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# **Criminal Records Disclosure: Non-Filterable Offences Summary**

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**Law Com No 371 (Summary)  
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# LAW COMMISSION

## CRIMINAL RECORDS DISCLOSURE: NON-FILTERABLE OFFENCES

### SUMMARY

#### SUBJECT OF THIS REPORT

- 1.1 The law regulating the circumstances in which an individual is obliged to reveal his or her criminal record must strike a careful balance between providing that individual with an opportunity for rehabilitation (for his or her past offending to be “forgotten”) and ensuring that there is adequate protection in place to guard against the risk that the individual might reoffend and that, as a result, harm may be caused. The question of how this balance is to be struck is one which dominates the system of criminal records disclosure.
- 1.2 This review considers one narrow aspect of the legal framework underlying the disclosure of criminal convictions and cautions. Specifically, it focuses on the law dealing with
  - (1) applicants for, and
  - (2) members or holders ofcertain professions, employments and licences where those positions are considered to require a high degree of trust. These include, but are not restricted to: those that involve contact with children and vulnerable adults (for example, doctors and nurses); members of the legal profession, and, gun or gambling licensees.
- 1.3 In particular, this review examines the process known as “filtering”. This is a process by which certain convictions and cautions need not be disclosed when an individual is asked questions about his or her criminal record for the purpose of assessing his or her suitability for a specific employment or role. The filtering system was introduced in 2013.<sup>1</sup>
- 1.4 Under the Rehabilitation of Offenders Act 1974 (“ROA 1974”), a criminal conviction may become “spent” after a certain period of time. At that point the person is treated for most purposes as not having committed the offence. A caution is considered spent immediately.<sup>2</sup>
- 1.5 There is an exception to this general rule. Under that exception, when an individual is asked a question in order to ascertain his or her suitability for a specific type of employment or role (as described in general terms in paragraph

<sup>1</sup> Following the case of *R (T and others) v Chief Constable of Greater Manchester* [2013] EWCA Civ 25.

<sup>2</sup> Unless it was imposed with conditions attached. See further para 1.31 and following, below.

1.1 above), all convictions and cautions should be disclosed, even if they are spent under the ROA 1974. Disclosure of spent convictions and cautions is, however, subject to the filtering system.<sup>3</sup>

- 1.6 Under that system, convictions and cautions for most criminal offences need not be disclosed (they are “filtered”), 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 offences which can never be filtered (the list of “non-filterable” offences). In general terms, this list includes offences of violence, sexual offences and offences relevant to the protection of children and vulnerable adults (often known as “safeguarding”).<sup>4</sup>
- 1.7 As noted above, the main purpose of the filtering system is to achieve a balance between two important policy needs:
- (1) An individual who has committed an offence should be allowed, after a suitable period of rehabilitation, to make a fresh start in life and not be held back by his or her previous record.
  - (2) Employers and others in a position of responsibility should be able to obtain the information required to fulfil those responsibilities, particularly in relation to the safeguarding of children and vulnerable adults. This concerns the provision of a proportionate amount of disclosure about, for example, the criminal history of prospective employees applying for particular positions.

### **The Disclosure and Barring Service**

- 1.8 In practice, most criminal record disclosures are made through the Disclosure and Barring Service (“DBS”) system.<sup>5</sup> Obtaining a criminal record certificate from DBS is one, but not the only, way in which an individual can answer a question about his or her criminal record.
- 1.9 A key purpose of DBS is to provide for disclosure of relevant criminal records to organisations and individuals making decisions about the suitability of an individual for a particular employment or role. An application to DBS for a criminal records check results in the issuing of a criminal record certificate, listing all “relevant matters” (convictions, cautions) recorded against the individual who is the subject of the application and – in some special cases – other information held by the police. We understand that in 2015 DBS processed 4.2 million applications, with 358,000 applications revealing potentially relevant matters pre-filtering. When the filtering rules were applied the number of certificates issued containing relevant matters was 244,000.

<sup>3</sup> There are some specific circumstances where filtering does not apply. These are discussed further in Chapter 2.

<sup>4</sup> See further para 1.33 below.

<sup>5</sup> DBS was established under the Protection of Freedoms Act 2012 and replaced the Criminal Records Bureau (CRB) and Independent Safeguarding Authority (ISA).

