

Land of the free?

Comparing England and Wales criminal records policy with five US states

Alexandra Kimmons
December 2023



Executive Summary

New research comparing criminal records disclosure in five US states with the England and Wales system shows stark difference in chances afforded to people with past convictions.

One in six people in England and Wales have a criminal record. But 27% of UK employers wouldn't hire someone with a conviction.

Employment is a key factor in preventing future offending. But people with criminal records are often trapped in the past, unable to find stable work and contribute their talents to society because of their record.

Other countries, like the US, have begun taking steps to solve the issue. How do we compare?

Researchers examined five scenarios in which someone with a previous conviction is seeking employment and compared what would appear on their criminal record in England and Wales and five US states: California, Connecticut, Utah, New Jersey, and Oklahoma.¹

Key Findings

- In three out of five scenarios, the England and Wales system is more punitive than any of the five US states.
- In two scenarios, the England and Wales system is similarly punitive to certain states, and more punitive than others.
- In all five states, convictions can often be expunged (deleted), meaning that a background check will not reveal them.
- In some states, employers cannot access information on childhood convictions and many offences are expunged automatically after a set period.

Example

Rich was convicted of drug possession 12 years ago. In all five US states explored, he can delete the conviction from his record after a maximum of 10 years and move on with his life.

In England and Wales, Rich's conviction will show for the rest of his life on the detailed checks required for many roles. He will constantly face the fear, and very real prospect, that employers will discriminate against him based on his record.

Conclusion

Researchers at Reed Smith concluded: "It is clear that criminal record disclosure requirements in England and Wales are much more punitive than the five U.S. states we have researched. In Oklahoma, Utah and New Jersey, convictions can often be expunged or pardoned, meaning that a background check will not reveal them. In other states, such as California and Connecticut, employers cannot access information on childhood convictions and many offences are sealed automatically so that employers cannot see them. This allows individuals with past convictions a degree of comfort in knowing that future career prospects will not be hindered by the past. Neither position is replicated in England and Wales."

Recommendations

FairChecks is calling for a full review of the criminal records disclosure system in England and Wales. In the short-term, FairChecks has three stepping stone policy recommendations which would free thousands of people from the enduring impact of a criminal record:

1. Wipe the slate clean for childhood offences
2. Remove cautions from criminal record checks
3. Stop revealing short prison sentences forever

Introduction

Transatlantic law firm Reed Smith has conducted pro-bono research on behalf of FairChecks (a campaign calling for reform of the criminal records disclosure system) to discover whether the US system is more punitive than that of England and Wales.²

12 million people in the UK have a criminal record. Fewer than 10% of these records are for crimes which resulted in a prison sentence. But even minor offences from long ago can show up on criminal record checks for years or even decades.

A criminal record can lead to discrimination when seeking employment, due to stigma and the perceived risk of hiring someone with a caution or conviction. This stigma can also compound other types of bias, such as racial discrimination.³

Some crimes are eventually removed from a person's record, but many will appear forever on some types of criminal record checks. This means that people who have already completed their sentence are punished indefinitely and prevented from moving on with their lives.

Other countries, like the US, have begun taking steps to address this injustice. This report introduces the criminal records disclosure system in England and Wales as well as key differences in the sampled US states, and compares the impact each jurisdiction has on someone's ability to find work and move on after an offence.

Criminal records disclosure in the US is handled at the state level. Researchers compared England and Wales with California, Connecticut, Utah, New Jersey and Oklahoma, all of which have recently passed 'Clean Slate' criminal records legislation.

Approximately one in four adults in these states have a criminal record. Three of the states investigated voted Democrat and two voted Republican in the 2020 presidential election.

In order to illustrate the real-life impact of the different jurisdictions, researchers explored how specific scenarios would play out in each location. The scenarios differ in offence type, age of conviction, and sentence. The criminal record implications for each scenario are tested against five different work or volunteering opportunities.

In three out of five scenarios, the England and Wales system is more punitive than any of the five US states. In two scenarios, the England and Wales system is similarly punitive to certain states, and more punitive than others.

