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# **ANALYSIS OF SYMPOSIUM – CRIMINAL RECORDS DISCLOSURE: NON-FILTERABLE OFFENCES**

## **INTRODUCTION**

- 1.1 On 1 February the Law Commission launched its report *Criminal Records Disclosure: Non-Filterable Offences*<sup>1</sup> at a symposium held at City University. The report examined one part of the narrow aspect of the criminal records disclosure system known as “filtering”: the “list of non-filterable offences”.
- 1.2 Delegates and speakers (collectively referred to as “participants” in this analysis) came from a variety of backgrounds and included: academics, NGOs, representatives from the police and foreign disclosure systems, members of the judiciary and the legal profession as well as the Information Commissioner’s Office.<sup>2</sup> Thus the discussion was informed by a broad range of perspectives. That discussion provided valuable insight into the broader context of the Law Commission’s report – both in terms of how the current law operates and how the reform options outlined in the report might be approached.

## **OVERVIEW AND EMERGING THEMES**

- 1.3 A wide range of topics were covered over the course of the day. The five panels were titled:
  - (1) The Filtering Regime.
  - (2) Revising the list of non-filterable offences: what should the principles be?
  - (3) Proportionality and the disclosure system.
  - (4) The impact of disclosure on young offenders.
  - (5) Learning from other jurisdictions.
- 1.4 There was general consensus that:
  - (1) The law in this area is complex and is in need of reform.

<sup>1</sup> (2017) Law Com No 371.

<sup>2</sup> Speakers were: DJ Sunita Mason CBE; Dominic Headley of Nacro; Superintendent Lee Warhurst of Hampshire Constabulary; Karen Progl of ACRO; Professor Liz Campbell of Durham Law School; Ian Deasha from the ICO; Detective Superintendent Jackie Alexander of Nottinghamshire Police; Christopher Stacey of Unlock; Sam Hawke of Liberty; Jamie Grace of Sheffield Hallam University; Professor Anthony Edwards, duty solicitor; Timothy Pitt-Payne QC (absent), Tessa Murphy of the Standing Committee for Youth Justice; Quincy Whitaker of Doughty Street Chambers; Caroline Adams of Sussex Police; Steven Tysoe, MOJ lead on youth criminal records (absent); James Laing of Disclosure Scotland; Lucy Saunders of ACRO.

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- (2) There are concerns about proportionality and safeguards.
  - (3) There is a need for a wider review of the disclosure system more broadly, in particular in relation to:
    - (a) young offenders;
    - (b) the treatment and effect of cautions; and
    - (c) lessons from other jurisdictions.

1.5 We will address these topics in order.

**The law is overly complex and in need of reform**

- 1.6 There was overwhelming consensus among participants that the law in this area is in need of reform. In his opening remarks Professor David Ormerod QC noted the complexity of the statutory framework governing the disclosure system.
- 1.7 This complexity is particularly relevant in the case of the list of non-filterable offences. There is no single list. It exists in two statutory sources which cross refer. The 2013 legislation created a list by way of reference to numerous other lists in numerous other pieces of legislation. In this way the identification of what offences must always fall to be disclosed is incredibly unclear.
- 1.8 The list fails to provide with sufficient specificity and particularity for corresponding armed service offence and overseas offences – even offences within other parts of the UK can cause confusion. It also includes foreign offences and armed forces offences that “correspond” to other offences on the list, but that opens up a host of questions about what degree of correspondence there must be in order for an offence to qualify for inclusion.
- 1.9 There exists further ambiguity where an offence has been “superseded by” an offence on the list. The interpretation of superseded in this context has been the subject of debate in the courts. For the avoidance of confusion, the Law Commission adopted a narrow interpretation in line with the ordinary meaning of “superseded”, that is to say “repealed and replaced by”.
- 1.10 DJ Sunita Mason CBE, as well as other participants, noted that although the narrow terms of reference are limiting there is much merit to the work that has been done. She said “The Law Commission is absolutely talking about this problem from the right point of view.” Starting with a list that everyone can understand is desirable to all.