1.10 Failures in the system can have far-reaching consequences, both in terms of the number of people affected by, and the gravity of, the risks arising from those failures. Risks include:

- (1) the possibility of relevant criminal history remaining undetected, leading to risks that an individual in a particular employment or role is unsuitable for it and, where relevant, that vulnerable adults and children will not be adequately protected or safeguarded; or
- (2) the possibility of inappropriate disclosure, which risks unfairly prejudicing an individual's right to rehabilitation (to have previous criminal behaviour "forgotten" after an appropriate length of time and/or in appropriate circumstances), with profound personal consequences for that individual.

Given the critical interests at stake, it is essential for the legal and operational framework supporting the decisions of DBS to be clear, fair and robust.

### **BACKGROUND TO THE PROJECT**

1.11 In late 2015 the Law Commission was approached by the Home Office regarding a possible project to conduct a comprehensive review of the legislative framework for the system of disclosing criminal records.

1.12 The legislative framework for the system is contained within the relevant parts of:

- (1) the Rehabilitation of Offenders Act 1974;
- (2) the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975;
- (3) the Police Act 1997;
- (4) the Police Act 1997 (Enhanced Criminal Record Certificates) (Protection of Vulnerable Adults) Regulations 2002;
- (5) the Safeguarding Vulnerable Groups Act 2006; and
- (6) the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

1.13 In July 2016, further discussion focused on a narrower, shorter project considering the effectiveness of certain aspects of the list of non-filterable offences, which can be found in section 113A(6D) of the Police Act 1997.<sup>6</sup>

1.14 The terms of reference for the project, as agreed between the Law Commission and the Home Office, set out the aims of the present review as being to:

- (1) simplify and clarify the operation of filtering;
- (2) ensure the system deals effectively and comprehensively with conduct that presents a safeguarding risk; and

<sup>6</sup> A corresponding list can be found in Article 2A of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.

- (3) avoid the system compelling the disclosure of minor offences where that is unnecessary.
- 1.15 Also in those terms of reference, it was agreed that we would:
- (1) develop a set of principles by which offences can be categorised as appropriate for the list of non-filterable offences and consider whether the present list of offences specified in section 113A(6D) of the Police Act 1997 is comprehensive, with particular reference to common law and historic offences;
  - (2) be mindful of the system of offence codes underpinning the recording of offences on the Police National Computer (“PNC”) and the policy intent of the Government to ensure that vulnerable adults and children are protected from conduct that presents a safeguarding risk;
  - (3) assess the best way to future-proof the regime to deal with the abolition of common law offences and repeal of statutory ones; and
  - (4) consider options for redrafting the relevant secondary legislation.
- 1.16 For reasons explained in later chapters, as this review has progressed it has become clear that it would not be feasible to develop a set of principles, as suggested in (1) above, within the parameters of the project as agreed with the Home Office. The project is a very narrow one with a short time frame. Our terms of reference expressly limit our review to changes that can be achieved using only secondary legislation.
- 1.17 However, we were also asked to assess the potential need for a broader review of the system of criminal records disclosure (unhindered by such limits) 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. We consider, within the context of this potential broader review, the issue of principles by which offences can be categorised as appropriate for inclusion in the list of non-filterable offences. Chapter 5 of our report contains a discussion of these broader issues.

## **STAKEHOLDER ENGAGEMENT**

- 1.18 In light of the limited timeframe for the project and the technical focus of the review suggested, we adopted a two-tier approach to consultation. We identified key representative groups and conducted a series of targeted consultation meetings and roundtables with experts in this field, alongside an online public consultation seeking input regarding broader issues for reform.
- 1.19 The types of consultee targeted by us included:
- (1) Government bodies and agencies involved in the development and operation of the criminal records disclosure system in England and Wales;
  - (2) Government bodies and agencies involved in the development and operation of disclosure systems in other jurisdictions;

- (3) police officers and organisations, in particular those responsible for the PNC;
- (4) the Ministry of Defence and the Service Prosecution Authority;
- (5) legal practitioners;
- (6) legal academics;
- (7) regulators and professional bodies, in particular those concerned with admission to the legal, health care and educational professions; and
- (8) charities and other non-governmental organisations representing the interests of both employers who rely on the DBS system and those individuals who make applications to DBS for criminal records certificates.

