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Criminal Records Disclosure: Non-Filterable Offences

# Criminal Records Disclosure: Non-Filterable Offences

Law Com No 371

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# **The Law Commission**

(LAW COM No 371)

## **CRIMINAL RECORDS DISCLOSURE: NON-FILTERABLE OFFENCES**

Presented to Parliament pursuant to section 3(2) of the Law  
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The text of this report is available on the Law Commission's website at <http://www.lawcom.gov.uk/project/criminal-records-disclosure/>.

**THE LAW COMMISSION**  
**CRIMINAL RECORDS DISCLOSURE: NON-FILTERABLE**  
**OFFENCES**

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# THE LAW COMMISSION

## CRIMINAL RECORDS DISCLOSURE: NON-FILTERABLE OFFENCES

*To the Right Honourable Elizabeth Truss MP, Lord Chancellor and Secretary of State for Justice*

### CHAPTER 1 INTRODUCTION

#### 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 the legal framework underlying the disclosure of criminal convictions and cautions recorded against:
  - (1) applicants for, and
  - (2) members or holders ofcertain professions, employments and licences. These are types of position that are considered to require a high degree of trust. They 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>

<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.



- 1.5 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 paragraph 1.1 above), all convictions and cautions should be disclosed, even if they are spent under 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 In general terms, 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 the 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 record 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-

<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).

filtering. When the filtering rules were applied the number of certificates issued containing relevant matters was 244,000.

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;

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

- (2) ensure the system deals effectively and comprehensively with conduct that presents a safeguarding risk; and
- (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 the issue of principles by which offences can be categorised as appropriate for inclusion in the list of non-filterable offences within the context of this potential broader review. Chapter 5 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 this report is as follows:

- (1) Chapter 1 is this 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 in the rest of this chapter.

## **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 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 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 offence 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 1.39(1) above.

<sup>16</sup> See para 1.39(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.

<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 may not indicate propensity to reoffend where, for example, it is for a minor offence different in kind from the first. In addition, 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

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

a separate, much shorter, list of non-filterable offences where cautions are concerned.

- 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.

### **ACKNOWLEDGMENTS**

- 1.63 We wish to thank the Home Office and the Ministry of Justice for their co-operation in connection with this project. We are additionally grateful to the following organisations and individuals for their contributions to our consultation process.
- (1) Government departments and arms-length bodies: the Ministry of Defence, the Service Prosecution Authority, the Disclosure and Barring Service and the Youth Justice Board.
  - (2) Police bodies: ACC Pryde and ACPO Criminal Records Office, Clare Chamberlain and David Lowe.
  - (3) Regulators and other professional bodies: the Judicial Appointments Commission, the Bar Standards Board, the Solicitors' Regulatory Authority, the Honourable Societies of Middle and Inner Temple, The

<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.

General Medical Council, The Nursing and Midwifery Council, the Health and Care Professions Council, NHS England, NHS Employers, the General Osteopathic Council and the Professional Standards Authority.

- (4) Practitioners: Timothy Pitt-Payne QC, Quincy Whitaker, Azeem Suterwalla and Fiona Alexander.
- (5) Academics: Jamie Grace, Nicola Padfield, Professor Liz Campbell and Professor Anthony Edwards.
- (6) Charities and other non-governmental organisations: the Standing Committee for Youth Justice, Nacro, Unlock, Liberty and the Information Commissioner's Office.
- (7) All other individuals who responded to our online consultation.

1.64 The Law Commission's criminal law Commissioner is Professor David Ormerod QC. The criminal law team manager is Jessica Ugucioni. The members of the criminal law team who worked on this report are: Justine Davidge (team lawyer), Simon Tabbush (team lawyer), Katie Jones (research assistant), Laura McDavitt (research assistant) and Kathleen Shields (research assistant).

# CHAPTER 2

## CURRENT LAW

### INTRODUCTION

- 2.1 In Chapter 1 we mentioned briefly the legislative framework for both the rehabilitation of offenders scheme and the disclosure of criminal records scheme. This framework is both technical and complex in its detail. This chapter sets out that detail.
- 2.2 To help in understanding the content of this chapter, we summarise here the main components of each scheme.

### Rehabilitation of offenders

- 2.3 The provisions of the Rehabilitation of Offenders Act 1974 ("ROA 1974") are, briefly, as follows:
- (1) A person's previous criminal convictions are to be regarded as "spent" after a sufficient period of time has elapsed, as long as the person has not committed another offence since.
  - (2) The time taken for a conviction to become spent depends on the sentence imposed for the offence.
  - (3) The effect of a conviction becoming spent is that the offender it relates to should be treated as if he or she had never been convicted of that offence, and therefore will not have to disclose it when he or she is asked about his or her criminal history (by, for example, a prospective employer or insurer).
  - (4) There are a number of exceptions to the operation of rehabilitation. One exception concerns circumstances where a conviction, whether spent or not, will never fall to be disclosed. The remaining exceptions concern circumstances where spent convictions will remain disclosable.
  - (5) Some circumstances where convictions will remain disclosable are contained in ROA 1974 and others in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ("the 1975 Order"):
    - (a) Under ROA 1974, the rehabilitation scheme does not prevent the giving of evidence about previous, spent convictions in some types of court proceedings;
    - (b) Under the 1975 Order, for the purposes of individuals gaining or retaining certain types of appointment or employment, certain provisions of the rehabilitation scheme are disapplied, so all spent convictions will always fall to be disclosed;
    - (c) Another exemption concerns people applying to work with children or vulnerable adults;



- (d) The rehabilitation scheme does not apply for some purposes connected with financial services (either in whole or in part, depending on the particular purpose concerned); and
- (e) The rehabilitation scheme does not apply where an individual is being asked about his or her criminal offending in particular circumstances, listed in the 1975 Order. For convenience we refer to these as “exempted questions”.<sup>1</sup> An exempted question is not a question of a particular type but a question put in particular circumstances (mainly asked for the purpose of assessing suitability for certain professions and employments or for the grant of certain licences). When a person is required to answer these questions (subject to the operation of filtering, as described below), spent convictions and cautions need to be disclosed.

### **Disclosure of criminal records**

- 2.4 At the most basic level, any individual can apply for a criminal conviction certificate, often referred to as a “basic” certificate. This is available to an applicant at any time and includes only convictions that are not spent under ROA 1974.
- 2.5 The Police Act 1997 (“PA 1997”) also provides that in specified circumstances an individual can obtain a “criminal record certificate” for disclosure, for example, to a prospective employer. These certificates are provided by the Disclosure and Barring Service (“DBS”).
  - (1) “Standard” criminal record certificates: these are available only where an applicant has been asked to answer an exempted question and include all convictions and cautions, whether spent or not, apart from those subject to filtering.
  - (2) “Enhanced” criminal record certificates: these are similar to standard criminal record certificates, being issued only where the applicant has been asked an exempted question, but are available only for a “prescribed purpose”. They contain the same information as standard certificates, together with additional information considered relevant by the chief of any police force which has direct knowledge of the applicant.

Where the “prescribed purpose” involves contact with children or vulnerable adults, the certificate must also state whether the applicant is on one of the barred lists (entry upon which prevents a person working with such groups).

### **Filtering**

- 2.6 An exception to the blanket disclosure of spent convictions and cautions where a person’s suitability for a particular employment or role is being assessed was introduced in 2013, so that old and minor convictions and cautions need not always be disclosed. This applies both when exempted questions are asked and

<sup>1</sup> See para 2.32 below.

when a criminal record certificate is applied for. These convictions and cautions are said to be “filtered”.

- 2.7 There is a list of offences, mainly violent and sexual offences, which are never filtered. The main purpose of this narrow project is to review the working of this list.
- 2.8 We describe in more detail below each of the schemes outlined above before discussing the “filtering” regime, referred to both in Chapter 1 and in paragraph 2.6, which applies to both schemes.

## **REHABILITATION OF OFFENDERS**

### **Background**

- 2.9 In 1972, the independent Gardiner Committee<sup>2</sup> was set up jointly by JUSTICE (a human rights campaign organisation), the Howard League for Penal Reform (a charity working for prison reform and the rehabilitation of offenders) and Nacro (a social justice charity) to consider how former offenders who have not reoffended for a sufficient number of years could be regarded as rehabilitated and re-integrated into the community. The Committee recommended a scheme in which:
- (1) Certain persons who have been convicted of criminal offences should be classified as “rehabilitated persons” if they have not been reconvicted for a number of years.
  - (2) “Rehabilitated persons” should be treated in law – with certain necessary exceptions – as if they had never been convicted, by making inadmissible any evidence showing that they have committed the relevant offence, been charged with it, convicted of it or sentenced for it.

### **The Rehabilitation of Offenders Act 1974**

- 2.10 The result of the Gardiner Committee’s recommendations was the passage of ROA 1974. The basic principle of the Act is that, once a sufficient period of time has elapsed since a person has been convicted of and punished for an offence, and provided that the person has not reoffended in the meantime, the conviction should be regarded as “spent”. He or she should not then be required to disclose his or her spent convictions. In 2008 this system was extended to include police cautions.
- 2.11 The time taken for a conviction to become spent depends on the sentence imposed. Under section 5(1) of ROA 1974, if the sentence imposed was one of imprisonment for life,<sup>3</sup> one of preventive detention or for more than four years, the conviction never becomes spent. Thus a conviction for murder, for example,

<sup>2</sup> The Gardiner Committee, *Living it Down: the Problem of Old Convictions*: the report of a committee set up by JUSTICE, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders (1972).

<sup>3</sup> Under s 5(1) a conviction also never becomes spent where the sentence imposed was one of detention during her Majesty’s pleasure for life under s 90-91 Powers of Criminal Courts (Sentencing) Act 2000, s 209 or 218 of the Armed Forces Act 2006, or s 205 of the Criminal Procedure (Scotland) Act 1975.

never becomes spent as the mandatory sentence for murder is life imprisonment. At the other end of the scale, a conviction resulting in an absolute discharge is spent immediately. Otherwise, the rehabilitation period is (as set out in section 5(2) of ROA 1974):

- (1) Seven years from the end of the sentence, if the sentence was one of imprisonment for more than 30 but not more than 48 months;
- (2) Four years from the end of the sentence, if the sentence was one of imprisonment for more than six but not more than 30 months;
- (3) Two years from the end of sentence, if the sentence was one of imprisonment for up to and including six months;
- (4) One year from end of a community order, if the sentence consists of such an order;<sup>4</sup>
- (5) One year from conviction, in the case of a fine; or
- (6) In the case of a conditional discharge<sup>5</sup> or a type of “relevant order”<sup>6</sup> such as a disqualification, the court sets the date up to which the order has effect, and that is the rehabilitation period.
- (7) In the case of a compensation order the conviction becomes spent once the order is paid in full.

2.12 References to the sentence period, and to the end of the sentence, are to the sentence as pronounced rather than as served, and therefore include any period of release on licence.<sup>7</sup> References to a sentence of imprisonment include a suspended sentence of imprisonment.

2.13 The effect of a conviction becoming spent is set out in full in section 4 of the Act:

#### **4. Effect of rehabilitation.**

(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the

<sup>4</sup> Although there is an exception to this rule. S 5(3) ROA 1974 states “where no provision is made by or under a community or youth rehabilitation order or a relevant order for the last day on which the order is to have effect, the rehabilitation period for the order is to be the period of 24 months beginning with the date of conviction”.

<sup>5</sup> A conditional discharge involves an offender promising to be of good behaviour for a set period of time (for example, six months). If he or she manages to do this then no further penalty will be imposed for the offence committed.

<sup>6</sup> ROA 1974, s 5(2).

<sup>7</sup> An offender sentenced to a term of imprisonment may be eligible for release into the community “on licence” before the term pronounced has ended. During this period the offender will be subject to supervision and liable to being recalled to prison if he or she reoffends or breaches any of the terms of his or her supervision.

subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—

- (a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in England and Wales to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and
- (b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

(2) Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—

- (a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and
- (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.

(3) Subject to the provisions of any order made under subsection (4) below—

- (a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and
- (b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.

(4) The Secretary of State may by order—

- (a) make such provision as seems to him appropriate for excluding or modifying the application of either or both of paragraphs (a)

and (b) of subsection (2) above in relation to questions put in such circumstances as may be specified in the order;

- (b) provide for such exceptions from the provisions of subsection (3) above as seem to him appropriate, in such cases or classes of case, and in relation to convictions of such a description, as may be specified in the order.

[...]

- 2.14 In summary, therefore, the effect of section 4 is that a person with a spent conviction should be treated as if he or she had never been convicted of the offence in question, and therefore will not have to disclose that conviction when he or she is asked about his or her criminal history (by, for example, a prospective employer or insurer).

### **Exceptions to rehabilitation**

- 2.15 There are however a number of exceptions to the operation of rehabilitation. One concerns circumstances where a conviction, whether spent or not, will never fall to be disclosed. Most concern circumstances where spent convictions will remain disclosable.

#### ***The exception that means a conviction never needs to be disclosed***

- 2.16 There is one exception to the rehabilitation of offenders scheme that has the effect of rendering particular convictions and cautions non-disclosable under any circumstances. Some convictions (generally for offences that have since been abolished concerning consensual sexual activity between men) can be “disregarded” under Chapter 4 of Part 5 of the Protection of Freedoms Act 2012. Under section 1(5) and (6) of ROA 1974, these convictions are not subject to the rehabilitation scheme, as there is no need for them to be.

#### ***Exceptions that require or permit disclosure of spent convictions***

- 2.17 Some of these are set out in the Act itself:
- (1) The rehabilitation scheme does not prevent the giving of evidence about previous, spent convictions for the purposes of certain legal proceedings<sup>8</sup> or if in other legal proceedings where the court considers that justice cannot be done if evidence of those convictions is not given.<sup>9</sup>
  - (2) ROA 1974 does not prevent the use of previous convictions in support of certain defences to defamation (libel and slander) actions.<sup>10</sup>
- 2.18 There are also statutory powers to create further exceptions to the operation of rehabilitation. These allow the Secretary of State to create such exceptions by way of secondary legislation. Under section 4(4) – set out in paragraph 2.3 above

<sup>8</sup> ROA 1974, s 7(2).

<sup>9</sup> ROA 1974, s 7(3).

<sup>10</sup> ROA 1974, s 8.

– the Secretary of State can make provision for excluding or modifying the application of either or both of paragraphs (a) and (b) of section 4(2) and can likewise provide for exceptions from the provisions of section 4(3).

2.19 Similarly, section 7(4) reads:

(4) The Secretary of State may by order exclude the application of section 4(1) above in relation to any proceedings specified in the order (other than proceedings to which section 8 below applies) to such extent and for such purposes as may be so specified.

2.20 Both of these statutory powers were exercised by the Secretary of State in making the 1975 Order.<sup>11</sup> That Order has been amended a number of times by subsequent legislation and, in its amended form, now has the following effects:

- (1) For some purposes, certain provisions of the rehabilitation scheme are disapplied. This means that where a person is asked questions about his or her past for those purposes, he or she will always have to disclose spent convictions. The purposes include employments connected with national security<sup>12</sup> and assessing an individual's suitability to be elected Police and Crime Commissioner.<sup>13</sup>
- (2) Another exemption concerns people applying for certain types of work with children or vulnerable adults. Where questions about people applying to work in such roles are put to the person him or herself or a third party (for example, a former employer), all convictions and cautions must be disclosed as long as the third party:
  - (a) has been told that spent convictions must be disclosed; and
  - (b) knows that the person in question has been barred from working with children or vulnerable adults.<sup>14</sup>
- (3) Section 4(3)(b)<sup>15</sup> does not apply for some purposes connected with financial services, subject to the regime of filtering as described below.<sup>16</sup> For certain other purposes in connection with financial services, section 4(1) does not apply, without any exemption for filtering.<sup>17</sup>
- (4) The 1975 Order contains a list of questions to which section 4(2)<sup>18</sup> will not apply.<sup>19</sup> For convenience we refer to these as "exempted questions",

<sup>11</sup> SI 1975/1023.

<sup>12</sup> 1975 Order, arts 3ZA and 4ZA, as inserted by SI 2013/1198.

<sup>13</sup> 1975 Order, art 4A, as inserted by SI 2012/1957.

<sup>14</sup> 1975 Order, art 3A, as inserted by SI 2010/1153.

<sup>15</sup> See also para 3(5) of schedule 2 of ROA 1974.

<sup>16</sup> 1975 Order, art 4.

<sup>17</sup> 1975 Order, art 5.

<sup>18</sup> See also para 3(5) of schedule 2 of ROA 1974.

<sup>19</sup> 1975 Order, art 3.

though that phrase is not used in the 1975 Order.<sup>20</sup> An exempted question is not a question of a particular type but a question put in particular circumstances as explained below.

- 2.21 The most complex aspect of the 1975 Order is the list of exempted questions. As originally drafted, an exempted question was a question asked in order to assess the suitability of a person for particular professions, employments, occupations or licences, listed in a schedule.<sup>21</sup> When the individual concerned, or a third party, is required to answer these questions (subject to the operation of filtering, as described below), spent convictions and cautions do need to be disclosed. These questions can be asked by anyone in the course of his or her office or employment. In all cases the person asked must be informed that he or she is required to disclose spent convictions.
- 2.22 The 1975 Order still includes these provisions, but several exempted questions of a different type have since been added. These include questions about suitability to adopt or be a special guardian of children, run a childminding agency, occupy certain positions in connection with financial services, hold a gambling licence, undertake licensable conduct<sup>22</sup> in the course of acting as a steward at a football ground, have access to criminal record certificates and be a member of the Master Locksmiths Association.<sup>23</sup> These differ from the questions in the previous paragraph by being restricted to questions asked by particular individuals or organisations.

### **Filtering**

- 2.23 As explained above, in cases where an exempted question is asked, the general rule is that all convictions and cautions are disclosed. However, an exception to that general rule was introduced in 2013 in response to the Court of Appeal judgment in *R (on the application of T) v Chief Constable of Greater Manchester*.<sup>24</sup> The purpose of that change was to ensure that some convictions and cautions (generally speaking, old and minor ones) need not be disclosed even in response to an exempted question. This is informally known as “filtering”, and equally applies to the scheme governing criminal records disclosure, discussed below. We leave detailed analysis of filtering until after that discussion.

### **CRIMINAL RECORDS**

- 2.24 The most important context in which criminal convictions and cautions are disclosed is as part of a criminal record “check”, that is to say when an individual applies for a copy of his or her criminal record history. Any individual can apply for a criminal conviction certificate. This is available to an applicant at any time, and includes only those convictions that are not spent under ROA 1974.<sup>25</sup>

<sup>20</sup> It is used in the Police Act 1997, discussed below.

<sup>21</sup> 1975 Order, art 3(1)(a) and (aa). Schedule 1 lists the professions, employments and occupations; schedule 2 lists the licences.

<sup>22</sup> As defined by the Private Securities Act 2001.

<sup>23</sup> 1975 Order, art 3(1).

<sup>24</sup> [2013] EWCA Civ 25, [2013] 1 WLR 2515.

<sup>25</sup> Police Act 1997, s 112.

Criminal conviction certificates are provided by an organisation known as Disclosure Scotland.<sup>26</sup>

- 2.25 PA 1997 also provides that in specified circumstances an individual can obtain a criminal record certificate for disclosure, for example, to a prospective employer. These certificates have, since 2012, been provided by DBS. Between 2002 and 2012 they were provided by the Criminal Records Bureau (“CRB”) in conjunction with the Independent Safeguarding Authority (“ISA”).<sup>27</sup>
- 2.26 Where a criminal record certificate is issued it must give details of every relevant matter (every offence that is not a protected conviction or caution) relating to the applicant which is recorded in “central records”.<sup>28</sup> It is worth setting out what this means before discussing the types of certificate that can be issued.
- 2.27 The concept of “central records” is defined in secondary legislation as a “names database held by the National Policing Improvement Agency (NPIA) for the use of constables”.<sup>29</sup> In practice this means that central records comprise the names file database contained within the PNC system, which contains the names of individuals convicted of and/or cautioned for criminal offences and the details of those convictions and cautions.
- 2.28 Not all convictions and cautions are entered on the PNC however, only those offences that are “recordable”. Regulation 3(1) of the National Police Records (Recordable Offences) Regulations 2000<sup>30</sup> states that a conviction or caution may only be recorded in central records if:
- (1) there is power to impose a sentence of imprisonment; or
  - (2) it is listed in the schedule to the 2000 Regulations.

Additionally, regulation 3(3) provides that: “where the conviction of any person is recordable in accordance with this regulation, there may also be recorded in national police records his conviction for any other offence of which he is convicted in the same proceedings”.

- 2.29 Therefore an offence may be automatically eligible to be recorded, because it falls within the definition within regulation 3(1), or any other offence may become eligible for recording in the circumstances set out in regulation 3(3). An offence that is eligible to be recorded on the PNC is assigned a PNC code.

<sup>26</sup> Although this is the name of the organisation providing this service, it is not restricted to Scotland.

<sup>27</sup> DBS replaced these two organisations following the Protection of Freedoms Act 2012.

<sup>28</sup> PA 1997, s 113A(3).

<sup>29</sup> Reg 9 of the Police Act 1997 (Criminal Record) Regulations 2002/233, as amended by the Police Act 1997 (Criminal Record) (Amendment) Regulations 2007/700. In fact the NPIA was abolished by Crime and Courts Act 2013, s 15. The PNC is now managed by the National Police Chiefs’ Council) (formerly ACPO) and managed and controlled by the Home Office.

<sup>30</sup> SI 2000/1139.



2.30 We described briefly in Chapter 1 the types of criminal record certificate available under PA 1997. They are as follows:

- (1) Standard criminal record certificates: these are available to an applicant, but the application must be countersigned by a “registered person” (usually, the prospective employer). They are available only where an applicant has been asked to answer an exempted question and include all convictions and cautions, whether spent or not, apart from those subject to filtering.<sup>31</sup>
- (2) Enhanced criminal record certificates: these are similar to standard criminal record certificates, being issued only where the applicant has been asked an exempted question, but are available only for a “prescribed purpose”. They contain the same information as standard criminal record certificates, together with any information (known as “soft intelligence”) considered relevant by the chief of any police force which has direct knowledge of the applicant. This may include both further details about the convictions or cautions on the individual’s record and other facts which the police consider relevant though they may arise from unconnected incidents.

Where the “prescribed purpose” involves contact with children or vulnerable adults, an enhanced criminal record certificate must also state whether the applicant is on one of the barred lists (entry upon which prevents a person working with such groups).

There are different processes for people applying for Crown employment<sup>32</sup> or a judicial appointment.<sup>33</sup>

2.31 We explain what an “exempted question”, a “registered person” and a “prescribed purpose” mean in what follows.

2.32 Section 113A(6) of PA 1997 provides:

*“exempted question”* means a question which—

- (a) so far as it applies to convictions, is a question in relation to which section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by an order of the Secretary of State under section 4(4) of that Act; and
- (b) so far as it applies to cautions, is a question to which paragraph 3(3) or (4) of Schedule 2 to that Act has been excluded by an order of the Secretary of State under paragraph 4 of that Schedule.

<sup>31</sup> PA 1997, s 113A.

<sup>32</sup> PA 1997, s 114.

<sup>33</sup> PA 1997, s 116.

Therefore, for the purposes of criminal record certificates, the term “exempted question” has the same meaning as it does for the purposes of the rehabilitation of offenders scheme. The questions are those listed in the 1975 Order, described in paragraphs 2.18 and following above.

2.33 A “registered person” means a person listed in a register maintained by DBS. A person or organisation may apply to be registered if he, she or it is a company, official or individual employer likely to ask exempted questions or countersign applications for certificates at the request of persons or bodies asking exempted questions. To be registered, a person must also be likely to ask at least 99 exempted questions or countersign at least 99 applications a year.<sup>34</sup>

2.34 A “prescribed purpose” means a purpose prescribed by regulations made by the Secretary of State.<sup>35</sup>

(1) As concerns enhanced criminal record certificates generally, this power was exercised in regulation 5A of the Police Act 1997 (Criminal Records) Regulations 2002,<sup>36</sup> and the prescribed purposes concern suitability for work involving gambling, guns, drugs, immigration and care of children and adults in hospitals and elsewhere.

(2) As concerns the cases involving contact with children or vulnerable adults, where the certificate must give information about individuals who are on lists barring them from all work involving such contact, the “prescribed purposes” are listed in regulations 5 and 6 of the Police Act 1997 (Criminal Records) (No 2) Regulations 2009.<sup>37</sup>

<sup>34</sup> PA 1997, s 120. For the purposes of asking an exempted question, the person asking does not need to be a “registered person” but to be a registered person he or she must be entitled to ask an exempted question.

<sup>35</sup> PA 1997, s 125(1).

<sup>36</sup> SI 2002/233.

<sup>37</sup> SI 2009/1882.

## FILTERING FOR THE PURPOSES OF BOTH SCHEMES

### Background

- 2.35 Until 2006, the police had the ability to delete some convictions from criminal records under what were known as “weeding” rules, applied by the Association of Chief Police Officers (now known as the National Police Chiefs’ Council).<sup>38</sup> The rules appear to have been intended to minimise the disclosure of old and minor convictions where to do so would unnecessarily undermine the principle of rehabilitation. These rules took into account factors such as the period of time since the individual’s last conviction, disposal, the number of convictions, offence type and the vulnerability of the victim.<sup>39</sup>
- 2.36 This system of “weeding” was replaced in March 2006, when a new model referred to as “step-down” was introduced. Under the new model, all details of convictions, cautions, reprimands and final warnings on the PNC were retained by the police until a person reached 100 years old. However, an individual could apply to the police to have them “stepped down”. As a result, the conviction, caution, reprimand or final warning in question would not be disclosed on a standard or enhanced criminal record certificate although it would remain as a record on the PNC.
- 2.37 The purpose of the step-down model was stated to be:
- ...to restrict access to certain data fields by non-police users of the PNC, after set periods of time, whilst allowing the police continued access in support of policing purposes.<sup>40</sup>
- 2.38 In October 2009, following the Court of Appeal decision in *Chief Constable of Humberside v Information Commissioner*<sup>41</sup> (the “Five Constables Case”), the step-down process was discontinued. Lord Justice Hughes stated:
- This may have potential as a policy... It would, however, require modification of the Rehabilitation of Offenders Act and of the Police Act 1997, which at present requires the police to provide the Secretary of State with everything in the record. Moreover, it would

<sup>38</sup> Association of Chief Police Officers of England, Wales and Northern Ireland, *General Rules for Criminal Record Weeding on Police Systems* (Weeding Rules Version 5, November 2000) available at <http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/ACPOweedingrules00.pdf> (last visited 6 October 2016).

<sup>39</sup> The scheme had been criticised for inconsistency. See Unlock, *Retention and deletion of police cautions and convictions* available at <http://hub.unlock.org.uk/knowledgebase/retention-deletion-police-records/> (last visited 6 October 2016).

<sup>40</sup> ACPO, *Retention Guidelines for Nominal Records on the Police National Computer: Incorporating the Step Down Model* (March 2006) available at <https://www.acpo.police.uk/uploadedFiles/Content/Bureau/Guidance/Retention20of20Records06.pdf> (last visited 6 October 2016).