Read on to see the specific scenarios researchers compared.

A Clean Slate

In the last five years, 12 US states have passed progressive 'Clean Slate' legislation on criminal records, providing a pathway for 2 million people to clear their record completely.⁴

The trend in US policy is to introduce opportunities for people who have criminal records to 'expunge' (delete) those records, meaning records are not visible to members of the public including employers. Courts and government agencies are exceptions to this rule, and expunged records may need to be revealed to become a licensed lawyer or join the military, for example. Otherwise, expungement is effectively full deletion of a record. This process usually requires an individual to apply for their record to be expunged, but the most progressive policies offer automated expungement after a certain period without reoffending.

Meanwhile, there has been less radical movement in England and Wales. Although the disclosure of criminal records changed in October 2023 following implementation of the Police, Crime, Sentencing and Courts Act (2022), thousands do not benefit from the new legislation, which only applies to basic checks (see 'criminal record check ABCs' below).

Detailed standard and enhanced criminal record checks, which are required for an ever-increasing number of jobs and roles such as doorman or gardener, still reveal decades-old convictions including many offences committed in childhood.

Freedom of Information requests submitted by FairChecks found that more than 16,000 criminal record checks would have come back clear in 2021-22 if childhood offences had not been revealed. And over 120,000 criminal record checks would have come back clear in the last five years if one-off cautions given for low-level crimes were removed from people's records.

These are just two small examples of the impact further reform could have on the lives of people with cautions and convictions in England and Wales.

Criminal records pose a huge barrier to employment, volunteering, and promotion opportunities. The latest research shows that 27% of UK employers wouldn't hire someone with a conviction under any circumstances.⁵

This is a hidden issue. Most people have heard of the Rehabilitation of Offenders Act (1974), but few understand the different types of checks or that detailed checks can reveal relatively minor incidents for decades. Because of this lack of understanding, there is little public urgency to change a system which is holding thousands of people back unnecessarily.

Criminal record check ABCs

The criminal records disclosure system in England and Wales is made up of different types of checks which employers can request depending on the role they are hiring for. The type of check conducted determines what information can be disclosed. Some information is removed from checks after a given period, depending on the type of offence and the sentence received.

In order for an employer to access detailed Standard or Enhanced checks, the role in question must be 'eligible', but criteria is broad and covers many positions and circumstances.⁶ For example, a construction worker may be required to produce an enhanced check if doing work at a school.



Source: Alliance for Safety and Justice, USA

Convictions which appear on criminal record checks do not prevent employers hiring someone, unless they appear on a barring list, which prevents them working with children or vulnerable adults.

But many employers choose not to proceed if a candidate has past convictions because of ongoing stigma or concerns around organisational risk. Some people with convictions are offered positions, only for the offer to be retracted after their criminal record certificate comes through.

When information appears on a criminal record check it is a huge barrier to gaining employment, even when the offence revealed does not itself preclude an employer from giving a job offer.

Spending periods

Cautions and convictions come with a 'spending period', which indicates the length of time they must show on a basic criminal record check. Once the spending period has passed, the caution or conviction is considered 'spent' and no longer appears on basic checks. It can still appear on standard and enhanced checks.

Basic checks

Contains details of convictions and conditional cautions considered to be unspent (see 'spent' below). Any employer can carry out a basic criminal record check for any role in England and Wales. Some offences appear on a basic check forever.

Standard checks

Reveals details of both spent and unspent convictions, cautions, reprimands, and warnings that are held on the Police National Computer, which are not subject to filtering (eventual removal from standard and enhanced checks). Standard checks are required for roles such as accountant, barrister, and traffic warden.

Enhanced checks

Contains the same information as a standard DBS certificate but may also contain non-conviction information supplied by the police, provided on a discretionary basis if police deem it relevant.

Enhanced checks are required for roles such as nurse, teacher, and taxi driver, as they are perceived to involve significant interaction with potentially vulnerable populations.

