



Nacro position statement:

Filtering and the criminal records regime

June 2018

We have long called for a clearer, fairer and more transparent criminal records regime. Criminal records represent a major challenge, for both individuals moving on with their lives and employers forming fair and safe recruitment processes. On 19 June, the government's final appeal in defence of the existing filtering regime that affects the disclosure of criminal records on standard and enhanced DBS certificates will begin at the Supreme Court. In response to this, below we outline our position and suggested recommendations for the criminal records regime going forward.

Background

The [filtering system](#) was introduced by the Home Office in May 2013, in response to a Court of Appeal judgment that deemed the disclosure system for positions which are exempt from the [Rehabilitation of Offenders Act \(ROA\)](#) to be in breach of Article 8 of the European Convention on Human Rights. The blanket disclosure of all spent and unspent cautions and convictions for certain employment purposes was deemed excessive and disproportionate and *"was not necessary in a democratic society to attain the aim of protecting the safety of children"*.

The legal challenge to the filtering system was first brought before the courts in 2015 on the basis that the current filtering system does not go far enough to prevent the disclosure of less serious offences, offences that were committed a long time ago or offences that were committed when the person was a minor to prospective employers as part of a background criminal record check. The legal challenge has garnered widespread support from many organisations across the criminal justice sector. Simultaneously, a range of recent government reviews provide a growing case of support for broader change across the whole criminal record disclosure system. We believe we need a fundamental review of the criminal records regime including the filtering system to ensure a clearer, fairer and more transparent system. Below we set out some of problems with the current system.

We agree that the filtering system needs to change

We support the principles that underpin the filtering system and that the changes have benefitted some people with old, minor convictions. However, the system is unnecessarily complex and arbitrary and does not go far enough to achieve the balance between protecting vulnerable groups and allowing people with criminal records to move on from past mistakes. The following case studies highlight some of the inconsistencies:

At the age of 15, Sam* was cautioned for shoplifting with his friends. When he was at university and struggling financially, he was caught again shoplifting groceries and convicted at court, receiving a fine.

During a period of post-natal depression following the birth of her second child, Alison* uncharacteristically stole three cosmetic items from a chemist. She was convicted at court of three counts of shoplifting, receiving a 12-month conditional discharge.

Under the existing filtering regime, Sam's caution and conviction will become eligible for filtering, but Alison's conviction will not. Can we reasonably argue that Alison presents a greater safeguarding risk to vulnerable people than Sam?

Issues of a lack of transparency are endemic across the entire system of disclosure. This needs to change.

- **Filtering**

The list of non-filterable offences is made up of cross-references to various pieces of legislation, making it virtually impossible to understand. Furthermore, the operational list used by the DBS when processing standard and enhanced disclosure certificates is not the same as the public-facing list. This could lead to an individual inadvertently under-disclosing criminal record information due to them having the mistaken belief that, as their conviction or caution does not appear on the public facing list, it would not

be disclosed on their DBS certificate as it would be 'protected' and eligible for filtering. This in fact may not be the case if their conviction or caution is on the operational list, as it would not be 'protected' and would be disclosed on a DBS certificate. Should such a situation arise where a person is undergoing a criminal record check for employment purposes, an employer may interpret this as a person deliberately failing to disclose a conviction or caution, which could lead to the withdrawal of a job offer or the termination of employment.

As members of the public are not privy to the information that is contained on the DBS operational list or to the rationale that is applied when deciding which offences should be placed on the list, making a challenge for wrongful inclusion of offences on certificates is almost impossible.

We endorse the Law Commission's finding that there appears to be a lack of a principled basis for the inclusion of individual offences in the list. Any such list should reflect the need to safeguard vulnerable and must be clear enough to be understood by all.

- **Excepted posts**

The list of [excepted posts](#) has also been subject to multiple changes over the years, cross referencing numerous statutes and filled with legal jargon, making it virtually impossible for anybody to decipher. The government has placed the onus on organisations to ensure they ask only for the appropriate level of disclosure, but have provided very little means by which to help them navigate the complexities of the legislation.

We believe that a single, clear list of exempted posts together with a strengthening of enforceable sanctions for organisations that breach the ROA would significantly reduce the number of unlawful checks that are requested and processed each year.