<sup>41</sup> [2009] EWCA Civ 1079, [2010] 1 WLR 1136.

require immensely detailed programmes for organisation of the database...<sup>42</sup>

- 2.39 From 2009 until 2013, criminal record certificates showed all convictions and cautions recorded in central records without exception.
- 2.40 The current regime of filtering, the aim of which was once more to allow for the removal of old and minor convictions from an individual's criminal record certificate, was introduced in 2013 in response to the Court of Appeal judgment in *R (on the application of T) v Chief Constable of Greater Manchester ("T")*.<sup>43</sup>
- 2.41 Though the case of *T* (discussed further below) was the immediate trigger for this reform, there had been some previous discussion of the possibility of a filtering system in and following the *Five Constables Case*. The case involved an action taken by the Information Commissioner on behalf of five individuals against five police forces in relation to information held and released about their relatively old and minor criminal records. It was argued that the release of this information to the detriment of the individuals was not proportionate.
- 2.42 While the Court accepted the necessity of criminal record retention by the police, it further noted that there were separate issues around access to and disclosure of criminal records which needed to be addressed. The Court did not, however, think it was for it to pass judgment on these.
- 2.43 Following that case a review was undertaken by Sunita Mason, the Government's Independent Advisor for Criminality Information Management. The terms of reference of the review were to examine whether the existing regime struck the correct balance between an offender's right to rehabilitation and the need for employers to be aware of any previous criminal convictions or cautions that indicates that an offender might pose a risk of harm to the public, or some particular sections of it, such as children and vulnerable adults. The review was also asked to consider what actions, if any, were needed to rebalance the regime. The results of this review were published in stages:

- (1) *A Balanced Approach: Independent Review* (March 2010);<sup>44</sup>
- (2) *A Common Sense Approach: a review of the criminal records regime in England and Wales - Report on Phase 1* (11 February 2011);<sup>45</sup>
- (3) *A Common Sense Approach: a review of the criminal records regime in England and Wales - Report on Phase 2* (30 November 2011).<sup>46</sup>

<sup>42</sup> [2009] EWCA Civ 1079, [2010] 1 WLR 1136, 113.

<sup>43</sup> [2013] 1 WLR 2515.

<sup>44</sup> Available at <http://webarchive.nationalarchives.gov.uk/20100418065544/http://police.homeoffice.gov.uk/publications/about-us/ind-review-crim/a-balanced-approach-12835.pdf?view=Binary> (last visited 3 October 2016).

<sup>45</sup> Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97894/common-sense-approach.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97894/common-sense-approach.pdf) (last visited 3 October 2016).

- 2.44 This review was followed by a report from a panel of experts, including representatives from ACPO, the CRB, the National Society for the Prevention of Cruelty to Children (“NSPCC”), Unlock (a charity for people with convictions) and Liberty (an independent human rights organisation),<sup>47</sup> recommending that convictions and cautions should be filtered from a person’s record after a defined period of time. The report recommended that particular care should be taken before considering any sexual, drug related or violent offence type for filtering, and extra consideration should be given to convictions, cautions, warnings and reprimands defined as minor and received by individuals before their 18<sup>th</sup> birthday.

### **The case of T**

- 2.45 The facts of *T* were that the defendant had received two police warnings when aged 11, in connection with the theft of bicycles. The warnings were revealed by an enhanced criminal record certificate when, aged 17, he applied for a job which involved working with children, and two years later when he applied to attend university. Another applicant, B, had received a police caution when in her forties for leaving a shop with an unpaid-for item. She was unable to pursue a position as a carer when that caution was revealed by an enhanced criminal record certificate.
- 2.46 The Court of Appeal held that neither the disclosure provisions of PA 1997 nor the 1975 Order were compatible with Article 8 of the European Convention on Human Rights 1950 (“the ECHR”), which concerns an individual’s right to respect for his or her private and family life. The court held that the provisions imposed a blanket statutory regime requiring disclosure of cautions held on the police national computer which was disproportionate and went beyond the legitimate aims of protecting employers and vulnerable individuals. They accordingly held that the 1975 Order was beyond the powers conferred by ROA 1974. The Chief Constable appealed to the Supreme Court; however, while that appeal was pending new regulations were made introducing the present filtering system, so as to ensure that some convictions and cautions (generally speaking, old and minor ones) did not need to be disclosed.
- 2.47 The Supreme Court allowed the appeal in part.<sup>48</sup> It agreed with the basic point that the system as it stood before 2013 was incompatible with the ECHR, but disagreed with the Court of Appeal on the question of whether the 1975 Order

<sup>46</sup> Available at <http://www.homeoffice.gov.uk/publications/crime/criminal-records-review-phase2?view=Binary> (last visited 3 October 2016).

<sup>47</sup> S Mason, *Filtering of Old and Minor Offending from Criminal Records Disclosure* (DATE) available at <http://www.unlock.org.uk/wp-content/uploads/IAfCIM-RptFinal-Filtering-of-Old-and-Minor-Applications-19-Dec-11.pdf> (last visited 3 October 2016).

<sup>48</sup> [2014] UKSC 35; [2015] AC 49. See the case comments by M Cleaver, “The disclosure of criminal records to employers” [2013] *Police Journal* 87; Adam Jackson, “Criminal records, enhanced criminal records certificates and disclosure of spent convictions: impact of ECHR, Article 8” [2014] *Journal of Criminal Law* 463; 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] *Criminal Law Review* 149.

was beyond the powers conferred by ROA 1974. The important points in the judgments were as follows:

- (1) On the particular facts, the disclosure of T's warnings bore no rational relationship to the aim of protecting the safety of children with whom he might come into contact as an adult. The impact on B's private life of the disclosure of her caution for minor dishonesty many years earlier was disproportionate to its likely benefit in achieving the objective of protecting people who were receiving care.
- (2) The existing legislation failed to meet the requirements for disclosure to constitute an interference "in accordance with the law". That was because of the cumulative effect of:
  - (a) the failure to draw any distinction on the basis of:
    - (i) the nature of the offence;
    - (ii) the disposal in the case (the sentence imposed or caution given);
    - (iii) the time elapsed since the offence took place; or
    - (iv) the relevance of the data to the employment sought; and
  - (b) the absence of any mechanism for independent review of a decision to disclose data under section 113A.

### **The introduction of the filtering regime**

- 2.48 As explained, the present filtering system was introduced in response to the Court of Appeal's ruling in *T* so as to ensure that some convictions and cautions need not be disclosed.
- 2.49 The filtering regime applies to both the rehabilitation of offenders scheme and to the criminal records disclosure scheme. In practice, this means that where the filtering rules (set out below) apply to the exempted questions contained in the 1975 Order, they will also apply to any criminal record certificate that the applicant applies for as a result of that question being asked.
- 2.50 In essence, the obtaining and disclosure of a criminal record certificate is just one way of answering exempted questions. In practice, a job applicant is often asked questions about his or her record at an early stage, before any DBS check is requested. The filtering rules apply at both this stage (to be applied by the applicant him or herself and/or the employer in question) and to the DBS check.
- 2.51 The filtering rules are set out in both the 1975 Order and PA 1997. They are identical apart from the fact that differing terminology is used in the Order and the Act. For example:

- (1) Offences that can be filtered are referred to in the 1975 Order as “protected convictions” and “protected cautions”.<sup>49</sup>
- (2) Offences that should be disclosed on criminal record certificates are referred to in PA 1997 as “relevant matters”. The definition of “relevant matters”<sup>50</sup> includes all convictions and cautions other than those defined as “protected” by the 1975 Order,<sup>51</sup> but the term “protected” is not used in PA 1997.

2.52 The rules of the filtering system governing whether offences have to be disclosed are based on various factors, and the position differs between convictions and cautions:

- (1) Certain convictions (“protected convictions”) need not be disclosed in answer to an exempted question. This is where:
  - (a) an individual has only one conviction;
  - (b) it did not result in a custodial sentence;
  - (c) it is not for a “listed offence” (such as serious violent and sexual offences); and
  - (d) it was long enough ago.<sup>52</sup>
- (2) A (“protected”) caution, other than a caution for a listed offence, need not be disclosed in answer to an exempted question after a specified period of time since the caution was administered.<sup>53</sup>

2.53 Where a criminal record certificate is issued it must give details of every relevant matter (every offence that is not a protected conviction or caution) relating to the applicant which is recorded in central records, or else state that there is no such matter.<sup>54</sup>

2.54 The Supreme Court in *T* expressed no view on whether the defects that it had identified with the then existing system of criminal records disclosure were cured by the introduction of the filtering system. Of the five points identified in the above summary of the Supreme Court’s judgment,<sup>55</sup> it would seem that the system now

<sup>49</sup> Defined in the 1975 Order, art 2A.

<sup>50</sup> PA 1997, s 113A(6) and 113A(6E), as amended by the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200).

<sup>51</sup> The Secretary of State has the power to amend that definition under PA 1997, s 113A(7).

<sup>52</sup> At least 11 years in the case of an adult, or five and a half years if the person was under 18 at the time of the conviction. This period is generally longer than the rehabilitation period under ROA 1974.

<sup>53</sup> At least six years in the case of an adult or two years if the person was under 18 at the time of the caution.

<sup>54</sup> PA 1997, s 113A(3).

<sup>55</sup> Para 2.47(2) above.

draws distinctions on the basis of the nature of the offence, the disposal (sentence passed) in the case and the time elapsed since the offence took place.

- 2.55 There is still no clear distinction on the basis of the relevance of the data to the employment sought. A number of the offences on the non-filterable list appear to have been added because they are relevant to safeguarding purposes, however the list of non-filterable offences is applicable to all disclosures made in response to any of the exempted questions, no matter what type of employment or position that exempted question relates to (for example, whether it is related to safeguarding or not).
- 2.56 No mechanism for independent review has been provided (other than in relation to “soft intelligence” provided on enhanced criminal record certificates, discussed further below).
- 2.57 The complexities in the filtering system as it now operates largely concern the list of non-filterable offences.

#### **The list of non-filterable offences**

- 2.58 As we have seen, in both the rehabilitation of offenders and criminal records schemes, convictions for any offence remain permanently liable to disclosure if they resulted in a custodial sentence or the person has more than one conviction. The remaining aspect of the filtering regime is the list of offences that can never be filtered, even if there is only one conviction and no custodial sentence was imposed.
- 2.59 This list is contained in article 2A(5) of the 1975 Order and in section 113A(6D) of PA 1997, in identical terms.<sup>56</sup>
- 2.60 The list of non-filterable offences, as set out in section 113A(6D) in its current form, is as follows:

(6D) The offences referred to in paragraphs (a)(i) and (c) of the definition of ‘relevant matter’ in subsection (6), as it has effect in England and Wales, are as follows—

- (a) murder;
- (b) an offence under section 67(1A) of the Medicines Act 1968 (prescribing, etc. a medicinal product in contravention of certain conditions);
- (c) an offence under any of sections 126 to 129 of the Mental Health Act 1983;
- (d) an offence specified in the Schedule to the Disqualification from Caring for Children (England) Regulations 2002;

<sup>56</sup> Except that the list in the 1975 Order does not include murder, as a person with a conviction for murder can never become a rehabilitated person.



- (e) an offence specified in Schedule 15 to the Criminal Justice Act 2003 (specified offences for the purposes of Chapter 5 of Part 12 of that Act (dangerous offenders));
- (f) an offence under the following provisions of the Mental Capacity Act 2005—
  - (i) section 44 (ill-treatment or neglect);
  - (ii) paragraph 4 of Schedule 1 (applications and procedure for registration);
  - (iii) paragraph 4 of Schedule 4 (duties of attorney in event of incapacity of donor);
- (g) an offence under section 7, 9 or 19 of the Safeguarding Vulnerable Groups Act 2006 (offences in respect of regulated activity);
- (h) an offence specified in section 17(3)(a), (b) or (c) of the Health and Social Care Act 2008 (cancellation of registration), apart from an offence under section 76 of that Act (disclosure of confidential personal information);
- (i) an offence specified in the Schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009.
- (j) an offence specified in Schedule 2 or 3 to the Childcare (Disqualification) Regulations 2009;
- (k) an offence which has been superseded (directly or indirectly) by an offence within paragraphs (a) to (j);
- (l) an offence of—
  - (i) attempting or conspiring to commit any offence falling within paragraphs (a) to (k), or
  - (ii) inciting or aiding, abetting, counselling or procuring the commission of any such offence,
 or an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) committed in relation to any such offence;
- (m) an offence under the law of Scotland or Northern Ireland or any territory outside the United Kingdom which corresponds to an offence under the law of England and Wales within any of paragraphs (a) to (l);
- (n) any offence under section 42 of the Armed Forces Act 2006 in relation to which the corresponding offence under the law of

England and Wales (within the meaning of that section) is an offence within any of paragraphs (a) to (l);

- (o) an offence under section 70 of the Army Act 1955, section 70 of the Air Force Act 1955 or section 42 of the Naval Discipline Act 1957 of which the corresponding civil offence (within the meaning of that Act) is an offence within any of paragraphs (a) to (l).

- 2.61 We explain in Chapter 3 that these offences may be roughly divided into five categories. As we also discuss in Chapter 3 there is difficulty in accessing all of the different statutory provisions referred to in section 113A(6D) there are some doubts about the interpretation of section 113A(6D).
- 2.62 These difficulties mean that, in practice, when carrying out their filtering responsibilities, DBS are wholly reliant on an “operational list” of non-filterable offences created for them by the Home Office and could not operate on the basis of the legislation alone.
- 2.63 There also exists a list of “offences that will never be filtered”, which is published on the Government website, which was created as an attempt to provide a more accessible, publicly available list of non-filterable offences.<sup>57</sup>

#### **Procedures for review of criminal record certificates**

- 2.64 A criminal record certificate, whether standard or enhanced, is issued in the first instance to the applicant, that is to say the person whose criminal record is in question: it is for the applicant to forward it to the registered person (usually the prospective employer). An applicant cannot, however, obtain a certificate without an exempted question being asked. As a result there is no way for an applicant to see his or her standard or enhanced certificate before applying for a particular job or position.
- 2.65 The applicant may apply to DBS for a corrected certificate if he or she believes that the information in the certificate is inaccurate.<sup>58</sup> However, there is no mechanism within the Police Act 1997 to resolve a dispute if the applicant and DBS continue to disagree about the accuracy of the information.
- 2.66 It is not clear from a natural reading of the section whether “inaccurate” refers only to a case where the facts stated are untrue (for example, the certificate shows a conviction that the applicant does not in fact have), or also to a case where the facts are true but ought not to have been disclosed (for example, because the conviction should have been filtered).

<sup>57</sup> 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).

<sup>58</sup> PA 1997, s 117.

- 2.67 On balance, we believe that the section was intended to include both cases. It is implicit in the legislation that a certificate should not include filterable matters.<sup>59</sup> Within the meaning of the legislation, it is therefore not a “criminal record certificate”.
- 2.68 We are informed by DBS that in practice they treat applications to correct a certificate for reasons of filtering as concerning the accuracy of the certificate. However, in considering a complaint DBS can only check the certificate against the operational list and cannot consider whether to correct that list themselves. At most, such an application might result in DBS referring the issue to the Home Office, who may in turn correct the operational list.
- 2.69 In the case of an enhanced criminal record certificate, the applicant may challenge the information provided on the ground of irrelevance.<sup>60</sup> In this case the application is to the independent monitor appointed under section 119B of PA 1997, who has the statutory function of ensuring compliance with Article 8 of the European Convention of Human Rights. However, this applies only to the “soft intelligence” provided by police forces, and not to the convictions and cautions that would equally have been included in a standard criminal record certificate. Accordingly, the independent monitor cannot resolve disputes about whether the filtering rules apply.

<sup>59</sup> Under s 113A(3), a criminal record certificate is one which either gives details of all relevant matters or states that there is no such matter. A certificate giving details of a conviction which should have been filtered satisfies neither condition.

<sup>60</sup> PA 1997, s 117A, inserted by Protection of Freedoms Act 2012, s 82(5).

# **CHAPTER 3**

## **TECHNICAL PROBLEMS WITH THE LIST OF NON-FILTERABLE OFFENCES**

### **INTRODUCTION**

3.1 In this chapter we discuss:

- (1) Potential problems arising from the drafting of the list of non-filterable offences, as contained in section 113A(6D) of the Police Act 1997 and article 2A(5) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (the “1975 Order”).<sup>1</sup>
- (2) Practical difficulties encountered in the operation of the filtering system, in particular the difficulty in maintaining an accurate operational list of offences.
- (3) Possible anomalies and gaps in the choice of offences on the list, including offences created after 2013.

Possible solutions to these problems are discussed in Chapter 4.

3.2 This chapter does not address:

- (1) whether particular, individual offences should be added to or removed from the list as it is currently presented;
- (2) questions of principle concerning what offences should be on the list; and
- (3) whether a list is needed at all.

These questions are discussed in Chapter 5 in which we suggest topics for a wider review.

### **PROBLEMS OF DRAFTING AND INTERPRETATION**

3.3 Section 113A(6D) does not set out a comprehensive list of non-filterable offences. It contains:

- (a) some offences listed individually;

<sup>1</sup> SI 1975/1023.

- (b) a list of schedules to other Acts and regulations that contain lists of offences; and
- (c) offences referred to only by way of general description (such as “corresponding to” and “superseded by”).

3.4 This gives rise to problems of the following types:

- (1) The list is in an inaccessible format and hard to interpret from the point of view of users, for example job applicants and prospective employers.
- (2) When the section refers to a list contained in regulations it is uncertain whether this means those regulations as they existed in 2013 or at the time of disclosure.<sup>2</sup>
- (3) When the section refers to a list containing named offences in jurisdictions beyond England and Wales, where the same offence is also an offence in England and Wales, it is unclear whether these offences should:
  - (a) only be non-filterable when they are committed within that other jurisdiction; or
  - (b) also be non-filterable when committed in England and Wales.
- (4) The list refers to offences “superseded” by other offences on the list: the exact meaning and scope of this description are unclear.
- (5) There are similar uncertainties about the interpretation of the reference to offences under a jurisdiction other than England and Wales and military offences “corresponding” to other offences on the list.

3.5 These difficulties in the legislative definition are important in practice. Given the scale of the system, there is the possibility of error in many cases. As previously explained, most criminal records disclosures are made through the DBS system. We are informed by DBS that the DBS system processed approximately 4.2 million applications in 2015, with 358,000 applications revealing potentially relevant matters. Of these, approximately 113,165 were subject to filtering. Once the filtering process was complete, approximately 244,835 criminal record certificates containing relevant matters to be disclosed were issued.

<sup>2</sup> Discussed at para 3.11 and following, below.

- 3.6 In practice DBS uses an “operational list” of non-filterable offences created and updated by the Home Office, but for reasons explained below this list appears to contain many inaccuracies. This in turn may increase the likelihood of error being made at an operational level by DBS, which could have particularly severe consequences given the high volume of cases, the nature of the risks the disclosure system seeks to protect against and the likelihood of far-reaching effects on an individual’s future career.
- 3.7 The offences referred to in section 113A(6D) include the following categories:
- (1) offences specified by name, or described as an offence under a specified statutory provision or itemised list of provisions (paragraphs (a), (b), (c), (f), (g) and (h) (in part) of that subsection);
  - (2) offences listed in other statutory provisions in primary legislation (paragraphs (e) and (h) (in part));
  - (3) offences listed in other statutory provisions in secondary legislation (paragraphs (d), (h) (in part), (i) and (j));
  - (4) offences superseded by any of the above (paragraph (k)); and
  - (5) other offences dependent on or corresponding to the offences in the previous categories, namely:
    - (a) attempt, conspiracy and other inchoate offences related to the above (paragraph (l));
    - (b) offences under a jurisdiction other than England and Wales corresponding to any of the above (paragraph (m)); and
    - (c) service offences corresponding to any of the above (paragraph (o)).
- 3.8 As drafted, section 113A(6D), particularly paragraphs (k) and following, does not read as if it was intended to be interpreted as a comprehensive list of offences. Rather, it appears to be a test to be applied to any individual conviction or caution. Taking as an example paragraph (m), concerning offences under a jurisdiction other than England and Wales, it is possible to apply it to a specific case, by asking “this person has a conviction for a particular offence committed outside England and Wales; is it like any of the offences in paragraphs (a) to (j)?” It would be far more difficult to draw up a comprehensive list of all possible offences outside England and Wales caught by paragraph (m), as this would

require study of every offence in every legal system in the world. Accordingly, it might be assumed that, when the section was drafted, the expectation was that a DBS official would refer to the section and apply it to the facts on each occasion.

- 3.9 In fact, however, we have been informed by the Home Office that this was not the intention of the draftsman.<sup>3</sup> Our discussion with DBS also reveals that in practice that is not how the system works.
- 3.10 In practice, the process by which DBS makes disclosures relies on the automated identification of offences from records held on the Police National Computer (“PNC”).<sup>4</sup> DBS uses a checklist of offences (“the operational list”) prepared by the Home Office, where each listed offence corresponds to an existing ACPO PNC code, so that the process can take place mechanically. The operation of the list is constrained by the fact that DBS can only identify those matters recorded against a particular individual by way of a search of the PNC, as discussed further below.

### **The effect of changing legislation**

- 3.11 The offences contained within the operation of section 113A(6D) may change over time. This could happen in any of three ways:
- (1) Section 113A(6D) itself could be amended.<sup>5</sup>
  - (2) The schedules to Acts and regulations referred to in that section may be amended to include more or fewer offences: the question arises in a particularly complicated form in paragraph (h), where the reference is to a list of other statutory provisions which themselves contain lists of offences.
  - (3) The scope of an individual offence in one of the lists may change.

This can cause difficulty in applying section 113A(6D). In all three situations referred to there may be doubt as to which version of the list is relevant for the purposes of disclosure in an individual case. However, in practice, the most significant problems would arise in situations (2) and (3).

<sup>3</sup> The Crown, in the case of *W* [2015] EWHC Admin 1952 submitted a witness statement from a policy official within the Ministry of Justice, confirming this.

<sup>4</sup> The Police National Computer is a national database of information available to all police forces and law enforcement agencies throughout the UK. Within its “names” database, it holds details of, among others, convictions, cautions and custodial history.

<sup>5</sup> Though in fact there have been no amendments to that subsection since it was introduced in 2013.

- 3.12 The general principle is that statutory references in provisions concerning procedure should be interpreted as at the time when the procedure is to take place.<sup>6</sup> On this principle, we consider that both section 113A(6D) itself and all the statutory provisions referred to in that section should be read as at the time when the proposed disclosure is to be made, or the proposed certificate is to be issued.<sup>7</sup>

**Example:** A is convicted of an offence of keeping a brothel for the purposes of prostitution (under section 33A of the Sexual Offences Act 1956). The offence was inserted in the 1956 Act by section 55(2) of the Sexual Offences Act 2003 but not added into the list of non-filterable offences in section 113A(6D)(e) until 13 April 2015, when that section was amended by the Criminal Justice and Courts Act 2015.

If A, an adult, received a caution for the section 33A offence in 2005 and that caution was A's only caution or conviction, then the offence would have been eligible to be filtered from 2011 (after 6 years had passed). If A applied for a job in 2012, to which one of the exempted questions applied, A would not be obliged to disclose this caution to his or her prospective employer and the caution would not have appeared on any standard criminal record certificate that A's employer may have requested. However, if A applied for a similar position in 2016 then A would be obliged to disclose his or her caution and the caution would then appear on a standard criminal record certificate.

- 3.13 One apparent exception to this generalisation is the case where the scope of an offence changes but a historic conviction, based on the original definition of the offence, will be disclosed.<sup>8</sup> The applicant's behaviour, as found by the jury or other tribunal of fact, must have fallen within the definition of the offence at the time that it occurred, as otherwise he or she could not have been convicted of it. The only remaining question is whether that named offence falls within the list as at the time of the proposed disclosure or certificate.

<sup>6</sup> *Re Athlumney* [1898] 2 QB 547 at p 551-2; *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816; F Bennion, *Statutory Interpretation* (6th ed 2013) s 98, p 296.

<sup>7</sup> There may be an exception where the references are to provisions within secondary legislation: para 3.17 and following, below.

<sup>8</sup> Para 3.11 above.



**Example:** The offence of threatening to kill<sup>9</sup> is listed in schedule 15 to the Criminal Justice Act 2003, and is therefore on the non-filterable list by virtue of section 113A(6D)(e). Until 1977, that offence only referred to threats made by letter.<sup>10</sup> A conviction for that offence before 1977 will necessarily mean that the threat was made by letter. However, it is disclosed because the offence was listed in schedule 15 at the time of disclosure, even though the form of the offence so listed at that time is substantially different from its present form.

- 3.14 Where the scope of an offence changed before it was added to the list of non-filterable offences, as in the example above, then it can be assumed that when it was added the intention was that the offence in all of its versions should be included.
- 3.15 An issue arises where the scope of an offence on the non-filterable list changes after it has been added to the non-filterable list: specifically, where the offence is broadened to criminalise new, less serious, forms of conduct. Although both the older and newer versions of the offence would fall to be disclosed indefinitely there is unlikely to have been any principled consideration of whether the new versions of the offence are sufficiently serious to merit inclusion on the non-filterable list.

**Example:** One offence that has, since 2013, been broadened so as to include an additional type of conduct is section 1 of the Child and Young Persons Act 1933, which criminalises cruelty to and neglect of a child. Section 66 of the Serious Crime Act 2015 amended the offence to include situations where psychological, and not only physical, harm was caused or risked. It is unlikely that anyone would consider that an offence committed by way of this kind of behaviour should not be included on the non-filterable list, but it appears that there has been no consideration of the issue either.

- 3.16 In certain circumstances employers and others are entitled to updated versions of criminal record certificates;<sup>11</sup> again the provisions should be read as at the date at which the updated information is supplied.<sup>12</sup> This has the result that, if an offence was protected at the time the employment began, and was therefore not disclosed at the time, but that offence was subsequently added to the list, it is

<sup>9</sup> Offences Against the Person Act 1861, s 16.

<sup>10</sup> The present section was substituted by Criminal Law Act 1977, sch 12.

<sup>11</sup> Police Act 1997, s 116A.

<sup>12</sup> Subject to the point about sub-delegation, as discussed at para 3.17 and following, below.

then disclosed as part of the update. This result may appear somewhat harsh, and is likely to cause confusion to both employers and employees, but we have no doubt that it is the correct interpretation of the legislation.

**Example:** Using the example of A, above, the caution for the section 33A offence which did not need to be disclosed upon A's employment in 2012, would appear on any "updated" criminal records check undertaken by A's employer after 13 April 2015.

### ***The sub-delegation problem***

- 3.17 As explained, some paragraphs of section 113A(6D) refer to lists of offences contained in regulations. There is an argument that these lists should be read in the form in which they existed in 2013, and not as updated when the regulations change. The reason for this is that making one set of regulations automatically follow changes in another set of regulations may offend against the rule against sub-delegation, which we explain in the next few paragraphs.

#### THE RULE AGAINST SUB-DELEGATION IN GENERAL

- 3.18 A Minister or other person making an administrative decision, including an act of subordinate legislation, is required to exercise his or her discretion in deciding on its contents. He or she ought not to delegate that discretion by making the decision depend automatically on what another person decides.<sup>13</sup> Therefore, to make the contents of one statutory instrument depend on another statutory instrument, made by a different authority for other purposes, in such a way as to follow the wording of that other instrument however much it may change in the future, may amount to an unlawful delegation of discretion. The provision referred to would therefore have to be interpreted as it stood at the date when the referring provision came into force.
- 3.19 In simpler terms, where an individual is creating or amending secondary legislation, he or she must do so with the purpose of the particular provision being created in mind, and no other. If at the time that the individual created or amended a piece of secondary legislation he or she had done so to meet the purposes of another piece of legislation instead, then he or she would be acting outside of the scope of his or her legislative power.
- 3.20 That said, we consider that the rule against sub-delegation should not be interpreted in too absolute a fashion.

<sup>13</sup> *Allingham v Minister of Agriculture* [1948] 1 All ER 780; *Barnard v National Dock Labour Board* [1953] 2 QB 18; *Commissioners of Customs and Excise v Cure and Deeley* [1962] 1 QB 340; *H Lavender & Son Ltd v Minister of Housing and Local Government* [1970] 1 WLR 1231.