Enhanced and barring checks

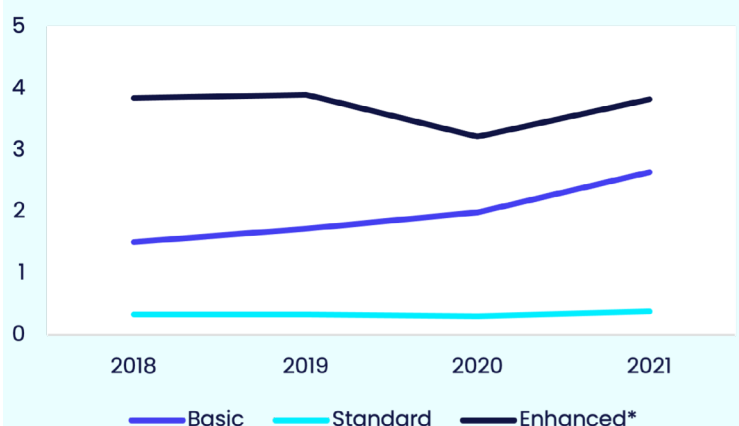
Contains the same information as an enhanced DBS certificate but will also include a check of one or both Barred Lists. The Barred Lists are databases that contain details of individuals who have been banned from working with children or vulnerable adults due to past behaviour or offences.

Filtering

Some cautions and convictions for certain offences can be removed from standard and enhanced checks after a given period, and will no longer appear on an individual's criminal record. This is called 'filtering'. A prison sentence can never be filtered and will appear forever on standard and enhanced checks.⁷ The types of offences that can be filtered include convictions for simple assault or drug possession that did not result in a prison sentence.

The use of basic checks, the kind that any employer can request for any role, increased by 75% from 2018 to 2021.

Chart 1: How often are different types of checks produced? (millions, 2018–2021)



*Including enhanced and barring checks

Source: FOI requests conducted by the FairChecks campaign to the DBS agency

Key differences in the US system

Different US states have different systems for handling criminal records. Some common features which differ from England and Wales are listed below.

Access to records

In California and Connecticut employers have no access to records from juvenile courts, which handle cases for children under 16 in some states or 18 in others. In California, most background checks are conducted through consumer credit reporting agencies. Such agencies cannot report on convictions that are more than seven years old, meaning they will not appear on a check.

In Utah employers must be a 'Qualifying Entity' to access any criminal records, whereas in England and Wales any employer can request a basic check. The definition of a 'Qualifying Entity' in Utah covers organisations with a similar range of roles to those eligible for standard or enhanced checks in England and Wales, such as schools and hospitals.⁸

Expungement

In all five states included in this research, an individual can apply for some offences to be expunged from their criminal record. Once a record is expunged, it will not show on background checks. Expungement is possible for most misdemeanors (minor crimes). In some states, it is also possible for certain felony (serious) convictions to be expunged.

In England and Wales some offences are eventually automatically deleted from standard and enhanced checks, but there is no system to support individuals to get a clean slate earlier. It's possible to request deletion of records, but this is rarely granted and is usually reserved for police information about cases that did not result in a caution or conviction.⁹

The proportion of convictions eligible for expungement differs state by state. As an example, in Connecticut two thirds of people with a conviction are eligible for expungement under Clean Slate legislation.¹⁰

The US separates offences into two broad categories. Misdemeanours are lower-level crimes, and felonies are more serious crimes. Certain criminal record expungement provisions apply only to misdemeanours, others to a selection of felony offences as well.

Automatic expungement

Although expungement is available in most states, there is a gap between the number of people who are eligible for expungement and those who actually complete the process. In an effort to address this gap and reduce the load on bureaucratic services, some states including California and Connecticut have introduced automatic expungement for certain offences after a set period.

Pardons

In some states, people need a pardon to receive an expungement of a criminal record.¹¹ In Oklahoma, pardons are granted by the Governor, following recommendations from the board of pardons and parole. 80% of pardons requested in Oklahoma are successful.¹² In some states, a pardoned conviction will not show on background checks. In other states, such as Oklahoma, a pardon alone does not wipe a conviction from the record.