1.20 Our online public consultation consisted of the following question published on our website on 16 September 2016:

Our current work is limited to a review of the operation of the ‘non-filterable list’ which sets out offences which are so serious that they should always be disclosed.

We invite consultees to provide evidence of any problems or difficulties they may have experienced in connection to the list of serious offences which will always be disclosed.

1.21 Responses to these questions were accepted until 11 October 2016. We wish to thank all of those consultees who responded directly to the online consultation.

### **THE REPORT IN SUMMARY**

1.22 The structure of our report is as follows:

- (1) Chapter 1 is the introduction.
- (2) Chapter 2 sets out the current law on disclosure and criminal record certificates.
- (3) Chapter 3 discusses the problems affecting the non-filtering list.
- (4) Chapter 4 discusses and recommends solutions to these problems.
- (5) Chapter 5 suggests topics to be considered in a wider review.
- (6) Chapter 6 lists our recommendations.

We summarise our findings below.

## **Current law (Chapter 2)**

### ***Rehabilitation of offenders***

- 1.23 The Rehabilitation of Offenders Act 1974 (“ROA 1974”) provides that when a period has elapsed after conviction and punishment for certain offences, the conviction is “spent”. Provided there has been no re-offending, the offender has the right to be treated for most purposes as if he or she had not committed the offence. This period of time varies from no time at all (if the offender received an absolute discharge) to seven years from the end of the sentence (if the offender received a custodial sentence of more than 30 and less than 48 months). If the sentence is for more than 48 months, the offence is never spent.
- 1.24 There are similar provisions when an offender has received a caution. A caution is spent as soon as it is issued, except in some cases where the caution was given with conditions attached.
- 1.25 Under section 4 of the ROA 1974, the Secretary of State may make orders creating exceptions in particular circumstances to the right to non-disclosure mentioned above. The order now in force which sets out these exceptions is the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (“the 1975 Order”).<sup>7</sup>
- 1.26 The 1975 Order provides that the right to non-disclosure in the ROA 1974 does not apply when a person is asked to disclose his or her criminal record for the purpose of ascertaining his or her suitability for certain employments, professions and licences and in some other situations requiring a high degree of trust and/or involving contact with children and vulnerable adults. In these cases, all convictions and cautions should be disclosed, whether spent or not, unless they are “filtered”.
- 1.27 As explained in Chapter 2, in most cases the person asked to disclose his or her criminal record will be able to do so by applying to DBS for a criminal record certificate. In some cases the employer or other organisation seeking disclosure will require the person to obtain such a certificate.

### ***Criminal records certificates***

- 1.28 The Police Act 1997 provides for the following types of certificate to be issued:
- (1) criminal *conviction* certificates, containing current (that is, non-spent) convictions and cautions only (commonly referred to as “basic” certificates – a term that we adopt for ease of reference);
  - (2) criminal *record* certificates (commonly referred to as “standard” certificates – a term that we also adopt for ease of reference), containing all convictions and cautions, whether spent or not, subject to “filtering”; and
  - (3) enhanced criminal record certificates (which we will refer to as enhanced certificates), containing the same information as standard certificates, together with additional information determined to be relevant by the

<sup>7</sup> SI 1975/1023.

police (and in some cases, stating whether the person in question is barred from working with children or vulnerable adults).

- 1.29 Criminal conviction, or basic, certificates are available to any individual seeking a copy of his or her own criminal conviction history, for any purpose. DBS does not have responsibility for these.<sup>8</sup>
- 1.30 DBS does have responsibility for issuing both standard and enhanced criminal records certificates. Our terms of reference for this review only cover the information that can be included on both standard and enhanced criminal record certificates (but not information that can only be included on an enhanced certificate). These types of criminal record certificates can only be issued when a person is asked a question in relation to his or her suitability for certain employments, professions and licences and in some other situations: in other words, in exactly the same circumstances as those mentioned in the 1975 Order.
- 1.31 The certificate is issued to the individual in question, who then passes it on to the prospective employer or other person considering the question of their suitability, such as a professional body or licensing authority. This mechanism only applies when the prospective employer or other person is a “registered person”. (A business, official or authority can be “registered” if it shows that it is likely to receive such applications and ask questions about applicants’ criminal records.) The individual to whom the certificate relates can complain if he or she considers that it is inaccurate (discussed further below at paragraph 1.40).