- (1) In some cases, two or more enactments may be intrinsically connected, in the sense that they are made for the same purpose and in essence form part of a single scheme: for example, there is extensive cross-referring among the different sets of orders and regulations governing legal aid.
- (2) In others, regulations may need to refer to some concrete result brought about or influenced by another enactment, rather than to that enactment itself. For example, in administrative practice it is necessary, and always assumed, that:
  - (a) Regulations referring to a given county should usually mean that county as it exists from time to time, rather than in its boundaries as they existed at the time of the regulations, despite the fact that county boundaries may themselves be altered by secondary legislation.
  - (b) The same is true of regulations referring to a body or institution (such as DBS): for practical purposes, any reference to a thing to be done by or to that body or institution must necessarily mean the body or institution as it actually exists.<sup>14</sup>

3.21 The main problem in respect of this issue is, it seems, that legislation that is drafted in a way that potentially offends the principle against sub-delegation will inevitably give rise to uncertainty as to how its contents should be interpreted. We would discourage perpetuating this uncertainty.

#### APPLICATION TO THE LIST OF NON-FILTERABLE OFFENCES

3.22 This problem could arise in connection with the existing non-filterable list. Section 113A(6D) was itself inserted by secondary legislation, and paragraphs (d), (i) and (j) of that subsection refer directly to other secondary legislation. Also, paragraph (h) of the list refers to offences listed in “section 17(3)(a), (b) or (c) of the Health and Social Care Act 2008”, and subsections (3)(b) and (c) of that section refer to an offence under certain Acts “or regulations made under” those Acts.

3.23 If the sub-delegation argument applies, the references in the non-filterable list to offences under those regulations should be construed as referring to those offences as they existed at the time when section 113A(6D) came into force and no later.

<sup>14</sup> We recognise, however, that the two examples are quite specific examples and therefore there may be an argument that they should not be relied upon too heavily to support wider exemptions from the rule against sub-delegation.

3.24 In contrast, where section 113A(6D) refers to lists contained in other primary legislation (in paragraph (e) for example) Parliament may be taken, when amending those lists, to be aware of the effect that the amendment would have on the contents of section 113A(6D) and the non-filterable list. Therefore the reference in paragraph (e) to Schedule 15 of the Criminal Justice Act 2003 could be read as a reference to that list as it may be amended from time to time.

3.25 On the present wording of section 113A(6D) of Police Act 1997 and section 17 of the Health and Social Care Act 2008, the sub-delegation problem potentially affects any offences introduced after 2013 by way of amendment to:

- (1) the schedule to the Disqualification from Caring for Children (England) Regulations 2002 (referred in in paragraph (d) of the subsection);
- (2) regulations made under the Registered Homes Act 1984 or Part 2 of the Care Standards Act 2000 (referred to in section 17(3)(b) and (c) of the Health and Social Care Act 2008, which are in turn referred to in paragraph (h) of the subsection);
- (3) the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (referred to in paragraph (i) of the subsection); and
- (4) schedule 2 or 3 to the Childcare (Disqualification) Regulations 2009 (referred to in paragraph (j) of the subsection).

**Example:** One such offence is that under section 5 of the Psychoactive Substances Act 2016 (supply or offer to supply psychoactive substance – specific to a child). This is now listed in the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, referred to in paragraph (i). If the argument against sub-delegation applies in the way we discuss above (see para 3.17), then this offence will not appear on the list of non-filterable offences even though it has specific relevance to the purpose of safeguarding children.

3.26 There is an argument for saying that the reference in paragraph (i) of the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 is an example of an intrinsic

connection, of the type discussed above,<sup>15</sup> so that the sub-delegation problem does not apply.

- 3.27 The Safeguarding Vulnerable Groups Act 2006 requires the DBS to maintain two lists: one list of individuals barred from working with children, and another list of individuals barred from working with vulnerable adults. The Act also confers power to determine which offences require the offender to be put on one or other barred list, either automatically or after giving the offender the chance to make representations. These lists of “barrable offences” are contained in the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009.
- 3.28 The offences referred to in paragraph (i) of the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 are therefore those which mean that the offender must be entered on the lists kept by DBS of persons barred from working with children or vulnerable adults. On this argument, the purposes of the criminal records system fall within those of the barred lists, and it is clearly desirable that the list of non-filterable offences should include all offences resulting in barring, as they exist from time to time. For the definition of “relevant matters” to contain a reference to the barring scheme as it exists from time to time could therefore be regarded as being within the powers conferred by the Police Act 1997. If so, the offence under section 5 of the Psychoactive Substances Act 2016 is legitimately included in the list of non-filterable offences.
- 3.29 It is less likely that a similar argument might succeed in connection with the offences listed in paragraphs (d), (h) and (j), as in these cases there is no direct reference to DBS or to the work done by it, as there is for paragraph (i).
- 3.30 For present purposes it is sufficient to say that the doubt exists in relation to all four paragraphs and that this is a significant ambiguity in the current scheme, which we would not wish to continue. We discuss this issue further in Chapter 4 when considering what recommendations can be made to improve the non-filterable list of offences.

#### **Jurisdictional issues**

- 3.31 The following paragraphs of section 113A(6D) contain reference to lists of offences contained within secondary legislation, which include named offences in the specific context of jurisdictions beyond England and Wales: Scotland, Northern Ireland, the Channel Islands and the Isle of Man:

<sup>15</sup> See para 3.20.

- (1) Paragraph (d) - offences specified in the schedule to the Disqualification from Caring for Children (England) Regulations 2002 in paragraphs 2, 3 and 4 of that schedule. Paragraph 2 lists "Offences in Scotland", paragraph 3 lists "Offences in Northern Ireland" and paragraph 4 contains a list of "Other offences", some of which are applicable throughout the UK and some applicable only to Scotland.
- (2) Paragraph (i) - an offence specified in the schedule to the Safeguarding of Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 in paragraphs 1 to 4 of that schedule. All four paragraphs contain lists of offences, divided into sub-paragraphs: some applicable to England and Wales, some to Scotland and some to Northern Ireland.
- (3) Paragraph (j) - offences specified in Childcare (Disqualification) Regulations 2009 in paragraphs 1 and 2 of schedule 2 and paragraphs 1 to 7 of schedule 3 to the regulations. Within schedule 2: paragraphs 1 and 2 list a number of "Repealed statutory offences" applicable to England and Wales, as well as some other UK jurisdictions. Within schedule 3: paragraph 1 lists "Offences in England and Wales"; paragraphs 2 to 6 list "Offences in Scotland", "Offences in Northern Ireland", "Offences in Jersey", "Offences in Guernsey" and "Offences in the Isle of Man"; and paragraph 7 contains "Other offences", some of which are applicable throughout the UK and some of which are applicable only to Scotland.

3.32 We do not know why the lists of offences contained within these three sets of regulations were arranged in this way but, given that all three pre-date the creation of the non-filterable list, it is unlikely that any of the reasons for doing so relate to the purposes of the non-filterable list of offences.

3.33 Where reference is made, within section 113A(6D), to a named offence in the context of another jurisdiction a question arises: what is the effect of this reference on the content of the list of non-filterable offences? Specifically, does the inclusion of these offences on the list depend on where they were committed, or possibly on where the conviction occurs? We consider that the answer to this question will depend on the nature of the individual offence and how it is referred to within the relevant regulations.

3.34 The individual offences listed with reference to a specific jurisdiction may take any of four forms:

- (1) An offence under a statutory provision specific to a particular jurisdiction. An example is the offence of assisting or inducing a child to abscond under section 83(a) of the Children (Scotland) Act 1995 (listed in paragraph 2 of the schedule to the Disqualification from Caring for Children (England) Regulations 2002, under the heading "Offences in Scotland").
- (2) A common law offence specific to a particular jurisdiction. An example is the Scottish offence of plagium (theft of a child below the age of puberty) (also listed in paragraph 2 of that schedule under the heading "Offences in Scotland").

- (3) An offence under a statutory provision that is equally applicable in both the specific jurisdiction referred to and in England and Wales. An example is causing or allowing the death of a child or young person under section 5 of the Domestic Violence, Crime and Victims Act 2004 (listed in paragraph 3 of that schedule, under the heading “Offences in Northern Ireland”).
- (4) A common law offence that is equally applicable in both the specific jurisdiction referred to and in England and Wales. An example is murder (of a child or young person) (also listed in paragraph 3 of that schedule under the heading “Offences in Northern Ireland”).

3.35 Where the offence in question is one committed under a statutory provision or a common law offence specific to the jurisdictions named (as in (1) and (2) above), the answer to our question is straightforward. It is only the offence as committed under that specific provision, or contrary to that part of the common law, that is non-filterable. Therefore, it is only when that offence is committed within the relevant jurisdiction, as defined by the law governing that jurisdiction, that it is included on the list. This will be so when:

- (1) the offence is committed within Scotland (or Northern Ireland as the case may be), and the offender is tried and convicted under the law of Scotland or Northern Ireland; or
- (2) the offence is committed elsewhere, but as a matter of Scots (or Northern Irish) law it is extra-territorial, and the offender is tried and convicted under the law of Scotland or Northern Ireland.

**Example:** The common law offence of plagiarism is only included on the list when it is committed within the territory of Scotland (as defined by Scots law).

However, if a particular statutory provision, such as section 83(a) of the Children (Scotland) Act 1995, specifically states that an offence can be committed outside of the territory of Scotland and still fall to be tried in that country, then that offence is also included on the list when committed outside of the territory of Scotland.

3.36 There is more difficulty in cases (3) and (4) above, where an offence existing both under the law of Scotland or Northern Ireland and under the law of England and Wales is included in a list of offences apparently referring only to Scotland or Northern Ireland.

3.37 There is no doubt about the situation where the offence is committed, and the offender is tried and convicted, in Scotland or Northern Ireland. Nor would there be doubt in the (probably very rare) situation when the offence is committed in England and Wales (or for that matter outside the United Kingdom) and the offender is tried and convicted in Scotland or Northern Ireland because the offence is extra-territorial by the law of Scotland or Northern Ireland. In both cases the offence is under the law of Scotland or Northern Ireland, and therefore non-filterable.

- 3.38 The doubtful point arises when the offence is both committed and tried in England and Wales. The question is then not one of jurisdiction but purely one of interpretation. The offence is referred to in a list of offences under the law of Scotland or Northern Ireland. Does that mean that the offence is only non-filterable when it is in fact an offence under that law? Or is it included in the list for all purposes? In other words, do the headings and placement of the offence in the list have the effect of limiting its meaning?
- 3.39 In some cases the point is moot because the offence in question is also included within the list of non-filterable offences without any specificity as to jurisdiction by virtue of another paragraph within section 113(6D). Where this occurs the offence in question will definitely be included on the list when committed in England and Wales. For example, the common law offence of murder is referred to (without reference to a particular jurisdiction) in section 113A(6D)(a), and section 5 of the Domestic Violence, Crime and Victims Act 2004 is likewise included in section 113A(6D)(i).
- 3.40 However, in some cases the offence in question only appears with a particular paragraph with a heading related to a specific jurisdiction.

**Example:** Common assault, only where committed in relation to a child, is included in the list of non-filterable offences under section 113A(6D)(i) within the list of Northern Irish offences. It is not included anywhere else on the list.

#### ***The effect of headings***

- 3.41 Section 113A(6D) paragraphs (d) and (j) both refer to lists of offences which are sub-divided using headings related to specific jurisdictions. In contrast, the list of offences referred to in paragraph (i) does not use headings.
- 3.42 We are advised by Parliamentary Counsel that the headings under which the offences are referred to in the above regulations are not necessarily determinative of how they will apply to the list. Specifically, the fact that the offences are listed under headings specifying the jurisdiction concerned arguably has no legal effect, headings not traditionally being considered to be part of the legislation. The traditional view was set out by Mr Justice Avory in the case of *Hare*.



Headings of sections and marginal notes form no part of a statute. They are not voted on or passed by Parliament, but are inserted after the Bill has become law.<sup>16</sup>

- 3.43 Therefore it may be that all of the offences listed within such paragraphs with specific headings will be included within the non-filterable list, irrespective of the jurisdiction in which they were committed. However, we consider that this view could well be subject to challenge in the future where an offence listed with reference to the specific context of another jurisdiction is disclosed and on the facts it was actually committed within England and Wales.
- 3.44 In the 2005 case of *Montila*,<sup>17</sup> the Court of Appeal considered afresh the effect of headings and side notes in legislation. The Court of Appeal considered that the comments made by Mr Justice Avory in *Hare* were now “out of keeping with the modern approach to the interpretation of statutes and statutory instruments”. The better view would appear to be that, though the headings are not a legally binding part of the statute, they are at least a useful guide to interpretation of which the court should take account.
- 3.45 Similarly, modern works of statutory interpretation suggest that “where general words are preceded by a heading indicating a narrower scope it is legitimate to treat the general words as cut down by the heading”.<sup>18</sup> To ignore completely the specific headings used to categorise particular offences by jurisdiction would therefore seem inappropriate.
- 3.46 This means that offences relevant for the purposes of the non-filterable list will be disclosable when committed in a specified jurisdiction included on the list but may not be when they are committed in England and Wales. This creates a disparity within the list, specifically in relation to paragraphs (d) and (j) of section 113A(6D).

**Example:** If common assault in relation to a child were to be committed within the jurisdiction of England and Wales it would fall to be filtered, but if the same offence was committed within the jurisdiction Northern Ireland it would never be filtered.

- 3.47 In the case of common assault this may in fact be the desired result. We are aware that when the case of *W* was decided by the High Court, it was made clear by the Respondent that the decision of the Government, when drafting the 2013

<sup>16</sup> *Hare* [1934] 1 KB 354 as per Avory J.

<sup>17</sup> *Montila* [2004] UKHL 50, [2004] 1 WLR 3141.

<sup>18</sup> O Jones, *Bennion on Statutory Interpretation* (6th ed 2013) section 255.

Order introducing the filtering regime, had been that common assault should not be included on the list of non-filterable offences.<sup>19</sup>

3.48 Finally, there could be an argument that, even if there were no heading to consider, the very fact that an offence is placed in a list mostly consisting of offences exclusive to Scotland or Northern Ireland is a strong indication that the offence is only included as respects that jurisdiction. This argument could apply to paragraphs (d), (i) and (j). There is an established principle that the interpretation of words in a statute can be limited by their immediate context.<sup>20</sup> However, the position here is less certain and the better view would seem to be that:

- (1) offences listed under a heading related to a specific jurisdiction are only likely to be non-filterable when committed in that jurisdiction, but
- (2) offences with application to England and Wales, which are simply listed alongside offences exclusive to specific jurisdictions without such a heading, are likely to be non-filterable even when committed outside those specific jurisdictions.

3.49 We discuss this matter further in Chapter 4.

#### **Other problems arising from the use of other lists of offences**

3.50 We have identified two further problems arising from lists of offences being used to compile the list of non-filterable offences.

- (1) Some provisions referred to within section 113A(6D) are not offence-creating provisions and therefore do not have the effect of including a particular offence within the list.

**Example:** As mentioned above, common assault (when committed in relation to a child) is only included in 113A(6D) by virtue of (d) and (i). The offence of common assault is included in both (d) and (i) by virtue of references to Schedule 1 of the Children and Young Persons Act (Northern Ireland) 1968, which specifies “common assault and battery (in relation to a child or young person) contrary to sections 42 and 43 of the Offences Against the Person Act 1861”. These sections are not in fact offence creating provisions: common

<sup>19</sup> *W* [2015] EWHC Admin 1952. The Respondent submitted a witness statement from a policy official within the Ministry of Justice, confirming this.

<sup>20</sup> The maxim is *noscitur a sociis*, “it is known by the company it keeps”.

assault is a common law offence and sections 42 and 43 merely set out penalties for different forms of the offence. As such the offence of common assault is not in fact included within the list of non-filterable offences by virtue of the reference to Schedule 1 of the Children and Young Persons Act (Northern Ireland) 1968 in section 113A(6D) paragraphs (d) or (i) (even where the offence is committed within the jurisdiction of Northern Ireland). The correct description of the offence of common assault (contrary to common law) is not referred to within section 113A(6D).

- (2) Some provisions were repealed before section 113A(6D) was enacted and more recent versions of the same offences are not included, leading to the anomalous result that certain historic offences are non-filterable while their modern counterparts cannot be disclosed.

**Example:** In addition to sections 42 and 43 of the Offences Against the Person Act 1861 not being offence-creating provisions, these provisions were repealed by the Criminal Justice Act 1988. The provision replacing them (section 39 Criminal Justice Act 2003) is not referred to in section 113A(6D).

- 3.51 These problems do not arise from the cross-reference of one list to another as such, but could have been avoided if the list of non-filterable offences had been drafted in an itemised format.

#### **The meaning of “superseded”**

- 3.52 Subsection (6D)(k) refers to “any offence which has been superseded (directly or indirectly) by an offence within paragraphs (a) to (j)”. It is debatable whether there is any clear legal definition of the word “supersede” when used in this context. The two possible meanings appear to be:

- (1) a narrow meaning, “abolish and replace”; or
- (2) a broader meaning, including any case where a newer offence overlaps with an older one and can therefore be prosecuted instead of the older offence in particular contexts.

- 3.53 We understand that at the time section 113A(6D) was drafted there was concern that the provision, as a “snapshot” of relevant criminal offences at a particular time, should cover “historic” offences that corresponded to offences on the non-filterable list. Convictions for these historic offences should continue to appear on a criminal record even if the offence may no longer be charged in respect of current behaviour. Accordingly, where offences have been repealed and replaced (in whole or in part) by an offence on the list of non-filterable offences, they should still be considered non-filterable.

**Example:** Offences under sections 22 and 23 of the Firearms Act 1937, well as section 1 of the Firearms Act 1967, were repealed and replaced by offences in sections 16, 17 and 18 of the Firearms Act

1968. Where an individual was convicted of an offence under section 22 of the 1937 Act (possession of a firearm with intent to endanger life), that conviction would be disclosed on a criminal record certificate, as it was an offence “superseded” by section 16 of the Firearms Act 1968 (possession of a firearm with intent to endanger life).

3.54 We have conducted substantial research into the use of the word “superseded” in legal contexts. There is doubt that it has any specific legal meaning beyond its everyday meaning of “abolish and replace”. It is unlikely, in our view, to extend to encompass offences not on the list of non-filterable offences which overlap with offences that are on it. It would be undesirable for “overlapping” offences to be included in the non-filterable list in this way. The concept of “overlapping” could be far too uncertain and open to alternative interpretations. We met with a number of legal practitioners with particular experience of the issue of criminal records disclosure and all raised significant concerns regarding an over-broad definition of “superseded”.

3.55 However, a broader view appears to have been taken in practice. Examples are as follows:

- (1) The list of “offences that will never be filtered”, as published on the Government website,<sup>21</sup> includes “any offence specified above under common law or under local acts and bye-laws”. This cannot be understood as referring to offences replaced by any particular offences referred to in section 113A(6D)(a) to (j) of the Police Act 1997. It appears to reflect a broader concept including any overlapping common law or local act offences not specifically included within the operation of section 113A(6D) but which cover similar subject matter. We believe this to be incorrect.
- (2) Similarly the operational list used by DBS includes the offence contrary to section 1 of the Street Offences Act 1959 – loitering or soliciting for purposes of prostitution. The offence itself is not referred to in section 113A(6D). The offence arguably overlaps with a number of other offences concerning prostitution and soliciting that are referred to in section 113A(6D), nevertheless the provision remains in force, and therefore cannot be said to have been “superseded” by any other offence.

<sup>21</sup> 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).

- (3) Sections 11, 12, 23 and 32 of the Children and Young Persons Act 1933 (regarding the exposure of children to risks of harm in particular circumstances) appear on the operational list but are not referred to in section 113A(6D). There are equivalent offences under later Scottish and Northern Irish legislation which are referred to in section 113A(6D) under paragraphs (d) and (j). However, none of these later offences repealed and replaced sections 11, 12, 23 and 32 of the Children and Young Persons Act 1933 as each of these offences is still in force. Their inclusion in the operational list appears to reflect an overly broad interpretation of ‘superseded’, to mean offences that overlap.

- 3.56 Even within the narrower interpretation of “superseded”, the replacement of the previous offence by a new one need not be exact, as a new scheme of offences may divide the different variations of criminal behaviour differently from the old scheme. A narrow offence may be replaced by a wider one.

**Example:** the offence of rape under the Sexual Offences Act 2003 arguably supersedes the offence of rape under the Sexual Offences Act 1956. However, oral rape and the rape of a male were not “rape” under the 1956 Act, though they did constitute other offences under that Act.<sup>22</sup>

- 3.57 The opposite problem could also arise. A broader offence may be replaced by a narrower one which serves the same basic purpose but excludes certain types of behaviour previously caught, either because these types are covered by another offence or because they are decriminalised altogether. Does a conviction for the old (unlisted) offence, which on the facts involved types of behaviour now excluded from that offence, still need to be disclosed because the offence as a whole is “superseded” by the new (listed) one?

**Example:** Common law offences relating to public disorder, such as riot, affray, unlawful assembly and rout were abolished and replaced by a set of statutory offences under the Public Order Act 1986. The new statutory offences of riot and affray more closely defined, and therefore narrowed, the original common law offences. Further, the new offence of violent disorder (under section 2 of the 1986 Act) replaced the previous offence of unlawful assembly in a narrower

<sup>22</sup> As it happens, most offences under the 1956 Act are included by name in one or more of the provisions referred to in the non-filterable list and so this is not a problem in practice in relation to sexual offences.

form: where three people or more actually use or threaten unlawful violence.<sup>23</sup>

- 3.58 This could create problems of interpretation. Whilst the statutory offences of riot, affray and unlawful assembly appear on the list, the common law offences of riot, affray and violent disorder do not, except by virtue of paragraph (k). There might therefore be a problem if a person had been convicted of common law unlawful assembly in the form that did not involve even a threat of violence but did, for example, involve an intent to trespass.<sup>24</sup> Was this form of the common law offence “superseded” by violent disorder and therefore included on the list? Or alternatively, was it replaced by the offence under section 14B of the Public Order Act 1986 concerning participation in trespassory assemblies<sup>25</sup> and therefore not included?
- 3.59 Arguably, in both cases, the relevant factor is the offence label applied at the time of the conviction, rather than the exact facts of the case. That is, the question is “what replaces the offence then called X”, not “what would D now be convicted of”. The label need not be exactly the same, but must be similar enough to be readily identifiable as a replacement.
- (1) In the first case, where the new offence is broader than the old, we see no problem. An act constituting rape under the Sexual Offences Act 1956 will also constitute rape under the Sexual Offences Act 2003.
  - (2) In the second case, where the new offence is narrower than the old, as with violent disorder, a conviction for the old offence could remain indefinitely disclosable though the same act, committed now, would constitute a different offence or no offence at all. This is basically similar to the situation when an offence is abolished but left on the list. What remains disclosable is the fact that D broke the law as it then stood.
- 3.60 The major exception to this is the regime of “disregarded convictions” for homosexual behaviour.<sup>26</sup> In these cases, if an individual applies to the Secretary of State and his application is granted, the conviction need never be disclosed in

<sup>23</sup> Offences against Public Order, Law Com No 82.

<sup>24</sup> By the 19<sup>th</sup> century, *unlawful assembly* was the term used in English law for an assembly of three or more persons with intent to commit a crime by force, or to carry out a common purpose (whether lawful or unlawful), in such a manner or in such circumstances as would in the opinion of firm and rational men endanger the public peace or create fear of immediate danger to the tranquillity of the neighbourhood.

<sup>25</sup> Inserted by Criminal Justice and Public Order Act 1994, s 70.

<sup>26</sup> ROA 1974, s 1(5) and (6). Disregarded convictions and cautions are defined the Protection of Freedoms Act 2012, s 92.

answer to an exempted question and never appears on a criminal record certificate.<sup>27</sup> If in future an offence is abolished, or narrowed to exclude particular conduct, on the ground that that conduct should never have been criminal, it may be necessary to provide for this in a similar way. That does not affect our conclusion on the interpretation of the legislation as it stands.

- 3.61 The problem of interpreting “superseded” may be at its most acute not when examining the operational list, but when an individual applicant or a third party is asked “exempted questions” without any DBS check being applied for. In that case all historic convictions are disclosable subject to the filtering rules, and the individual or third party has the onerous responsibility of deciding which offences “supersede” those offences in paragraphs (a) to (l).

#### **The meaning of “corresponding”**

- 3.62 Section 113A(6D) also speaks of offences under jurisdictions other than England and Wales and service offences “corresponding” to earlier entries on the list.

#### ***Offences under a jurisdiction other than England and Wales***

- 3.63 As with “superseded”, we believe that “corresponding” may need to be interpreted narrowly, as meaning that one offence in substance represents the other, and that a bare overlap is not sufficient. Once again, the practitioners we consulted with on the subject matter of this project were in agreement that a wider interpretation would result in an unacceptable level of uncertainty.
- 3.64 In some cases this is straightforward. Some offences in force in other parts of the British Isles and in Commonwealth and common law countries directly correspond to offences in England and Wales, historically as well as in terms of content. For example, several offences under the Offences Against the Person Act 1861 are in force in some other jurisdictions, in particular Northern Ireland. Many other countries have criminal codes based on the work of James Fitzjames Stephen, who was aiming to reflect the content of English criminal law as it stood at the time, again making it easy to identify offences as corresponding one to one with English offences.
- 3.65 Outside these examples, it may be that only the most obvious correspondences could be included. For example, most countries will have offences clearly recognisable as corresponding to “murder”, “rape” and “theft”, though the boundaries may differ in some respects. Beyond this type of offence it will be extremely difficult to establish whether a particular offence in another jurisdiction corresponds to an existing offence in England and Wales.

<sup>27</sup> Police Act 1997, s 113A(6E) defines “conviction” as meaning the same as in ROA 1974.

- 3.66 Even adopting such a narrow interpretation of corresponding does not, however, assist in compiling a list of all offences in paragraph (m), as this would involve a study of every legal system in the world and the task would be potentially infinite.
- 3.67 As previously discussed, the offences recorded on a criminal record certificate are confined to those offences eligible to be recorded in “central records”, namely the PNC.<sup>28</sup> These will not normally include convictions from outside England and Wales. Exceptions are:
- (1) under the European Criminal Records Information System, when an EU national is convicted of an offence in another EU country, the home country must be informed;<sup>29</sup>
  - (2) similarly, if a national of one EU country is arrested in another, the country of arrest may request the home country to provide information about convictions.<sup>30</sup>

In both cases the information is provided to ACRO (the police criminal records office) and may be recorded on the PNC under the code of the nearest corresponding UK offence, with a qualifying note “FR” meaning “foreign”, though in the second case this is only done for offences on a list of “serious” offences maintained by the Home Office for this purpose.<sup>31</sup> There are also arrangements for notification of convictions of British citizens in some other countries, which are then recorded in the same way.<sup>32</sup>

- 3.68 In short, the decision about which offences “correspond” is made at the recording stage, and which offences committed outside the jurisdiction of England and Wales are included in a criminal record certificate is determined by whether they are recorded on the police national computer and with what codes.
- 3.69 As such the number of offences under jurisdictions other than England and Wales recorded in central records, and therefore likely to appear on a criminal record certificate, is limited. The problem is far more likely to arise when an individual applicant or a third party is asked “exempted questions” without any DBS check being applied for. In those circumstances, as discussed above, in relation to superseded offences, the individual or third party has the responsibility

<sup>28</sup> See Chapter 2.

<sup>29</sup> Council Framework Decision 2009/315/JHA, art 4.

<sup>30</sup> Council Framework Decision 2009/315/JHA, art 7.

<sup>31</sup> In this context “serious” is not defined other than by reference to the offences on that list. See PNC User Manual version 12.01. (March 2012).

<sup>32</sup> Information provided by the Metropolitan Police.



of deciding which offences from other jurisdictions “correspond” to offences in paragraphs (a) to (l).

### **Service offences**

3.70 Paragraphs (n) and (o) of section 113A(6D) of the Police Act 1997 read:

- (n) Any offence under section 42 of the Armed Forces Act 2006 in relation to which the corresponding offence under the law of England and Wales (within the meaning of that section) is an offence within any of paragraphs (a) to (l).
- (o) An offence under section 70 of the Army Act 1955, section 70 of the Air Force Act 1955 or section 42 of the Naval Discipline Act 1957 of which the corresponding civil offence (within the meaning of that Act) is an offence within any of paragraphs (a) to (l).

The schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, referred to in paragraph (i) of that section, also refers to offences under these provisions of the service legislation “corresponding” to other offences referred to in the schedule.

3.71 Section 42 of the Armed Forces Act 2006 reads, so far as relevant:

#### **42. Criminal conduct**

(1) A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that—

- (a) is punishable by the law of England and Wales; or
- (b) if done in England or Wales, would be so punishable.

...

(8) In this Act “the corresponding offence under the law of England and Wales”, in relation to an offence under this section, means—

- (a) the act constituting the offence under this section; or
- (b) if that act is not punishable by the law of England and Wales, the equivalent act done in England or Wales.

3.72 This section supersedes similar provisions in section 70 of the Army Act 1955, section 70 of the Air Force Act 1955 and section 42 of the Naval Discipline Act 1957, as referred to in paragraph (o) of section 113A(6D), all of which speak of the “corresponding civil offence”.

3.73 The meaning of “corresponding” in these provisions, and therefore in paragraphs (n) and (o) of section 113A(6D), is clear. Every criminal offence in the law of England and Wales is, for military purposes, replicated by an identical service offence which may be committed either in England and Wales or abroad. It is

only within these offences that military equivalents to the offences in paragraphs (a) to (l) are to be sought. Within the military, offences under section 42 are referred to as “criminal conduct offences”. Some of these criminal conduct offences will be eligible to be recorded in central records (see paragraph 3.130 below), some will not be.

- 3.74 There are of course numerous other service offences defined in other sections of the statutes referred to, and in regulations made under, those statutes. Within the military these are referred to as non-criminal conduct offences and can also be divided into offences that are and are not eligible to be recorded in central records.<sup>33</sup>
- 3.75 Some non-criminal conduct offences may overlap with general law offences such as misconduct in public office. These general law offences do not “correspond” to the military offences within the meaning of those statutes, and therefore do not provide a ground for including those military offences in the list of non-filterable offences.
- 3.76 In terms of definition, paragraph (m) does not therefore appear to pose a significant problem for the operation of the list of non-filterable offences. There are, however, problems arising from the manner in which military offences are currently recorded on the PNC affecting the operation of the filtering regime, which were identified from discussions with stakeholders including the Ministry of Defence and Nacro. These are discussed further below.

### **Conclusion**

- 3.77 In conclusion, there are doubts about the interpretation of section 113A(6D), which make it unclear what offences ought to be included in the operational list, used in practice by DBS.<sup>34</sup> Further, as explained below, whatever view we may take of the interpretation of the section, the operational list used by DBS appears to be inaccurate. It is at least inconsistent with other lists of non-filterable offences available in the public domain.<sup>35</sup> It is therefore possible that, in some cases, criminal record certificates include convictions or cautions that ought not to be disclosed.
- 3.78 It may be the case that some (probably fewer) certificates do not contain convictions or cautions that should have been disclosed.

<sup>33</sup> See Chapter 2.

<sup>34</sup> Discussed at para 3.87 and following, below.

<sup>35</sup> See para 3.90 and following, below.

- 3.79 As already noted, we discuss potential solutions to these problems in the following chapter, Chapter 4.

**Presentational difficulties**

- 3.80 Finally, though less importantly, there are two particular respects in which the drafting of the relevant provisions is difficult for the reader, even if it does not generate actual ambiguities.

***(a) The list of non-filterable offences appears in two different statutory contexts***

- 3.81 Although the provisions of the Police Act 1997 identifying “non-filterable” offences are in substance identical to those of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 for identifying protected convictions, they are contained in separate instruments which do not cross-refer. Moreover, there are apparently arbitrary differences in terminology (for example, the provisions about what constitutes a “listed offence” in one scheme correspond to part of the definition of a “relevant matter” in the other). We are told that the lists were created separately purely because of the parliamentary procedure needed to enact both. Otherwise there appears to be no good reason for having two “stand-alone” provisions dealing with the same material.

***(b) The list contains significant duplication***

- 3.82 As stated, section 113A(6D) includes reference to a number of different lists of offences within different statutes and regulations. The use of multiple lists of offences in this way results in a degree of duplication in respect of the offences within the operation of section 113A(6D). This makes the non-filterable list unwieldy and difficult to use.

**Examples:**

(1) Murder appears in both section 113A(6D)(a) and schedule 15 to the Criminal Justice Act 2003, referred to in paragraph (e).

(2) The offence of rape of a child under 13 years old is included in several of the lists referred to in section 113A(6D). Some of these references include rape as a whole, and others include rape only when committed against children.

- 3.83 If the non-filterable list was presented as an itemised list instead, all duplication could be removed and it would be clearer and easier to use. If the list continues to rely on broad general tests then some duplication is inevitable.

***(c) The list is not regularly updated***

3.84 It is likely that there are offences created since 2013 which are not included in the list. The way in which section 113A(6D) is drafted means that new offences can only be added to the operation of the section through either:

- (1) the updating of a schedule referred to by the section;<sup>36</sup> or
- (2) legislation amending the section itself.

There is no forward-looking process or provision which would ensure that future offences that supersede current non-filterable offences will be added to the list.

3.85 So far as we are aware, there has been no legislation making direct amendments to section 113A(6D). Therefore, the filtering regime has so far relied on the effective and efficient updating of one, or more, of a number of separate lists of offences in different pieces of legislation, to keep the list of non-filterable offences up to date. As discussed above, this may not be effective in cases where the legislation referred to is secondary and the question of sub-delegation arises. There is also the possibility that some offences, which may be regarded as relevant to the purposes of the list of non-filterable offences, may not satisfy the criteria for inclusion in any of the separate lists of offences referred to by section 113A(6D) and would therefore not be added to any one of them and, as such, remain filterable. This is discussed further below.

3.86 It has emerged in discussions with a variety of stakeholders that, from an operational point of view, there is concern that the legislative process for adding to section 113A(6D) is unable to keep pace with the rate of the creation of new offences that are relevant for the purposes of filtering.

**PRACTICAL AND OPERATIONAL PROBLEMS**

3.87 We are aware, from stakeholder discussions, that in carrying out their filtering responsibilities, DBS are wholly reliant on the operational list created for them by the Home Office and could not operate on the basis of the legislation alone.

3.88 DBS presently identify “non-filterable” offences through a comparison of the ACPO PNC codes used to identify an offence on an individual’s PNC record and the “operational list” of non-filterable offences held by DBS, which also identifies separate offences through ACPO PNC codes.

<sup>36</sup> Though, as explained in para 3.17 above, this may not always be effective when the schedule is contained in secondary legislation.

3.89 We have examined the operational list carefully and identified the following specific practical and operational problems:

- (1) possible inaccuracy of the operational list;
- (2) likely inefficiency in the system of offence codes;
- (3) risk of unnecessary or inadequate disclosure;
- (4) risk of the need for constant updating of the list not being met; and
- (5) a lack of guidance for those answering exempted questions.

#### **Possible inaccuracy of the operational list**

3.90 As we have seen, the wording of some subsections within section 113A(6D) is open to differing interpretations. One example is subsection (k) – dealing with offences that have been “superseded” (directly or indirectly) by offences specifically included within the operation of section 113A(6D). Another is subsection (m) – dealing with offences in different jurisdictions that correspond to offences specifically included within the operation of section 113A(6D). In practice this means that different versions of lists of non-filterable offences can exist, created using different interpretations.

3.91 We have had sight of different versions of lists of non-filterable offences used by the Home Office and DBS. These lists do not include the same number of offences. In some cases, an offence entry has been duplicated numerous times. In others, groups of offences are listed under a single entry. For example:

- (1) The publicly available “list of offences that will never be filtered”<sup>37</sup> (“the public list”) contains 1011 individual statutory offences, 13 entries for groups of offences with a particular subject matter (for example, any offence of assault or indecent assault on a child) and three entries that refer to groups of offences of a certain type. In some instances these are not in the same terms as those used in section 113A(6D) to describe different categories of non-filterable offences.
- (2) The operational list, as provided to us by DBS, contains a total of 4,886 different entries, based on the number of different existing PNC codes for the offences referred to in section 113A(6D). The vast majority are entries for individual offences, although these are often listed more than

<sup>37</sup> This is currently available to the public at:  
<https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check> (last visited 5 September 2016).

once (there are 143 entries relating to supply of drugs contrary to s4(3) of the Misuse of Drugs Act 1971). There are also a number of entries that refer to groups of offences of a certain type, and these are often not in the same terms as those used within section 113A(6D) to describe different categories of non-filterable offences.

- 3.92 Our analysis illustrates potential inconsistencies between the public and operational lists and the statutory list in section 113A(6D), making it unlikely that the system of filtering is operated correctly in accordance with section 113A(6D). Stakeholders such as Unlock, Nacro and Liberty agreed with our conclusion that the operational list may be inaccurate in significant respects.
- 3.93 In particular the ACPO PNC code system, on which the operational list is based, may not always provide sufficient information to support filtering decisions – primarily because it is now being used for a purpose for which it was not designed.<sup>38</sup>
- 3.94 We have focussed on the operational list because it is this list upon which the vast majority of disclosure decisions are based. Three particular problems with the operational list are that:
- (1) it includes some offences that should only be included in specific circumstances;
  - (2) it includes some offences that either never existed or are so obsolete that it is not possible that any living person has been convicted of them; and
  - (3) some offences listed in section 113A(6D) cannot be added to the operational list because they have no PNC code.

***Offences in specific circumstances***

- 3.95 Section 92 of the Protection of Freedoms Act 2012 provides for a category of “disregarded offences”, namely abolished offences concerning homosexual behaviour, which need never be disclosed. Under section 1(5) and (6) of Rehabilitation of Offenders Act 1974 where the person originally convicted or cautioned has successfully applied to the Secretary of State to have that conviction or caution disregarded that matter will no longer be regarded as

<sup>38</sup> The ACPO PNC codes also, in theory, transpose across to the CJS codes used by the courts and the PNLD codes used by the Home Office – the existence of three separate codes conveying the same information is a result of historical factors – but we have been told that in practice this “mapping” is not always effective.

conviction or caution for a criminal offence. Where a successful application is made, that conviction or caution will then be removed from the individual's PNC record by the police. Where an application is refused, because the facts of the conviction mean that it is ineligible to be disregarded, then the conviction will not be removed. Likewise where an individual does not apply to have the conviction disregarded it will remain on his or her PNC record.

- 3.96 Disregarded offences include offences under sections 12 and 13 of the Sexual Offences Act 1956 (as committed in England and Wales)<sup>39</sup> where the sexual activity involved was consensual and both parties engaged in that activity were aged 16 or over at the time.
- 3.97 The effect of section 113A(6D) paragraphs (i) and (j) is that the offences under sections 12 and 13 of the Sexual Offences Act 1956 are non-filterable, but only when the activities in question were non-consensual or one or both parties were under 16 at the time. These offences are accordingly included in the operational list, in a form correctly reflecting that qualification. However, the operational list also contains entries for those offences without any such qualification, with the result that in practice they could be treated as non-filterable in all circumstances.
- 3.98 We emphasise here that the concern being raised is not with the system of disregarded convictions itself, but with the fact that, whilst the legislation only includes convictions and cautions under sections 12 and 13 of the 1956 Act within the non-filterable list of offences in specific circumstances, the operational list also includes reference to such convictions and cautions without any specificity.<sup>40</sup>
- 3.99 This problem equally arises with other offences that should only be included in the list where they are committed in specific circumstances. For example, common assault should only be included on the list if it is committed in relation to a child.
- 3.100 We discuss later in this chapter how a lack of specificity within the PNC code system may be the reason why some (but not all) such offences are included on the list of non-filterable offences in error.

<sup>39</sup> The position is different in Northern Ireland.

<sup>40</sup> An amendment to the Policing and Crime Bill, proposed by Lord Sharkey and Baroness Williams of Trafford, which allows for the pardoning of all individuals who have successfully applied to have their convictions under s12 or 13 disregarded, was carried with Government support in the House of Lords on 12 December 2016: <http://services.parliament.uk/bills/2016-17/policingandcrime.html> (last visited). This amendment will have no practical effect on the question of how disregarded convictions are treated for the purposes of criminal records disclosure.

### **Obsolete offences**

- 3.101 The operational list used by DBS contains a number of entries for offences that, in practical terms, could never appear on an individual's criminal record. This is because the offence in question was repealed so long ago that there would no longer be any individuals surviving who were convicted of it.

**Example:** The operational list includes separate offences of unlawful wounding and grievous bodily harm with intent, both contrary to common law (each type of conduct is listed separately on the list and has a separate police national computer code). Wounding and/or causing grievous bodily harm with intent is a (single) offence contrary to section 18 of the Offences Against the Person Act 1861.

- 3.102 Presumably the offences contrary to common law were placed on the list as they were identified from the police national computer as offences that could have been superseded by sections 18 and 20 of the 1861 Act, both of which are referred to in section 113A(6D)(e) and are therefore non-filterable offences. However, it is obvious that no one alive in 2013 could have been convicted of an offence that was abolished in 1861 and therefore we cannot see any logic in including offences of wounding or grievous bodily harm contrary to common law on the non-filterable list.
- 3.103 The consideration of obsolete offences also highlights the potential difficulties in ensuring that any historic offences included on the non-filterable list accurately reflect the historic legal position. Whilst it appears to have been assumed, for the purposes of creating the operational list, that the offences within sections 18 and 20 of the 1861 Act would have repealed and replaced common law offences covering the same ground, in fact we can be sure that this was not the case.
- 3.104 In our consultation paper *Reform of offences against the person*<sup>41</sup> we explained that both sections 18 and 20 of the 1861 Act replaced earlier statutory offences, rather than common law ones. This example may cast doubt on a number of other historic offences included on the non-filterable list, but in any event, as explained above, our view is that it would be absurd to include offences of this age on the list.
- 3.105 We understand from discussions with the Metropolitan Police, who have ownership of the police national computer codes, that there is no clear reason why obsolete offences and these purported "common law offences", with no apparent basis in law, have been included within the police national computer system. One suggestion is that, when historic criminal records were transferred

<sup>41</sup> Law Commission CP No 217 (2014).



from microfiche to the police national computer, the information contained within the records was not checked for accuracy.

**Offences with no PNC code**

- 3.106 A number of offences referred to in section 113A(6D) cannot be added to the operational list because they have no PNC code. As we have previously discussed,<sup>42</sup> DBS can only identify offences for the purposes of disclosure on a criminal record certificate through an automated search of the PNC for a specific code. This has advantages in respect of reducing the possibility of human error and processing disclosure applications more quickly. Without the option of automated searches based on PNC codes, DBS employees would have to search the PNC manually for relevant matters that should be disclosed and this would make the system much slower and more cumbersome.
- 3.107 Restricting the offences on the non-filterable list to those with PNC codes is, for the most part, justified by the legislative framework in place. Section 113A(3) states that where a criminal record certificate is issued it must give details of every relevant matter (every offence that is not a protected conviction or caution) relating to the applicant which is recorded in central records, or else state that there is no such matter. Not every offence is recorded in central records (entered onto the PNC) and therefore allocated a PNC code.<sup>43</sup>
- 3.108 Therefore, if an offence listed under section 113A(6D) is not recorded in central records, it is right that it should not be listed on the DBS operative list. However, for the purposes of creating an accurate list itemising every offence on the non-filterable list, which should be disclosed in answer to an exempted question where the answer is not requested by way of a certificate from DBS, then every offence listed in section 113A(6D) will need to be itemised, whether recorded in central records or not.

**Example:** A series of offences under the Foster Children Act 1980 are not included on the operational list, although they are on lists of offences referred to in sections 113A(6D)(d) and (i). These offences have no PNC codes as they are not offences that have ever been recorded in central records.

<sup>42</sup> See para 3.10 above.

<sup>43</sup> See Chapter 2.

### **Other examples**

- 3.109 There are some offences on the operational list for which we cannot account by reference to section 113A(6D), even using the broader interpretations of “superseded” and “corresponding”.

**Example:** The offences under the Human Medicines Regulations 2012, regulations 214 and 255, both appear on the DBS operational list but not on the legislative list and do not appear to be, and are likely too new to have been, superseded by a listed offence within the meaning of section 113A(6D).

- 3.110 Stakeholders have suggested that in some cases offences have been added to the operational list simply because they are similar to offences already on the list, without any attempt to find a statutory justification. This may have occurred in particular where the offence in question was considered to serve a safeguarding purpose, at least in part.

**Example:** An offence of impeding apprehension of an offender under section 4 of the Criminal Law Act 1967 appears on the operational list but is not referred to in any provision under section 113(6D).

- 3.111 Other offences may also appear on the face of it to satisfy the purposes of the non-filterable list, although they arguably cannot do so in practice.

**Example:** The offence under section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007 appears on the current operational list but is not referred to in any provision under section 113A(6D). Prosecution cannot, however, be brought against an individual and therefore can never appear on a criminal record certificate for disclosure purposes.

- 3.112 If it is correct that offences have been erroneously added to the list then it will result in offences being disclosed when they should not be.

### **The operational list is unwieldy and inefficient**

- 3.113 Arguably, for the filtering system to work effectively, there should be one ACPO PNC code for every variation of an offence (for example, there would be three different codes for possession of class A, B and C drugs), with each code created when the offence is entered into the PNC for the first time. In practice there are many more ACPO PNC codes than offences in existence. Therefore, in addition to the duplication contained within section 113A(6D) the operational list contains further burdensome duplication as a result of there being too many PNC codes.

- 3.114 This state of affairs has arisen because, over time, slightly different descriptions for the same variation of an offence have been used to generate multiple codes for that offence (143 different codes for supply of drugs currently exist). Multiple PNC codes are also created for different levels of offence categorisation. We understand that a number of codes have been created for purely statistical purposes (such as to monitor the prevalence of particular drugs in different areas of the UK).

- 3.115 A multiplicity of different codes for the same offence potentially leads to confusion and inconsistent recording practices between different police forces (particularly with offences that arise less often), as well as an extremely unwieldy DBS operational list. Stakeholders also emphasised to us that this is more than an issue about the list not being ‘neat’ or ‘streamlined’ but a more fundamental one about the list being inaccessible to those who need to use it and the lack of transparency with the criminal records disclosure system as a whole. As we explain in Chapter 4, any solution that we propose to make the non-filterable list of offences more effective will require some level of reform of the PNC code system.
- 3.116 A further problem is that there is no mechanism for DBS to go behind the operational list and the offence codes, even on an application for a corrected certificate.<sup>44</sup> The applicant therefore cannot have his or her certificate corrected on the grounds that in this case the operational list has led to a legally wrong result. At most, such an application might result in the Home Office correcting the operational list. This may solve the problem as concerns future convictions, but not for convictions already in existence

#### **The risk of inadequate or inappropriate disclosure**

- 3.117 The present reliance by DBS on the ACPO PNC codes is not only inefficient, it also poses a potential risk of inadequate or inappropriate disclosures being made.
- 3.118 Identification of an offence by way of its ACPO PNC code means that the information available to DBS on a “standard”, rather than an “enhanced”, check about each offence is extremely limited. Each offence on the PNC is identified either by a relevant ACPO code or by a short-form description, no longer than 108 characters. This means that more detailed, specific information relevant to the question of whether an offence can be filtered or not, is not always available to DBS at the stage when the filtering decision needs to be made. This could result in either non-filterable offences not being disclosed when they should be or, to avoid this possibility, offences that should be filtered being improperly included in the non-filterable list.
- 3.119 The ACPO Criminal Records Office (“ACRO”) expressed some concern about the fact that the short-form description field on the PNC system is so limited. ACRO also expressed interest in the possibility of improving the system of how offences are recorded on the PNC, suggesting that the age of the system and its piecemeal development may have contributed to the problems now being experienced.

<sup>44</sup> See para 2.64.

- 3.120 As an example of this problem, under section 113A(6D)(i), all offences listed within the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 are non-filterable. Paragraph 2 of that schedule includes the offence under section 4(3) of the Misuse of Drugs Act 1971, but only where the person to whom controlled drugs were supplied or offered to be supplied was a child.
- 3.121 We are aware, however, from looking at the DBS operational list, that the section 4(3) offence has in fact been included in the list without any specification that it can only be non-filterable when committed in relation to a child. An attempt may have been made to solve the problem described above by including the offence on the operational DBS list whatever the facts of the case, opting for systematic over-inclusiveness rather than leaving a gap. This approach could, however, result in the inevitable disclosure of convictions that should in law be filtered from criminal record certificates.
- 3.122 As discussed above, we are aware that certain offences are included on the operational list in both the specified form required by section 113A(6D) and in their entirety. For example, offences of buggery and gross indecency between males (sections 12 and 13 of the Sexual Offences Act 1956) appear on the list in general (all form of buggery included) and specific (acts of buggery committed in relation to boys under 16 years and/or without consent) forms. This demonstrates that even where it is possible to achieve specificity on the operational list, constraints imposed within section 113A(6D) may not necessarily be followed.
- 3.123 This could also suggest that at some point decisions were taken to include offences on the list in a wider format despite the availability of specific PNC codes that accurately reflect the form of the offence included within section 113A(6D). If so, this should not have occurred.
- 3.124 We can present two examples of how the lack of codes to refer to specific forms of an offence causes particular problems:
- (1) it makes it impossible to identify those crimes of violence that have attracted enhanced sentencing because of hostility to particular groups; and
  - (2) it makes it impossible to record correctly criminal conduct offences under services law that correspond to non-filterable civilian offences.

***Enhanced sentencing for hate crimes***

- 3.125 We mentioned earlier the question of only particular forms of certain offences being included within the list of non-filterable offences, for example those where the offence was committed in relation to a child. Another example would be where there has been a finding that D's crime involved hostility on the grounds of a victim's race or religion.
- 3.126 We can see a potential argument that hate crime is a specific type of crime that should be included on the non-filterable list of offences, particularly where safeguarding is a purpose of the non-filterable list. At present, aggravated forms of certain criminal offences (including assaults, criminal damage, public order offences and harassment) can be prosecuted under sections 29 to 32 of the

Crime and Disorder Act 1998. These apply where either: the offender demonstrates hostility based on the victim's membership of a particular race or religious group at the time of committing the offence; or where the offence is motivated by hostility towards members of a racial or religious group. These offences are specifically included on the non-filterable list within section 113A(6D)(e).

3.127 However, the prosecution of an aggravated offence is not the only way in which hostility towards a member of a particular group, based on the personal characteristics of that group in the context of committing a general criminal offence, can be recorded by the court. Sections 145 and 146 of the Criminal Justice Act 2003 allows a court sentencing an offender for any offence to impose a higher sentence (within the maximum for that offence) where the court is satisfied that the offender's crime was motivated by hostility towards any of the following characteristics: race, religion, disability or sexual orientation. It could be suggested that if aggravated offences under the Crime and Disorder Act 1998 are included on the non-filterable list, then offences marked by way of an enhanced sentence should also be included. Of course, this would only be possible under the current system if these offences could be identified by DBS from the PNC.

3.128 In our report on *Hate Crime: Should the offences be extended?*<sup>45</sup> we considered the possibility of recording enhanced sentences passed for hate crime offences on the PNC.

We understand that PNC qualifier codes are available in respect of aggravation based on hostility on the grounds of race, religion, sexual orientation or disability (but not, as yet, transgender identity).<sup>46</sup> However, at present these are not generally used and further steps would be necessary to ensure their consistent use in all cases where sentences have been enhanced.

We recommended that steps be taken to ensure that the available qualifier codes were utilised in relation to instances of hate crime.

3.129 However, these qualifier codes would be input in relation to the offence disposal (sentence) rather than the conviction itself and we therefore concluded that for the qualifier to additionally be reflected on a criminal record certificate issued by DBS, this "would require the regulations (under the Police Act 1997) to be amended, to bring the application of section 145 or 146 (of the Criminal Justice

<sup>45</sup> Law Commission (2014) No 348.

<sup>46</sup> "Qualifier" here refers to the availability of a qualifying note that can be selected on the PNC system to indicate certain notable features of an offence e.g. that it was one motivated by hostility on the grounds of race and/or religion.

Act 2003) within the “prescribed details” that appear on certificates”. The amendment would be to allow enhanced sentences to be recognised as a specific method of disposal (sentence).

### ***Service offences***

- 3.130 We also referred previously to additional problems that arise in respect of the recording of military offences on the PNC. To summarise the process of recording military offences briefly, records of all criminal conduct offences (charged under section 42 of the Armed Forces Act 2006) are forwarded to the police to be recorded on the PNC (where they are in fact eligible to be recorded),<sup>47</sup> and are therefore within central records.
- 3.131 Logically, it might be assumed that military offences which correspond with civilian offences should be recorded in a similar manner to those offences from other jurisdictions which correspond to those in England and Wales (the qualifying mark of “FR” being used in relation to “foreign” offences). In practice, however, there is no such qualifying mark to be used for military offences. Surprisingly all military offences under section 42 corresponding with civilian criminal offences are supposed to be recorded under a single PNC code, which is included on the DBS operational list with the description “subject to service law/service discipline commit offence punishable by law of England and Wales”.<sup>48</sup> However, we are told that in practice these offences are usually recorded in the same way as the corresponding civilian offence, without any mention of the fact that the charge was under section 42.
- 3.132 This could have a significant effect for members of the armed forces convicted of a criminal conduct offence. If offences were correctly recorded under the PNC code for section 42, there would be no way by which filterable and non-filterable military offences which correspond with a civilian offence in England and Wales can be distinguished. The result in practice would be over-disclosure of every conviction (there is no equivalent to a caution within the armed forces) for a criminal conduct offence recorded on the PNC system received by a member of service personnel, regardless of whether or not the corresponding civilian offence would be non-filterable. In fact, because all criminal conduct service offences are in practice recorded using a civilian PNC Code, over-disclosure by DBS is very unlikely to occur. However, the failure to distinguish between service criminal conduct offences and civilian offences through the PNC code system may have other disadvantages.

<sup>47</sup> See para 3.73 above.

<sup>48</sup> There are a number of specific non-criminal conduct service offences which have a unique PNC code, but none of those offences are included on the non-filterable list of offences under s113A(6D)(m) and therefore also are not included on the operational list.

- 3.133 We discussed previously the fact that any military offence that receives a sentence of service detention automatically becomes non-filterable under the filtering regime. In many cases service detention is imposed for very short periods to address minor offences. It is considered a rehabilitative sentence and rarely comparable to civilian imprisonment. Where a service criminal conduct offence is recorded under a corresponding civilian PNC code, there may be even less opportunity to identify the distinction. Different sentence disposals for criminal offences are also recorded on the PNC with reference to their own unique codes. However, there appears to be no separate disposal code for service detention to distinguish it from imprisonment.
- 3.134 This could make it very difficult for employers and other organisations assessing an individual's suitability for a particular employment or role (outside of the military) to appreciate that the sentence received was not in fact one of imprisonment as understood in the civilian context. Therefore employers and other organisations may also be unlikely to understand that the disposal recorded is not necessarily reflective of the seriousness of the offence committed.

#### **The need for constant updating**

- 3.135 It is clearly a challenge, given the complexity of section 113A(6D), to ensure that the DBS operational list is kept up to date. It is entirely possible for an offence to be included in the scheme through the operation of 113A(6D) but to not be added to the operational list. In practice, because of the reliance DBS places on that list, the offence is then unlikely to be disclosed when it should be disclosed.

**Example:** Section 33A of the Sexual Offences Act 1956 (keeping a brothel for the purposes of prostitution) was added to schedule 15 of the Criminal Justice Act 2003 under section 2(6) of the Criminal Justice and Courts Act 2015 (and thereby referred to section 113A(6D)(e)), but not listed on the operational list. Meanwhile section 33 of the Sexual Offences Act 1956 (containing a similar offence) was removed from schedule 15 by the 2015 Act but remains on the operational list.

