



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Access NI Filtering Scheme: DOJ/Access NI
Briefing

17 October 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Mr Patsy McGlone
Mr Jim Wells

Witnesses:

Mr Tom Clarke	Access NI
Ms Debbie Pritchard	Department of Justice
Mr Simon Rogers	Department of Justice

The Chairperson: I welcome Mr Simon Rogers, the deputy director of the protection and organised crime unit in the Department of Justice (DOJ), Mr Tom Clarke, the operations manager for Access NI, and Debbie Pritchard from the criminal records review team at the Department of Justice. I will hand over to you, Mr Rogers.

Mr Simon Rogers (Department of Justice): Thank you, Chair. We are presenting proposals to the Committee today that seek to introduce a proportionate statutory scheme to enable filtering of information from disclosures by Access NI while, crucially, maintaining suitable safeguarding arrangements. It is important to try to run fairly quickly through the background against which we are bringing the proposals.

In November 2012, the European Court ruled that the disclosure of a caution in a case called MM by the Police Service of Northern Ireland to an employer was a violation of article 8 of the European Convention on Human Rights (ECHR) in that it violated the right to privacy. At that time, we briefed the Committee on the case and on our move to revise our disclosures as a consequence of that in respect of cautions. The Committee was subsequently advised of the judgement by the Court of Appeal in England and Wales of three cases: T, JB and AW. In those cases, the court found that in the case of cautions, the disclosure by the disclosure body in England and Wales was disproportionate to the legitimate aims of the disclosure scheme. The court noted that, with disclosure, relevance must depend on a number of factors, including the seriousness of the offence; the age of the offender at the time of the offence; the sentence or other disposal; the time that had elapsed since the offence; whether the individual had subsequently reoffended; and the nature of the work that the individual wished to undertake.

After that case, the Home Office and the Ministry of Justice in England and Wales introduced a scheme that was designed to filter old and minor convictions and cautions from various checks, which came into effect on 29 May. That is set out in the background paper that we sent to the Committee. Scotland already had a scheme in place. For the sake of completeness, the Republic of Ireland is considering its position and is looking at whether it should have a scheme. We took legal advice from the Attorney General and senior counsel on the risk of challenge to our scheme, as a result of which we believe that there is a real risk of a finding of a violation of article 8 here as identified by the European Court.

Another relevant piece of the jigsaw is Sunita Mason's report, which we have previously brought to the Committee. Part 1 of Mrs Mason's report on the review of the criminal records regime recommends that Access NI should routinely disclose informed warnings, cautions and details of diversionary youth conferences with a stepping-down arrangement for cases involving a young person. She was concerned that non-disclosure of that information could have a detrimental impact on public protection. She noted that, in those cases, some form of offending had occurred; the information is revealed on disclosures elsewhere in the United Kingdom; and that it is not retained indefinitely, given that it is stepped down after a set period. She also noted that some 4,000 of the 31,000 records that are held on the Northern Ireland criminal history database of cautions and diversionary disposals included cautions that related to what might be broadly described as "sexual offences", albeit offences that are not considered to be sufficiently serious to bring to court. Mrs Mason recommended that we should bring forward proposals to filter out convictions that were minor and old, and criminal information such as cautions for disclosure purposes. She noted that some types of more serious information should always be disclosed.

After the publication of Mrs Mason's report, we launched a consultation exercise. With regard to routine disclosure, which she called for, of informed warnings, cautions and diversionary youth conferences, 12 of the organisations that responded broadly supported the recommendation, with five organisations disagreeing. An overwhelming number of respondents to the consultation agreed with filtering, to some degree at least.

In view of the judgements, the establishment of the scheme in England and Wales for filtering and our legal advice about the risk of a violation of article 8, as well as Sunita Mason's recommendations and the broad support for her proposals, the Minister of Justice concluded that a statutory-based scheme to filter convictions that are both old and minor, and disposals such as cautions, should be introduced here as quickly as possible. The idea of the proposal is that the scheme should be similar to the one in England and Wales. Our background paper sets out our aims for the scheme with regard to being compliant with ECHR, maintaining barred lists and aligning as far as possible with England and Wales because of our links with them, through the barred list and because of the updating service that we hope to introduce.

The scheme that we want to introduce here, however, would have to be and ought to be tailored to our individual circumstances. That includes the offence provisions that are specific here. On the basis of legal advice, the Minister of Justice wishes to include a provision for people to ask for discretion to be exercised in their particular case and to consider their case not automatically but through a review mechanism. Ultimately, we have tried to come up with a scheme that provides full disclosure relating to the safeguarding and protection of children and vulnerable adults, which does not pose a risk of harm or the likelihood of harm to the public, children and vulnerable adults and also meets Sunita Mason's proposals. The details are set out in our background paper. In essence, certain offences, such as murder, would always be disclosable. Cases involving imprisonment or a suspended sentence would always be disclosed. There are different schemes for convictions and cautions and, indeed, for adults compared with young people.

We welcome the Committee's views. Should we proceed, we can then introduce the changes through secondary legislation, and we would need to put further detail to the Committee at the SL1 stage. The review process would be slightly more complicated because it would require an amendment to the Police Act 1997 and would require primary legislation. Our aim would be to try to introduce that alongside the other changes being introduced in light of Sunita Mason's report in the forthcoming Justice Bill.