### ***Filtering***

- 1.32 In the case of *R (T and others) v Chief Constable of Greater Manchester*<sup>9</sup> the Court of Appeal held that blanket disclosure of all convictions and cautions, where an individual’s suitability for certain employments, professions and licences was being assessed, was disproportionate. In other words, the statutory scheme for checking criminal records did not strike the right balance between the need to ensure that employers and other organisations making suitability assessments had relevant information relating to the individual’s criminal history and an individual’s right to rehabilitation.
- 1.33 As a result, in 2013 the Home Office introduced a system allowing some old and minor convictions and cautions to be “filtered”. A filtered conviction or caution need not be disclosed when a person is asked to disclose his or her criminal record for the purposes of the employments, professions and licences and other situations discussed above. Nor does it appear on that person’s criminal record certificate (whether standard or enhanced).
- 1.34 A conviction is filtered if:

<sup>8</sup> They are currently issued by an organisation named Disclosure Scotland, although this body issues certificates to applicants throughout England and Wales, as well as Scotland. DBS will, however, be taking over this process from June 2017. Applicants from Northern Ireland obtain criminal conviction and records certificates from Access NI.

<sup>9</sup> [2013] EWCA Civ 25. See also (subsequent to the introduction of filtering) the Supreme Court decision of [2014] UKSC 35. For further reading see Sam Thomas, “The Supreme Court judgment in *R (on the application of T) v Chief Constable of Greater Manchester and the effect on professional regulators*” [2015] 2 *Criminal Law Review* 149.

- (1) it is a person's only conviction;
  - (2) it did not result in a custodial sentence, whether immediate or suspended, or a term of service detention;
  - (3) it occurred over at least 11 years previously, in the case of an adult, or at least five and a half years previously, in the case of a person who was under 18 at the time of the conviction; and
  - (4) it was not for a "listed offence".
- 1.35 A caution is filtered if it was given at least six years previously in the case of an adult or at least two years previously in the case of a person under 18 at the time of the offence, and it was not for a listed offence.
- 1.36 The list of listed offences, also called "non-filterable offences", is set out in two places:
- (1) for the purposes of the rehabilitation of offenders, in article 2A(5) of the 1975 Order; and
  - (2) for the purposes of criminal record certificates, in section 113A(6D) of the Police Act 1997.

These lists are identical except that the list in the 1975 Order does not include murder.<sup>10</sup> For convenience, we refer to only the list in section 113A(6D) of the Police Act 1997 (section 113A(6D)).

- 1.37 Section 113A(6D) does not contain an itemised list of offences. It refers to some offences by name, but also refers to lists contained in Schedules to other legislation, both Acts of Parliament and regulations. Some of these lists overlap with each other, resulting in extensive duplication. The references made to lists in other legislation, specifically in regulations, may also lead to significant uncertainty as to what is and is not on the list of non-filterable offences at any one time.
- 1.38 The section also refers to:
- (1) offences "superseded" by other offences in the list;
  - (2) attempts, conspiracies and other inchoate offences<sup>11</sup> related to other offences in the list; and
  - (3) offences under a jurisdiction other than England and Wales, and offences contrary to service law "corresponding" to other offences in the list.

<sup>10</sup> The reason for this is that, under ROA 1974, a conviction for murder is never spent.

<sup>11</sup> An "inchoate" offence is an offence consisting of preparing for or promoting the commission of another offence. Examples are attempt, conspiracy and the offences of assisting and encouraging crime under Part 2 of the Serious Crime Act 2007.

### Problems with the current filtering regime (Chapter 3)

1.39 The drafting of the section makes it hard to understand and inaccessible to users, both because the list is in two places and because it refers so extensively to other legislation, which is difficult to access. These difficulties arise both from the fact that a number of different pieces of legislation must be referred to in order to identify offences that are non-filterable,<sup>12</sup> and that an up to date copy of the relevant legislation is currently only accessible from legal databases available on subscription. There are also doubts about the interpretation of the list, in particular the following:

- (1) *Which version of the list:* where the section refers to a list contained in an order or regulations, it is not clear whether the effect is to include all offences in that list as amended from time to time, or only the offences which were on that list in 2013.