- 3.136 In this particular case the problem might be compounded by the fact that an offence under section 33A has no separate ACPO PNC code,<sup>49</sup> whilst section 33 does.
- 3.137 There is some tension between the need for the list to be transparent and the need to keep it updated. If the definition was to take the form of an itemised list, it

<sup>49</sup> This may be because it has never been prosecuted or it might be because offences under s 33A are erroneously recorded as offences under s 33.

would be clearer and easier to use but would need to be updated whenever a relevant new offence is created. If it relies on broad general criteria, this will save the need for updating but will lead to uncertainty about what offences are in fact included. We discuss this further in Chapter 4.

### **The lack of guidance for applicants and others answering exempted questions**

- 3.138 The system of filtering, with its attendant difficulties, applies not only to DBS when issuing criminal record certificates but also to applicants for employment who have to answer questions about their record (“exempted questions”) as part of their application. At that stage they cannot obtain assistance from DBS, and must form their own view about what convictions to disclose. However:
- (1) There is no readily available and accurate list that an individual can search in order to form a view on whether his or her conviction will need to be disclosed and, as explained, the only available list in the public domain (“the list of offences that will never be filtered”) is unreliable.
  - (2) Furthermore, even if the individual has the time and ability to research the legislation directly, the publicly available legislation sites are often less reliable than those available only on subscription.
  - (3) A further concern raised by some stakeholders is that the list is in a negative form, in that it lists the offences that are not “filtered” (and therefore need to be disclosed) rather than those that are.
- 3.139 The same difficulties are also experienced by advisory bodies such as Unlock and Nacro and are particularly likely to arise in connection with superseded offences and offences committed in a jurisdiction other than England and Wales. A number of stakeholders carrying out recruitment or regulatory functions within the legal and health care sectors expressed the view that the list of non-filterable offences was extremely difficult to decipher. The majority view was that it was difficult in practice to be confident that any guidance and/or advice provided to individuals, of whom disclosure requests were being made, was accurate and/or up to date.
- 3.140 One effect of these difficulties is that even an individual who has access to the relevant law,<sup>50</sup> when asked about his or her convictions at an early stage of a job application or upon entry into a profession, may disclose convictions that ought not to have been disclosed, unnecessarily prejudicing his or her prospects of

<sup>50</sup> It is of note that the current version of s 113A(6D) is not displayed on the publicly available legislative database [www.legislation.gov.uk](http://www.legislation.gov.uk).



success. One example might be where an individual discloses an old conviction that would legally fall to be filtered but where the offence is included on the publicly available list of “offences that will never be filtered” in the wrong form, such as common assault in relation to a young person when committed in England and Wales. Conversely, an individual may fail to disclose a conviction in the genuine but mistaken belief that there is no obligation to do so, and later be accused of dishonesty when the certificate revealing that conviction is issued.

- 3.141 The legal practitioners we spoke to emphasised that the law is so complicated that even lawyers with particular expertise in the area struggle to understand and explain the filtering regime. This was also a view expressed by some of the legal sector stakeholders we consulted, specifically those who consider the suitability of barristers to enter the profession.
- 3.142 All stakeholders consulted by us in both the legal and health care sectors indicated that over-disclosure of convictions and cautions was a regular occurrence, where an individual undertook to try and apply the filtering rules themselves. In most cases stakeholders considered that these would be old and minor convictions and therefore unlikely to affect an individual’s situation, but as a result of the disclosure employers and regulators would be made aware of these non-disclosable matters before going on to make decisions that would affect the individual’s future. In some cases the person receiving the information would differ from the person making the decision, but in others the person would be the same. In such circumstances it would be difficult to assess whether the matters disclosed unnecessarily had any negative affect on the employer’s or regulator’s assessment of the individual concerned.
- 3.143 Finally, Nacro has informed us that there is a potential further issue where an individual convicted of a criminal offence receives a fine, but the court specifies that if that fine is not paid then he or she must serve a sentence of imprisonment in default (a “default sentence”). If the fine is paid then no sentence is served, but the usual practice is to record the period to be served on the PNC whether it is served or not. Nacro has expressed concerns over whether a risk exists of convictions being wrongly disclosed in cases involving default, rather than substantive custodial sentences, where that custodial sentence is recorded on the PNC. Nacro are not however aware of any cases arising where this has actually occurred.
- 3.144 In our view this approach to disclosure is incorrect. In fact the (albeit also very complex) legislation concerning criminal sentencing states that a default

sentence does not constitute a custodial sentence.<sup>51</sup> The lack of available guidance regarding the filtering regime contributes to confusion on this issue.

- 3.145 The existence of the above problems is unsatisfactory given the significance that disclosure has for the individual concerned, for an employer or regulator and for society. It is not an exaggeration to say that it can involve life-changing decisions, since the suitability of a person for a particular employment or decision may turn on what is disclosed (although information contained on a criminal record certificate is generally only one of the matters that an employer or other relevant organisation considers when assessing that suitability). Conversely, inadequate disclosure can have life-changing effects for future victims of that individual, should he or she in fact reoffend. There is a need both to ensure that sufficient information is disclosed to satisfy the regime's objectives and to maintain confidence that the system is fit for purpose.
- 3.146 We consider that these general problems with the current system cannot be fully addressed within the context of our present, narrow review. Any recommendations that we made regarding the non-filterable list would clarify the contents of that list and make it more accessible for users of DBS, but more deep-seated confusion regarding the operation of the Rehabilitation of Offenders Act 1974 and the exempted questions would remain. In Chapter 5 we discuss possible topics for a wider project addressing both the criminal records disclosure system and the rehabilitation of offenders scheme.

#### **ANOMALIES IN THE CHOICE OF OFFENCES**

- 3.147 The purposes for which the different lists of offences, referred to within section 113A(6D), were created do not correspond precisely to the purposes of the list of non-filterable offences, although they may overlap to a degree. For example Schedule 15 to the Criminal Justice Act 2003, designed to be used for the purpose of sentencing "dangerous" offenders, operates in a very different context from that where disclosure of past offences is requested. Accordingly, even if in 2013 the listed offences were all relevant to the purposes of the filtering regime, it does not follow that they will always be so: the lists may change.
- 3.148 As stated in Chapter 1, in general terms, the main purpose of the filtering system is to achieve a balance between two important policy needs.

<sup>51</sup> S 76 of the Powers of Criminal Courts (Sentencing) Act sets out the definition and various categories of a "custodial sentence". A default of this kind only has the potential to fall under s 76(1)(a) "a sentence of imprisonment". S 305 of the Criminal Justice Act 2003, however, excludes from the definition of "sentence of imprisonment" a default of payment of any sum of money.

- (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 (for example, about prospective employees) required to fulfil those responsibilities, particularly (but not solely) in relation to the safeguarding of children and vulnerable adults.

3.149 It is unclear whether the offences currently within the operation of section 113A(6D) adequately meet the purposes that the exempted questions seek to serve. There is a risk that an offence which should be included on the list of non-filterable offences will not be included in the regime, because it does not satisfy the criteria for inclusion in any of the separate lists of offences referred to by section 113A(6D).

3.150 We are aware of a number of relatively new offences that would appear relevant to the safeguarding objective of the filtering system, which nonetheless do not appear to have been added to any list of offences referred to within (6D).

**Examples:**

(1) The offences created by sections 20 and 21 of the Criminal Justice and Courts Act 2015, which concern wilful neglect by a either a care worker or a care provider.

(2) The offence created by section 26 of the Criminal Justice and Courts Act 2015, concerning improper behaviour by a police constable with the purpose of either obtaining a benefit, or causing a detriment to another.

(3) The offence under section 3ZA of the Computer Misuse Act 1990 (added by section 41 of the Serious Crime Act 2015) concerning unauthorised acts causing or creating risk of serious damage. The offence specifically includes within the definition of "serious damage" damage to human welfare, including a risk of death.

(4) Section 76 of the Serious Crime Act 2015 concerning controlling or coercive behaviour in an intimate relationship is not included on any of the lists of offences referred to in section 113A(6D).

- 3.151 There may also be omissions relevant to other purposes of the exempted questions: for example bribery offences under the Bribery Act 2010.<sup>52</sup> One stakeholder (within the legal sector) expressed surprise that the offences of bribery and fraud by abuse of position were not on the list of non-filterable offences given the importance of integrity to the legal profession and that inquiring as to a person's suitability for entering the legal profession is one circumstance where an exempted question can be asked.
- 3.152 Additionally, there may be offences that were not included because they are only relevant to the purposes of the non-filterable list in certain circumstances, and this was not immediately apparent from the nature of the offence. This may be because the offence's relevance is not immediately apparent without considering the particular circumstances in which it may be prosecuted.

**Examples:**

(1) Misconduct in public office is a wide common law offence that is often used, on the one hand, to prosecute public office holders who neglect vulnerable people and cause them harm (such as those in police custody), and on the other, to prosecute public office holders who abuse their position to gain a personal advantage (usually of either a financial or a sexual nature).

(2) An offence of fraud committed by way of abuse of position, contrary to section 4 of the Fraud Act 2006, might be directly relevant to the purpose of safeguarding only where it is committed in relation to a victim with a physical or mental disability.

At present neither of the two offences above is included on the list of non-filterable offences, even when committed in relation to children and/or vulnerable adults.

- 3.153 There are also some offences which, although not included on any of the lists referred to in section 113A(6D), are so similar to existing offences on one of those lists that their omission may well have been an oversight.

**Example:** The offence of failing to protect a girl from the risk of genital mutilation under section 3A Female Genital Mutilation Act 2003. Sections 1 (offence of female genital mutilation), 2 (offence of assisting a girl to mutilate her own genitalia) and 3 (offence of

<sup>52</sup> This is particularly likely to be the case if one accepts the view that some of the lists referred to must be interpreted as those lists stood in 2013 and do not reflect later amendments: para 3.17 and following, above.

assisting a non-UK person to mutilate overseas a girl's genitalia) are already included on the list.<sup>53</sup>

- 3.154 One stakeholder we spoke to (within the health care sector) expressed the view that relevant offences may not be disclosed if they were not listed on the list of non-filterable offences but nevertheless may be relevant to purposes of safeguarding. One example might be an offence committed with the context of domestic violence but not involving any bodily injury or threats to cause harm, for example criminal damage.
- 3.155 We are also aware of ongoing concern within both the police and the prison service that "civilian" staff (including in the prison service educators, catering and maintenance staff) and volunteers are at risk of being recruited when they are in fact unsuited to working in a police or prison environment. This is because the current criminal records disclosure system may provide insufficient information in respect of an individual's background. However, for the most part these concerns relate to the quality of "soft intelligence" provided as part of an enhanced criminal record certificate, consideration of which is outside of the scope of this project.
- 3.156 There are also offences included within the operation of section 113A(6D) that would seem irrelevant to the stated purposes of the filtering regime. These may be included for historical reasons connected with the legislation referred to.

**Example:** The offence of obstructing an officer dealing with a wreck under section 23 of the Offences Against the Person Act 1861.<sup>54</sup>

- 3.157 Finally, there may also be offences included on the list without any qualification that nevertheless would not, in some circumstances, be relevant to its purposes.

**Example:** Assault occasioning actual bodily harm is included within section 113A(6D)(e) and is a broad based offence that can encompass a wide range of circumstances and a range of bodily injury: from minor grazes and bruises to injuries just falling short of grievous bodily harm. On the one hand it could include an assault on a vulnerable adult requiring hospital treatment. On the other it could include a very minor injury inflicted by an individual who felt threatened by the behaviour of the injured party but whose reaction to

<sup>53</sup> Added by s 72(2) of the Serious Crime Act 2015.

<sup>54</sup> This is an offence that our recent report on *Reforming offences against the person* (2015) Law Com 361 demonstrated has, in any event, fallen into disuse (see para 1.14 of that report). We recommended in that report that the offence should be abolished.

that perceived threat was beyond the permitted bounds of self-defence.

- 3.158 Stakeholders (including individual police officers working within police force criminal record disclosure units, recruiters of and regulatory bodies for health care professionals, Unlock and Nacro) have shared a number of concerns with us in respect of the types of offence contained on the current list of non-filterable offences. The vast majority of concerns were voiced in respect of perceived over-inclusivity within the list.
- 3.159 Some police stakeholders specifically cited “unfairness” in terms of disclosure of all instances of broad-based offences such as assault occasioning actual bodily harm, without consideration being given to the facts of individual cases, as a problem with the list of non-filterable offences.

### **CONCLUSION**

- 3.160 After three years of operation the non-filterable list of offences appears, in many respects, to be incapable of meeting the objectives for which it was created: to balance the right of an offender to rehabilitation on one hand against the need to ensure that information relevant to an assessment of an individual’s suitability to hold a particular employment or role.
- 3.161 At present it is difficult to assess whether the offences included on the non-filterable list meet the purposes of the exempted questions. It could be argued that until there are clear principles against which offences being considered for inclusion on the list can be assessed, then there will be a continued risk that the list will fall short of meeting such purposes.
- 3.162 As we explain in Chapter 4, although our original terms of reference included the opportunity for us to recommend principles to be adopted and applied when revising the non-filterable list, other limitations imposed upon this review render this impossible.

# CHAPTER 4

## POSSIBLE REFORMS TO ADDRESS THE TECHNICAL PROBLEMS WITH THE LIST OF NON-FILTERABLE OFFENCES

### INTRODUCTION

- 4.1 As explained in previous chapters, section 113A(6D) of the Police Act 1997 (“PA 1997”) defines the offences which are excluded from the operation of the filtering regime. In other words, it defines the offences for which a conviction remains disclosable indefinitely. However, much of this definition is in the form of broad categories rather than an itemised list.
- 4.2 In practice, when issuing criminal records certificates, the Disclosure and Barring Service (“DBS”) uses an itemised list (“the operational list”) compiled by the Home Office. This does not always appear to correspond to the statutory definition, which, in some parts of section 113A(6d), is particularly unclear.<sup>1</sup> There are also, in practice, other problems with using the operational list.
- 4.3 We consider that the risks of potential over or under disclosure of criminal record information arising from the current legislation and the use of the operational list are significant. In this chapter we set out some possible ways in which reform of the non-filterable list can be achieved within the confines of the current project. Possible wider reform of the system of criminal records disclosure is considered in Chapter 5.
- 4.4 Our approach to reforming the filtering regime consisted of the following stages:
- (1) First, producing an itemised list of offences which as accurately as possible reflects the current law (“the itemised list”)<sup>2</sup> and distinguishing those offences that are definitely non-filterable from any offences where there is some doubt as to whether they are covered by the definitions.
  - (2) Then, identifying discrepancies between the itemised list and the operational list now in use, in order to identify instances where:
    - (a) the operational list may be under-inclusive: offences that are not on the operational list but fall within the legislative definition; and
    - (b) the operational list may be over-inclusive: offences that are on the operational list but do not fall within the legislative definition.

<sup>1</sup> In this chapter “the operational list” means the list produced by the Home Office and now used by DBS, which we compare to “the itemised list” at stage (2).

<sup>2</sup> In this chapter “the itemised list” means the itemised list of non-filterable offences produced by us, at stage (1), containing all offences which we consider to be non-filterable in current law, but without further changes.

- (3) Finally, considering the possibility of producing a *revised* list of offences which should be non-filterable.<sup>3</sup>
- 4.5 The purposes of some of these stages overlap, as the results of the first two stages may feed into the third. For example, in considering how a future revised list might be compiled at stage (3), one approach could be to examine whether further offences should be included in the revised list. These might include, amongst other possibilities:
  - (1) Offences doubtfully within the statutory definition (identified at stage (1)).
  - (2) Offences which are not within the definition but which have been included in the operational list (identified at stage (2)).
- 4.6 We set out the results of the first two stages in Appendix A, which takes the form of a fully searchable Excel workbook listing offences on several sheets.
  - (1) The first eight sheets set out a colour coded key and the accompanying itemised list of offences which we believe to be non-filterable as a matter of current law, highlighting some examples we believe to be doubtful.
  - (2) The ninth sheet sets out discrepancies between the itemised list in sheets two to eight and the operational list now in use.
- 4.7 The order of topics discussed in this chapter is as follows:
  - (1) Stage (1): producing an itemised list reflecting the current law.
  - (2) Stage (2): discrepancies between the itemised list and the operational list.
  - (3) Stage (3): the possibility of producing a revised list.
  - (4) How a revised list of offences could be implemented in statute.
  - (5) How such a list could be kept up to date in the future.
  - (6) The risks associated with our recommended approach, including:
    - (a) continuing problems with PNC offence codes;
    - (b) the risk of problems to do with statutory powers, in particular the rule against sub-delegation; and
    - (c) the risk of future legal challenge on the ground of the proportionality of disclosure to the purpose for which it is required.

<sup>3</sup> In this chapter “revised list” means any list produced following the conclusion of stage (3), so as to include those offences which are not at present included but should be and exclude those offences which are at present included but should not be.



## **STAGE (1): PRODUCING AN ITEMISED LIST**

- 4.8 The starting point for a review of the filtering system was to ascertain precisely what the list of non-filterable offences within section 113A(6D) actually contains. We therefore set out to compile a complete and accurate, itemised list of the offences defined as non-filterable under section 113A(6D), as far as this proved to be possible. This work is contained in Appendix A.
- 4.9 Only by doing this have we been able properly to assess the extent of any problems caused by the way that the legislation is drafted. Our work in Appendix A was also essential in order for us to be able to understand what, if any, problems arise in operating the non-filterable list for the purposes of issuing individual criminal record certificates. These problems were discussed in full in Chapter 3.
- 4.10 The itemised list of non-filterable offences that we have compiled is drawn solely from the provisions of section 113A(6D), which we will title “the statutory list” for ease of reference. The itemised list is not an altered version of the operational list used by DBS.
- 4.11 The itemised list does not name every single offence that is excluded from filtering. For reasons explained further below, it is unnecessary to attempt to list all inchoate and secondary liability offences relating to substantive offences in (a) to (k) or, equally, to list all military offences that correspond with a civilian offence listed in those paragraphs. It is also unrealistic to attempt to list all offences under a jurisdiction other than England and Wales corresponding to those listed.<sup>4</sup>
- 4.12 There are 2194 entries on the itemised list of non-filterable offences. We calculate that the majority of these entries are duplicated and that, in fact, there are only 946 individual offences on the list.
- 4.13 In general the itemised list contains only offences which we consider are certainly excluded from filtering. Some doubtful cases, discussed below, have been included in the list but colour coded to show the existence of the doubt.
- 4.14 In comparison to our itemised list of 2194 entries, the operational list contains 4686 entries. However, this includes a number of offences under a jurisdiction other than England and Wales that seem to have been added because they correspond with an offence in England and Wales (included in the list by virtue of section 113A(6D)(m)). An example would be section 4 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) (Northern Ireland) Act 2015 – committing an offence with intent to commit a human trafficking offence.
- 4.15 The existence of corresponding offences under a jurisdiction other than England and Wales does not however offer a complete explanation for the disparity between the number of offences on the operational list and on our itemised list.

<sup>4</sup> Para 4.38 and following, below.

### **The format of the itemised list**

4.16 Within Appendix A the worksheets containing the itemised list are labelled as follows (the labels are limited by the number of characters that the software permits):

- (1) Key to workbook – this contains a table setting out the number of both individual offences and duplicate entries found in each of the categories of offence referred to by the statutory list in section 113A(6D). It also contains a table explaining how we have highlighted, by colour, areas of duplication and doubt within the itemised list.
- (2) “Named offences” – offences referred to by name in section 113A(6D) paragraphs (a), (b), (c), (f), (g) and (h) (in part). Where offences appear on the list by virtue of more than one paragraph of section 113A(6D) this is highlighted.
- (3) “Offences in other primary leg” – offences listed in schedules to primary legislation, as referred to by section 113A(6D) paragraphs (e) and (h) (in part). Where offences appear on the list by virtue of more than one paragraph this is highlighted.
- (4) “Offences in other secondary leg” – offences listed in schedules to secondary legislation, as referred to in section 113A(6D) paragraphs (d), (i), (h) (in part) and (j). Where listed offences may potentially offend the principle against sub-delegation,<sup>5</sup> these have been highlighted. Where offences appear on the list by virtue of more than one paragraph this is also highlighted.
- (5) “Superseded offences” – offences referred to by section 113A(6D) paragraph (k). Where it is unclear whether particular offences do in fact supersede others these have been highlighted. Where offences appear on the list by virtue of more than one paragraph this is also highlighted.
- (6) “Inchoate and secondary offences” – offences of attempt, conspiracy, aiding and abetting, incitement and assisting and encouraging in relation to other listed offences, as referred to in section 113A(6D) paragraph (l).
- (7) “Overseas offences” – offences in other countries corresponding to other listed offences, as referred to in section 113A(6D) paragraph (m).
- (8) “Military offences” – offences under service law corresponding to other listed offences, as referred to in section 113A(6D) paragraphs (n) and (o).

### **Our approach to identifying offences for the itemised list**

4.17 In this section we consider in order the seven groups of offences set out above and explain our approach to listing the offences in each group.

<sup>5</sup> See para 3.16, and para 4.27 below.

### ***Sheet (2): Offences specified by name***

- 4.18 The identification of offences in this group was straightforward. The relevant paragraphs of section 113A(6D) have not been amended since that subsection came into force at the beginning of 2014. Our itemised list includes these offences in the same way as those paragraphs currently do. If those paragraphs are amended in the future then the offences within them would need to be read in the amended form and our itemised list will need to be amended to reflect this. Likewise for the purposes of issuing criminal records certificates, the list should be taken as it stands at the time that the certificate is applied for. This is because the system of disclosure and filtering is a matter of procedure: the accepted legal interpretation is that provisions about procedure should be read as at the time the procedure takes place.
- 4.19 There are some overlaps between this group and the other groups in the list. For example, murder is specified by name in paragraph (a) but also figures in the list of serious offences in schedule 15 to the Criminal Justice Act 2003, as referred to in paragraph (e).<sup>6</sup> This however is relevant to our work in listing the offences in paragraph (e), rather than in listing offences in this group: the duplication of the offence in paragraph (e) is highlighted on sheet 3.

### ***Sheet (3): Offences listed in other primary legislation***

- 4.20 It was possible to convert these provisions into an itemised list of offences by simply transcribing the lists in the legislation referred to, namely:
- (1) schedule 15 to the Criminal Justice Act 2003 (as amended to date), referred to in section 113A(6D) paragraph (e); and
  - (2) Part 1 of the Health and Social Care Act 2008, the Registered Homes Act 1984 and Part 2 of the Care Standards Act 2000, all referred to by the legislation specified in section 113A(6D) paragraph (h).
- 4.21 There are considerable overlaps between these lists and offences in the other groups. We have already mentioned the example of murder, which belongs in the named offences category as well as being listed in schedule 15 to the Criminal Justice Act 2003. There are further overlaps between this list and those lists contained in secondary legislation: for example, almost all of the offences under the Sexual Offences Act 2003 are listed both in schedule 15 to the Criminal Justice Act 2003 and in the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, referred to in paragraph (i). Duplication is highlighted where it occurs.
- 4.22 Schedule 15, and the other statutory provisions referred to, may change over time. As explained above the system of disclosure and filtering is a matter of procedure, so we have compiled our itemised list in such a way as to reflect those Acts as they stood at the time when the list was compiled.<sup>7</sup> For the purposes of compiling an itemised list for use in future legislation, or interpreting it

<sup>6</sup> See para 3.81.

<sup>7</sup> *Re Athlumney* [1898] 2 QB 547 at p 551-2; *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816; F Bennion, *Statutory Interpretation* (6th ed 2013) s 98, p 296.

at the time of a proposed disclosure, the list should be taken as it stands immediately before the future legislation is introduced or at the time of that disclosure.

- 4.23 This will have the effect that, if a new list comes into force, itemising each individual non-filterable offence (as discussed further below), the number of offences will remain fixed unless the list is amended. It will no longer automatically include, for example, all offences in schedule 15 to the Criminal Justice Act 2003 if that Act changes in the future.

**Sheet (4): Offences referred to in secondary legislation**

- 4.24 The offences in this group are those listed in:

- (1) the schedule to the Disqualification from Caring for Children (England) Regulations 2002 (referred to in paragraph (d) of section 113A(6D));
- (2) regulations made under various Acts named in subsections (3)(b) and (c) of the Health and Social Care Act 2008 (referred to in paragraph (h));
- (3) the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (referred to in paragraph (i)); and
- (4) schedules 2 and 3 to the Childcare (Disqualification) Regulations 2009 (referred to in paragraph (j)).

- 4.25 These lists of offences are much longer than those previously considered. Once more there are overlaps, which we highlight:

- (1) an offence may both be listed in one of these schedules and be referred to in one of the other paragraphs of section 113A(6D);
- (2) an offence may be listed in more than one of these schedules; and
- (3) even within the same schedule, the same offence may appear more than once, as the schedule may contain different lists existing for different purposes.

- 4.26 One example of this is the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009. This consists of four lists:

- (1) offences requiring a person to be placed on the barred list for working with children, without the right to make representations;
- (2) offences requiring a person to be placed on the barred list for working with children, subject to the right to make representations;
- (3) offences requiring a person to be placed on the barred list for working with vulnerable adults, without the right to make representations; and
- (4) offences requiring a person to be placed on the barred list for working with vulnerable adults, subject to the right to make representations.

Some offences, such as rape, are included in more than one of these lists. Also, some offences on the lists relating to children are only included when on the facts of the offence it is apparent that they were committed in relation to children; whereas the same offence may be listed in other parts of the schedule, or in other statutory lists referred to in section 113A(6D), whether committed against children or not.

4.27 There are two important differences between this group of offences derived from secondary legislation and the previous one, of offences listed in primary legislation.

- (1) As explained in Chapter 3,<sup>8</sup> there is an argument that references to secondary legislation do not automatically update, as references to primary legislation would. If this is correct any offences added to the lists of offences within regulations referred to in section 113A(6D) after 29 May 2013 should not appear on the itemised list.<sup>9</sup> This problem is a possible result of the rule against sub-delegation.

In the itemised list we have accordingly highlighted any offences listed in secondary legislation introduced after 29 May 2013 as doubtfully included within the non-filterable list of offences.

- (2) A number of the offences listed in this group are listed in the context of a specific UK jurisdiction outside England and Wales (usually under jurisdiction specific headings). Where such offences fall within paragraphs (d), (i) and (j) we have listed them in full in the worksheet.

As discussed in Chapter 3 however, the way in which these offences are listed may generate uncertainty about whether, where those offences are also offences under the law of England and Wales, they should be included on the itemised list when they are committed in England and Wales or only when they are committed in the specific jurisdiction referred to. Where offences arise and it is doubtful as to whether they are non-filterable, these are highlighted.

#### ***Sheet (5): Superseded offences***

4.28 Section 113A(6D)(k) refers to “any offence which has been superseded (directly or indirectly) by an offence within paragraphs (a) to (j)”. When populating the itemised list, four issues arose in respect of paragraph (k).

#### THE DEFINITION OF SUPERSEDED

4.29 We have discussed in Chapter 3 the meaning of “superseded” as a matter of statutory interpretation.<sup>10</sup> Our conclusions were, briefly, that:

<sup>8</sup> See para 3.16 and following.

<sup>9</sup> Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013 No 1200).

<sup>10</sup> See para 3.51 and following.

- (1) supersede means no more than “abolish and replace”, and does not have a wider meaning so as to include any newer offence covering some of the same ground as an older one; and
- (2) in considering whether one offence supersedes another, the question should be asked in relation to the whole named offence, and not in relation to the facts in the particular case: the test is “what supersedes the offence then called X (of which D was convicted)”, not “what would D be convicted of if the same behaviour occurred today”.

We applied this narrow interpretation of superseded in compiling our itemised list of non-filterable offences.