What are employers entitled to see?

The employment landscape is complicated and different roles require different types of checks across jurisdictions.

To provide an overview of the basic situation in each of the jurisdictions explored in this research, the table on the next page lays out what employers are entitled to see when hiring for a shop assistant position.

Shops in England and Wales aren't obliged to ask for a basic check but can if they want to.

Table 1: What information can employers in each jurisdiction see when hiring a shop assistant?

	Childhood conviction	Adult conviction
E&W	Any unspent conviction will show on a basic check. Spent convictions won't show. An applicant may be asked to declare any unspent convictions in their initial application.	
California	Employers have no access to juvenile court convictions.	Convictions won't show if the applicant has successfully had the conviction expunged. An employer cannot ask an applicant about any convictions before making a conditional offer of employment.
Connecticut	Employers have no access to juvenile court convictions.	Convictions won't show if the applicant has successfully had the conviction expunged. An employer cannot ask an applicant about any convictions in the initial application.
Utah	Criminal record disclosure is not required. Employers only have access to criminal records if they are a 'Qualifying Entity'.	
New Jersey	Convictions won't show if the applicant has successfully had the conviction expunged. An employer can only ask an applicant about any convictions after an initial interview.	
Oklahoma	Convictions won't show if the applicant has successfully had the conviction expunged. An employer cannot ask an applicant about any convictions in the initial application.	



SCENARIO 1

Elaine

Elaine was convicted of fraud when she was 22. She received a suspended prison sentence for forging someone's signature on a cheque for £500 in a moment of personal crisis. 15 years later, she wants to volunteer at her children's school. Surely her old conviction won't get in the way?

England & Wales

Elaine's conviction will show forever on the enhanced check required to volunteer in her children's school. There is no route for Elaine to have her conviction expunged.

Elaine's conviction does not prevent her from volunteering, but the school may reject her due to stigma and perceived risk.

The US

California

Elaine's conviction will be automatically expunged after either one or four years (depending on if it was classified as a misdemeanor or a felony) and will not show on a criminal background check.

Connecticut

Elaine's conviction will be automatically expunged after 10 years. It will not show up on a criminal background check.

Utah

Elaine's conviction will be automatically expunged after seven years. It will not show up on a criminal background check.

New Jersey

Elaine can apply for her conviction to be expunged after 10 years. If she is successful, it will not show on a criminal background check.

Oklahoma

Elaine can apply for her conviction to be expunged after either one or five years (depending on if it was classified as a misdemeanour or a felony). If she is successful, it will not show on a criminal background check.

Because of a recent change in the law in Oklahoma, Elaine's conviction will be eligible for automatic expungement after 1 November 2025 because her offence was a misdemeanour and happened more than five years ago.



The system in England and Wales is more punitive than all five states in this scenario. To volunteer at her children's school in England and Wales, Elaine will need to reveal her conviction forever. In the States, she will be able to remove the conviction from her record after a maximum of 10 years.

SCENARIO 2

Thomas

Thomas received a 6-month Youth Rehabilitation Order (a community order) for stealing a phone when he was 15. Five years on, he has ambitions to join the banking sector. Will his teenage conviction be a barrier?

England & Wales

Most roles in banking require a standard check, which will show Thomas' conviction. The record will be filtered (removed from standard and enhanced checks) after six years.

Thomas' Youth Rehabilitation Order does not prevent employers from hiring him, but it will put his application at a disadvantage due to stigma and perceived risk.

The US

California

Employers in the banking sector won't be able to see Thomas' conviction if they conduct a background check, because it was received when he was a child.

Connecticut

Employers in the banking sector won't be able to see Thomas' conviction if they conduct a background check, because it was received when he was a child.

Utah

Thomas can apply for his childhood record to be expunged when he turns 18. If he is successful, it will not show on a criminal background check.

New Jersey

Thomas can apply for his childhood record to be expunged after three years. If he is successful, it will not show on a criminal background check.

