



Independent Monitor

Annual Report 2017



Introduction

This is the fifth Annual Report of the Independent Monitor and it is my pleasure to present the report for the period January to December 2017.

In my 2016 report, I did not make any recommendations but I did receive a response from the previous Home Secretary prior to publication of the report which responded not only to the 2016 report but also to the recommendations made in my 2015 Annual Report as well as a recommendation made in my 2014 Annual Report. The, then, Home Secretary's response was attached to my 2016 Annual Report and I will undertake to review the response in this year's report.

Overview of the year

Referrals.

The total number of cases received in 2017 was 237 which is comparable to the 243 cases received in 2016.

This consistent number of referrals is reassuring and I believe it does support my contention that work carried out during previous years, which developed a more proportionate way of writing disclosure texts, is now having an effect.

Northern Ireland

The Northern Ireland Justice Act commenced on 2nd November 2015 and had the effect of extending the full role of the Independent Monitor to reviewing disclosure disputes made in Northern Ireland in the same way as it currently does in England and Wales. The numbers of referrals from Northern Ireland have remained low over this reporting period with only 1 case being referred to me for review.

As a part of my role I have reviewed a sample of cases from Northern Ireland in which the police have either disclosed or not disclosed information. I have not identified any specific issues as a result of this exercise.

Judicial Reviews.

There has been one case in the reporting year where an applicant challenged my decision by requesting a Judicial Review. This is the final recourse available to an individual who disputes the information disclosed by police on their Enhanced Criminal Record Certificate. In this case (*R (LG) v Independent Monitor*) my decision was not upheld and the disclosure was quashed due to the outcome of a court of appeal case (*R(SD) v North Yorkshire Police*).

As a result of the judgments, I have been involved in the discussions with various stakeholders in this matter and am pleased that the National Police Chiefs' Council (NPCC) and the Disclosure and Barring Service (DBS) has now issued advice to police forces in relation to this matter.

Cases I had identified as being affected by the points raised in SD and LG have been returned to their respective police forces for further consideration and amendments to disclosures in adherence with the recent advice.

I acknowledge and support the right of the individual to challenge my decisions, which they can do through the Judicial Review process. As in previous years, decisions of the court have enabled me to refine subsequent decision making.

Previous Recommendations.

In my 2015 Annual Report I made two recommendations.

My first recommendation was that the police should be added to the list of agencies able to access transcripts of court cases without having to seek the permission of the trial judge. This has caused delays in obtaining transcripts which have been referred to by applicants in their representations. I am convinced that in many cases the dispute process could be greatly speeded up if this recommendation were to be accepted.

The previous Home Secretary has responded as follows;

“Your first recommendation is that for the purposes of disclosure, the police are added to the list of those agencies that are able to obtain court transcripts without seeking the prior approval of the trial judge. I support this recommendation. As you know, policy for HM Courts and Tribunals Service rests with the Ministry of Justice. I have asked officials to liaise with [The] NPCC Disclosure lead to consider whether this is something that would be of benefit to police disclosure and, if so, ask the NPCC to write to the Secretary of State for Justice to make the case.”

I am grateful for the support to this recommendation which I raised as it was one which affects the timeliness of the cases I deal with. I note that the previous Home Secretary has referred the matter back to the police to establish if it is also an issue for them. In the meantime, this matter remains an issue for me and I would welcome a solution to it. As my role is independent of the Police I would ask the Home Secretary to consider writing to the Lord Chancellor and Secretary of State for Justice to extend his support to this issue.

My second recommendation related to the disclosure of information relating to people related or otherwise closely linked to the applicant who the police hold adverse information about. These are known as third party disclosures and I feel that there has been an inconsistent approach to this type of disclosure across police forces.

The previous Home Secretary responded as follows;

“Your second recommendation is that there should be a more consistent approach to third party disclosures through the development of more detailed guidance. Again, I support this recommendation. I understand you meet regularly with the Disclosure and Barring Service and the Disclosure lead in the National Police Chiefs Council and it would therefore seem that you are best placed to discuss and agree a more consistent approach that could be reflected in guidance.”

I am grateful for the support for this recommendation and I am happy to be involved in the development of guidance on this important issue. I am not able to change the Statutory Guidance on Disclosure, as this document is owned by the Home Office. Similarly, the Quality Assurance

Framework (QAF), which is used by police disclosure teams when making their disclosure decisions, is jointly owned by the Police and DBS.

