convicted of an offence, there may be circumstances where the disclosure of "unproven" non-conviction information pertaining to that individual's ECRC application would significantly reduce the risk of harm to children or other vulnerable groups who might otherwise be exposed to dangerous individuals.

Recalling the Soham Murders, at the time of applying for employment as a caretaker in his victims' school, Ian Huntley had been investigated in relation to numerous isolated incidents of serious sexual and violent offences. Whilst he was not convicted of any of these offences, the details of these investigations taken together clearly demonstrated that Huntley posed a considerable risk to children.[53] In cases where there is insurmountable evidence that an individual would pose a *risk* of serious harm to those under his or her care, yet insufficient evidence of *criminality* to secure a conviction, a decision maker's discretion to disclose should not be completely extinguished by an overly broad interpretation of art.6(2).

To interpret the scope of art.6(2) to cover all "unproven" non-conviction ECRC disclosure then would be objectionable. This is not to say Larrauri's arguments about the stigmatising effect of non-conviction disclosure are irrelevant when assessing non-conviction disclosure from a fundamental human rights perspective. Rather, it is to suggest that, instead of serving as a

[52] Larrauri, "Are Police Records Criminal Records?" (2014) 22 Eur. J. Crime Crim. L. & Crim. Just. 377 at p.385. Parentheses and emphasis in original.

[53] These details included suggestions that Huntley was in a relationship with a 15-year-old girl when he was aged 21, and numerous isolated complaints of sexual violence, which, when taken together, gave a strong indication that Huntley posed a clear risk to children and vulnerable groups. See House of Commons, *The Bichard Inquiry Report*, p.24.

barrier to disclosure, these concerns are better addressed as part of a broader art.8 inquiry.[54] Any decision to disclose non-conviction information on an ECRC, which may well imply suspicion and stigmatise the job applicant, is only justifiable insofar as it complies with art.8 ECHR.

This detail aside, it remains important for the police (and, indeed, the courts) to be alert to their obligations under art.6 when considering how the presentation of information on an ECRC might have the effect of undermining a non-conviction disposal. The current approach of domestic courts seems to suggest that art.6 will only be violated through non-conviction disclosure where a chief police officer explicitly questions or re-examines the non-conviction disposal. This is a low hurdle for those responsible for making disclosure decisions to clear. If public authorities are to truly treat non-convicted individuals in a manner consistent with their legal status, it is essential that non-conviction disclosure is devoid of bias or insinuation, and gives a fair representation of any inculpatory and exculpatory evidence pertaining to the applicant's involvement in a criminal process.

*When Does Disclosure Violate Article 8?*

Whether or not an ECRC contains insinuation or bias on the part of the police – thus constituting a potential violation of the presumption of innocence, as we just saw – the disclosure of non-conviction information pursuant to an ECRC may be objectionable in another way. This is the deleterious impact it has upon the privacy interests of the job applicant contrary to art.8 ECHR.

The assessment of whether or not a decision (such as here, disclosure of non-conviction information in an ECRC) is compatible with a qualified right such as art.8 follows a standard five-stage analysis. First, does a decision to disclose non-conviction information engage, that is fall within the scope of, the right to respect for private life? Secondly, does such a disclosure interfere with that right? Thirdly, is the disclosure prescribed by law – that is, is it lawful under both domestic law and under the general principles of foreseeability and accessibility in the ECHR? Fourthly, does the disclosure pursue one of the listed "legitimate aims", such as

[54] In *Mikolajova*, the ECtHR endorses the view that complaints related to the stigmatising effect of being subject to a criminal process can be taken into account in an art.8 balancing exercise, notwithstanding that the conduct of a public authority has not violated the applicant's art.6(2) rights. See *Mikolajova v Slovakia*, App no 4479/03 (ECtHR, 18 January 2011) at [44].

preventing disorder or crime, and ensuring public safety? Lastly, is the disclosure "necessary"?[55] It is beyond doubt that the disclosure of non-conviction information as part of an ECRC falls within the scope of art.8 and constitutes an interference with art.8(1) ECHR.[56] The focus of what follows is on whether the amended framework is in compliance with the last three stages.