A principle of administrative law known as the “rule against sub-delegation” states that an authority making a decision, including a decision to make regulations, must exercise his or her own discretion and not make that decision depend on other decisions made by a different authority or for different purposes. This means that those making regulations must apply their minds to the contents of those regulations, and not blindly follow other regulations which they have not seen: in particular, regulations which will only be made in the future. Interpreting the section in such a way as to refer to regulations as amended from time to time may offend against this principle. This may mean in practice that the non-filterable list is not updated in line with any additions, removals or other amendments that may be made to some of the lists of offences referred to in section 113A(6D).

- (2) *Jurisdiction:* some of the lists referred to in the section appear to relate to offences in Scotland or Northern Ireland, but contain some offences that can also be committed in England and Wales. It is not clear whether this means that those offences are also “non-filterable” when committed in England and Wales.
- (3) *The meaning of “superseded”:* section 113A(6D) paragraph (k) refers to offences “superseded” by offences referred to elsewhere in the section. It is unclear whether “supersede” has the narrow meaning of “abolish and replace”, or a broader meaning including any situation where a newer offence overlaps with and may be used in place of an older one. Theft under the Theft Act 1968 clearly supersedes the old larceny offences, which have ceased to exist. It is less clear that the offence under section 1 of the Street Offences Act 1959 (loitering or soliciting for purposes of prostitution) has been superseded by more recent prostitution offences: the older offence is still in use.

<sup>12</sup> As explained further in Chapters 2 and 3, there exists a list of “offences that will never be filtered”, which is published on the Government website but this does not appear to reflect the legislation accurately. DBS and Home Office, *List of offences that will never be filtered from a DBS certificate* (December 2013) available at <https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check> (last visited 20 October 2016).

- (4) *The treatment of offences under a jurisdiction other than England and Wales and service offences:* it is unclear whether a “corresponding” service offence, or offence committed in a jurisdiction other than England and Wales, must correspond exactly to a listed offence in England and Wales, and, if not, how close the correspondence must be.

1.40 There are, arguably, also significant operational problems. When issuing criminal record certificates, DBS does not refer directly to section 113A(6D) but uses an itemised “operational list” of offences prepared by the Home Office. The operational list in turn relies on the offence codes used by the PNC in order to identify those offences that are non-filterable. This gives rise to the following difficulties:

- (1) *PNC codes do not always accurately correspond to listed offences:* some offences are only non-filterable in certain circumstances, for example when the offence is committed in relation to a child. The PNC codes used to identify individual offences within the PNC system do not always reflect these distinctions. There is capacity within the PNC system to identify specific forms of a particular offence and to assign unique codes to those specific forms, but there appears to be no process in place to ensure that this is done for each specified form of a particular offence that appears on the non-filterable list of offences. The result can sometimes be that offences that are only non-filterable in certain circumstances are included in the operational list and treated as non-filterable whatever the circumstances.
- (2) *Service offences:* there is only one PNC code representing all service offences corresponding to an offence on the non-filterable list.<sup>13</sup> Under the legislation service offences are only non-filterable if the corresponding civilian offence is also non-filterable. Because of its reliance on the PNC codes, as explained in Chapter 3, if service offences are recorded correctly the operational list cannot reflect this distinction. We understand that in practice, however, service offences that correspond with civilian offences are recorded on the PNC as if they were civilian offences, using those offence codes. This is an incorrect recording practice. It has the effect of ensuring that only service offences that correspond to an offence on the non-filterable list are disclosed on a criminal record certificate, but it may have other undesirable consequences. For example, it may not allow for sentences of military detention to be distinguished from sentences of imprisonment.
- (3) *Interpretation of “superseded”:* some offences appear to have been included in the operational list on the basis of what is arguably an over-wide interpretation of “superseded”, as described above.
- (4) *Offences included without any apparent basis in statute at all:* some offences on the operational list appear to fall within none of the lists, or descriptions of offences, contained in section 113A(6D).

<sup>13</sup> Under the Armed Forces Act 2006, s 42, every offence under the general criminal law has its counterpart in service law, the difference being that it can be committed in any part of the world.