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- 1.11 This sentiment was echoed by a number of participants over the course of the day. Dominic Headley of Nacro highlighted, with the use of case studies, the confusion and uncertainty faced by both individuals and organisations attempting to determine what convictions and cautions do and do not need to be disclosed under the present regime. He emphasised that the filtering system is confusing to individuals, organisations and even lawyers who use the system, oftentimes without specific expert knowledge in the area. He also highlighted in his presentation concerns around the lack of accuracy of information contained on some criminal record disclosures (e.g. non-disclosure of certain motoring or military offences).
- 1.12 DJ Sunita Mason CBE also noted that in producing her initial recommendations to Government in respect of the proposed filtering of old and minor convictions, one of her primary concerns was accessibility of the system to those it affects most directly.
- 1.13 DJ Sunita Mason CBE's key recommendations were accepted in part by the then-Government. She thought it was interesting that in her area of work (in the family courts), safeguarding and proportionality were arguably afforded more importance.
- 1.14 Anthony Edwards noted that from a practical perspective, the most frequent walk-in enquiry, received by criminal solicitors, from those who have not been arrested, is a criminal records disclosure query. However, the law is so complex that it took him, a practising lawyer with access to legal databases, 24 minutes to locate in statute the Security Industries Authority exception to the disclosure regime. His view was that this law is clearly not fit for purpose if it cannot be clearly understood and navigated. The lack of legal certainty is concerning. Over 50 percent of people are unrepresented at police stations, and many accept cautions without sufficient appreciation of the future disclosure implications.
- 1.15 Superintendent Lee Warhurst of Hampshire Constabulary, speaking on behalf of the National Police Chiefs Council ("NPCC"), also acknowledged that the present system is unsatisfactory. His view was that, amongst the police, there is a general consensus that common sense and moral concerns demand a more proportionate approach. The number of "enhanced" Disclosure and Barring Service ("DBS") referrals already dealt with by the police was put forward as an argument in favour of a more police-led system. He noted that 90 percent of DBS checks relate to enhanced certificates, which are therefore referred to the police for the consideration of adding "soft intelligence" information. Of the 4.5million DBS applications, 2.2million were so referred. From there, only 11,000 non-criminal record related disclosures were made by individual forces. Superintendent Warhurst considered that "if we trust chief officers to do that" properly, they can surely be entrusted to ensure the proportionate disclosure of all convictions and cautions.
- 1.16 Christopher Stacey of Unlock agreed that the police give great attention to enhanced certificates and that that system is more effective than the one solely operated by DBS.

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1.17 Meanwhile, Karen Progl of ACRO Criminal Records Office outlined how ACRO work in relation to the current regime, in respect of disclosures that do not fall within the filtering system. ACRO still use the step-down model for Police Certificates (details of their criteria were provided to the audience) that was widely used by the police prior to 2010.<sup>3</sup> Their National Disclosure team provide information directly to members of the public in three areas:

- (1) police certificates; using the Step Down Model these are for the purpose of immigration (£40 standard service, or £80 for two days).
- (2) international child protection certificates; all convictions are produced on a certificate. Certain offences will result in the refusal of a certificate. (£60).
- (3) subject access checks (£10).

1.18 Child protection certificates are produced for those UK nationals working overseas with children. Disclosure is undertaken in conjunction with the National Crime Agency (“NCA”), ACRO will send convictions to an independent panel for consideration of refusing a certificate.

#### **Proportionality and safeguards**

1.19 Ian Deasha, from the ICO, spoke about the need for transparency in the disclosure system. He argued that intrusions into private life must be justified - we need a system that is adequate, relevant and efficient so as to safeguard against arbitrary decisions.

1.20 He noted the need for certainty, saying:

The real benefit of the Law Commission’s report is the itemised list. You should be able to anticipate and predict what is required of you when applying for a position.

1.21 Christopher Stacey argued that the current system is too geared towards the principle of “safeguarding”. He advocated for more flexibility. He stated that, while he would support an automated process with “bright line” rules there also exists a need for an independent review system so as to ensure proportionality. The current rules around custodial sentences and multiple convictions are, in his view, disproportionate.

<sup>3</sup> Available at <https://www.acro.police.uk/uploadedFiles/Content/Bureau/Guidance/Retention20of20Records06.pdf>.