In my 2012-13 Annual Report, I raised an issue regarding the disclosure of information relating to a person's mental ill health. The Home Office accepted this recommendation and as a result the Statutory Guidance was amended. 'Sexting' was another matter which was of concern to the Home Office. Discussions on this matter were led by the Home Office, and subsequently the Quality Assurance Framework was amended.

I do meet regularly with Police and DBS and I have been able to influence some minor but important amendments to the disclosure process for example the way risk is described on a disclosure. This was the right level for this matter to be resolved.

The issue of third party disclosures is one which I believe requires a similar approach, with a wider level of engagement from the Home Office, the DBS and Police and should also include external stakeholders. Therefore, I would urge that this matter is led by the appropriate Home Office unit.

The previous Secretary response also referred to a recommendation from my 2014 Annual Report to introduce a time limit for disputing disclosures

The, then, Home Secretary stated;

"I am aware that your second recommendation [in 2014] to introduce a time limit for disputing a disclosure remains outstanding as it requires an amendment to primary legislation. Since publishing your 2014 Annual Report, I understand the need to seek a legislative slot to introduce a time limit for disputing disclosure cases has lessened because you are employing a new process that should reduce these applications significantly. I appreciate your willingness to seek a non-legislative solution to this issue and would be grateful if you could keep this issue under review and inform me of any significant issues."

I am pleased with the support from the previous Home Secretary in relation to my approach to this issue. Whilst I have introduced a process to deal with these types of cases which has reduced the impact of these cases on police disclosure units. I believe that it would benefit the overall disclosure process if the matter was covered in legislation in the future in order that valuable time for each of the parties involved in the disclosure process can be saved.

Engagement

Over the past year I have continued with my attendance at the Police National and Regional Disclosure Forums, as well as the Police Disclosure Portfolio Group meetings. I have visited the DBS in Liverpool and Access Northern Ireland (ANI) in Belfast. I continue to meet regularly with operational leads from the DBS, ANI, NPCC and the police disclosure units to identify issues of concern. My approach has been to deal with such issues as they arise throughout the year rather than using my Annual Report as the only vehicle to flag concerns and to identify areas for improvement.

Sampling of cases.

I have also undertaken a sampling exercise of disputes from 2017 as is required under section 119B of the Police Act 1997. The cases included those where the police had disclosed information as well as those where they had chosen not to disclose information. I sampled 45 Enhanced Disclosure cases and 23 cases from the Update Service. These cases were from 12 police forces. In addition, I identified 5 forces, where I have not received any dispute cases. I then reviewed an additional 30 cases from those forces.

Amongst these cases, I have conducted a review of a sample of cases from the Police Service of Northern Ireland.

Following my dip-sampling I have provided feedback to each of the forces whose cases I have reviewed and out of the cases I have sampled in this or in previous years I have not identified any significant issues. It may be that this is indicative of consistent decision-making and the compliance of police disclosure units with the QAF and this would be a positive outcome.

My intention for 2018 reporting year is to expand the sampling exercise either by theme or occupation and I am currently working with the DBS Standards and Compliance Unit to progress this. I will report back in my 2018 Annual Report.

Recommendations

I have no specific recommendations to make this year.

Conclusion

There are a number of ongoing issues which impact on the disclosure process. I am pleased that my previous recommendations have been accepted and I look forward to working with relevant parties to progress these over the coming months.

I remain grateful for the support I receive from my Secretariat and their continuing efforts in managing my caseload along with enquiries from applicants and their representatives.

A handwritten signature in black ink, appearing to read 'Simon Pountain', with a stylized flourish underneath.

Simon Pountain

Powers under which the Independent Monitor operates

The Independent Monitor is appointed by the Secretary of State under section 119B of the Police Act 1997 and has two statutory duties relating to the disclosure of information on a person's Enhanced Criminal Records Certificate.

Firstly, in accordance with section 119B of the Police Act 1997 (1997 Act), the Independent Monitor must review a sample of cases in which police non-conviction information is included, or not included, on enhanced criminal record certificates under section 113B(4) of the Act. The purpose of these reviews is to ensure compliance with Home Office Statutory Guidance on disclosure and Article 8 of the European Convention of Human Rights (ECHR).