- (5) *Newer offences missing from the operational list:* some recently created offences, such as those under the Modern Slavery Act 2015, are now covered by statutes or regulations referred to in section 113A(6D) but have not been added to the operational list.
- 1.41 From the point of view of an individual applying for a criminal record certificate or otherwise relying on the DBS disclosure system, there are the following practical problems:
- (1) The inaccuracies in the operational list mean that some convictions and cautions could well be wrongly disclosed or wrongly withheld.
  - (2) The individual cannot apply for an advance view of a criminal record certificate, and because of the uncertainty of the law, DBS are unable to provide any help in answering questions put by, for example, a prospective employer before a certificate is issued. Similarly, help is not available to third parties, such as previous employers, who are asked questions about the individual's past history. There may be discrepancies between the answers received early in the application procedure and the contents of the criminal record certificate when issued. This could result in confusion, with convictions or cautions either being disclosed unnecessarily or the individual being later accused of answering questions dishonestly.
  - (3) An employer who carries out regular "updating" checks on his or her employees may find that, because the list of non-filterable offences changes from time to time, later updates contain more or less information than the original check or earlier updates. This could cause confusion as to why, for example, older convictions that were not disclosed previously are now being disclosed.
  - (4) The applicant can complain that a criminal record certificate is inaccurate, but in considering that complaint DBS can only check the certificate against the operational list and cannot consider whether the list is correct. There is therefore no channel for complaining that an offence has been wrongly included because the operational list itself is inaccurate.
- 1.42 Finally, the choice of offences in the list appears to lack coherence and a clear basis. We understand from the Home Office that the primary purpose to be served by the list of non-filterable offences is the safeguarding of children and vulnerable adults. However, this is not the only purpose of the non-filterable list.
- (1) Section 113A(6D) often refers to lists of offences contained in legislation made for wholly different purposes, such as identifying dangerous offenders for sentencing purposes.
  - (2) Conversely, there are offences that appear relevant to the purposes of the exempted questions, including but not limited to safeguarding, which are not on the list of non-filterable offences as the law stands.

## **Possible reforms (Chapter 4)**

### ***Producing an accurate and clear list of non-filterable offences***

- 1.43 The first stage in this review was to produce, as far as possible, an accurate itemised list of non-filterable offences on the basis of the current legislation. This is contained in Appendix A,<sup>14</sup> and consists of a workbook with 9 sheets. Sheets 2 to 8 contain the offences which we believe to be non-filterable in current law. Sheet 1 contains a key to the workbook's contents.
- 1.44 In producing this list we deliberately took the narrowest view of the law on points of doubt, in particular concerning the rule against sub-delegation<sup>15</sup> and the meaning of "superseded".<sup>16</sup> The list also shows offences which might be included if a broader view were taken, but these are colour coded to show that their status is doubtful.
- 1.45 Sheet 9 in Appendix A shows the differences, as far as we have been able to identify them, between the itemised list as prepared by us and the operational list used by DBS.

### ***Revising the list of non-filterable offences***

- 1.46 We then consider how a revised list could be implemented in secondary legislation. For reasons of accessibility and ease of use, we recommend that the legislation should set out an itemised list of offences rather than referring to generic categories as at present. Exceptions to this approach are:
- (1) inchoate offences, such as attempt, conspiracy, aiding and abetting and assisting and encouraging, which need not be listed separately in relation to each substantive offence;
  - (2) service offences, which correspond one to one with civilian offences and need not be listed separately; and
  - (3) offences under a jurisdiction other than England and Wales, where a complete list would require study of every legal system in the world and would therefore be impossible to achieve.

### ***Our preferred approach – a single list of non-filterable offences***

- 1.47 One question is whether it is necessary for the list to appear in two different instruments as at present or whether it is sufficient to have a complete list for the purposes of the rehabilitation of offenders<sup>17</sup> and a cross-reference to it in the statute governing criminal record certificates.<sup>18</sup> The second course would be more economical in drafting terms, but there could be the problem of sub-delegation, as already discussed. That is, there is a risk that the list used for the

<sup>14</sup> Available on line at <http://www.lawcom.gov.uk/project/criminal-records-disclosure/>.

<sup>15</sup> See para 1.398(1) above.

<sup>16</sup> See para 1.398(3) above.

<sup>17</sup> In an order replacing the 1975 Order.