Oklahoma

Thomas can apply for his childhood conviction to be expunged when he turns 21. If he is successful, it will not show on a criminal background check.

Because of a recent change in the law in Oklahoma, Thomas' conviction will be eligible for automatic expungement after 1 November 2025 if he has received a pardon.



The system in England and Wales is more punitive than four states in this scenario, and equally as punitive as Oklahoma. Both of these jurisdictions allow Thomas' conviction to be removed from his record after six years (when he is 21), whereas the other four prevent employers from seeing his record after he turns 18 either automatically or by applying for expungement.

SCENARIO 3

Maria

Maria was convicted of assaulting a police officer when she was 13 years old and sentenced to 4 months in prison. 10 years on, she wants to be a lawyer. How will her one-off conviction impact her chances?

England & Wales

Maria can't become a solicitor because she received a prison sentence.¹³ She could become a barrister, but her conviction will show forever on the standard checks required. There is no route for Maria to have her conviction expunged.

The US

To practice law in the US, individuals must pass the State Bar exam. In some states, including California and Connecticut, the State Bar has access to all conviction records, including juvenile and expunged offences.

Employers hiring someone who has passed the bar exam won't have the same level of access to their records. However, serious convictions may be a barrier to admission to the State Bar in some circumstances, and may therefore limit access to work as a licenced lawyer.

California

Employers are entitled to see juvenile court records when hiring for some roles in law, in which case Maria's childhood record will show. Maria can apply for her childhood record to be expunged. If she is successful, it will not show on a criminal background check.

The background check for admission to the California State Bar shows childhood and expunged records. Maria's conviction will show.

Connecticut

Employers have no access to juvenile court convictions. Maria's conviction will not show on a criminal background check.

Maria's conviction may be revealed during her application for admission to the Connecticut State Bar.

Utah

Maria can apply for her childhood record to be expunged when she turns 18. If she is successful, it will not show on a criminal background check.

The background check for admission to the Utah State Bar shows childhood and expunged records. Maria's conviction will show.

New Jersey

Maria can apply for her childhood record to be expunged after 3 years. If she is successful, it will not show on a criminal background check.

Only convictions for assault within the past 10 years are disclosed on the background check for admission to the New Jersey State Bar. Maria's conviction will not show.

Oklahoma

Maria can apply for her childhood conviction to be expunged when she turns 21. If she is successful, it will not show on a criminal background check.

Because of a recent change in the law in Oklahoma, Maria's conviction will be eligible for automatic expungement after 1 November 2025 if she has received a pardon.

It is unclear whether childhood and expunged records are revealed during the application for admission to the Oklahoma State Bar.



The system in England and Wales is more punitive than any of the five states in this scenario. To work as a lawyer in England and Wales, Maria will have to reveal her childhood conviction for the rest of her life. In the US, once she has passed the State Bar, future employers will not be able to see her record if it has been expunged.

SCENARIO 4

Rich

Rich spent 8 weeks in prison while at university for possession of ecstasy, a class A drug, for personal use. 12 years later, he wants to give back to his community by becoming a teacher. How will his old conviction impact his chances?

England & Wales

Rich's conviction will show forever on the enhanced checks required to become a teacher. There is no route for Rich to have his conviction expunged.

Rich's conviction does not prevent employers from hiring him, but it will put his application at a disadvantage due to stigma and perceived risk.

The US

California

Rich's conviction will be automatically expunged after one year and will not show on a criminal background check.

Connecticut

Rich's conviction will be automatically expunged after seven years. It will not show on a criminal background check.

Utah

Rich can apply for his conviction to be expunged after seven years. If he is successful, it will not show on a criminal background check.

New Jersey

Rich can apply for his conviction to be expunged after 10 years. If he is successful, it will not show on a criminal background check.

Oklahoma

Rich can apply for his conviction to be expunged after 10 years. If he is successful, it will not show on a criminal background check.

Because of a recent change in the law in Oklahoma, Rich's conviction may be eligible for automatic expungement after 1 November 2025 if he can get it reclassified as a misdemeanour.



