Falsely Accused

F.A.C.T.

Carers and Teachers

Fighting Injustice

Lobbying for Change

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(Falsely Accused Carers and Teachers)

Submission

to the

Independent Advisory Panel

on the

Disclosure of Criminal Records (IAPDCR)

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Context:

1. Following the General Election the Home Secretary, Theresa May, indicated that the Government intended to carry out a thorough review of the retention and usage of criminal records.

2. As a result Sunita Mason the Government's Independent Advisor for Criminality Information Management was requested to undertake a review of criminal records procedures and to report her findings to the Government.

3. Before taking on this role Ms Mason undertook a prior review of related issues which were published in a report, "A Balanced Approach - Safeguarding the public through the fair and proportionate use of accurate criminal record information".

4. We are grateful to Ms Mason for inviting F.A.C.T. to submit its views, in person and in writing, as part of this current review.

Introduction:

5. F.A.C.T. (Falsely Accused Carers and Teachers) is a UK wide, membership based, voluntary organisation whose primary aim is to support carers, teachers and other professionals who maintain they have been falsely accused or wrongly convicted of abuse or misconduct in an occupational context.

6. F.A.C.T. was formed in 2002 and operates a helpline and advice centre. CRB issues form by far the greater number of its referrals.

7. F.A.C.T. recognises however that the Criminal Records Bureau has an important role in protecting the public, in helping strengthen safeguarding arrangements for children and vulnerable adults, and in helping ensure safe recruitment decisions are taken.

8. Never the less it is our view that the present system of disclosure, particularly in relation to enhanced certificates of disclosure, is fundamentally flawed in that it is often applied without regard for common sense and fairness.

9. We agree that the scheme in its present form raises fundamental issues of law (especially human rights), policy (Government guidance) and Police practice (inconsistencies within and between police force areas and the Criminal Records Bureau itself).

10. We also recognise that the Criminal Records Bureau has to some extent been unfairly criticised in that it is required to work within the existing legal framework, which in our view needs overhauling, and is not responsible for the content of police intelligence. This raises

important issues which we hope the review will take into account.

11. The present disclosure system, in so far as it relates to the recruitment of paid and unpaid workers in settings where there is a safeguarding requirement, is in danger of falling into disrepute. In part this seems to be due to a much wider cultural problem regarding the UK's obsession with the need to provide more and more protection for children and vulnerable adults. Whilst organisational improvements are needed and can be made, significant change will not occur until the Government takes a lead in dealing with the underlying cultural causes.

12. We therefore welcome this review and very much hope that it will lead to a system which is robust, just and fair, and one which hopefully will ensure better informed recruitment and listing decisions whilst at the same time providing the subjects of disclosure with opportunities to make their own representations about adverse findings.

13. We note that the time scales for this review are very short and that it is essentially about process. Never the less we think it is important to state first principles.

First Principles

14. Society has a right to expect that the State will afford protection to all citizens who are vulnerable to being harmed by people who are criminally minded, have committed a crime, or are judged on the basis of reliable evidence likely to do so in the future.

15. In assessing the risk involved the State should act only on the basis of known facts and reliable intelligence. Those who hold relevant information should be accountable for their decisions, including, if necessary, to an independent appeal body.

16. Citizens have a right to expect that any actual or perceived risk will be managed in accordance with objective criteria. Opinions should be evidence based rather than belief based. Subjective opinion has no part to play in this process.

17. The present pre-occupation with 'zero risk' in policing and child/adult protection inevitably creates injustice and on occasion false allegations. There needs to be a more credible model of risk management which takes into account the nature of the concern (severity/degree), the likelihood of any possible repeat (recidivism v rehabilitation), and whether or not the circumstances described are relevant to the person's occupational status/work setting (relevancy).

18. Citizens have a right to expect the State to understand that people will sometimes commit offences (especially in their youth and in early adulthood) but that does not necessarily mean any such risk is ever present. People can be (and are) rehabilitated either by a maturing process, the result of personal or professional intervention in their lives, or as a consequence of Court sanction, or a combination of these.

19. Citizens have a right to expect that information disclosed by the police to third parties will

only be shared if, when it was initially disclosed, it had been properly sourced. Shared police intelligence should be limited to information which is credible, verifiable and meets recognised standards of information management.

20. Good policing is dependant upon mutual respect and a 'contract' between the police and the public that the action taken is lawful, necessary and proportionate. A great deal of harm has been done to the reputation of the police by its handling of CRB issues.