Disclosure "in accordance with the law"?

In *MM,* the ECtHR determined that to be "in accordance with the law" measures pertaining to the storage and use of criminal record data must have clear and detailed rules concerning their scope; minimum safeguards governing the duration, storage, usage, procedures for preserving integrity, and confidentiality of data; and must provide sufficient guarantees against the risk of abuse and arbitrariness.[57] In *T,* the Supreme Court held that the statutory regime contained in Pt 5 of the Police Act 1997, which governed the disclosure of convictions and cautions as part of ECRCs and SCRCs, was incompatible with art.8 ECHR owing, in part, to its indiscriminate nature and lack of safeguards.[58] Lord Reed held that for any interference to be "in accordance with the law" there must exist safeguards, which have the effect of enabling an adequate proportionality analysis.[59]

The conviction and caution disclosure scheme, as it was originally enacted, required the disclosure of all convictions and cautions even if "spent". As discussed above,[60] new filtering rules, introduced in an amendment to the Police Act 1997, created some minimal safeguards, but still required the automatic disclosure of any conviction occurring within the last 11 years; any spent conviction or caution for a "serious" offence[61]; and any spent conviction where the person has more than one conviction.[62] In *P,* four appellants argued that this amended statutory scheme was, inter alia, insufficiently calibrated to satisfy the "in accordance with the law" limb of art.8(2).[63] Sir Brian Leveson P drew on Lord Reed's judgment in *T,* observing that, whilst

[55] See *Re Gaughran's Application for Judicial Review* [2015] UKSC 29; [2016] A.C. 345; [2015] Crim. L.R. 809 (p. 354).
[56] *L* [2009] UKSC 3; [2010] 1 A.C. 410 (pp. 427-429).
[57] *MM v United Kingdom,* App no 24029/07 (ECtHR, 13 November 2012) at [195].
[58] *R. (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] A.C. 49; [2014] 2 Cr. App. R. 24 (p.359).
[59] *T* [2014] UKSC 35; [2015] A.C. 49; [2014] 2 Cr. App. R. 24 (p. 359).
[60] See fn.5.
[61] These offences are listed in the Criminal Justice Act 2003 Sch.15.
[62] See Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200).
[63] *R. (P) v Secretary of State for the Home Department* [2017] EWCA Civ 321; [2017] 2 Cr. App. R. 12 (p. 137).

"there is no one safeguard that converts what is otherwise arbitrary into a scheme that is in accordance with the law," the cumulative effect of whatever safeguards are in place must be such as to ensure that there exists a "coherent and relevant link" between the disclosure and the public interest to be protected.[64] Applying this to the amended scheme, his Lordship held that the new filtering rules were not "in accordance with the law" as they were applied automatically regardless of the nature of the offence, the time elapsed since its occurrence, and without an independent mechanism for review.[65]

What about the scheme governing the disclosure of non-conviction information? In response to the Mason reports, the Government amended s.113B of the Police Act 1997. The amendments directly address safeguarding standards mentioned in *MM*. For instance, the statutory guidance addresses the nature and currency of the offence as relevant considerations.[66] As discussed above, this guidance gives little indication of exactly how, in assessing whether or not information should be disclosed, relevant chief police officers should strike a balance between seriousness and currency of the information. However, this is not decisive when assessing whether disclosure is "in accordance with the law" for the purposes of art.8. The statutory scheme is not indiscriminate. It includes more safeguards than the schemes considered in *T* and *P*, requiring chief officers to consider whether disclosure is necessary on a case-by-case basis, and providing some mechanism for independent review. In the statutory guidance to be used by relevant chief police officers, direction is given for all of the safeguarding points mentioned in *MM.* The law has therefore been reformed to meet the quality of law requirement for compliance with art.8(2).

In pursuit of a legitimate aim?

It is not foreseeable that such disclosure, done in accordance with the law, would struggle to clear the legitimate aim hurdle. Where a relevant chief police officer has followed the legislative provisions contained in Part V of the Police Act 1997 and its accompanying statutory guidance, such disclosure will be made to prevent crime and/or in the interests of public safety.