Secondly, when a request for an Enhanced Certificate is made, an individual's details are referred to any police force which may hold information about the individual. This enables the force to check against their records for any information which they reasonably believe to be relevant to the prescribed purpose for which the certificate is sought and then consider if it ought to be disclosed. If an applicant is not satisfied with the information being disclosed they may apply to the Independent Monitor for a review. Under section 117A of the 1997 Act, the Independent Monitor has a role in reviewing those cases where a person feels that the information disclosed by police within a Disclosure and Barring Service Enhanced Criminal Record Certificate is either not relevant to the workforce they are applying for, or that it ought not to be disclosed.

Operation of the Secretariat and function of the Independent Monitor

The Independent Monitor's role in the reviewing of referrals about information disclosed by police forces was introduced by the Protection of Freedoms Act (PoFA) 2012. A Secretariat to support the Independent Monitor to perform this function was set up in October 2012 and now consists of two full time members of staff.

Prior to October 2012 and the changes introduced in PoFA, an individual who was dissatisfied with information that appeared on their enhanced certificate only had recourse to appeal to the Chief Constable of the relevant force in relation to the accuracy of the text. If the applicant was unsatisfied with the outcome of this or the overall wording of the text then their only option was to request a Judicial Review of the disclosure decision, which would be costly to the applicant and to the DBS in both time and resource. The Independent Monitor role now acts as an additional layer of review before a person has to resort to Judicial Review.

Since its creation in September 2012 to the end of December 2017, the Secretariat has received a total of 1536 referrals from individuals who are concerned about information disclosed on their disclosure certificates. Case papers consist of the disclosure certificate provided by the DBS together with any dispute documents about the disclosure information that the applicant may have raised with the DBS previously. Once a case is received, the Secretariat will ask the police for information relating to the case and the applicant for any additional representations they may wish to make. Upon receipt of representations the referral case is put to the Independent Monitor for review.

In deciding on the inclusion of information on a certificate, and following statutory guidance, the Independent Monitor considers:

1. Whether the information provided is accurate;
2. Whether the information provided is relevant to the prescribed purpose for which the certificate has been obtained (following policy changes in 2012 this is now generally for work within the child or adult workforces rather than to a specific role); and
3. Whether the information ought to be disclosed, including;
 - a. What the legitimate aim of the disclosure is;
 - b. Whether the disclosure is necessary to achieve that legitimate aim; and

- c. Whether the disclosure is proportionate, striking a fair balance between the rights of the applicant and the rights of those whom the disclosure seeks to protect.

All criteria are considered equally, there is no weighting. Once a decision has been made the Secretariat will write to the applicant, the DBS and the relevant police chief officer informing them of the Independent Monitor's decision.

In addition to providing decisions on requests for review of a chief officer disclosure of approved information, the Independent Monitor has also undertaken the required sample exercise under s119B (5) of the 1997 Act. The exercise has consisted of the sampling of police information provided on Enhanced Certificates for a number of forces. Following these reviews, the Independent Monitor has provided feedback to forces to ensure quality and compliance with Statutory Guidance.