The system in England and Wales is more punitive than all five states in this scenario. To work as a teacher in England and Wales, Rich will need to reveal his conviction forever. In the States, he will be able to remove the conviction from his record after a maximum of 10 years.

SCENARIO 5

Dylan

Dylan was given a conditional discharge for arson 30 years ago after setting some building materials on fire in an empty building. He's struggled to find work ever since. He's considering becoming a taxi driver as he has lots of experience driving. Will his decades-old offence get in the way?

England & Wales

Dylan's offence will show forever on the enhanced checks required to become a taxi driver. There is no route for Dylan to have his conviction expunged.

Dylan's conviction does not prevent him from becoming a taxi driver, but he may struggle to have his licence approved due to stigma and perceived risk.

The US

Arson of any kind is a felony in most US states, so the equivalent sentence of conditional discharge is not applicable.

The information below relates to the criminal record implications of a felony conviction for arson in each of the five states.

California

Dylan can apply for his offence to be expunged. If he is successful, it will not show on a criminal background check.

If the check is conducted through a consumer credit reporting agency, the conviction will not show up as it is more than seven years old.

Connecticut

Dylan's offence will show on a criminal record check. The offence of arson is not eligible for expungement in Connecticut.

Utah

Dylan is not required to disclose previous convictions in order to become a taxi driver in Utah.

New Jersey

Dylan's offence will show on a criminal record check. The offence of arson is not eligible for expungement in New Jersey.

Oklahoma

Dylan's offence will show on a criminal record check. The offence of arson is not eligible for expungement in Oklahoma.



The system in England and Wales is more punitive than California and Utah in this scenario, even though the two states treat arson as a felony. The criminal record implications for a conditional discharge for arson in England and Wales are just as severe as the implications for a felony charge in Connecticut, New Jersey, and Oklahoma.

Bridging the gap

The criminal records disclosure system in England and Wales is more punitive than some or all of the sampled US states in each scenario. How can we bridge the gap and build a fairer and more proportionate criminal records system?

Years of incremental change to individual parts of the system have resulted in inconsistent, often unfair legislation. Many people with prior convictions who are directly impacted feel confused about what will appear each time an employer conducts a criminal record check.

FairChecks is calling for a full review of the criminal records disclosure system in England and Wales through an open policy-making process. This would allow people directly impacted by the criminal record system to contribute their experience and provide an opportunity to address inconsistencies.

Stepping stones

A full review will require time and political commitment. In the meantime, FairChecks has three stepping stone policy recommendations which would free thousands of people from the enduring impact of a criminal record.

1 Wipe the slate clean for childhood offences

Most childhood offences should be automatically removed from an individual's record when they turn 18, or within a set period afterwards if the offence took place shortly before the individual turned 18. For serious offences, individuals should be able to apply to have the offence reviewed and removed from their record if deemed appropriate.

2 Remove cautions from criminal record checks

Cautions are given for low level crimes and many people accept them without knowing they come with a criminal record. Cautions should not be automatically revealed on criminal record checks.