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- 1.22 The fact that employers are being put in a difficult position as a result of the disproportionate levels of information being disclosed to them was also discussed. Ewen McLeod of the Bar Standards Board suggested that there should be a different level of disclosure in relation to employers as opposed to regulators as a result of the stigmatising effect disclosure can have on employment decisions.
- 1.23 In assessing what offences should be added or removed from the list, Professor Liz Campbell of Durham University Law School argued that we should operate within a core principle of “minimal inclusion”. She noted that further questions may need to be asked about the need for a list at all, but these would have to form part of a much wider review. Within the confines of the current system she said that there is a need to move away from the overly risk-averse position we now occupy.
- 1.24 The introduction of a review process (suggested by Christopher Stacey) was also supported by Superintendent Warhurst, who noted the merits of the Independent Monitor in Northern Ireland and the leave to apply to the Sherriff’s Court in Scotland.
- 1.25 Sam Hawke, representing Liberty, raised concerns about the recurring Article 8 challenges going through the courts, and the disproportionality of disclosing all convictions where there is more than one. This, he argued, goes far beyond the requirements of safeguarding.
- 1.26 Superintendent Warhurst echoed this, stating that if relevance and proportionality were the key principles then the worst convictions would fall out of filtering based on relevance alone. Article 8 would be considered afterwards. He gave an example of convictions for having sex with a person under 18: a more nuanced regime would differentiate between the offence of a 16-year-old in a relationship with a 15 year old and that of a teacher exploiting their pupil. From a disclosure perspective, taking into account the objective of safeguarding among others, it is arguable that these offences should be treated differently.
- 1.27 Participants agreed that there needs to be a coherent set of principles determining what should and should not be disclosable. It was emphasised that relevance to the role applied for needs to be a key consideration. Professor Campbell used the example of bribery to illustrate the fact that relevance is presently given little consideration and how this can result in unprincipled inclusions on, and exclusions from, the list.

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- 1.28 Jamie Grace of Sheffield Hallam University discussed the need for proportionate disclosure systems to have in-built principles of offence seriousness, offence currency, offence relevance (to the purpose of the disclosure sought) and offence provenance (whether we are dealing with a conviction, charge, arrest or allegation etc). He argued that systems also need to be in place to enable challenges by individuals to the procedure and outcomes of disclosure decision-making. Statutory reform in the future would be an opportunity to place current police common law powers, used in policies such as the Domestic Violence Disclosure Scheme, on a more transparent and accountable footing. In his view, such statutory reform would also need to be cognisant of shifting supranational legal relationships, in relation to EU privacy law, through Brexit, for example, as well as the European Convention on Human Rights.
- 1.29 Detective Superintendent Jackie Alexander of Nottinghamshire Police pointed out discrepancies in the operation of the disclosure system based on profession. For example, a police officer with a disciplinary record and dismissal for grooming vulnerable people would be barred from working in policing again, but may be able to gain employment with the ambulance service unless the DBS decision makers also recognised a risk. DS Alexander raised concerns about the lack of overarching principles for disclosure across professions, especially in the emergency services. She noted that there are also problems with references made from one employer to another, as they do not always disclose disciplinary matters.

#### **The need for a wider review**

- 1.30 Participants were unanimous in their agreement that a wider review of the entire disclosure system is long overdue. The topics addressed at the symposium in this respect included the impact of disclosure on young offenders, the treatment of cautions, the need to examine and learn from other jurisdictions, as well as operational problems.

#### ***Young offenders***

- 1.31 Tessa Murphy from the Standing Committee for Youth Justice (“SCYJ”) spoke of the damning effects of disclosure on a young person’s chances of securing jobs and housing for the duration of the rehabilitation period. If a non-filterable offence is recorded, the effect is lifelong: on education, employment, and housing. A Freedom of Information request made to DBS by the SCYJ revealed that, between 2013 and 2015, there was an 88% rate of disclosure of convictions where the subject was under 18 at the time of the conviction. The current system, in the SCYJ’s opinion, appears to frustrate the rehabilitative goals of the youth justice system.