Necessary in a democratic society

[64] *P* [2017] EWCA Civ 321; [2017] 2 Cr. App. R. 12 (p. 139).
[65] *P* [2017] EWCA Civ 321; [2017] 2 Cr. App. R. 12 (p. 140).
[66] See Home Office, *Statutory Disclosure Guidance*, p.3.

For an interference to meet the final requirement in art.8(2), it must respond to a "pressing social need" and be "proportionate to the legitimate aim pursued".[67] The former component requires that the reasons advanced in justification are "relevant and sufficient".[68] The latter requires a fair balance between the competing interests at stake, taking into consideration whether the measure is minimally intrusive.[69]

The first broad task for domestic courts is to consider the seriousness of the setback to the individual's private life occasioned through non-conviction disclosure. Röessler argues that the reason the protection of privacy matters to people is that it is "an intrinsic part of their self understanding as autonomous individuals (within familiar limits) to have *control over their self presentation.*"[70] Thus, privacy's value stems from the protection it affords an individual to assert control over how he or she presents him or herself to the world, which is said to be instrumental to various ends. Other accounts provide similar conceptions of privacy.[71] These basic insights are useful in developing our understanding of how the disclosure of non-conviction information as part of an ECRC might represent a significant setback to an individual's privacy related interests.

In the context of criminal records, the limiting of access to such personal information protects the individual's reputation. This can forestall any stigmatisation which might result if the fact that an individual has been excluded from employment were to become widely known.[72] Even in the absence of such information becoming widely known in the individual's community, ECRC disclosure can be stigmatising as it amounts to the state treating the individual differently on the basis of *potential* guilt. Fenton and Rumney discuss how the stigma associated with sex offences is such that those merely suspected of committing such crimes can find themselves in a social world where distinctions between those who are accused and

[67] *Olsson v Sweden* (1989) 11 E.H.R.R. 259; Times, March 28, 1988 at [67].
[68] See *Stoll v Switzerland* (2007) 44 E.H.R.R. 53; 24 B.H.R.C. 258 at [101].
[69] See *Z v Finland* (1998) 25 E.H.R.R. 371; (1999) 45 B.M.L.R. 107 at [96].
[70] B. Röessler, *The Value of Privacy* (Cambridge: Polity Press, 2005), p.116 (emphasis in original).
[71] See, for example T. Nagel, "Concealment and Exposure" (1998) 27 Philos. Public Aff. 3; B. von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart, 2011).
[72] *R. (Wright) v Secretary of State for Health* [2009] UKHL 3; [2009] 1 A.C. 739; [2009] 2 W.L.R. 267; [2009] 2 All E.R. 129 (p. 754). The risk of such information becoming widely known is partially limited by the Code of Practice to which employers must adhere pursuant to Police Act 1997, s.120. The Code stipulates that employers must only use criminal record information for the legitimate purpose for which it was obtained. See Home Office, *Revised Code of Practice for Disclosure and Barring Service Registered Persons* (London: The Stationery Office, 2015).

those who are convicted are not necessarily recognised, once information of an official suspicion has been disclosed to the public.[73]

The ECtHR recognises that the dissemination of information linking an individual to a criminal matter will generally interfere with art.8(1).[74] Indeed, domestic courts have acknowledged that non-conviction disclosure will likely inflict a "killer blow" on the applicant's employment opportunities in his or her chosen field.[75] This is because, once such information is disclosed - whether it relates to uncontested information from a credible source or untested allegations from an unreliable source - the employer is under no duty to view the information objectively, having regard to the job applicant's rights under art.8. Thus, given the employer's primary responsibility is safeguarding children or vulnerable groups, he or she is bound to take a risk averse approach upon learning about the existence of any non-conviction information held by the police.