<sup>18</sup> Currently in the Police Act 1997.

purpose of criminal record certificates would not automatically reflect future changes in the list used for the rehabilitation scheme.<sup>19</sup>

- 1.48 One effect of having an itemised list is that it will be necessary to update it when new offences are created, and that it will not be possible to rely on amendments made to other statutes as at present. However, as these statutes are often made for different purposes which do not correspond to those of filtering, under the present system these amendments will not necessarily achieve the right results. Under the proposed system, the relevance of the new offence to safeguarding could always be the main consideration in deciding whether to add it to the list, and the list will continue to serve its intended purpose.
- 1.49 We do not make recommendations about whether any particular offences should be added or removed from the list of non-filterable offences. Specifically, we have not produced a draft statutory instrument containing a revised list of non-filterable offences for implementation. We have concerns that merely introducing new statutory instruments to give effect to either the itemised list that we have produced, or a revised list compiled within the narrow confines of the present project, would be unlikely to produce the best solution to wider problems with the disclosure regime as a whole.
- 1.50 There are broader questions of policy about what this optimal solution might be and, in our view, these can only be properly addressed in the context of a broader discussion of the disclosure regime and the development of clear principles upon which filtering may be based.
- 1.51 Finally, we discuss any risks that may arise and/or remain if our preferred approach were to be adopted, and how the operational arrangements (in particular the offence PNC codes) might need to be adjusted to ensure that any new list is effective.

## **Topics for a wider review (Chapter 5)**

### ***The choice of offences for the list***

- 1.52 A major potential problem in the current law is that there is a very wide range of purposes for which criminal record certificates are required and, where the exempted questions apply, all unspent offences other than filtered ones are disclosed whatever the purpose of the application. A court could hold that the infringement of the right to respect for private life under Article 8 of the European Convention on Human Rights is disproportionate to the purposes served by disclosure.<sup>20</sup> Possible remedies are:
- (1) to subdivide the list of non-filterable offences according to the different purposes for which disclosure is required, so that only relevant offences are disclosed in each case; or

<sup>19</sup> This is discussed fully in Chapter 3 of our report.

<sup>20</sup> See for example *R (on the application of G) v Chief Constable of Surrey Police and others* [2016] EWHC 295 (Admin), although this case did not specifically address the issue of the non-filterable list of offences being used for multiple purposes.

- (2) to create a discretion or a review mechanism for deciding on the relevance of a conviction or caution to the particular application made.
- 1.53 Another consideration is that some offences cover a broad range of behaviour, only some of which is relevant to the purposes of the non-filterable list. An offence should only be included in the list if all or most instances of its commission are likely to raise concerns regarding those purposes.
- 1.54 Alternatively, in broad spectrum offences of this kind there should be a test for distinguishing those instances which are likely to raise such concerns. One such test may be found in the existing rule that a conviction is not filtered if there is more than one or if it resulted in a custodial sentence. This may be an argument against including broad spectrum offences in the list. It could even be questioned whether, given this rule, there is a need for any offences to be non-filterable.

#### ***The rules about multiple convictions and custodial sentences***

- 1.55 Another possibility is to relax the existing rule that convictions are never filtered if the person has more than one conviction.<sup>21</sup> A second conviction does not necessarily mean that a person has committed offences on two separate occasions.
- 1.56 The rule about disclosing all convictions resulting in a custodial sentence might also need to be reconsidered. There would be an argument for allowing the filtering of convictions where the sentence was below a certain length, particularly if suspended (that is, where an offender is not imprisoned as long as he or she abides by set conditions for a certain period of time).
- 1.57 The rule bears particularly harshly on military personnel, as the statute specifically provides that offences are non-filterable if they result in a term of service detention. In the armed forces, detention is often imposed for fairly minor acts of misconduct and for periods of only a few days: service detention is regarded as being for rehabilitative purposes and does not necessarily carry any particular stigma.

#### ***The effect on young offenders***

- 1.58 The system might be regarded as disproportionately harsh in its effect on young offenders. There is an argument that some offences, although they may justifiably be non-filterable when committed by an adult, should be allowed to be removed from the record after a time in the case of a young offender.
- 1.59 Especially for young offenders, but to some extent for adults as well, there is an argument that cautions should not remain permanently on the record, even if they are for a listed offence. If an offence was not thought serious enough to merit prosecution at the time, it may seem odd to treat it as raising lifelong concerns about the offender's future behaviour. Alternatively it could be argued that this may be so in the case of a very few offences, and that there should therefore be a separate, much shorter, list of non-filterable offences where cautions are concerned.