- 4.30 One difficulty encountered in interpreting and applying paragraph (k) is that the attempt to produce a comprehensive list of superseded offences requires the legislation to be used for a purpose for which it is not fitted. Section 113A(6D) reads like a test to be applied in each particular case as it arises, rather than a means of generating an itemised checklist in advance.<sup>11</sup> The question raised by paragraph (k) is therefore “which if any new offence supersedes old offence X (of which D was convicted)”, rather than “what old offences does new offence Y supersede”.

#### CHANGES IN THE BOUNDARIES OF OFFENCES

- 4.31 Another difficulty, discussed in Chapter 3, is that the replacement of old offences is often not one to one. Several narrower offences may be replaced by one broader one, or one broader one by several narrower ones, or several old offences by several new ones that divide the ground differently.
- 4.32 For the purpose of compiling an itemised list, we deliberately took a conservative view. We treated a new offence as superseding an old offence only if either:
- (1) the replacement is one to one and the new offence is substantially similar to the old, albeit with some changes of coverage. A strong indication is if it has the same name: for example public order offences of riot and affray under the Public Order Act 1986 replaced the common law offences of the same name. However, this is not essential: another indicator is where the conduct covered is substantially, even if not precisely, the same. For example, theft under the Theft Act 1968 replaced larceny under the previous law; or
  - (2) the old offence is one of several offences replaced by one comprehensive offence and is wholly covered by it (for example arson under section 1(3) of the Criminal Damage Act 1971 replaces multiple offences of causing damage by fire under the Malicious Damage Act 1861).
- 4.33 Where a broad offence is replaced by a narrower offence, which excludes certain forms of conduct that would have been prosecuted under the older offences, we consider it may be doubtful whether the older offence should be described as superseded by the more recent one. If we were to go so far as to exclude broader

<sup>11</sup> See paras 3.8 to 3.10.

offences that were abolished and replaced by narrower ones from the list, this could have the result of certain offences currently listed on the operational list “dropping off” that list. Some of these may deserve to be included in any list of non-filterable offences, but it may not be appropriate to deem them included on the basis of an overly broad interpretation of “superseded” rather than any more principled rationale.

- 4.34 These examples occur rarely, but where they do we have highlighted them on the worksheet relating to superseded offences. For example, the offence of housebreaking with intent under section 27 of the Larceny Act 1916, committed when an offender enters a building as a trespasser with intent to commit any felony, was replaced under section 9 of the Theft Act 1968 with a more specific offence of burglary with intent to steal, commit grievous bodily harm, rape (at that time), or cause unlawful damage.
- 4.35 Where one broad offence is replaced by several narrower ones, we consider that it should not be treated as “superseded” by any of them, though there would be an argument for doing so if *all* the new offences fell within paragraphs (a) to (j).<sup>12</sup> We have found no clear examples of this type of problem arising.

#### OBSOLETE OFFENCES

- 4.36 We discussed in Chapter 3 the fact that the current operational list includes a large number of obsolete offences, which may have been added because it was considered that they might have been superseded by a listed offence. Where it is obvious that the age of particular superseded offences is such that there would be no longer any prospect of an individual’s criminal record containing them (for example, common law arson, superseded by offences in the Malicious Damage Act 1861), we have not added them to the itemised list. As a general rule we have not included any offence on the itemised list that was repealed and replaced more than 100 years ago.

#### OFFENCES IN UK JURISDICTIONS BEYOND ENGLAND AND WALES

- 4.37 We also noted previously that the current list contains a number of offences that are specific to UK jurisdictions other than England and Wales. In relation to these, paragraph (k) would currently operate to include within the non-filterable list any historic offences superseded by these. However, for a number of reasons we have taken the decision not to itemise historic offences that can only be committed outside England and Wales:

- (1) As the Law Commission for England and Wales we may not be best equipped to carry out extensive legal research into historic offences in other jurisdictions.
- (2) Our research of historic offences within the jurisdiction of England and Wales that have been superseded by those on the non-filterable list has demonstrated to us that the resources available to undertake this task in

<sup>12</sup> Paragraph (k) speaks of an offence which has been superseded by “an” offence within the preceding paragraphs; but by the Interpretation Act 1978, s 6(c) words in the singular include the plural.

relation to other jurisdictions are unlikely to be sufficient to achieve a reliable result.

- (3) The operation of a provision equivalent to paragraph 113A(6D)(m) – see below - would, in any event, operate to include within any revised list all historic offences from other jurisdictions that correspond with a historic offence in England and Wales included on the list.

***Sheets (6), (7) and (8): Inchoate offences, offences under a jurisdiction other than England and Wales and military offences***

4.38 We do not consider it necessary to include itemised lists of:

- (1) attempts, conspiracies and other inchoate offences relating to other offences on the list (current paragraph (l));
- (2) offences under a jurisdiction other than England and Wales corresponding to other offences on the list (current paragraph (m)); or
- (3) service offences corresponding to other offences on the list (current paragraphs (n) and (o)).

INCHOATE OFFENCES

4.39 The number of inchoate offences relating to offences on the list is finite but need not be set out in full as these can be ascertained by reference to the substantive offences already listed. If an offence was created in an inchoate form (for example, aiding or abetting suicide under section 13(1) of the Criminal Justice (Northern Ireland) Act 1966) and appears on the statutory list then it has been added to the itemised list under the relevant paragraph where it appears. Offences of this type are very few in number.

CORRESPONDING OFFENCES

4.40 As with “superseded”, we interpreted “corresponding” narrowly, as meaning that one offence in substance represents the other, and that a mere overlap is not sufficient. There are two categories of “corresponding” offences on the statutory list of non-filterable offences.

*Offences under a jurisdiction other than England and Wales*

4.41 The number of offences under a jurisdiction other than England and Wales that could “correspond” with English and Welsh offences on the list, referred to in section 113A(6D)(m), is too large, and too subject to future change, to allow a comprehensive listing. However, where offences under a jurisdiction other than England and Wales, in particular offences under the law of Scotland, Northern Ireland, the Channel Islands and the Isle of Man, are specifically referred to in other paragraphs of that subsection we have included them in the section of the list relating to that paragraph.

4.42 The existing system, in which ACRO decides on the nearest equivalent English and Welsh offence when notification of a conviction under a jurisdiction other than England and Wales is received, is probably the best that can be hoped for in practice.



### *Military offences*

- 4.43 This last category should give rise to no uncertainties: once the offence of wounding (for example) is on the list, it necessarily follows that the corresponding military offence of wounding is covered.

### **Other areas of doubt arising within the itemised list**

- 4.44 We have noted above the areas of doubt that occur within a particular group of offences as they appear on the itemised list. There are two further areas of doubt that arise, which are common across worksheets (2) to (8).

### ***Offences in specific circumstances***

- 4.45 As explained in Chapter 3, some offences are only to be classified as non-filterable where they occur in specific circumstances. Where offences of this nature appear in the itemised list they are highlighted on the relevant worksheet.

### ***Provisions that do not create an offence***

- 4.46 Some provisions referred to within section 113A(6D) do not create an offence and therefore do not have the effect of including a particular offence within the list. Some provisions, for example, refer to penalties to be imposed for offences committed contrary to other sections of the same Act. Offences of this type are also highlighted on the itemised list.

## **STAGE (2): COMPARISON OF THE ITEMISED LIST WITH THE OPERATIONAL LIST**

- 4.47 Once the itemised list was completed (subject to the points made above in respect of corresponding offences) we were able to compare its content to that of the current operational list and identify differences between them. The main practical effect on the current disclosure system of using the itemised list instead of the operational list would be that:

- (1) Offences on the itemised list would be disclosable as non-filterable offences, even if they are not currently on the operational list and not therefore disclosed by DBS.
- (2) Offences not on the itemised list would not be disclosed as non-filterable offences, even if they are currently on the operational list and are therefore disclosed by DBS.

- 4.48 We have collated offences that would fall into either of these categories and highlighted them on worksheet 8, entitled “discrepancies”, in the workbook in Appendix A. This contains two lists of offences, which either:

- (1) appear on the itemised list but not on the operational list; or
- (2) appear on the operational list but not on the itemised list.

***Offences that are included in the itemised list but not the operational list***

4.49 In Chapter 3 we considered a number of examples of offences that fall within this category<sup>13</sup> and also, within the discussions of the problems inherent in both the statutory and operational lists, considered why these offences may not have been added to the operational list. The possible reasons for this include:

- (1) the possibility that the operational list is not updated on a regular or systematic basis; and
- (2) the fact that the offence in question does not have its own PNC code.

***Offences that are not included in the itemised list but are on the operational list***

4.50 Similarly, in Chapter 3 we discussed a number of examples of this type.<sup>14</sup> These differences between the lists could arise for one of a number of reasons:

- (1) The operational list fails to accurately reflect specific content of some provisions of section 113A(6D).
- (2) The use of a much wider interpretation of 'superseded' in section 113A(6D)(k) than that discussed in Chapter 3.
- (3) The addition of offences to the operational list that might appear to serve a purpose of the non-filterable list, such as safeguarding, but in fact there is no legal basis for their inclusion.
- (4) The addition of offences to the operational list where there is both no legal basis for their inclusion and although the offences may, at first sight, appear to be relevant to one of the purposes of the non-filterable list, they are in fact not, because of the way in which they apply.
- (5) The fact that offences referred to in section 113A(6D) were abolished before section 113A(6D) was drafted.
- (6) The fact that offences have been removed from the list in section 113A(6D).

**STAGE (3): REVISING THE LIST**

4.51 This chapter has focused on:

- (1) ways of identifying and listing those offences which are certainly covered by section 113A(6D) in its current form, and those which are doubtfully so covered; and
- (2) discrepancies between the statutory definition and the operational list.

<sup>13</sup> See para 3.134.

<sup>14</sup> See, for example, para 3.108 and following.

- 4.52 The remaining concern would be to improve the list by adding offences which are not currently covered but should be, as well as by removing any offences that clearly should not be included.

#### **Possible methods of revising the list**

- 4.53 The ideal would be to create a list afresh, by identifying a coherent set of principles by which offences should be chosen for inclusion. These principles could, for example, include:

- (1) Relevance of subject matter to the purpose for which the exempted question is asked or the certificate is required; for example, whether the conduct involved in an offence poses a threat to the safety of children or vulnerable adults.
- (2) Gravity of the offence.
- (3) How far the fact of the offence is relevant in predicting future behaviour.

- 4.54 Our original terms of reference included the development of such principles within the scope of this targeted review. However, on further consideration our view is that this approach would require us to consider wide-ranging reforms to the structure of the system, for example dividing the list in such a way that different offences would be disclosed in response to different exempted questions or the different purposes of the non-filterable list of offences. Reforms of this kind would need a far more extensive review, which would be outside the limit this project and we therefore consider these issues in Chapter 5.

- 4.55 A second, far more modest approach could involve assessing only the most obvious cases as candidates for addition to or removal from the current list of non-filterable offences. These could include:

- (1) offences where there is doubt as to whether they are non-filterable in current law (highlighted in worksheets 2 to 8 in Appendix A);
- (2) offences which are on the operational list but not on the itemised list (worksheet 9); and
- (3) offences which are on the itemised list but not the operational list (worksheet 9).

Examples of each of these types of offence were provided in Chapter 3.

- 4.56 A third approach would be to give prominence to the purpose of safeguarding when selecting offences for the non-filterable list. Essentially, the criterion for adding a new offence to the list would be its relevance to one or more of the exempted questions identified in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (“the 1975 Order”). Within these, the highest priority could be given to offences concerned with the safeguarding of children and vulnerable adults from physical harm and sexual violation. The consideration of offences that might be relevant to other purposes of the exempted questions could then be a matter to be examined as part of a wider review of the regime as discussed in Chapter 5.

- 4.57 Under the third option, the question to be asked in each case would be whether by its nature the conduct covered by an offence is such as to raise safeguarding or other relevant concerns. There may also be an argument that it is not sufficient that some instances of the offence might raise such concerns on their facts unless the offence can be included in the non-filterable list in a relevant, specified form (for example, where the offence is committed in relation to a child or vulnerable adult).
- 4.58 Under this approach, in addition to the obvious candidates referred to above, inclusion of the following types of offences could also be considered for addition to the list. These are all types of offences which are on neither the operational list nor the itemised list.
- (1) Recently introduced offences with possible relevance to the safeguarding of children and vulnerable adults;
  - (2) Offences that do not, on the face of it, appear to meet the purposes of one of the lists of offences referred to within section 113A(6D) but have possible relevance to the safeguarding of children and vulnerable adults (albeit that they may only need to appear on the list in a specified form related to those groups); and
  - (3) Offences closely related to an offence already on the list concerned with safeguarding.
- 4.59 Conversely, offences to be considered for removal from the list could include:
- (1) offences which currently appear on both lists in their entirety but which may only justify inclusion on the list in a specific form; and
  - (2) offences with no obvious relevance to the safeguarding of children and vulnerable adults.

Again, examples of each of the types of offence referred to above were provided in Chapter 3.

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

- 4.60 The above paragraphs are not intended to set out rules for whether an offence should or should not be included in a revised list, but only serve as a way of identifying examples for consideration. Effectively, we are just describing possible ways of creating a revised list and not adopting any particular approach to list creation. In each case, it will be necessary to consider afresh whether the offences in question fall within the purposes of the list or not.
- 4.61 The primary criterion for adding a new offence to the list should be relevance to one or more of the exempted questions identified in the 1975 Order. The scope of this narrow project does not allow us to make any further recommendations as to the adoption of principles by which offences should be chosen for inclusion on the non-filterable list.

- 4.62 We would however have significant concerns about introducing new statutory instruments to give effect to a revised list based on either the second or third approaches described above. In our view this is not likely to produce the best solution to wider problems with the disclosure regime as a whole and we would not therefore recommend that either of the second or third approaches be adopted in order to create a revised list of non-filterable offences.
- 4.63 There are broader questions of policy about the optimal solution for improving the system of criminal records disclosure and 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.

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

- 4.64 At present the list is set out in full in both section 113A(6D) of the Police Act 1997 and article 2A(5) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. We think it desirable that it should be set out in one instrument rather than two.
- 4.65 The list was created to serve two functions: to decide what offences should be disclosed in answer to an exempted question, and to decide what offences should be included in a criminal record certificate. However, the second function is in a sense a specialised application of the first: providing a criminal record certificate is one way of answering exempted questions. If there is to be a single list, its logical home is in the legislation concerning rehabilitation of offenders and exempted questions, rather than in that concerning criminal record certificates.
- 4.66 The definition of “relevant matter” in the Police Act 1997 could be amended to refer to that list. Rather than referring to the specific instrument in which the list is set out, the reference could be a generic one, along the lines of ““relevant matter” means (a) every conviction or caution other than one which, under section 4 of the Rehabilitation of Offenders Act 1974 and any order made thereunder, need not be disclosed in answer to an exempted question; (b) ...”.
- 4.67 There is one difference between the offences that need to be disclosed in answer to an exempted question and those that appear on a criminal record certificate, namely that the latter are confined to those recorded in central records.<sup>15</sup> This however is not a legal obstacle to the scheme proposed. Section 113A(3) specifically provides that criminal record certificates should contain “every relevant matter relating to the applicant which is recorded in central records”.<sup>16</sup>

<sup>15</sup> It may be that ROA 1974 made no reference to “central records” as the PNC itself only came into being that same year.

<sup>16</sup> PA 1997, s 113A(3)(a).

The definition of “relevant matter” in section 113A(6) need not also be restricted to matters recorded in central records.

- 4.68 The only possible legal obstacle we see to the proposal that the non-filterable list only be set out in full in one Act is the problem of sub-delegation, as explained in Chapter 3.<sup>17</sup> The argument could be made that the rehabilitation of offenders and the issue of criminal record certificates are two different purposes, and that an authority making an order concerning certificates should not fetter his or her discretion by making it depend on the details of the rehabilitation scheme. Parliamentary Counsel has advised us that this is a valid concern, and that if the Police Act 1997 were amended in this way it might have to be interpreted as referring to the list in the new Order under the Rehabilitation of Offenders Act 1974 as it stood at the time of the amendment.
- 4.69 There is one possible counter-argument to this objection. The purpose of the 1975 Order is to allow relevant information about criminal behaviour to be disclosed to potential employers and others, notwithstanding the Rehabilitation of Offenders Act 1974. This is exactly the same as the purpose of the criminal record certificate. In substance, the system of disclosure and filtering is a single scheme, whether it applies in the context of exempted questions or of criminal record certificates. This is corroborated by the fact that section 113B specifically refers to “exempted questions”, meaning the questions set out in the 1975 Order.<sup>18</sup>
- 4.70 On balance we do not consider that unifying the lists as suggested would offend against the rule against sub-delegation. The purpose of doing so is the legitimate one of ensuring that criminal record certificates contain all convictions and cautions that would in fact have to be disclosed if an exempted question were asked. That does not amount to abdication of the responsibility to decide which convictions should be contained in a criminal record certificate. If, contrary to our opinion, the view is taken that it is not legally possible to unify the two lists as suggested, there is a strong further argument for a more radical review of the primary legislation.

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

#### **Listing offences individually**

- 4.71 To maximise the accessibility of the scheme the non-filterable offences should ideally be listed individually by name and section, without reference to lists in other legislation.
- 4.72 In particular, this has the advantage of avoiding the problem of sub-delegation, as concerns references to lists contained in regulations.<sup>19</sup> On one argument, the power to alter the definition of “relevant matters” by statutory instrument does not include a power to incorporate ambulatory (that is to say, continuously updated)

<sup>17</sup> See para 3.16 and following.

<sup>18</sup> Though as the definition of “exempted question” is contained in primary legislation the problem of sub-delegation does not arise here.

<sup>19</sup> See para 3.16 and following.

references to other regulations. As explained in Chapter 3, this problem potentially affects the references in paragraphs (d), (h) (in part), (i) and (j) of the existing definition.

- 4.73 An exception to itemising each and every non-filterable offence could be made when there is an intrinsic connection between the purposes of the criminal record system and that of the legislation referred to.<sup>20</sup> One example of this is the system of barring, which is also operated by the DBS.
- 4.74 As explained in Chapter 3, the Safeguarding Vulnerable Groups Act 2006 requires the DBS to maintain two lists; one list of individuals barred from working with children, and another list of individuals barred from working with vulnerable adults. These lists of “barrable offences” are contained in the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009.
- 4.75 It is clearly necessary that all offences requiring the offender to be entered on the barred lists should be indefinitely disclosable. Accordingly the non-filterable list should include all barrable offences and any processes for updating the lists of barrable offences must ensure that this continues to be the case.
- 4.76 There would therefore be an argument for retaining the reference in paragraph (i), to avoid the need for updating the list of non-filterable offences whenever a new offence is made barrable. However, we consider that this could still detract from the comprehensibility and accessibility of the list. There are also substantial overlaps between the list of barrable offences and the lists referred to in other paragraphs of the existing definition, in particular paragraphs (d) and (j). If the offences referred to in all the other paragraphs were set out in itemised form, but paragraph (i) was retained, these overlaps would continue. Indeed, an itemised list could have the advantage of removing all unnecessary duplication from the list.
- 4.77 This approach also has the advantage of avoiding the difficulties involving issues of jurisdiction discussed in Chapter 3. Specifically, there would no longer be a disparity between offences being included in the list by virtue of a regulatory reference to a specific Scottish, Northern Irish, Channel Islands or Isle of Man provision where the equivalent offence in England and Wales is not referred to and included. It would also remove the blanket inclusion of large groups of regulatory offences with no PNC codes: each offence would need to be considered separately to assess whether it merited inclusion on the list.

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

#### **“Superseded” offences**

- 4.78 For similar reasons, we suggest eliminating paragraph (k) (“an offence which has been superseded (directly or indirectly) by an offence within paragraphs (a) to (j)”) altogether and ensuring that all relevant abolished offences are included in the list by name.

<sup>20</sup> See para 3.19.

4.79 There is a tension between the need for accessibility and the need for ease of updating. If the present provision was replaced by an itemised list, with no equivalent of paragraph (k), then if at any time in the future it was decided to add another offence to the list (other than as a replacement for an existing offence in the list) it would be necessary to decide on each occasion whether:

- (1) to research all the precursors of that offence and specifically include them in the list, or
- (2) to be content that only convictions under the newly included offence will remain indefinitely disclosable.

4.80 We have done a considerable amount of work to ensure that the itemised list contains all offences superseded by offences referred to in paragraphs (a) to (j) of the current list. We consider that the need to decide about precursors of offences added to the list in the future is a small price to pay for the convenience of an accessible itemised list.

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

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

4.81 We consider that there is no need to itemise inchoate offences or service offences, and listing all relevant offences under a jurisdiction other than England and Wales would be an impossible task.<sup>21</sup> Any new legislation will therefore need to contain equivalents to paragraphs (l) to (o) of the existing section 113A(6D) of the Police Act 1997.

**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.

#### **Keeping a refreshed list up to date**

4.82 The question of “future proofing” the non-filter list also suffers from tensions between accessibility and flexibility. The choice is between a general provision describing the future offences to be included and a mechanism for adding future offences individually.

#### **General updating provisions**

4.83 In existing law, there is already limited provision for the updating of references to statutory provisions. Section 17(2) of the Interpretation Act 1978 provides that a statutory reference to any enactment shall be construed as extending to the replacement provision when the enactment referred to is repealed and re-enacted with or without modification. This is fairly narrow: repeal and re-enactment does not extend to all replacement provisions performing a similar function.

<sup>21</sup> We explain the reasons for this at para 4.38 and following, above.



- 4.84 Additionally, section 20 of the 1978 Act contains an interpretation provision in respect of “references to other enactments”. Under this section, a reference to an Act includes that Act in a later amended form.<sup>22</sup>
- 4.85 Section 113A(6D) in its existing form contains references to lists of offences in other legislation, both primary and secondary, and several offences are included in more than one of these lists. One effect of this is that, when a list in any of these underlying pieces of legislation is updated, the list of non-filterable offences automatically updates with it. As explained above, however, there is doubt whether this is so in the case of a list contained in secondary legislation.
- 4.86 There is also evidence that new offences, relevant to the purposes of the non-filterable list, including safeguarding, are not always added to one of the lists of offences referred to in section 113A(6D).
- 4.87 Also, because the lists in other legislation referred to are so numerous, it is also extremely difficult to ascertain all of the updates that should be taken into consideration at any one time. The effect of this is to leave, for example, any job applicant in a state of uncertainty as to whether a particular conviction or caution will be disclosed to a potential employer, either upon applying for a job or if the employer applies for an updated criminal record certificate. It also means that the operational list used by DBS is unlikely to be completely up to date unless it is reviewed on a very regular (for example, monthly) basis.
- 4.88 Furthermore, as shown above, the purposes of the various lists in the legislation referred to are often different from those of the filtering system. Automatic inclusion in the non-filterable list of all offences added to these other lists may therefore result in the inclusion of some offences with no relevance to the desired purposes of the list of non-filterable offences, while failing to include other offences that are relevant to these purposes. Relying on these other lists, as in the present system, is therefore an unreliable way of keeping the non-filterable list up to date.
- 4.89 Under our recommendations, all these references to other legislation would be replaced by an itemised list of offences, so this (somewhat uncertain) channel of updating would no longer be available.
- 4.90 Finally, it would be possible for new legislation to contain a provision similar to paragraph (k), but in reverse: instead of referring to offences superseded by a listed offence, it would refer to future offences superseding a listed offence. This however would create the same kind of uncertainty in the law as exists in the case of the current paragraph (k), and which the proposal for an itemised list was intended to avoid. Further, in the case of future offences created by secondary legislation there would be serious concerns about sub-delegation.

<sup>22</sup> There is still some ambiguity whether that means as amended up to the date of the referring Act or as amended from time to time: *Willows v Lewis* [1981] TR 439, (1981) 125 SJ 792.

### ***Adding offences individually***

- 4.91 An itemised list set out in legislation should in principle be updated by amending that legislation. Under the existing law, this is done by order requiring an affirmative resolution.<sup>23</sup>
- 4.92 It must be conceded that, compared with a general updating provision as discussed above, the process of continually adding to a list by way of secondary legislation will involve more work. It will be necessary continually to monitor the creation of new offences and apply clear criteria to decide which of them should be added to the non-filter list; principally, that of relevance to one or more exempted questions. In practice the relevant Government department could accumulate a list of offences it wishes to be added, and amend the list to include them at intervals of (for example) a year.<sup>24</sup>
- 4.93 Nevertheless, we believe on balance that this would be the best approach, as a general updating provision would generate the same kind of uncertainty as that which affects the existing list. The need for piecemeal updating may be regarded as a price worth paying for the greater certainty and accessibility of an itemised list.

**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**

#### **Continuing over-inclusivity**

- 4.94 In considering offences that might be added to a revised list, we suggest above that one question that could be asked is whether the conduct covered by an offence is such as to raise safeguarding or other relevant concerns by its nature.
- 4.95 However, there are many broad spectrum offences that encompass some conduct that is contrary to the purpose of safeguarding (or other interests reflected in the exempted questions), but which are not restricted to that conduct. In respect of these examples the question arises as to whether these offences should be included within a revised list, or whether that would make the list over-inclusive.
- 4.96 Some of these are not on the itemised list within Appendix A but are on the operational list. Examples include the offence of failing to apprehend an offender under section 4 of the Criminal Law Act 1967. This offence may be relevant to the purpose of safeguarding where the offender is question posed a particular danger to vulnerable adults and children, but would not be where, for example, he or she had committed theft from a shop.

<sup>23</sup> The power in the Police Act 1997, s 113A(7) to amend the definition of “relevant matter” requires the affirmative resolution procedure, as does the power in the Rehabilitation of Offenders Act 1974, s 4(3) to create exceptions to the operation of that Act.

<sup>24</sup> As no offence will be filtered in any event before the expiry of at least a two year period (in the case of an offender aged under 18 who receives a caution) then updating the list at least once every two years would ensure that there will be no failures to disclose new offences that should be non-filterable.

- 4.97 An example of a broad spectrum offence which is on neither list is the common law offence of misconduct in public office, which includes some types of conduct which are clearly relevant, but many which are not. The offence is sometimes charged as an alternative to non-consensual sexual offences, where that conduct is committed by a public office holder, as it may be easier to prove than a specific sexual offence. As we explain in *Issues Paper 1, Misconduct in Public Office: The Current Law*<sup>25</sup> the offence is most often used in relation to allegations that police and prison officers have abused their positions to exploit vulnerable people for their own sexual gratification. The offence is also used to prosecute cases of neglect that lead to death or serious harm, where the offence of gross negligence manslaughter would not be available and the accused person is a public office holder.
- 4.98 However, the offence is also used as an alternative to charges of false accounting and unauthorised disclosure of official secrets. None of these forms of the offence will necessarily raise any safeguarding concerns, although they may raise concerns about a person's suitability for positions that involve a high level of trust.
- 4.99 The difficulty lies in identifying which instances of those offences could legitimately be included within the revised list and which should not. The boundaries may be particularly difficult to draw with any certainty and it is questionable whether any distinctions drawn would be reflected in the operation of the disclosure system.
- 4.100 We have already seen, for example, that there are deficiencies with the current PNC system in respect of creating unique codes for specified forms of offences included within section 113A(6D), such as supplying drugs to a child. However, this is unlikely to be an insurmountable obstacle, as we have seen that specific versions of other offences, such as buggery, have been added to the PNC.
- 4.101 A more fundamental difficulty would present itself when attempting to define who was a 'vulnerable' adult within the context of the misconduct offence and deciding which individual victims should be identified as 'vulnerable adults' for the purposes of PNC categorisation. Misconduct in public office prosecutions often refer to individuals with temporary or situational vulnerabilities, such as those who have witnessed a crime, rather than those with inherent or permanent vulnerabilities, such as someone with a mental health disorder or a physical disability. It would of course be possible to limit the offence's inclusion on the revised list to only those instances where it was committed against a vulnerable person as defined by reference to independently verifiable factors. For example, that the victim was a child, as is the case with supply of drugs offences, or that he or she suffered from a recognised mental disorder or physical condition.
- 4.102 In the case of broad spectrum offences we consider that there is an argument that any safeguarding concern might, already, be adequately met by the rule that a conviction, even if not for a listed offence, remains indefinitely disclosable if it resulted in a custodial sentence or the offender has another conviction. Specifically, the most serious forms of misconduct in public office, which involve

<sup>25</sup> Law Commission *Issues Paper 1, Misconduct in public Office: The Current Law* 20 January 2016.

harm or a risk of harm to vulnerable people, will inevitably attract a custodial sentence and therefore not be filtered. This is also true for the most serious forms of misconduct in public office that might be relevant to purposes other than safeguarding. We discuss this issue further in Chapter 5.