In recent years, the domestic courts have begun to grapple with how and why privacy interests are affected by disclosure.[76] However, this analysis is terse, and does not consistently make appropriate distinctions between different types of non-conviction information. The domestic courts have not considered the broader implications of non-conviction disclosure, particularly that such disclosure can be detrimental to the wider social utility that might be accrued through the protection of the job applicant's privacy. When privacy interests clash with other societal interests, such as free speech, they are often deemed to be of marginal importance, selfish, or anti-social.[77] The extent to which the public interest can be served *through* privacy protection is often downplayed or ignored. However, the embarrassing or stigmatising nature of information, such as that which links an individual to a criminal matter can, when disseminated,

[73] P. Rumney and R. Fenton, "Rape, Defendant Anonymity and Evidence-Based Policy Making" (2013) 76 M.L.R. 109 at p.127. There is some admittedly limited empirical research from the United States supporting the notion that the disclosure of minor arrests on a job applicant's criminal record will have a deleterious impact on his or her chances of gaining employment. See C. Uggen, M. Vuolo, and S. Lageson, "The Edge of Stigma: An experimental audit of the effects of low-level criminal records on employment" (2014) 52 Criminology 627 at p.649.

[74] *Niemietz v Germany* (1993) 16 EHRR 97 at [29]; *Segerstedt-Wiberg v Sweden* (2007) 44 E.H.R.R. 2; 21 B.H.R.C. 155 at [72]; *MM v United Kingdom,* App no 24029/07 (ECtHR, 13 November 2012) at [189].

[75] *L* [2009] UKSC 3; [2010] 1 A.C. 410 (p. 438).

[76] *L* [2009] UKSC 3; [2010] 1 A.C. 410 (pp. 427-429, 438).

[77] Criticisms of the right to privacy which run along these lines have come from a number of different angles: see C. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), p.187; A. Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999).

prevent him or her from developing new social relationships. This is detrimental not only to the individual concerned, but also to society. As Mead suggests:

> "The social benefit of A's individual privacy in such a case is predicated on social identity being something that is not inscribed and static but socially contextualised and reflexively interactive. I learn about myself from my interactions with others. A learns to develop, to mature and to change following those interactions – as in turn does B."[78]

Thus, the trade off between privacy, on the one hand, and the prevention of crime, on the other, is no longer one where the individual's personal and *possibly* reprehensible desire to conceal aspects of his or her self is competing against the common welfare of all of society. Rather it becomes two aspects of the common good competing against one another. For privacy interests to be taken seriously, they must be recognised as being fundamentally important to society and not just the individual making the claim.[79]

Although it may seem counterintuitive, selective protection against non-conviction disclosure may also *serve* the public's interest in crime prevention and public safety. Non-conviction disclosure is, essentially, a form of disintegrative stigmatisation[80]: it outcasts the subject of the disclosure, blocking his or her access to an avenue of legitimate participation in society (namely, through the pursuit of a chosen career). In doing so, such disclosure may - as is well documented in criminological literature - diminish the individual's social bonds to the community, increasing the likelihood that the individual will engage in offending behaviour.[81] The lack of domestic recognition for the potentially complicated and varied impact of disclosure in this context is significant. Unless the police and the courts recognise how it is that disclosure sets back privacy interests, and the potential for disclosure to have unintended consequences that are detrimental to the common good, it is doubtful whether they can consistently strike a fair balance between the interests served through disclosure and non-disclosure respectively. The challenges to the disclosure framework have shown that decision makers have persistently failed to recognise the impact of disclosure on fundamental rights,

[78] D. Mead, "A socialised conceptualisation of individual privacy: a theoretical and empirical study of the notion of 'public' in MOPI cases" (2017) 9 J.M.L. 100, at p.112.
[79] B. Goold, "How Much Surveillance is Too Much? Some Thoughts on Surveillance, Democracy and the Political Value of Privacy" in D. Schartum (ed), *Overvaaking i en Rettstat: Surveillance in a Constitutional Government* (Fagbokforlaget, 2010), p.46.
[80] J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge, Cambridge University Press, 1989), p.101.
[81] Braithwaite, *Crime, Shame and Reintegration* (1989); D. Downes, P. Rock, and E. McLaughlin, *Understanding Deviance*, 7th edn (Oxford: Oxford University Press, 2016), pp.160–184.

and society – even when applying the amended framework. In what follows, a proposal for law reform is suggested which would address the pervasive inconsistencies and biases towards disclosure under the amended framework.

