

THE LAW COMMISSION

CRIMINAL RECORDS DISCLOSURE: NON-FILTERABLE OFFENCES - OVERVIEW

In July 2016, we agreed with the Home Office to undertake a limited project considering the effectiveness of a particular aspect of the criminal records disclosure system.

The system is a complex and technical one reflecting the combined effect of numerous statutory schemes enacted over the last 40 years. Our terms of reference expressly limited our review to changes that could be achieved using only secondary legislation.

Under the Rehabilitation of Offenders Act 1974, individuals are not required to disclose convictions and cautions once they have become 'spent', i.e. a certain period of time has passed. However, in some circumstances disclosure of spent convictions or cautions can be requested. For example, for employment purposes in the interests of safeguarding children and vulnerable adults, as well as to secure admission to and retain membership of certain professions, and the grant of certain licences. This is known as asking an "exempted" question. Even in these circumstances not all spent convictions and cautions need to be revealed - some are "filtered" under a process introduced in 2013.

In this report we address one aspect of the filtering system, namely the list of offences that are never filtered – in other words those offences that will always be disclosed even if spent. The report, together with accompanying appendices and the summary (including a Welsh language version of the summary), is available online at <http://www.lawcom.gov.uk/project/criminal-records-disclosure/>

The current filtering regime and its problems

Under the filtering regime, convictions and cautions for most criminal offences need not be disclosed (they are "filtered") in answer to an exempted question, provided a certain amount of time has elapsed and certain other conditions are met. One of the conditions for a conviction or caution to be filtered is that the offence to which it relates is not on the list of "non-filterable" offences, a list which primarily includes violent and sexual offences and other offences relevant to the protection of children and vulnerable adults. The list is set out in section 113A(6D) of the Police Act 1997.

Following an online consultation and extensive discussion with experts on this area of law, we identified a number of significant problems with the filtering regime.

First, the legislation governing filtering is hard to understand and inaccessible to users. The drafting is very convoluted, particularly in the Police Act 1997. The list of non-filterable offences exists in two pieces of legislation and is mostly made up of references to different lists of offences in other pieces of legislation, which are not readily available to non-lawyers. There is uncertainty as to what is and is not on the list of non-filterable offences at any one time, as the content of each of these different lists may change from time to time. The language used in the legislation is also difficult to understand, which is especially problematic given that it is being relied on by people who are not legally trained. For example, it refers to offences "superseded" by other offences in the list but it is unclear how that word should be interpreted in this context: it most likely refers to historic offences that have been repealed and replaced by newer ones, but it has also been argued that it has a wider meaning than this. Overall, there also appears to be a lack of a principled basis for the inclusion of individual offences on the list.

Secondly, we believe there are also significant operational problems with the list. Most criminal record disclosures are made through the Disclosure and Barring Service ("DBS") system. When issuing criminal record certificates, DBS does not refer directly to the legislation governing filtering; it uses a different itemised "operational list" of offences prepared by the Home Office. Arguably, this

list is inaccurate in places. The operational list relies in turn on the offence codes used by the Police National Computer (PNC) in order to identify non-filterable offences. This increases the risk of error as there are possible inconsistencies between the operational list and the PNC Codes.

Finally, individuals applying for a criminal record certificate may face further significant practical problems. There is uncertainty for individuals about what will be disclosed on a criminal record certificate – especially as there is no way for individuals to view certificates in advance. There is also no direct channel for complaining that an offence has been wrongly included on a certificate because the operational list is inaccurate.

Law reform options and recommendations

Our principal aim within the confines of this project has been to produce an accurate itemised list of non-filterable offences on the basis of our interpretation of the current legislation. We have highlighted the apparent discrepancies between the legislation and the DBS operational list. However, we have not made recommendations about whether any particular offences should be added or removed from this list of non-filterable offences in order to make it more effective. It is our view that a wider review of the disclosure system is required in order to create a coherent set of principles upon which offences could be selected for inclusion or removal from the list.

We have also made recommendations designed to bring clarity to the list within the existing framework of primary legislation. We recommend that in the future a statutory instrument should set out a single, itemised list of non-filterable offences. This list should be updated by amending the legislation in which it is contained. Each non-filterable offence (including those historic offences which have been abolished and/or repealed and replaced) should be listed individually by name and by reference to the section of the Act by which it was created. We recommend that no reference to lists in other legislation should be made. The legislation should, however, continue to include general provisions about related offences (attempts, conspiracy and offences assisting or encouraging), and “corresponding” offences which are contrary to either service law or the law in jurisdictions other than England and Wales. To address current operational problems with the filtering system we recommend a review of the PNC code system to assess how it can be made more effective.

The need for a wider review of the criminal records disclosure system

We were asked by the Home Office to assess the need for a wider review of the system of criminal records disclosure and to consider what reforms, beyond revisions to the non-filterable list, may be necessary or desirable to produce a more effective and efficient scheme. A wider review would allow for consideration of whether the statutory powers do, or should, allow for more simplicity or flexibility in the regime for disclosure of criminal records.

Topics for any potential wider review of the criminal records disclosure system could include:

- reviewing the choice of offences which appear on any non-filterable list of offences;
- reconsidering the existing rules that convictions are never filtered if the person has more than one conviction or if their conviction resulted in a custodial sentence;
- reducing the impact of the current filtering system on young offenders; and
- introducing procedural reforms to minimise the scope for confusion and error around the process of applying for a criminal record certificate from DBS.

We recognise that merely introducing a new statutory instrument to give effect to an itemised list is unlikely to produce the best solution to the broader problems with the filtering system and the wider criminal records disclosure regime. We believe that there is a compelling case for a wider review of the disclosure system as a whole. A mere technical fix in a piece of secondary legislation is not sufficient to tackle the interwoven and large scale problems with criminal records disclosure that we have identified whilst undertaking this project.