#### **Mistaken inclusion or exclusion of offences**

- 4.103 Our approach would eradicate the need for separate legislative and operational lists of non-filterable offences. Any operational document used should be a direct copy of the legislative list of offences. In this way, there should be less concern about operational documents being updated to reflect changes in legislation.
- 4.104 Nevertheless, in any attempt to produce an itemised list of offences, there is the risk of mistakes, either in representing the existing law or in identifying offences that should be added. In particular, the use of an itemised list increases the risk that offences created in the future are not added to the list when they should be.

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

- 4.105 In Chapter 3 we described how the current system relies on the ACPO PNC codes to identify non-filterable offences. We are of the view that the use of the current PNC code system contributes significantly to the potential difficulties in operating the current system for disclosing criminal records. It may risk both unnecessary and inadequate disclosure being made. No revision of the non-filterable list could, in our view, be effective without some reform of the PNC code system.
- 4.106 We consider that there may be more than one solution to this problem. Some would require wider-ranging reform than others.
- (1) To create PNC codes for offences on the non-filterable list which do not already have them and to create specific PNC codes for recording offences that can only be included on the non-filter list in specific circumstances.

The aim of the second suggestion would be to ensure that PNC codes were allocated in such a way that matters critical to an offence being on or off the non-filter list have a discrete code: for example, for assault offences and drug offences when committed in relation to a child.

We are aware that this is possible, as we can see from the DBS list that there are in fact separate ACPO PNC codes for “common assault in relation to a child”. However, we have been informed that this was unlikely to have been a deliberate response to the filtering regime’s requirements: it was more probably a result of a particular police force’s recording practices.

We have additionally been informed by the Metropolitan Police (who have ownership of the PNC codes) that the Home Office can request a level of offence specificity to be reflected in any PNC code used for an offence in England and Wales, which is then implemented through the addition of a further two digits at the end of the code. Such a request is usually made for the purpose of gathering crime statistics (and is likely to

have been the reason why 143 PNC codes were created for supply of drug offences), but the making of a request is not confined to these purposes.

- (2) The solution in (1) plus the creation of a PNC qualifier in respect of military offences, similar to that used for recording under a jurisdiction other than England and Wales offences.
- (3) The solution in (1) plus reform of the PNC code system to remove obsolete and duplicate codes from the system and reinstate the original hierarchy of codes, which were intended to record offences in increasing levels of detail.
- (4) A complete overhaul and alignment of the ACPO PNC codes, CJS codes and PNLN codes, so that the criminal justice system records all instances of criminal offending using a single set of codes structured in a sufficiently detailed way to serve the purposes of the filtering system.<sup>26</sup>

We consider that a review of the PNC code system should be undertaken to assess which of these possible solutions can be realistically achieved.

- 4.107 The difficulty with all these solutions is that, while they may improve the recording of convictions in the future, old offences will either remain on the PNC system with their mistaken historic codes or remain outside of the PNC system. At the very least, for the foreseeable future, if our suggestion of a fully itemised list is adopted, when a criminal record certificate is applied for it will be necessary to collate manually the output of the PNC with the itemised list contained in new legislation, and there will not be a reliable fully automated system.

**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.

#### **Continuing problems with accessibility**

- 4.108 We discussed in Chapter 3 that there is currently a distinct lack of guidance for those both asking and answering exempted questions. Owing to the fact that there is presently no clear and unambiguous list of non-filterable offences available, neither DBS nor the Government is able to offer clear guidance as to which offences should and should not be filtered.

- 4.109 This problem presents itself in a number of ways:

- (1) It is extremely unlikely that a suspect who is considering accepting a caution for or pleading guilty to a criminal offence will be fully informed of the potential consequences of doing so, in terms of what might fall to be disclosed as part of a future criminal records check. We are aware from engaging with practitioners specialising in this area that they find it

extremely difficult to advise clients as to what offences are included within the filtering regime and which are not.

- (2) It is extremely difficult for a job applicant to assess what they should or should not disclose if they are asked an exempted question before, or without, a DBS criminal record certificate being applied for. Disclosing too much unnecessarily may have the result of needlessly prejudicing their application and disclosing too little may result in allegations of dishonesty being made at a later stage. Stakeholders in the health care and legal sectors were particularly concerned about this continuing difficulty.
- (3) Likewise, where a non-registered body (who cannot apply for a DBS check) is asked to answer an exempted question and seeks to apply the filtering rules under the Rehabilitation of Offenders Act regime to matters disclosed to them as a result, it is extremely difficult for that body to do so accurately. Again, stakeholders in the health care and legal sectors were particularly concerned about this.

This situation will frequently arise when a prospective employer seeks information about a job applicant from a previous employer or a professional body. Where an employer does not comply with their duty to apply the filtering rules under the Rehabilitation of Offenders Act 1974 legal action may follow.

- 4.110 Our recommendations, focused as they are on reforming the legislative provisions pertaining to the list of non-filterable offences, may ease the uncertainty currently inherent in the system – a single comprehensive list is easier to understand than a list that is a mix of named offences, references to other legislation and descriptive provisions. Nonetheless difficulties may remain – in part because the list that is provided is a negative one (of non-filterable, rather than filterable offences) and in part because an individual applicant cannot themselves apply for a DBS criminal record certificate before an exempted question is asked. Stakeholders have informed us that, in their experience, ordinary members of the public find the negative format of the current list confusing and consider that the system would be fairer and more transparent if an individual could have a prior sighting of their own certificate.
- 4.111 Solving the latter problem is outside of the scope of this particular project and would require amending the Police Act 1997 in respect of the circumstances in which an individual is eligible to obtain a certificate.
- 4.112 Likewise, solving the former problem would be impossible, as the number of filterable offences would be many times larger than the number of non-filterable ones and would include many offences that have not been assigned an individual PNC code (because they have never been recorded in central records). It has been suggested that, although a comprehensive list of filterable offences cannot

<sup>26</sup> This could be considered as part of any current project to introduce a new “Law Enforcement Data System”, a Home Office initiative which has been brought to our attention by stakeholders. Indications are that this system would not, however, come into operation until 2020 at the earliest, and that the focus of the system reforms are on user accessibility not the format of the information held.

be created, one that is representative of the types of offence that are filterable could be compiled. Unfortunately, however, we consider that such a list would ultimately be misleading in nature and is likely to provide false assurances to individuals searching it for a particular offence that the fact the offence is not in it means that it is in fact filterable.

- 4.113 However, additional changes could be suggested to make the list more accessible and its effect more easily understood. For example, it could be published online with a fully searchable facility and it could become a requirement for police officers offering a suspect the option of a caution or charging a suspect with an offence, to refer that suspect and their legal representatives to the list of non-filterable offences at that point.

#### **Problems with the statutory powers**

- 4.114 The terms of reference for the present project restrict it to improvements that can be achieved under the existing statutory powers, principally those under sections 4 and 7 of the Rehabilitation of Offenders Act 1974 and section 113A(7) of the Police Act 1997. The main limitation on the use of those powers is the rule against sub-delegation. This could cause problems in two contexts:

- (1) In existing law, there is doubt whether the list in section 113A(6D), so far as it refers to lists in secondary legislation, should be read as automatically updating when those lists are amended. This problem would be solved by our current recommendations, under which that list would become an itemised list of offences.
- (2) Under our proposals, it might be problematic to make the definition of relevant matters in section 113A(6D) or its statutory successor depend on a list contained in an order under section 4 of the Rehabilitation of Offenders Act 1974.

If this second problem is a serious concern, then it may be necessary to reconsider our conclusion in Chapter 4, that it would be possible to maintain a single list of non-filterable offences. The only remaining option would be to set out the list in full in both places, as at present.

#### **Possible legal challenges**

- 4.115 The main criterion for including an offence in the non-filter list is, and should continue to be, relevance to the purposes of one or more exempted questions, meaning questions about criminal convictions and cautions which must be answered notwithstanding section 4 of the Rehabilitation of Offenders Act 1974.
- 4.116 However, the exempted questions cover a very wide range, and not all listed offences are relevant to all exempted questions. A court in the future could therefore decide that requiring all listed offences to be disclosed in all cases is an infringement of the right to respect for private life, under Article 8 of the European Convention on Human Rights, disproportionate to the need to achieve protection for employers and service users. For similar reasons, it could be challenged by judicial review, even apart from considerations of human rights, as an irrational use of the statutory power.

4.117 This is properly the subject of a wider review, and we discuss it further in Chapter 5. We mention it here only as a possible risk inherent in the existing system that is not cured by our present recommendations.



# CHAPTER 5

## THE CASE FOR A WIDER REVIEW

### PURPOSE OF THIS CHAPTER

- 5.1 As explained in Chapter 1, since the beginning of 2016 there has been discussion between the Home Office and the Law Commission of the possibility of a review of the system of disclosure of criminal records, both within the scheme of the Rehabilitation of Offenders Act 1974 and in the form of criminal record certificates. The review of the list of non-filterable offences, contained in Chapters 2 to 4, concerns just one aspect of the system.
- 5.2 The agreed terms of reference for this project are limited to those reforms that can be achieved by secondary legislation. In addition, as explained in the previous chapter, we have been unable to propose, within the confines of this project, a comprehensive set of principles on which offences should be selected for inclusion in the non-filterable list. Such a review of principle would entail wider reforms falling outside the terms of reference (for example, changes to primary legislation<sup>1</sup>).
- 5.3 The terms of reference for this project do not allow us to engage in such a review. In effect, therefore, the previous three chapters simply recommend technical reforms to the drafting and operational problems arising from the list of non-filterable offences in its present form and suggest limited changes to its contents.
- 5.4 The terms of reference do, however, provide for us to assess the potential need for a broader review of the DBS regime, including the possibility of changes that would require primary legislation.
- 5.5 We have identified a number of significant issues that do not fall within the terms of reference of the present project but, in our view, it is vital that these are considered for the future effective and fair operation of the system. The most pressing concerns encountered in our research and raised with us by stakeholders were the following:
- (1) a lack of proportionality;
  - (2) a failure to take into account the relevance of offences; and
  - (3) ECHR incompatibility.
- 5.6 The overwhelming majority of stakeholders were critical of the operation of the current system and insisted on the need for a wider review.
- (1) Unlock, a charity concerned with the rehabilitation of offenders, told us:

<sup>1</sup> As explained in Chapter 4, on further consideration our view is that this approach would require us to consider wide-ranging reforms to the structure of the system, for example dividing the list in such a way that different offences would be disclosed in response to different exempted questions or the different purposes of the non-filterable list of offences.

We understand the narrow parameters of this targeted review of the list of non-filterable offences. However, it is our view that it is very difficult to tackle this in isolation.

It is clear that the review will be able to make a number of recommendations that will technically 'clean up' the legislation and provide both the Home Office and the DBS with a system that they feel more confident in implementing. However, it is unclear to what extent this will result in a fairer and more proportionate system where fewer offences are included on the list, or that our broader concerns on how the filtering system as a whole operates will be addressed.

We would therefore recommend that the Law Commission include a broader review of the DBS regime, with a particular emphasis on the disproportionate impact on law-abiding people with criminal records.

(2) Liberty told us:

Liberty welcomes any attempt to make an overly complex, convoluted system more intelligible and transparent to ordinary people, as well as more just and effective. To do so, we believe that the system needs not piecemeal changes, but comprehensive reform to render it systematically compliant with Article 8 and to prevent recurring challenge in the courts. Indeed, the technical problems relating to the operation of 'bright line' rules identified by the Law Commission indicate further the need for properly tailored rules with proportionate exceptions.

Without a genuinely proportionate and effective filtering system, with real, independent safeguards, the current regime will continue to breach individuals' rights to privacy and inflict very serious and lasting hardship. It must be changed.

Other stakeholders raised concerns as to whether the current system was able to fully meet the purposes of the criminal records disclosure system, including that of safeguarding children and vulnerable adults.

5.7 This chapter identifies areas of concern which have been drawn to our attention as vital to include in any future wider review. These include some further problems affecting the non-filterable list, as well as other aspects of the disclosure and certification systems. There are likely to be further problems with the current system which will become apparent in the course of the initial research carried out as part of a broader review.

5.8 These topics may be grouped as follows:

- (1) the principles for including offences in the list;
- (2) limiting disclosure to what is necessary and proportionate;

- (3) the rules about multiple convictions and custodial sentences;
- (4) the system as it affects young offenders;
- (5) whether cautions should be treated differently from convictions;
- (6) reforms to procedure; and
- (7) other matters.

### THE PRINCIPLES FOR INCLUDING OFFENCES IN THE LIST

- 5.9 We understand that some stakeholders believe section 113A(6D) of the Police Act 1997 to have been drafted as a temporary measure. The speed with which the regulations were produced might appear to support this. However, there is no clear evidence that this was the Government’s intention at the time.<sup>2</sup>
- 5.10 Whether or not section 113A(6D) was intended to be temporary or permanent, so far as we are aware, the section was drafted without the development or application of a set of clear principles to help determine which offences should be listed as non-filterable.
- 5.11 So far as we have been able to ascertain, the objective was to filter out “old and minor offences”. Some of the offences in the list (for example, those contained in schedule 15 to the Criminal Justice Act 2003, as referred to in paragraph (e) of section 113A(6D)) seem to have been included simply on the basis of seriousness rather than relevance.

**Example:** The offence of destroying or damaging property by fire (arson) under section 1(1) of the Criminal Damage Act 1971 is included on Schedule 15 for the purposes of enhanced sentencing. While this offence may satisfy a seriousness threshold it is difficult to see its direct relevance to any of the purposes of the list. The inclusion of the more serious offence of committing arson either with intent to endanger life or being reckless as to whether life is endangered is likely to be easier to justify.

- 5.12 Other offences clearly appear to have been added because of their relevance to the purpose of safeguarding. These would include offences listed in paragraphs (c), (d), (f), (h), (i) and (j) which concern the protection of children and vulnerable adults.
- 5.13 Our recommendations in the previous chapters already include some suggestions for adding and removing some offences to and from the list, so as to remove obvious anomalies. In the longer term it will be desirable to devise a more principled criterion for what offences should be included. This would be central to any wider project.

<sup>2</sup> The Crown, in the case of *W* [2015] EWHC Admin 1952, submitted a witness statement from a policy official within the Ministry of Justice setting out the process used to create the list of non-filterable offences in s 113A(6D). This statement did not refer to the provision as being considered temporary.

5.14 A provisional assessment has led us to consider that the most suitable overarching criterion might be the relevance of the offence to the purposes of the list of non-filterable offences. This could, in turn, be divided into three different aspects:

- (1) the subject-matter of the offence;
- (2) the gravity of the offence; and
- (3) whether the offence is one that can be assumed to serve as a predictor of a risk that an individual will act contrary to the purposes of the non-filter list (for example, that they will pose a risk to children and/or vulnerable adults).

5.15 A further question is whether the list should simply specify the offences to be included, so that a given offence is either always filterable or always non-filterable, or whether some offences should be filterable in some circumstances but not others. This question will arise in our consideration of all three aspects.

#### **(1) Subject matter**

5.16 This first aspect raises the question: what are the purposes of the list of non-filterable offences? One important purpose is the protection of vulnerable adults and children from the risk of harm from criminal offending. However, as explained above, the filtering regime works within the framework of the Rehabilitation of Offenders Act 1974 and the “exempted questions”, which serve several purposes in addition to safeguarding.

5.17 The Home Office have emphasised to us in strong terms that whilst the legislation makes provision for old and minor convictions to remain protected from disclosure through the filtering process, the filtering system needs also to operate in a way that safeguards vulnerable adults and children from a risk of harm.

5.18 However, because of the relationship between the disclosure of criminal records and rehabilitation of offenders’ schemes,<sup>3</sup> the list of offences should necessarily correspond to all the purposes for which “exempted questions” may be asked (as defined in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975). These questions cover much wider purposes than safeguarding. For example, Schedule 1 to the 1975 Order includes questions in relation to the suitability for “any occupation in respect of which an application to the Gaming Board for Great Britain for a licence, certificate or registration is required by or under any enactment”.

<sup>3</sup> The policy responsibility for ROA 1974 lies with the Ministry of Justice, whilst the policy responsibility for PA 1997 lies with the Home Office. We are informed that the Ministry of Justice will consider on a case by case basis whether each eligible role / activity justifies exemption from the operation of the rehabilitation of offenders scheme. Consideration is given to whether the disclosure of spent convictions is necessary in relation to the role in question during this process. Meanwhile the Home Office, will consider whether a particular role/activity has a specific safeguarding aspect to it and therefore whether it requires a higher level of disclosure (i.e. an enhanced criminal record certificate) within the criminal records disclosure system.

5.19 There was some disagreement among stakeholders about whether, in any future system, safeguarding should be the main or indeed the only objective served by the filtering system, or whether other interests should be represented.

- (1) Nacro expressed the view that the list of exempted questions, and therefore the list of non-filterable offences, had been widened too far and moved far away from its primary purpose. It was natural that prospective employers would want to know about offences such as fraud that were relevant to their sector, but there were other means of checking the suitability of candidates which did not involve a criminal records check.
- (2) By contrast, the Solicitors' Regulation Authority considered it surprising that bribery and similar offences were not included in the list of non-filterable offences and indicated that they might expect them to be included for the purpose of assessing suitability for entry to the legal profession.

5.20 We do not need to express a decided view on this question at the present stage, as this chapter is only concerned with identifying topics for a broader review. Any further work undertaken by us in this area would have to examine closely the role of safeguarding as it relates to disclosure. We provisionally identify two possible approaches:

- (1) To decide that the safeguarding of children and vulnerable adults should be the sole or main purpose of the non-filter list, and to scale down both the non-filter list and the list of exempted questions to reflect this. However, in almost all cases where safeguarding issues arise, an enhanced criminal record certificate is available. On this approach, one question to be decided would be whether it is necessary to preserve the distinction between standard and enhanced certificates or whether standard certificates could be considered unnecessary.
- (2) To decide that there are interests to be served other than safeguarding, and to divide the exempted questions into groups. The list of non-filterable offences could also be divided, so that different offences are disclosed for different purposes. This possibility is discussed in more detail below.

***Including offences only in specified circumstances***

5.21 The fact that a person has a criminal record for committing certain types of offence might, because of the type of offence concerned, render it more likely that he or she will pose a greater future risk to children and vulnerable adults. An obvious example is a person with a record for sexual offences against children. In these cases the offence label may be regarded as a sufficient indicator of relevance to the particular purpose pursued, namely the safeguarding of children and vulnerable adults.

5.22 However, the same will not always be true of other purposes within the exempted questions, and other offences. Here, the relevance of a particular criminal act to the purpose in question may depend on many factors other than the identity of the offence committed. The circumstances of the offence and other facts about

the offender and the victim, which are not reflected in the offence label, may be equally if not more relevant. In this connection, Nacro observed:

One of the key reasons the current system is so arbitrary is that exclusions are based on offence category alone, which in many cases is determined by the police before sufficient evidence is gathered – particularly in the case of cautions.

5.23 The basic problem is that some offences cover a broad range of behaviour, only some of which is relevant to the purposes of safeguarding. As part of any future wider review we would seek to examine whether:

- (1) an offence should only be included in the list if all or most instances are likely to raise safeguarding concerns; or
- (2) in the case of broad spectrum offences of this kind, there should be a test for distinguishing those instances which are likely to raise such concerns.

5.24 One such test may be found in the existing rule that a conviction is not filtered if it resulted in a custodial sentence. Alternatively, it might be found in the rule that if there is another conviction then all of an individual's convictions will become non-filterable. If either or both of these rules are retained, there is an argument against including broad spectrum offences in the list.

5.25 To some extent the operation of section 113A(6D) already allows for a degree of specificity based on circumstances. For example, within the operation of section 113A(6D) specific reference is made to lower level assaults and certain drug offences when committed in relation to children. In practice, the problem lies in the fact that this specificity is not carried through in the ACPO PNC code system and the DBS operational list.

## **(2) Gravity**

5.26 The filtering regime offers a means of excluding “old and minor” offences from a person's record. This is a clear recognition that, as a matter of policy, an offence should not be capable of being disclosed indefinitely unless it reaches a certain level of gravity.

5.27 There is, however, an ambiguity in the use of the term ‘gravity’ does this mean the gravity of the offence in general, or of the particular circumstances of the offence and offender? If the latter, there could be a rule in which some instances of an offence are indefinitely disclosable while others are not. This could be by reference to the sentence passed, or to other factors such as the age of the offender and whether the victim of the offence was vulnerable.<sup>4</sup>

5.28 For offences not on the non-filterable list, there is already a rule determining that some instances of an offence should remain disclosable for longer than others and that yet other instances always remain disclosable. For adults, caution drops off the record after six years; a conviction not resulting in a custodial sentence drops off after 11 years; a conviction resulting in a custodial sentence is

<sup>4</sup> These factors are among those referred to in Sentencing Guidelines, and would be assessed in accordance with the view taken by the court in passing sentence.

indefinitely disclosable.<sup>5</sup> If the sentence passed can be used as the primary indicator of the gravity of an offence, then there is an argument to say that the gravest instances of all offences will always fall to be disclosed, whether or not they are non-filterable.

- 5.29 Additionally, as discussed above, there is already reference within section 113A(6D) to offences that involve specific circumstances that increase their seriousness. This suggests that it is already possible to base decisions as to whether or not to include certain offences on the non-filterable list on the gravity of the particular circumstances of the offence committed.

### **Possible ways of assessing the gravity of an offence**

- 5.30 In looking for the types of offence that should be on a future list, our work would need to examine whether to look beyond the inclusion of all offences potentially involving serious misconduct or with high sentencing powers. Considered research would need to assess whether a more valuable criterion could be relied upon, for example, that the defined behaviour is such that even instances at the lower end of the scale are likely to be a legitimate cause for concern in respect of future risk to the vulnerable.
- 5.31 In some cases this is obvious from the definition of the offence: there is no such thing as a minor rape or a minor murder. This can be contrasted with broad-spectrum offences such as assault. While we are not claiming that assaults are a minor matter, if a particular assault was not thought worthy of a custodial sentence, and still more if it was not even thought worthy of prosecution and dealt with instead by way of a caution,<sup>6</sup> it should not remain on a person's record forever and thereby preclude effective rehabilitation.
- 5.32 One other measure of the gravity of an offence is the maximum sentence available to be imposed. It would be possible to have an exclusionary principle to the effect that certain offences, where the maximum sentence does not exceed a length to be chosen (for example, 6 months, 1 year or 2 years), should not appear on the non-filterable list of offences. If the maximum sentence for an offence does exceed that limit that would be a necessary but not a sufficient condition for its inclusion in the non-filter list.
- 5.33 However, this would be likely to cause difficulties in respect of historic offences, where in some cases the maximum sentence available at the time the offence was in force is no longer regarded as an indicator of the offence's gravity. An example would be indecent assault, which between 1956 and 1985 had a maximum sentence of only 2 years.<sup>7</sup> It may also prove difficult to justify in relation to common law offences, which usually carry a maximum possible sentence of

<sup>5</sup> As discussed in Chapter 2, the relevant periods are reduced for those aged under 18.

<sup>6</sup> This could also be an argument for treating cautions differently from convictions. We discuss this below at para 5.80 and following.

<sup>7</sup> Increased to 10 years by Sexual Offences Act 1985, s 3.

life imprisonment, even if in practice the sentences imposed for such offences are very low (for example, public nuisance).<sup>8</sup>

### **(3) Predictive value**

- 5.34 As mentioned previously, some offences are assumed as a matter of common sense to be more significant than others in indicating a likely pattern of recurrent behaviour. For example, some sexual offences or offences involving drugs. This may be considered a further reason for inclusion on the list of non-filterable offences.
- 5.35 We note that some offences, such as theft, are generally accepted to have a higher recidivism rate than others. For example, in 2013 the Ministry of Justice estimated that the proportion of those found guilty of theft who were proven to have reoffended within one year was 42.9% whereas the proportion for fraud was estimated to be 10.3%.<sup>9</sup>
- 5.36 We highlight here that this discussion is based on common sense assumptions about recidivism and risk and not on hard evidence. If a wider review is undertaken, it will be necessary to discover whether there is any research demonstrating a link between offence type or the gravity of an offence and risk of reoffending.
- 5.37 The difficulty in treating past convictions as a predictor of future behaviour is that many other factors, such as the offender's age, personality and circumstances, may be more significant than the question of what offence was committed. This line of argument would require significant criminological research in order to assess with any degree of confidence the validity of these 'predictors'. As with the gravity criterion, the facts of the particular incident may be more relevant than the offence label. In this connection, Nacro observed:

The decisions in the judgments that have deemed the criminal record regime unlawful made reference to the fact the regime did not reflect that 1) Many people who make mistakes in their life have done so after experiencing difficult and painful circumstances in their lives 2) People can and do change. The system did not allow for that. Human factor needs to be considered... Naturally, this can go both ways. The circumstances behind the offence can be mitigating factors or aggravating factors. But would this allow for the fact that people can and do change?

- 5.38 More radically, it could be argued that, whatever the offence label, if a person has not re-offended for 11 years (or 5 and a half years in the case of a youth), the old conviction is no longer of value as an indication of propensity and the risk of

<sup>8</sup> Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358.

<sup>9</sup> Ministry of Justice, *Proven Reoffending Quarterly Bulletin: October 2013 to September 2014, England and Wales* (28 July 2016).



offending is no greater than in the case of any other person.<sup>10</sup> It may be thought that this, together with the rule about convictions resulting in a custodial sentence, already meets the need to ensure that offences of sufficient gravity and predictive value remain indefinitely disclosable. On this reasoning, there is arguably no need for any list of non-filterable offences.

- 5.39 On the other hand, the absence of a second conviction may mean not that the person has abstained from crime but that he or she has not been caught. One possible compromise would be a system in which some offences would continue to be non-filterable but, following the expiry of 11 years, the individual could apply for convictions for those offences to be removed from the record by presenting evidence that his or her lifestyle has been clean for a given period of years and that the risk of recurrence is minimal. The French system for disclosing criminal records contains some elements of this approach.<sup>11</sup>
- 5.40 Whether this point holds up under scrutiny would require a more in depth analysis of the available criminological literature on risk and would form a key strand of research in any wider review.

#### **Conclusion on principles when identifying non-filterable offences**

- 5.41 We envisage, as part of any wider review, carrying out significant work to determine how demanding the conditions for an offence being included on the non-filterable list should be. An offence, in our provisional assessment, should only be included if it is relevant, in terms of subject matter, to one or more objectives of the filtering regime (whatever these might be decided to be) and either:
- (1) it is likely that a single instance of the offence would be grave enough to cause concern for an indefinite period, despite not resulting in imprisonment; or
  - (2) it is likely that a single instance of the offence would be sufficient to indicate a likelihood of future offending, even if there has not in fact been any offending for the last 11 years.

Ideally, the condition for an offence to be disclosed should be its relevance to the purpose arising in the particular case, rather than its relevance to any one or more of the purposes contained in the list of exempted questions.

- 5.42 There is a further possible reason against being heavily risk-averse in including too many offences in the non-filter list. In cases where important safeguarding issues arise, an enhanced certificate will be applied for, and facts concerning filtered convictions and cautions will be disclosed where demonstrably relevant.