Clarification

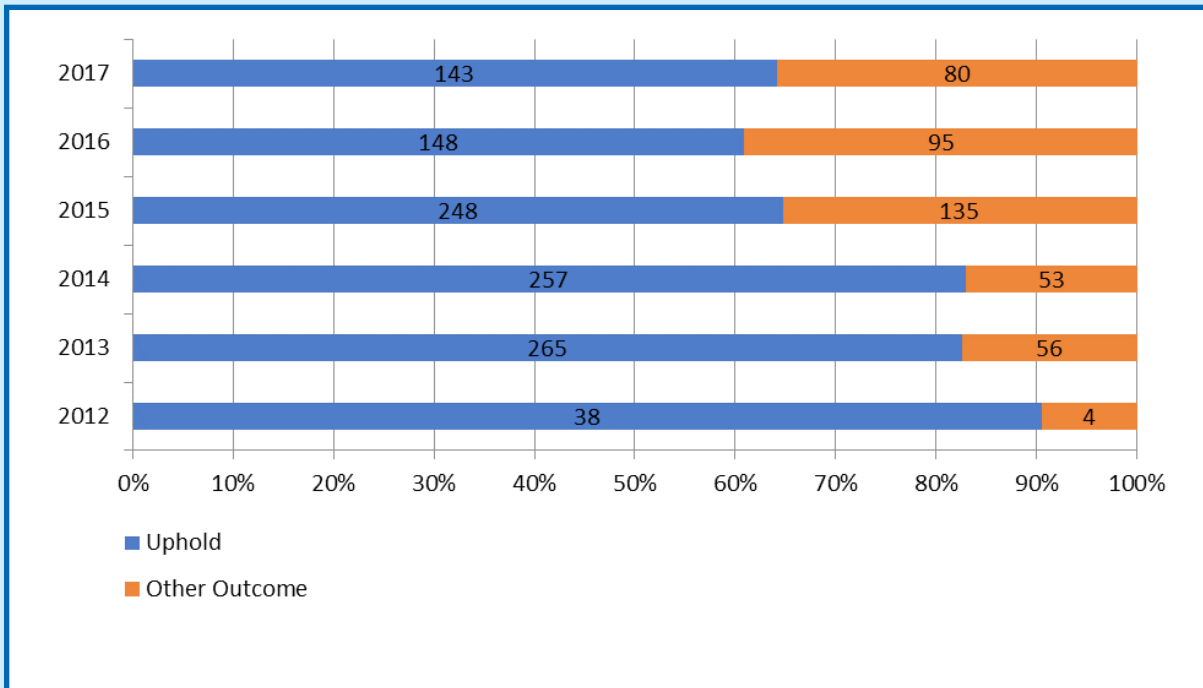
My role is different from the Independent Complaints Reviewer (ICR) for the DBS. As a statutory appointee, my role is to consider appeals from applicants disputing the inclusion of non-conviction information within their enhanced disclosure certificates issued by the DBS. Such certificates are required for those who wish to work with children and vulnerable adults and in some other specified areas such as taxi driving.

The ICR reviews complaints about the DBS and offers constructive advice about the way in which the DBS deals with customers and how the DBS handles complaints.

Independent Monitor Case referrals: 2017 Summary

The chart below shows the outcomes of the referrals received by the Independent Monitor in 2016 compared with the previous years. It also shows the same information for the period between September and December 2012 following the introduction of the Independent Monitor role. ‘Uphold’ refers to those cases where I have supported the police disclosure in its entirety.

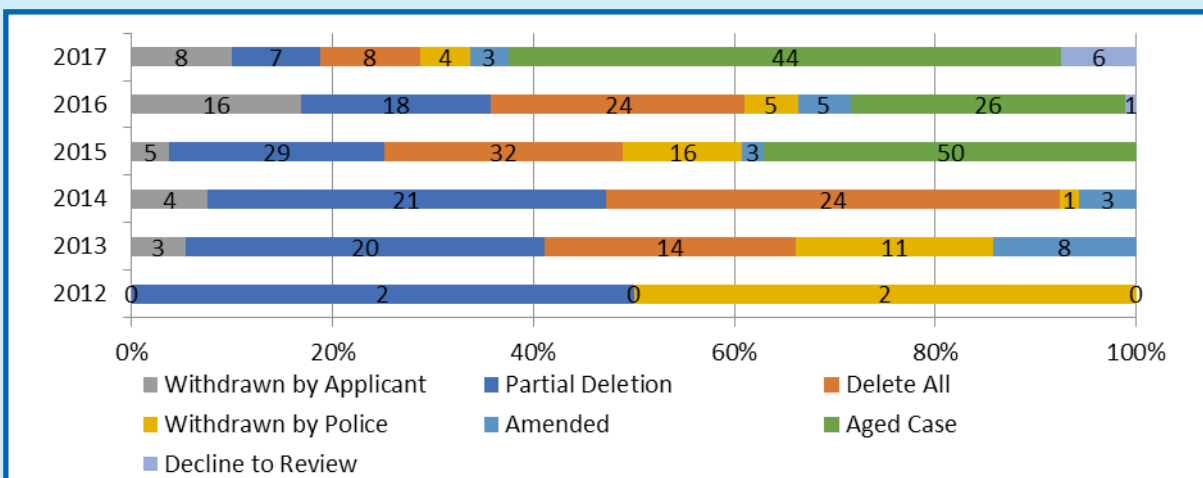
Chart 1



Note: The figures for 2017 do not total 237 as there are 14 cases currently awaiting review.