*A Proposal for Law Reform*

One solution to the lack of rigour and consistency in the proportionality analysis might be to include a series of "bright line" rules in the disclosure guidance, which set specific exclusionary limits on non-conviction disclosure. These bright line rules would have the effect of excluding from ECRC disclosure certain categories of non-conviction information which, in view of the preceding analysis, it would be disproportionate to disclose. The *Statutory Disclosure Guidance*, as it is currently formulated, points to certain factors to which a chief police officer must have regard before making a decision to disclose (including the relevance, seriousness, currency, and credibility of the information at issue), leaving the police to attribute weight to these factors as they see fit. The proposed reforms would limit this discretion, which has led to inconsistency in the disclosure process. For example, where the non-conviction information relates to an acquittal, a bright line rule might restrict non-conviction disclosure only to offences that indicate a propensity to commit *serious* harm (such as those offences listed in Criminal Justice Act 2003, Sch.15). Another rule addressing the currency of the information might exclude the disclosure of any acquittals that did not occur within the last five years. A further rule might permit a chief police officer to depart from a general rule in certain exceptional circumstances.

Deciding exactly where to place such bright line rules in a manner that is not arbitrary is a difficult task, which Parliament should approach with considerable care. In the context of non-conviction DNA and fingerprint retention, the bright line approach set forth in s.63 of the Police and Criminal Evidence Act 1984, as amended by ss.3-5 of the Protection of Freedoms Act 2012, has proven (somewhat) successful in improving safeguards to the privacy rights of those subject to a criminal process.[82] This approach sets time limits on the retention of biometric information taken from non-convicted persons by the police, which vary depending on the seriousness of the offence for which the individual is arrested, and the age of the arrestee. It is

[82] J. Purshouse, "Article 8 and the retention of non-conviction DNA and fingerprint data in England and Wales" [2017] Crim. L.R. 253.

designed to address the broad and indiscriminate retention system that was roundly held to violate the art.8 rights of arrestees in *S and Marper*.[83]

Unlike the provisions in s.63 of the Police and Criminal Evidence Act 1984, however, the proposed reforms to non-conviction ECRC disclosure would not apply inflexibly, fettering the discretion of chief police officers to withhold non-conviction information where disclosure would be disproportionate in all of the circumstances. Rather, under the proposed system, chief police officers would still be required to assess the proportionality of disclosure on a case-by-case basis. This provides an important additional safeguard in conceivable circumstances where, notwithstanding that the information is eligible; disclosure would not represent a proportionate means of achieving a legitimate aim.[84] This approach, which combines bright line rules with a case-by-case assessment of proportionality, would improve consistency in the non-conviction disclosure framework, whilst recognising that rigidly formulated rules may produce unjust outcomes at the margins.

*Conclusion*

The new statutory regime under which chief police officers may disclose non-conviction information as part of an ECRC represents a step forward in safeguarding the human rights of those who have been subject to the criminal justice process. Relevant chief police officers must now carefully consider whether the disclosure of non-conviction information corresponds to a pressing social need and is proportionate.

However, the amended legal framework's overly broad guidance and limited oversight breed inconsistent and disproportionate disclosure. Repeated legal challenges to the disclosure of such information since these reforms were implemented indicate that there remains an alarming lack of consistency in the application of these provisions amongst not only chief police officers, but also domestic judges. There seems to be a lack of clarity regarding exactly how a fair balance should be struck between the privacy interests at stake (which are not adequately recognised) and the competing legitimate aims. In particular, domestic lawmakers have failed to acknowledge or appropriately manage the epistemic deficit which is bound to exist when assessments of the risk an individual poses to children and vulnerable groups are made based

[83] *S and Marper v United Kingdom* (2009) 48 E.H.R.R. 50; [2009] Crim. L.R. 355.

[84] Such circumstances may arise where, despite the currency and seriousness of the non-conviction information, some other factor such as the non-convicted person's age may make it disproportionate to disclose.

on partial, untested, and often contested personal information. They have also failed to accurately assess the impact that such disclosure can have on human rights, and on society at large. This article has demonstrated that, whilst recent legislative reforms have to some extent redressed the unjust system of non-conviction disclosure under *X*, renewed efforts are needed to ensure that the human rights of those subject to this process are adequately and consistently protected.