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- 1.32 Quincy Whitaker of Doughty Street Chambers spoke from the perspective of her role as counsel in the case of *G*<sup>4</sup>. After delineating the facts of *G* she criticised the failure of the current regime to assess the relevance of a conviction: The police had deemed that the juvenile reprimand *G* received as a 12 year old was irrelevant to risk but the present scheme requires lifelong mandatory disclosure on all criminal record checks. The High Court in this case held that the inability of the scheme to assess proportionality of disclosure of the conviction rendered it inconsistent with Article 8 of the ECHR. The Government's argument was that it is not possible to have a more nuanced approach, but as was noted earlier in the symposium, enhanced certificates already require such an approach from the police. The present regime was not, she said, designed with young people in mind.
- 1.33 Caroline Adams of Sussex Police said the National Strategy for the Policing of Children and Young People has developed a greater understanding of why young people offend, however, we need a better understanding of the outcomes of offending on young people's future prospects. She noted the recent publication of the Charlie Taylor review which pointed out – correctly – that police should focus on the child and not the offence. Rehabilitation must therefore be the central focus.
- 1.34 Participants felt that the multiple conviction rule operates particularly harshly in respect of young offenders. Young people in difficult circumstances may offend multiple times before accessing the support that they need.
- 1.35 The role played by youth culture and its propensity for leading to offending was also discussed. Sexting was discussed as an example of where young people had been done a disservice by the criminal justice system. Although now there is police and school guidance as to when it might and might not be appropriate to take police action, before this guidance was issued it was common place for cautions to be given out in respect of sexting behaviour; and all of these cautions are now non-filterable. Participants emphasised the need to give young people a second chance.
- 1.36 Discussion also turned to the issue of youth brain development. Christopher Stacey mentioned the Justice Committee's youth criminal records review which recently suggested reviewing the treatment of criminal records acquired prior to the age of 25. This is in line with the latest scientific research on the development of the adolescent brain.

<sup>4</sup> *R (on the application of G) v Chief Constable of Surrey Police* [2016] EWHC 295 (Admin).

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### ***The treatment and effect of cautions***

- 1.37 The debate over how to treat cautions was a feature of the symposium. The Commission's report notes that this would need to be considered as part of a wider review. Participants expressed concerns about police practice in the issuing of cautions. It is unclear whether individuals are aware, when accepting a caution for an offence on the non-filterable list, that it will remain indefinitely disclosable. Further, it was suggested that if a caution is issued, even for a non-filterable offence, the circumstances of the offending must not have been to such a degree of seriousness as to warrant indefinite disclosure or surely the disposal would have been harsher.
- 1.38 These concerns were echoed by David Wacks of CRB Problems Ltd. He stated that there is a problem where police forces are giving out cautions for the offence of actual bodily harm ("ABH") when the offence committed was, in reality, a common assault. This is compounded by the variation in police practices in respect of the discretionary removal of cautions. He spoke anecdotally of cautions being disclosed after they had supposedly been deleted from official records.
- 1.39 DS Alexander noted the role of socio-economic factors in perpetuating the inequity of the disclosure system. Individuals without access to the correct information may accept a caution without full understanding of the potential longer term consequences of having a criminal record.
- 1.40 David Williams of Bedfordshire Police indicated that their force has moved away from issuing cautions somewhat in favour of restorative justice models, particularly in the case of young offenders.
- 1.41 Karen Progl highlighted the practice of applying for cautions to be expunged from the record. Quincy Whitaker countered that this again depends on the practice of specific police forces and is by no means a satisfactory solution. For example, in the case of *G*, the Chief Constable of Surrey rejected an application for removal. There is inconsistent policy and practice across forces.

### ***Lessons from other jurisdictions***

- 1.42 Panel 5 focussed on the disclosure regimes in other jurisdictions and what lessons can be learned from them. As part of a wider review, much could be gained from an examination of the various regimes in place across a wide range of jurisdictions.
- 1.43 James Laing of Disclosure Scotland detailed the Scottish disclosure regime. In Scotland, enhanced certificates and the Protection of Vulnerable Groups ("PVG") disclosure scheme are approached in the same way. While cautions do not exist in Scotland, there are alternatives to prosecution which are only disclosed at the discretion of the Chief Constable.
- 1.44 There are two lists of offences, set out in Schedules to the Police Act 1997 as that Act applies in Scotland, each with differing disclosure requirements:



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- (1) The “always” list. Behind this there is an idea of serious harm, significant breach of trust, exploitative behaviour, or dishonesty. Offences on the always list are always disclosed, even if spent, as long as they are in central records (which themselves, in Scotland, are subject to “weeding”). Serious sexual offences and violent offences are examples of the types of offences disclosed for life.
  - (2) The “rules” list. If convicted for an offence on this list, when aged 18 or over, the conviction is protected 15 years from the date of conviction. If under 18 at the date of conviction, the conviction becomes protected after 7.5 years. A conviction for an offence on the rules list that has a non-punishment disposal, admonished and absolute discharge, is a protected conviction and so not disclosed if spent.
- 1.45 There is a third “virtual” list of offences that are not included on either the “always” or the “rules” lists. If a conviction for an offence is on the virtual list is spent, it is protected.
- 1.46 In Scotland, multiple convictions are assessed on a case-by-case basis. There is also an appeal possible to a sheriff between the spent and protected periods for offences on the “rules” list.
- 1.47 David Williams asked James Laing how onerous the process of manual intervention was for removal of protected convictions. James Laing noted that there was a teething period, but as time progressed and staff became more familiar the process became easier.
- 1.48 Christopher Stacey suggested the major stumbling block to a development of this kind would be cost. He felt the current filtering system and its attendant failures were a result of an unwillingness to invest in the disclosure regime.
- 1.49 Lucy Saunders, the second representative present from ACRO, explained Framework Decision 315, through which ACRO receives notifications of convictions acquired overseas which must be entered onto the Police National Computer (“PNC”) (and vice versa). There is a period of 10 days within which the UK must respond to a Member State’s request. Not all offences are entered onto the PNC – EU Nationals must pose a “serious and high-level risk” in order to qualify for inclusion. 30 percent of the UK’s requests come back with information, including non-criminal information (for example, information regarding immigration and Children and Family Court Advisory and Support Service).
- 1.50 She then discussed requests for information under EU Directive 93 and noted that different countries respond to this in different ways. There is currently a pilot between AccessNI, DBS and the Dutch and Latvian authorities. Responses to information requests are varied and inconsistent across those countries. Last year there were 12,000 requests for non-criminal disclosure and 150,000 for conviction disclosure (of which 113,000 requests related to EU Nationals). 11,000 of these requests related to UK Nationals.

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- 1.51 Christopher Stacey discussed his Winston Churchill Research Fellowship, which involved in depth research of disclosure systems in other European countries. Regarding disclosure in England and Wales, he said "we are in a class of our own when it comes to dealing with criminal records". For example, criminal records are not built into recruitment processes, they are considered beforehand. The Work and Pensions Committee recently mentioned the 'Ban the Box' campaign, supported by Nacro, as a potential means of tackling this. It was noted that in Sweden it is a fundamental process that you should be able to get your own criminal record in advance of applying for a job.
- 1.52 The panel discussed the review mechanisms available in France and Germany, among others. There are varying requirements for each of these reviews: some are automatic while others require some demonstration of merit. The potential for a review mechanism to mitigate against the Article 8 concerns with the present system in England and Wales would make this cross jurisdictional study a key element of any wider review which might take place.
- 1.53 Dominic Headley reiterated Nacro's position that England and Wales may want to consider the introduction of a process of delaying disclosure in the employment context – "ban the box". He talked about the similar "ban the box" campaign in the USA, but highlighted that banning the box in the USA was statutory in a number of states and employers were required to demonstrate that they followed a risk assessment process before making decision in regards to an applicant's suitability. He called for a similar approach to be adopted in line with the recommendations made in the Work and Pensions Inquiry on support for ex-offenders. He expressed concern that in England and Wales an employer can legally reject on the mere basis of having a criminal record and ended by stating we had a societal and economic need to solve this problem.

#### **Other issues raised**

- 1.54 Simon Tabbush, a Law Commission lawyer who worked on the report, asked about the merits of different categories of certificate for different jobs. He was concerned that this could be difficult to reconcile with an individual's desire to see a certificate in advance.
- 1.55 Christopher Stacey responded that this type of disclosure is in operation in Sweden without any significant difficulties. While there are issues surrounding workability, without some level of sophistication the system will remain disproportionate. Superintendent Warhurst expressed support for consideration of a "post-specific" regime. He indicated that a workforce-wide regime might still be considered disproportionate.

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- 1.56 Superintendent Warhurst also said that issues of clarity persist in relation to the line of demarcation between information retention and disclosure. Nick Waller of Cambridgeshire Police agreed, but stated that he believes the *Five Constables*<sup>5</sup> case leaves scope for this to be revisited.
- 1.57 Another issue to look at, raised by Professor Anthony Edwards, would involve the disclosure of criminal data for travel, for example, to the USA.

**Closing remarks: David Ormerod**

- 1.58 Professor Ormerod noted the clear sentiment in the room was in support of the report's key recommendation that a wider review is required in this area to facilitate broader reform. He thanked panel members, attendees, all those who contributed to the report and the team.

<sup>5</sup> *Chief Constable of Humberside v Information Commissioner and Another* [2009] EWCA Civ 1079.