The following chart breaks down the ‘other outcome’ category above to show the way in which the cases have been dealt with.

Chart 2



In general, it can be seen that the total number of referrals has remained very similar to those from 2016. I attributed last year’s fall in case numbers to the changes in the way police were asked to articulate risk in the disclosure text. I believe that the consistent numbers for this year supports that view and I am pleased that these changes have had a positive impact.

I have continued with my policy of not reviewing those cases where the dispute is made a significant time after the disclosure was made and where the prescribed purpose no longer exists or it is reasonable to believe that this is the case.

There is also a category shown in the chart above for amended cases. Occasionally there are cases where I feel that a disclosure requires some amendment rather than having text deleted. This may be where a deletion would leave the text grammatically incorrect or where I believe the disclosure is worded subjectively. In these cases, I will negotiate with the Chief Officer to agree an amended form of words.

I have declined to review six cases this year. In two of the cases the applicant explained that they were no longer seeking the role which they had applied for; in one case the registered body had wrongly identified the role as home based and I advised that this be resolved on another application; in two cases the police were still considering the case and in the final case I considered that the dispute process had not concluded between the applicant and police and as a result a disclosure text was agreed without the need for me to review the case further.

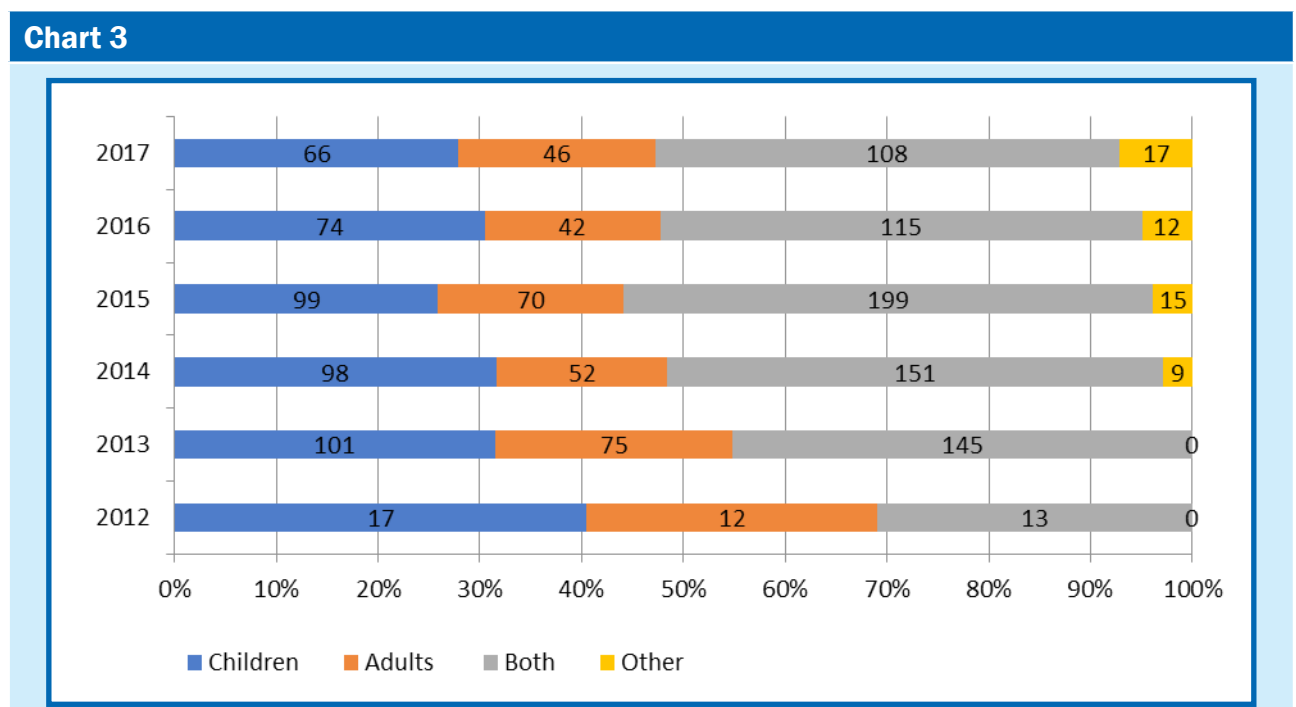
There are fourteen cases from 2017 which are awaiting review. These are the cases I have referred to in my introduction which I have returned to their originating police force pending police consideration in respect of the recent judicial reviews of SD v North Yorkshire Police and LG v Independent Monitor.