Legal Framework and Barriers to Change

21. Increasingly in recent months there has been widespread criticism of the current CRB disclosure arrangements and related safeguarding systems. The Criminal Records Bureau (CRB) and the Independent Safeguarding Authority (ISA) have come under fierce scrutiny by the broadsheets; policy think-tanks such as the Manifesto Club, Spiked, The Register; campaign groups such as Liberty, Unlock, NACRO, FASO; and by employer's organisations and trades unions. Julie Spence, the former Chief Constable of Cambridgeshire Police, recently wrote an article in the Daily Telegraph criticising existing arrangements and stressing the need for a more common-sense approach to criminal records checks.

The Police Act 1997 (Section 115)

22. In summary this places a duty on Chief Constables to provide potential employers with **any** information which *might be relevant* AND **ought** to be included. In our view this duty is too broad in scope in that it permits disclosure of information, some of it often historic or stale in nature which ranges from mere gossip obtained by the police for whatever reason and in whatever circumstances, to verifiable facts properly obtained in a police investigation. We believe this part of the Police Act needs to be revised so that the police can only release information:-

    a) Judged to be relevant (rather than *might be* relevant). There should be a requirement for Chief Constables to meet a statutory test of relevance in terms of the post applied for, the nature of police concern, including when and how the information arose, and why it remains relevant to the present day.

    b) Obtained in relation to a police inquiry into the subject's a) alleged criminal behaviour and/or b) alleged misconduct which has safeguarding implications.

Home Office Circular 5/2005

23. It is not clear whether this circular sets out statutory or non statutory guidance. Although its purpose is to help the police decide what information is relevant and ought to be included on a certificate of disclosure, it is too broad in nature to have any impact.

24. The Circular places a test of reasonableness, relevance and proportionality on the police in terms of any information they wish to disclose to a prospective employer. In our view there is often a mismatch between what the general public, and indeed some employers and the

police might regard as being relevant, as the following examples illustrate. A conviction for poaching incurred some 30 years previously hardly seems relevant in the case of a teacher applying for a Deputy Headteacher position. A police investigation into an alleged sexual assault where the accused (an adult) who had no previous convictions or police history was found not guilty and told he left the Court without a stain on his character, hardly seems relevant to a subsequent application many years later by the accused's mother to provide supportive lodgings, when the accused rarely visits his mother and lives some 150 miles from her home.

25. Para 11(b) of the circular places a responsibility on Chief Constables to indicate whether the subject poses a risk. In F.A.C.T.'s experience the police very rarely meet this requirement, preferring instead to correctly point out that it is entirely up to the employer whether or not they appoint him/her. We take the view that if there was a risk the police would say so. In effect what they do is turn the issue of risk on its head by implying that the *employer* might be taking a risk should they decide to engage this person.

26. In our view the issue of risk of re-offending or repeat behaviour needs to be re-evaluated. The issue is driven by far too many myths and assumptions, particularly in respect of drug and alcohol misuse, and more particularly sexual offending – alleged or otherwise. Little credence is given to the fact that offences of these types vary in degree from the less serious to the very serious. This is particularly true of drug related offences and sex offences.

27. Furthermore it is often assumed that alcohol, drug, or sexual offenders are addicted to their crimes and pose considerable risk. This may be true of some but is not true of all, or indeed the majority. Indeed in the case of sexual offenders the Government's own research shows that of all the offending groups they are the *least* likely to re-offend.

28. Paradoxically, consideration of offending behaviour is often lost in the principle that the more serious the offence the greater the risk. This is not only dangerous but also fails to recognise the valuable role that recovered alcoholics and drug abusers can make to therapeutic intervention.

29. Intellectual corruption of this sort not only serves to promote prejudice (including amongst professionals) but fuels a moral panic that children (and others) are very likely to be abused by delinquent carers, teachers, health care professionals and any other man who dedicates their life to helping children (and their families), whether as part of a paid job or as an unpaid worker in the local community.

30. We believe that the question of perceived recidivism and rehabilitation needs to be re-examined in light of powers given to the Criminal Records Bureau (in so far as it relates to enhanced disclosures), the ISA and other listing bodies, and changing recruitment practice.

31. We believe that where it can be shown that the offending behaviour (i.e. conduct that has resulted in a conviction) has not been present for a substantial period of time no reference should be made to it except in the gravest circumstances. We note that previously the police employed a step down model of disclosure based on the severity of the offence and the

intervening timescale. Whilst we think the scheme had some merit in terms of disclosure decisions relating to convictions it could be easily circumvented by employers. We are never the less disappointed that the scheme has been abandoned and would urge that consideration be given to imposing a statutory scheme with similar aims.