- **Motoring convictions**

Motoring offences are criminal offences and they may form part of a criminal record, depending on whether the offence is recordable and on the disposal received. This case study highlights the inconsistency and lack of clarity over which motoring convictions are disclosed or not.

In February 2016, Sandra* was convicted of 'failing to supply information regarding driver's identity as required', which would not normally be recorded on the Police National Computer (PNC) as it is a non-recordable driving offence. This would mean that although Sandra had been convicted of a criminal offence, technically she would not have a 'criminal record'. Following her conviction she received a fine and her licence was endorsed with six penalty points. Due to a [savings provision](#) motoring convictions (that appear on criminal record checks) are disclosed for five years under the ROA; double the amount of time of a custodial sentence of six months, which is disclosed for just 2½ years.

Despite the conviction being non-recordable, it appeared on Sandra's basic check issued by Disclosure Scotland and her standard DBS certificate. Yet the individual's sister, who was convicted at the same court, on the same date of exactly the same offence had a basic check issued by Disclosure Scotland that came back clear.

- **Military offences**

Nacro have worked continuously to [highlight](#) the inconsistencies of recording practices of military convictions and the case below is just one example of many that we have of the transparency issues as they relate to military offences.

Dave* was convicted at Court Martial in 2002 of being absent without Leave (AWOL), a non-recordable service offence. He was 17 at the time of offence and went AWOL for a month after suffering bullying and harassment. He received just 36 days service detention and went on to serve for another ten years in the military (he was promoted during this time); Dave was medically discharged a few years ago.

Dave has been turned down for work in regulated environments as an experienced specialist dog handler due to the conviction for detention appearing on his DBS checks as it is has been wrongly interpreted by potential employers as a prison sentence. The filtering rules exclude a sentence for

service detention from ever being filtered, so Dave will always have this information disclosed on his standard and enhanced DBS certificates.

We urge the government to initiate a fundamental review of the entire system of disclosure.

We believe that wholesale reform of the criminal record regime is needed in order to achieve meaningful change so that it is clear, fair and transparent for individuals and organisations. It is important that reform strikes the correct balance between public protection and giving people who have made mistakes in their past a fair opportunity to move on with their lives.

We recommend:

1. A fundamental review of the ROA, involving full consultation with a wide range of interested stakeholders. Of particular priority to us is that:
 - Rehabilitation periods are appropriate and consistent in line with the offence committed.
 - The outstanding anomalies created by the reforms as outlined above are addressed.
 - Prison sentences of more than four years (which are currently never spent) have a rehabilitation period attached to them.
 - Moving away from references to 'rehabilitation' within the legislation as this is confusing. We welcome Scotland's efforts to address this issue in their Management of Offenders Bill and urge the government to do the same for legislation covering England and Wales.
2. That Government act on the evidence around offending and disadvantaged groups, including [the disproportionate number of BAME represented in the criminal justice regime, and any indirect discrimination](#). We recommend that the government to use this evidence to make 'ban the box' a statutory requirement.
3. A thorough review of the filtering regime, including:
 - Implementation of the recommendation made by the Law Commission to have one list covered by one statute of offences that are ineligible for filtering
 - Consideration of separate filtering rules for under-18s, 18-25 and over 25s
 - Review of the filtering rules to include multiple convictions.
4. That any posts included under the Exceptions Order are justifiably included and that the list is amalgamated under one statute, able to be understood by organisations and individuals.
5. That issues relating to police recording practices are resolved. For example, the inconsistent approach to placing non-recordable criminal record information on the PNC.
6. A commitment to clean up the criminal record regime so that unlawful checks are eradicated and ensure that sufficient legal sanctions are put in place against organisations that carry out unlawful checks, or take into account spent convictions when making a suitability decision, where they are not entitled to do so.
7. Working in partnership with key stakeholders to develop good practice, advice, [support](#), [guidance](#), and [training](#) for organisations, individuals and practitioners on handling and managing disclosures; and also practitioners in the wider criminal justice system: police officers, lawyers, magistrates, judges, YOT officers, probation officers and prison officers.