<sup>10</sup> The reasons for setting these particular time periods were explained by Lord Taylor of Holbeach, Lords Minister and Minister for Criminal Information when the regulations introducing the filtering regime were debated in the House of Lords: *Hansard* (HL), 21 May 2013, vol 745, col 35.

<sup>11</sup> We summarise a number of alternative systems used in other jurisdictions in our Appendix B, available online at: <http://www.lawcom.gov.uk/project/criminal-records-disclosure/>.

5.43 There are already some cases in which the circumstances governing whether an offence remains disclosable indefinitely are based on factors other than the offence label. An example of this is supplying drugs to a child. There would in theory be no obstacle to imposing conditions of this kind on other offences included in the non-filter list, provided that the condition relates to a readily verifiable fact and does not require the exercise of judgment or discretion.

#### **LIMITING DISCLOSURE TO WHAT IS NECESSARY AND PROPORTIONATE**

5.44 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 that all offences other than filtered ones are disclosed whatever the purpose of the application. A court could hold that the infringement of the right to private life under Article 8 of the European Convention on Human Rights is disproportionate to the purposes served by disclosure.<sup>12</sup>

5.45 As part of a full review we would need to assess the viability of the following remedies, among others:

- (1) Reducing the number of purposes for which certificates are required.
- (2) Subdividing 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.
- (3) Creating a discretion or a review mechanism for deciding on the relevance of a conviction or caution to the particular application made.

5.46 At present, the same very wide list is used for several specialised and unrelated purposes. A conviction for an offence of child neglect is likely to be relevant to an application for an employment role working with children, and a conviction for an offence of theft is clearly relevant to an application for a gaming licence. It is less clear why a conviction for an offence of neglect should remain indefinitely disclosable for the purposes of an application for a gaming licence, or similarly a conviction for theft for the purposes of an application to work with children.

5.47 The filtering system in its present form appears a very blunt instrument. The blanket disclosure of all listed offences regardless of relevance to the particular purpose could be regarded as a disproportionate inroad on the right to rehabilitation.<sup>13</sup>

5.48 It is essential that the disclosure system endeavours to achieve the correct balance between the right of a former offender to make a fresh start and the right of employers or other responsible persons to information enabling them to fulfil their safeguarding responsibilities.<sup>14</sup> Our provisional assessment is that this may not be attainable under the present regime. No one doubts that, when these two

<sup>12</sup> See for example *R (on the application of G) v Chief Constable of Surrey Police and others* [2016] EWHC 295 (Admin). The case did not specifically address the question of the list of non-filterable offences being used for multiple purposes.

<sup>13</sup> *G* [2016] EWHC 295 (Admin).

<sup>14</sup> The government has an overall responsibility for public protection and to safeguard vulnerable people from harm.

rights come into conflict in a particular case, the safeguarding objective should prevail. However:

- (1) some of the purposes for which the non-filterable list exists are not concerned with safeguarding, and it is not clear that these purposes should always prevail over the right to rehabilitation; and
- (2) because of the blanket operation of the system, offences are disclosed though not relevant to any of the purposes that arise in the particular case.

5.49 In short, the “exempted questions” under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 cover a very wide range of purposes. Even if we are to assume that the list of non-filterable offences accurately reflects these purposes, it remains the case that all offences on the list are disclosed, whatever the purpose of the questions. This could result in the disclosure of offences that are wholly irrelevant to the particular purpose for which the exempted question was asked, and is manifestly disproportionate. In this connection, Unlock observes:

Within the remit of this review, the commission should seek to shift away from this presumption,<sup>15</sup> and instead base the list of offences on a set of principles that considers the purpose for which the disclosure is being sought and which seeks to only disclose information that is relevant to that purpose.

5.50 We are informed that the government’s policy position is that it is for the employer, or other relevant organisation seeking disclosure, to determine the relevance of the information disclosed on a criminal record certificate to the role they are assessing the suitability of the person for, presumably on a case by case basis.

#### **Reducing the purposes for which disclosure is required**

5.51 One possible approach to reform, discussed above,<sup>16</sup> is to narrow the range of the scheme, so that only offences potentially relevant to the safeguarding of children and vulnerable adults would be non-filterable. This is something that would need to be explored fully as part of any wider review to better understand the impact of such a shift.

5.52 This on its own would not solve the problem of over-inclusive disclosure unless the range of exempted questions was also narrowed. Several of the exempted questions do not relate to safeguarding. It would be anomalous if, in answer to such a question, a person had to disclose all the convictions and cautions that do relate to safeguarding.

5.53 Reducing the range of exempted questions, to only those which address safeguarding concerns, could be still more problematic. When a question was asked in connection with an application where safeguarding risks do not arise (and therefore the question is not an exempted question), no criminal record

<sup>15</sup> That is, the presumption that, when an exempted question is asked, all convictions and cautions are disclosed.

<sup>16</sup> Para 5.17 and following, above.

certificate would be available. There would be no need to disclose convictions and cautions which are spent, but would not yet be considered filterable because the period for filtering has not expired. This may be an undesirable result for the individual or body asking the question.

5.54 One provisionally suggested possibility, which we would need to research comprehensively in any wider review, could be to divide the exempted questions into two groups, depending on whether or not safeguarding issues could arise in connection with the particular employment, qualification or licence applied for. This could allow for the non-filterable list of offences to be re-drafted in a way as to prioritise safeguarding concerns.

(1) When a question in the “safeguarding” group is asked, all non-filterable offences on the revised list would be disclosed, together with all offences which are filterable but not yet filtered. This is like the present system, except that the number of non-filterable offences would be reduced.

(2) When a question in the “non-safeguarding” group is asked, the rule about non-filterable offences would not apply. All convictions and cautions would be filtered after the expiry of the filtering period, unless the other rules against filtering applied (there is more than one conviction or the conviction resulted in a custodial sentence).

5.55 As mentioned above,<sup>17</sup> there would be a high degree of overlap between the situations covered by exempted questions in the safeguarding group and the situations in which enhanced criminal record certificates are required. One potential means of achieving the suggested solution to be considered as part of a full research project, could be to provide that the all offences are filterable except in cases where an enhanced criminal record certificate is or could be applied for. As part of a full review of the regime, both this approach and a number of other solutions would need to be examined.

#### **Dividing the exempted questions into groups**

5.56 Another approach, also requiring careful analysis in the course of our research would be to divide the exempted questions into categories, for example those concerning safeguarding, those concerning financial probity and so on. The list of non-filterable offences would be divided into corresponding groups, so that offences are disclosed only for the purposes underlying the particular questions asked.

5.57 In a system such as this, there would be a number of separate lists of non-filterable offences, divided by subject-matter. One list could target the primary objective of safeguarding vulnerable adults and children, applicable to exempted questions asked with that purpose: this list would include violent and sexual offences. Other lists could be targeted at other purposes for which exempted questions are asked (for example the honesty and integrity of a gambling licence holder): they could include some offences of dishonesty.

5.58 We emphasise that we only flag this possibility, and others, here as indicators of the potential direction of any wider review. This proposal only envisages sub-

<sup>17</sup> Para 5.20(1) above.

dividing the existing range of exempted questions, so as to avoid the need to disclose all offences in every case. We note that Nacro advised us that this would need to be carefully done so as not to provide a vehicle for the addition of further purposes to those served by the list, thus making more offences non-filterable because they are relevant to these additional purposes.

- 5.59 As part of a broader review, we could assess whether this proposal would align the disclosure of offences more closely with the objectives of the concept of non-filterable offences. We note that this approach is not without disadvantages. At this early stage, we identify that there would be a greater burden in maintaining the lists of non-filterable offences to ensure accuracy, and that there may be significant overlap between the different lists. It could also result in regulations that are still more complicated than at present.
- 5.60 One approach to counteracting these difficulties, discussed above, could be to draw a broad distinction between cases involving safeguarding and similar issues, for which an enhanced criminal record certificate is required, and other cases. Should this solution remain attractive, after the more in depth research possible as part of any wider project, it could readily be implemented in relation to the system of criminal record certificates under the Police Act 1997. It might be more difficult in drafting terms to transpose it to the scheme of the Rehabilitation of Offenders Act 1974 and its subordinate legislation, as the list of “exempted questions” is not at present divided so as to reflect any such distinction.

#### **Discretionary procedures**

- 5.61 A further possible means of ensuring greater relevance in the disclosure process would be to create a procedure for deciding, as a matter of discretion, whether the conviction in question is relevant to the application. This would be similar to the present system for deciding what information, other than convictions and cautions, should be disclosed for the purposes of enhanced criminal record certificates. As Unlock suggested to us:

There is clearly the need for ‘bright-line’ rules, but this needs to be offset by measures that achieve proportionality and that deal with disproportionate outcomes on the margins of such bright-line reviews.

- 5.62 Alternatively, there could be a procedure for a person to apply (to an independent person or body) at any time for a conviction to be disregarded in future for stated purposes, upon satisfying the relevant authority that there is no danger of recurrence. Both these systems exist in some other European countries and provisions allowing for an independent review of some disclosable matters have also recently been implemented in Scotland and Northern Ireland.<sup>18</sup> The Northern Irish system allows for an application to be made to the independent reviewer where the person whose criminal history is the subject of disclosure disputes the relevance of the matters due to be disclosed.
- 5.63 As against both of these suggestions, Nacro argue that the administrative burden would be disproportionately heavy:

<sup>18</sup> See further Appendix B available online at: <http://www.lawcom.gov.uk/project/criminal-records-disclosure/>.

It's not really possible for that [discretionary] decision to be made without the input of the employer concerned. Who would carry out such an assessment? There are already huge delays in processing EDBS (enhanced DBS) certificates and a stretch on resources for doing so...

Resourcing minefield and would also have huge potential impact upon recruitment policies and practices as employer will struggle to understand why they can know about one person's criminal record for assault but not another's.

## **THE RULES ABOUT MULTIPLE CONVICTIONS AND CUSTODIAL SENTENCES**

- 5.64 Another possibility is to relax the existing rule that convictions are never filtered if there is more than one. This is arguably too severe, particularly if the offences were committed at a young age or the convictions derive from a single incident of offending.
- 5.65 The rule about 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.

### **Cases where there is more than one conviction**

- 5.66 At present a conviction remains indefinitely disclosable if the individual has more than one conviction, regardless of the offence concerned in either conviction, how long ago they were committed or whether they were linked. This is arguably too severe, particularly if the offences were committed at a young age or the convictions are linked.
- 5.67 A second conviction does not necessarily mean that a person has committed offences on two separate occasions. A teenager might face two charges of shoplifting for stealing two different items from the same shop on the same visit.
- 5.68 It may also seem anomalous that a second conviction (especially where it is, for example, for a minor traffic offence) makes the first conviction disclosable where the convictions are unrelated and the fact of the second conviction (alone or in combination with the first) does not demonstrate a propensity to commit further offences of either type.
- 5.69 This rule has been criticised in *R (on the application of P) v Secretary of State for Justice*<sup>19</sup> as contrary to the ECHR. As the case may go to appeal, we will not comment on that judgment within the context of the present project. Additionally, as a review of this rule would be likely to require primary rather than secondary legislation, it would fall outside of the scope of this project - but it would be significant in any future review.

<sup>19</sup> [2016] EWHC 89 (Admin). It has also been held to be incompatible with Article 8 of the European Convention on Human Rights by the Court of Appeal in Northern Ireland: *Gallagher* [2016] NICA 42.

### **The blanket disclosure of offences receiving a custodial sentence**

- 5.70 A wider issue that arises in respect of the gravity of offences is whether the existing rule, that filterable offences receiving a custodial sentence will nonetheless always be disclosed, should be retained, or whether a more sophisticated and nuanced version of the list could be developed based on the gravity of particular offences. This would accord with some European disclosure regimes and would, arguably, be more in keeping with the spirit of the Rehabilitation of Offenders Act 1974.<sup>20</sup>
- 5.71 It may be argued that the difference between an individual receiving a custodial sentence for a particular offence, as opposed to a non-custodial one, depends on a large number of variables that are not necessarily reflective of an objective assessment of the gravity of offence. For example, whether or not the offender attended an appointment for a pre-sentence report, whether a drug treatment placement is available (drug rehabilitation orders often being used as a direct alternative to custody) and at what stage the offender entered a guilty plea.
- 5.72 There could be a case for some offences not on the non-filter list to drop off the record after a specified period (provided that there is no recurrence) even if they resulted in a short custodial sentence, especially if suspended. The threshold could be set at either:
- (1) an absolute figure (for example, six months); or
  - (2) a proportion of the maximum sentence available for the offence at the time it was passed (for example, one fifth of the maximum sentence for inflicting grievous bodily harm under section 20 of the Offences Against the Person Act 1861 – five years - would be 12 months).

However, this second approach would need to be refined to deal with offences for which the maximum sentence is life (as it is for some usually quite minor offences, such as public nuisance) where such a calculation would not be possible.

- 5.73 Another possibility could be to take the highest reported sentence for a particular offence as a “notional” maximum. However, there could also be difficulties in cases where the maximum sentence for an offence has changed: should it be taken as the proportion of the maximum available at the time of the offence, or at the time of the disclosure?
- 5.74 We are informed by stakeholders that this question is of particular concern in relation to service offences. In the armed forces, decisions to detain an individual are frequently made, following court proceedings or otherwise, and do not necessarily carry any particular stigma: the period of detention is usually very short and the purpose is one of rehabilitation. These situations do not resemble the effect of a custodial sentence in civilian life, and should not result in a permanent stain on the individual’s record. In existing law, however, a decision to impose detention following a finding of guilt for a service offence counts as a “custodial sentence” for the purposes of filtering. Nacro observed that:

<sup>20</sup> See Appendix B available online at <http://www.lawcom.gov.uk/project/criminal-records-disclosure/>.

The filtering regime treats all instances of service detention as a custodial sentence including summary hearings which are dealt with by Commanding Officer. Article 6 implications? We have a previous case where a matter is recorded as service detention of 5 days for swearing at a Lance Corporal and the person in question was simply confined to barracks for a few days. The inconsistency of recording practices needs to be considered here; some will not have their sentence recorded on the PNC... Also how it is recorded (e.g. forfeiture order or 30 days' imprisonment...or a fine or 30 days' imprisonment).

## **THE SYSTEM AS IT AFFECTS YOUNG OFFENDERS**

5.75 As the recent Review of the Youth Justice System in England and Wales (the "Youth Justice Review")<sup>21</sup> has concluded, the criminal disclosure system may be considered to be disproportionately harsh in its effect on young offenders:

- (1) For offences not on the non-filter list, some allowance for the offender's age is made: the period for which a conviction is disclosable is five and a half years instead of 11, while for cautions it is two years instead of six.
- (2) However, both convictions and cautions for offences on the non-filter list remain disclosable indefinitely, whatever the age of the offender, as do all convictions that result in a custodial sentence and multiple convictions.

5.76 There is an argument for saying that some offences, which might justifiably remain indefinitely disclosable in the case of an adult, should be allowed to reach some sort of closure in the case of a young offender, where the offence is unlikely to have any value in predicting his or her behaviour as an adult. In Northern Ireland, for example, there is an automatic review if a person's convictions all occurred before the age of 18.<sup>22</sup>

5.77 The Youth Justice Review made the following recommendations in relation to how children are treated by the criminal records system.<sup>23</sup>

The Ministry of Justice and the Home Office should develop a distinct approach to how childhood offending is treated by the criminal records system. (Paragraph 85) This should include:

- (1) consideration of distinguishing between under-15s and 15-17 year olds in terms of the retention and disclosure implications of offending; (Paragraph 86)

<sup>21</sup> This review, also known as the Taylor Review, was a departmental review of the youth justice system conducted by Charlie Taylor for the Ministry of Justice in 2016. It is available at: <https://www.gov.uk/government/publications/review-of-the-youth-justice-system> (last accessed January 2017).

<sup>22</sup> Introduced by the Justice Act (Northern Ireland) 2015, now found in s 117B and schedule 8A to PA 1997.

<sup>23</sup> Annex A of the Youth Justice Review, list of main recommendations, para 19.



- (2) further reductions in the periods before which childhood convictions become spent; (Paragraph 87)
- (3) all childhood offending (with the exception of the most serious offences) becoming non-disclosable after a period of time; (Paragraph 88) and
- (4) the circumstances in which police intelligence on childhood conduct can be disclosed being further restricted. The Home Office should consider the introduction of a presumption that police intelligence dating from childhood should not be disclosed except in exceptional circumstances. (Paragraph 89)

5.78 Following extensive research into this issue the Standing Committee for Youth Justice<sup>24</sup> have previously also made the following recommendations:<sup>25</sup>

- (1) All under-18 cautions [should be] automatically filtered, regardless of the offence type (after two years, as is the case now).
- (2) There [should be] no limit on the number of under-18 convictions that can be filtered.
- (3) All convictions committed by under-18s that did not lead to a prison sentence [should] be automatically filtered, providing four years have elapsed since the date of their last conviction.
- (4) Police [should] have discretion as to whether or not to filter under-18 convictions that resulted in a prison sentence, providing four years have elapsed since the end of their last sentence or order.
- (5) Police guidance should make clear that if a person has any unspent convictions, none of their convictions should be filtered.
- (6) Guidance to police should be amended, setting out the presumption that under-18 police intelligence is not disclosed.

5.79 All of the proposals set out in paragraphs 5.73 and 5.74 could be explored as part of any wider review.

### **WHETHER CAUTIONS SHOULD BE TREATED DIFFERENTLY FROM CONVICTIONS**

5.80 One matter of particular concern, which would benefit from careful attention as part of any future wider review, is the effect of cautions. 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 considered serious enough to merit prosecution, it seems odd to treat it as important enough to be disclosable for the rest of the offender's life.

<sup>24</sup> The Standing Committee for Youth Justice is a membership body that campaigns for improvements to the youth justice system. It works on changing policy and legislation which affect young people in trouble with the law.

<sup>25</sup> Standing Committee for Youth Justice, *Reform of Childhood Criminal Record Legislation* (May 2016).

- 5.81 One possibility worth exploring as part of a full research project would be to abolish the rule that cautions for offences on the non-filter list are indefinitely disclosable: certainly for young offenders, and possibly across the board. As argued by Unlock:

Cautions are meant for first-time offenders who commit minor offences and admit the offence. Currently, cautions are treated in exactly the same way as convictions (except you can have more than one filtered, when in fact rarely people have more than one).

The fact that some individuals in the past have been cautioned for serious violent and sexual offences should not deter government from making such changes; it simply reinforces the need to ensure that cautions are only given for minor offences. The police discretion to disclose relevant information would enable historic instances of cautions for serious offences to be dealt with.

- 5.82 Alternatively it may be argued that, in a few cases, an offence for which a caution was received may raise lifelong concerns; for example if the offence is such as to show a risk of repetitive or addictive behaviour. On this reasoning, we would need to assess whether there should be a separate, much shorter, list of non-filterable offences where cautions are concerned.
- 5.83 As already mentioned, there is also a potential problem about police practice in cases where a caution is offered. A young person (or for that matter an adult) may accept a caution for an offence, believing that that is the end of the matter. It is not always sufficiently explained at the time of accepting the caution that, if the caution is for a non-filterable offence, it will remain permanently on the individual's record. 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.
- 5.84 At the very least, a review of police procedures in this area is needed to ensure that the full effect of a caution is explained in every case; in particular the rule that, if it is for a listed offence, it becomes a permanent part of the offender's record.

## **PROCEDURAL REFORMS**

### **Advance guidance on disclosure of offences**

- 5.85 As explained in previous chapters, an applicant cannot obtain guidance on how to answer questions about his or her criminal record unless a criminal record certificate is applied for.
- 5.86 In particular, it is impossible for an individual to seek a certificate, whether standard or enhanced, in order to know what is on his or her record, except in the course of an actual application for employment or a disciplinary process. This is an issue highlighted by more than one of the stakeholders we have consulted:

- (1) Unlock argued:

The list of offences (and any changes to it) makes the need for individuals to be clear about what it disclosed on their

DBS more important than ever. It is currently not possible for an applicant to obtain their own DBS in advance of applying for jobs, meaning that applicants often have to “guess” at what they need to disclose, resulting in a high proportion of both over and under disclosure.

Individuals should be able to apply for their own standard and enhanced check. Although the filtering rules are established in law, in practice many people with cautions and convictions do not know exactly how their situation was dealt with. This means that often they do not know whether something will be filtered or not until the check has been returned to them. At this stage, they would normally already have had to make a decision about whether to disclose or not.

The review should look at what amendments would be required to legislation to enable the DBS to provide certificates to applicants in advance of a specific employment position, so that they can be clear about what cautions/convictions they need to disclose for positions involving that level of check.

(2) Nacro argued:

Transparency is key, particularly as a person cannot obtain a DBS check on themselves. It is perverse that so much weight is placed on the individual’s honesty and them knowing what they are required to disclose; yet they do not even have access to a full and complete list of what would or would not be disclosed.

5.87 The resulting risk is that an individual answering questions asked by a prospective employer will reveal facts which need not have been disclosed, leading to confusion when a criminal record certificate, omitting those facts, is issued at a later stage. Alternatively, if an individual fails to disclose certain material that appears on a subsequent certificate there may be a suspicion that he or she has done so dishonestly, even if this was not the intention. One possible reform would be that an applicant should be entitled to a preview of his or her criminal record certificate at any stage.

5.88 Another problem, also mentioned above,<sup>26</sup> is that an applicant may complain of inaccuracies in a criminal record certificate but cannot in practice go behind the DBS operational list. This problem would be greatly reduced if the statutory list were itemised, as it would be following our suggested reforms, as this would avoid the need for a separate operational list. However, there will still be scope for error and there should arguably be an independent adjudicator with power to consider whether the filtering rules have been correctly applied as a matter of law.

<sup>26</sup> See Chapter 2 at para 2.61 and below.

- 5.89 Another alternative would be for DBS, in these particular cases to carry out a manual check of the PNC to establish the facts behind the conviction – this would only of course be possible where those facts are both recorded (as may not be the case with some older offences) and recorded accurately (which again may be difficult to assess with older offences).

#### **Disclosure through criminal record certificates only**

- 5.90 One further provisional approach we will research fully in any broader review would be to change the system so that a person cannot be required to answer questions about non-spent offences except by providing a criminal record certificate. There would then be only one channel for disclosing these details, and the applicant, and any third party asked to reply to exempted questions, would not have the burden of applying the rules about which offences should be disclosed.
- 5.91 This could also prevent the scenario arising where an employer or other organisation assessing the suitability of an individual for a particular employment or role wrongly requests disclosure from an individual that would include protected/filterable convictions and cautions. To request disclosure of such information in an indirect manner, usually by way of a question requiring information about any other material that may affect his or her suitability for the position, is not permitted under the provisions of the ROA 1974. To do so could in theory lead to judicial review or other proceedings (for breach of statutory duty) being brought against the employer or organisation.
- 5.92 The impact of such a potential reform would need to be explored as part of a full project.

#### **OTHER ISSUES**

##### **List of offences to be disclosed only when not spent**

- 5.93 A further modification of the system of disclosure and filtering was effected in Scotland in 2015. As in England and Wales, there are some offences which remain permanently disclosable in answer to an exempted question (the equivalent of non-filterable offences in England and Wales), and others which on certain conditions cease to be so disclosable after a period of years, generally longer than the rehabilitation period for the offence. However, in Scotland there is also a third category, of offences which cease to be disclosable as soon as the rehabilitation period has passed, whether or not a custodial sentence was imposed and whether or not there are other convictions. A similar reform could be considered for England and Wales as part of any wider project undertaken.

##### **Enhanced criminal record certificates**

- 5.94 Stakeholders have expressed to us a significant amount of concern regarding the current “soft disclosure” system used in relation to enhanced criminal record certificates. The question of what should and should not be disclosed is a matter for the discretion of the local policing body, depending on the criteria of relevance, and one consequence appears to be that disclosure practices around the country are often inconsistent and unpredictable for applicants.

- 5.95 There are similar discrepancies in practice about the recording of information. Different police areas may record different types of information; some older information may not be recorded at all.
- 5.96 As mentioned above,<sup>27</sup> even in the case of standard criminal record certificates an individual cannot obtain a preview so as to know what will be on the certificate. This problem occurs in a particularly acute form in relation to enhanced certificates, where the “soft intelligence” included is a matter of discretion and the individual cannot be expected to know what will appear on the certificate.
- 5.97 The ambiguity that an individual applying for an enhanced certificate can face, as to whether or not particular “relevant” matters will be disclosed, could be argued to be contrary to the principle of legal certainty, particularly where the individual may not know that particular “soft intelligence” exists until after its disclosure. Nacro observe:

This is a massive issue. There needs to be transparency for both individuals affected and organisations in receipt of disclosure information on a criminal record certificate.

- 5.98 In one respect, however, the applicant’s position in relation to “soft intelligence” included in an enhanced criminal record certificate is better than that in relation to convictions and cautions, as disclosed in both types of certificate. As explained in Chapter 2,<sup>28</sup> the applicant may challenge that intelligence on the grounds of irrelevance,<sup>29</sup> by applying to the independent monitor appointed under section 119B of PA 1997. The monitor then decides whether the proposed disclosure infringes the applicant’s rights under Article 8 of the European Convention on Human Rights. This is not an opportunity afforded to those wishing to contest the relevance of the non-filterable offences.

**International child safety certificates issued for UK citizens working abroad**

- 5.99 We understand that at present, DBS only issue criminal record certificates where the exempted questions are asked by employers, regulators or other relevant bodies in the UK. Where certificates are required by UK nationals going to work abroad they are issued by ACPO Criminal Records Office.<sup>30</sup> This separation of disclosure functions based on the location of the employment appears odd and is likely to prove unnecessarily confusing to users. Further this creates the potential for arbitrary inconsistencies in disclosure depending on geographic locations. We are also unclear how ACRO makes decisions as to what it should, and should not, disclose on such certificates but they are not subject to the filtering regime. It may be thought desirable to coordinate all criminal records disclosure functions within the DBS system; this would be an essential piece of work in any wider review requiring in depth research and consultation with all interested stakeholders.

<sup>27</sup> Para 5.87 above.

<sup>28</sup> See Chapter 2 para 2.65.

<sup>29</sup> PA 1997, s 117A, inserted by Protection of Freedoms Act 2012, s 82(5).

<sup>30</sup> ACPO Criminal Records Office manages criminal record information and improves the exchange of criminal records and biometric information.

### **Overseas nationals**

- 5.100 The question of how the convictions, cautions or equivalent of overseas nationals can accurately be recorded and encompassed within the filtering system has been raised with us by stakeholders. Often people coming to the UK to work or travel are asked for complete original police records of all offences, regardless of the rules that would apply if those offences had been committed in England and Wales. As observed by Nacro:

[This] highlights the current issue of potential inequitable treatment for applicants based in the UK who often face having more information disclosed on a check than they would in many other countries.

### **CONCLUSION**

- 5.101 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 ECHR non-compliance and, what may be considered to be, 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.

# CHAPTER 6

## SUMMARY OF RECOMMENDATIONS MADE IN CHAPTER 4

### THE NEED TO DEVELOP A SET OF PRINCIPLES FOR DETERMINING WHICH OFFENCES SHOULD BE NON-FILTERABLE

- 6.1 **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) 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.

Para 4.63.

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

#### Consolidation

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

Para 4.70.

#### Listing offences individually

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

Para 4.77.

#### “Superseded” offences

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

Para 4.80.

#### Inchoate and “corresponding” offences

- 6.5 **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 corresponding to other offences on the list, and service offences corresponding to other offences on the list).

Para 4.81.

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

### **Adding offences individually**

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

**Para 4.93.**

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

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

- 6.7 **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.

**Para 4.107.**

(Signed) DAVID BEAN, *Chairman*  
NICK HOPKINS  
STEPHEN LEWIS  
DAVID ORMEROD  
NICHOLAS PAINES

PHIL GOLDING, *Chief Executive*  
17 January 2017