<sup>21</sup> See for example *R (on the application of P) v Secretary of State for Justice* [2016] EWHC 89 (Admin).

- 1.60 A further concern is that, at present, offenders of all ages who accept cautions for non-filterable offences are not always informed at the time of accepting the caution that these offences will remain on their record indefinitely. They therefore accept the caution in the belief that that will be the end of the matter, and do not appreciate the long term consequences. The potential for an individual not fully to understand the effect of a caution, and the impact on his or her future employment prospects, is particularly great where the offender is a young person.

### ***Procedural reforms***

- 1.61 As mentioned above, an individual cannot obtain specific guidance from DBS on how to answer questions about his or her criminal record prior to an application for criminal record certificate being made.<sup>22</sup> One possible reform would be that an applicant should be entitled to a preview of his or her criminal record certificate at any stage. Another would be to provide that an applicant is never required to answer questions about his or her criminal record except by providing a criminal record certificate.
- 1.62 Another problem, also mentioned above, is that an applicant may complain of inaccuracies in a criminal record certificate but cannot in practice question the DBS operational list. This problem would be greatly reduced if the statutory list were itemised as we recommend, as this would avoid the need for a separate operational list. However, there will still be scope for error and it could be argued that there should be an independent adjudicator with power to consider whether the filtering rules have been correctly applied as a matter of law.

### **Conclusion**

- 1.63 Given the vast array and magnitude of the problems identified by our provisional assessment of the disclosure system as a whole, there is a compelling case to be made in favour of a wider review. Our conclusion is that the present system raises significant concerns in relation to non-compliance with the ECHR and the overly harsh outcomes stemming from a failure to incorporate either proportionality or relevance into disclosure decisions. An impenetrable legislative framework and questions of legal certainty further compound the situation. This is an area of law in dire need of thorough and expert analysis. A mere technical fix is not sufficient to tackle such interwoven and large scale problems.

### **List of recommendations**

#### ***The need to develop a set of principles for determining which offences should be non-filterable***

**Recommendation 1:** The primary criterion for adding a new offence to the non-filterable list of offences should be relevance to one or more of the exempted questions identified in the Rehabilitation of Offenders Act 1974 (Exceptions)

<sup>22</sup> General guidance on the obtaining of criminal records certificates and the application of filtering is published on the DBS section of the Government website: <https://www.gov.uk/government/collections/dbs-filtering-guidance>. In addition the Government has published guidance on the effect of the operation of the rehabilitation of offenders scheme, found here: <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974> (last visited 12 January 2017). The guidance does not specifically address which individual offences are non-filterable.

Order 1975 (“the 1975 Order”). We strongly believe that a wider review of the system of criminal records disclosure is required in order to create a coherent set of principles upon which offences could be selected for inclusion.

## **HOW A NEW LIST COULD BE IMPLEMENTED IN STATUTE**

### **Consolidation**

- 1.64 **Recommendation 2:** The non-filterable list of offences should be set out in one statutory instrument rather than two.

### **Listing offences individually**

- 1.65 **Recommendation 3:** The non-filterable offences should be listed individually by name and section, without reference to lists in other legislation.

### **“Superseded” offences**

- 1.66 **Recommendation 4:** The non-filterable list of offences should include all relevant abolished offences by name.

### **Inchoate and “corresponding” offences**

- 1.67 **Recommendation 5:** The non-filterable list of offences should include equivalents to paragraphs (l) to (o) of the existing section 113A(6D) of the Police Act 1997 (covering inchoate versions of offences on the list, offences committed in a jurisdiction other than England and Wales and service offences, corresponding to other offences on the list).

## **KEEPING A REFRESHED LIST UP TO DATE**

### **Adding offences individually**

- 1.68 **Recommendation 6:** The non-filterable list of offences, set out in legislation, should be updated by amending that legislation.

## **RISKS ASSOCIATED WITH A REVISED LIST**

### **Need to reform the PNC code system**

- 1.69 **Recommendation 7:** A review of the PNC code system should be undertaken to assess how it can be reformed in order to make the filtering regime more effective.