32. Of more concern to us, however, is the fact that there is no comparable scheme for dealing with police intelligence which describes conduct which falls short of criminal behaviour or describes alleged criminal activity when the subject has been found not guilty. It would of course be absurd if a step down model existed which prevented the disclosure of a criminal record after a set period of time, when no such scheme existed in relation to 'soft' information held on those who are legally innocent.

33. Should the practice of sharing 'soft intelligence' be considered a necessary requirement of public protection, we believe there should be a presumption of innocence or minimal risk where it can be shown that the subject has **not** repeated the recorded behaviour AND has (or had) no further relevant involvement with the police for a defined period. We suggest that this period should be set at between 2 and 10 years depending on the nature of the concern and assessment of risk.

34. We think it important that the Government recognises that the principle that you are innocent until you are proven guilty appears not to hold true for the Police and the Criminal Records Bureau. The Government needs to understand that it is deeply offensive to have information recorded about yourself on a certificate of disclosure issued by Criminal Records Bureau when you have no convictions, or indeed in may never have appeared before a Court. We think immediate action should be taken to remedy this, possibly by changing the name of the Criminal Records Bureau to Police Information and Criminal Records Bureau or Criminal and Police Intelligence Bureau. This would not only be a more honest description but also much less stigmatising, and one which employers would more readily understand.

35. It should be noted (129)that according to Paras 19 -21 of the circular, disclosed "information must be credible, clear and capable of being substantiated." Whilst this is a necessary requirement it does put the cart before the horse; what is important is that the *act* referred to is (or was) capable of being substantiated. This would reduce the potential to record mere gossip, or vengeful accounts given by spouses/partners in domestic/marital proceedings, or child care/access disputes.

36. The circular also makes it clear that the power to disclose **additional information** to the employer and to include it on the certificate itself should only be used in exceptional circumstances. This information is not normally made available to the subject. In our view all information disclosed by the police should be made available to the subject except where there is an ongoing police investigation concerning the subject which, for operational reasons, the police cannot disclose to him/her.

37. **Good Police Practice: Guidance on the Management of Police Information and Statutory Code of Practice.** Following the passing of the Police Act 1997 several measures have been taken to improve the management of police information. By implication the necessity to do

so is an admission that recording practice was not as good as it should have been and that the necessary safeguards for the police and the subjects concerned were not in place. This reality is not however reflected in current police practice concerning the disclosure of *historical* information to which, in our view special rules need to be applied.

38. In 2005, following the recommendation of the Bichard Inquiry, ACPO and the National Centre for Policing Excellence (NCPE) issued *Guidance on the Management of Police Information*. http://www.acpo.police.uk/asp/policies/Data/MoPI%20Guidance_INTER_03.03.06.pdf

    This came into effect on 14th November 2005.This guidance provides a very useful background to many of the issues the review will want to consider, including in particular:

    38.1. The Five Stages of Information Management:
    Collection, Recording, Evaluation and Actioning, Sharing, Review, Retention and Disposal.

    38.2. Important data 'quality principles':

    38.3. Accuracy, Adequacy, Relevance and Timeliness.

    38.4. A 5x5x5 Information/Intelligence Report Model:
    The 5x5x5 is a very useful tool which allows the Police Service to manage **and evaluate** information which has risk attached to it, or is given to the police in confidence by a member of the public - whether or not in the course of their employment. Information is graded according to whether the source is always reliable (A), mostly reliable (B), sometimes reliable (C), unreliable (D), and never reliable (D). It is also subject to *information intelligence gathering* based on whether the information is known to be true without reservation (1), known personally to the source but not to the person reporting (2), known personally to the source but uncorroborated (3), cannot be judged (4), or suspected to be false (5).

    38.5. We believe that a model similar to this should be applied in circumstances where 'soft' intelligence is shared. Currently prospective employers are in an invidious position in having to make their own assessment of the events described.

39. CRB Code of Practice
The new CRB Code of Practice primarily sets out the obligations and responsibilities for registered persons and other recipients of information. We note that this code is much reduced compared with the previous code. There are two compliance issues to which we wish to draw to your attention.

39.1. Firstly the increasing numbers of employers who seek enhanced disclosures even though the jobs they wish to be covered do not fit in with the existing criteria.

39.2. Secondly a failure to properly secure disclosures issued by the CRB.

Both suggest there is a need for some form of inspection to ensure compliance.

40. Case Law:

There have been several attempts to clarify the legal position of those affected by adverse certificates of disclosure. These include:- R (X) V Chief Constable of West Midlands, the Five Chief Constables Case v the Information Commissioner, and R (on the application of L) (FC) (Appellant) *v* Commissioner of Police of the Metropolis (Respondent). In addition there have been a small number of judicial reviews of which the Pinnington case attracted the most media attention.