3 Stop revealing short prison sentences forever

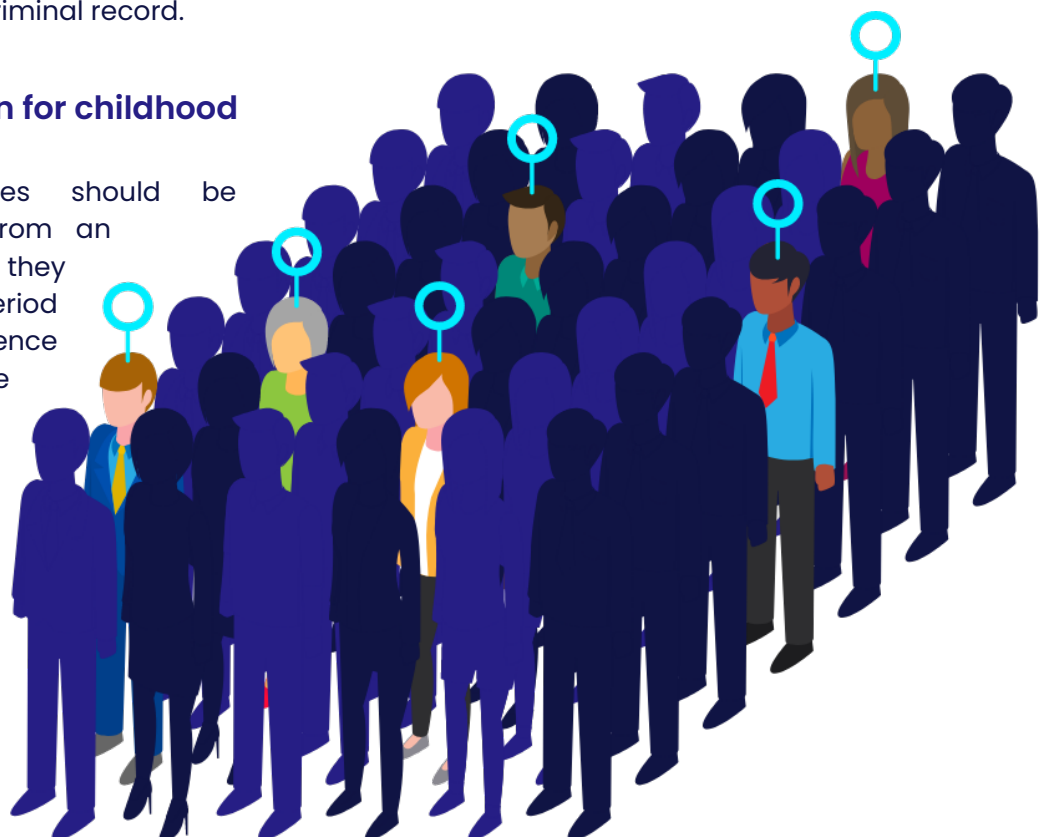
At the moment, a prison sentence of two weeks will follow someone for life. Short prison sentences should be removed from Standard and Enhanced checks after a set period of time.

Next steps

FairChecks is building support for change to bring forward the day when people with cautions and convictions aren't unfairly impacted by our outdated disclosure system.

Will you join us?

We work with members of the public, politicians, voluntary sector organisations and business representatives to amplify our call for change. There's room for everyone with many different ways to get involved. Learn more and sign up at FairChecks.org.uk



Endnotes

- 1 The scenarios explored are composite examples drawn from real life.
- 2 <https://www.transformjustice.org.uk/wp-content/uploads/2023/12/Transform-Justice-Reed-Smith-Final-Findings.pdf>
- 3 <https://www.unlock.org.uk/wp-content/uploads/Double-discrimination-Full-report-July-2019.pdf>
- 4 <https://www.cleanslateinitiative.org/>
- 5 https://workingchance.ams3.cdn.digitaloceanspaces.com/media/documents/Progress_-_Prejudice_Shifts_in_UK_employer_attitudes_to_hiring_people_with_convictions.pdf
- 6 <https://www.gov.uk/government/collections/dbs-eligibility-guidance>
- 7 <https://unlock.org.uk/advice/filtering-cautions-convictions/>
- 8 Qualifying entities under Utah law include businesses, organisations or government entities employing individuals in the following areas: national security interests; care, custody or control of children; fiduciary trust of money; providing health care to children or vulnerable adults; providing vulnerable adults with care, protection, food, shelter, clothing, assistance with the activities of daily living; or assistance with financial resource management.
- 9 <https://unlock.org.uk/advice/retention-deletion-police-records/>
- 10 <https://paperprisons.org/states/CT.html>
- 11 https://www.ok.gov/ppb/Pardons_and_Commutations/Pardons/index.html
- 12 <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/>
- 13 <https://www.sra.org.uk/solicitors/handbook/introAuthPrac/suitabilitytest/>

Produced with thanks to Reed
Smith LLP and the Responsible
Business Initiative for Justice.

Contact

fairchecks.org.uk

fairchecks@transformjustice.org.uk