Government response to the Justice Committee’s report on disclosure of youth criminal records

You will of course know that, on 30 January 2019, the Supreme Court delivered its judgment in the joined cases of P, G and W; and Gallagher [2019 UKSC 3]. The Court dismissed the Government’s appeals except in the case of W, although it adopted a different legal reasoning to that used by the Court of Appeal. In essence, the Supreme Court held that two features of the current regime for the disclosure of criminal records are disproportionate and thus in breach of Article 8 of the European Convention on Human Rights: (1) mandatory indefinite disclosure of multiple convictions and (2) mandatory indefinite disclosure of a reprimand/caution given to a child for a listed serious offence.

As you know, the Justice Committee’s inquiry into disclosure of youth criminal records heard evidence from witnesses who highlighted the adverse effect of childhood criminal records on their access – as adults – to employment, education, and housing. The inquiry concluded that the current disclosure regime is inconsistent with the aims of the youth justice system and its evidence supported the case for changing the regime to remove barriers to rehabilitation. The Committee’s report of this inquiry [First Report of Session 2017–19] was published in July 2018.

You will also recall that the Government’s response (dated 30 January 2018) did not respond to several of the Committee’s recommendations, stating that a response would follow after conclusion of the litigation in the Supreme Court. For ease of reference, a list of these recommendations is appended to this letter. Subsequently, the Committee’s follow-up report on Young Adults in the Criminal Justice System [Eighth Report of Session 2017–19] set out an expectation that the Government would revisit the Committee’s recommendations on disclosure of records of childhood offences within one month of the Supreme Court judgment. The Government’s response to that recommendation merely stated that “an update would will be made to the Committee on progress in due course”.

Following the Supreme Court’s judgment, it is beyond doubt that some aspects of the criminal records regime are unlawful because they fall short of the requirements of Article 8 of the European Convention on Human Rights. In addition, a full year has now elapsed since the Government’s partial response to the Committee’s report on disclosure of youth criminal records. I look therefore forward to receiving your response to the outstanding recommendations within the next four weeks. Would you please, in particular, let us know
(1) what steps you are taking to ensure that the Disclosure and Barring Service suspends without delay the unlawful elements of the current regime, and (2) how you propose to review the regime to restore proportionality, and within what time frame.

I am writing in similar terms to the Secretary of State for the Home Department. I look forward to receiving the Government’s early response.

Bob Neill MP
Chair
Justice Committee
Government response to the previous Committee’s report on disclosure of youth criminal records – outstanding recommendations [emphasis added]

The Government’s response to the Committee’s report on disclosure of youth criminal records [First Report of Session 2017/19] was published as a Command Paper in January 2018. In relation to several of the Committee’s recommendations, the response states that “the Government believes that it is appropriate to consider these recommendations in conjunction with an authoritative judgment of the Supreme Court on the requirements of Article 8 in this context.” The recommendations in question are set out below, together with the Government’s comments (emphasis added).

Disclosure rules for standard and enhanced criminal records certificates

The government response takes three of the Committee’s recommendations together, as set out below. At paragraph 31, the Government states: ‘We will consider these recommendations following the conclusion of the litigation’.

The three recommendations in the Committee’s report are as follows:

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

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

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

Introducing discretion or a review process

At paragraph 35 of its response, the Government states that it will consider the two recommendations from the Committee for introducing discretion or a new review process once the ongoing litigation has concluded, along with consideration of the recommendations of the Taylor review[1] and the Lammy review[2]. The Committee’s two recommendations are as follows:

- **Recommendation 18** at paragraph 92 of the report: ‘We recognise the potential advantages of allowing applications to a court or to the Parole Board to have criminal records “sealed”, but we anticipate that this would impose unsustainable pressures on the decision-making body because of the number of individuals likely to

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1 Review of the Youth Justice System in England and Wales; Charlie Taylor, December 2016

2 The Lammy Review An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System. September 2017
apply. We therefore conclude that a filtering system, albeit with substantial revisions, should be retained to allow automatic filtering of many criminal records.

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

**Discriminatory impact of the disclosure regime**

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

The Government states at paragraph 73 of its response that ‘it is important to look at the different aspects of the disclosure regime in the round, and we will therefore consider these recommendations, along with recommendations on criminal records made by Charlie Taylor, the Justice Committee and others, *once the litigation is concluded*’.

**Young adults**

**Recommendation 15** at paragraph 74 of the Committee’s report states: ‘We recommend that a new approach for disclosing the criminal records of young adults be the subject of comprehensive research’.

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