41. It is not necessary for me to go into detail about the findings in each of these cases except to say that whilst individual aspects in each case have been criticised by the judges the Courts have upheld the Police right to disclose information to prospective employers, *even though it might be inaccurate*. We believe this is fundamentally wrong. In essence the Courts have said that Parliament intended the law to be as it is and it is up to Parliament to change it if it so wishes. Human rights issues have been advanced with limited success; never the less there are in our view significant issues regarding the right to a fair hearing and the right to a private life.

Critical Issues (in brief)

42. The present disclosure system (in so far as it relates to recruitment of paid and unpaid workers in settings where there is a safeguarding requirement) is in danger of falling into disrepute. Whilst organisational improvements are needed and can be achieved, significant change will not occur until the Government takes positive action to deal with the underlying cultural issues in relation to public attitudes towards the need for child protection.

43. It is generally accepted that the UK has one of the toughest child protection regimes in the world. Whilst this is not necessarily a bad thing it should not be at the expense of essential freedoms and just solutions to complex issues.

44. We agree that there should be a radical overhaul of the role of the listing bodies, including the Independent Safeguarding Authority, the General Social Care Council, the General Teaching Council, and similar bodies. There are now so many that their very existence is being called into question. Whilst we believe there is a strong case for rationalising safeguarding provision we do not wish to see the CRB abolished – reformed yes, but not abolished. Indeed we think there is a powerful argument for increasing its role, if necessary, at the expense of the other bodies, so that it acts independently of the police and provides for a statutory appeal mechanism so that the subject of a disclosure can appeal against any adverse findings. We believe this appeal process should take the form of a Police Information and Criminal Records Appeal Tribunal with full statutory powers.

45. We endorse the need for a common sense approach to safeguarding generally. Surely common sense tells us that children and vulnerable adults are only at risk when the opportunity to abuse exists. Thus, normal contact with children and vulnerable adults (outside the one-to-one situation) should not require automatic vetting unless it involves

personal or intimate care.

46. Risk assessments require a proportionate, common sense approach. Whenever the level of risk is considered unacceptably high the police should ensure a risk assessment is carried out by a competent professional at Police expense.

47. New rules need to be established in respect of those who:-

    47.1. Have been found not guilty of a relevant offence.

    47.1. Have been convicted but who win their appeal and have their convictions quashed.

48. In both cases the individuals have been subjected to the full process of the Law. The effect of being not guilty or of overturning your conviction should be to return the accused to the status they enjoyed *before the allegation was made*. In the eyes of the law they are innocent and there should be no question of the police being able to make judgements which lead to the legal proceedings being disclosed, or giving an adverse opinion as to the person's suitability. The police view is an opinion; the conclusion of the Law is a fact.

An Agenda For Change

There is a need ….

1. for the CRB to be renamed and for its role to be strengthened so that it can act independently of Chief Constables.

2. to institute a statutory appeal mechanism against adverse comments on [enhanced] CRBs.

3. to repeal Section 115 (7) of the Police Act 1977.

4. to raise the information thresholds, particularly in respect of 'soft intelligence'.

5. to promote an evidence based approach to disclosure rather than the 'belief based approach' favoured by child protection/safeguarding bodies.

6. to ensure that comments made on enhanced CRBs are confined to …

7. findings of guilt in criminal cases

8. findings made in civil cases e.g. compensation

9. findings made in employment and listing tribunals (e.g. ISA, GSCC, etc)

10. to limit the use of soft intelligence to defined circumstances and for time limited periods.

11. to ensure that all information, other than factual information relating to convictions, which appears on a certificate of disclosure, is fully in accord with the principles contained in the police 5x5x5 information management system.

12. to give greater cognisance to principles contained in the Rehabilitation of Offenders Act and the Data Protection legislation.

13. for stricter monitoring of employers' compliance with the regulations in order to prevent them asking for enhanced CRBs when the post applied for does not require it (e.g. school ancillary staff, neighbourhood contact with children as a result of a) being a parent/carer and b) casual volunteering for youth and community work and sports activities.

Final Comment:

Any questions relating to this submission should be referred to Michael Barnes who can be contacted at F.A.C.T. (Falsely Accused Carers and Teachers).

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Michael is a former social work manager who retired in 2003. In his role as a Divisional Resources Manager he was also responsible for taking recruitment decisions in respect of prospective and current members of staff who required enhanced certificates of disclosures. In recent years Michael has been working for F.A.C.T., principally as its Advice and Representation Officer.

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