I have undertaken to prioritise these cases once the issue is resolved and the cases are returned to me.

Workforces applied for.

The following chart shows a comparison of the workforces for which applications for review have been received.

It can be seen from the chart that the proportion of cases in each workforce remains fairly consistent with previous years and I have not detected any shift in the workforces where information is being disputed. The majority of disputes are from applicants who have applied for both the Children’s and Adult’s workforces. It remains the case that in these cases more information is considered by police due to the wider portability of the certificate and it is therefore often the case that individuals are concerned that the information being disclosed is not relevant to the specific role applied for.



Note: There were no disputes recorded in the 'Other workforce' category in 2012 or 2013 as Taxi Drivers were considered as a part of the Children’s workforce during those years.

Appendix A. Government Response to 2017 Annual report.



Home Secretary
2 Marsham Street
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2 Marsham Street
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17 September 2018

Dear Simon,

Thank you for your 2017 Annual Report which I intend to publish on gov.uk shortly. Your report provided a helpful insight into the disclosure of police information on enhanced criminal record certificates (ECRCs) and your work with regional disclosure forums to develop a consistency of approach.

I note that you have not made any new recommendations in this report, but have reiterated those previously made by you in earlier years. Having considered these, I have set out our response below.

Previous Recommendations

Access to Court Transcripts

I note that my predecessor supported your recommendation that the police be added to the list of those agencies able to obtain court transcripts without seeking the prior approval of the trial judge. My officials have raised this with Nick Adderley, NPCC Disclosure lead and we will assist as required. I note your request that I write to the Secretary of State for Justice, as well as to the Lord Chancellor, and would suggest that you keep this matter under review, and if the situation persists once the NPCC have made their case, to inform me whereupon I can reconsider this action.

Third Party Disclosures

Your recommendation that there should be a more consistent approach to third party disclosures through more detailed guidance was supported by my predecessor, and I am in agreement with the intention underlying this recommendation. I note the proposed action that you meet with both DBS and NPCC representatives to discuss a consistency of approach that could be reflected in guidance. I appreciate where the responsibilities for updating the relevant guidance lies, and my officials will keep this matter under review in light of your ongoing discussions.

Time Limit for Disputing Disclosures

As you will be aware, your recommendation to introduce a time limit for disputing disclosure will require amendment to primary legislation, though I am aware of your introduction of a new process to reduce the quantity of such applications, which I understand reduced the urgency of this amendment. I reiterate the thanks offered to you by my predecessor for this innovative solution to a challenging issue. I note your statement that you believe this should be addressed by way of legislative amendment to benefit the disclosure process overall, and will ask my officials to consider when an appropriate juncture to progress this can occur.

I thank you for your important work over the past period.

A handwritten signature in black ink, appearing to read 'S. Javid', with a small flourish at the end.

Rt Hon Sajid Javid MP

Appendix B: Table of previous recommendations.

Recommendation	Year made	status	Current position
Mental Health	2013	Accepted	The statutory guidance has now been amended in respect of Mental Health cases and was issued in August 2015.
Home Based Occupations	2013	Partially Accepted	DBS amended the applicant and RB guidance in 2015 and promoted this in DBS News.
Workforce v Position Applied for	2013	Not Accepted	Issue raised again in 2014 Annual Report. This resulted in the previous response being reiterated.
Registered Bodies	2013	Accepted	DBS worked with NACRO and CIPD to develop guidance for employers on how to handle and assess information that appears on a disclosure certificate.
Statutory Time limit for disputes	2014	Accepted and awaits further development.	
Formal process to review recommendations	2014	Accepted.	Meeting structure in place.
Police Disclosure Units to have access to Court Transcripts	2015	Accepted and awaits further development.	
Development of guidance on Third Party Disclosures	2015	Accepted and awaits further development.	