As we set out in our background paper, our intention is to review the operation of the scheme with registered bodies and others after a year of operation to see whether it is working appropriately and whether other amendments need to be made, which would be possible through secondary legislation.

In conclusion, we are seeking to introduce a system that will ensure that we will remove any risk of being non-compliant with article 8 of the convention, will continue to provide information on people who work with children and vulnerable adults that is proportionate and relevant to the risk, and will maintain safeguards for vulnerable groups. We welcome the Committee's views on our paper.

The Chairperson: Thank you, Mr Rogers. At this stage, you want an indication from the Committee, but ultimately, you have to take this to the Executive in the first instance.

Mr Simon Rogers: Yes.

The Chairperson: I want to be clear in my mind about the process that you need to follow.

Mr Wells: I can see where you are coming from. However, take the example of someone who has been seen hanging around a children's play area or a school playground. In that example, that person — possibly she, but mostly he — has not been cautioned for anything more serious than trespass, and although we have nothing on him, the circumstances indicate that it is a bit unusual for him to be hanging around a children's play area regularly. If he had applied to be, say, a childcare assistant, that would be something to be worried about. Would that automatically be filtered out?

Mr Simon Rogers: That would not be registered as a caution or an informed warning, so we would be no worse off than we are today. In practice, the police could reveal that because, in addition to the stage of Access NI looking at the criminal records cautions or convictions, cases can be looked at by the police in enhanced checks to see whether there is any other relevant material that ought to be disclosed. In that example, the police would have the information and would be in a position to disclose it if they felt that it was relevant to the post. Therefore, it would not be subject to filtering.

Mr Wells: So, even if it is a low-key caution or event, the police still have discretion. They can still put it on if they think that it is relevant to the post. In other cases, they might not do that if it is not relevant — for instance, if he were to apply for a job dealing with adults.

Mr Simon Rogers: They would make a call on whether that should be disclosed. As you said, if it were a position working with adults, they might deem it not relevant. If it were a position in a children's home, they would probably think that it is relevant.

Mr Wells: Do those low-key additions to a record drop off completely after five or six years on the basis of the Rehabilitation of Offenders Act, or are they still always on the record?

Mr Tom Clarke (Access NI): Those offences will always be held on the criminal record, and, for the purposes of disclosure, we will filter them in the cases of people who want to work with children or vulnerable adults. We carry out a different type of disclosure based on the Rehabilitation of Offenders Act. Caution automatically falls within the Rehabilitation of Offenders Act and would never be disclosed on a basic check, but it is in standard and enhanced checks, which we carry out for people who apply to work with children or vulnerable adults.

Mr Wells: So there is no danger of those falling off the system completely at some stage.

Mr Tom Clarke: No; they will always be on the criminal record. We are simply filtering them out for the purposes of disclosure.

Mr Wells: The only drawback is that you are then asking your staff at Access Northern Ireland to make a value judgement on what should and should not go on.

Mr Tom Clarke: In broad terms, not really, because the scheme provides a system whereby there are a number of offences that will never be filtered. We have a list of those, and, when specific offences occur, we will never filter off, whether it is a caution, a conviction or whatever. After that, time limits are applied to various offences. If, for example, it was not on the list of specified offences and the conviction was more than 11 years ago, it would be filtered off. If the conviction was less than 11 years ago, it would stay on the disclosure. There are broad lines that staff can work on. They are not making a value judgement in each case. They will simply go by the criteria of the scheme and disclose or remove the disclosure. As Simon said, the police will still have the opportunity to put back

on anything that has been filtered off by Access NI if they believe that it is relevant to the position that is being applied for.

Mr Wells: They have to make that judgement, however.

Mr Tom Clarke: They simply make a judgement against a set of criteria based on what is on the specified list and the time limits. They do not look at every case and say that they will disclose this one, that one or the other one; there will be a broad set of criteria for them to work against.

Mr Wells: Could they be left in a situation in which they believe that a very low-key entry creates suspicion in their minds that something is not right, but it has to be automatically deleted because of the criteria?

Mr Tom Clarke: No, I do not foresee that. We have tested this to find out how it would work, what the impact would be, and what would be filtered off. We have found that, in many cases, we are filtering off driving offences from 20 or 30 years ago. We quite often use the example of Access NI disclosing a theft offence for which someone was fined £10 35 years ago. That is the sort of thing that would fall off, not the more serious type of offence that you refer to.

Mr Wells: I was involved in a case in south Down in which a gentleman was found hiding in the bushes in the grounds of a primary school. All he got was a caution to tell him to get off the premises; that was all that they could do. Would that stay on?

Mr Tom Clarke: It will always be on his criminal record. It depends on the nature of the offence that he was charged with, so if a caution was for indecent behaviour, for example, that would stay on.

Mr Wells: It was not, and that is the problem. There were grave doubts as to why he was there.

Ms Debbie Pritchard (Department of Justice): That information will always be held by the police. It will always be on the person's criminal history that is held by the police and that they can access. If the person is looking for an enhanced certificate to work with children or vulnerable adults, once the filtering exercise has been done at Access NI level, the papers will be sent to the police. The police will then have all that background information and can put it back on the certificate under the provisions of adding additional information. The filtering scheme will allow for that.

The Chairperson: There are no other members wishing to ask questions. Thank you. If you are happy to seek to get the scheme through the Executive, we will deal with it in due course.